UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re: CHAPTER 11

Brutger Equities, Inc.,
f/k/a/ Brutger Companies, Inc.
for itself and as successor by Bky. 3-90-5937
90-5937
merger to various and sundry
limited partnerships,
Debtor.

Brutger Equities, Inc.,
Plaintiff,

v. ADV. 3-92-36

Lodging Acquisition Corporation,
Defendant. ORDER

This matter was heard March 13, 1992, on Defendant's alternative motions for dismissal, transfer, or stay of the proceeding pending motion to the district court for withdrawal of reference. Appearances are as noted in the record. The Court, having heard and received arguments, pleadings, briefs and affidavits, and now being fully advised in the matter, makes this Order pursuant to the federal and local Rules of Bankruptcy Procedure.

I.

In December 1986, the parties entered into an agreement for the sale to Lodging Acquisition Corporation (LAC) by Brutger Equities (Brutger) of nine motel properties for the total purchase price of $18,350,000. There were two parts to the agreement, an installment contract and contract for deed (collectively, the contract). The contract was guaranteed by individual shareholders of LAC.

On December 18, 1990, Brutger filed a Chapter 11 petition. At the time of filing, a dispute existed between the parties over the contract, each accusing the other of breach. During the course of the bankruptcy case, Brutger claims that the parties negotiated and globally settled the dispute in April 1991, (settlement agreement). LAC denies that a binding settlement agreement was ever reached. On May 30, 1991, the Court approved the alleged settlement agreement as in the best interests of the Debtor's estate, without prejudice to LAC regarding any defenses it claimed to the agreement, including the defense that no binding agreement exists.

In November 1991, LAC filed a claim in the estate based on the contract in the amount of $350,000, to which Brutger objected. The Debtor obtained confirmation of a plan of reorganization on November 25, 1991. The confirmed plan calls for either performance of the December 1986 contract with LAC, or performance of the settlement agreement, whichever is judicially determined to control the rights and responsibilities of the parties.

Following confirmation, Brutger commenced two actions in federal district court involving its dispute with LAC. One seeks recovery against the guarantors of the December 1986 contract on the breach theory. The other seeks relief against LAC, the guarantors, and others, including alternative remedies of damages based on breach of the contract, and for specific performance of the settlement agreement or damages for its breach. Finally, this adversary proceeding was commenced in the Bankruptcy Court against LAC. The adversary contains the same allegations as the district court lawsuit wherein LAC is a named defendant. Additionally, Brutger pleaded its objection to LAC's filed claim pursuant to Local Rule 505.

LAC seeks, in the alternative:

1) dismissal of the adversary proceeding on the grounds that it, for the most part, is neither a core nor related proceeding;(FN1)

2) transfer of the proceeding to the district court on the alternative grounds that,

i) this is a related proceeding which LAC does not consent to have determined by this Court,

ii) LAC is entitled to trial by jury,

iii) on grounds of judicial economy and comity; or,

3) stay of the proceeding pending LAC's filing a motion for withdrawal of reference.

Brutger resists the motion in all respects.

II.

LAC argues that the settlement agreement dispute is not a core proceeding for two reasons: 1) breach of contract claims generally are not core proceedings; and 2) even if it otherwise might be a core proceeding, this dispute cannot be a core proceeding because

(FN1) LAC concedes that the breach of contract claim and objection to claim, so far as they relate to the December 1986 contract, are core proceedings.

the issue concerns the very existence of the contract, not merely its breach. LAC cites: Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159 (9th Cir. 1986) and Southwinds Assoc. v. Reedy (In re Southwinds Assoc.), 115 B.R. 857 (Bankr. W.D. Pa. 1990) for these propositions. However, those cases involved prepetition contracts entered by the debtors, not post-petition contracts entered by bankruptcy estates. Disputes involving post-petition contracts entered by debtors' estates have been held to be core proceedings under 28 U.S.C. Section 157(b)(2)(A). See: Ben Cooper v. Ins. Co. of Pa. (In re Ben Cooper), 896 F.2d 1394 (2d Cir. 1990), vacated on other grounds, _____ U.S._____ , 111 S.Ct. 425 (1990); and, Arnold Print Works v. Apkin (In re Arnold Print Works) 815 F.2d 165 (1st Cir. 1987). The dispute regarding the settlement agreement presents a core proceeding under 28 U.S.C. Section 157(b)(2)(A).(FN2)

The entire dispute pleaded by Brutger is also a core proceeding under 28 U.S.C. Section 157(b)(2)(C) as counterclaims by Brutger to the filed claim of LAC.(FN3) LAC argues that the section is limited to counterclaims arising from the same transaction, citing Lombard-Wall v. New York City Hous. Dev. Corp. (In re Lombard-Wall), 48 B.R. 986 (S.D.N.Y. 1985), and concludes that the settlement agreement dispute does not arise from the same transaction as the contract. LAC reads the case too narrowly. Lombard simply recognizes that some connection between the claims must exist in order for bankruptcy courts to assert jurisdiction under the 28 U.S.C. Section 157(b)(2)(C). See: In re Lombard, at p. 990-91. The case does not stand for the proposition that the counterclaim must be compulsory in nature to enable the bankruptcy court to assert jurisdiction under the section. The facts in Lombard are analogous to the facts here, in that, the dispute, which the court found to be core, involved a prepetition claim, alleged to have been modified by a post-petition agreement that the debtor claimed was breached. Certainly, the alleged post-petition settlement agreement, in this case, has substantial connection with LAC's claim, even if the allegation might not present a compulsory counterclaim.(FN4)

