UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DOROTHY ANN CONLON — CASE NO. 95-64406

Debtor

L. DAVID ZUBE, ESQ.
Chapter 7 Trustee

Plaintiff

vs. — ADV. PRO. NO. 96-70235A

EDWARD F. CRUMB, ESQ.

Defendant

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND REFERENCE

This matter is before the Court by way of a motion for summary judgment filed on February 10, 1997, by Edward F. Crumb, Esq. ("Crumb") in connection with the adversary proceeding commenced on September 3, 1996, by Dorothy Ann Conlon ("Debtor" or "Plaintiff"). Crumb seeks dismissal of the Debtor's complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P."), and also requests in the alternative that the Court abstain from hearing the matter pursuant to 28 U.S.C. § 1334(c). Debtor filed opposition to the motion on April 8, 1997, and served it on Crumb by first class mail that same day. In the interim, on March 24, 1997, the Debtor filed a motion seeking partial summary judgment with respect to the third cause of action in her complaint, to which opposition was filed with the Court and served by first class mail on behalf of Crumb on April 11, 1997.

A hearing on both motions was held on April 14, 1997, at the Court's regular motion term in Binghamton, New York. The Court reserved its decision on both motions, as well as Debtor's assertion that Crumb's opposition to her summary judgment motion was untimely.[1] The matters were submitted for decision on April 24, 1997.

Prior to the issuance of any decision by the Court, Crumb filed a motion on August 20, 1997, seeking permission to commence a third-party action against certain other individuals

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[1] Debtor relies on Local Rule 913.1(k), which requires that answering papers in opposition be filed and served not later than three business days prior to the return date of the motion. In this case, Crumb served his response to the Debtor's motion on Friday, April 11, 1997, for a hearing to be held on Monday, April 14, 1997.

pursuant to Fed.R.Bankr.P. 7014, which incorporates by reference Fed.R.Civ.P. 14 ("Rule 14 Motion"). The motion was opposed by the Debtor on September 11, 1997, and following several consensual adjournments, the motion was heard by the Court on February 10, 1998. At the hearing on the motion, the Court agreed to address Crumb's request within this Decision.

In the interim, on September 26, 1997, the Court granted the Debtor's application to convert the case to chapter 7. On September 30, 1997, L. David Zube was appointed chapter 7 trustee ("Trustee" or "Plaintiff"), and on November 10, 1997, sought approval of a stipulation substituting the Trustee as plaintiff in the matter herein.[2] An Order was entered by the Court on January 15, 1998, granting the Trustee's request and also approving the retention of special counsel to continue litigation of the matter.[3]

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(c)(1).

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[2] Given the conversion of the case, the Court delayed its ruling on the motions in order to allow the Trustee an opportunity to determine whether it was appropriate to pursue the relief sought by the Debtor. Had the Trustee elected to abandon the causes of action to the Debtor, the Court would have been without jurisdiction to decide the motions.

[3] Because the arguments on behalf of the Debtor in connection with the motions herein were made by special counsel now retained by the Trustee, the Court finds it unnecessary to request that the Trustee submit a separate memorandum of law. The Court will presume that most of the arguments made on behalf of the Debtor, with the exception of any reference to the possibility of reorganization, are equally applicable to the Trustee.

FACTS

At some time prior to 1985 the Debtor inherited shares in Canny Trucking Co. ("Canny Trucking"). *See* Debtor's Affidavit, sworn to September 15, 1994 (Exhibit "H" of Debtor's Motion). She, along with five others ("Canny Family Partnership"), also held a one-sixth interest in real estate in Binghamton, New York, on which was located a terminal facility leased to Canny Trucking. *See id.* On September 21, 1987, Canny Trucking filed a petition in the Northern District of New York pursuant to chapter 11 of the Bankruptcy Code. *See Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. - Pension Fund v. Canny*, 900 F.Supp. 583, 587 (N.D.N.Y. 1995) ("District Court action"). During the course of that bankruptcy proceeding, Canny Trucking ceased operations, which effectuated its withdrawal from the pension fund. *See id.* Allegedly, Canny Trucking was provided with notice of a withdrawal liability assessment against it by the Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. ("Pension Fund") but failed to make any payments.

