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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	)	CHAPTER 11
	)	
OMNA MEDICAL PARTNERS, INC., et al.,	)	Case No. 00-1493 (MFW) through 00-1508 (MFW)
	)	
Debtors.	)	(Jointly Administered Under Case No. 00-1493 (MFW))
OMNA MEDICAL PARTNERS, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. No. A00-439 & A00-550
	)	
CARUS HEALTHCARE, P.A. et al.,	)	
	)	
Defendants.	)	
	)	

OPINION[1]

Before the Court is the Motion of Carus Healthcare, P.A. and certain doctors associated with it (collectively "Carus" or "the Defendants") for abstention, dismissal, or transfer of venue of two adversary actions brought against the Defendants by OMNA Medical Partners, Inc. ("the Debtor"). The First Adversary Proceeding was commenced by the Debtor seeking to extend the automatic stay to enjoin a suit commenced in Texas by Carus and two of its member doctors against the Debtor and five of its present and former officers and/or directors ("the Carus Texas litigation"). The Second Adversary Proceeding was instituted by

[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

the Debtor against the Defendants asserting that the Defendants have breached the Management Services Agreement ("the MSA") executed pre-petition by the parties. For the reasons set forth below, we grant the Motion.

I. BACKGROUND FACTS

Prior to the filing of its chapter 11 case on March 24, 2000, the Debtor and Carus were parties to the MSA which was effective November 1, 1997. A dispute arose which resulted in the Debtor giving notice, on March 7, 2000, that Carus was in breach of the MSA, that the MSA was terminated and that the Debtor would seek to enforce its termination rights under the MSA. The Debtor subsequently commenced an action in Texas to foreclose on collateral in which the Debtor asserted an interest pursuant to the MSA ("the OMNA Texas litigation"). Carus responded by filing the Carus Texas litigation against the Debtor and five of its current and former officers and directors seeking to enjoin the foreclosure. An ex parte temporary restraining order was entered on March 17, 2000, in the Carus Texas litigation. Upon the expiration of the Texas TRO, the Debtor foreclosed on the collateral. The Texas court has stayed any further proceedings in the Carus Texas litigation in light of the filing of the Debtor's bankruptcy proceeding on March 24, 2000.

On the day it filed its bankruptcy proceeding, the Debtor also commenced the First Adversary Proceeding against Carus and two of the doctor Defendants seeking to extend the automatic stay to cover the directors and officers named in the Carus Texas litigation. An order was entered granting that relief on April 5, 2000, which was extended by agreement of the parties first until May 15, 2000, and then until a decision can be rendered on the instant Motion.

On April 20, 2000, the Debtor commenced the Second Adversary Proceeding by which it sought to enforce its contractual rights under the MSA. In that proceeding the Debtor sought turnover of the accounts receivable pursuant to section 542 of the Bankruptcy Code, enforcement of its rights under the MSA pursuant to section 365 of the Bankruptcy Code and enforcement of the automatic stay under section 362 of the Bankruptcy Code by enjoining Carus's interference with the accounts receivable and other property of the Debtor.

II. DISCUSSION

Carus' Motion seeks mandatory or discretionary abstention, dismissal pursuant to Fed. R. Civ. P. 12(b)(3) or (6) or, alternatively, transfer of venue of the First and Second Adversary Proceedings to the Texas court for resolution in

connection with the pending Texas litigation. The Debtor opposes the Motion.

A. Mandatory Abstention

Abstention by the Bankruptcy Court is mandatory under 28 U.S.C. § 1334(c) if the matter is non-core and the proceeding is commenced and can be timely adjudicated in a state court. Carus asserts that the Adversary Proceedings are non-core as the dispute is simply a contract issue, governed by state law. Carus notes that the issues which the Debtor seeks to litigate in the Second Adversary are essentially the same issues that Carus raised in its Texas litigation: the respective rights of the parties under the MSA.

The Debtor disagrees asserting that the First Adversary Proceeding is clearly core, since it could not have been brought in the absence of the bankruptcy filing. That proceeding seeks to extend the automatic stay to the officers and directors under section 105 of the Bankruptcy Code. We agree with the Debtor that the First Adversary is core.

The Debtor asserts that the Second Adversary is also core because it seeks a turnover of property of the estate (the accounts receivable) under section 542 of the Bankruptcy Code. The Debtor further emphasizes that its entitlement to the accounts receivable is derived from language in the MSA which is

identical to language in all its other contracts and, therefore, a decision in this adversary could have profound effects on its bankruptcy case generally.

We agree with the Debtor that this Court has exclusive jurisdiction over property of the estate, wherever located. 28 U.S.C. § 1334(e). This also vests the Bankruptcy Court with jurisdiction to determine what is property of the estate and to decide competing interests in property which is alleged to be property of the estate. See, e.g., In re Marcus Hook Dev. Park, Inc., 943 F.2d 261, 267 (3d Cir. 1991)(determination of extent or validity of lien on property of the estate is core); Pension Benefit Guaranty Corp. v. Continental Airlines, Inc., 138 B.R. 442, 445 (D. Del. 1992)(determination of what is property of the estate is core); In re Jartran, Inc., 87 B.R. 525, 527 (N.D. Ill. 1988)(an action to determine the extent, nature, and priority of a creditor's claim is core).

The Second Adversary Proceeding does raise issues regarding the ownership of the accounts receivable and other property which the Debtor asserts is property of the estate. Thus, we conclude that it is core. To the extent the First and Second Adversary Proceedings raise core issues, mandatory abstention is not warranted. See, e.g., In re Ben Cooper, Inc., 924 F.2d 36, 38 (2d Cir.), cert. denied, 500 U.S. 928 (1991)(mandatory abstention does not apply to core matters).

B. Discretionary Abstention

Carus asserts alternatively that the doctrine of discretionary abstention under 28 U.S.C. § 1334(c)(1) militates in favor of abstaining from considering the issues raised in the Adversary Proceedings.

Courts have previously identified twelve factors relevant to the abstention decision:

> In determining whether abstention is appropriate under section 1334(c)(1), courts consider the following factors: (1) the effect or lack thereof on the efficient administration of the estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy 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 the 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 the enforcement left to the bankruptcy court; (9) the burden of the 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 Continental Airlines, Inc., 156 B.R. 441, 443 (Bankr. D. Del. 1993); In re Total Technical Services, Inc., 142 B.R. 96, 100-01 (Bankr. D. Del. 1992)(citations omitted).

Applying those factors to the issues raised by the Second Adversary Proceeding, we find that most favor abstention. First,

the efficient administration of the bankruptcy estate will not be disrupted by litigating these issues in the state courts. The Debtor asserts that the issues raised by the Carus Texas litigation are common to issues which may be raised by other practice groups since the MSAs are virtually identical. Thus, the Debtor argues that a decision in the Carus Texas litigation could have profound effects on the Debtor's successful reorganization which is dependent on the Debtor's rights under the MSAs. Therefore, the Debtor argues that the efficient administration of the bankruptcy estate mandates that these issues be litigated in this Court.

However, there is a significant difference between the Carus MSA and the others which this Court will be called upon to adjudicate: the Carus agreement was terminated pre-bankruptcy (by the Debtor). Thus, it is not an executory contract like the other MSAs. Nor does the Debtor contemplate reorganizing around its relationship with the Carus Group, as it does with respect to the other doctor groups with whom it still has an existing contractual relationship. The Carus litigation involves only what the respective rights of the parties are under the now-terminated MSA. In contrast, the other MSAs will require consideration of whether they should be assumed or rejected under section 365, as well as their impact on confirmation of the Debtor's Plan.

State law issues obviously dominate the subject matter of the Texas litigation. While the Debtor seeks to characterize the issues as bankruptcy issues (turnover under section 542 of the Bankruptcy Code, enforcement of the automatic stay and rights in an executory contract under section 365), the issues are simply contract interpretation issues and are, by the terms of the contract, governed by Texas law. Thus, there are no uniquely bankruptcy issues that need be decided in this Court.[2] While we are not aware that there are any unsettled or difficult state law questions involved, we believe that the state court is the better forum to make that determination, if there are.

There are state court proceedings already commenced, one by the Debtor itself which it has continued to prosecute post-petition. While the Carus Texas litigation has not significantly progressed, because of the pendency of the automatic stay, the OMNA Texas litigation has. It is fundamentally unfair to allow the Debtor to proceed with state court litigation, but not to allow the Defendants to proceed with related litigation. See, e.g., Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446 (3d Cir. 1982)(permitting debtor to proceed with its appeal while appeal of the same case by creditor is stayed would be unfair).

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[2] This is in contrast to the non-terminated MSAs because the parties' rights under them may be modified by the Bankruptcy Code. See 11 U.S.C. §365.

