IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

IN RE:	**DANNY LEE WEAVER and STACY ELAINE WEAVER, Debtors**	**Case No. 3:10-bk-11297 E CHAPTER 13**
DANNY LEE WEAVER and STACY ELAINE WEAVER		**PLAINTIFFS**
v.	**AP No. 3:13-ap-01092**	
EVERHOME MORTGAGE COMPANY; EVERBANK; and FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE")		**DEFENDANTS**

ORDER GRANTING MOTION FOR DISCRETIONARY ABSTENTION AND DISMISSING ADVERSARY PROCEEDING

Now before the Court is a *Motion to Dismiss, or Alternatively, for Abstention* filed by Judy Simmons Henry on behalf of Everhome Mortgage Company ("**Everhome**"), Everbank,[1] and Federal National Mortgage Association (collectively, the "**Defendants**") in the above captioned adversary proceeding ("**AP**"). Joel G. Hargis, Annabelle Lee Patterson, and Kathy Cruz, filed a *Response and Brief in Support* on behalf of Danny Lee Weaver and Stacy Elaine Weaver (the "**Plaintiffs**"). After reviewing the parties' pleadings, the Court grants the Defendants' motion for discretionary abstention for the reasons described below.

[1] On July 1, 2011, Everhome merged into Everbank.

FACTS

On February 26, 2010, the Plaintiffs filed a joint bankruptcy petition under Chapter 13 of the Bankruptcy Code. They filed their Chapter 13 plan the same day. Subsequently, the Plaintiffs amended their plan several times. To date, the Court has entered five orders confirming modifications to their plan. The most recent order was entered on May 17, 2013, and confirmed a modification in which the Plaintiffs will pay Everhome $533.94 per month on their mortgage as well as cure a pre and postpetition arrearage of $10,493.71 by paying an additional $457.00 per month, until they are current on the mortgage. (Dkt. No. 137).

Two and a half months later, on July 31, 2013, the Plaintiffs commenced this AP against the Defendants. In their adversary complaint, the Plaintiffs assert claims for (1) breach of contract; (2) gross negligence; (3) negligent supervision; (4) tortious interference with contractual relations; and (5) violations of the Arkansas Deceptive Trade Practices Act, codified at Ark. Code Ann. §§ 4–88–101, et seq. The claims are based on postpetition allegations, beginning in the summer of 2012, stemming from damage to their roof and their subsequent dealings with the Defendants to cover the costs of the repairs.

Before any dispositive motion was decided, on December 23, 2013, the Plaintiffs filed another modified plan. The modified plan states that the Plaintiffs "propose to cure some of the delinquent mortgage arrearage by making a lump sum payment into the case, upon the resolution of the pending AP." (Dkt. No. 153). It is the Court's understanding that the Plaintiffs will make the lump sum payment only if they prevail on their AP claims.

Shortly thereafter, the Defendants filed their *Motion to Dismiss, or Alternatively, for Abstention*, and the Plaintiffs filed their response. The Court's analysis follows.

JURISDICTION

Initially, the Court must "be satisfied that it has jurisdiction before it turns to the merits of other legal arguments." *Humes v. LVNV Funding, L.C.C. (In re Humes)*, 496 B.R. 557, 566 (Bankr. E.D. Ark. 2013) (quoting *Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1050 (8th Cir. 2006)). The Defendants maintain that the Court lacks jurisdiction over this AP. This argument is without merit.

A bankruptcy court's subject matter jurisdiction is outlined in 28 U.S.C. § 1334.[2] This provision grants to the district courts "original and exclusive jurisdiction over all cases under title 11" of the Bankruptcy Code ("**Code**"), and original, but not exclusive jurisdiction over all proceedings "arising under title 11, or arising in or related to cases under title 11" of the Code. § 1334(a)-(b). Pursuant to § 157(a), the district court may automatically refer matters within § 1334 to the bankruptcy court. With certain exceptions not relevant here, the Eastern District of Arkansas has referred all cases under title 11 as well as all proceedings arising under, arising in, or related to a case under title 11 to the bankruptcy court. *See* U.S. Dist. Ct. Local Rule 83.1.

