IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re:

Case No. 23-12227

Whitson Builders LLC,

Debtor.

John David Thomas, et al.,

Plaintiffs,

v.

Adversary Case No. 24-1022

Hancock Whitney Bank, et al.,

Defendants.

ORDER REMANDING CASE

Defendant Hancock Whitney Bank removed a state court action to this court on May 7, 2024. The state court plaintiffs – John David Thomas, Lisa West Thomas, and Elizabeth H. Perry ("the plaintiffs") – filed a motion to remand or abstain (doc. 17). Defendants Hancock Whitney Bank ("Hancock") and Triad Financial Services, Inc. ("Triad") oppose abstention or remand. The other state court defendants have not taken a position. Debtors John Whitson and Whitson Builders LLC are not parties to the state court action, and the chapter 7 trustee for the Whitson and Whitson Builders bankruptcies has stated that he does not have a position on remand.

The motion has been fully briefed and the court has reviewed the submissions of the parties and also heard the oral argument of counsel. For the reasons discussed below, the court grants the motion and remands this action to the state court.

Background

In August and September 2023, several creditors – including Hancock and Triad – filed chapter 7 involuntary petitions against John Whitson (the owner of Whitson Builders) and Whitson Builders. Orders for relief were eventually entered, and Parker Sweet has been appointed as the chapter 7 trustee in both cases.

On March 30, 2024, the plaintiffs filed a 38-page complaint (included as part of doc. 1-2 in this removed action[1]) in the Circuit Court of Baldwin County, Alabama, and demanded a jury trial. The defendants in the state court case are Hancock; Triad; Brennan Edward Whitson; Dustin M. Blount; Justice Lovell; JDX Construction, LLC; Jennifer Whitson; and Rebecca McKeithen Whitson. The plaintiffs allege "a fraudulent scheme and conspiracy deliberately perpetrated by building contractor and modular home installer John Edward Whitson, Whitson Builders, LLC, Brennan Edward Whitson, Dustin M. Blount, and the other Defendants."[2] (*See* compl. ¶2). They further allege that Hancock knowingly participated in this scheme, which resulted in substantial losses to the plaintiffs. (*See id.*).

According to the complaint, Hancock managed the escrow and operating account of Whitson Builders, and the plaintiffs allege that Hancock and the other "[d]efendants were acting as fiduciaries for" them. (*See id.*, ¶¶ 5, 78-79, 88). Plaintiffs John and Lisa Thomas claim that the money they invested to pay for the construction of a home "was paid out, used up, or wire transferred to [d]efendants or on their behalf for their own personal and business use or to pay

[1] The state court complaint is also attached to the notice of removal (doc. 1) as doc. 1-3.

[2] To the extent the court quotes or otherwise discusses the allegations of the state court complaint in this "background," this section should not be considered findings of fact. Rather, it is context for the legal discussion that follows.

debts owed for other jobs or loans made in a classic pyramid or 'rob Peter to pay Paul' scheme." (*See id.*, ¶36). Plaintiff Elizabeth Perry similarly claims that she paid a deposit of over $100,000 for a home that was never built. (*See id.*, ¶¶ 58-75). According to the plaintiffs, Triad was the beneficiary of some of these payments "for loans on floorplans for modular homes purchased by Whitson Builders for customers." (*See id.*, ¶31; *see also id.,* ¶¶ 44-48, 79, 105, 120).

