

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: RICHARD MOORE	CASE NO. 02-16606
IN RE: BOBBY BROOKS	CASE NO. 02-16607
IN RE: PIGS TO HOGS, INC.	CASE NO. 02-16836
IN RE: GONE HOG WILD	CASE NO. 02-17171
IN RE: PIG PALACE, INC.	CASE NO. 02-17184
IN RE: JAMES BLISSARD	CASE NO. 02-17267
IN RE: JERRY MILNER	CASE NO. 02-17269
IN RE: J & J FARMS, INC.	CASE NO. 02-17281

JIM NORMAN, ET AL

PLAINTIFFS

VERSUS

ADV. PROC. NO. 03-1100

PRESTAGE FARMS, INC., ET AL

DEFENDANTS

OPINION

On consideration before the court are the following matters, to-wit:

1. Motion to remand for lack of subject matter jurisdiction filed by the plaintiffs, Jim Norman, et al.
2. Motion of Prestage Farms, Inc., for leave to file second amendment to Prestage Farms, Inc.'s, answer and counter-claim/cross-claim.
3. Motion of Prestage Farms, Inc., to file amended removal pleadings.

Timely responses were filed to each of the aforesaid motions, and the court, having heard and considered same, hereby finds as follows, to-wit:

I.

Jurisdiction and Proceeding Definitions

Since the Chapter 12 debtors, who will be referred to herein occasionally as debtor/defendants, are presently named defendants in the above captioned adversary proceeding, this court has jurisdiction of the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157, as well as, the General Order of Reference entered by the United States District Court for the Northern District of Mississippi on July 27, 1984.

The aspects of this cause of action which directly affect the Chapter 12 debtor/defendants would be considered collectively a core proceeding as defined in 28 U.S.C. §157(b)(2)(A), (B), and (O). Because of the direct impact upon the debtor/defendants, the aspects of this cause of action which seek relief against the non-debtor/defendant, Prestage Farms, Inc., would be considered collectively a “non-core” or “related” proceeding as contemplated by 28 U.S.C. §157(c).

II.

Procedural Background

The above captioned adversary proceeding was originally filed in the Chancery Court of Montgomery County, Mississippi, on January 4, 2000, by 68 plaintiffs seeking injunctive relief, as well as, substantial compensatory and punitive damages because of alleged noxious and offensive emissions resulting from the debtor/defendants’ operation of separate hog farms pursuant to contractual agreements with their co-defendant, Prestage Farms, Inc., (Prestage Farms).

The plaintiffs are all residents of the State of Mississippi as are the defendants with the sole exception of Prestage Farms, which is a North Carolina corporation. Early in the state court proceeding, the defendants filed a motion for severance which was denied. The decision was appealed to and ultimately affirmed by the Mississippi Supreme Court.

On October 24, 2002, Richard A. Moore and Bobby D. Brooks, two of the named defendants in the chancery court cause of action, filed voluntary Chapter 12 bankruptcy petitions in this court. On October 28, 2002, the defendants removed the state court proceeding to the United States District Court for the Northern District of Mississippi pursuant to 28 U.S.C. §§1334, 157, and 1452, as well as, Rule 9027, Federal Rules of Bankruptcy Procedure. Shortly thereafter, the plaintiffs filed in the district court a motion for mandatory or discretionary abstention, equitable remand, or, in the alternative, for severance. Because of the obvious bankruptcy implications, the district court transferred the cause of action to this court for consideration. In the interim, with the exception of Prestage Farms, the remaining defendants filed voluntary Chapter 12 bankruptcy petitions in this court.

Initially, the state court plaintiffs actively participated in the debtors' bankruptcy cases by filing motions for the extension of the deadline for filing non-government proofs of claim, motions for the extension of the deadline for filing non-dischargeability complaints, motions to stay the Chapter 12 plan confirmation proceedings, motions for relief from the automatic stay, and objections to confirmation. However, following an apparent change in litigation strategy, the plaintiffs withdrew their earlier motions requesting an extension of the time to file proofs of claim. Most of the other motions are still pending.

