

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ICS CYBERNETICS, INC.

CASE NO. 88-00478

Debtor

Chapter 11

ICS CYBERNETICS, INC.,

Plaintiff

vs.

ADV. PRO. NO. 90-60079A

GRAMMCO COMPUTER SALES, INC.;
SANTA ROSA MEDICAL CENTER;
COMPUTER LEASING, INC.; and
CIBA-GEIGY CORPORATION,

Defendants

APPEARANCES:

GRASS, BALANOFF & WHITELAW, P.C.
Attorneys for Plaintiff
247 W. Fayette Street
Syracuse, New York 13202

MARY LANNON FANGIO, ESQ.
Of Counsel

HAROLD P. GOLDBERG, ESQ.
Attorney for Santa Rosa Medical Center
1408 W. Genesee Street
Syracuse, New York 13202

MELVIN & MELVIN, ESQS.
Attorneys for Computer Leasing, Inc.
700 Merchants Bank Building
Syracuse, New York 13202

LOUIS LEVINE, ESQ.
Of Counsel

MENTER, RUDIN & TRIVELPIECE, P.C.
Attorneys for Ciba-Geigy
500 South Salina Street
Syracuse, New York 13202

JEFFREY A. DOVE, ESQ.
Of Counsel

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The defendant, Santa Rosa Medical Center ("SRMC") has moved for an order pursuant to Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 8 and 12(e) dismissing a cross-claim filed in the within adversary proceeding by Computer Leasing, Inc. ("CLI") or in the alternative requiring CLI to file a more definite statement.

The motion was argued at a term of this Court held at Syracuse, New York on May 7, 1991 and the motion was finally submitted for decision on June 12, 1991 following the filing of memoranda of law.

SRMC's motion is somewhat confusing in that the Notice of Motion dated March 29, 1991 seeks an "Order dismissing the within action against the defendant Santa Rosa Medical Center". However, a review of the motion papers indicates that SRMC actually seeks a dismissal of the cross-claim of CLI not a dismissal of the entire adversary proceeding and the Court will treat it as such.

Further, while SRMC relies specifically on Fed.R.Civ.P. 8 and 12(e), it is apparent that its motion is also grounded on this Court lacking personal jurisdiction over SRMC, subject matter jurisdiction of the cross-claim pursuant to 28 U.S.C. §157(b) and being unable to impanel a jury when SRMC contends that it is entitled to a jury trial on said cross-claim.

FACTS

The Debtor herein commenced this adversary proceeding on or about June 25, 1990

against multiple defendants to include SRMC and CLI.

Debtor's complaint alleges that CLI is a so-called "upstream" owner/lessor of certain computer equipment which Debtor subleased from the defendant Ciba-Geigy ("Ciba"). The complaint further alleges that the Debtor sublet the equipment, or some portion thereof, to the defendant Grammco Computer Sales, Inc. ("Grammco"), who in turn either subleased or sold the equipment to SRMC.

As to all of the defendants, Debtor seeks a declaration of its rights, while specifically as to CLI it seeks a declaration as to the amount, if any, due and owing between the Debtor and CLI. As to SRMC, Debtor seeks a turnover of the computer equipment pursuant to §542 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code").

On or about August 30, 1990, CLI served its Answer, Counterclaim and Cross-claim seeking affirmative relief against the Debtor, and all of the other defendants. Specifically, as against SRMC, CLI seeks rent, or in the alternative, the reasonable market value of the computer equipment as of the date of its alleged conversion.

On April 3, 1991, after stipulated extensions of time to serve responsive pleadings, SRMC filed the instant motion seeking, in part, a dismissal of CLI's cross-claim, based upon this Court's lack of personal, as well as subject matter, jurisdiction, and its inability to conduct a jury trial to which SRMC claims it is entitled.

ARGUMENTS

SRMC simply contends that a "determination of the cross-claim will not affect this bankruptcy estate, nor does this Court need to resolve the cross-claim in order to complete its

administrative duties;". (See Memorandum Brief in Support of Defendant Santa Rosa Medical Center's Motion To Dismiss Or Alternatively For A More Definite Statement, filed April 3, 1991).

SRMC seems to rely primarily on the contention that because the dispute evidenced by CLI's cross-claim exists between two non-debtors, it does not fall within the subject matter jurisdiction of this Court.

