

1 DO NOT PUBLISH

2
3
4
5
6 UNITED STATES BANKRUPTCY COURT
7 NORTHERN DISTRICT OF CALIFORNIA
8

9 In re:) Bankruptcy Case
10 PATRICIA A. McCOLM,) No. 98-3-4290-SDM
11 Debtor.) Chapter 7
12)

13 PATRICIA A. McCOLM,)
14 Plaintiff,) **Adv. Proc. No. 99-3-104-TC**
15 vs.)

16 STEVEN THEOHARIS; ANITA THEOHARIS;) **MEMORANDUM RE**
17 CITY AND COUNTY OF SAN FRANCISCO;) **MOTIONS TO DISMISS**
18 JUDY BOYAJIAN; WALT DISNEY CORPORA-)
19 TION; JEFFREY NEVIN; FIREMAN'S FUND)
20 INSURANCE COMPANIES, INC.;)
21 JAMES SCHRATZ; and DOES 1-500,)
22 Defendants.)

23 Several Defendants filed motions to dismiss the above-
24 entitled action on the basis of lack of subject-matter
25 jurisdiction and on other grounds. The motions were set for
26 hearing on August 6, 1999. The motions were properly served and
27 filed 28 days before that hearing date pursuant to Bankruptcy
28

MEMORANDUM RE MOTIONS TO DISMISS

1 Local Rule 7007-1(a). On July 23, 1999, Plaintiff filed an ex
2 parte motion to continue the August 6, 1999 hearing. The court
3 returned the moving papers, stating that the court declined to
4 consider the motion on an ex parte basis. Plaintiff's opposition
5 to the motions was due on July 23, 1999 per Bankruptcy Local Rule
6 7007-1(b). Plaintiff had filed no written opposition as of August
7 4, 1999. On August 5, 1999, the court cancelled the August 6,
8 1999 hearing and stated its intention to dismiss the action for
9 lack of subject-matter jurisdiction, because Plaintiff failed to
10 file opposition to the motion to dismiss.

11

12 **FACTS**

13 Plaintiff filed the above-entitled action (the Action) in the
14 United States District Court on August 25, 1998. Plaintiff filed
15 a petition under chapter 11 of the Bankruptcy Code in this court
16 on August 28, 1998. On September 3, 1998, District Judge Sandra
17 Brown Armstrong issued an order dismissing the Action with leave
18 to amend. The order stated that the allegations raising 42 U.S.C.
19 § 1983 and federal RICO claims failed to state a claim upon which
20 relief can be granted. The order noted the remainder of the
21 allegations related to state-law claims over which the court had
22 no independent basis of jurisdiction. The order allowed Plaintiff
23 until September 14, 1998 to file an amended complaint, and stated
24 that the action would be dismissed with prejudice if Plaintiff
25 failed to meet that deadline.

26 Plaintiff never filed an amended complaint. Plaintiff did
27 file a notice of removal to the Bankruptcy Court on November 12,

28

MEMORANDUM RE MOTIONS TO DISMISS

1 1998. Plaintiff's chapter 11 case was converted to one under
2 chapter 7 on January 27, 1999. Judge Armstrong issued an order
3 transferring the Action to the Bankruptcy Court on February 22,
4 1999. On April 22, 1999, Plaintiff filed an amended Schedule C
5 in her bankruptcy case, claiming the Action exempt. Neither the
6 chapter 7 trustee nor any other party in interest filed an
7 objection to that claim of exemption, and the time for objecting
8 has expired under Fed. R. Bankr. P. 4003(b).

9
10 **DISCUSSION**

11 **1. Subject-matter jurisdiction.** The subject-matter
12 jurisdiction of the Bankruptcy Courts is defined in 28 U.S.C.
13 § 1334(b): "Notwithstanding any Act of Congress that confers
14 exclusive jurisdiction on a court or courts other than the
15 district courts, the district courts shall have original but not
16 exclusive jurisdiction of all civil proceedings arising under
17 title 11, or arising in or related to cases under title 11."