In their motion to remand for lack of subject matter jurisdiction, the plaintiffs assert that they do not intend to file proofs of claim in any of the debtors' pending bankruptcy cases or to otherwise assert any claims against the debtors' estates. They add that they do not seek any pre-petition relief against the debtors, and conclude that, by not filing proofs of claim, that their claims against the debtors will effectively be discharged in bankruptcy. Paradoxically, the plaintiffs have filed no formal pleading to dismiss the debtor/defendants from this lawsuit, nor have they officially announced that they would or intend to do so. One can only wonder whether the plaintiffs plan on retaining the debtor/defendants as named parties in an effort to counter the diversity jurisdiction argument which Prestage Farms now seeks to advance in its proposed amended removal pleadings.

The plaintiffs obviously initiated these latest maneuvers in order to enhance their chances of returning to state court since their motion to remand had little merit as long as claims were being asserted against the Chapter 12 debtor/defendants.

As a "follow-up" to these procedural changes, Prestage Farms filed a motion to amend its removal pleadings, noted hereinabove, to assert diversity jurisdiction. It also filed a separate motion to amend its answer in order to add a cross-claim against the debtor/defendants.

### III.

#### The Debtors' Business Relationships with Prestage Farms

All of the Chapter 12 debtors have entered into separate hog farming contracts with Prestage Farms. Each debtor, denominated as a "finisher," owns and operates its own farm facility where the hogs are raised in conformity with the Prestage Farms contract. Prestage Farms supplies the hog barns, equipment, and related supplies relative to the operations. It

furnishes each debtor with young pigs, feed, and instructions on raising the animals. The debtors feed and care for the pigs until they reach a certain weight. Prestage Farms then retrieves the matured hogs after the growing cycle and takes them to Bryan Foods in West Point, Mississippi, for sale.

Prestage Farms has the contractual right to cancel the farming relationships with the debtors at the end of any growing cycle. The debtors' ongoing connection with Prestage Farms, however, is essential to the success of their farming operations and their respective bankruptcy reorganizations. Suffice to say, without Prestage Farms, the debtors' existing farming activities would terminate, and there would be no reorganizations.

#### IV.

##### Impact of the Litigation on the Debtors

Although the plaintiffs have indicated that they are willing to forgo their claims against the debtor/defendants, they fully intend to pursue Prestage Farms in some judicial forum which would necessarily be either the state chancery court, the U.S. District Court, or this court. Since the debtor/defendants have now filed for bankruptcy relief, the only economic justification to hold them in the lawsuit, unless the plaintiffs' claims were clearly non-dischargeable, would be to liquidate the amounts of the respective claims for inclusion in the debtors' plans of reorganization. Declining to pursue monetary claims against the debtor/defendants apparently has only a modest "downside" insofar as the plaintiffs are concerned.

However, as a major part of the relief requested in their complaint, the plaintiffs seek to enjoin the defendants, through the remedy of abatement, from engaging in the farming operations. If the plaintiffs are successful in enjoining only Prestage Farms, they will

correspondingly achieve one of their primary litigation goals by effectively “shutting down” the debtors’ farming operations even though the plaintiffs technically would not be asserting claims directly against the debtors. The court would add that a preliminary order of abatement against Prestage Farms would be just as fatal to the debtors as a permanent order. Consequently, the impact of this cause of action, even at its preliminary stages, is not just incidental to the debtors’ prospects of financial reorganization; it is critical.

V.

Prestage Farms’ Objections to Confirmation and  
Potential Cross-Claim Against the Debtor/Defendants

Prestage Farms has filed an objection to confirmation in each of the Chapter 12 bankruptcy cases. The objection is premised primarily on the feasibility of the debtors’ plans of reorganization. Feasibility obviously is implicated, both directly and indirectly, by events that could likely occur in the subject litigation.

Prestage Farms has also filed a motion for leave to file a second amended answer and counterclaim/cross-claim. The cross-claim names seven of the eight Chapter 12 debtors as cross-defendants and seeks declaratory relief concerning the effects of the debtors’ plans of reorganization. The cross-claim could likely be expanded to encompass claims by Prestage Farms for contractual indemnification or contribution against the debtor/defendants. Remedies such as these, which are inextricably “tied” to the cause of action against Prestage Farms, could dramatically impact the debtors’ reorganization efforts.

