

In the United States Bankruptcy Court

for the Northern District of Iowa

FORT DODGE CREAMERY

Bankruptcy No. X88-155OF

Debtor(s).

Chapter 7

KATHARINE DOAN and
GERTRUDE AMBROSE

Adversary No. X89-0154F

Plaintiff(s)

vs.

ALLEN R. LOOMIS; A. ROBERT
LOOMIS; FORT DODGE CREAMERY
COMPANY; MAURICE STARK; and
McGLADREY HENDRICKSON & PULLEN

Defendant(s)

REPORT AND RECOMMENDATION TO THE DISTRICT COURT RE: MOTION TO REMAND

The matter before the court is a motion by Maurice Stark seeking remand of this adversary proceeding to the Iowa District Court. Defendant McGladrey, Hendrickson & Pullen joins in the motion. Pursuant to Bankr. R. 9027(e), this court now files its report and recommendation to the United States District Court for the Northern District of Iowa. This report and recommendation will include findings of fact and conclusions of law.

FINDINGS OF FACT

An order for relief under chapter 7 was entered against Fort Dodge Creamery on February 8, 1989 as the result of an involuntary petition filed October 11, 1988. At the time this petition was filed, a lawsuit involving Fort Dodge Creamery Company (FDC) was pending in the Iowa District Court for Webster County (state court). The lawsuit is a shareholder derivative action filed by Katherine Doan (DOAN) and Gertrude Ambrose (AMBROSE), minority shareholders of FDC, against Allen Loomis and Robert Loomis (LOOMIS), as directors and officers of FDC; Maurice Stark (STARK), an attorney who represented Loomis and FDC; and McGladrey, Hendrickson & Pullen (McGLADREY), a certified public accounting firm that represented Loomis and FDC.

The petition alleges inter alia that these defendants "conspired together and aided and abetted each other in breaching their fiduciary obligations owed to other shareholders and to the corporation. . . ." (Petition, 10, Adv. No. X89-0154F). Specifically, plaintiffs allege that defendants set up a corporation, Rosedale Farms, Inc. (ROSEDALE) to which they fraudulently transferred real estate of FDC, and that the real estate was then used as security for debt to First American State Bank of Fort Dodge (FASB). Plaintiffs say that the actions of the defendants were part of an FDC corporate

reorganization which damaged the corporation and its minority shareholders. Plaintiffs contend that the defendants' actions were negligent and a breach of defendants' fiduciary duties. Relief requested by the plaintiffs includes \$500,000.00 damages, as well as punitive damages, indemnity from any tax liability arising from defendant's alleged misdeeds and the appointment of a liquidating receiver to protect the assets of FDC.

On March 13, 1989, James H. Cossitt, the FDC bankruptcy trustee, entered an appearance in the state court lawsuit and requested the state court to enter an order granting his Application for Substitution of Parties. In his appearance and application, Cossitt asserted ownership of an interest in the lawsuit by the FDC bankruptcy estate. On July 5, 1989, the state court, the Honorable Allen L. Goode presiding, entered an order granting the Application for Substitution of Parties. Shortly thereafter, on July 12, 1989, Cossitt filed a "Motion for Nunc Pro Tunc Order" in which he stated:

1. That on June 26, 1989 a hearing was held on the Trustee's Application for Substitution of Parties and Motion for Extension of Time.
2. That counsel for all parties appeared and agreed that the Trustee's Application should be granted and the Trustee should be substituted as a party plaintiff to assert directly the claims formerly asserted by the derivative plaintiffs against the defendants.
3. That on July 5, 1989 The Court entered an Order sustaining the Application for Substitution of Parties.
4. That the Order does not reflect the parties [sic] agreement that the Trustee should be substituted as a party plaintiff to directly assert the claims formerly asserted by the derivative plaintiffs.
5. That the entry of an Order Nunc Pro Tunc would be appropriate to clarify the status of the Trustee as a party plaintiff.

Prior to the filing of the application for removal on August 9 1989, the state court had not yet ruled on the motion for nunc pro tunc order.

On March 9, 1989, Doan and Ambrose filed a motion in the bankruptcy case seeking termination of the automatic stay to permit the continued involvement of FDC in the "Shareholder Lawsuit." Alleging that the bankruptcy court lacked jurisdiction of other defendants in the state court suit, Doan and Ambrose alternatively sought modification of the stay to permit discovery to continue. When the motion was filed, Cossitt had not yet appeared in the state proceeding. The bankruptcy court denied the motion for relief on March 29, 1989 for the reason that 11 U.S.C. § 362(a)(3) prevented Doan and Ambrose from prosecuting claims of the bankruptcy estate. The court noted, however, that any individual claims of Doan and Ambrose against defendants other than Fort Dodge Creamery could continue as these were not stayed. It is not clear whether the state court proceeding asserted any such individual claims, although it appears that they did not.

On August 9, 1989, the trustee removed this lawsuit to the bankruptcy court and served notice of removal on all parties in accordance with Bankr. R. 9027(d). Defendants Stark and McGladrey now seek the remand of this adversary proceeding to state court. The trustee opposes this motion for remand and has filed a motion to consolidate the removal action with a bankruptcy adversary proceeding filed by him captioned Cossitt v. Loomis, et al., Adv. No. X89-0158F. This latter proceeding seeks the recovery of allegedly fraudulent conveyances or the value of the property

conveyed; the appointment of a receiver for Rosedale; the subordination of FASB claims to that of general unsecured creditors and a transfer of FASB's lien to the estate; the denial of claims of FASB against the estate; and a determination of tax liability of FDC or the estate for the FDC corporate reorganization and a judgment against Stark, McGladrey and FASB for the amount of any taxes attributable to the reorganization.

DISCUSSION

Stark and McGladrey argue that the case should be remanded to the Iowa District Court for two reasons. First, the state court action has not been stayed under the Code, and therefore removal was untimely under Bankr. R. 9027(a)(2). Second, even if the state court action has been properly removed, the action should be remanded on equitable grounds in accordance with 28 U.S.C. § 1452 (b).

A. Timeliness

Stark and McGladrey allege:

The state court action has not been stayed under § 362 of the Code; this court has previously acknowledged that the trustee will become a party plaintiff in the state court proceeding and ruled that the stay does not prevent the trustee from taking legal action against the defendants in state court.

(Stark Motion for Remand, Adv. No. X89-0154F, August 24, 1989, paragraph 3.)

In its March 29, 1989 stay order, this court stated that the automatic stay of 11 U.S.C. § 362 did not protect non-debtors, and therefore, the state court action was not stayed with respect to any claims of Doan and Ambrose against non-debtor defendants. See Harrison v. IRS (In re Harrison), 82 B.R. 557, 558 (Bankr. D. Colo. 1987). However, the court concluded that the automatic stay did prevent state court plaintiffs Doan and Ambrose from further asserting the claims of FDC. The court denied permission for Doan and Ambrose to continue to assert the corporation's claims in state court. They are even now stayed from doing so. Given the nature of stockholder derivative suits, it is unlikely that the court solely at the instance of the plaintiffs would permit termination of the stay. Once a bankruptcy case was instituted for Fort Dodge Creamery Company, it is the case trustee who determines in what forum and by whom the corporate rights or claims are pursued.

It is the nature of a derivative action which makes the determination of the timeliness of the removal so difficult. A stockholder's derivative suit has been described by the Iowa Supreme Court as follows:

This proceeding in equity, commonly called a stockholder's suit or derivative action, is one brought by one or more stockholders of a corporation in their name as plaintiffs, but as representatives of the corporation, and for its benefit. They are plaintiffs in name only, and though the corporation is made a defendant, it is the real plaintiff in interest, and the beneficiary of any judgment recovered. Its basis is the damage done to the corporation by the real defendants and the refusal or failure of the corporation to redress the wrongdoing.

Des Moines Bank & Trust Co. v. George M. Bechtel & Co., 51 N.W.2d 174, 217, 243 Iowa 1007 (1952). See also Iowa Rule of Civil Procedure 44.

In a bankruptcy context, removal is governed by 28 U.S.C. 1452(a) which permits any party to remove. This is different from removals in a non-bankruptcy setting; such are governed by 28 U.S.C. § 1466 which permits only defendants to remove actions to federal courts. However, a debtor's status as a plaintiff or defendant in a pending state court suit may affect the timeliness of removal by a trustee under Bankr. R. 9027(a)(2). This Rule states:

If the claim or cause of action in a civil action is pending when a case under the Code is commenced, an application for removal may be filed only within the longest of

(A) 90 days after the order for relief in the case under the Code,

(B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or

(C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

When there is normal alignment of parties, the effect of the Rule is this--if the debtor is a defendant in a pending state court action, the trustee has thirty days after the entry of an order terminating the stay to file his removal application. If the debtor is the plaintiff in a pending state court action, no stay exists to inhibit the trustee's pursuit of estate claims; therefore he would have 90 days after the order for relief to remove the pending state court action to federal court.

This court doubts that the drafters of Rule 9027(a)(2) contemplated a situation where the debtor is a nominal defendant but is a party-in-interest whose claims for relief are being litigated by a third party.

There appears to this court to be two alternatives in resolving the timeliness issue given the nature of a derivative action. First, it is arguable that because the corporation is a nominal defendant and the stay had not been lifted permitting the litigation of the corporation's rights against the other state court defendants, there is no time limit presently confronting the trustee with regard to removal. This is the trustee's argument.

Second, it is arguable that as a "real" plaintiff, if the trustee desires to pursue the corporation's rights in the pending litigation, he must obtain the removal within the 90 days from the entry of the order for relief.

This second argument may be thusly stated. When the bankruptcy case is filed, the trustee, upon investigation of the pending lawsuit, might decide that he does not want to pursue the corporation's rights in the pending state court proceeding. He could, therefore, resist any motion for relief from the stay by plaintiffs Doan and Ambrose which seeks to continue the litigation on behalf of the corporation. Through the protection of the stay, the trustee could ignore the state court lawsuit, and seek instead to enforce the corporate claims in another state court lawsuit, or in a federal court. Alternatively, the trustee might decide that the pending state claim is adequate to his needs and he could pursue the corporation's claims in the pending suit. If he chooses that avenue, however, but wants a change in forum, he must remove within the 90-day period after the order for relief.

In situations where the debtor is plaintiff, both real and named, once the order for relief enters, the trustee does not have the luxury of waiting beyond 90 days to file his application to remove. Arguably, the present case should be no different. If he seeks to take advantage of the pending litigation and remove it to federal court, he should make that determination as a plaintiff within ninety

days. If he does not and yet later seeks to take advantage of the pending litigation as a plaintiff, he should be bound by the original choice of forum.

This court, however, can find no case law to support or detract from either alternative. The Rule itself does not explicitly deal with this situation and although the court believes it is the second alternative which may be the more appropriate, in the absence of a clear rule applicable to this situation, and because the trustee's situation fits literally within the 30-day rule (Rule 9027(a)(2)(B)), the application for removal should not be found to be untimely.

B. Remand

Stark and McGladrey also argue that even if this court finds that the state court action has been properly removed, the action should be remanded pursuant to 28 U.S.C. § 1452(b), which states:

The court to which such a claim or cause of action is removed may remand such claim or cause of action on any equitable ground.

Stark and McGladrey give three equitable grounds for remand of this action:

- (a) The state court is better able to respond to a suit involving questions of state law;
- (b) The state court action has been pending from April 7, 1988, to date, during which time the state court has exercised jurisdiction over pleadings, motions and discovery; and
- (c) A state court provides a more convenient forum for the litigation.

(Stark Motion for Remand, Adversary No. X88-0154F, August 24, 1989, paragraph 6.)

In response, the trustee argues that the derivative action is a core proceeding and therefore should not be remanded. He further contends that even if the shareholder suit is non-core, it is sufficiently "related to" the case to warrant the jurisdiction of the bankruptcy court.

This court agrees that it has jurisdiction over the shareholder derivative suit. At the very least, this proceeding is sufficiently "related to" the bankruptcy case within the test set forth by the Eighth Circuit in In re Dogpatch U.S.A., Inc. to confer jurisdiction on this court:

The test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that Proceeding could conceivably have any effect on the estate being administered in bankruptcy * * *. An action is related if the outcome could alter the debtor's rights, liabilities, options, or freedom of action * * * and which in any way impacts upon the handling of the bankrupt estate.

Dogpatch Properties, Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.), 810 F.2d 782, 786 (8th Cir. 1987) quoting Pacor v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984) (emphasis in the original). However, the court does not, for the purposes of this proceeding, need to determine whether the shareholder derivative suit is core or non-core. This distinction is irrelevant with regard to the issue of remand.

The trustee's argument appears to be that because this proceeding is within the jurisdictional domain of the bankruptcy court, and because this jurisdiction cannot be withdrawn, Stark cannot now seek remand to state court. The court can find no authority in support of this theory. There is no doubt that

Stark has consented to the jurisdiction of this court by filing a proof of claim against the debtor, nor is there any indication that Stark wishes to withdraw from this court's jurisdiction. However, this in no way affects Stark's right to seek remand of the shareholder suit.

Jurisdiction over this shareholder suit by the bankruptcy court is not exclusive. 28 U.S.C. § 1334(b) states:

The district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 . . . or arising in or related to cases under title

11 . . .

(emphasis added). In other words, the fact that the bankruptcy court has jurisdiction over this matter, even if it is a core proceeding, does not mean that it is required to hear it. Stark does not argue that the bankruptcy court lacks jurisdiction; he merely contends that there are sufficient equitable grounds to remand the case to the state court. Therefore, the court finds no merit in the trustee's jurisdictional arguments.

Upon consideration of the grounds for remand listed by the defendants, the bankruptcy court does not find them persuasive. The undersigned does not believe, and no basis has been stated for, the proposition that the state court "is better able to respond to a suit involving questions of state law." Second, movants have provided this court with no evidence that the state court "provides a more convenient forum for the litigation." The federal courts provide a fine facility for trials in Fort Dodge, Iowa, the same situs as the state court proceeding.

Movants argue also that the state court action has been pending since April, 1988 during which time the state court has exercised jurisdiction over pleadings, motions and discovery. This is true, but the involvement of the state court in the litigation has not been so pervasive as to make duplication, inefficiency and delay foregone conclusions resulting from removal. An examination of the court file reveals that seven orders were entered during the state court action. Four different state court judges were involved in the case. The last order entered granted the recently appearing trustee a continuance of the trial which had been set and an extension of time for discovery. Had there been no removal application, this case would not have immediately proceeded to trial. It does not appear that this case was assigned to one state court judge who then became uniquely familiar with it.

As a final matter, the pendency of the trustee's other adversary proceeding (X89-0158F) convinces the bankruptcy court that remand ought not to be granted. The trustee's adversary complaint was filed September 5, 1989. Defendants in the suit are Allen and A. Robert Loomis (they are also defendants in the removed action), Central States Southeast and Southwest Areas Health and Welfare Fund, Central States Southeast and Southwest Areas Pension Fund, First American State Bank of Fort Dodge, Rosedale Farms, Inc. and the Internal Revenue Service.

The adversary is based upon four events: (1) the corporate reorganization of Fort Dodge Creamery Company; (2) the formation/ incorporation of Rosedale Farms, Inc.; (3) the transfer of farmland owned by FDC to Rosedale Farms, Inc.; and (4) the transfer of a mortgage on the farmland from Rosedale Farms, Inc. to First American State Bank. These are the very same events upon which the removed action is based. It is true that the trustee adds additional defendants, but these additional defendants appear only to be other participants in the same events.

In the removed suit, the trustee seeks monetary damages based on theories of negligence and breach of fiduciary duties. In adversary X89-0158F, the trustee seeks return of the farmland or its value, a recovery of rents and profits from the farmland, the imposition of a constructive trust on the farmland, the avoidance of the bank's mortgage on the land, the disallowance of the bank's claim against the FDC estate, and the subordination of the bank's claim to the claims of unsecured creditors.

It seems reasonable to the bankruptcy court that all of trustee's claims against all of the defendants in the two suits should be decided by one trial in one forum. That can be done in the bankruptcy court, but not in the state court. The resolution in one action of all of the estate's claims arising from the alleged events is a more economical use of judicial resources; it avoids duplication; it may avoid problems which might be encountered because of possible issue or claim preclusion; it lessens the possibilities of inconsistent results from two suits. Such considerations outweigh any concern over delay or whether the issues in the removed action might be better addressed by the state court. Mid-America Savings Bank v. Peoples Bank & Trust Co. of Waterloo, Iowa (In re Peoples Bankshares, Ltd.), Bankr. No. 86-02217W, Adv. No. 86-0484W, slip op. at 10 (Bankr. N.D. Iowa, May 27, 1987).

CONCLUSION

The equitable grounds asserted by movants are insufficient to support a remand of this action under 28 U.S.C. § 1452(b).

RECOMMENDATION

Based upon the foregoing considerations, the bankruptcy court recommends to the district court that the motion to remand be denied.

DATED February 5, 1990

William L. Edmonds
Chief Bankruptcy Judge

In the United States District Court

for the Northern District of Iowa

Central Division

FORT DODGE CREAMERY
Debtor.

Bankruptcy No. X88-155OF

KATHARINE DOAN and GERTRUDE
AMBROSE
Plaintiffs

Adversary No. X89-0154

NO. Misc. 90-3002

vs.

ALLEN R. LOOMIS; A. ROBERT LOOMIS;
FORT DODGE CREAMERY COMPANY;
MAURICE STARK; and McGLADREY,
HENDRICKSON & PULLEN

Defendants.

ORDER

This matter is before the court on the report and recommendation of the bankruptcy court, filed February 5, 1990. The bankruptcy court recommends that the motion to remand, filed with the bankruptcy court by defendant Maurice Stark on August 24, 1989, and joined in by defendant McGladrey & Pullen on August 29, 1989, be denied. Defendant Stark filed objections to the report and recommendation with the bankruptcy court on February 15, 1990. The trustee for the debtor filed a response to defendant's objections on February 27, 1990.

Removal and remand of state actions related to bankruptcy cases are governed by 28 U.S.C. § 1452 and Bankruptcy Rule 9027. Bankruptcy Rule 9027(e) provides that, "[u]nless the district court orders otherwise, a motion for remand shall be heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion." A party may object within 10 days. Bankruptcy Rule 9027(e). This court's review of the report and recommendation is pursuant to Bankruptcy Rule 9033. Bankruptcy Rule 9027(e). Bankruptcy Rule 9033(d) provides that:

The district judge shall make a de novo review upon the record or, after additional evidence, of any portion of the bankruptcy judge's findings of fact or conclusions of law to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the proposed findings of fact or conclusions of law, receive further evidence, or recommit the matter to the bankruptcy judge with instructions.

Defendant Stark objects only to the bankruptcy court's conclusion that the trustee's removal of this action was timely within the meaning of Bankruptcy Rule 9027(a)(2). Mr. Stark does not object to the bankruptcy court's findings of fact or the bankruptcy court's conclusion that remand upon equitable grounds pursuant to 28 U.S.C. § 1452(b) is not warranted in this case. The court has reviewed the unobjected to portions of the report and finds that the bankruptcy court's findings of fact and conclusions regarding 28 U.S.C. § 1452(b) should be adopted.

Bankruptcy Rule 9027(a)(2) provides that:

If the claim or cause of action in a civil action is pending when a case under the Code is commenced, an application for removal may be filed only within the longest of

- A. 90 days after the order for relief in the case under the Code,
- B. 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under S 362 of the Code, or

The bankruptcy court described the adversary action as a shareholder derivative suit essentially alleging that defendants breached their fiduciary duties to the debtor corporation. Report and recommendation at 2. The order for relief in debtor's Chapter 7 case was entered on February 8, 1989.

On August 9, 1989, the trustee removed the state court action to the bankruptcy court. It does not appear that any order terminating any 11 U.S.C. S 362 stay, assuming that a stay was or is in effect, has been entered in this case by the bankruptcy court.

The bankruptcy court reasoned as follows:

It is the nature of a derivative action which makes the determination of the timeliness of the removal so difficult. . . . (A] debtor's status as a plaintiff or defendant in a pending state court suit may affect the timeliness of removal by a trustee under Bankr. R. 9027(a)(2) When there is normal alignment of parties, the effect of the Rule is this - - if the debtor is a defendant in a pending state court action, the trustee has thirty days after the entry of an order terminating the stay to file his removal application. If the debtor is the plaintiff in a pending state court action, no stay exists to inhibit the trustee's pursuit of estate claims; therefore he would have 90 days after the order for relief to remove the pending state court action to federal court. . . . There appears to this court to be two alternatives . . . First, it is arguable that because the corporation is a nominal defendant and the stay had not been lifted permitting the litigation of the corporation's rights against the other state court defendants, there is no time limit presently confronting the trustee . . . Second, it is arguable that as a "real" plaintiff, if the trustee desires to pursue the corporation's rights in the pending litigation, he must obtain the removal within the 90 days from the entry of the order for relief This court, however, can find no case law to support or detract from either alternative. The Rule itself does not explicitly deal with this situation and although the court believes it is the second alternative which may be the more appropriate, in the absence of a clear rule applicable to this situation, and because the trustee's situation fits literally within the 30-day rule (Rule 9027(a)(2)(B)), the application for removal should not be found to be untimely.

Report and recommendation at 6-9. Like the bankruptcy court, this court has been unable to locate any case law on point.

Defendant Stark argues that the debtor is the real plaintiff, that the state litigation was not stayed, and thus the removal application is untimely as it was not filed within 90 days of the entry of the order of relief. The trustee argues that the debtor is both a real and a nominal defendant, and as a real defendant, the § 362 stay was in force and the 30 day time period of Bankruptcy Rule 9027(a)(2)(B) applied. The trustee appears to argue that, at a minimum, the status of the debtor as a real or nominal defendant was unclear, and that the trustee had a good faith belief that Bankruptcy Rule 9027(a)(2)(B) applied which should excuse any late filing. The trustee also supports his position with excerpts from briefs filed in the bankruptcy court by defendants Allen R. Loomis and A. Robert Loomis, and by First American State Bank, which appears to be a creditor in debtor's bankruptcy. These briefs suggest that plaintiffs Doan and Ambrose's claims include claims directly against debtor.

Paragraph 8 of plaintiffs, state court petition states that "Plaintiffs bring this action on behalf of themselves and other shareholders similarly [situated]. This is a shareholder derivative suit brought by and on behalf of the nominal corporate defendant, Fort Dodge Creamery Company." The bankruptcy court stated that the action is a shareholder derivative action. Report and recommendation at 2. On March 9, 1989, plaintiffs Doan and Ambrose filed a motion to terminate the automatic stay. On March 29, 1989, the bankruptcy court denied this motion

for the reason that 11 U.S.C. S 362(a)(3) prevented Doan and Ambrose from prosecuting claims of the bankruptcy estate. The court noted, however, that any individual claims of

Doan and Ambrose against defendants other than Fort Dodge Creamery could continue as these were not stayed. It is not clear whether the state court proceeding asserted any such individual claims, although it appears that they did not.

Report and recommendation at 4. This court has examined the state court petition and finds no basis for finding that the action is anything other than a shareholder derivative action.

An additional reason exists for viewing the debtor corporation as the real plaintiff in interest and not as a real defendant. On March 13, 1989, the trustee filed, in state court, an application for substitution of parties. The trustee asserted an ownership interest in the suit on behalf of the debtor's bankruptcy estate. The state court granted this motion on July 5, 1989. On July 12, 1989, the trustee filed, in state court, a motion for a nunc pro tunc order to clarify the trustee's substitution as a party plaintiff rather than as a defendant. This motion was not ruled upon by the state court prior to removal of this matter. Thus, the trustee's own actions suggest that the debtor corporation is the plaintiff rather than a real defendant.

Under Iowa law, a stockholder's derivative suit has been described as follows.

