DOCKET NUMBER: 97-11031
ADV. NUMBER: 99-1049
JUDGE: M. A. Mahoney
PARTIES: Mason Plan Company, Inc., Theodore L. Hall, Whitney Bank of Alabama, Whitney National Bank, The Peoples Bank of Coffee County
CHAPTER: 7
ATTORNEYS: J. J. Hartley, D. B. Hembree, D. J. Stewart
DATE: 11/22/99
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MASON PLAN COMPANY, INC. Case No. 97-11031-MAM-7

Debtor.

THEODORE L. HALL

Trustee,

v. Adv. No. 99-1049

WHITNEY BANK OF ALABAMA and
WHITNEY NATIONAL BANK

Defendant.

WHITNEY NATIONAL BANK

Plaintiff,

v.

THE PEOPLES BANK OF COFFEE COUNTY
et al.

Defendant.

ORDER AND JUDGMENT GRANTING MOTION TO DISMISS

Jeffery J. Hartley, Mobile, Alabama, Attorney for Whitney National Bank
Deborah Bittl Hembree, Mobile, Alabama, Attorney for Whitney National Bank
Donald J. Stewart, Mobile, Alabama, Attorney for PBA Financial Corporation

This matter is before the Court on the motion of PBA Financial Corporation (PBA) to dismiss the third party complaint brought by Whitney National Bank (Whitney). For the reasons set forth below, the Court finds it lacks jurisdiction over the subject matter of this dispute and grants the motion to dismiss.

FACTS

Mason Plan Company, Inc. (Mason Plan) filed for relief pursuant to chapter 7 of the Bankruptcy Code on March 19, 1997. Theodore L. Hall was appointed trustee in the chapter 7 proceeding and he brought this adversary complaint against Whitney. The complaint consists of five counts: fraudulent transfers, preferences, constructive trust, unjust enrichment and equitable subordination.

Whitney filed a third party complaint against PBA and related entities alleging that PBA is liable for any amount assessed against Whitney on the trustee's complaint. The third party complaint premises PBA's liability on contractual indemnity, misrepresentation, suppression of fact, breach of warranty and negligence. Whitney asserts that the trustee's claims arise out of loans between the debtor's former CEO and PBA, not Whitney. Subsequent to the making of the loans, Whitney purchased them along with other assets from PBA. In the purchase agreement, PBA warranted that the loans were valid, PBA agreed to indemnify, hold harmless, and defend Whitney, and Whitney disclaimed any liability caused by an act or omission of PBA.

LAW

PBA asks the Court to dismiss Whitney's complaint against it on five grounds: (1) lack of subject matter jurisdiction; (2) insufficiency of process; (3) PBA is not a suable entity; (4) the complaint violates Fed. R. Bankr. P. 7008(a); and (5) statute of limitations. The Court will take up the issue of lack of subject matter jurisdiction first.

PBA contends that the complaint must be dismissed for lack of jurisdiction over the subject matter pursuant to Fed. R. Civ. P. 12(b)(1), which is made applicable to bankruptcy cases by Fed. R. Bankr. P. 7012. In evaluating the complaint, "whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the

complaint should be construed favorably to the pleader." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986) (cites omitted).

Whitney contends that the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 or, in the alternative, that the Court may exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a).

1.

Section 1334(b), title 28, United States Code, provides that district courts shall have original, but not exclusive jurisdiction of all civil proceedings: (1) arising under title 11, (2) arising in cases under title 11, or (3) related to cases under title 11. Bankruptcy jurisdiction is derived only from these three bases. *Continental Nat'ional Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1344 (11th Cir. 1999).

"Arising under" proceedings are matters invoking a substantive right created by the Bankruptcy Code. *Id*. at 1345. Whitney's third party complaint contains fraud, negligence and contractual indemnity claims. They do not invoke any rights created by the Bankruptcy Code. "Arising in" jurisdiction generally involves administrative matters that could only arise in bankruptcy. *Id*. Whitney could bring its claim against PBA outside the context of this bankruptcy case; it does not "arise in" a case under title 11 since it is not a suit by or against the debtor or involving the debtor's assets. Thus, the only category of bankruptcy jurisdiction applicable is the "related to cases under title 11" category.

"'[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy.'" *Munford v. Munford, Inc. (Matter of Munford, Inc.)*, 97 F.3d 449,

453 (11th Cir. 1996) (cite omitted). This has been called the "nexus" test because it essentially requires some nexus between the adversary proceeding and the title 11 case. *Id*.

