

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

GOCO REALTY FUND, I, a California
limited partnership,

Debtor.

Case No. 92-5-3651-MM

GOCO REALTY FUND, I, a California
limited partnership, and GRIFFIN
INVESTMENTS, a California limited
partnership,

Plaintiffs,

Adversary No. 92-5-446

**MEMORANDUM DECISION AND
ORDER THEREON**

vs.

NEW WEST FEDERAL SAVINGS AND
LOAN ASSOCIATION, a California
corporation and DOES 1 through 100,

Defendants.

INTRODUCTION

This matter comes before the Court on the Motion of New West Federal Savings and Loan Association for Abstention and Remand of State Court Action. For the following reasons, the Court abstains from hearing this case and remands the case to the Superior Court for San Mateo County.

FACTS

The debtor filed its voluntary chapter 11 petition on May 21, 1992. On the same date, the debtor and Griffin Investments (the "Plaintiffs") filed a complaint against New West Federal Savings

1 & Loan Association ("New West") in the Superior Court for the State of California for San Mateo
2 County. In the complaint, the Plaintiffs assert the following causes of action: breach of contract,
3 breach of the covenant of good faith and fair dealing, misrepresentation, conspiracy to induce breach
4 of contract, dissolution of partnership, and an accounting. They are seeking: 1) a determination that
5 the parties are partners or joint venturers; 2) compensatory damages; 3) punitive damages; 4) specific
6 performance; and 5) dissolution and an accounting. The Plaintiffs have also requested a jury trial.

7 The causes of action asserted by the Plaintiffs arise in connection with a series of financing
8 transactions with New West that originated around 1982. The debtor is a California limited
9 partnership. Its predecessors are various affiliated Glenborough companies and limited partnerships
10 that originated during 1982 to 1984 primarily to participate in a real estate investment program with
11 American Savings and Loan Association, f/k/a State Savings and Loan Association ("ASLA").

12 Many of these loans to the Glenborough partnerships by ASLA were distressed by 1985; they
13 were renegotiated in 1986. At about the same time, all of the Glenborough partnerships were
14 consolidated into one entity. The 1986 loans were restructured again in 1987 into one loan (the
15 "GOCO loan"). Some of the properties were transferred to Griffin Investments during the 1987
16 restructure. The Plaintiffs allege that the 1986 and 1987 loan restructures resulted in the formation of
17 a partnership between GOCO and ASLA in which the partners were to share both the profits and the
18 losses from their joint enterprise. ASLA was declared insolvent in September 1988, and New
19 West succeeded to ASLA's interest in the GOCO loan in December 1988. The GOCO loan
20 continued to be distressed notwithstanding the 1987 restructure. GOCO and New West continued to
21 negotiate extensively regarding the terms of the loan. On October 10, 1991, the parties entered into a
22 Memorandum of Understanding (the "MOU"), which set forth goals with respect to refinancing
23 terms. The Plaintiffs allege that the MOU provided that the parties would restructure the GOCO loan
24 to adjust for the declining real estate market, to provide for continued payments to New West, and to
25 provide for other tax benefits to both parties. It also provided that New West would use reasonable
26 efforts to procure the RTC's approval of the MOU. The alleged breach of the provisions of the MOU
27 is the basis for this lawsuit.

28 On May 21, 1992, New West also filed a complaint against GOCO in Orange County to

1 pursue judicial foreclosure of all of the Debtor's assets securing the loan, specific performance,
2 injunctive relief, and the appointment of a receiver. New West filed a motion to change the venue of
3 the San Mateo suit to Orange County and agreed to continue the hearing on that motion pending a
4 ruling on New West's motion to disqualify GOCO's special litigation counsel. Upon disposition of
5 that motion, the Court also granted the debtor's motion for a stay of discovery in this lawsuit until
6 October 1, 1992.

7 GOCO filed its Notice of Removal to this Court on August 11, 1992. New West has not filed
8 a proof of claim, and does not consent to the entry of a final judgment by this Court.

9 DISCUSSION

10 28 U.S.C. § 1334(c)(2) provides that abstention is mandatory if three elements are satisfied:

11 (1) The proceeding is based upon a state law claim or cause of action which, although related
12 to a case under Title 11, does not arise under Title 11 or arise in a case under Title 11;

13 (2) The proceeding could not have been commenced in federal court absent bankruptcy
14 court jurisdiction; and

15 (3) The proceeding could be timely adjudicated in a state court. 28 U.S.C. § 1334(c)(2).