LAC argues that it has a right to trial by jury, especially regarding the alleged post-petition settlement agreement. However, because LAC filed a claim in the estate, and because allegations

(FN2) 28 U.S.C. 157(b)(2)(A) authorizes bankruptcy judges to hear and determine, as core proceedings, "matters concerning the administration of the estate". Whether the post-confirmation resolution of a dispute arising from a post-petition contract can be constitutionally vested in a non-Article III federal judicial officer as a core proceeding under circumstances where the estate no longer exists, and where the plan's consummation is not contingent or dependent on a particular resolution, is a question that is neither addressed nor determined by the holding in this case. The issue was not raised.

(FN3) 28 U.S.C. Section157(b)(2)(C) lists "counterclaims by the estate against persons filing claims against the estate" as core proceedings.

regarding both breach of the contract and the settlement agreement are properly assertable by Brutger as core counterclaims under 28

(FN4) In fact, the allegation appears to be the subject of either an affirmative defense to the claim, which would be waived if not asserted, or a compulsory counterclaim. See: United States v. Haywood, Robbins & Co., 430 F.2d 1077 (2nd Cir. 1970).

U.S.C. Section 157(b)(2)(C), LAC has no right to a jury trial regarding any portion of the dispute. See: Langenkamp v. Culp, U.S._____ , 111 S. Ct. 330 (1990) (per curiam) reh'g denied, U.S._____ , 111 S.Ct. 721 (1991); and Grandfinanciera, S.A. v. Norberg, 492 U.S. 33, 109 S.Ct. 2782, (1989).

III.

LAC argues that the Court should transfer the proceeding to the district court for reasons of judicial economy and under principles of comity. Bankruptcy judges receive their authority to hear and determine cases and proceedings by reference from the district court under 28 U.S.C. Section 157. What has been referred cannot simply be transferred back because a bankruptcy judge might think it a good idea. Authority must exist by statute or rule to transfer a referred case, or a proceeding arising from a referred case, back to the district court. Local Rule 204 provides for transfer of matters by the Bankruptcy Court to the district court, and does not authorize transfer of core proceedings of this type, or of bankruptcy cases.(FN5) Accordingly, the Court is without authority to transfer the adversary proceeding to the district court.

However, LAC's arguments regarding judicial economy and principles of comity are well taken. Brutger concedes that all allegations pleaded in this proceeding will require proof in the district court actions against the non-LAC defendants.

(FN5) Part II of the Local Rules, where Rule 204 resides, was promulgated by the district court, not by the Bankruptcy Court.

Determination of these issues in this Court will not likely be res judicata in the district court as to those defendants. Brutger does not argue otherwise. Furthermore, the non-LAC defendants are entitled to trial by jury in the district court.

While Brutger complains that LAC seeks to unreasonably delay resolution of the controversy by its motion, Brutger put these causes of action into play in the district court, not LAC. The result is the prospect of piecemeal resolution of related issues and, perhaps more importantly, the prospect of inconsistent results. One of the forums where the actions are pending should determine the propriety of maintaining separate cases as opposed to consolidation. That determination should be made by the district court for several reasons.

First, when substantial overlap between suits pending in different courts has been demonstrated, ordinarily the ultimate determination of the need for a remedy lies with the first court in

which suit was commenced. See: Boston and Marine Corp. v. United Transportation, 110 F.R.D. 323, 328-29 (D. Mass. 1986). Here, suit was first commenced in the district court. Second, should consolidation be appropriate, this Court could not absorb the district court cases because it would be unable to obtain or retain jurisdiction over the causes of action against parties other than LAC. Finally, the district court apparently has full jurisdiction over all issues and parties, should it determine to exercise it through withdrawal of reference.

For the reasons stated, the district court should have the opportunity, through consideration of withdrawal of reference, to determine whether judicial economy and principles of comity require consolidation of this proceeding with the pending district court actions. Furthermore, this Court believes that substantial possibility exists the district court will withdraw reference of the adversary proceeding in considering the matter, and that, therefore, good cause exists for suspending further discovery pending resolution of a motion timely brought and heard.

IV.

Based on the forgoing, IT IS HEREBY ORDERED: Discovery in this adversary proceeding is suspended on condition that Defendant file its motion for withdrawal of reference within ten days from the entry of this order, and that it obtain a hearing thereon within thirty days from the filing of the motion.

Dated: April 9, 1992. By The Court:

D. O'BRIEN
U.S. BANKRUPTCY JUDGE