

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
The Honorable A. Bruce Campbell**

In re)) AMERICAN MART HOTEL CORPORATION,)) Debtor.))) _____)) BANK OF NEW YORK MELLON, as) successor to Bank of New York – Global) Corporate Trust, as Trustee for the Registered) Certificateholders of Commercial Capital Access) One, Inc., Commercial Mortgage Bonds,) Series 3, by BERKADIA COMMERCIAL) MORTGAGE, LLC, as Special Servicer,)) Plaintiff,) v.)) AMERICAN REALTY TRUST, INC., a) Georgia Corporation,)) Defendant.)	Case No. 10-36776-SGJ11 Chapter 11 (United States Bankruptcy Court for the Northern District of Texas, Dallas Division) Adversary No. 10-1813 ABC
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**ORDER GRANTING PLAINTIFF’S MOTION TO ABSTAIN AND REMAND
AND ORDER DENYING DEFENDANT’S MOTION TO TRANSFER VENUE**

This matter is before the Court on the Motion to Abstain and Remand (“Motion”) filed by Plaintiff, Bank of New York Mellon (“Plaintiff” or “Bank”), and the Objection thereto filed by Defendant American Realty Trust, Inc. (“Defendant” or “ART”). Also pending is Defendant’s Motion to Transfer Venue and Plaintiff’s Response. This adversary proceeding is a lawsuit originally commenced in state court in Colorado which has been removed to this Court pursuant to 28 U.S.C. § 1452(a).

Background

The following facts are taken from the Bank’s Complaint and other documents filed by the parties in this adversary proceeding. In 1997, Dynex Commercial, Inc. (“Dynex”) made a \$4 million loan to American Mart Hotel Corporation (“American Mart”) which was secured by American Mart’s hotel property located in Adams County, Colorado. ART guaranteed American Mart’s obligations to Dynex. The guaranty agreement provides that:

With respect to any claim or action arising hereunder, Guarantor [ART] (a) irrevocably submits to the jurisdiction of the courts of the State in which the Property [the hotel property owned by American Mart] is located . . .

The loan documents and ART's guarantee were later assigned to the Bank. In February, 2010, American Mart defaulted on the loan and the Bank commenced foreclosure proceedings on the hotel property. In August, 2010, American Mart filed a Chapter 11 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Texas. Venue of American Mart's Chapter 11 case has since been transferred to the United States Bankruptcy Court for the Northern District of Texas, Dallas Division.

Meanwhile, on October 13, 2010, the Bank sued ART, in the District Court for Adams County, Colorado ("State Court"), to recover on ART's guarantee of the obligations of American Mart ("State Court Lawsuit").

On November, 4, 2010, ART filed its notice of removal, pursuant to 28 U.S.C. § 1452(a) and 28 U.S.C. § 157(a), in this Court, and, upon filing of a copy of the notice of removal in the State Court, effecting the removal of the State Court Lawsuit to this Court. ART then filed its Motion to Transfer Venue of this adversary proceeding to the Dallas Bankruptcy Court where American Mart's Chapter 11 case is proceeding. The Bank opposed the transfer of venue, and requested this Court to abstain from hearing the State Court Lawsuit and to remand it back to the State Court.

General Principles of Removal and Abstention Under 28 U.S.C. §§ 1334 and 1452

With certain exceptions not applicable here, a party may remove "any claim or cause of action in a civil action. . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of [title 28]." 28 U.S.C. § 1452(a). Accordingly, if there is federal bankruptcy jurisdiction of a cause of action, it may be removed under this statute from the state court in which it is pending to the federal district court for that district.¹

Bankruptcy jurisdiction under 28 U.S.C. § 1334, encompasses "cases under title 11 . . . [and] civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a) and (b). Matters not within this limited grant of jurisdiction are not properly removable under 28 U.S.C. § 1452, and must be remanded.² Matters which are within

¹By virtue of 28 U.S.C. § 157(a), allowing for referral of bankruptcy matters to the bankruptcy judges of the district, matters removed under 28 U.S.C. § 1452 are removed directly to a "unit of the district court . . . known as the bankruptcy court." 28 U.S.C. § 151.

²28 U.S.C. § 1447(c) provides in pertinent part that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be

bankruptcy jurisdiction, though properly removable, may be remanded on “any equitable ground,” under 28 U.S.C. § 1452(b).

In addition to its authority to remand on equitable grounds, the bankruptcy court may abstain from hearing any civil proceeding arising under, arising in, or related to a bankruptcy case “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). The bankruptcy court is required to abstain from hearing a pending state proceeding if there is no independent basis for federal court jurisdiction and if the matter can be timely adjudicated in the state forum. 28 U.S.C. § 1334(c)(2).³

Factors to be considered in determining whether remand on equitable grounds under 28 U.S.C. § 1452(b) is appropriate include:

- 1) duplication of judicial resources; 2) uneconomical use of judicial resources; 3) effect of remand on the administration of the bankruptcy estate; 4) . . . questions of state law better addressed by a state court; 5) comity; 6) prejudice to the involuntarily removed parties; 7) lessened possibility of an inconsistent result; and 8) expertise of the court where action originated.

