

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In re)
)
Emerson Sutton) Case No. 05-40284-172
d/b/a Emerson Sutton Realty) Chapter 11
)
Debtor.)

In re)
) Case No. 05-40284-172
Emerson Sutton)
) Adv. No. 05-04009-172
Debtor.)
)
Emerson Sutton) Chapter 11
)
Plaintiff,)
)
vs.)
)
Missouri Department of Revenue)
Missouri Real Estate Commission)
Missouri Real Estate Appraisers Commission)
Director, Missouri Department of Revenue)
)
Defendants.)

ORDER

This Order addresses the Defendants' Motions to Dismiss the adversary proceeding filed by the Debtor (Adversary Documents 22 and 23), the Debtor's Motion to Dismiss his Chapter 11 case (Motion 31), and the Motion to Dismiss the Chapter 11 bankruptcy case filed by the United States Trustee (Motion 29).

A hearing to consider these matters was conducted on April 27, 2005. Emerson Sutton ("Plaintiff" or "Debtor"), pro se, appeared in person; the Director of the Missouri Department of

Revenue (“MDOR”) appeared by its Counsel; and the State of Missouri, the Director of the Missouri Real Estate Commission (“MREC”) and the Director of the Missouri Real Estate Appraiser’s Commission (“MREAC”) appeared by Counsel who represented all three Parties. The Missouri State entities may hereinafter be collectively described as the “Defendants”. Upon consideration of the oral arguments at the hearing, and having considered the record as a whole, the Court announced its determinations and orders from the bench.

The determination of the motions to dismiss, and the motion to transfer the Adversary Proceeding are core proceedings pursuant to Section 157(b)(2)(A) of Title 28 of the United States Code. The Court has jurisdiction over these matters pursuant to 28 U.S.C. Sections 151, 157 and 1334, and Rule 81-9.01 of the Local Rules of the United States District Court for the Eastern District of Missouri.

The Debtor filed a voluntary petition for relief under Chapter 11, and an adversary complaint on January 10, 2005. The Plaintiff’s “Third Amended Petition for Injunctive Relief, Declaratory Judgement in his Favor, Damages, and Costs” (Adversary Document No. 21) is a 13 count complaint against the State of Missouri (“State”)¹. The complaint alleges the existence of causes of action under state and federal law. The state law actions include: Count I, Intentional Infliction of Emotional Distress; Count II, Action for Fraud and Deceit; Count III, Breach of Fiduciary Responsibility; Count IV, Fraudulent Concealment; Count V, Libel in Privileged Situations; Count VI, Breach of Employment Contract; Count VII, Tortuous Interference with Contract; and Count VIII, Conspiracy. The federal claims include: Count IX, Section 7 of Clayton Act (anti-trust); Count X, Conspiracy to Interfere with Civil Rights; Count XI, Racial Discrimination in Employment; Count XII, Violation of Federal Fair Debt Collection Practice Act; and Count XIII, Violation of RICO Act. In his

¹The State of Missouri was listed as a defendant on the Third Amended Complaint but was not listed as a defendant in the original complaint (Adversary Document No. 1) or in the first amended complaint (Adversary Document No. 3).

prayer for relief, the Plaintiff requested immediate and permanent injunctive relief to stop any actions by the State of Missouri to suspend his real estate broker's license and/or his real estate appraiser's license, and to stop any actions by the State to collect any taxes allegedly owed prior to the filing of the bankruptcy petition. The Plaintiff also requested money damages in the amount of \$1,000,000.00 or more against each Defendant "solely and jointly" for each count plus costs. Other than the request in the prayer to enjoin collection of tax debts allegedly owed prior to the petition, the questions of the validity or amounts of the tax debts was not raised in the various counts of the complaint.

In the Chapter 11 case, the exclusive period within which a Plan and Disclosure Statement are to be filed expires on May 10, 2005. In his Schedules and Statement of Affairs, the Debtor listed assets valued at \$1,295,000.00 (valuing his real estate broker license and real estate appraiser license at \$1,000,000.00), and debts aggregating \$165,746.00. The Debtor listed monthly income of \$7,200.00 and monthly expenses of \$7,074.00.

