

DOCKET NUMBER: Ancillary No. 95-0002

ADV. NUMBER: 95-1251

JUDGE: M. A. Mahoney

PARTIES: Tony Ray Weaver, Palace Casinos, Inc., Maritime Group, Ltd.

CHAPTER:

ATTORNEYS:

DATE: 12/20/95

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

TONY RAY WEAVER, et al.,

Plaintiffs,

Ancillary No. 95-0002  
Adversary No. 95-1251

v.

PALACE CASINOS, INC., et al.,

Defendants.

**REPORT AND RECOMMENDATION**

This matter is before the Court on the Motion of the Defendant, Maritime Group LTD, to dismiss the complaint pursuant to Fed. R. Bankr. P. 7012(b) and a Motion of the Plaintiff to Remand and Abstain. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1334 and the Order of Reference of the District Court. This matter is not a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). The Defendant, Maritime, consents to this Court's entry of final orders in this lawsuit. The Plaintiff does not. Therefore, the Court cannot enter any final orders. Therefore, this Court reports and recommends to the District Court pursuant to Fed. R. Bankr. P. 9033 that it withdraw reference of this matter to this Court and instruct the Defendant, Maritime Group LTD, to seek a Section 157(b)(5) determination of proper venue from the United States District Court for the Southern District of Mississippi.

This suit is one by the representative of the surviving heirs of Deborah Ann Weaver for damages resulting from her death in an auto accident. The Plaintiff claims Maritime Group LTD is liable due to alleged unlawful sale or provision of alcoholic beverages to the driver of the vehicle which allegedly caused the death of Ms. Weaver on December 2, 1994. Maritime had filed a Chapter 11 bankruptcy case in the Southern District of Mississippi on December 1, 1994,

one day before Ms. Weaver's death occurred. This suit was filed on November 2, 1995 in the Circuit Court of Mobile County, Alabama. Maritime removed the matter to federal court pursuant to Fed. R. Bankr. P. 9027 directly to this Court. The Plaintiff and Defendant then filed their respective motions to remand and dismiss.

### LAW

There are two matters which the Court must address. First, is the matter a core proceeding? Second, if it is not, what should be done with the case? These issues are discussed below.

This matter appears to be a core proceeding in several ways. It relates to resolution of the amount of a Section 503(b) administrative claim which likely will need to be estimated or liquidated prior to confirmation of any plan or final distribution of assets in Maritime's bankruptcy. Under 28 U.S.C. §§ 157(b)(2)(A), (B) and (L), this would be a core proceeding except for one important exception to "coreness" listed in 28 U.S.C. § 157(b)(2)(B). It states:

allowance or disallowance of claims against the estate . . . and estimation of claims . . . but not the liquidation or estimation of . . . unliquidated personal injury, tort, or wrongful death claims against the estate . . . (Emphasis added)

This caveat expressly takes away the bankruptcy court's authority to issue final orders in matters in this suit without consent, which is expressly not given by the plaintiff. Therefore, the action is not core and a district court must enter all final orders.

District courts are given the sole authority to try wrongful death actions arising in or related to bankruptcy cases. Which district court tries a wrongful death case is to be decided by the district court in which the main bankruptcy case is pending. 28 U.S.C. § 157(b)(5). In this case, that means that the District Court of the Southern District of Mississippi should determine where the case will be tried.

The court which will try a suit should also have control over the pretrial issues in the case. Therefore, this Court recommends to this District Court that it instruct the parties to make a motion in the United States District Court of the Southern District of Mississippi seeking instruction as to where this case should be tried. If the District Court in Mississippi decides that the case should be tried in Mississippi, the District Court in Alabama should transfer the case to Mississippi. If the District Court in Mississippi decides the case should remain here, the District Court here should determine how the case should proceed, whether it should be remanded to state court, and all other pretrial and trial issues. This was the procedure followed in *A. H. Robins Company, Inc. v. Piccinin*, 788 F.2d 994, 1014 (4th Cir. 1986) in dealing with the Dalkon Shield litigation. *See also, Stokes v. Southeast Hotel Properties, Ltd., et al.*, 877 F. Supp. 986 (D.W.D.N.C. 1994) (stating motion to transfer or motion for 28 U.S.C. § 157(b)(5) determination needed).

Therefore, this Court reports and recommends to the District Court that it withdraw reference of this case and instruct the parties to seek a determination of the proper venue of this action pursuant to 28 U.S.C. § 157(b)(5) in the District Court in the Southern District of Mississippi. A form of order is attached.

Dated: December 20, 1995

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MARGARET A. MAHONEY  
U.S. BANKRUPTCY JUDGE

**PROPOSED ORDER**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF ALABAMA

In Re

TONY RAY WEAVER, et al.,

Ancillary No. 95-0002  
Adversary No. 95-1251

Plaintiffs,

v.

PALACE CASINOS, INC., et al.,

Defendants.

**ORDER**

This matter is before the United States District Court upon the Report and Recommendation of one of the bankruptcy judges of this District. This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334.

Based upon the Report and Recommendation of the bankruptcy judge dated December 20, 1995, it is appropriate to withdraw reference of this matter from the Bankruptcy Court since this is a wrongful death action over which a bankruptcy court does not have core jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(B), and is a matter which only a district judge may try pursuant to 28 U.S.C. § 157(b)(5). This Court also finds that the procedure recommended by the Bankruptcy Court is appropriate. The parties will be instructed to seek a determination from a judge in the United States District Court of the Southern District of Mississippi as to the proper forum for trial of this case. *See, A. H. Robins Company, Inc. v. Piccinin*, 788 F.2d 994, 1014 (4th Cir. 1986)

THEREFORE, IT IS ORDERED that:

1. The reference of this matter to the Bankruptcy Court of this District pursuant to 28 U.S.C. § 157(a) and the Order of Reference of this Court is withdrawn.
2. The Defendant, Maritime Group LTD, shall file a motion seeking a determination as to the proper forum for this suit pursuant to 28 U.S.C. § 157(b)(5) by January 30, 1996 and shall file a copy of the motion when filed with this Court. Any other party may also file such a motion or join in the Defendant's motion, as appropriate.
3. Resolution of all other motions filed in this case is stayed pending a ruling on the Motion for Determination of Venue pursuant 28 U.S.C. § 157(b)(5) by the United States District Court for the Southern District of Mississippi.

Dated:

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U.S. DISTRICT JUDGE