The complaint includes no federal causes of action. Stated in general terms, the causes of action are for

- negligence and gross negligence against Hancock related to the handling of funds in the Whitson Builders accounts (counts 1 and 2);
- negligence, gross negligence and negligence per against the other defendants for violations of Alabama statutory and regulatory obligations related to home builders, as well as representations made about the construction of the plaintiffs' homes (count 3);
- aiding and abetting fraud and aiding and abetting conversion against all defendants related to alleged misappropriation of funds provided by the plaintiffs for the construction of their homes (counts 4 and 5);
- fraudulent misrepresentation, concealment, and suppression, including promissory fraud, against all defendants related to promises to provide homes for the plaintiffs, which promises the defendants never intended to perform and/or worked together not to perform (count 6);
- innocent misrepresentation against all defendants related to representations about the safeguards of the accounts at Hancock (count 7);
- breach of contract against all defendants related to the contracts to build their homes (count 8); and
- unjust enrichment against all defendants for wrongful appropriation, retention, and/or possession of the funds paid by the plaintiffs for their homes, which were never built (count 9).

Mr. Sweet, as chapter 7 trustee, appeared at hearing on the motion to remand and stated that he did not intend to pursue any of the state court claims on behalf of the estate, even if he

ultimately determined that some claims were property of the estate (such as those related to transfer of funds out of the Whitson Builder accounts). The plaintiffs do not consent to the entry of a final order or judgment by the bankruptcy court in this adversary proceeding. (*See* doc. 16).

Conclusions of Law

A bankruptcy court can abstain from hearing a removed action. Abstention is either "mandatory" or "permissive" depending on whether the removed action constitutes a "core" proceeding. *See* 28 U.S.C. § 1334(c). The court may permissively abstain "upon request of a party or *sua sponte*." *See Owens v. Dyken*, No. 1:20-00297-KD-B, 2023 WL 4002478, at *14 (S.D. Ala. June 14, 2023) (citation and quotation marks omitted); *In re Orlando Gateway Partners, LLC*, 555 B.R. 848, 853 (Bankr. M.D. Fla. 2016). In addition, a bankruptcy court can remand an action to the state court from which it has been removed because of bankruptcy "on any equitable ground." *See* 28 U.S.C. § 1452. Mandatory abstention, permissive abstention, and remand are all warranted here.

I. Mandatory abstention is required under 28 U.S.C. § 1334(c)(2).

Mandatory abstention applies if

1. The claim has no independent basis for federal jurisdiction, other than § 1334(b), which provides for nonexclusive jurisdiction of cases "arising under title 11, or arising in or relating to cases under title 11[;]"

2. The claim is a non-core proceeding; that is, it is related to a case under title 11 but does not arise under or arise in a case under that title;

3. An action has been commenced in state court; and

4. The action could be timely adjudicated in state court.

See Vision Bank v. Platinum Invs., L.L.C., No. 11-00093-KD-B, 2011 WL 2144547, at *3 (S.D. Ala. May 11, 2011).

There does not appear to be a dispute that the state law claims have no independent basis for federal jurisdiction, other than 28 U.S.C. § 1334(b), and the court finds that no independent basis exists. Hancock argues in its brief (doc. 27) that the plaintiffs have not met their burden to show that this is a non-core proceeding and that the actions can be timely adjudicated in state court. It also argues that "mandatory abstention does not apply where the removed action was commenced after the filing of the bankruptcy." (Hancock br., doc. 27, at p.3). This court does not agree.

First, the court finds that this proceeding is "related to" the pending involuntary bankruptcies but is not core. A proceeding is "core" if it is included in the list set forth in 28 U.S.C. § 157(b)(2); "if the proceeding involves a right created by the federal bankruptcy law[;]" or "if the proceeding is one that would arise only in bankruptcy." *See In re Electric Mach. Enters., Inc.*, 479 F.3d 791, 797 (11th Cir. 2007) (citations, quotation marks, and brackets omitted).