CLI postures that while the dispute between itself and SRMC is on first impression only related to the Debtor's Chapter 11 case in accordance with 28 U.S.C. §157(c), an in depth examination of that dispute indicates that it will "affect the adjustment of the debtor-creditor relationship because the moneys that are owed and paid by one co-defendant to defendant C.L.I. will reduce the claim defendant C.L.I. holds against the debtor. Therefore, the cross-claim of defendant C.L.I. against co-defendant S.R.M.C. retains core jurisdiction pursuant to §157(b)(2)(O)." (See Letter Memorandum of Law submitted by CLI and dated June 5, 1991).

CLI argues additionally that even if its cross-claim does not fall within the subject matter jurisdiction of this Court, jurisdiction may be retained until the case is ready for trial, at which point the cross-claim may be transferred to a district court for trial. In the alternative, CLI suggests that if this Court finds that it does not have subject matter jurisdiction, it will move for the withdrawal of the entire adversary proceeding to the appropriate district court pursuant to 28 U.S.C. §157(d).

DISCUSSION

The motion of SRMC presents numerous issues, not all of which the Court needs to resolve in this decision.

That portion of the motion which is grounded upon Fed.R.Civ.P. 8 and 12(e) will not be considered herein as the parties have indicated a willingness, at oral argument, to resolve the procedural difficulties raised by SRMC relating to those specific Rules.

With regard to SRMC's assertion that the Court lacks jurisdiction over its person, the Court must conclude that either SRMC confuses personal jurisdiction with subject matter jurisdiction or it is unaware of the scope of Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7004(d). In either case, the Court must conclude that it does in fact have personal jurisdiction of SRMC.

The two remaining issues raised by SRMC present the Court with significantly greater difficulty. The first and perhaps the threshold issue, involves this Court's subject matter jurisdiction over CLI's cross-claim pursuant to 28 U.S.C. §157(b). As CLI points out, generally speaking a dispute between two non-debtors having some nexus to a pending bankruptcy case is clearly a related matter pursuant to 28 U.S.C. §157(c). Thus, while this Court can entertain the proceeding, it is without jurisdiction to enter a final order; that is left to the district court after considering the proposed findings of fact and conclusions of law of the bankruptcy court.

As CLI observes in its letter memorandum, the restructuring of the debtor-creditor relationship is at the "core" of this Court's subject matter jurisdiction. See Granfinanciera S.A. v. Nordberg, 492 U.S. ___, 109 S.Ct. 2782, 2798-99, 106 L.Ed. 26, ___ (1989); Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 71, 102 S.Ct. 2858 2871, 73 L.Ed. 598, ___ (1982); .

The Court notes further that the scope of core jurisdiction as referenced in 28 U.S.C. §157(b)(2)(A) and (O) is by no means a settled issue. An expansive view of core jurisdiction was embraced by the First Circuit in In re Arnold Printworks, Inc., 815 F.2d 165 (1st Cir. 1987) and the

Second Circuit in In re Manville Forest Products, 896 F.2d 1384 (2d Cir. 1990) and in In re Ben Cooper, Inc., 896 F.2d 1394 (2d Cir. 1990), while a much more restrictive view was articulated by the Ninth Circuit in In re Cinematronics, Inc., 916 F.2d 1444 (9th Cir. 1990); In re Castlerock Properties, 781 F.2d 159 (9th Cir. 1986); and the Fifth Circuit in In re Wood, 825 F.2d 90 (5th Cir. 1987).

The instant cross-claim, however, does not present a factual scenario similar to those encountered in any of the aforementioned circuit court decisions, nor has SRMC submitted itself to the jurisdiction of this Court by filing a proof of claim. See Granfinanciera v. Nordberg S.A., *supra*.

It is CLI's contention, in opposition to the motion, that any recovery it may secure on its cross-claim against SRMC will inure to the benefit of the creditors of the Debtor's estate, because it will reduce CLI's counter-claim against the Debtor. SRMC does not dispute this assertion of CLI. SRMC simply generalizes that the determination of the cross-claim will not affect this bankruptcy estate.

