

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re:

Case Nos. 97-51164 and 96-55212

ABDULAHAD T. KATTULA,

Chapter 7

Debtor.

Judge Thomas J. Tucker

_____/

ABDULAHAD T. KATTULA, assignee of
RANDALL L. FRANK, CHAPTER 7
TRUSTEE OF THE ESTATE OF
ABDULAHAD T. KATTULA,

Plaintiff,

v.

Adv. Pro. No. 04-4981

K. JIN LIM, and KENNETH SCHNEIDER,
and SCHNEIDER, MILLER & LIM, P.C.,

[Former District Court Case
No. 2:04-cv-72880-RHC-SDP;
formerly assigned to Judge Cleland]

Defendants.

_____/

**RECOMMENDATION TO THE UNITED STATES DISTRICT COURT
THAT IT WITHDRAW THE REFERENCE IN THIS
ADVERSARY PROCEEDING**

For the reasons explained below, the undersigned bankruptcy judge, *sua sponte*, recommends to the United States District Court that it withdraw the reference previously made of this adversary proceeding, as permitted by 28 U.S.C. § 157(d), in order to conduct a jury trial of the Plaintiff's remaining claim in this adversary proceeding.

A. Background and Status of the Case.

The Plaintiff filed this action in the Wayne County Circuit Court. The Defendants removed the case to the United States District Court by filing a notice of removal on July 29, 2004. The case was assigned to United States District Judge Robert H. Cleland, Case No. 2:04-

cv-72880-RHC-SDP. By an order filed October 20, 2004, the district court referred this case to the bankruptcy court.

The case is now ready for a final pretrial conference and jury trial. The following is a brief description of proceedings that have occurred in the bankruptcy court to date. On March 7, 2005, this Court denied the Plaintiff's motion to remand the case to state court for lack of subject matter jurisdiction or to abstain, for the reasons stated in a bench opinion given on January 27, 2005 (*see* Tr. at Docket #13). Among other things, the Court concluded that it has subject matter jurisdiction under 28 U.S.C. §§ 1334(b) and 157(b)(1), and that this is a core proceeding under 28 U.S.C. § 157(b)(2).

On September 6, 2005, the Court granted in part and denied in part the Defendants' first motion for summary judgment, for reasons stated in a bench opinion given during the hearing held on August 17, 2005 (*see* Tr. at Docket #34). In this ruling, the Court granted summary judgment for Defendants on Plaintiff's legal malpractice claim (Count II), but denied summary judgment with respect to Plaintiff's claim for breach of fiduciary duty (Count I). The Defendants filed a second summary judgment motion, which the Court denied in a bench opinion given on June 23, 2006 and in an order filed the same date (Docket #74). (A transcript of this bench opinion is on file at Docket #91).

The Defendants moved to strike Plaintiff's jury demand, arguing that Plaintiff does not have a right to jury trial on his breach of fiduciary duty claim under the Seventh Amendment to the United States Constitution. In an Order filed January 5, 2007 (Docket #96) the Court denied

the motion, after concluding that Plaintiff does have a right to jury trial. This ruling is explained in a rather lengthy bench opinion given on January 4, 2007.¹

All discovery in this case is complete. A final pretrial order has not yet been entered. Under the most recent scheduling order, the case is scheduled for a final pretrial conference in the bankruptcy court on February 5, 2007, and a trial on March 13, 2007. These dates are, of course, subject to change if the district court withdraws the reference.

B. Reasons for the recommendation to withdraw the reference.

The recommendation to withdraw the reference is based upon the following:

(1) Plaintiff demanded a jury trial on all of his claims. This jury demand was contained in the Plaintiff's Complaint, filed in the state court before the case was removed.

(2) One of Plaintiff's two claims, namely Plaintiff's claim for damages against the defendants for breach of fiduciary duty, has survived two motions by the Defendants for summary judgment. As noted above, the Court has determined that Plaintiff has a right to a jury trial on his remaining claim.

(3) Although Plaintiff consents to the bankruptcy judge conducting the jury trial on the remaining claim, the defendants do not consent;² therefore, the bankruptcy judge cannot conduct

¹ A transcript of that bench opinion has been ordered, and will be filed in the bankruptcy court soon.

² In a bench ruling given at a hearing held on August 30, 2006, the undersigned bankruptcy judge rejected the Plaintiff's argument that the Defendants must be deemed to consent to the bankruptcy court conducting the jury trial, under the Bankruptcy Court's Local Rule 9015-1. That Rule provides:

Rule 9015-1 Effect of Jury Trial Demand

A party who demands a jury trial shall be deemed to have consented to the bankruptcy
(continued...)

a jury trial in this adversary proceeding and any such trial must be conducted by the district court.

See 28 U.S.C. § 157(e); *Rafoth v. National Union Fire Insurance Co. (In re Banker & Getty Financial Services Inc.)*, 954 F.2d 1169, 1172-73 (6th Cir. 1992).

C. Conclusion.

Because the Court has determined that Plaintiff has a right to a jury trial on his remaining claim, and the parties do not all expressly consent to the bankruptcy judge conducting the jury trial, only the district court may do so. For these reasons, the undersigned bankruptcy judge recommends that the district court withdraw the reference.

The Clerk of the Bankruptcy Court will promptly transmit this Recommendation, and any other paper that the district court may request, to the Clerk of the District Court.

Respectfully submitted,

Date: January 5, 2007

/s/ Thomas J. Tucker
Thomas J. Tucker
United States Bankruptcy Judge

Not for Publication

²(...continued)

judge conducting the jury trial unless, concurrently with the filing of the jury demand, the demanding party files a motion to withdraw the reference. The other party or parties shall have 10 days after the service of a jury demand to file a motion to withdraw the reference; otherwise the non-demanding party shall be deemed to have consented to a jury trial conducted by the bankruptcy judge.

This Court concluded that this rule does not apply in this case because the Plaintiff filed his jury demand as part of his complaint in the state court, and the removal of this case occurred more than 10 days later. As a result, it was impossible for the Defendants to have filed a motion to withdraw the reference by the deadline stated in Local Rule 9015-1. A motion to withdraw the reference, of course, could be filed only after the case was removed to the United States District Court and then referred to the bankruptcy court, all of which occurred months after the Plaintiff filed his jury demand in the state court.