Hancock originally stated that the plaintiffs' state law claims were non-core (*see* notice of removal, doc. 1, ¶5), but Hancock and Triad now take the opposite position. The plaintiffs' claims do "not invoke a substantive right created by the federal bankruptcy law" and those claims could and do "exist outside of bankruptcy." *See In re Electric Mach. Enters.*, 479 F.3d at 797. However, the creditors argue that the resolution of the state law claims will affect their proofs of claim in the bankruptcies of John Whitson and Whitson Builders; thus, they contend

that the state law claims are core under 28 U.S.C. §§ 157(b)(2)(A) and/or (B) ("Core proceedings include . . . matters concerning the administration of the estate; allowance or disallowance of claims against the estate . . . . ."). For example, Hancock argues that if the plaintiffs succeed in their "claims against the [d]efendants in this case, those [d]efendants will have the right to asset [*sic*] indemnity claims against the [d]ebtors, which will have an effect on the administration of the bankruptcy proceedings." (*See* Hancock br., doc. 27, ¶22). But "[i]t is well established that [a] matter is not a 'core' proceeding merely because the resolution of the action may result in more or less assets in the estate." *See In re Talisman Marina, Inc.*, 385 B.R. 338, 341 (Bankr. M.D. Fla. 2008). And any contingent indemnity claim that Hancock or Triad may have against one or both debtors "does not support core jursidiction[,]" only non-core or "related to" jurisdiction. *See In re AOG Ent., Inc.*, 569 B.R. 563, 576-78 (Bankr. S.D.N.Y. 2017). In short, the creditors' argument for core jurisdiction over the state law claims is too tenuous. *See, e.g.*, *Lead I JV, LP v. N. Fork Bank*, 401 B.R. 571, 582 (E.D.N.Y. 2009).

Second, while the Bankruptcy Code does not define "timely adjudication," "[c]ourts interpreting this phrase have not focused primarily on when the case would be tried but rather on whether allowing an action to proceed in state court will have any unfavorable effect on the administration of the bankruptcy case." *See In re United Container LLC*, 284 B.R. 162, 174 (Bankr. S.D. Fla. 2002). "[C]onvincing proof that the case will be tried sooner in the state court than in federal court" is not what is required. *See Lennar Corp. v. Briarwood Cap. LLC*, 430 B.R. 253, 265 (Bankr. S.D. Fla. 2010). Rather, courts consider

> (1) backlog of the state court and federal court calendar; (2) status of the proceeding in state court prior to being removed (i.e., whether discovery had been commenced); (3) status of the bankruptcy case; (4) the complexity of the issues to be resolved; (5) whether the parties consent to the bankruptcy court entering

> judgment in the non-core case; (6) whether a jury demand has been made; and whether the underlying bankruptcy case is a reorganization or liquidation case.

In re SOL, LLC, 419 B.R. 498, 507 (Bankr. S.D. Fla. 2009) (citation and quotation marks omitted).

"With bankruptcy administration being the primary focus, the nature of the bankruptcy case becomes the single most important factor to consider." *Id.* at 507-08. For chapter 7 cases like those here, "where the primary concern is the orderly accumulation and distribution of assets, the requirement of timely adjudication is seldom significant." *See id.* at 508 (citation and quotation marks omitted); *see also Fed. Home Loan Bank of Atlanta v. Countrywide Sec. Corp.*, No. 1:11-CV-489-TWT, 2011 WL 1598944, at *3 (N.D. Ga. Apr. 22, 2011).

Although no discovery has been conducted in the state court proceeding, "[a]ll of the issues are state court issues that can be resolved by the state court." *See In re SOL*, 419 B.R. at 508. The plaintiffs have demanded a jury trial and have not consented to this court's entry of a final judgment. *See id.*. It is unclear whether this case could be resolved more quickly in this court, which cannot conduct a jury trial under the local order of reference (discussed in the section below) and cannot enter a final order since not all parties have consented.

Finally, while some courts require that the state court case have been commenced and pending before the bankruptcy for mandatory abstention to apply, "[t]his interpretation of [§] 1334(c)(2) reads a requirement into the statute which plainly does not exist." *See In re Midgard Corp.*, 204 B.R. 764, 778 n.16 (B.A.P. 10th Cir. 1997). This is especially true here where the two objecting parties – Hancock and Triad – controlled the timing of the underlying bankruptcies, which they initiated by filing involuntary chapter 7 petitions.