16 The first element required for the mandatory abstention statute to apply is that the proceeding
17 must be a related proceeding. In re McFadyen, 92 Daily Journal DAR 13664 (E.D. Cal. Sept. 30,
18 1992). A civil proceeding is "related to" bankruptcy if the outcome of the proceeding could
19 conceivably have any effect on the estate being administered in bankruptcy. In re Feitz, 852 F.2d
20 455, 457 (9th Cir. 1988). Accord In re Pacor, 743 F.2d 984, 994 (3d Cir. 1984).

21 28 U.S.C. § 157(b)(2) enumerates a non-exclusive list of specific matters that are deemed
22 core. It includes several broad, catch-all provisions under subsections (A), (E), and (O). 28 U.S.C. §
23 157(b) was adopted in 1984 to address some of the constitutional concerns raised in Northern
24 Pipeline Constr. v. Marathon Pipe Line Co., 458 U.S. 50; 102 S.Ct. 2858 (1982). "Although this list
25 appears to cast an extremely wide net, caselaw in light of Northern Pipeline...has developed a more
26 precise definition." McFadyen at 13665.

27 In Northern Pipeline Constr. v. Marathon Pipe Line Co., the Supreme Court held that Section
28 1471(c) of the 1978 Bankruptcy Reform Act was unconstitutional because it vested jurisdiction over

1 all matters arising under bankruptcy laws in non-Article III bankruptcy judges. Id. at 87-88. It
2 further held that bankruptcy courts have jurisdiction to issue final orders in proceedings that are at the
3 core of bankruptcy jurisdiction, primarily the restructuring of the debtor-creditor relationship, but not
4 "private right" claims, such as for breach of contract, merely because those claims involved a debtor.
5 Id. at 71.

6 The Plaintiffs' causes of action in this case sound in state contract, tort, and partnership law.
7 However, a determination of whether a proceeding is or is not core is not based solely on its
8 resolution by state law. 28 U.S.C. § 157(b)(3). To determine whether a case is core, the Court must
9 look to both the form and the substance of the proceeding. In re Wood, 825 F.2d 90, 97 (5th Cir.
10 1987)(wrongful appropriation of corporate assets is non-core). To be considered core, a proceeding
11 must involve a right created by federal bankruptcy law or that would arise only in bankruptcy. Id. at
12 96-97. A proceeding that does not invoke a substantive right created by federal bankruptcy law, that
13 could exist independently outside of bankruptcy, and that could proceed in another court in the
14 absence of bankruptcy is not a core proceeding. Id.

15 GOCO argues that the drafters of the Bankruptcy Code intended to expand the jurisdiction of
16 bankruptcy courts to adjudicate claims such as the one before the Court. It cites In re Marshland
17 Development, Inc., 129 Bankr. 626 (Bankr. N. D. Cal. 1991), in support of its argument that this
18 proceeding is indeed core. However, the facts in this case are very distinguishable from those in
19 Marshland. In Marshland, the Court determined that a suit for environmental damage that had been
20 removed to the bankruptcy court by the debtor/defendant had been transmuted into a core proceeding
21 because the essence of the action was claim resolution. Id. at 632. It is significant that in Marshland
22 the non-debtor/plaintiff was not opposed to this treatment. In this case, New West has not filed a
23 proof of claim and it has not submitted to the jurisdiction of the bankruptcy court. Although Plaintiffs
24 may argue this is a distinction without a difference, this Court is bound by the decisions of the United
25 States Supreme Court. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782 (1989).

26 The Court has considered the specifically enumerated matters set forth in 28 U.S.C. §
27 157(b)(2) and finds that none of these are applicable to this proceeding except for two of the catch-all
28 provisions as they are literally read: 1) subsection (A) "matters concerning the administration of the

1 estate;" and 2) subsection (O) "other proceedings affecting the liquidation of the assets of the estate
2 or the adjustment of the debtor-creditor or the equity security holder relationship."

