

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
FORTRESS SYSTEMS, LLC,)
)
Debtor(s).) CASE NO. BK03-81735
FORTRESS SYSTEMS, LLC,) A04-8043
)
Plaintiff,) CH. 11
)
vs.)
)
UNEMED CORPORATION; DONALD)
MILLER; JONATHAN VENNERSTROM;)
JON WAGNER; DENNIS ROBINSON;)
SAM AUGUSTINE; BIOVANCE)
TECHNOLOGIES, INC.; and BOARD)
OF REGENTS OF THE UNIVERSITY)
OF NEBRASKA,)
)
Defendants.)

MEMORANDUM

This matter is before the court on the motion to abstain by defendants Augustine, Miller, Robinson, Vennerstrom, Wagner, Unemed Corporation, and Board of Regents of the University of Nebraska (Fil. #12), and on the motion to abstain by defendant BioVance Technologies, Inc. (Fil. #15). Donald Dworak represents the debtor, and Lawrence Sheehan represents the defendants. The motions were taken under advisement as submitted without oral argument. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A).

Chapter 11 debtor Fortress Systems filed this adversary proceeding against the defendants alleging misappropriation of proprietary scientific technology in violation of the Nebraska Trade Secrets Act, and asking for a permanent injunction against any further use and disclosure of the technology and an order directing certain of the defendants to transfer to the debtor all licenses, rights, and so forth in proprietary technology

developed from the disclosure of debtor's trade secret.

The defendants have moved for abstention pursuant to Federal Rule of Bankruptcy Procedure 5011 and 28 U.S.C. § 1334(c) and an order directing the debtor/plaintiff to pursue this action in state court, arguing that the adversary proceeding is based solely on an alleged violation of state statute, contains no federal question, is not a core proceeding, and will not affect the assets of the estate as no money damages are involved. No resistances were filed to the motions for abstention.

Under the statute governing jurisdiction of bankruptcy cases, the court may exercise permissive abstention under certain circumstances, and must exercise mandatory abstention under others. 28 U.S.C. § 1334(c).

The mandatory abstention portion of § 1334(c)(2) provides:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

If these elements exist, the court does not have jurisdiction to decide the proceeding. Transamerica Fin'l Life Ins. Co. v. Merrill Lynch & Co., Inc., 302 B.R. 620, 627 (N.D. Iowa 2003). In this case, although it does not appear that a state court action has been filed, the motions for abstention were timely filed, the cause of action (violation of a state statute) is completely based on and governed by state law, and it could not otherwise have been brought in federal court as it involves no federal question or diversity of citizenship.

Moreover, the issue does not appear to be a core proceeding. Civil proceedings in a bankruptcy case are divided into two categories, core proceedings and non-core related proceedings. Core proceedings under 28 U.S.C. § 157 are those which arise only in bankruptcy or involve a right created by federal bankruptcy law, while non-core related proceedings are those which do not invoke a substantive right created by federal

bankruptcy law and could exist outside of a bankruptcy, although they may be related to a bankruptcy. Specialty Mills, Inc. v. Citizens State Bank, 51 F.3d 770, 773-74 (8th Cir. 1995) (citations omitted).

In this case, there is no cause of action that arises only because of the bankruptcy case or involves rights created by bankruptcy law. The bankruptcy overlay to the case produced by the debtor's Chapter 11 filing does not turn this into a core proceeding.

Even if this case is not suitable for mandatory abstention, 28 U.S.C. § 1334(c)(1) authorizes permissive abstention:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

The factors to be considered include:

- (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention,
- (2) the extent to which state law issues predominate over bankruptcy issues,
- (3) the difficult or unsettled nature of the applicable 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 enforcement left to the bankruptcy court,
- (9) the burden on the bankruptcy court's docket,
- (10) the likelihood that the commencement of the proceeding 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 non-debtor parties.

Williams v. Citifinancial Mortgage Co. (In re Williams), 256 B.R. 885, 894 (B.A.P. 8th Cir. 2001).

Again, the majority of these factors favor abstention in this case. The issue in the lawsuit is straightforward and is solely one of state law, and the case could not have been brought in federal court except for the debtor's bankruptcy filing. There is no evidence of forum-shopping, or that a speedier resolution is possible in this court than in the state court. The matter is not a core proceeding. All of the defendants are non-debtor parties and do not appear to be involved in the bankruptcy case in any capacity. The issue of interpretation and application of the Nebraska Trade Secrets Act should be left to the state court.

For these reasons, the court will abstain from hearing this case under 28 U.S.C. § 1334(c)(2), or in the alternative, § 1334(c)(1). Separate order will be entered.

DATED: August 16, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
Donald Dworak
*Lawrence Sheehan
U.S. Trustee

Movant (*) is responsible for giving notice of this order to all other parties not listed above if required by rule or statute.

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ORDER

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IT IS ORDERED: The motions to abstain by defendants Augustine, Miller, Robinson, Vennerstrom, Wagner, UneMed Corporation, and Board of Regents of the University of Nebraska (Fil. #12) and by defendant BioVance Technologies, Inc. (Fil. #15) are granted. For the reasons stated in the Memorandum filed contemporaneously herewith, the court will abstain from hearing this case under 28 U.S.C. § 1334(c)(2), or in the alternative, § 1334(c)(1).

IT IS FURTHER ORDERED: This adversary proceeding is hereby dismissed. The debtor may pursue this litigation in state court.

DATED: August 16, 2004

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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