Four proofs of claim have been filed. Claims Number 1 and Number 2 were filed by the Missouri Department of Revenue. Claim Number 2, in the amount of \$20,541.52 for income taxes for the years 1987-1992 and 1996-2000, amended Claim Number 1. Claims Number 3 and Number 4 were filed by the Personal Property Tax Division of St. Louis County, Missouri. Claim Number 4, in the amount of \$126.67, amended Claim Number 3. No Claims Bar Date has been set in the case.

The Defendants filed motions to dismiss the adversary proceeding under 28 U.S.C. §1334, or alternatively, under 11 U.S.C. § 305(a)(1). (Adversary Documents 22 and 23).

The United States Trustee filed a motion to dismiss the Chapter 11 case under 11 U.S.C. § 1112(b), citing the Debtor's failure to appear at the continued § 341 Meeting of Creditors and the Debtor's apparent willingness to have the case dismissed. **See File Document No. 29.**

The Debtor filed a motion to dismiss the Chapter 11 bankruptcy case without prejudice (Case File Document No. 29), requesting immediate transfer of the adversary proceeding to the U.S. District Court, Eastern District of Missouri. The Defendants filed responses to the Debtor's motion to dismiss in the adversary proceeding that did not object to the dismissal of the bankruptcy case, but contested the Court's authority to transfer the adversary proceeding to district court absent an underlying bankruptcy case (Adversary Documents No. 34 and 35).

The Court has jurisdiction in this matter pursuant to 28 U.S.C. Sections 151, 157 and 1334, and Rule 81-9.01 of the Local Rules of the United States District Court for the Eastern District of Missouri. The claims asserted by the Plaintiff are not core proceedings under the Bankruptcy Code; that is, they are not causes of action expressly created or determined by title 11. Furthermore, the claims do not arise in a case under Chapter 11; that is, they are not claims expressly created by title 11 that would have no existence but for the filing of a bankruptcy petition. These are claims that are non-core but otherwise related to the bankruptcy case in that these pre-petition causes of action are property of the bankruptcy estate, and the outcome of the litigation of these claims could conceivably have an effect on the administration of the Bankruptcy estate. **See 28 U.S.C. § 157; 28 U.S.C. § 1334; In re Williams**, 256 B.R. 885, 891 (8th Cir. B.A.P. 2001). As a general rule, the dismissal of a bankruptcy case results in the dismissal of non-core, related proceedings, because the bankruptcy jurisdiction in the non-core proceeding depends on the nexus between the non-core, related proceeding and the bankruptcy case. **Williams**, 256 B.R. at 892 (citations omitted).

Defendants' Motions to Dismiss the Adversary Proceeding

The State of Missouri, Director of MREC and Director of MREAC filed a motion to dismiss (Adversary Document No. 23). The Director of MDOR filed a separate motion to dismiss (Adversary Document No. 22). The Defendants' arguments in favor of dismissal of the adversary proceeding

were threefold; lack of personal jurisdiction over the Defendants, sovereign immunity as a bar to the relief requested, and the absence of a ripe justiciable issue.

First, the Defendants alleged that in the adversary proceeding the Plaintiff had failed to obtain proper service on them pursuant to the Federal Rules of Bankruptcy Procedure. The record supports the Defendants' allegations that they have not been properly served. Until the Defendants are properly served or service is waived, the Court does not have personal jurisdiction over the Defendants and the case against them cannot proceed. The Plaintiff's argument that the operation of the automatic stay of 11 U.S.C. §362 functions as service of process in an Adversary Proceeding is incorrect.

Second, the Defendants alleged that the doctrine of sovereign immunity bars a federal court from making any determinations as to the issues here that are based on state law. The Defendants argue further that the doctrine also operates to bar a federal court from awarding monetary damages here based on federal law, although prospective injunctive relief might be available. The Defendants requested dismissal under the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2) or, alternatively, under the Bankruptcy Code abstention provisions of 11 U.S.C. § 305.

