



IT IS SO ORDERED.
Signed January 3, 2014

Arthur S. Weissbrodt

Arthur S. Weissbrodt
U.S. Bankruptcy

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 05-50953-ASW
JAMES W. NELSEN,]	Chapter 7
Debtor.]	
<hr/>		
WILLIAM T. DOLAN, CYNTHIA DOLAN,]	Adv. Pro. No. 10-05259-ASW
and DONOVAN DOLAN,]	
Plaintiffs,]	
v.]	
JAMES W. NELSEN; UNION BANK OF]	
CALIFORNIA, N.A.; FIRST NATIONAL]	
BANK OF CENTRAL CALIFORNIA, N.A.;]	
JANE NELSEN; JAMES SCOTT NELSEN;]	
and STEWART TITLE OF CALIFORNIA,]	
INC.,]	
Defendants.]	

DECISION AND ORDER GRANTING MOTIONS TO ABSTAIN AND REMAND

Before the Court are the motions of Plaintiffs William T. Dolan and Cynthia Dolan -- hereafter referred to as "Plaintiffs" -- and Defendant Stewart Title of California, Inc. -- hereafter referred to as "Stewart Title," to remand this adversary proceeding to the Superior Court of California, County of Monterey. Debtor

1 and Defendant James W. Nelsen, who appears in pro per, filed an
2 opposition to the motions but did not appear at the hearing on
3 October 18, 2013, nor has he filed anything in response to the
4 supplemental briefing filed by the other parties.

5 At the October 18, 2013 hearing, the Court recited the
6 relevant facts and will not repeat them here. Although the Court
7 acknowledged that there was a basis to remand, the Court questioned
8 whether the Dolans' claims against Mr. Nelsen had been discharged,
9 because most of the conduct complained of in the state court action
10 had occurred pre-petition. The Court also questioned whether the
11 "unanimous joinder rule"¹ was a jurisdictional requirement that
12 would divest this Court of jurisdiction over the removed case,
13 given that Stewart Title had not consented to removal. The parties
14 have filed supplemental briefs addressing these issues.

15
16 **1. Nondischargeability**

17 With respect to the discharge, Plaintiffs argue that Mr.
18 Nelsen's discharge did not apply to Plaintiffs' claims because Mr.
19 Nelsen's debt to Plaintiffs was automatically rendered
20 nondischargeable under § 523(a)(3). Under that section, a
21 discharge under § 727 does not discharge an individual debtor from
22 any debt:

23 (3) neither listed nor scheduled under section 521(a)(1)
24 of this title, with the name, if known to the debtor, of
25 the creditor to whom such debt is owed, in time to
26 permit--

27 ¹The unanimous joinder rule requires that, where there are
28 multiple defendants in a removed proceeding, all defendants must
join or consent to removal. See Chicago, Rock Island, & Pacific
Ry. Co. v. Martin, 178 U.S. 245, (1900); Proctor v. Vishay
Intertechnology Inc., 584 F.3d 1208, 1224 (9th Cir. 2009).

1

2 (B) if such debt is of a kind specified in paragraph (2),
3 (4), or (6) of this subsection, timely filing of a proof
4 of claim and timely request for a determination of
5 dischargeability of such debt under one of such
6 paragraphs, unless such creditor had notice or actual
7 knowledge of the case in time for such timely filing and
8 request[.]

9 Plaintiffs point out that under Fed. R. Bankr. P. 4007(c),
10 they are time-barred from filing a nondischargeability complaint
11 under § 523(a)(2), (4), or (6). Rule 4007(c) sets a deadline of 60
12 days after the first date set for the meeting of creditors for a
13 creditor to file a nondischargeability complaint under § 523(c).
14 Section 523(c) applies to subsections (a)(2), (4) and (6), which
15 are the subsections applicable to Plaintiffs' state court claims.

16 Plaintiffs' contention that they are time-barred from filing a
17 complaint for a determination of nondischargeability is premised
18 upon a misapplication of Fed. R. Bankr. P. 4007. Here, Plaintiffs
19 would be filing a complaint pursuant to § 523(a)(3) rather than
20 § 523(c). Hence, the applicable subsection is Fed. R. Bankr. P.
21 4007(b), which provides, "[a] complaint other than under § 523(c)
22 may be filed at any time." In re Santiago, 175 B.R. 48, 50 (9th
23 Cir. BAP 1994); In re Jensen, 46 B.R. 578, 583 (Bankr. E.D.N.Y.
24 1985).