Bankruptcy courts generally do not have "related to" jurisdiction over third party complaints for contribution and indemnity if the debtor is not the alleged indemnitor or indemnitee. *Munford, Inc.*, 97 F.3d at 454 (stating in dicta that "non-debtors in an adversary proceeding cannot assert state cross-claims of contribution and indemnity because such claims standing alone fail the nexus test . . . ."); *Walker v. Cadle Company (Matter of Walker)*, 51 F.3d 562 (5th Cir. 1995); *Boyajian v. DeLuca (In re Remington Dev. Group, Inc.)*, 180 B.R. 365 (Bankr. D. R.I. 1995); *see also* Ralph Brubaker, *One Hundred Years of Federal Bankruptcy Law and Still Clinging to an In Rem Model of Bankruptcy Jurisdiction*, 15 BANKR. DEV. J. 261, 276-77 (Spring 1999) (conceding that under current jurisprudence, third party claims for contribution and indemnification are not "related to" bankruptcy cases). Whitney asserts that its complaint involves more than a bare claim for indemnity or contribution. Whitney set forth claims of negligence, misrepresentation, suppression of material fact and breach of warranty. Nevertheless, the complaint clearly conditions any liability of PBA upon the trustee recovering against Whitney. Whitney attempts to paint its PBA claims closer to the debtor by asserting that PBA and the other third party defendants are really the parties liable to the debtor. However, the debtor did not sue PBA. It only sued Whitney Bank. The debtor will win or lose solely on its claims against Whitney Bank. Whitney's claims, boiled down to their essence, are for indemnity or contribution. BLACK'S LAW DICTIONARY 772 (7th ed. 1999) (defining indemnity as a duty to make good any loss incurred by another). Based on the rationale of the cases cited above, this Court finds that it does not have jurisdiction over Whitney's claim against PBA for indemnity or contribution.

The Court's conclusion is unchanged even if the claims against PBA involve something other than indemnity or contribution. Regardless of how Whitney's claims are classified, they involve the allocation of loss among third parties, not an allocation between them and the debtor's estate. Any amount paid to Whitney by PBA will not affect the debtor's estate. The trustee's ability to collect will not be enhanced by providing a third party against whom Whitney National Bank can collect. *See Remington Development*, 180 B.R. at 371 (stating that nothing suggests that defendant will be unable to pay the judgment the debtor seeks against it). Thus, there is no conceivable effect on the administration of the estate, and the rights or liabilities of the debtor will not be affected by Whitney's claims against PBA. Regardless of how it is construed, Whitney's complaint is not "related to" the Mason Plan's bankruptcy estate.

Whitney contends that time, money and judicial resources will be saved if the Court hears its third party complaint. Although this may be true, "[j]udicial economy itself does not justify federal jurisdiction." *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd. Cir. 1984). Notions of economy "cannot supersede statutory limits on the bankruptcy courts' jurisdiction." *Remington*, 180 B.R. at 375. Section 1334 renders Whitney's third party complaint beyond this Court's jurisdiction.[1]

2.

[1]Whitney submitted that its complaint is a core proceeding. This Court's finding that the proceeding is not within the scope of bankruptcy jurisdiction means that it is also not core. *In re Toledo*, 170 F.3d at n.6 (by definition all core proceedings are within the bankruptcy court's jurisdiction); *Official Creditors' Committee v. International Ins. Co. (In re Pettibone Corp.)*, 135 B.R. 847, 851 (Bankr. N.D. Ill. 1992) (discussion of whether core jurisdiction exists is irrelevant when § 1334 jurisdiction is lacking because § 157 is not an independent source of jurisdiction). The core/non-core distinction relates to whether a bankruptcy court may enter final orders or judgments in proceedings referred to it or may only submit proposed findings to the district court. 28 U.S.C. § 157. By definition, if a bankruptcy court lacks subject matter jurisdiction over a controversy, the matter cannot be a core proceeding.

In actions over which district courts have original jurisdiction, they have "supplemental jurisdiction over all other claims that are so related to claims in the action . . . that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Whitney contends that its third party proceeding is "so related" to the trustee's adversary proceeding (over which this Court has jurisdiction) that this Court can exercise supplemental jurisdiction over it.

A bankruptcy court may only hear cases referred to it by the district court pursuant to 28 U.S.C. § 157. The district court may only refer proceedings "arising under title 11 or arising in or related to a case under title 11," i.e., proceedings in which bankruptcy jurisdiction exists. 28 U.S.C. § 157(a). There is no statute enabling district courts to refer to bankruptcy court proceedings in which subject matter jurisdiction is based on 28 U.S.C. § 1367(a). Section 1367 applies only to district courts, not bankruptcy courts. *Walker*, 51 F.3d at 572-573; *Adams v. Prudential Securities, Inc. (In re Foundation for New Era Philanthropy)*, 201 B.R. 382 (Bankr. E.D. Pa. 1996); *Remington Development*, 180 B.R. at 372-374; *see also Chrome Plate, Inc. v. District Director of Internal Revenue*, 442 F. Supp. 1023, 1025-1026 (W.D. Tex. 1977) (holding statute in which United States has waived sovereign immunity and consented to be sued for tax refunds applies only to district courts, not bankruptcy courts). This Court does not have § 1367 jurisdiction over Whitney's complaint.

In conclusion, the Court finds that the subject matter of Whitney's complaint is not within the bankruptcy jurisdiction granted district courts in 28 U.S.C. § 1334 and it therefore cannot be heard by this Bankruptcy Court. Whitney is free to pursue its action against PBA in a forum that has jurisdiction over its subject matter. The motion of PBA to dismiss the complaint against it is due to be granted based upon a lack of subject matter jurisdiction. Because the

Court is granting relief on this ground, the other four grounds under which PBA alleges the case could be dismissed are not discussed.

THEREFORE IT IS ORDERED AND ADJUDGED that the third party complaint of Whitney National Bank against PBA Financial Corporation is DISMISSED.

Dated: November 22, 1999

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE