



IT IS ORDERED as set forth below:

Date: August 18, 2008

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. 04-81572

Russell Smith and Whitney Smith,

CHAPTER 7

Debtors.

JUDGE MASSEY

Opteum Financial Services and Branch Banking
& Trust Company,

Plaintiffs,

v.

ADVERSARY NO. 07-6043

RBC Centura Bank,

Defendant.

ORDER DISMISSING ADVERSARY PROCEEDING FOR LACK OF JURISDICTION

In this adversary proceeding, Plaintiffs seek a declaratory judgment determining the relative priorities of their liens and a lien held by Defendant with respect to real property located at 1049 West Conway Drive, Atlanta, Fulton County, Georgia 30327 (the "Property") and owned as

of petition date by Debtor Whitney Smith. The question at hand, which the Court has raised *sua sponte*, is whether it has subject matter jurisdiction.

The material facts are not in dispute, as reflected in Plaintiffs' Statement of Material Facts submitted with respect to their motion for summary judgment, Defendant's Response to Statement of Facts and documents filed in the main bankruptcy case of the Smiths of which the Court takes judicial notice.

In 2003 Whitney Smith purchased the Property and obtained financing in the amount of \$2,082,500 for that purpose from D&M Financial Corporation ("D&M") secured by the Property. Thereafter in July 2003, Ms. Smith obtained credit from Plaintiff Branch Banking & Trust Company ("BB&T") evidenced by a note in the original principal amount of \$750,000, secured by the Property. In the fall of 2003, Ms. Smith obtained a line of credit from Defendant RBC Centura Bank ("RBC") secured by the Property, and the principal amount of that debt is \$617,500.

In early December 2003, Ms. Smith refinanced the D&M loan by obtaining a new loan from HomeStar Mortgage Services, LLC, now known as Opteum Financial Services ("Opteum"), one of the Plaintiffs, in the amount of \$2,000,000, which funds were used to pay the debt owed to D&M. The debt to Opteum is secured by the Property.

Russell Smith and Whitney Smith filed their bankruptcy petition commencing this Chapter 7 case on December 29, 2004. In their Schedule A, the Debtors valued the Property at \$2,400,000. On Schedule D, they showed that the debts owed on first and second mortgages on the Property totaled \$2,750,000. Debtors failed to list the debt to RBC on Schedule D.

On July 28, 2006, BB&T moved for stay relief with respect to the Property, alleging that the Property was worth \$2,400,000 based on a 2004 appraisal and that there was little or no equity in the Property. The conclusion was based on its recitation of the existence of debts totaling in the

aggregate \$3,367,000 secured by the Property based on a \$2,000,000 first mortgage, a debt of \$750,000 owed to BB&T and a debt of \$617,000 owed to RBC. Neither the Trustee nor the Debtors opposed BB&T's motion, which the Court granted in an order entered on August 23, 2006.

On February 1, 2007, Plaintiffs filed this adversary proceeding seeking a declaratory judgment that Opteum holds the first priority lien against the Property and that Branch Bank holds the second priority lien against the Property. Defendant RBC contends that it holds the first priority lien against the Property.¹

On July 11, 2007, the Court entered an order granting Debtors a discharge. The Trustee filed a report of no distribution on April 7, 2008. The case was closed on April 29, 2008.

In the complaint, Plaintiffs asserted the conclusion of law that the Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(a). Defendant admitted Plaintiffs' jurisdictional statement. Plaintiffs moved for summary judgment and Defendant filed a response. Neither party raised any jurisdictional issue. The parties may not, however, confer subject matter jurisdiction by consent. *Latin American Property & Cas. Ins. Co. v. Hi-Lift Marina, Inc.*, 887 F.2d 1477, 1479 (11th Cir. 1989) ("Subject-matter jurisdiction can never be waived or conferred by the consent of the parties.") This Court has a duty to determine whether or not it has subject matter jurisdiction, "even if doing so raises the issue *sua sponte*." *Cf. In re Walker*, 515 F.3d 1204, 1210 (11th Cir. 2008).

U.S. district courts have jurisdiction in bankruptcy cases pursuant to 28 U.S.C. § 1334(a) and (b), which provides:

¹ A court can resolve the dispute arising solely under Georgia law by determining the extent of the applicability of the doctrine of equitable subrogation and/or the extent to which a subordination agreement executed by a "Bank Officer" of RBC is enforceable.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(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.