25 Plaintiffs would then be required to prove their § 523(c)
26 claims in the § 523(a)(3) proceeding. In re Lochrie, 78 B.R. 257,
27 259 (9th Cir. BAP 1987). In Lochrie, the Ninth Circuit Bankruptcy
28 Appellate Panel reversed the bankruptcy court's ruling that mere
allegations of a cause of action under § 523(a)(2), (4), or (6) are
insufficient for a finding of nondischargeability under
§ 523(a)(3)(B), noting: "[s]ection 523(a)(3)(B) does not create a

1 separate exception from discharge merely for the debtor's failure
2 to schedule a creditor. Instead, the creditor must also have a
3 cause of action under § 523(a)(2), (4), or (6)."

4 Plaintiffs should be aware that the Ninth Circuit Court of
5 Appeals has held that the doctrine of laches applied to bar a
6 § 523(a)(3) complaint filed by an unlisted creditor nearly five
7 years after having notice of the bankruptcy. In re Beaty, 306 F.3d
8 914 (9th Cir. 2002).

10 **2. Unanimous Joinder Rule**

11 Stewart Title has provided authority to the effect that the
12 unanimous joinder rule is not jurisdictional. Fellhauer v. City of
13 Geneva, 673 F. Supp. 1445, 1447 (N.D. Ill. 1987). Nevertheless,
14 the authorities are to the effect that if the procedural
15 requirements for removal are not complied with, remand is
16 mandatory. See, e.g., Knutson v. Allis-Chalmers Corp., 358 F.
17 Supp. 2d 983, 990-91 (D. Nev. 2005); Douglass v. Weyerhaeuser Co.,
18 662 F. Supp. 147, 149 (C.D. Cal. 1987); Fellhauer, 673 F. Supp. at
19 1447 (N.D. Ill. 1987); and McKinney v. Rodney C. Hunt Co., 464 F.
20 Supp. 59, 62-63 (D.N.C. 1978).

21 Because the right of removal is "entirely a creature
22 of statute," Syngenta Crop Protection, Inc. v. Henson,
23 537 U.S. 28, 32, 123 S. Ct. 366, 369-70, 154 L. Ed. 2d
24 368 (2002), and because removal itself is done in
25 "derogation of state sovereignty," U.S. ex. rel. Walker
26 v. Gunn, 511 F.2d 1024, 1027 (9th Cir. 1975), courts are
27 required to "scrupulously confine their own jurisdiction
28 to the precise limits which the statute has defined."
Healy v. Ratta, 292 U.S. 263, 270, 54 S. Ct. 700, 703, 78
L. Ed. 1248 (1934). Consequently, the strict construction
applied in interpreting the removal statute necessarily
requires removing defendants to conform precisely to the
procedural requirements outlined in the statute. See,
e.g., Johnson v. Circuit City Stores, Inc., 71 F. Supp.
2d 1026, 1028 (N.D. Cal. 1999). If the removal has not

1 been effectuated in a procedurally correct manner, the
2 Plaintiff will prevail in a motion for remand.
3 Knutson, 358 F. Supp. 2d at 990. The defendant bears the burden of
4 overcoming a strict construction of the removal statute against
5 removal. Johnson, 71 F. Supp. 2d at 1028.

6 Here, the case was removed on July 23, 2010. Stewart Title
7 filed a motion to abstain and remand on August 23, 2010, within the
8 30-day deadline of 28 U.S.C. § 1447(c). It is undisputed that Mr.
9 Nelsen did not obtain the consent or joinder of Stewart Title in
10 the removal, nor is there any showing that any of the other
11 defendants joined or consented to removal. Therefore, remand is
12 appropriate. See 28 U.S.C. § 1452(b).

13 An additional ground for remand, as noted by the Court at the
14 October 18, 2013 hearing, is that the state court action is based
15 solely upon state law claims.

16 Therefore, the motions to remand are granted. The Court notes
17 that, even if Plaintiffs return to state court and prevail, they
18 would still need to file an adversary proceeding in the bankruptcy
19 court if they seek a determination that the pre-petition claims are
20 nondischargeable.

21 IT IS SO ORDERED.

22 ***** END OF DECISION AND ORDER *****

23
24
25
26
27
28

Court Service List

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

All recipients are ECF participants