(Cite as: 1994 WL 18686 (Bankr.D.Vt.))

In re ST. JOHNSBURY TRUCKING CO., INC., Debtor,

The OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF ST. JOHNSBURY TRUCKING

COMPANY, INC., and St. Johnsbury Trucking Company, Inc., Plaintiff,

v.

BANKERS TRUST COMPANY, as agent, Defendant.

Bankruptcy No. 93-B-43145, Adv. No. 93-1073.

United States Bankruptcy Court. D. Vermont.

Jan. 18, 1994.

S.L. Chenetz, Esq., and R. Levy, Esq., of Marcus Montgomery Wolfson & Burten, P.C., New York City, for Official Committeee of Unsecured Creditors.

J.P.S. LeShaw, of Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, Miami, FL, for St. Johnsburg Trucking Co., Inc.

A. Harris, and K.S. Ziman, of O'Melveny & Myers, New York City, or Bankers Trust Co. (Bankers).

MEMORANDUM OF DECISION ON CHANGE OF VENUE MOTION

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** Bankers' "Motion for an Order Pursuant to 28 USC § 1412 and Bankruptcy Rule 7087 Transferring Venue of Adversary Proceeding from the District of Vermont to the Southern District of New York" [FN1] was denied by Order of this Court entered Jan. 5, 1994. This Memorandum of Decision sets forth the reasons for our decision.

Bankers argues that the District of Vermont is an improper venue for this adversary proceeding under the applicable venue statutes, and, alternatively, that the interests of

justice and the convenience of the parties warrant transfer to the Southern District of New York, where the Debtor's bankruptcy case is pending.

The Complaint filed against Bankers by Debtor and Committee (both hereinafter referred to as "Plaintiffs") contains five counts. Count 1 asks this Court to declare that a "Collection Account Agreement" (hereinafter "Agreement") entered into between Debtor, Bankers, and a Vermont bank gave Bankers only a security interest in a collection account in the Vermont bank, despite certain language in the agreement that purports to give Bankers "all right, title and interest in and to all of the items from time to time on deposit in the Collection Account and their proceeds." Agreement, 3(b). Counts 2 and 3 seek avoidance of Bankers' security interests in accounts receivable and contract rights respectively, on grounds that Bankers failed to perfect its security interests as required by Vermont's version of the Uniform Commercial Code. Vt.Stat.Ann. tit. 9A. Avoidance of Bankers' security interest in three leases in other states under the laws of those states is the relief sought by Count 4. Count 5 seeks a judgment declaring that Bankers has no valid security interests in the accounts receivable, contract rights and leases at issue in Counts 2-4.

Plaintiffs' Complaint alleges that the District of Vermont is a proper venue for this adversary proceeding under 28 USC §§ 1391(b), and 1409(a) and (c). Complaint, 4. The § 1409(a) basis for venue is no longer an issue in dispute because Plaintiffs do not, in their pleadings and argument, dispute Bankers' well-founded contention that § 1409(a) does not authorize venue in the District of Vermont. [FN2] Plaintiffs continue to argue, however, that § 1391(b), a general venue statute for civil actions in the federal District Courts, provides an independent basis for venue in the District of Vermont. Bankers counters that § 1409, which governs venue for bankruptcy proceedings, limits resort to nonbankruptcy venue statutes to circumstances not present here.

Plaintiffs also argue that Count 1 provides a proper basis for venue under § 1409(c), which makes § 1391(b) available. Both sides agree that if venue is proper as to that count, we may also determine the remaining counts under the doctrine of pendant venue. Bankers concedes in its pleadings and argument that Plaintiffs are in fact entitled to the relief sought in Count 1. That concession, Bankers contends, eliminates Count 1 as a basis for venue. Bankers also argues that even if contested, Count 1 fails to meet the requirements of § 1409(c).

We hold that § 1409 limits applicability of § 1391(b) to circumstances not present here, and thus § 1391(b) is not an independent basis for venue of this adversary proceeding in the District of Vermont. We also hold, nonetheless, that venue is properly in this District because Count 1 provided a proper basis for venue under § 1409(c) at the time the complaint was filed. The discussion that follows will consider first the availability of § 1391(b) as an independent basis for venue, and then consider whether § 1409(c) makes § 1391(b) applicable to this proceeding.

***2** "The task of resolving [a] dispute over ... meaning begins where all such inquiries must begin: with the language of the statute itself." U.S. v. Ron Pair Enterprises, 489 US 235, 241 (1989). Section 1391(b) provides:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in ... (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is subject of the action is situated.... (Emphasis added.)

While an adversary proceeding resembles a "civil action", the two forms of suit are not identical. Norton Bankruptcy Law and Practice 2d § 138.3. A review of the District Court [FN3] venue provisions contained in Chapter 87 of Title 28, §§ 1391-1412, suggests that Congress intended to distinguish among the various forms of suit. The phrase "civil action" is used in § 1391 (general venue provisions), § 1392 (defendants or property in different districts in the same state), § 1393 (divisions where defendants reside), § 1394 (actions by national banking associations against Comptroller of the Currency), § 1396 (collection of internal revenue taxes), § 1398 (Interstate Commerce Commission orders), § 1399 (partition action involving United States), § 1401 (stockholder's derivative actions), and § 1402 (United States as defendant).

Section 1395 covers "[a] civil proceeding for the recovery of a pecuniary fine, penalty or forfeiture" and "[a] proceeding in admiralty for the enforcement of fines, penalties and forfeitures." Similarly, § 1403 governs "[p]roceedings to condemn real estate for the use of the United States...." By contrast, both "actions" and "proceedings" are covered by § 1405, which deals with the impact on venue of creation or alteration of districts and divisions.

The general change of venue statute, § 1404, uses "civil action" in sections (a) and (c), and "any action, suit or proceeding of a civil nature or any motion or hearing thereof" in section (b). If Congress intended the phrase "civil action" to include "a case or proceeding under title 11," then the special Bankruptcy change of venue statute, § 1412, [FN4] would be unnecessary, because § 1404(a) [FN5] would apply. See In re JCC Capital Corp., 147 BR 349, 356-57 (Bkrtcy.S.D.N.Y.1992) ("the factors courts apply in determining whether to transfer venue are the same under either section 1404(a) or 1412").

Similarly, the statute conferring bankruptcy jurisdiction on the federal District Courts, 28 USC § 1334, extends to "cases under title 11," § 1334(a), and "civil proceedings arising under title 11, or arising in or related to cases under title 11." § 1334(b). The bankruptcy venue statutes also refer to "cases under title 11," 28 USC § 1408, and to "proceedings arising under" or "arising in or related to cases under title 11." 28 USC § 1409. Moreover, § 1409(c), allows

***3** a trustee [FN6] in a case under title 11 [to] commence a proceeding arising in or related to such case ... in the district court ... in which, under applicable nonbankruptcy venue

provisions, the debtor or creditors ... may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

Emphasis added. This clear delineation in the same statute between a "proceeding" in bankruptcy and an "action" outside of bankruptcy underscores our conviction that the distinctive phrasings which appear in the various venue statutes reviewed above were intended by Congress, and that "civil actions" and "proceedings arising under title 11" are different and distinct. Norton Bankruptcy Law and Practice 2d § 138:3. Accordingly, § 1391, which covers only "civil actions," is not an independent basis for venue of "proceedings" in bankruptcy. Rather, § 1391 and other nonbankruptcy venue statutes are available in bankruptcy only to the extent provided by the bankruptcy venue statutes themselves.

This distinction has been traditionally observed by Courts in making rulings on venue. See e. g., SECA Leasing Ltd. Partnership v. Brandt, 144 BR 381, 383-84 (N.D.Ill.1992) (where requirements of § 1409(e) not satisfied, nonbankruptcy venue provisions not available); In re Geauga Trenching Corp., 110 BR 638, 652 (Bkrtcy.E.D.N.Y.1990) (§ 1409(d) satisfied, so nonbankruptcy venue statutes of §§ 1332 and 1391 applicable); Brock v. American Messenger Service, 65 BR 670, 672 (D.N.H.1986) (§ 1409(e) makes § 28 USC § 1391 applicable); In re Continental Air Lines, Inc., 61 BR 758, 772 (S.D.Tex.1986) (§ 1409(d) "mandates" that venue is to be determined by 28 USC § 1391(b)); Weaver v. Gillen, 49 BR 70, 72-73 (W.D.N.Y.1985) (§ 1409 specifies when nonbankruptcy venue statutes applicable). But see In re Sonnax Industries, Inc., 99 BR 591, 594 (D.Vt.1989) (§ 1409 and Clayton Act anti-trust venue statute, 15 USC § 22, "need not be viewed as conflicting, but rather as merely providing additional choice."), aff'd on other grounds, 907 F.2d 1208 (2d Cir.1990). Accordingly, we hold that § 1391 does not provide an independent basis for venue of this adversary proceeding in the District of Vermont.

Venue is proper in the District of Vermont, nonetheless, because Count 1 fulfills the requirements of § 1409(c), which makes § 1391 available as a basis for venue. Bankers contends that Count 1 fails to meet the requirements of § 1409(c). First, Bankers argues that Plaintiffs are not acting as the "statutory successor to the debtor or creditors under section 541 or 544(b) of title 11" because no controversy has ever existed over the status of the account involved in Count 1, [FN7] and thus § 541 is not involved. Conceding that the Agreement was intended only to provide it with a security interest, despite the fact that it contains both assignment as security and absolute assignment language, compare Agreement §§ 2 and 3(b), Bankers says that it has never taken a contrary position. Second, Bankers argues, this is not a proceeding "arising in or related to" a case under title 11, but is one "arising under title 11," and thus is required by § 1409(a) to be brought "in the district court in which such case is pending." [FN8] We reject both contentions.

***4** As Bankers concedes, the Agreement itself gives Bankers both a security interest in the collection account [FN9] and "all right, title and interest in and to all of the items from time to time on deposit in the Collection Account and their proceeds...." Agreement, § 3(b). The

Agreement specifically provides that Bankers' failure to assert its property rights in the account is of no consequence.

No delay or failure on the part of [Bankers] in exercising, and no course of dealing with respect to, any right, power or remedy hereunder shall operate as a waiver thereof nor shall any single or partial exercise by [Bankers] of any right, power or remedy hereunder preclude other or further exercise thereof or the exercise of any other right, power or remedy. The rights, remedies, and benefits of [Bankers] herein provided are cumulative and not exclusive of any other rights, remedies or benefits which [Bankers] may have under this Agreement ... or at law, in equity, by statute, or otherwise.

Agreement, § 9. Plaintiffs have a legitimate interest in determining ownership of the account, and Count 1 of this adversary proceeding is an appropriate means of obtaining a conclusive determination. Accordingly, we reject Bankers' contention that no controversy exists.

We also reject Bankers' argument that this is a matter "arising under" and not one "arising in" or "related to" a case under Title 11. Bankers concedes that a proceeding based on § 541 is one "arising in" or "related to" a case under Title 11. It argues that because it now concedes that it has only a security interest in the account at issue in Count 1, it has eliminated any basis for venue under § 541. Plaintiffs' remaining counts are under § 544(a) of the Code, which both sides agree do not invoke the venue provisions of § 1409(c). Venue, however, is generally determined at the time the suit is commenced. Bigio v. U.S., 710 F.Supp. 790, 791 (S.D.Fla.1988). Application of a different rule in this case would permit Bankers to manipulate Plaintiffs' choice of forum. Bankers' concession that it has no ownership interest in the collection account is an appropriate basis for entry of judgment against it on Count 1. That concession, however, appears to us, based on the plain and unequivocal language of the Agreement, to be a voluntary sacrifice of its rights in the hope of obtaining what it believes to be a more favorable forum, if not a more favorable judge. [FN10] In any event, the Agreement itself creates what appears on this record to be considerable doubt about the Debtor's prepetition interest in the collection account. Count 1 seeks a determination of the estate's interest in the account under § 541. The estate's interest is dependent upon the Debtor's prepetition interest. Count 1 is thus a proceeding "arising in" a case under Title 11, and satisfies the requirements of § 1409(c), which makes venue properin the District of Vermont under § 1391(b)(2), the applicable nonbankruptcy venue provision.

***5** In addition to challenging the propriety of the venue chosen by Plaintiffs, Bankers also moves for an order transferring venue from the District of Vermont to the Southern District of New York under 28 USC § 1412 and Fed.R.Bkrtcy.P. 7087, which permit transfer even where venue as filed is proper if to do so is "in the interest of justice" or "for the convenience of the parties." Continental Airlines, Inc. v. Chrysler (In re Continental Airlines, Inc.), 133 BR 585, 587 (1991). Venue motions are entrusted to the discretion of the court. In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 149 BR 365, 368 (Bkrtcy.S.D.N. Y.1993) (citations omitted). The moving party bears the burden of proving that transfer is

warranted by a preponderance of the evidence. Id., at 368-69; In re JCC Capital Corp., 147 BR 349, 357 (Bkrtcy.S.D.N.Y.1992).

Venue motions are decided "upon the particular facts of each case, in light of the broad purposes of convenience and fairness." In re Finley, Kumble, supra, 149 BR at 368. The "interests of justice" component of venue transfer is

a broad and flexible standard which must be applied on a case-by-case basis. It contemplates a consideration of whether the transferring venue would promote the efficient administration of bankruptcy estates, judicial economy, timeliness, and fairness.