River Cement Co. v. Bangert Bros. Constr. Co., 852 F.Supp. 25, 27 (D. Colo. 1994).

Factors to be considered in determining whether discretionary abstention under 28 U.S.C. § 1334(c)(1) is appropriate include:

- 1) the effect or lack thereof on the efficient administration of the [bankruptcy] estate . . . , (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty 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, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than 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 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 Schempp Real Estate, LLC, 303 B.R. 866, 876 (Bankr. D. Colo.2003)(quoting *In re Tucson*

remanded.”

³Mandatory abstention is not required in this case because the parties’ diversity of citizenship creates an independent basis for federal jurisdiction.

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

Discussion and Analysis

The State Court Lawsuit involves a claim for breach of a guaranty contract. It is a state law claim between two parties that are not in bankruptcy. Clearly it is not a bankruptcy case; it does not arise under title 11; nor does it arise in a bankruptcy case. This cause of action is properly removable to this Court, then, only if it is a civil proceeding “related to” a bankruptcy case. ART claims the lawsuit is related to American Mart’s bankruptcy, citing the parameters of “related to” jurisdiction first articulated in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3rd Cir. 1984), and adopted by the Tenth Circuit Court of Appeals in *Gardner v. United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990). The *Pacor* test for determining whether a civil proceeding is “related to” a bankruptcy case is “whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.” 743 F.2d at 994.

In *dicta* in the *Pacor* opinion, the Third Circuit reasoned that an action by a creditor against a guarantor of a debtor’s obligations would be within the bankruptcy court’s “related to” jurisdiction because it would “necessarily affect that creditor’s status vis a vis other creditors, and administration of the estate therefore depends upon the outcome of that litigation.” 743 F.2d at 995. Accordingly, most courts which have adopted *Pacor*’s broad test of “related to” jurisdiction have found that suits by a creditor against a guarantor of a bankruptcy debtor’s obligations are related to the bankruptcy case of the debtor. See *e.g.*, *Joremi Ent., Inc. v. Hershkowitz (In re New 118th LLC)*, 396 B.R. 885 (Bankr. S.D.N.Y. 2008), and cases cited therein at 890-92. Not all courts are willing to extend “related to” jurisdiction so far, however, notwithstanding the *dicta* in *Pacor*. See *Work/Family Directions, Inc. v. Children’s Discovery Ctrs., Inc. (In re Santa Clara County Child Care Consortium)*, 223 B.R. 40, 49 (1st Cir. B.A.P. 1998)(state court suit regarding enforceability of guaranty would have no substantial and direct financial impact upon bankruptcy reorganization; the substitution of creditors would not affect the debt structure of the debtor.)

In this case, neither party has presented the Court with any argument that the State Court Lawsuit would have any effect on the American Mart bankruptcy case other than to change the composition of the creditor body. To the extent the Bank succeeds in collecting from ART on its guaranty of American Mart’s debt, ART may be substituted for the Bank on a dollar for dollar basis. Under these circumstances, the state court litigation is, at most, on the outside fringes of this Court’s “related to” jurisdiction.

The minimal effect of the State Court Lawsuit on American Mart’s bankruptcy is a significant factor weighing in favor of discretionary abstention and remand of this matter. The following factors also weigh heavily in favor of abstention and remand: (1) only state law issues are present in the State Court Lawsuit and no “core” bankruptcy matters exist that would need to be severed, (2) remoteness of the guaranty suit from American Mart’s Chapter 11 case, (3) likelihood that the commencement of the proceeding in this Court, combined with the requested transfer to the Dallas bankruptcy court, involve an attempt by ART to avoid the forum selection

clause in the guaranty; (4) only nondebtor parties are present in the State Court Lawsuit; and (5) interests of comity with the State Court and respect for State law. The remaining discretionary abstention factors either are not present, or do not militate strongly in favor of retaining this matter in the bankruptcy court.

Conclusion

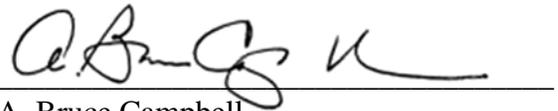
For the foregoing reasons it is

ORDERED that Plaintiff's Motion to Abstain and Remand is GRANTED, and this proceeding is remanded, pursuant to 11 U.S.C. §§ 1334(c)(1) and 1452(b), to the District Court for Adams County, Colorado; and it is

FURTHER ORDERED that Defendant's Motion to Transfer Venue is DENIED as moot.

DATED: February 7, 2011

BY THE COURT:

A handwritten signature in black ink, appearing to read "A. Bruce Campbell", is written over a horizontal line.

A. Bruce Campbell,
United States Bankruptcy Judge