



IT IS ORDERED as set forth below:

Date: June 16, 2009

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 08-82033

Valerie Vroon Raymond and Robert Louis
Raymond,

CHAPTER 7

Debtors.

JUDGE MASSEY

Martha A. Miller, Trustee,

Plaintiff,

v.

ADVERSARY NO. 09-6177

Ronald A. Hirn,

Defendant.

ORDER DENYING MOTION TO DISMISS

In this adversary proceeding, Plaintiff sues to recover an alleged avoidable preference in the amount of \$6,000. Defendant, who resides outside the Northern District of Georgia, moves to

dismiss on the ground that venue is improper under 28 U.S.C. § 1409(b). Section 1409(a) and (b) provide:

(a) Except as otherwise provided in subsections (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.

(b) Except as provided in subsection (d) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than \$1,100 or a consumer debt of less than \$16,425, or a debt (excluding a consumer debt) against a noninsider of less than \$10,950, only in the district court for the district in which the defendant resides.

The exception in subsection (d) is not relevant to the question here.

The Court held a hearing on the motion on June 1, 2009, at which the Court noted the issue of whether section 1409(b) applies to proceedings to avoid and recover on a preference. Plaintiff contends that such proceedings are not covered by section 1409(b). At that hearing, the Court also addressed the issue raised by Defendant in his brief, which is whether Plaintiff is seeking to recover a consumer debt.

For the reasons stated below, the Court determines that section 1409(b) on which Defendant relies applies to proceedings to avoid and recover preferences. But the Court also holds that venue here is proper because none of the exceptions in that subsection apply; the debt in question is not a “consumer debt,” and the fact that Defendant is an insider cuts off an out based on the amount of the claim.

Section 1409(a) supplies the general rule 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.” The terms “arising under,” “arising in,” and “related to” also appear in 28 U.S.C. § 1334(b), which provides:

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, 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.

“‘Arising under’ proceedings are matters invoking a substantive right created by the Bankruptcy Code. *Wood v. Wood* (*In re Wood*), 825 F.2d 90, 97 (5th Cir.1987); 1 Collier on Bankruptcy ¶ 3.01[4][c][I].” *In re Toledo*, 170 F.3d 1340, 1345 (11th Cir. 1999).

Section 1409(b) provides exceptions to the general venue provision in subsection (a).

Unlike subsection(a), there is no reference in subsection (b) to proceedings arising under title 11.

But a proceeding to recover on a preference arises under title 11. On this basis, the Trustee contends that subsection (b) does not apply to proceedings arising under the Bankruptcy Code and that venue here is proper, citing *Van Huffel Tube Corp. v. A & G Industries*, 71 B.R. 155 (Bankr. N.D. Ohio, 1987), *Ehrlich v. American Express Travel Related Services Co., Inc.* (*In re Guilmette*), 202 B.R. 9, 12-13 (Bankr. N.D.N.Y. 1996); and 4 COLLIER ON BANKRUPTCY p.4.02[2][b] (15th Ed. Rev. 2008).

In *In re Little Lake Industries, Inc.*, 158 B.R. 478 (9th Cir. BAP 1993), the debtor-in-possession sued to recover a preference. The bankruptcy court granted the defendant’s motion to dismiss on the ground of improper venue. The Bankruptcy Appellate Panel affirmed, holding that venue was proper only in the defendant’s home district. The appellate court concluded that “the terms “arising under” and “arising in” cannot be interpreted as mutually exclusive, and their use in § 1409 as a whole does not indicate that the elliptical omission in subsection (b), whether intended or inadvertent, operates to exclude a class of cases thereunder.” *Id.* at 484.

That court based its analysis largely on the omission of the words “arising under title 11” in section 1409(c), which states:

(c) Except as provided in subsection (b) of this section, a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced.

Section 544(b) creates the right of a trustee to avoid a transfer, one that arises under the Bankruptcy Code. *See Carlton v. Baww, Inc.*, 751 F.2d 781, 787 (5th Cir.1985); *Rahl v. Bande*, 316 B.R. 127, 132 (S.D.N.Y. 2004). It is a right similar to the one arising under section 547. Thus, if the omission of the words “arising under title 11” were critical, subsection (c) would not be coherent. This ambiguity led the court in the *Little Lake* case to its conclusion that Congress did not intend to exclude cases arising under title 11 from the restrictions in subsection (b). None of the cases on which Plaintiff relies discusses the problem presented by section 1409(c).