Third, the Defendants alleged that no ripe justiciable issue was before the Court because the Plaintiff's licenses were not revoked or suspended. The prospective injunctive relief requested by the Plaintiff is not needed because his licenses have been issued and are operational. Therefore, the Defendants argue that no case or controversy exists.

Debtor's Motion to Dismiss (Motion 31)

On March 16, 2005, the Debtor filed a motion to dismiss his bankruptcy case without prejudice and a motion to transfer the adversary proceeding to the United States District Court. As cause for dismissal, the Debtor stated that he believed that he and his creditors can better and more

fairly and equitably work out his financial problems and other financial issues outside of bankruptcy. The Debtor requested that the Court not rule on any pending motions prior to the dismissal and that the adversary proceeding not be dismissed but instead be transferred to the district court.

The Defendants in the Adversary Proceeding filed responses to the Debtor's motion to dismiss his case (Adversary Documents 34 and 35). In their responses, the Defendants had no objection to the dismissal of the bankruptcy case. However, the Defendants requested that the Court rule upon their motions to dismiss the Adversary Proceeding, and objected to a transfer of the Adversary Proceeding to the District Court. The Defendants alleged that it would not be equitable or reasonable for the Court to retain jurisdiction absent the nexus of the bankruptcy case.

United State Trustee Motion to Dismiss (Motion 29)

On March 18, 2005, the United States Trustee (UST) filed a motion to dismiss the Bankruptcy case alleging that the Debtor had failed to appear at a continued § 341 Meeting of Creditors; that dismissal was in the best interest of creditors; and that the Debtor, having filed a motion to dismiss, had no objection to the dismissal of the case. The UST alleged that further delay in the administration of the case constituted an unreasonable delay prejudicial to creditors and that dismissal under 11 U.S.C. § 1112 is appropriate.

Discussion

The issues presented in the Adversary Proceeding and in the Chapter 11 case are sufficiently intertwined for the Court to consider the record as a whole in its determination of the appropriateness of dismissing the Adversary Proceeding and/or the bankruptcy case.

The mandatory abstention provision of 28 U.S.C. § 1334 (c)(2) applies with respect to an action that could not have been commenced in federal court absent jurisdiction under 28 U.S.C. § 1334, if an action is commenced and can be timely adjudicated in a State forum of appropriate adjudication. **28 U.S.C. § 1334(c)(2)**. The Defendants do not allege, and from the record the Court

cannot find that an action is commenced in State court. Therefore, the mandatory abstention provisions of 28 U.S.C. § 1334(c)(2) do not apply.

Under 11 U.S.C. § 305(a)(1), the Court may dismiss a case under title 11 if the interests of creditors and the debtor would be better served by such dismissal. **11 U.S.C. § 305(a)(1)**.

The record strongly suggests that the doctrine of sovereign immunity may apply to the issues raised in the Adversary Proceeding. If applicable, sovereign immunity would severely limit the relief available from this Court. **See Seminole Tribe of Florida v. Florida**, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (Sovereign immunity shields a State from suits by individuals absent the State's consent); **Edelman v. Jordan**, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 745 (1977) (Federal courts may not award retrospective relief, i.e. money damages or its equivalent, if the State invokes its immunity); **Ex Parte Young**, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) (The Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law).

The Plaintiff holds a real estate broker's license and a real estate appraiser's license issued by the State of Missouri. In August, 2004, a statute became effective that required all governmental entities issuing professional licenses to provide the director of revenue with the name and Social Security Number of each licensee at least one month prior to the anticipated renewal of a licensee's license. **Mo. Rev. Stat. § 324.010 (2004)**. If such licensee was delinquent on any state tax or had failed to file state income tax returns in the last three years, the Director of the Missouri Department of revenue was required to notify the entity and the licensee. **Id.** Based upon the representations in this record, it appears that the Director, MDOR, notified the MREC and the MREAC that the Plaintiff had failed to pay income taxes for the years 1987-1992, 1996-2003, and that the Plaintiff received a notice pursuant to the statute that his licenses would be suspended if the delinquency was not cured, or arrangements to cure the delinquency were not made within 90