In their memorandum of authorities, the plaintiffs cited Miss. Code Ann. §85-5-5 (1972). This statute was repealed as of July 1, 1989. See, Adkinson v. International Harvester Company v. Harlow Products Corp., 975 F.2d 208, 218 (5th Cir. 1992).

In view of the plaintiffs' recently announced procedural changes, the court cannot perceive of any undue prejudicial effect to the plaintiffs by allowing Prestage Farms to file its proposed second amended answer and counterclaim/cross-claim. As such, the motion to amend will be sustained, and an order will be entered accordingly.

## VI.

### Discussion of the Remand Motion

The court recognizes that if all claims against the debtor/defendants are eliminated that this cause of action appears to be only a lawsuit by non-debtor plaintiffs against a non-debtor defendant. The question that immediately comes to mind is, "What business does this court have in presiding over third party litigation between non-debtors?" The analysis, set forth hereinabove, reveals, however, that the non-debtor technical appearance is only superficial. The undercurrents of the litigation, particularly the requested abatement relief, significantly affect the core of the debtors' prospects of economic survival and their ability to reorganize under Chapter 12 of the Bankruptcy Code.

This court's jurisdictional authority is conveyed by 28 U.S.C. §1334. For reference purposes, §1334(a) and (b) are set forth as follows:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not

exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

An examination of §1334(b) reveals a three part exception to the district courts' original and exclusive jurisdiction. It provides that the district courts shall have original, but not exclusive jurisdiction, of the following types of "civil proceedings": (1) those arising under Title 11, (2) those arising in a case under Title 11, and (3) those related to a case under Title 11. The Fifth Circuit in Wood v. Wood (In re Wood), 825 F.2d 90 (5th Cir. 1987), stated that distinguishing the separate provisions of §1334(b) is not necessary when determining the scope of bankruptcy jurisdiction, but that "it is necessary only to determine whether a matter is at least 'related to' the bankruptcy."

Although the term "related to" is not defined in the Bankruptcy Code, the United States Supreme Court has held that proceedings, which are sufficiently "related to" a bankruptcy case in order to confer jurisdiction, include "(1) causes of action owned by the debtor which become property of the estate pursuant to 11 U.S.C. §541, and (2) suits between third parties which have an effect on the bankruptcy estate." Celotex Corp v. Edwards, 514 U.S. 300, 308 n.5, 115 S.Ct. 1493, 131 L.Ed. 2d 403 (1995). In Celotex, the court noted with approval that the Fifth Circuit is one of eight circuits which have adopted the "Pacor test," first articulated by the Third Circuit for determining "related to" bankruptcy jurisdiction. Within the Fifth Circuit a proceeding is "related to" a Title 11 case "if 'the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.'" Wood v. Wood (In re Wood), 825 F.2d 90, 93 (5th Cir. 1987) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3rd Cir. 1984)).

The Fifth Circuit subsequently addressed the definition of "related to" as follows:



[A]n action is related to bankruptcy if the outcome could alter the debtors' rights, liabilities, options, or freedom of action (either positively or negatively) and...in any way impacts upon the administration of the bankrupt estate.

Feld v. Zale Corp. (Matter of Zale Corp.), 62 F.3d 746, 752 (5th Cir. 1995) (citing In re Walker, 51 F.3d at 569 (quoting Pacor, Inc., 743 F.2d at 994)).

This court is also mindful of the following comments taken from Zale, where the court discussed the bankruptcy court's "related to" jurisdiction over third party actions, to-wit:

[T]hese cases in which courts have upheld 'related to' jurisdiction over third party actions do so because the subject of the third party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate.

Conversely, courts have held that a third party action does not create "related to" jurisdiction when the asset in question is not property of the estate and the dispute has no effect on the estate. Shared facts between the third party action and a debtor/creditor conflict do not in and of themselves suffice to make the third party action "related to" the bankruptcy. Moreover, judicial economy alone cannot justify a court's finding jurisdiction over an otherwise unrelated suit.

