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IT IS SO ORDERED.

Thomas F. Waldron
Thomas F. Waldron
United States Bankruptcy Judge

Dated: May 24, 2005

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NCP ENTERPRISES, LLC,

Plaintiff

v.

FREUDENBERG HOUSEHOLD PRODUCTS
LP,

Defendant

Judge Waldron

Case No. 05-3169

**DECISION ON ORDER (1)
DENYING DEFENDANT’S MOTION
TO DISMISS, WITHOUT
PREJUDICE TO A FINAL
DETERMINATION IN AN
APPROPRIATE COURT; (2)
DENYING PLAINTIFF’S MOTION
TO REMAND CASE TO THE
BUTLER COUNTY COURT OF
COMMON PLEAS OR ABSTAIN;
(3) AND GRANTING
DEFENDANT’S MOTION TO
TRANSFER CASE TO THE
BANKRUPTCY COURT FOR THE
DISTRICT OF DELAWARE**

DATED AT DAYTON, OHIO this 24th Day of May, 2005:

On April 4, 2005, Defendant, Freudenberg Household Products LP (“FHP”) filed a *Notice of Removal* (Doc. 1) which, pursuant to 28 U.S.C. § 1452(a), 28 U.S.C. § 1334 and Bankruptcy Rule 9027¹, removed this case from the Clark County Court of Common Pleas to this Court to this court’s jurisdiction.² The case is a declaratory judgment action which seeks to enforce a trademark license agreement. On April 6, 2005, FHP filed *Defendant’s Motion to Transfer or Dismiss and Memorandum in Support* (Doc. 2) The motion sought to have the case dismissed for failure to state a claim [Federal Rule of Civil Procedure 12(b)(6), incorporated by Bankruptcy Rule 7012] or, transferred to the Bankruptcy Court for the District of Delaware. On April 14, 2005, the Plaintiff, NCP Enterprises, LLC (“NCP”) filed its statement under Bankruptcy Rule 9027(e)(3) denying that this was a core proceeding and not consenting to final judgment by this court. (Doc. 4) On April 26, 2005, NCP filed *Motion of Plaintiff NCP Enterprises, LLC to Remand Case to State Court or Abstain and Opposition to Defendant’s Motion to Transfer or Dismiss*. (Doc. 5) In short, NCP seeks the case returned to the Clark County Court of Common Pleas. On May 16, 2005, FHP filed *Memorandum of Defendant Frudenberg Household Products LP in*

¹ FHP also sought removal under 28 U.S.C. § 1441, based on diversity jurisdiction under 28 U.S.C. § 1332(a)(1). This removal is a “nullity and superfluous to its removal under 28 U.S.C.A. § 1452.” Diversity actions are not a proper basis for removal to a bankruptcy court. *Home Cable Concepts, Inc. v. Household Retail Svcs. (In re Best Reception Sys.)*, 219 B.R. 980, 984-85 (Bankr. E.D. Tenn. 1998).

² The Judge of the Clark County Court of Common Pleas signed a default entry which was filed on 8:37 a.m. on April 5, 2005. The Notice of Removal was filed with this court on April 4, 2005 and with the Clark County Court of Common Pleas on April 5, 2005. It was journalized on April 6, 2005. Pursuant to Ohio Rule of Civil Procedure 58(a), an order is not effective until journalized by the clerk. *The State ex rel. R.W. Sidley, Inc. v. Crawford*, 100 Ohio St.3d 113, 117, 796 N.E. 2d 929, 933 (Ohio 2003). Additionally, the Notice of Removal appears before the state court order on the state court docket. Accordingly, the default entry may be void. *Sweeney v. RTC*, 16 F.3d 1, 4 (1st Cir. 1994). However, this court makes no finding as to this jurisdictional issue as it is more appropriately addressed to the home bankruptcy court in the District of Delaware.

Response to Motion of Plaintiff NCP Enterprises, LLC to Remand Case to State Court or Abstain, and in Support of Defendant's Motion to Transfer or Dismiss (Doc. 6).

Some brief background is necessary. NCP was a licensee of a trademark. (Doc. 1 – Exhibit A) The licensor was O-Cedar Brands, Inc. Subsequent to the license agreement being entered, O-Cedar Brands, Inc. and a related affiliate (collectively, the “Debtors”) filed a chapter 11 case in the Bankruptcy Court for the District of Delaware.³ As a part of that bankruptcy case, substantially all of the Debtors’ assets were sold to FHP pursuant to an order of the Delaware Bankruptcy Court. See 11 U.S.C. § 363. Following the sale, the chapter 11 case was converted to a chapter 7 case. For purposes of this decision, it is sufficient to note the parties dispute whether the license agreement was included in the sale and, therefore, whether FHP is liable under the terms of the agreement. (This court makes no finding in that regard, nor any finding on many of the legal and factual disputes between the parties.)

The focus for the resolution of the pending issues is the language of the declaratory judgment action. The complaint requests “that Plaintiff [NCP] have a declaratory judgment herein that the Agreement is a valid and binding agreement between NCP and FHP.”⁴ “The Agreement” is “a Trademark License Agreement . . . with O-Cedar Brands, Inc. . . .” The legal issue presented is not simply a matter of contractual interpretation under Ohio law. The court accepts that the

³ *In re O-Cedar Holdings, Inc. et al.*, 03-12267

⁴ Despite the many state law issues raised in NCP’s filings, the complaint does not raise any of these issues. The complaint addresses a specific trademark license agreement originally entered into by the Debtors and NCP and whether FHP is bound by that agreement.

Agreement states that Clark County Court of Common Pleas has exclusive jurisdiction to interpret the Agreement under section 20.1; however, the predicate issue is whether FHP, a non-signatory to the Agreement, purchased the Agreement in the bankruptcy court sale or whether it was excluded in the sale of assets and ultimately rejected during the chapter 7 pursuant to 11 U.S.C. § 365(d)(1).⁵

The court believes this case is appropriately transferred to the Bankruptcy Court for the District of Delaware because (1) the relief sought in the complaint raises core bankruptcy issues concerning an executory contract [See 28 U.S.C. § 157(b)(2)], not merely state law contract interpretation issues and (2) the Bankruptcy Court for the District of Delaware retained jurisdiction to interpret this sale order.

Although the court is cognizant this dispute concerns two non-debtors, the resolution of this dispute may affect whether NCP has a claim in the Debtors' estates in Delaware. Moreover, in the sale order, the Delaware Bankruptcy Court concluded that disputes concerning the sale order are core proceedings to be determined in the Delaware Bankruptcy Court. See *Notice of Removal* (Doc. 1 – Exhibit B – *Order Under U.S.C. §§ 105, 363, and 365 and Fed. R. Bankr. P. 2002, 6004 and 6006 Approving (A) Sale of All or Substantially All of the Debtors' Assets Related to Its Business Free and Clear of All Liens, Claims, Interests, and*

⁵ 11 U.S.C. § 365(d)(1) provides that “[i]n a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.”

Encumbrances (Other Than Permitted Encumbrances), and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases, pg.13, Paragraph AA).

This court concludes FHP has met its burden to have this case transferred to the Bankruptcy Court for the District of Delaware. Any determination concerning the motion to dismiss and/or discretionary abstention is more appropriately addressed to the home bankruptcy court in Delaware.

Accordingly, Defendant's motion (Doc. 2), to the extent it requests dismissal, is DENIED, without prejudice to a final determination in an appropriate court. Plaintiff's motion to remand this case to the Butler County Court of Common Pleas or abstain (Doc. 5) is DENIED. Defendant's motion to transfer this case to the Bankruptcy Court for the District of Delaware (Doc. 2) is GRANTED. Pursuant to 28 U.S.C. § 1412, this case is TRANSFERRED to the Bankruptcy Court for the District of Delaware.

An order in accordance with this decision is simultaneously entered.

SO ORDERED.

c:

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