

2011 WL 7645816

Only the Westlaw citation is currently available.
United States Bankruptcy Court, S.D. Alabama,
Mobile Division.

In re Valeria Jane SMALL, Debtor.

Valeria Jane Small, Plaintiff,

v.

Seterus, Inc. f/k/a IBM Lender Business
Process Services, Federal National Mortgage
Association and Chase Home Finance, Defendant.

Bankruptcy No. 11–00384.

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Adversary No. 11–00169.

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Nov. 22, 2011.

Attorneys and Law Firms

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[Donald J. Stewart](#), Mobile, AL, for Chase Home Finance.

REPORT AND RECOMMENDATION ON PLAINTIFF'S MOTION TO WITHDRAW THE REFERENCE OF THIS CASE

[MARGARET A. MAHONEY](#), Chief Bankruptcy Judge.

*1 This matter is before the Court on the Plaintiff's motion to withdraw the reference of the District Court. The Plaintiff argues that, pursuant to 11 U.S.C. § 157(d), the allegations set forth in her complaint compel resolution of this matter in the United States District Court. For the reasons discussed below, this Court agrees that the reference should be withdrawn.

This adversary proceeding stems from a pre-petition mortgage loan that the Plaintiff entered into in January of 2007. In general, the Plaintiff claims that the Defendants mishandled the servicing and modification of her home loan, ultimately resulting in the commencement of foreclosure proceedings. The Plaintiff filed for Chapter

13 bankruptcy protection on February 2, 2011 and alleges that a foreclosure sale of her home was scheduled for February 3, 2011. She asserts six causes of action against the Defendants: (1) wrongful foreclosure, (2) negligence, (3) wantonness, (4) breach of fiduciary duty, (5) defamation, and (6) breach of the mortgage agreement. As to the first five causes of action, the Plaintiff seeks compensatory and punitive damages, along with associated costs. As to her breach of the mortgage agreement count, the Plaintiff demands compensatory damages, costs, and an interest award.

[28 U.S.C. § 157\(d\)](#) contains a mandatory and a permissive provision. A District court *must* withdraw “a proceeding if the court determines that resolution of the proceedings requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce .” Mandatory withdrawal is only compelled if “the current proceeding could not be resolved without substantial and material consideration of the non-Code federal law.” *Abrahams, et al. v. Phil-Con Services, LLC*, 2010 WL 4875581, at *2 (S.D.Ala. November 23, 2010) (quoting *In re Vicars Insurance Agency, Inc.*, 96 F.3d 949, 952 (7th Cir.1996)). Indeed, “significant interpretation of the non-Code statute must be required.” *Id.*

A District court *may* withdraw the reference “for cause shown .” “In making this discretionary determination, courts generally consider (1) advancing uniformity in bankruptcy administration, (2) decreasing forum shopping and confusion, (3) promoting the economical use of the parties' resources, (4) facilitating the bankruptcy process, (5) whether the claims are core or non-core, (6) whether there has been a jury demand, and (7) the prevention of delay.” *BankUnited Financial Corp. v. F.D.I.C.*, 436 B.R. 216, 220 (S.D.Fla.2010) (citing *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998 (5th Cir.1985)).

Additionally, the United States Supreme Court's recent decision in *Stern v. Marshall*, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), guides the instant analysis. In that case, the Supreme Court held that a bankruptcy court lacked constitutional authority to enter a final and binding order as to a state law counterclaim asserted by the debtor in her bankruptcy case. At a minimum, the *Stern* decision calls into question this bankruptcy court's authority to enter a

final order with regard to causes of action that are non-core and not integral to the bankruptcy case.

*2 Here, the Plaintiff asserts six pre-petition causes of action that find their basis in state law. With that in mind, this Court finds that withdrawal of the reference is not compelled by § 157(d) because the resolution of the Plaintiff's complaint does not require substantial and material interpretation of non-bankruptcy federal law. However, withdrawal is likely mandatory under *Stern v. Marshall*. Plaintiff's claims are non-core, state law claims that are not integral to the bankruptcy case. Plaintiff's suit is not a claim against the estate. Rather, any recovery by the Plaintiff would become an asset of the estate. The *Stern* decision counsels that this Court cannot enter a final judgment as to those claims.

Further, permissive withdrawal is appropriate in this case. The Plaintiff demands a jury trial as to every count alleged and seeks compensatory and punitive damages. The Plaintiff has the right to seek a jury trial as to her claims and this Court does not, at present, have the authority to try jury trial matters. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). This Court finds sufficient cause to withdraw the reference based on the nature of the Plaintiff's causes of action, request for a jury trial, and requested relief.

The District Court could also conclude that abstention from the matters might be appropriate pursuant to 28 U.S.C. § 1334(c)(2). That section provides that a proceeding based upon "state law claim[s] or state law

cause[s] of action" that could not have been brought in federal court without bankruptcy court jurisdiction may be subject to abstention.

This Court has the present ability and constitutional authority to handle all discovery and pretrial issues up to the point of trial. If the matter cannot be resolved, through settlement or otherwise, during that pretrial period, this Court recommends that the District Court withdraw the reference at that time in order to conduct a jury trial regarding Plaintiff's six causes of action.

Therefore, this Court REPORTS and RECOMMENDS that

1. All discovery and pretrial matters as to Plaintiff's six causes of action be handled by this Court.
2. If the case is not resolved prior to trial, this Court will report and recommend to the District Court that it withdraw the reference as to the Plaintiff's six causes of action.
3. If the District Court does not abstain from this matter and orders this Court to handle all pretrial matters, a pretrial conference on the issues involved in the Plaintiff's six causes of action, including any pending motions, shall be held on February 28, 2012 at 8:30 am.

All Citations

Not Reported in B.R., 2011 WL 7645816