Plaintiff also relies on *In re Olympia Holding Corp.*, 230 B.R. 629, 633 (Bankr. M.D.Fl. 1999), but in that case, the issue was whether venue became improper after the plaintiff’s initial theory of recovery was rejected, thereby reducing plaintiff’s claim below the threshold then contained in section 1409(b). The court held that the original demand established proper venue so that *Olympia* has nothing to do with the problem here.

Bankruptcy courts uniquely have nationwide jurisdiction. Such broad geographic jurisdiction is necessary for the Bankruptcy Code to work properly. At the same time, however, dragging a person into court 2,000 miles away over a small claim can be aggravating to say the least. The overarching aim of section 1409(b) is to shield a defendant from having to litigate a

small claim far from the defendant's residence where the cost of defense would in many instances exceed the amount of the claim.¹

The omission of the words "arising under" in subsection (b) tells us nothing about its meaning in view of their omission in subsection (c) in which Congress explicitly referred to an avoiding power arising under title 11. Preference claims, which arise under title 11, are no different with respect to the aim of section 1409(b) than other core proceedings, 28 U.S.C. § 157(b), arising in a case under title 11. Hence, in my judgment, subjecting preference claims to section 1409(b) is more likely than not what Congress intended.

The remaining question concerns Defendant's argument that Plaintiff seeks to recover a consumer loan. The argument rests on the contention that Defendant made a loan to Debtors to help them make their mortgage payments, which would constitute a "consumer loan." The argument fails because the Trustee is not suing to collect the loan that Defendant made to the Debtors.

In the Bankruptcy Code, the term "consumer debt" means "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). Section 1409 is not part of the Bankruptcy Code, but it is a safe assumption that Congress intended the term "consumer debt" to mean in section 1409 what it means in title 11.

Venue is proper under section 1409(b) only in the district in which the defendant resides if the trustee seeks to recover (1) less than \$1,100 (or property worth less than \$1,100), whether

¹ Section 547(c)(8) and (9) echo the same concern by providing defenses to preference claims for a transfer less than \$600 if the debtor is a individual with primarily consumer debts and for a transfer less than \$5,475 made by a debtor with primarily non-consumer debts.

or not the defendant is an insider, (2) a consumer debt less than \$16,425, whether or not the defendant is an insider, or (3) a non-consumer debt less than \$10,925, unless the defendant is an insider.

Plaintiff seeks to avoid and to recover the amount of an alleged preference and is therefore seeking to recover on a statutory claim. The nature of the transfer is not an element of a claim under sections 547 and 550. Thus, Plaintiff does not seek a “to recover . . . a consumer debt” within the meaning of section 1409(b); she seeks to recover on a debt created by the Bankruptcy Code by section 550 as the consequence of avoidance of a preference under section 547. It may be true that Plaintiff’s claim is rooted in a payment of a consumer debt made by Debtors to Defendant. But the consumer debt owed by Debtors is not the debt that Plaintiff seeks to recover.

Because the Trustee does not seek to recover a consumer debt and because the amount in controversy is less than \$10,950, venue is proper only if Defendant is an insider. “The term “insider” includes– (A) if the debtor is an individual– (i) relative of the debtor.” 11 U.S.C. § 101(31)(a)(i). The word “relative” means “individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.” 11 U.S.C. § 101(45). “Affinity” means “the relation that one spouse has to the blood relation of the other spouse’s relatives” or “familial relation resulting from marriage.” BLACK’S LAW DICTIONARY, p. 63 (8th Ed. 1999).

At the June 1, 2009 hearing, the parties informed the Court that Mr. Hirn is the husband of the sister of Debtor Valerie Raymond. There is no dispute that Defendant is an insider of the Debtors. It follows that venue is proper in this Court under 28 U.S.C. § 1409(b).

For these reasons, Defendant’s motion to dismiss for improper venue is DENIED.

END OF ORDER