Matter of Zale Corp., 62 F.3d 746 at 753.

In addition to the "related to" factors, discussed in the paragraphs hereinabove, the court would mention that all confirmation orders entered in Chapter 12 cases in this district contain language to the effect that the debtor's property will remain property of the bankruptcy estate until the debtor is discharged or the case is converted or dismissed. The debtors' respective contract rights with Prestage Farms are perhaps the most important assets of these bankruptcy estates and will likely continue as such until the bankruptcy cases are closed or dismissed. Of course, should Prestage Farms elect to exercise its contractual right to terminate the relationships with the debtors at the conclusion of a growing cycle, this court's "related to" jurisdiction over this litigation would be substantially diminished.

This court does not treat the decision in this proceeding lightly. It is, without doubt, an extremely difficult and close “call.” Quite frankly, considering the number of cases pending in this district, the “easy way out” would be to find unassailable reasons to either remand the proceeding, or, alternatively, to return it to the district court where the question of diversity jurisdiction could be tested. The latter alternative would be the preferred choice. This court, however, will not dodge its perceived responsibility. After balancing all of the factors, the court concludes that this lawsuit should remain in this court so that the implications of the debtors’ bankruptcy reorganizations under Chapter 12 can be appropriately considered.

By a separate order, the plaintiffs’ motion to remand for lack of subject matter jurisdiction will be denied.

## VII.

### Amendment to Removal Pleadings

While this litigation was still reposed in the chancery court, the plaintiffs fought tenaciously to keep Prestage Farms and the Mississippi debtor/defendants together in the lawsuit. It should not be a surprise to anyone that this was done to avoid federal diversity jurisdiction and the federal court system. There is absolutely nothing wrong with this, and this court does not find fault with the plaintiffs’ efforts to select their preferred forum. See, Pope v. Atlantic Coastline R. Co., 345 U.S. 379 (1953) and Piper Aircraft Co. v. Hartzell Propeller, Inc., 454 U.S. 235 (1981). The bankruptcy filings by the Mississippi debtor/defendants clearly disrupted this plan. The only possible way for the plaintiffs to escape the jurisdiction of the bankruptcy court was to “drop” their monetary claims against the debtor/defendants. Unfortunately, this strategy

invites the bite of the other side of the proverbial two-edged sword. True federal diversity jurisdiction comes into focus when, heretofore, it had not existed.

This court is aware that 28 U.S.C. §1446(b) provides, after being amended, that a lawsuit may not be removed on the basis of diversity jurisdiction more than a year after the state court cause of action was commenced. Courts, including the Fifth Circuit, have recognized “equitable exceptions” to this statute. See, Tedford v. Warner-Lambert Co., 327 F.3d 423 (5th Cir. 2003) and Morrison v. Natl. Benefit Life Ins. Co., 889 F. Supp. 945 (S.D. Miss. 1995). “Impossibility” should be just such an exception. Since the defendants’ earlier motion to sever had been denied, they were lawfully precluded from legitimately raising diversity jurisdiction. It was not until the plaintiffs announced that they would forgo their claims against the Mississippi debtor/defendants that the possibility of diversity jurisdiction re-emerged. Consequently, the motion of Prestage Farms to amend its removal pleadings to raise the issue of diversity jurisdiction is timely. The amended pleadings may be filed. However, this court will not address the merits of the amended pleadings since the issue is not ripe for consideration (the debtor/defendants are still parties in the cause of action), and a decision is not necessary to sustain bankruptcy jurisdiction.

## VIII.

### Conclusion

In order to finalize the conclusions expressed herein, a separate order will be entered granting the following relief:

1. The motion to remand for lack of subject matter jurisdiction filed by the plaintiffs, Jim Norman, et al, will be overruled.

2. The motion of Prestage Farms, Inc., for leave to file a second amendment to its answer and counterclaim/cross-claim will be sustained.
3. The motion of Prestage Farms, Inc., to file amended removal pleadings will be sustained.

This the 28th day of July, 2003.

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DAVID W. HOUSTON, III  
UNITED STATES BANKRUPTCY JUDGE