On November 30, 1993, the Pension Fund commenced an action in the U.S. District Court for the District of New Jersey, which was later transferred to the Northern District of New York, seeking to collect the withdrawal liability assessment from the Debtor and other defendants, including the Canny Family Partnership. *Id.* A complaint was served on the Debtor on or about April 6, 1994. *See* Debtor's Affidavit at ¶ 4. On or about April 23, 1994, Debtor retained Crumb to represent her individually in the District Court action. The Pension Fund moved for summary judgment against the defendants, and on September 14, 1995, the District Court issued its decision in which it found that "Canny Trucking and the leasing business were the same

entity in the eyes of the law" prior to the defendants' transfer of their stock in Canny Trucking in 1985. *See id.* at 592. The District Court concluded that the Canny Family Partnership, along with the Debtor and three other defendants, were "employers" under the Multiemployer Pension Plan Amendments Act (29 U.S.C. § 1001 *et seq.*) and on September 14, 1995, granted summary judgment against the Debtor, William Canny, Joseph Canny, Barbara Briggs and the Canny Family Partnership, jointly and severally, in the principal amount of $1,221,191; accrued interest of on the unpaid principal of $148,549, liquidated damages in the amount of $244,238, and attorneys' fees and costs of $80,441.79. *See* id. at 592, 595-96.

According to the Debtor, as a result of the judgment entered against her, she filed a voluntary petition pursuant to chapter 11 of the Bankruptcy Code (11 U.S.C. § 101-1330) ("Code") on December 7, 1995. Debtor commenced the adversary proceeding, which is the subject of the motions herein, with the filing of a complaint on September 3, 1996. Said complaint was subsequently amended and filed with the Court on October 9, 1996 ("Amended Complaint").

In her Amended Complaint, the Debtor asserts that she retained Crumb to defend her in the withdrawal liability suit "because he held himself out to the public as skilled and knowledgeable in matters involving ERISA and pension law." *See* Amended Complaint at ¶ 4. Debtor alleges as a first cause of action that Crumb failed to "act with the ordinary and reasonable degree of care, prudence and competence expected of a reasonable attorney with similar skills" in failing to seek arbitration on behalf of the Debtor in the District Court action within 90 days of the assessment of withdrawal liability against her on or about April 1, 1994, by the Trucking Employees of North Jersey Welfare Fund, Inc - Pension Fund ("Fund"). *See id.*

at ¶ 15. For a second cause of action, Debtor asserts that Crumb breached his contractual obligation as Debtor's fiduciary and counsel. *See id.* at ¶ 21. Debtor's third cause of action alleges that Crumb was negligent in failing to seek arbitration, which precluded Debtor from asserting an insolvency defense pursuant to 29 U.S.C. § 1405(b). *See id.* at ¶¶ 26 and 27.[4]

Pursuant to a stipulation extending the time to respond to the Amended Complaint, Crumb filed his Answer to the Amended Complaint on December 3, 1996. In his Answer, Crumb asserts as affirmative defenses that the Court lacks subject matter jurisdiction because *inter alia* the case raises claims arising under New York State law which should be adjudicated in New York State Supreme Court. *See* Answer at ¶¶ 26-28.

ARGUMENTS

In her Amended Complaint, the Debtor indicates that "[t]his is a common law legal malpractice action asserted against Debtor's former defense counsel . . . ." *See* Amended Complaint at ¶ 1. The Debtor further asserts that it is a core proceeding in that it "concerns a claim integrally related to the Debtor's bankruptcy proceeding and which effects the liquidation of assets of the estate." *See id.* The Debtor contends that the adversary proceeding is an attempt to collect the "only asset of the estate."

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[4] It is the Debtor's third cause of action for which partial summary judgment is sought. Specifically, the Debtor asserts that the Court "can determine as a matter of law that the withdrawal liability would have been reduced . . . based on the insolvency and liquidation provision [of 29 U.S.C. § 1405(b)]." According to the Debtor, this would entitle her to recover damages of either $1,622,419.70 or $847,209.83, depending on which limitations on withdrawal liability set forth in 29 U.S.C. § 1405(a) and (b) were found to be applicable. *See* Debtor's Memorandum of Law, filed March 24, 1997, at 3.