A case "under title 11" is the bankruptcy case itself. *Safeco Ins. Co. v. Farmland Indus., Inc. (In re Farmland Indus., Inc.)*, 296 B.R. 793, 802 (B.A.P. 8th Cir. 2003). A

[2] Unless otherwise specified, all statutory references are to Title 28 of the United States Code.

proceeding "arising under" title 11 is one created by or based on a provision of the Code. *Frelin v. Oakwood Homes Corp.*, 292 B.R. 369, 376–77 (Bankr. E.D. Ark. 2003) (citing *Nat'l City Bank v. Coopers & Lybrand*, 802 F.2d 990, 994 (8th Cir. 1986)). A proceeding "arising in" a case under title 11 is a proceeding that is not based on any right expressly created by the Code but lacks an existence outside the bankruptcy case. *Id.* at 376–77. Neither party argues that the above jurisdictional categories apply to this AP, and the Court finds that they do not apply. The claims raised in the Plaintiffs' complaint are based solely on state law and would not have been brought before this Court, but for the Plaintiffs being in bankruptcy. This is not a case under Title 11, and there is no arising under or arising in jurisdiction over this proceeding.

In this case, the parties specifically dispute whether the claims raised in this AP come within the Court's "related to" jurisdiction. "A claim is 'related to' a bankruptcy case under § 1334(b) if the outcome of the claim could have any conceivable affect upon the bankruptcy estate." *Valley Food Servs., LLC v. Schoenhofer (In re Valley Food Servs., LLC)*, 377 B.R. 207, 212 (B.A.P. 8th Cir. 2007) (citing *Nat'l Union Fire Ins. Co. v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325, 329–30 (8th Cir. 1988)). This jurisdictional grant is broad, extending to any action whose outcome "could alter the debtor's rights, liabilities, options, or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate." *Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir.1987).

The Defendants argue that resolution of this AP cannot have a conceivable effect on the estate. First, they rely on the order confirming the Plaintiffs' Chapter 13 plan. The

Defendants contend that the entry of this order prevents the Plaintiffs' rights and liabilities from being subsequently altered, and because resolution of this AP cannot change those rights and liabilities, there is no conceivable effect on the estate. The flaw in this argument is that a confirmed plan can be modified and thereby alter the rights and liabilities of the debtor. *See* 11 U.S.C. § 1329 (providing for postconfirmation modification to a plan). In this case alone, the Court has entered five orders confirming modifications to the Plaintiffs' plan.

Alternatively, the Defendants argue that even if the Plaintiffs are successful in this AP, there will not be any conceivable effect on the estate because under their proposed plan modification any recoveries from Everbank will be used to pay arrearages on a mortgage held by Everbank.[3] The Defendants' argument is based on the assumption that since the Plaintiffs are contractually obligated to pay the Everbank mortgage, a change in the source of the funds used to satisfy that obligation cannot have an impact on the estate. The Court rejects this argument. If the Plaintiffs prevail in this AP, Everbank and/or the Federal National Mortgage Association will be required to pay a significant portion of the mortgage arrearage that the Plaintiffs currently must pay out-of-pocket. The outcome of a debtor's postpetition claims litigation can conceivably affect the administration of its Chapter 13 bankruptcy estate because any monetary award obtained before the case is closed, dismissed, or converted constitutes property of the bankruptcy estate pursuant to 11 U.S.C. § 1306(a)(1). *See Humes*, 496 B.R. at 567. The fact that an award obtained

[3] As previously noted, Everhome merged into Everbank.

from a defendant in a successful adversary proceeding may eventually be paid over to that same defendant is not determinative. If the Plaintiffs prevail, there will be an effect on the estate. Therefore, the Court has related to subject matter jurisdiction over this AP.

The presence of subject matter jurisdiction over the Plaintiffs' claims requires a determination of whether this AP is a "core" or a "noncore" proceeding under § 157. "Proceedings that 'arise under' or 'arise in' a bankruptcy case are core proceedings whereas proceedings that are merely 'related to' the bankruptcy case are noncore proceedings." *Humes*, 496 B.R. at 567 (citations omitted). Because the claims raised in this AP are "related to" the bankruptcy case, they are noncore. As discussed below, the conclusion that this AP is a noncore, related to, proceeding is a significant factor in the Court's decision to abstain.

DISCRETIONARY ABSTENTION IS APPROPRIATE

Although the Court finds that there is related to jurisdiction over this AP, the Court exercises its discretion pursuant to § 1334(c)(1) and abstains from hearing this proceeding.

Section 1334(c)(1) provides for what is known as "permissive" or "discretionary" abstention. This provision states:

> Except with respect to a case under chapter 15 of title 11, 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.