The Debtor asserts that jurisdiction lies in this Court because this is a proceeding to determine the extent or validity of an interest of Carus in property of the Debtor. While it is true that we have jurisdiction, the Texas court also has jurisdiction. Further, the Texas court apparently has jurisdiction over all the parties to the litigation, debtor and non-debtor. Since the Texas court can determine the rights of all parties under the allegedly terminated MSA, we believe it is appropriate to allow it to do so. To the extent that the Texas litigation results in a determination that the Debtor is the owner of the disputed accounts receivable and other property, the Texas court has available process for enforcement of those rights. This will allow a speedier vindication of the Debtor's rights than the bifurcated process of litigation in this Court and enforcement through state process. (This is, no doubt, why the Debtor sought, even post-petition, to enforce its rights in the property in the Texas state court.) Conversely, to the extent that the Texas litigation results in the determination of a claim by Carus against the Debtor, any enforcement of that claim will still be subject to the automatic stay and to distribution in these bankruptcy proceedings in accordance with the Bankruptcy Code. Thus, it is feasible (and in fact preferable) to allow the state court to conclude the cases before

it, leaving for this Court only a determination as to the distribution, if any, to which Carus is entitled under the Code.

While we make no determination that the filing of either Adversary Proceeding was an attempt to forum shop by the Debtor, it is significant that the Debtor agreed that all issues under the MSA would be determined in the Texas courts. (See MSA at §15.1.) Forum selection clauses are presumptively valid and enforceable, absent compelling public policy considerations or serious inconvenience to the parties. See, e.g., M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10 (1972); In re Diaz Contracting, Inc., 817 F.2d 1047 (3d Cir. 1987); Coastal Steel Corp. v. Tilgman Wheelabrator, Ltd., 709 F.2d 190, 202 (3d Cir.), cert. denied, 364 U.S. 938 (1983). Like the instant case, both Diaz and Coastal Steel involved adversary proceedings brought by a debtor in possession to collect damages for breach of a pre-petition contract. Diaz, 817 F.2d at 1049 n.1; Coastal Steel, 709 F.2d at 193. In the Diaz case the debtor argued unsuccessfully that the forum selection clause should not be enforced because of the bankruptcy law policy to consolidate all issues relating to a debtor's property in one forum and the significant expense if the debtor, which was in perilous financial straits, was required to litigate the issue in a different forum. Diaz, 817 F.2d at 1051. Similarly, we find the Debtor's arguments here unpersuasive.

Since the Debtor has already availed itself of the Texas court on this issue, it cannot contend that Texas is not a convenient forum. The Debtor chose to enforce its rights under the terminated MSA in the Texas court both pre-petition and post-petition. The Debtor should not legitimately have expected that it could use the Texas court to enforce its rights under the terminated agreement, while depriving the Defendants of the concomitant right to enforce their rights under that same agreement in the same court. Nor, for the reasons stated above, does the public policy behind the Bankruptcy Code mandate that these issues be tried here. They are not so central to this reorganization as to overcome the presumptively valid forum selection clause to which the parties agreed.

The right to a jury is not implicated. The Texas litigation does involve nondebtor parties, the former and current officers and directors of the Debtor, as well as, obviously the Defendants. While we entered a preliminary injunction of the action against the officers and directors in the First Adversary Proceeding, it is appropriate to vacate that Order now to permit all the related actions in Texas to proceed. We will also grant relief from the stay, to the Defendants as well as the Debtor, to permit the parties to fully litigate the issues raised in the state court proceedings to the extent articulated above. See, St. Croix, 682 F.2d at 449, n.2.

C. Transfer of Venue

The Defendants alternatively request dismissal or transfer of venue of the Adversary Proceedings pursuant to 28 U.S.C. §1404(a) or §1412. Because we have determined to abstain from deciding the Adversary Proceedings, it is not necessary for us to decide these arguments.

III. CONCLUSION

For the foregoing reasons, the Defendant's Motion is granted in part and we will abstain from hearing the First and Second Adversary Proceedings.

An appropriate order is attached.

BY THE COURT:

Dated: June 12, 2000

Mary F. Walrath
United States Bankruptcy Judge

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CARUS HEALTHCARE, P.A. et al.,	)	
	)	
Defendants.	)	
	)	

O R D E R

AND NOW, this **12TH** day of **JUNE, 2000**, upon consideration of the Motion of Carus Healthcare, P.A. (“Carus”) and the other Defendants for abstention, dismissal, or transfer of venue of the above two adversary proceedings and the Response of the Debtor thereto, for the reasons set forth in the accompanying Opinion, it is hereby

ORDERED that the Motion to abstain is **GRANTED**; and it is further

ORDERED that the Order dated April 5, 2000, as previously extended by agreement of the parties is hereby **VACATED**; and it is further

ORDERED that the automatic stay is hereby **MODIFIED** to allow the parties to proceed with the Texas state litigation, provided

however, that the Defendants shall not be permitted to enforce any money judgment they may obtain against the Debtor or any judgment they may obtain against property of the Debtor's estate without further Order of this Court.

BY THE COURT:

Mary F. Walrath
United States Bankruptcy Judge

cc: See attached

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