

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
ROSE WAY, INC., : Case No. 89-1273-C H
Debtor. : Chapter 7
----- :
THOMAS G. McCUSKEY, TRUSTEE OF :
THE BANKRUPTCY ESTATE OF :
ROSE WAY, INC., : Adv. No. 90-115
Plaintiff, :
v. :
J.T. McCARTY, d/b/a :
COLONIAL GARDEN CENTER, :
Defendant. :

ORDER ON DEFENDANT'S MOTION TO DISMISS AND
FOR DETERMINATION UNDER 28 U.S.C. § 157(b) (3)

1. A complaint was filed on June 1, 1990, in which the Trustee/Plaintiff sought the recovery of freight undercharges from the Defendant.

2. On July 13, 1990, the defendant filed a motion to dismiss and for determination under 28 U.S.C. § 157(b)(3). Defendant also filed a brief in support of its motion on July 13, 1990.

3. On August 2, 1990, the Plaintiff filed a memorandum in opposition to the Defendant's motion to dismiss and for determination under 28 U.S.C. § 157(b)(3).

4. Defendant filed a supplemental brief on August 14,

1990.

5. A hearing on Defendant's motion was held on August 14, 1990. Present were Trustee Thomas McCuskey, Trustee's counsel Thomas E. Wolff, and Defendant's counsel Steven C. Reed and Mike Blazek.

DISCUSSION

Core-Noncore Determination

Section 157(b)(2) does not define "core proceeding." "Whether an action is a non-core proceeding is left for the bankruptcy court's determination, guided by §157(b)(2)'s non-exclusive list of factors." Rosen-Novak Auto Co. v. Honz, 783 F.2d 739, 742 (8th Cir. 1986). To determine core or non-core status, a court must look to the substantive action before it.

In re Hoffman, 99 B.R. 929, 931 (N.D. Iowa 1989). The 8th Circuit has cautioned against a broad interpretation of the "catch-all" provisions of §157(b)(2) (A) and §157(b)(2)(O). See In re Cassidy Land and Cattle Co., 836 F.2d 1130, 1132 (8th Cir. 1988), cert denied, 486 U.S. 1033, 108 S.Ct. 2016, 100 L.Ed 2d 603 (1988).

A bankruptcy judge may hear non-core proceedings that are otherwise "related" to a case under Title 11. 28 U.S.C. §157(c)(1). For a proceeding to be "related to" a bankruptcy case for purposes of bankruptcy jurisdiction, it must have "some effect on the administration of the debtor's estate."

In re Dogpatch U.S.A., Inc., 810 F.2d 782, 786 (8th Cir. 1987); see also In re Titan Energy, Inc., 837 F.2d 325, 329-30 (8th Cir. 1988) (a proceeding is "related to" if the outcome could conceivably have any effect on the estate being administered in bankruptcy); National City Bank v. Coopers & Lybrand, 802 F.2d 990, 994 (8th Cir. 1986) (same). "[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate" is "related to" a bankruptcy case for jurisdictional purposes. Titan Energy, 837 F.2d at 330. Section 157(c)(1) is construed broadly in order to effectuate the policies of the bankruptcy code. In re NWFEX, Inc., 881 F.2d 530, 533 (8th Cir. 1989), vacated on other grounds, 904 F.2d 469 (8th Cir. 1990).

There appear to be no Eighth Circuit or Iowa federal court decisions which address whether actions for the recovery of freight undercharges are core proceedings. In jurisdictions where this issue has been raised, courts have adopted varying analyses to resolve the question of core/noncore status. In In re Total Transportation, Inc., 87 B.R. 568 (D.Minn. 1988), the court addressed whether an action to recover undercharges was a core proceeding and held it was because it was an action on a matured account receivable and was the type of turnover proceeding included in 28 U.S.C. §157(b)(2)(E). Id. at 573. This is the approach advocated by the Trustee in this case.

In In re Maislin Industries U.S., 50 B.R. 943 (Bankr. E.D. Mich. 1985), the court looked to the principles underlying Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), and concluded an action to recover undercharges was not a core proceeding because:

- 1) the claim involved rights independent of and antecedent to the petition that conferred jurisdiction upon the bankruptcy court;
- 2) it was not integral to the restructuring of debtor-creditor rights; and
- 3) the complaint was before the court only because the debtor had filed a petition for reorganization.

See Maislin, 50 B.R. at 950.

The court in In re Tobler Transfer, Inc., 74 B.R. 373 (Bankr. C.D. Ill. 1987), looked to Marathon and indicated an overly broad reading of §157(b)(2)(E) may expand bankruptcy court jurisdiction beyond that allowed in Marathon. Id. at 375. The court emphasized an action for recovery of undercharges would exist despite a filing of the bankruptcy case and core proceedings are generally those proceedings which could not exist absent a bankruptcy filing. Id. Also mindful of the jurisdictional limits of Marathon, the court In re Oneida Motor Freight Co., 86 B.R. 344, 347-48 (Bankr. D.N.J. 1987), held actions to recover freight undercharges were in fact proceedings to recover pre-petition account

receivables and were noncore proceedings.

In Marathon the Supreme Court struck the broad grant of jurisdiction granted the bankruptcy courts by the Bankruptcy Act of 1978. Of concern to the court was the placement of jurisdiction over private (as opposed to public) rights in non-Article III courts. Marathon, 458 U.S. at 70. The court noted that the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights such as the right to recover contract damages. Id. at 71.

The Marathon court found the jurisdiction provisions of the Bankruptcy Act would encroach upon private-rights disputes which lie at the core of historically recognized judicial power. See id. at 70, 84. The breach of contract and misrepresentation claims at issue in Marathon were rights created by state law and were rights independent of and antecedent to the bankruptcy petition which had conferred jurisdiction upon the bankruptcy court. Id. at 84.

Concerns about the Marathon limits on jurisdiction were expressed by Judge Melloy in In re Hoffman, 99 B.R. 929 (N.D. Iowa 1989). Although Hoffman did not involve an action to recover undercharges, it is instructive on the interplay of Marathon and core status determinations. In proposed findings and conclusions adopted by the district court, Judge Melloy

concluded a lender liability action was not a core proceeding.

Id. at 932. Judge Melloy takes the view that a proceeding is core under §157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. If a proceeding does not meet this test it is a non-core proceeding. Id.

The Trustee's complaint stems from a federal statute which mandates a carrier shall not provide services except at the filed rate. 49 U.S.C. § 10761. This adversary involves a claim independent of and antecedent to the bankruptcy petition which conferred jurisdiction upon this court and the Court concludes this is a noncore proceeding which is "otherwise related" to a case under title 11. 28 U.S.C. 157(c)(1). See Tobler Transfer, 74 B.R. at 375 (while noncore, the proceeding to collect freight undercharges was "otherwise related" because if successful it would result in additional funds for the bankruptcy estate).

Dismissal

The Defendant moves for dismissal pursuant to Fed.R.Bankr.P. 7012. Neither Defendant's motion nor supporting brief elaborates on the court's alleged lack of personal and subject matter jurisdiction and the court cannot find the Defendant's mere allegations support dismissal of the

action.

The Defendant also asserts venue is improper in this action and cites 28 U.S.C. § 1391(b). 28 U.S.C. § 1409(a) governs venue of proceedings related to cases under title 11 and venue of this action properly rests with this court.

The Defendant's motion alludes to abstention under 28 U.S.C. §1334(c) and suggests abstention "would be in the interest of justice." The Defendant's brief elaborates somewhat and suggests the court should "abstain from asserting jurisdiction and defer to the expertise of the Interstate Commerce Commission."

A motion for abstention is heard by the bankruptcy judge who submits a report and recommendation for disposition of the motion. Fed.R.Bankr.P. 5011. Issues of abstention generally arise when it appears an issue can best be resolved in state court and the bankruptcy court wishes to preserve comity with state courts or respect for state law. See In re Titan Energy, Inc., 837 F.2d 325 (8th Cir. 1988); 1 Collier on Bankruptcy, ¶3.01[3] (1st ed. 1990).

This Court declines to address the issue of abstention. The Defendant never filed a motion for abstention, it only alluded to abstention in the text of another motion and in its supporting brief. It is questionable whether this issue has been properly presented for review by the court. In any case, the Court notes the rationale underlying the Defendant's

references to abstention is its desire to have the matter referred to the Interstate Commerce Commission (ICC). The issue of referral will be disposed of with the Court's order on the Defendant's separate motion seeking referral to the ICC.

In the last paragraph of its brief the Defendant suggests the proceeding should be heard by the district court because "the action involves non-Title 11 laws regulating organizations or activities affecting interstate commerce." While the Defendant does not cite 28 U.S.C. § 157(d), it seems apparent this authority is the basis for its position. See generally Matter of Hawkeye Chemical Co., 73 B.R. 318 (Bankr. S.D. Iowa 1987); Fed.R.Bankr.P. 5011; Local Rule 24.

The Defendant never filed a motion for withdrawal of the reference of jurisdiction nor did it pay the \$60 filing fee required to accompany such motions. The Defendant has not properly submitted a motion for withdrawal and the issue will not be directed to the district court for disposition. Fed.R.Bankr.P. 5011(a).

IT IS HEREBY ORDERED, as follows:

1) This is a noncore proceeding "otherwise related" to a case under Title 11, and

2) Defendant's motion to dismiss is denied.

Dated this 4th day of April, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE