

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

JAMES D. MAJOR
Debtor.

Bankruptcy No. 92-51653XS
Chapter 7

JAMES D. MAJOR
Plaintiff

Adversary No. 94-5129XS

vs.

RICHARD HALL,
MARIAN HALL, and
CITIZENS SECURITY MUTUAL INSURANCE
COMPANY
Defendants.

ORDER RE: MOTION TO DISMISS and MOTION TO ABSTAIN

Citizens Security Mutual Insurance Company (CITIZENS) has filed a motion to dismiss it as a defendant. Docket 15. Richard Hall and Marian Hall have filed a motion requesting the court to abstain from hearing the proceeding and to dismiss the action. Docket 16. James Major resists the motion to abstain. Hearing on the motions was held February 8, 1995.

James Major filed a Chapter 7 petition September 8, 1992 and received his discharge December 12, 1992. The trustee filed a "no-asset" report. The bankruptcy case closed March 9, 1993. Major reopened his case July 22, 1994 to amend his schedules to add the Halls as creditors. The case has been reopened, but no amendments have been filed.

On August 23, 1994, Major filed the complaint in this proceeding seeking a judgment declaring that his debt to the Halls is discharged. The Halls' claim relates to an auto accident on August 11, 1992 that involved Richard Hall and Major's son, Seth. Defendant Citizens Security is Major's automobile insurance carrier. Major has apparently named Citizens as a defendant because Citizens has sued Major in state court to determine its obligations under an insurance contract; Halls are also defendants.

The motion of Citizens Security states that the insurer has no interest in whether the Halls' claim against Major is discharged and that the complaint seeks no relief against Citizens Security.

The Halls' motion requests the bankruptcy court to decline to exercise jurisdiction over the dischargeability proceeding. Two cases are pending in the Iowa District Court for Woodbury County, one a personal injury action by the Halls against Major (Law No. 108986), and the other a declaratory judgment action brought by Citizens Security to determine whether insurance coverage and the duty

of defense is available to Major (No. 1091224C). The Halls contend that it would be more efficient to allow the state court to resolve all issues. The Halls argue that the bankruptcy court should apply the doctrine of forum non conveniens or should abstain as allowed by 28 U.S.C. 1334(c)(1).

The Halls state in their motion that the doctrine of forum non conveniens is similar to abstention under 11 U.S.C. § 305. However, § 305 relates to abstention from an entire bankruptcy case rather than an adversary proceeding. 11 U.S.C. § 305(a) ("the court ... may dismiss a case under this title, or may suspend all proceedings in a case").

Forum non conveniens is a judicial doctrine which allows a court the discretion to decline jurisdiction over a case "when the convenience of the parties and the ends of justice would be better served if the action were brought and tried in another forum." Black's Law Dictionary 589 (5th ed. 1979). The doctrine is considered a narrow one with stringent requirements. Norwood v. Kirkpatrick, 349 U.S. 29, 75 S.Ct. 544 (1955) (comparing the doctrine with a motion for change of venue). In cases where transfer to another federal district is appropriate, the doctrine has been largely replaced by the motion for change of venue pursuant to 28 U.S.C. § 1404(a), which allows transfer of an action to another district "for the convenience of parties and witnesses, in the interest of justice." See Norwood, 349 U.S. at 32, 75 S.Ct. at 546 (court considers similar factors in § 1404(a) motion but with broader discretion); 5A Wright & Miller, Federal Practice and Procedure § 1352 at 268-71.

It is not necessary for the court to discuss the scope of the judicial doctrine of forum non conveniens or its applicability to the Halls' motion. The court finds and concludes that it will, in part, grant Halls' motion on the alternative basis of discretionary abstention under § 1334(c)(1). See generally 1 Collier on Bankruptcy 3.01[3] at 3-73 to 3-78.

Section 1334(c)(1) provides:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). In making the decision whether to abstain, a court should consider factors affecting the interests of the parties, economic use of judicial resources, and efficient administration of the bankruptcy estate. See, e.g., Nationwide Roofing & Sheet Metal, Inc. v. Cincinnati Insurance Co. (In re Nationwide Roofing & Sheet Metal, Inc.), 130 B.R. 768, 779-80 (Bankr. S.D. Ohio 1991) (listing several factors).

There appear to be at least three avenues of dispute involving the debtor, Halls and the insurance companies. First is the declaratory judgment action brought by Citizens Security Mutual Insurance Company to determine its obligation to provide a defense for James Major and its obligation to provide insurance coverage for the accident which injured the Halls. That action is now pending in state court as civil action number 109124C. The state court has jurisdiction over such a proceeding. Arguably, so does the bankruptcy court, as such an action would determine the prepetition contractual duties between Major and his insurance company. 28 U.S.C. § 157(b)(2)(O).

The second avenue is Halls' personal injury claim against the debtor which is joined with their claims against debtor's son and Mrs. Major.

Third is Major's proceeding in bankruptcy court to determine the dischargeability of Halls' and Citizen's claims against him under § 523(a)(3). To be determined to be nondischargeable, the court

would have to find that the debtor acted in some way to make his underlying debt to Halls nondischargeable under 11 U.S.C. § 523(a)(2), (4) or (6). The more likely areas of attack are under § 523(a)(2) and (6). Halls have argued before the bankruptcy court that Major violated both of these provisions by telling intentional untruths about whether he gave consent for his unlicensed son to drive his car. Halls perhaps also argue that their "negligent entrustment" theory in state court is a claim within 11 U.S.C. § 523(a)(6). Both the bankruptcy court and the state court have jurisdiction of the Halls' claim under 11 U.S.C. § 523(a)(3). In re Iannacone, 21 B.R. 153, 155 (Bankr. D. Mass. 1982); 3 Collier on Bankruptcy p. 523.13[9] (bankruptcy court has exclusive jurisdiction over dischargeability under § 523(2), (4), and (6) and concurrent jurisdiction with state court over dischargeability under § 523(a)(3)); Fed.R.Bankr.P. 4007, Advisory Committee Note (1983). Halls ask that the state court be left to determine the dischargeability issues as part of their tort action.

So far as any bankruptcy issues are concerned, the linchpin of all the litigation is the determination of the coverage issue in the declaratory judgment action. If that is tried first, the court's determination may delimit the remaining disputes. If the court determines that there was consent by debtor for his son's use of the car and that, therefore, there is insurance coverage, that decision would very likely affect the nature and extent of Halls' remaining claims, if any, against the debtor. If the court determines there was no consent, then, the nondischargeability claim against debtor under § 523(a)(3) as to an underlying fraud may terminate, perhaps leaving only the § 523(a)(3) claim based on negligent entrustment.

In the interest of judicial economy, it is this court's view that the declaratory judgment action should be tried first. Moreover, that action should be tried by the state court. Accordingly,

IT IS ORDERED that the proceedings before the bankruptcy court in this adversary proceeding are stayed pending the outcome of declaratory judgment action, civil number 109124C in the Iowa District Court for Woodbury County.

IT IS FURTHER ORDERED that Halls are enjoined from further action against James Major in the Iowa District Court for Woodbury County in law number 108986.

IT IS FURTHER ORDERED that the parties to this adversary proceeding shall advise the bankruptcy court of the outcome of the declaratory judgment action, and that at such time this court will consider further whether further abstention as to this proceeding should be ordered pursuant to 18 U.S.C. § 1334(c)(1).

SO ORDERED THIS 24th DAY OF FEBRUARY, 1995.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U.S. mail to: W. J. Giles III, Kay Dull and U. S. Trustee.