II. Permissive abstention is appropriate under 28 U.S.C. § 1334(c)(1).[3]

Under 28 U.S.C. § 1334(c)(1), abstention is permissive "in the interest of justice" or "in the interest of comity with State courts or respect for State law . . . ." Factors include:

1. The effect of abstention on the efficient administration of the bankruptcy estate;

2. The extent to which state law issues predominate;

3. The difficulty or unsettled nature of the applicable law;

4. The presence of a related proceeding commenced in state court;

5. The basis of bankruptcy jurisdiction, 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 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;

8. The burden on the bankruptcy court's docket;

9. The likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

10. The existence of a right to a jury trial; and

11. The presence in the proceeding of non-debtor parties.

In re Taylor Agency, Inc., 281 B.R. 94, 98-99 (Bankr. S.D. Ala. 2001); *see also In re SOL*, 419 B.R. at 508-10.

Even if mandatory abstention is not required, the factors for permissive abstention weigh heavily in favor of abstention. There is no independent basis for federal jurisdiction. While

[3] The court's decision to permissively abstain "is not reviewable by appeal or otherwise by the court of appeals . . . ." *See* 28 U.S.C. § 1334(d). Likewise, the court's decision to remand "is not reviewable by appeal or otherwise by the court of appeals . . . ." *See* 28 U.S.C. § 1452(b).

Hancock and Triad may not be "forum shopping" per se, they were the ones who instituted the bankruptcies – not the debtors. In other words, if the creditors had not filed the involuntary petitions, these claims would never have been in bankruptcy court. The claims are purely state law claims, which the state court is better equipped to handle. The plaintiffs have a right to a jury trial and requested one in state court. Even if the defendants consented to a jury trial in this court, this district's standing order of reference for bankruptcy matters (available at https://www.alsd.uscourts.gov/general-orders-court) does not allow this court to conduct a jury trial. *See* 28 U.S.C. § 157(e) (district court must authorize jury trial by bankruptcy court and all parties must expressly consent). There are many non-debtor parties to the state court litigation; the debtors are not parties and will not be parties unless this court lifts the automatic stay (unlikely in the absence of insurance coverage).

Hancock argues that resolution of the state court claims "will affect the efficient administration of" the bankruptcy estates. (*See* Hancock br., doc. 27, ¶22). But the chapter 7 trustee specifically stated at the remand hearing that he does not intend on behalf of the respective bankruptcy estates to pursue any of the claims made in the state court case. *See In re SOL*, 419 B.R. at 508. And, as with the mandatory abstention analysis above, the court finds that any potential indemnity claims by Hancock or Triad are not enough for this court to exercise its jurisdiction over the state law claims. The court likewise rejects the other arguments by Hancock and Triad for the court to exercise jurisdiction over those claims.

III. If the court is incorrect on its views on abstention, an alternative ground for returning this matter to state court exists in the form of remand under 28 U.S.C. § 1452.

The factors for permissive abstention and remand largely overlap. *See Vision Bank v. Platinum Invs.*, 2011 WL 2144547, at *4; *In re SOL*, 410 B.R. at 510 (permissive abstention and remand criteria "are virtually identical."). The same reasons for permissive abstention also support remand in this case. *See In re Coleman*, 200 B.R. 403, 406 (Bankr. S.D. Ala. 1996); *see also In re Taylor Agency*, 281 B.R. at 98-99.

Conclusion

To the extent the court has not specifically addressed any of the arguments in opposition to remand and abstention made in the parties' filings or at oral argument, it has considered them and determined that they would not alter this result. The court grants the motion remand or abstain and remands this adversary proceeding to the Circuit Court of Baldwin County for further proceedings. The plaintiffs' request for attorney's fees is denied. *See Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 140-41 (2005).

Dated: October 22, 2024

HENRY A. CALLAWAY
U.S. BANKRUPTCY JUDGE