

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

In Re:

Boiler House Limited Partnership,  
CHAPTER 11  
Debtor.

BKY No. 3-96-3648

ADV No. 3-96-255

Graphic Systems, Inc.  
Plaintiff,

vs.

ORDER

Boiler House Limited Partnership and Welsh  
Companies, Inc.,  
Defendants.

This matter is before the Court on motion of Plaintiff Graphic Systems, Inc. requesting a jury trial and transfer of the adversary proceeding to federal district court; or, in the alternative, remand of the proceeding to Hennepin County State District Court, from which the action was removed by Defendant Boiler House. The motion was heard on September 23, 1996, and appearances are as noted in the record at the hearing. Based on the arguments of counsel, memoranda, and the file, the Court now makes this ORDER pursuant to the Federal and Local Rules of Bankruptcy Procedure.

I.  
FACTS

Graphic Systems, Inc. entered into lease with Boiler House Limited Partnership for space at the Crown Plaza Building, prior to bankruptcy. The lease has been amended four times. Welsh Companies, Inc. was hired as the management company for the property in the summer of 1995. Disputes arose between Graphic Systems and Boiler House surrounding the lease and the property. On May 3, 1996, Graphic Systems brought this suit in Hennepin County district court against both Boiler House and Welsh Companies.(1F) "The claims included breach of lease, breach of a duty to reduce costs, promissory estopped (sic), breach of an implied covenant of good faith and fair dealing, and breach of implied covenant of quiet enjoyment and use." Notice of Motion and Motion for Jury Trial and Request for Removal, August 23, 1996 at 2. The Defendant, Boiler House, asserted a counterclaim, "alleging that Plaintiff breached the terms of the lease agreement by failing and refusing to pay rent pursuant to the terms of the lease agreement and

otherwise vacating the premises without securing a suitable subtenant." Defendant's Memorandum in Response to Plaintiff's Motion for Jury Trial and Request for Removal, September 19, 1996 at 2.

On June 28, 1996, Boiler House filed a petition for relief under 11 U.S.C. Chapter 11. On July 24, 1996, the Defendant Debtor removed the Hennepin County litigation to Federal Bankruptcy Court. The Plaintiff has since made four separate demands for jury trial; and, seeks transfer of the proceeding under Local Rule of Bankruptcy Procedure Rule 204. The parties agreed at the hearing on this motion that Graphic Systems is entitled to a jury trial if a timely demand has been made. The Defendant Debtor argues, however, that the demands were all untimely, and requests that the motion be denied.

## II. DISCUSSION

### A) JURY TRIAL

#### 1) Issue Triable By a Jury

A trustee's action for prepetition breach of a lease is an action at law for which the other party is ordinarily entitled to trial by jury. See: *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989); and, *Beard v. Braunstein*, 914 F.2d 434, 438 (3rd Cir. 1990). However, the right trial by jury might be lost if the action is part of broader claims litigation. Bankruptcy courts are essentially considered courts of equity, and bankruptcy claims litigation is equitable in nature. *Granfinanciera*, 492 U.S. at 57.

When an issue that would normally be triable at law arises as part of the process of allowance or disallowance of claims, the dispute becomes triable in equity. *Granfinanciera*, 492 U.S. at 58. Thus, if a party files a claim in the bankruptcy case, the party loses the right to trial by jury on any claim that the estate has against the party, including what would otherwise be a legal action. In that event, the party is considered to have "waived" the right to jury trial by the filing of the party's claim. See: *Lagenkamp v. Culp*, 498 U.S. 42, 111 S.Ct. 330, 112 L.E.2d 343 (1991); *Glen Eagle Square, Inc. v. First Union National Bank of North Carolina*, 132 B.R. 106 (Bankr. E.D. Penn. 1991); *In re Lion Country Safari, Inc.*, 124 B.R. 566 (Bankr. C.D. Cal. 1991); *Light Foundry Associates v. Alter*, 112 B.R. 134 (Bankr. E.D. Penn. 1990); and *In re Beugen*, 81 B.R. 994 (Bankr. N.D. Cal. 1988).

When the present motion was heard, on September 23, 1996, Graphic Systems had not filed a claim in the case. The Plaintiff still has not filed a claim, and the time to file has now expired.(2F) The Plaintiff was not scheduled as a creditor by Boiler House in the bankruptcy case. Failure of Graphic Systems to timely file a claim has resulted in the Plaintiff's being barred from participation in the bankruptcy case regarding any claim. See: F.R.B.P.

3003(2) and (3); and, 11 U.S.C. sec. 1141. The Boiler House counterclaim can no longer become part of bankruptcy claims litigation, since Graphic Systems can no longer assert its claim against the estate. The only apparent remaining viability of Graphic Systems' action is its use defensively in set off or recoupment against the Boiler House counterclaim. Accordingly, Graphic Systems retains the right to trial by jury.

2) Timely Demand For Jury Trial

Graphic Systems demanded trial by jury in Plaintiff's answer to the counterclaim, filed on August 19, 1996.(3F) Local Rules of Bankruptcy Procedure Rule 203 provides, in part:

Any party may demand a trial by jury of any issue triable by a jury by serving on the other parties a demand therefor in writing not later than ten days after service of the last pleading directed to such issue.

Boiler House had served its counterclaim upon Plaintiff Systems Graphics on May 31, 1996 by mail. F.R.B.P. 9027(g) provides, in pertinent part:

[In] a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

The rule applies to answers to counterclaims. Boiler House filed its notice of removal on July 24, 1996. The last day for Plaintiff to timely respond, under Rule 9027(g), to Defendant's counterclaim was July 29, 1996. Plaintiff did not answer until August 19, 1996. Defendant argues that failure to timely answer the counterclaim under Rule 9027(g), rendered Plaintiff's jury demand untimely. The Court does not agree.

Local Rule 203 does not condition the effectiveness of a jury demand on the timeliness of any pleading. The demand is timely made within ten days after service of the last pleading addressing the issue for which a jury trial is demanded; and, the demand is timely, if made in the pleading itself, regardless of timeliness of the pleading, unless the pleading is stricken. Plaintiff's demand for jury trial on Defendant's counterclaim was timely made when asserted in the answer to the counterclaim, even though the answer itself was untimely under F.R.B.P. 9027(g).

B) TRANSFER

Local Rules of Bankruptcy Procedure Rule 204,

provides, in part:

(a) TRANSFER. On the judge's own initiative or on motion of a party in interest, the bankruptcy judge shall transfer to the district court 1) any proceeding in which the court has determined that there is a right to trial by jury of the issues for which a jury trial has been timely demanded, and the parties have not consented to the bankruptcy judge conducting the jury trial.

. . .

The adversary proceeding must be transferred to district court under the rule because Plaintiff is entitled to trial by jury; the demand for jury trial was timely made; and, Plaintiff does not consent to a bankruptcy judge conducting the trial.

### III. DISPOSITION

Based on the foregoing, it is hereby ORDERED:

This adversary proceeding shall be transferred to the district court, pursuant to Local Rules of Bankruptcy Procedure Rule 204, for trial by jury. The clerk shall transfer the file accordingly and all further proceedings in the matter shall be had in the district court.

Dated: December 3, 1996 By the Court:

Dennis D. O'Brien  
Chief United States  
Bankruptcy Judge

(1) Welsh Companies is no longer part of this adversary proceeding as it reached a settlement with Graphic Systems and filed the stipulation with this court on November 12, 1996. The stipulation was approved by court order dated November 20, 1996.

(2) The Notice of Commencement of The Case set November 12, 1996, as the last day for nongovernment creditors to file claims.

(3) Plaintiff made these other jury trial demands as well: Request for Jury Trial filed 8/15/96; Request for Jury Trial filed 8/19/96; and Notice of Motion and Motion for Jury Trial and Request for Removal filed 8/23/96.