It is Crumb's position that since the Debtor's causes of action arise under New York law and require the adjudication of state created private rights, the proceeding is not core. *See* Crumb's Summary Judgment Motion at ¶ 18. Crumb points out that the causes of action arose prepetition and, but for the fact that the plaintiff filed a bankruptcy petition, they have little or no relationship to title 11. In addition, Crumb argues that the Court should abstain in the interest of justice and comity with state courts. *See id.* Crumb also makes the argument that even if it is determined that the adversary proceeding is related to the bankruptcy case, this Court cannot hear the matter if he has a Seventh Amendment right to a jury trial. Debtor responds by pointing out that pursuant to Fed.R.Civ.P. 38(d), Crumb has waived any right he might have to a jury trial, having failed to request one within ten days after the service of the last pleading.

Crumb requests that the Court grant him leave to commence a third-party action against Joseph Canny, Barbara Briggs, Mary Louise Hacker and Joseph Fletcher as Personal Representative of the Estate of Rita Fletcher ("Canny Defendants"). It is alleged on behalf of Crumb that "to the extent monies can be collected in contribution from plaintiff's [Debtor's] joint obligors, plaintiff's liability is reduced as a joint and several obligor, thereby reducing defendant's [Crumb's] exposure to liability on plaintiff's malpractice claim." *See* Crumb's Rule 14 Motion at ¶ 8. The Debtor's only opposition to the Rule 14 Motion is that Crumb does not propose to include William Canny[5] as a third party defendant. The Debtor asserts that "[w]ithout William Canny's joinder in the proposed third party suit, defendant will not be able to fully minimalize his exposure to liability, as is his intention." *See* Affidavit of Harvey S. Mars, Esq.,

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[5] Apparently, William Canny also was represented by Crumb in the District Court action. *See Canny,* 900 F.Supp. at 587.

filed September 11, 1997, at ¶ 3. Debtor contends that William Canny is a necessary party.

DISCUSSION

Timeliness of Opposing Papers

As a threshold matter, both parties assert that opposition to their initial two motions was untimely and, therefore, the Court should grant the relief sought therein by default. Crumb points out that if his motion is granted and the complaint is dismissed or the Court abstains that there would be no need to address the Debtor's motion for partial summary judgment. Crumb also argues that if his opposition papers to the Debtor's motion are deemed to be untimely that the Court should still consider them in order that any relief granted be based on the merits of both parties' arguments.

In asserting that Crumb's opposition was untimely, the Debtor places reliance on Local Rule 913.1(k), which states that a party must serve written opposition on the movant's counsel and file it with the clerk of the Court not later than three business days prior to the return date of the motion; otherwise, the Court will consider the motion as unopposed. L.R. 913.1(k) was supplemented by an Administrative Order of the Court which became effective for motions filed on or after January 2, 1997.[6] Contrary to the Debtor's assertion that it applies to all motions, however, L.R. 913.1(k) applies only to those motions specifically enumerated in the rule and the Administrative Order. Motions for summary judgment are not included in the list of motions to

[6] The Local Rules of Bankruptcy Practice for the Northern District of New York have since been amended and took effect January 1, 1998. Local Rule 913.1(k) is now found at L.R. 9013-4 and identified as "Default Motion Practice."

which L.R. 913.1(k) was applicable at the time these motions were made.

Crumb is correct in his assertion that L.R. 913.1(c)[7] applies to motions for summary judgment. L.R. 913.1(c) requires that written opposition be served and filed "so as to be received no later than three business days before the return date of the hearing." Crumb's opposition to the Debtor's motion for partial summary judgment was clearly untimely as it was not served or filed until April 11, 1997, one business day prior to the hearing. At the same time, the Debtor's papers in opposition to Crumb's motion to dismiss the complaint or to have the Court abstain were mailed from New York City to Crumb's counsel in Syracuse, New York, by first class mail on April 8, 1997. In order to comply with L.R. 913.1(c), they would have had to have been received the following day. Crumb's attorney contends that they were not received until April 11, 1997, at the earliest. Debtor's counsel does not appear to dispute this. *See* Letter from Debtor's counsel, dated April 23, 1997, at Footnote 3. Thus, this service also fails to comply with L.R. 913.1(c).

Both parties appeared at the hearing on April 14, 1997, and presented their opposition to the respective motions at oral argument. So as not to prejudice either party, the Court will consider both sets of opposition papers, which were filed prior to the hearing. However, the Court cautions both attorneys to be more conscientious in their compliance with the Local Rules of the Court.

Motion to Dismiss the Complaint

Although brought as a motion for summary judgment pursuant to Fed.R.Bankr.P. 7056

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[7] L.R. 913.1(c) is now embodied in L.R. 9013-1(c).

seeking dismissal of the Amended Complaint on the basis that the Court lacks subject matter jurisdiction, the Court will treat Crumb's motion as one pursuant to Fed.R.Bankr.P. 7012(b)(1), which provides that a pleader may raise the defense of a lack of subject matter jurisdiction in a motion.

The Court's subject matter jurisdiction is defined in 28 U.S.C. §§ 157 and 1334. *See Plaza at Latham v. Citicorp. North American*, 150 B.R. 507, 510 (N.D.N.Y. 1993). This Court has subject matter jurisdiction with respect to (1) cases "under title 11," (2) civil proceedings "arising under title 11," (3) civil proceedings "arising in" a case under title 11 and (4) civil proceedings "related to" a case under title 11. 28 U.S.C. § 157(a). The first three categories are considered "core" proceedings in which a bankruptcy court has the power to enter appropriate final orders and judgments subject only to a right of appeal. *See* 28 U.S.C. §§ 157(b)(1) and 158. On the other hand with respect to matters determined to be merely "related to," a bankruptcy court may only "submit proposed findings of fact and conclusions of law to the district court and may not enter final orders and judgment." 28 U.S.C. § 157(c)(1).[8]

Section 157(b)(3) authorizes the bankruptcy judge to make a determination whether a proceeding is a "core" proceeding or otherwise related to the bankruptcy case. In this regard, a review of the legislative history of 28 U.S.C. § 157 supports the conclusion that Congress intended "a broad interpretation of the parameters of a core proceeding." *See Plaza at Latham* at 511, citing *In re Ben Cooper, Inc.*, 896 F.2d 1394, 1398-99 (2d Cir. 1990). In addition, the statute makes it clear that simply because the resolution of the matter may be affected by State

[8] A district court may refer "related to" matters to the bankruptcy court to enter final orders and judgment with the consent of all parties to the proceeding. 28 U.S.C. 157(c)(2).

law does not prevent the bankruptcy court from finding that it is a core matter. *See* 28 U.S.C. § 157(3).

The Debtor, while acknowledging that this is a "common law legal malpractice action," goes on to argue that it is "integrally related to the Debtor's bankruptcy case." However, that in and of itself does not meet the standards set forth in 28 U.S.C. § 157(b) for finding that it is "core." The causes of action in the complaint were not created or determined by any provision in the Bankruptcy Code; therefore, they do not "arise under" title 11. *See Plaza at Latham*, 150 B.R. at 510 n.4 (citations omitted). Furthermore, they clearly do not involve administrative matters that arise only in a bankruptcy case. Indeed, the causes of action based on alleged legal malpractice, breach of contract and negligence all arose outside of the bankruptcy case. They cannot, therefore, be deemed to "arise in" the bankruptcy case. *See id.* at 511 n. 5. The Court must conclude that the adversary proceeding does not involve "core" matters.

Having determined that the adversary proceeding fails to qualify as a "core" proceeding, the Court must also consider whether it is "related to" the bankruptcy case. In *In re Turner*, 724 F.2d 338, 340-41 (2d Cir. 1983), the Second Circuit Court of Appeals held that in order to be found to be "related to," the proceeding must have a "significant connection" to the debtor's bankruptcy case.[9] The Second Circuit subsequently clarified its position in this regard in *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir. 1992), in which it indicated that "The test for determining whether litigation has a significant connection with a pending bankruptcy proceeding

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[9] This approach has been found by some courts to be rather narrow. *See e.g. In re Gen. Am. Communications Corp.*, 130 B.R. 136, 156 (S.D.N.Y. 1991). The more frequently cited test is that found in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984), which required the court to consider whether the outcome of the proceeding would have any "conceivable effect" on the bankruptcy estate.

is whether its outcome might have any 'conceivable effect' on the bankruptcy estate." *See id.* at 114 (citations omitted).

In this instance, the Debtor contends that at a minimum she should be able to recover $847,209.83 if she is successful in proving that but for Crumb's alleged negligence, the amount of withdrawal liability would have been reduced based on 29 U.S.C. § 1405(b). As this is now a chapter 7 case and it is the Trustee that is the actual plaintiff, this would be a substantial amount that would inure to the benefit of the estate.

