

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Desks By Design, Inc., et al. v. Ralph Laranaga III, et al.
Case Number: 03-01216
Nature of Suit:
Judge Code: S
Reference Number: 03-01216 - S

Document Information		
Number:	15	
Description:	Order Denying [6-1] Motion Remand this cause of action to the District Court of Santa Fe County and abstain from the Court's "related to" jurisdiction in this matter. by Ralph Laranaga III .	
Size:	11 pages (21k)	
Date Received:	10/14/2003 10:05:43 AM	Date Filed: 10/14/2003 Date Entered On Docket: 10/14/2003
Court Digital Signature		View History
15 fe b3 25 c9 1d 60 c2 e7 8d c6 73 39 12 d1 7c b2 bb 4f 67 bf 50 59 fd ed c6 5a f3 01 6d 7d 0e 3a 34 d0 b2 5d 36 7d a4 b5 df 8c 67 93 54 8f 0f 70 65 c6 11 7a 85 92 2f cf 20 fa af f2 27 a6 d8 0f 27 42 dc b4 d9 07 e8 0e 92 9f 19 62 5f e9 44 ba 6a af 4f b4 08 ad 8c b1 e0 c0 4c d8 79 c0 85 e8 07 89 9f 2c 0a 1d 28 4e 82 a5 cf f6 a8 6b 26 41 59 be 35 fc 6b 8c 5b 3d 06 44 07 52 a6 5d a0		
Filer Information		
Submitted By:	James E Burke	
Comments:	Order Denying Defendant's Motion to Remand or Abstain	

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

D IV DESIGNS, INC.,
Debtor.

No. 11-03-11984 SS

DESKS BY DESIGN, INC., et al.,
Plaintiffs,

v.

Adv. No. 03-1216 S

RALPH LARANAGA III, et al.,
Defendants.

**ORDER DENYING DEFENDANT'S
MOTION TO REMAND OR ABSTAIN**

This matter is before the Court on Defendant Ralph Larranaga's Motion to Remand and for Abstention (doc. 6) and the objection thereto by D IV Designs, Inc. ("Debtor")(doc. 9). Both parties submitted briefs, Larranaga through his attorney Gary B. Ottinger (doc. 13) and Debtor through its attorney George M. Moore (doc. 14). For the reasons set forth below, the Court finds that it should deny Defendant's motion.

BANKRUPTCY JURISDICTION

Federal courts are courts of limited jurisdiction, and empowered to hear only those cases authorized and defined in the Constitution and entrusted to them by Congress. Henry v. Office of Thrift Supervision, 43 F.3d 507, 511 (10th Cir. 1994). Parties cannot waive lack of subject matter jurisdiction. Id. Federal courts are obligated to examine their own jurisdiction, and subject matter jurisdiction can be

raised at any time, by a party or by the court sua sponte.
May v. Missouri Department of Revenue (In re May), 251 B.R.
714, 719 (8th Cir. B.A.P. 2000).

Bankruptcy Court jurisdiction is established by 28 U.S.C. § 1334, which lists four types of matters over which the district court has bankruptcy jurisdiction: 1) cases "under" title 11 (which are the bankruptcy cases themselves, initiated by the filing of a Chapter 7, Chapter 11, etc. petition), 2) proceedings "arising under" title 11, 3) proceedings "arising in" a case under title 11, and 4) proceedings "related to" a case under title 11. Wood v. Wood (In re Wood), 825 F.2d 90, 92 (5th Cir. 1987). In the District of New Mexico, all four types have been referred to the bankruptcy court. See 28 U.S.C. § 157(a); Administrative Order, Misc. No. 84-0324 (D. N.M. March 19, 1992). Jurisdiction is then further broken down by 28 U.S.C. § 157, which grants full judicial power to bankruptcy courts over "core" proceedings, but only limited judicial power over "related" or "non-core" proceedings. Wood, 825 F.2d at 91; Personette v. Kennedy (In re Midgard Corporation), 204 B.R. 764, 771 (10th Cir. B.A.P. 1997).

"Core" proceedings are matters "arising under" and "arising in" cases under title 11. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Matters "arise under" title 11 if

they involve a cause of action created or determined by a statutory provision of title 11. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Matters "arise in" a bankruptcy if they concern the administration of the bankruptcy case and have no existence outside of the bankruptcy. Wood, 825 F.2d at 97; Midgard, 204 B.R. at 771.

"Non-core" proceedings are those that do not depend on the bankruptcy laws for their existence and that could proceed in another court even in the absence of bankruptcy. Wood, 825 F.2d at 96; Midgard, 204 B.R. at 771. Bankruptcy courts have jurisdiction over non-core proceedings if they are at least "related to" a case under title 11. 28 U.S.C. § 157(c)(1) ("A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11.")

"[T]he test for determining whether a civil proceeding is related in bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984)(emphasis omitted.) Although the proceeding need not be against the debtor or his property, the proceeding is related to the bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the estate. Id. ...

[T]he bankruptcy court lacks related jurisdiction to resolve controversies between third party creditors which do not involve the debtor or his property

unless the court cannot complete administrative duties without resolving the controversy. In re Shirley Duke Assocs., 611 F.2d 15, 18 (2nd Cir. 1979).

Gardner v. United States (In re Gardner), 913 F.2d 1515, 1518 (10th Cir. 1990). See also Celotex v. Edwards, 514 U.S. 300, 307 n. 5 (1995) ("Proceedings 'related to' the bankruptcy include (1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. § 541, and (2) suits between third parties which have an effect on the bankruptcy estate.")

RELEVANT STATUTES

28 U.S.C. § 1334(c) provides:

(1) Nothing in this section prevents a district court in the interests 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.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 157(b)(2) provides:

Core proceedings include, but are not limited to--
(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate ... and estimation of claims or interests for the purposes of confirming a plan under chapter 11 ... but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;
(C) counterclaims by the estate against persons filing claims against the estate;

...

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

...

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(3) and (4) provide:

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) or title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

28 U.S.C. § 157(b)(5) provides:

The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

DISCUSSION

Debtor and Desk by Design, Inc. filed this action in the First Judicial District Court, Santa Fe County, New Mexico, on or about June 23, 2002 against Defendants Ralph Larranaga, III, Patrick Vialpando, and John Does 1-4. The complaint seeks declaratory judgment, recovery of converted or embezzled property and funds, and damages for breach of fiduciary duty, tortious interference with contractual relations, intentional emotional distress and outrageous conduct.

Defendant Larranaga answered, demanded a jury trial, and filed a counterclaim to recover money damages for breach of contract, breach of fiduciary duty, breach of obligations owed to shareholders, and civil conspiracy to interfere with contractual relations, intentional interference with contractual relationship, intentional infliction of emotional distress, and prima facie tort. Defendant Vialpando filed a motion to dismiss for failure to state a claim upon which relief can be granted. Debtor answered the counterclaim and demanded a jury trial on the counterclaim. Debtor also filed a response to Vialpando's motion to dismiss. Most of the remainder of the state court file consists of discovery matters, except a motion by Larranaga to dismiss for willful abuse of discovery and for default judgment against plaintiff on liability.

Debtor filed its voluntary chapter 11 proceeding on March 13, 2003 and remains a Debtor-in-Possession. Debtor removed this action from state court on April 2, 2003.

This action was pending when the Debtor's chapter 11 case was filed, and therefore does not "arise under" or "arise in" a Title 11 case. The outcome of this proceeding will affect the administration of the estate, however, so it is a "related to" proceeding. The action does not depend on the bankruptcy laws for its existence; it could proceed in state court in the absence of bankruptcy. Therefore, it is a non-core proceeding.

Although this case is technically "non-core", functionally several of the counts are state law versions of "core" proceedings. For example, Plaintiff's complaint against Larranaga for conversion and embezzlement is equivalent to both a turnover proceeding (based on 11 U.S.C. § 542) and a fraudulent transfer proceeding (based on 11 U.S.C. § 548). Plaintiff's other causes of action relate to administration of the estate, allowance of claims against the estate, and declarations related to adjusting the debtor-creditor relationships with the Defendants. Larranaga's counterclaims concern administration of the estate and allowance of his claims against the estate. Overall, the

Court finds that the non-core causes of action in the complaint are substantially related to Debtor's chapter 11 case.

Mandatory Abstention

The affidavit of Randolph B. Felker (doc. 10) estimates that the state court case would "likely take at least another year before it comes to trial in the state court." The affidavit does not address how long it would take to receive an actual adjudication in the state court, however. This Court takes judicial notice of its own docket, and estimates that this case could be tried in the Bankruptcy Court and fully adjudicated within 9 months to a year, absent extended discovery. Therefore, the Court finds that a requirement of mandatory abstention, i.e. timely adjudication, is missing.

Furthermore, to the extent either side has sought tort damages (e.g., the claims for intentional emotional distress, outrageous conduct, prima facie tort, etc.), they are "non-core proceedings under section 157(b)(2)(B)" and therefore not subject to the mandatory abstention provisions. See 28 U.S.C. § 157(b)(4); Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Connecticut (In re Dow Corning Corp.), 86 F.3d 482, 497 (6th Cir. 1996).

Therefore, the Court finds that mandatory abstention is not appropriate. So, the Court will turn to permissive abstention.

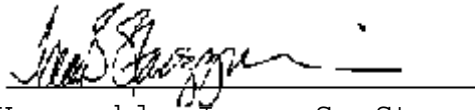
Permissive Abstention

[28 U.S.C. § 1334(c)(1)] allows the district court to abstain from hearing a non-core proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law." Court have considered a host of factors in applying this subsection, including: effect (or lack thereof) on the efficient administration of the bankrupt estate, predominance of state law issues over bankruptcy issues, difficulty or unsettled nature of the applicable law, existence of related proceedings in state court, whether other bases for federal subject matter jurisdiction exist, the burden on the federal court's docket, the extent to which the commencement of the case in federal court involved forum shopping, existence of the right to a jury trial, and presence of non-debtor parties, comity, possibility of prejudice to the other parties in the case, the economical use of judicial resources, and the expertise of the court.

Rice v. Bridgestone/Firestone, Inc. (In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation), 2002 WL 31243417, *3 (S.D. Ind. 2002). As in Bridgestone/Firestone, certain considerations militate in favor of abstention, and others counsel retention of this case. Id. Specifically, factors favoring abstention include: no other basis than Debtor's bankruptcy for federal jurisdiction; and the likelihood that Debtor was forum shopping. Factors favoring retention include: retaining

jurisdiction will have a favorable effect on the efficient administration of the bankruptcy estate because all actions concerning Debtor will be concentrated in one forum; there do not appear to be any difficult or unsettled laws; there are no other related proceedings pending in state court; there will not be a burden on the federal court docket (as compared to, e.g., the removal of hundreds or thousands of personal injury claims in mass tort cases); the parties' rights to jury trial will be preserved, either through consent to trial in the Bankruptcy Court or transfer to the District Court; there are non-debtor parties (albeit most of them are affiliated with the Debtor), but only one has moved for remand; there seems to be little possibility or prejudice to the other parties in the case; and retaining jurisdiction would be the most economical use of judicial resources because this same Court will deal with the bankruptcy issues raised by the success or failure of the removed lawsuit. Three Bridgestone/Firestone factors suggest either result: while there is a predominance of state law issues over bankruptcy issues as currently plead, as mentioned above, many of the state law issues have bankruptcy counterparts; there is no issue of comity because the state court case had not gone to trial or even had any significant involvement by a judge up to the point it was removed; and

neither the state court nor bankruptcy court would have more expertise in the issues raised in the action. Overall, the Court finds that it should not permissively abstain from hearing this case.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 14, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

George M Moore
PO Box 216
Albuquerque, NM 87103-0216

Randolph B Felker
911 Old Pecos Trl
Santa Fe, NM 87505-0366

Peter D White
644 Don Gaspar Ave
Santa Fe, NM 87505-2666

D Diego Zamora
444 Galisteo St Ste E
Santa Fe, NM 87501-2648

Gary B Ottinger
PO Box 1782
Albuquerque, NM 87103-1782