18 This court lacks jurisdiction over the Action under each of
19 the three prongs of section 1334(b). First, the complaint clearly
20 does not allege a cause of action "arising in" the bankruptcy
21 case, because the acts alleged in the complaint occurred before
22 the bankruptcy case was filed. Second, the claims asserted do not
23 "arise under" title 11. The complaint contains no reference to
24 title 11, nor can any of the acts alleged be construed to give
25 rise to a claim created by title 11. Third, the claims asserted
26 in the complaint are not "related to" the Plaintiff's bankruptcy
27 case. A claim is related to a bankruptcy case if it conceivably

1 could have an effect on the bankruptcy estate. See In re Fietz,
2 852 F.2d 455, 457 (9th Cir. 1988). Plaintiff has claimed the
3 Action exempt, and no timely objection was filed to that claim of
4 exemption. Thus, any recovery on the action would benefit
5 Plaintiff rather than the bankruptcy estate, and the Action is
6 therefore not related to the bankruptcy case under Fietz.

7 **2. Judge Armstrong's Order.** Having determined that the
8 Bankruptcy Court lacks subject-matter jurisdiction over the
9 Action, the question arises whether the Action should be returned
10 to Judge Armstrong for final disposition of the federal question
11 claims. I determine that such action is unnecessary.

12 Judge Armstrong's September 3, 1999 order is a
13 sufficient basis to dismiss the federal question claims. Per that
14 order, the complaint was dismissed with prejudice regarding the
15 federal claims if Plaintiff failed to file an amended complaint by
16 September 14, 1998. That deadline may have been extended to
17 October 27, 1998 through 11 U.S.C. § 108(b). Plaintiff, however,
18 has never filed an amended complaint. Thus, I determine that the
19 federal claims have been dismissed with prejudice via Judge
20 Armstrong's September 3, 1998 order.

21 I interpret Judge Armstrong's February 22, 1999 order
22 transferring the Action to this court as relating only to the
23 state-law claims raised in the complaint, not as affecting in any
24 way her prior dismissal of the federal question claims. The
25 Bankruptcy Court has broader jurisdiction over state-law claims

1 than the District Court.^{1/} Thus, it was appropriate for this court
2 to consider whether it had jurisdiction over the state-law claims
3 before those claims were dismissed. An order from Judge Armstrong
4 was necessary to get the Action before the Bankruptcy Court.
5 Plaintiff's notice of removal did not effect a transfer to the
6 Bankruptcy Court, because 28 U.S.C. § 1452 provides for removal
7 to the District Court. Cases within the bankruptcy jurisdiction
8 of the District Court get to the Bankruptcy Court via referral
9 pursuant to 28 U.S.C. § 157(a). Bankruptcy Local Rule 5011-1(b)
10 provides, however, that an action pending in the District Court
11 when the bankruptcy petition is filed is not referred automatic-
12 ally, but only by order of the District Judge before whom the
13 action is pending.

14 **3. Request for pre-filing order and attorneys fees.** I
15 decline to enter an order precluding Plaintiff from filing future
16 actions in the Bankruptcy Court. If Plaintiff files any future
17 action over which this court lacks subject-matter jurisdiction,
18 this court can dismiss that action before the Defendants are
19 required to file a response, and can restrict future filings at
20 that time.

21 I also decline to grant the request of Defendant
22 Theoharis for an award of attorneys fees. Because this court
23 lacks subject-matter jurisdiction over the claims raised by
24 Plaintiff, I am reluctant to be drawn into an evaluation of the
25 merits of the action for purpose of awarding fees. Nor would it

27 ^{1/} This court would have jurisdiction over those claims had
28 the Action not been claimed as exempt.

1 be appropriate to award fees on the basis that the Plaintiff's
2 notice of removal was frivolous. At the time the Plaintiff
3 attempted to have the Action transferred to this court, this court
4 did have subject-matter jurisdiction, and many attorneys fail to
5 understand the difference between "removal" and "referral" of
6 bankruptcy proceedings.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

All federal question claims are dismissed with prejudice as to all Defendants pursuant to the September 3, 1999 order of Judge Armstrong. All state-law claims are dismissed without prejudice as to all Defendants for lack of subject-matter jurisdiction.

Dated: _____

Thomas E. Carlson
United States Bankruptcy Judge