This proceeding in equity, commonly called a stockholder's suit or derivative action, is one brought by one or more stockholders of a corporation in their name as plaintiffs, but as representatives of the corporation, and for its benefit. They are plaintiffs in name only, and though the corporation is made a defendant, it is the real party in interest, and the beneficiary of any judgment recovered. Its basis is the damage done to the corporation by the real defendants and the refusal or the failure of the corporation to redress the wrongdoing.

Des Moines Bank k Trust Co. v. George M. Bechtel & Co., 51 N.W.2d 174, 217 (Iowa 1952) (quoted by the bankruptcy court, see report and recommendation at 6). See also Rowen v. Le Mars Mut. Ins. Co. of Iowa, 282 N.W.2d 639, 645 (Iowa 1979) ("[T]he corporation for whose benefit the suit is brought, although actually the plaintiff, is a nominal defendant."); Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 523 (Iowa 1974) ("Of course, though the corporation is ordinarily named a defendant, it is the real plaintiff in interest, and beneficiary of any judgment recovered.").

The court reaches the following conclusions. First, under Iowa law, the corporation, although nominally a defendant, is the real plaintiff in interest. Second, the action brought by Doan and Ambrose was a shareholder derivative action. The court does not find that the debtor corporation was a "real defendant" or that Doan and Ambrose presented any claims in any capacity other than as representatives of the corporation and shareholders. Third, while the automatic stay provision of S 362(a)(3) prevented Doan and Ambrose from pursuing the debtor corporation's claims against the real defendants once the order for relief was entered, it did not prevent the trustee from pursuing those claims on the debtor corporation's behalf. Title 11 U.S.C. § 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." Litigation which is pending at the time of the commencement of the case is governed by § 362(a)(1), which stays "the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was . . . commenced before the commencement of the case." (emphasis added). This section does not apply to situations where the debtor is the plaintiff. The court finds that the circumstances presented by this matter are more analogous to situations where the debtor is the plaintiff. Consequently, no stay inhibited the trustee. By operation of Bankruptcy Rule 9027(a)(2)(A) the trustee had 90 days from the entry of the order for relief to remove this matter. The trustee's removal was not timely.

The court has considered an alternative line of reasoning. Since § 362(a)(3) stayed the named plaintiffs from continuing the suit, i.e., from "exercising control over property of the estate," the stay is potentially not "terminated" until the trustee is substituted as a party plaintiff. The court does recognize that no order terminating the stay has been entered. However, as previously stated, the § 362(a)(3) stay applied only against Doan and Ambrose and not against the trustee. There is some confusion in the record as to whether the trustee has been properly substituted as a party plaintiff. The trustee's motion for substitution was granted by the stated court on July 5, 1989. The trustee removed this matter on August 9, 1989. This removal was outside of the 30 day period provided for in Bankruptcy Rule 9027(a)(2)(B). The trustee did move for an order nunc pro tunc on July 12, 1989, apparently because the order substituted the trustee as a defendant rather than as a party plaintiff as had been intended. See report and recommendation at 3. However, an order nunc pro tunc relates back to the date of the original order, in this case July 5, 1989. See General Mills v. Prall, 56 N.W.2d 596, 600 (Iowa 1953) ("The function of a nunc pro tunc order is not to modify or correct a judgment but to make the record show truthfully what judgment was actually rendered - 'not to make an order now for then, but to enter now for then an order previously made.'"); Miller v. Wellman Dynamics Corp., 419 N.W.2d 380, 382 (Iowa 1988) ("The purpose of such an order is to make the record show truthfully what judgment was actually rendered."); McVay v. Kenneth E. Montz Implement Co., 287 N.W.2d 149, 150-151 (Iowa 1980); Headley v. Headley, 172 N.W.2d 104, 108 (Iowa 1969); Chariton & Lucas County Nat. Bank v. Taylor, 240 N.W. 740, 741 (Iowa 1932) ("The office and function of a nunc pro tunc order or judgment is to put upon the record and to render effective some finding or adjudication of the court actually or inferentially made, but by oversight or evident mistake not made of record."). Consequently, assuming that the trustee's substitution as a party plaintiff terminates the § 362(a)(3) stay, the trustee's removal was untimely.