3 The Second Circuit has indicated that the language of subsection (A) could be construed to
4 include almost any matter relating to bankruptcy, but that the structure of the statute as a whole does
5 not permit such a construction. In re Ben Cooper, Inc., 896 F.2d 1394, 1398 (2d Cir. 1990),
6 vacated, ___ U.S. ___, 111 S.Ct. 425 (1990), reinstated, 924 F.2d 36 (9th Cir 1991). The Fifth Circuit
7 has also noted that the language of subsection (O) is similar in scope to the test for jurisdiction in 28
8 U.S.C. § 1334 and has declined to give subsection (O) a broad reading. To do so would include the
9 entire range of bankruptcy proceedings within the scope of core proceedings, contrary to the
10 constitutional limitations articulated in Marathon. In re Wood, 825 F.2d at 95.

11 In In re Castlerock Properties, the Ninth Circuit addressed the issue of the
12 determination of core matters. It held that state law contract claims that do not fall within the
13 categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are related proceedings
14 under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions,
15 sections 157(b)(2)(A) and (O). In re Castlerock Properties, 781 F.2d 159, 162 (9th Cir. 1986). To
16 hold otherwise would permit bankruptcy courts to enter final judgments that the Supreme Court has
17 held to be unconstitutional. The Ninth Circuit emphasized that courts "should avoid characterizing a
18 proceeding as 'core' if to do so would raise constitutional problems." Id.

19 The Circuit Court reiterated that position in In re Cinematronics, Inc., a case which involved
20 state law claims against a non-debtor shareholder for breach of contract, breach of the covenant of
21 good faith and fair dealing, and fraud. In re Cinematronics, Inc., 916 F.2d 1444 (9th Cir. 1990). The
22 Court indicated it could find "no clear expression of congressional intent to include within the catch-
23 all categories of core proceedings state claims that relate to a bankruptcy proceeding but that exist
24 against a non-debtor." Id at 1450.

25 It should be noted that some courts have held that the enforcement of a postpetition contract
26 is a core matter because postpetition contracts are integral to the administration of the estate from the
27 day that the contracts are executed. In re Ben Cooper, 896 F.2d at 1399; In re Case, 937 F.2d 1014,
28 1020 (5th Cir. 1991). However, the facts before this Court allege the prepetition breach of a

1 prepetition contract. The causes of action asserted are independent of and antecedent to the
2 bankruptcy petition. Although the determination of those claims will ultimately affect the
3 administration of the estate, those claims became part of the assets of the estate under § 541 upon the
4 filing of the bankruptcy petition. This proceeding is, therefore, a related, non-core proceeding.

5 There have been no other bases for federal jurisdiction asserted, and the Court is aware of
6 none.

7 New West has submitted sufficient evidence that both San Mateo County and Orange County
8 are participants in the pilot fast track system to process cases expeditiously in the California courts.
9 Therefore, there is no reason to believe that this case would not be timely adjudicated if it is
10 remanded to the Superior Court.

11 As all three elements for mandatory abstention are satisfied, this Court abstains from hearing
12 this case.

13 CONCLUSION

14 Because the Court has determined that mandatory abstention is appropriate in this case, it is
15 not necessary to reach the factors to be weighed under In re Tucson Estates, 912 F.2d 1162, 1167
16 (9th Cir. 1990), to determine whether discretionary abstention is appropriate or to consider whether
17 equitable remand under 28 U.S.C. § 1452(b) is appropriate. Where abstention is mandatory, remand
18 is elevated to a matter of right. In re Marathon Home Loans, 96 Bankr. 296, 301 (E.D. Cal. 1989).
19 Therefore, this case is remanded to the Superior Court for San Mateo County.

20 Good cause appearing,

21 IT IS SO ORDERED.

22
23 DATED:

UNITED STATES BANKRUPTCY JUDGE

B. Discretionary Abstention

The Court may in its discretion nonetheless abstain from hearing a matter in the interest of justice, or in the interest of comity with state courts or respect for state law. 28 U.S.C. § 1334(c)(1).

In In re Tucson Estates, Inc., the Ninth Circuit identified twelve factors that a court should consider when deciding whether to abstain:

- 1) the effect on the efficient administration of the estate;
- 2) the extent to which state law predominates over bankruptcy issues;
- 3) the difficulty or unsettled nature of the state law;
- 4) the presence of a related proceeding state court or other court;
- 5) the jurisdictional basis other than 28 U.S.C. § 1334;
- 6) the degree of relatedness to the main bankruptcy case;
- 7) the substance of the 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 of the bankruptcy court's docket;
- 10) the likelihood that the commencement of the proceeding in bankruptcy court 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.

In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir. 1990).