days of the notice. It further appears that the Plaintiff made payments that were applied to his 2001, 2002, and 2003 Missouri Income tax liabilities, but that the MDOR did not accept the Plaintiff's protest as to his remaining tax liabilities. (See Exhibits to Third Amended Complaint, Adversary Document 21). The Plaintiff was notified that his licenses would be suspended on or about January 10, 2005 (See Exhibits to Third Amended Complaint). The Plaintiff filed a Chapter 11 bankruptcy case that caused the MREC and the MREAC to be stayed from suspending his licenses. The Plaintiff's licenses are not suspended (See Exhibit to Amended Complaint, "Certification of Tax Compliance dated January 20, 2005", Adversary Document No. 12).

The Plaintiff is suing the State and certain individuals in their official capacity acting under state law. The Missouri cases cited by the Plaintiff to support his allegation that the State has waived sovereign immunity contain specific holdings that the issue being determined in those cases was not sovereign immunity. The Plaintiff's authority to support his allegations of improper ex post facto legislation, **Kring v. Missouri**, 107 U.S. 221 (1882), was overruled by **Collins v. Youngblood**, 497 U.S. 37, 50, 110 S. Ct. 2715, 2724 (1990) (Limiting the application of the ex post facto doctrine).

If sovereign immunity is found to apply, the relief requested by the Plaintiff in the adversary proceeding, other than prospective injunctive relief on the federal causes of action, cannot be awarded by a federal court. The Debtor's licenses are not suspended or revoked, therefore, injunctive relief as to the licenses is not ripe for judicial determination. No basis for awarding injunctive relief as to the tax debts was alleged and therefore is not before the Court as a claim in controversy. The Plaintiff is proceeding pro se in areas of the law that are complex and not entirely settled. Litigation of the Debtor's claims will not be routine.

Since filing the Chapter 11 petition, the Debtor has not actively pursued confirmation of a plan of reorganization. The Chapter 11 estate has assets that exceed the debts owed against it. However, the Debtor's monthly surplus cash flow is insufficient to adequately fund a Chapter 11 plan of reorganization if confirmed. It is evident from the record that the Debtor desires to continue the litigation against the State and its agencies. Given the time and effort that will be required for this litigation, and the uncertainty of the jurisdiction of the federal courts over these claims, it is unlikely that the Debtor will be able to confirm a feasible plan of reorganization in a reasonable time. Therefore, the interests of the Debtor, the interests of the Defendants in the Adversary Proceeding, and the interests of the creditors are better served by the Bankruptcy Court's abstention. Therefore,

IT IS ORDERED that these matters are concluded; and that the motion of the Debtor to dismiss the bankruptcy case is granted in part; and that the bankruptcy case is dismissed under 11 U.S.C. § 305(a)(1), prior to submission or confirmation of a plan of reorganization.

IT IS FURTHER ORDERED that the Debtor's request that the adversary proceeding be transferred to United States District Court is denied; and

That as a related proceeding not arising under the Bankruptcy Code nor arising in a case under title 11, wherein the Bankruptcy court may be unable to grant the requested relief, the adversary proceeding is also dismissed without prejudice; and

That the United States Trustee's motion to dismiss is denied as moot; and that the Defendants' motions to dismiss the Adversary Proceeding are denied as moot; and that all other requests are denied.

DATED: May 4, 2005

St. Louis, Missouri



James J. Barta
Chief U. S. Bankruptcy Judge

Copy mailed to:

Office of the United States Trustee
Attn: Leonora S. Long
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Suite 6.353
St. Louis, MO 63102

Sheryl L. Moreau
Missouri Department of Revenue
General Counsel's Office
PO Box 475
Jefferson City, MO 65105-0475

Shelley L. Forrest
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102

Emerson Sutton
Pro Se Debtor
1909 Hurstgreen Avenue
Overland, MO 63114

Christie A. Kincannon
Missouri Attorney General's Office
221 West High Street, P.O. Box 899
Jefferson City, MO 65102