The trustee has made several equitable arguments asserting reasons why this matter should remain in and be resolved by the bankruptcy court. See trustee's response to objection, filed with the bankruptcy court on February 27, 1990, at 9-11. While some of these assertions may have some validity, the trustee has not cited and the court has not found any authority for considering such arguments when deciding whether the removal was timely under Bankruptcy Rule 9027(a)(2). Bankruptcy Rule 9006 (b)(1) does provide in part that "when an act is required or allowed to be done at or within a specified period by these rules . . . the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect." See Collier on Bankruptcy, para. 9027-05, p. 9027-19 (15th ed. 1989) ("If the time period is missed by the party who seeks to remove, Rule 9006(b)(1) requires a showing of excusable neglect if the period is sought to be extended."). The trustee has not moved to extend the time period for removal as required by Bankruptcy Rule 9006, although the trustee has argued that the confusion over debtor's status should excuse any late removal. Consequently, Bankruptcy Rule 9006 (b)(1) does not come into play.

ORDER:

Accordingly, It Is Ordered:

1. The report of the bankruptcy court, filed February 5, 1990, is adopted to the extent it is not inconsistent with the text above. The court declines to follow the recommendation of the bankruptcy court.
2. Defendant Maurice Stark's motion for remand, filed August 24, 1989, with the United States Bankruptcy Court, Northern District of Iowa, and joined in by defendant McGladrey & Pullen on

August 29, 1989, is granted. This matter, Adversary No. X89-0154F contained in Bankruptcy No. X88-1550F, is remanded to the Iowa District Court for Webster County.

Done and ordered this 11th day of May, 1990.

David R. Hansen, Judge
UNITED STATES DISTRICT COURT

In the United States District Court
for the Northern District of Iowa
Central Division

FORT DODGE CREAMERY
Debtor.

Bankruptcy No. X88-1550F

KATHARINE DOAN and GERTRUDE
AMBROSE
Plaintiffs

Adversary No. X89-0154

NO. Misc. 90-3002

vs.

ALLEN R. LOOMIS; A. ROBERT LOOMIS;
FORT DODGE CREAMERY COMPANY;
MAURICE STARK; and McGLADREY,
HENDRICKSON & PULLEN
Defendants.

This matter is before the court on the bankruptcy trustee's resisted motion for relief from order, motion to amend or make additional findings of fact, and motion for enlargement of time, filed May 21, 1990.

On May 11, 1990, this court, after reviewing the report and recommendation of the bankruptcy court, entered an order granting defendant Maurice Stark's motion for remand and remanding this matter to the Iowa District Court for Webster County due to the trustee's failure to effect a timely removal.

It is widely held that once a federal district court mails a certified copy of an order remanding a case to a state court, the federal court is completely divested of jurisdiction over the matters remanded. Seedman v. United States District Court for the Central District of California, 837 F.2d 413, 414 (9th Cir. 1988) ("Once a district court certifies a remand order to state court it is divested of jurisdiction and can take no further action on the case."); Browning v. Navarro, 743 F.2d 1069, 1078-1079 (5th Cir. 1984); Three J Farms, Inc. v. Alton Box Board Co., 609 F.2d 112, 115-116 (4th Cir. 1979), cert. denied, 445 U.S. 911 (1980); Federal Deposit Insu. Corp. v. Santiago Plaza, 598 F.2d 634, 636 (1st Cir. 1979); City of Valparaiso, Ind. v. Iron Workers Local 395, 118 F.R.D. 466, 468 (N.D. Ind. 1987). This rule results from the language of 28 U.S.C. § 1447(d), the statutory section governing procedure

after removal generally, which states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d) (emphasis added). Consequently, this court finds that it lacks jurisdiction to rule on defendants' motions.

ORDER:

Accordingly, It Is Ordered:

The bankruptcy trustee's motion for relief from order, motion to amend or make additional findings of fact, and motion for enlargement of time, filed May 21, 1990, are denied for lack of jurisdiction.

Done and Ordered this 23rd day of July, 1990.

David R. Hansen, Judge
UNITED STATES DISTRICT COURT