The Court notes some similarity between the argument advanced by CLI and the conclusion reached by the District Court in In re SPI Communications and Marketing, Inc., 114 B.R. 14 (N.D.N.Y. 1990) wherein it was held that the claim of two of the corporate debtors' former principals ("intervenor") against the debtors' former counsel for legal malpractice were core because, "[t]o the extent that the Intervenor are guarantors and obligors of the Debtors, damages awarded to the Intervenor will ultimately flow to the same places as damages awarded to the Debtors in their parallel actions: to the creditors. When money goes to the creditors, the estate is benefitted. Benefit to the estate, in conjunction with a nexus in the subject bankruptcy proceedings is a characteristic of a core proceeding." *Id.* at pg. 18.

This Court concludes, however, that the District Court relied upon two additional

factors not present here in finding core jurisdiction.

The District Court observed that "additional weight to this consideration is provided by the fact that the Intervenor's claims arose post-petition, and that the claims would not exist but for the Debtor's bankruptcy petitions. The Second Circuit has identified these two factors as pivotal in determining whether a proceeding is core." Id. at pg. 18.

Having thus determined that this Court does not have core jurisdiction over the cross-claim of CLI versus SRMC and that it can only enter proposed findings and conclusions subject to de novo review by a district court, the Court must likewise conclude that it cannot conduct a jury trial. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." U.S. Cons. Amendment VII. In re Ben Cooper, Inc., supra 896 F.2d at 1403.

CLI suggests that if this Court determines that it is without core jurisdiction of its cross-claim versus SRMC, then it need not adopt dismissal of the cross-claim as its only alternative. The Court agrees.

CLI's first suggestion is that this Court retain control of the cross-claim until it is "ripe" for trial then "transfer" it to the appropriate district court. Secondly, CLI asserts that the entire adversary proceeding can be withdrawn to the appropriate district court either sua sponte or upon CLI's motion.

The Court suggests that possibly a third alternative with the same result is discretionary abstention in accordance with 28 U.S.C. §1334(c)(1). See In re SPI Communications & Marketing, Inc., 112 B.R. 507, 513 (Bankr. N.D.N.Y. 1990).

Having considered all three alternatives, the Court believes that at this juncture the most appropriate course would be it to retain control of CLI's cross-claim until that claim is ready

for trial and at that point transfer it to the District Court, if in fact it is finally determined that SRMC is entitled to a jury trial on the cross-claim (an issue which none of the parties have argued or briefed to this Court).

In view of the fact that CLI's cross-claim against SRMC is so closely tied to the remaining claims to be adjudicated by this Court within this adversary proceeding, the Court believes that retention of the cross-claim as a non-core related matter until the time of actual trial fosters judicial economy. In that regard, the Court notes that there has been considerable discovery undertaken by the parties and the completion of that discovery will be facilitated by retaining the entire adversary proceeding in this Court up to the time of trial.

As was stated by Bankruptcy Judge Queenan in In re THB Corp., 94 B.R. 797 (Bankr. D.Mass. 1988), a case involving similar jurisdictional and procedural problems, "[w]e will retain these proceedings for speedy pre-trials and interlocutory rulings, and for proposed rulings upon any dispositive motions. A bankruptcy judge may adjudicate interlocutory matters under §157(c)(1); the statute preserves only 'final' orders for entry by the district judge and its procedure would be unworkable if the district judge had to adjudicate interlocutory matters." Id. at pg. 803. See also In re Adelphi Institute, Inc., 112 B.R. 534 (S.D.N.Y. 1990); In re Wedtech Corp., 94 B.R. 293 (S.D.N.Y. 1988); In re Colbert, 117 B.R. 51 (Bankr. D.Conn. 1990).

Based upon the foregoing, it is

ORDERED that the motion of SRMC insofar as it seeks a dismissal of the cross-claim of CLI is denied, and it is further

ORDERED that the Court shall retain jurisdiction of said cross-claim pursuant to 28 U.S.C. §157(c) until such time as it is determined that SRMC has a Seventh Amendment right to a jury trial and that the entire adversary proceeding is ready for trial, at which point the cross-claim

will either be transferred to the appropriate district court for a jury trial or disposed of by way of interlocutory findings of this Court subject to de novo review by the appropriate district court.

Dated at Utica, New York

this day of October, 1991

STEPHEN D. GERLING
U.S. Bankruptcy Judge