In re Manville Forest Products Corp., 896 F.2d 1384, 1391 (2d Cir.1990). Among the factors to consider in determining whether transfer is warranted under the "convenience of the parties" component are the state's interest in having matters involving state law decided within its borders by those familiar with its law; access to and availability of proof and witnesses; and the costs and convenience to the parties and their witnesses. See Gulf Oil v. Gilbert, 330 US 501, 508-09 (1946); JCC Capital Corp., supra, 147 BR at 357.

We believe that the balance tips decidedly in favor of Plaintiffs in this case, and thus deny Bankers' motion for transfer of venue. The matters in controversy in this adversary proceeding are discrete issues that are not inextricably intertwined with the main case, although a ruling unfavorable to the Bank may increase any distribution to unsecured creditors. We see no particular advantage to requiring the main case and this adversary proceeding to be determined in the same venue. Further, most of the witnesses and evidence relevant to this matter are located in Vermont, including Debtors' books and records on the disputed accounts receivable and contract rights, the employees responsible for billing and collection, Debtor's computer data center, and the banks through which Debtor's accounts receivable were collected. Bankers' representatives routinely travelled to Vermont for audits and consultations with Debtor's employees. If we determine that Vermont law applies, the State's interest in having matters involving local law determined within its borders by persons familiar with the idiosyncrasies [FN11] of its law will be served by leaving venue in Vermont. In addition to being more familiar with Vermont law and having greater access to materials related to its application, Vermont attorneys are of comparable competence and cost substantially less than those in New York. Finally, the undersigned is the presiding judge of the District of Vermont. Because the main case was assigned randomly to this Court in the Southern District of New York, where we sit by special designation, there is no threat to Bankers here of inconsistent rulings. The same judge sits in the main case and in this adversary, albeit in different districts. Finally, Vermont's docket is uncrowded, while the oppressive dockets in the Southern District of New York make 60-hour work weeks routine for my brother and sister bankruptcy judges there. Thus, this adversary proceeding is sure to receive a prompt determination in the District of Vermont.

***6** For the foregoing reasons, we believe that the interests of justice and the convenience of the parties are best served by leaving venue in the District of Vermont, and would have granted a motion for change of venue to that District even had this adversary proceeding originally been brought in the Southern District of Vermont. Accordingly, we deny Bankers' motion for a change of venue.

FN1. Our subject matter jurisdiction over this controversy arises under 28 USC § 1334 (b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This is a core matter under 28 USC §§ 157(b)(2)(A) and (K).

FN2. Section 1409(a) provides, with exceptions not relevant here, that, "a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending." This case is pending in the Southern District of New York. Thus, as applied to this case, § 1409(a) authorizes filing of this proceeding only in that district.

FN3. The Bankruptcy Court is a unit of the District Court. 28 USC § 151.

FN4. 28 USC § 1412 provides:

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

FN5. 28 USC § 1404(a) provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

FN6. Although § 1409(c) refers to the "trustee," the provision also applies to debtors-in-possession, by virtue of Code § 1107. 1A Moore's Federal Practice, 0.344[14.-2], 4286.5.

FN7. As originally formulated in its "Memorandum of Law in Support of Motion," 17, Bankers' argument that Plaintiffs are not acting as statutory successors to the Debtor or creditors was premised on the allegation that Count 1 asserts only the property rights of the estate under Code § 541, and does not implicate the prepetition rights of the Debtor. This argument, which is utterly without merit, appears to have been abandoned in Bankers' "Post-Hearing Reply," 6-15. The original formulation is devoid of merit because, as § 541 makes ineluctably clear, the property rights included in the postpetition estate are in fact the prepetition rights of the debtor. More particularly,

"commencement of a case ... creates an estate ... comprised of ... [a]ll legal or equitable interests of the debtor in property as of commencement of the case." 11 USC § 541(a)(1). As we have previously held, "[o]nly such interest as the debtor has 'as of the commencement of the case' passes into the estate." In re Drexel Burnham Lambert Group, Inc., 138 BR 687, 710 (Bkrtcy.S.D.N.Y.1992).

FN8. 28 USC § 1409(a) provides:

Except as otherwise provided in subsection (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

FN9. Section 2 of the Agreement grants Bank "a security interest in all of [Debtor's] right, title, and interest, ... in and to the Collection Account...."

FN10. Even if the forum changes, the judge would not. See page 13, infra.

FN11. Vermont is one of a handful of states that continue to adhere to the 1962 version of the Uniform Commercial Code.

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