§ 1334(c)(1).[4] Thus, courts can abstain from hearing a related to proceeding for one of three reasons: (1) the interest of justice; (2) the interest of comity with State courts; or (3) respect for State law. In recognition that these are "three admittedly nebulous criteria," *Coker v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.)*, 950 F.2d 839, 845 (2d Cir. 1991), the appellate courts have developed a number of factors for the trial court to consider in determining whether discretionary abstention is appropriate.

The Bankruptcy Appellate Panel for the Eighth Circuit Court of Appeals has applied the following factors to guide a court's discretionary abstention determination:

> (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
>
> (2) the extent to which state law issues predominate over bankruptcy issues,
>
> (3) the difficult or unsettled nature of the applicable law,
>
> (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
>
> (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,

[4] The Defendants do not argue that the Court is required to abstain pursuant to the mandatory abstention provision of § 1334(c)(2), presumably because that statute requires the commencement of a related proceeding in another court. *Frelin*, 292 B.R. at 380. There is no related proceeding here that was either commenced or is pending in another court. Unlike the mandatory abstention provision, the discretionary abstention provision does not require the existence of a pending proceeding. *Brown v. State Bar of Ariz. (In re Bankr. Petition Preparers Who Are Not Certified Pursuant to Requirements of Ariz. Sup. Ct.)*, 307 B.R. 134, 140 (B.A.P. 9th Cir. 2004) ("There is no parallel requirement of a commenced action in the discretionary abstention provision . . . ."); *In re Zurn*, 290 F.3d 861, 867–68 (7th Cir. 2002) (J., Ripple, dissenting) ("Nowhere does the statute require that a state proceeding must be commenced before a bankruptcy court may invoke this provision.").

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,

(7) the substance rather than the form of an asserted 'core' proceeding,

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,

(9) the burden on the bankruptcy court's docket,

(10) the likelihood that the commencement of the proceeding involves forum shopping by one of the parties,

(11) the existence of a right to a jury trial, and

(12) the presence in the proceeding of nondebtor parties.

Williams v. Citifinancial Mortg. Co. (In re Williams), 256 B.R. 885, 894 (B.A.P. 8th Cir. 2001) (citations omitted). "Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." *Id*. (quoting *In re Chi., Milwaukee, St. Paul & Pac. R. Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993)).

The Court has studied the above factors carefully and finds only one factor, the fourth, weighs in favor of this Court retaining the case. This factor requires weighing whether a related proceeding has been commenced in state court or other nonbankruptcy court. No related proceeding has been commenced here. Therefore, if the Court abstains, this AP will be dismissed and the Plaintiffs will need to refile their complaint in another forum. The Court recognizes that refiling a complaint in another forum could run afoul of the statute of limitations. *See, e.g., Welt v. EfloorTrade, LLC (In re Phx. Diversified Inv. Corp.)*, 439 B.R. 231, 246–47 (Bankr. S.D. Fla. 2010) ("Trustee could no longer claim the

benefit of section 108(a) and would need to rely solely on state law statute of limitations analysis to avoid dismissal of his claims [if brought] in state court."); *Hallmark Capital Grp. v. Pickett (In re Pickett)*, 362 B.R. 794, 799 (Bankr. S.D. Tex. 2007); *Lozano v. Swift Energy Co., (In re Wright)*, 231 B.R. 597, 603 (Bankr. W.D. Tex. 1999).[5] Yet the Plaintiffs have not stated that any statute of limitations issues would arise were the Court to abstain. Moreover, because the facts giving rise to the Plaintiffs' claims occurred less than three years ago, requiring the Plaintiffs to refile their complaint elsewhere does not appear to present a statute of limitations problem.

While the remaining factors weigh in favor of abstention, the Court abstains and dismisses this case primarily because this AP involves claims almost entirely controlled by state law[6] and this AP may require a trial by jury.[7] If the Court were to retain this case and determine that the Plaintiffs' claims give rise to a right to trial by jury, see generally *Calderon v. Bank of Am. Corp. (In re Calderon)*, 497 B.R. 558 (Bankr. E.D. Ark. 2013), it could not conduct one because all parties must expressly consent to the bankruptcy court conducting a jury trial, § 157(e), and the Defendants do not. Consequently, any jury trial

[5] *But see In re New York City Off-Track Betting Corp.*, 434 B.R. 131, 152 (Bankr. S.D.N.Y. 2010) (refusing to give absence of parallel proceeding particular importance when case law "do[es] not indicate that any single factor is of more importance than the others" and "courts opine that not all twelve factors must be considered.").

[6] The exception is the Defendants' argument that only the Chapter 13 Trustee has standing to bring this AP. While this threshold issue may require application of federal law, it is a preliminary issue for the trial court to decide.

[7] Both parties requested a jury trial. The Plaintiffs withdrew their request in their *Second Amended Complaint*, (AP Dkt. No. 16 ¶ 305), but they concede that their withdrawal may be invalid. (AP Dkt. No. 35 pp. 6–7); *see also* Fed. R. Bankr. P. 9015(a) (incorporating Fed. R. Civ. P. 38(d) ("A proper demand may be withdrawn only if the parties consent.")).

would have to be held in the District Court, making this Court's connection with the case tenuous at best. Since there are no bankruptcy issues, the Court would serve as a conduit through which state law claims flowed to be tried in the District Court before a jury.

Conversely, if the Court were to determine that the claims do not give rise to a right to trial by jury, the Court and the parties would be left with a cumbersome, complex, and time consuming procedure. When a party does not consent to the entry of a final judgment on a noncore claim, the bankruptcy court conducts the trial and then prepares proposed findings of fact and conclusions of law for submission to the District Court. § 157(c)(1)-(2). Before submission to the District Court, the Bankruptcy Court's proposed findings of fact and conclusions of law are served on the parties who have 14 days to file written objections with the clerk of the bankruptcy court. *See* Fed. R. Bankr. P. 9033. The clerk of the bankruptcy court then transfers the Bankruptcy Court's proposed findings of fact and conclusions of law along with any objections to the District Court. The District Court then reviews the Bankruptcy Court's proposed findings of fact and conclusions of law, the evidence, the record, and the objections, and determines whether a final judgment should be entered consistent with the Bankruptcy Court's recommendations.[8] However, even if the District Court fully adopts the Bankruptcy Court's recommendations, the case is not necessarily over. If there are any other outstanding issues such as whether the prevailing party should be awarded fees or costs, then the entire procedure described above

[8] All of this effort is necessary to achieve a final, appealable order that only the District Court can enter.

must be repeated.[9] This protracted process is neither a necessary nor an appropriate use of resources for the resolution of the state law claims raised in this AP.

Ultimately, by this Court abstaining and permitting the Plaintiffs to refile their case in state or federal district court, only one court is involved to achieve entry of a final, appealable order. That Court makes all preliminary decisions and conducts the trial. A final judgment can be entered in one (comparatively) streamlined and familiar procedure. Should the Plaintiffs prevail, any funds obtained will constitute property of the estate under 11 U.S.C. 1306(a) and be distributed to creditors in accordance with their Plaintiffs' Chapter 13 plan.

CONCLUSION

Notwithstanding the presence of related to jurisdiction over this AP, the Court exercises its discretion to abstain from hearing this proceeding. The Court abstains because the procedure necessary to establish finality on these state law causes of action is cumbersome, time consuming, and a poor use of judicial resources. Further, since a related pending action has not been commenced, the Court will issue an order, concurrently with this order, granting the Plaintiffs relief from the stay to proceed in another forum to prosecute their suit.[10]

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[9] The Court has followed this procedure only one time in 12 years. *See Humes v. LVNV Funding, L.C.C. (In re Humes)*, 496 B.R. 557 (Bankr. E.D. Ark. 2013), *adopted*, No. 3:13–CV–00179–SWW (E.D. Ark. Aug. 7, 2013); *Humes v. LVNV Funding, L.C.C. (In re Humes)*, 505 B.R. 851 (Bankr. E.D. Ark. 2013), *adopted*, No. 3:13–CV–00179–SWW, 2014 WL 310451 (E.D. Ark. Jan. 28, 2014). In the Humes Litigation, two separate opinions were prepared, submitted, and adopted prior to entry of a final judgment.

[10] *Vaughan v. First Nat'l Bank*, No. 93–7032, 1993 WL 537771, at *1 (10th Cir. Dec. 23, 1993) (unpublished) ("Section 105(a) of the Bankruptcy Code allows bankruptcy courts to

Accordingly, it is hereby

ORDERED that the motion for discretionary abstention is **GRANTED**. It is further

ORDERED that because there is nothing left for this Court to adjudicate, this AP is **DISMISSED**.

IT IS SO ORDERED.

Audrey R. Evans
United States Bankruptcy Judge
Dated: 04/23/2014

CC: Attorney for Plaintiff(s)
Plaintiff(s)
Attorney for Defendant(s)
Defendant(s)
Trustee
US Trustee

sua sponte issue any order necessary or appropriate for the administration of the estate, including modifications to the automatic stay.").