A bankruptcy court's jurisdiction is derivative of the jurisdiction of the district court because "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C. § 157(a). The U.S. District Court for the Northern District of Georgia has provided for such referrals pursuant to its Local Rule 83.7.

Subject matter jurisdiction in this adversary proceeding must rest on allegations of facts that satisfy one of the three categories in section 1334. The first two are easily eliminated. This is not a proceeding "arising under," or "arising in" a case under, the Bankruptcy Code.

"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]. The "arising in a case under" category is generally thought to involve administrative-type matters, 1 Collier on Bankruptcy ¶ 3.01[4][c][iv], or as the *Wood* court put it, "matters that could arise only in bankruptcy," *Wood*, 825 F.2d at 97. Hence, the only one of the three categories of proceedings over which the district court is granted jurisdiction in § 1334(b) that is potentially relevant to the instant case is proceedings "related to cases under title 11." The "related to" connection has been described as "the minimum for bankruptcy jurisdiction." E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake L.Rev. 1, 7 (1995).

In re Toledo, 170 F.3d 1340, 1344-1345 (11th Cir. 1999).

"The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy. The proceeding need not necessarily be against the debtor or the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate."

Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir.1990)(quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir.1984)).

In raising the issue of subject matter jurisdiction, this Court invited the parties to brief the issue. The Court has carefully considered those briefs. Defendant now contends that the Court lacks jurisdiction. Plaintiffs contend that the Court has jurisdiction, basing their argument on *Fidelity & Deposit Co. of Md. v. Morris (In re Morris)*, 950 F.2d 1531 (11th Cir. 1992).

In *Morris*, the debtor filed an adversary proceeding as part of his Chapter 11 case in which he sought to collect a prepetition debt. There was and could be no dispute that the bankruptcy court had “related to” jurisdiction in that adversary proceeding. After three years of little activity in the Chapter 11 case, the bankruptcy court dismissed the main bankruptcy case. Nonetheless, the bankruptcy court thereafter tried the adversary proceeding and entered a judgment in favor of the debtor.

The defendant appealed and the district court reversed, holding that the bankruptcy court lacked jurisdiction in the adversary proceeding because it had not expressly retained jurisdiction when it dismissed the main case. The district court held alternatively that the bankruptcy court abused its discretion in retaining jurisdiction.

The Court of Appeals reversed, holding that a bankruptcy court retains jurisdiction of an adversary proceeding without having to expressly do so when dismissing the underlying bankruptcy case. The Eleventh Circuit further held that the bankruptcy court had discretion in deciding whether to retain jurisdiction and did not abuse its discretion in doing so.

Morris has nothing to do with the issue of jurisdiction here. The bankruptcy case in *Morris* was dismissed, while the main case here was closed, but that is not an important distinction. In *Morris*, there was no question that the bankruptcy court had subject matter jurisdiction in the

adversary proceeding at the time it filed. The issue was whether the bankruptcy court retained subject matter jurisdiction that it possessed prior to the dismissal of the main case, because it failed to expressly reserve jurisdiction. By contrast, the threshold issue here is whether this Court had jurisdiction in this adversary proceeding on February 1, 2007 when it was filed. Plaintiffs' brief failed to respond to the Defendant's arguments on this issue in its earlier-filed brief or otherwise to address this issue.

There appears to be no dispute that the aggregate amount of debt owed by Ms. Smith to the three parties at all times on and after the date of the filing of the adversary proceeding exceeded the value of the Property. (Were it otherwise, the parties would presumably have worked out an arrangement with the Trustee or among themselves for the sale of the Property so that they could all be paid.) The Court lifted the automatic stay as to the Property without objection by the Trustee or Debtors long prior to the filing of this adversary proceeding. Thus, as of the filing of this adversary proceeding, the relative priority of each security deed against the Property was immaterial to the estate, the Trustee and the Debtors. The complaint alleges no facts to show that the outcome of this dispute could have any conceivable effect on the bankruptcy estate or on the Debtors. In their brief on the issue of jurisdiction, Plaintiffs did not identify any such possible effect. For these reasons, this adversary proceeding is not related to the Debtors' bankruptcy case within the meaning of 28 U.S.C. § 1334(b), thereby depriving the Court of jurisdiction to resolve this dispute.

Accordingly, this adversary proceeding is DISMISSED.

END OF ORDER