According to the Debtor's schedules, her assets at the commencement of the case were valued at $60,536.28, of which she claimed $56,400 as exempt. Debtor listed no real property among her assets. The Fund and its attorneys were listed as the only secured creditors by virtue of the district court judgment.[10] Debtor also listed the Internal Revenue Service and the New York State Department of Taxation and Finance as holding priority claims in undetermined amounts.[11] The only unsecured creditors listed in the Debtor's petition, other than Crumb, were identified by her as "contingent creditors" and appear to be the other named defendants in the District Court action, some of whom were found to be jointly and severally liable along with the Debtor.

State law claims such as claims of breach of contract, breach of fiduciary duty and legal

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[10] The proof of claim filed by the Fund and its attorneys on November 10, 1997, labels the claim as unsecured in the amount of $1,707,464.29.

[11] During the pendency of the Debtor's chapter 11 case, the IRS filed a proof of claim in the amount of $15,000 for unassessed income taxes for the tax periods ending December 31, 1992-94, identified as a priority claim. The NYSDT&F filed a proof of claim for gift taxes in the amount of $8,499.78, of which $6,126.18 was labeled as a priority claim and $2,373.60 as a general unsecured claim.

malpractice "have traditionally and consistently been found to be non-core in nature due to their tenuous relationship to a bankruptcy case." *Steege v. Northern Trust Bank/O'Hare, N.A.*, 1996 WL 332428 at *2 (N.D.Ill. 1996). However, the Second Circuit has made it clear that "bankruptcy courts are not precluded from adjudicating state law claims when such claims are at the heart of the administration of the bankruptcy estate." *Ben Cooper,* 896 F.2d at 1399. In *Diamond Mortg. Corp. v. Sugar*, 913 F.2d 1233 (7th Cir. 1990), the debtors commenced an action against their former attorneys in district court, alleging prepetition legal malpractice and breach of fiduciary duty. The defendants disputed the district court's jurisdiction to hear the matter since there was no diversity between the parties. On appeal, the Court of Appeals for the Seventh Circuit found that the action was related to the underlying bankruptcy cases "for its resolution may have a direct and substantial impact on the asset pool available for distribution to the estates." *See id.* at 1239. The court concluded that the district court could have exercised its bankruptcy subject matter jurisdiction over the claim. *See id.*

In this case, it appears that the only possibility for there to be any distribution to the creditors is if the Plaintiff is successful in recovering from Crumb. Conceivably, the outcome of the adversary proceeding may have a direct impact on the case and its administration. Accordingly, the Court concludes that the proceeding is "related to" the Debtor's case and that the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 157(c)(1) to hear the proceeding and to submit proposed findings of fact and conclusions of law to the District Court.

Motion for Abstention

Crumb also requests that the Court abstain from hearing the matter. The Debtor argues

that Crumb's request for abstention is untimely, having been brought approximately five months after the adversary proceeding was commenced. The Debtor asserts that abstention would preclude timely adjudication of the matter. Ultimately, she contends, "it will be the estate's creditors who will suffer while this proceeding is slowly adjudicated in state court since it will be impossible to formulate a reorganization plan until the adversary proceeding is resolved."[12] *See* Debtor's Memorandum of Law, filed April 8, 1997, at 1. Furthermore, the Debtor asserts that discretionary abstention is the exception, not the rule, and should be granted only in limited circumstances.

Mandatory abstention pursuant to 28 U.S.C. § 1334(c)(2) is inappropriate because no state court action is currently pending. *See In re JCC Capital Corp.*, 147 B.R. 349, 354 (Bankr. S.D.N.Y. 1992). Therefore, the Court must consider whether discretionary abstention pursuant to 28 U.S.C. § 1334(c)(1) would be appropriate. This section allows abstention in the interest of justice, comity with state courts or respect for state laws. *See id.* Unlike a motion for mandatory abstention, there is no express requirement in the statute that a motion seeking discretionary abstention be "timely." *See In re Clayter*, 174 B.R. 134, 142 (Bankr. D.KAN.. 1994) (quoting *In re Terracor*, 86 B.R. 671, 677 (D.Utah 1988) for the view that "Matters involving abstention come within the general context of subject matter jurisdiction. Questions involving subject matter jurisdiction may be asserted by any party at any time or raised by a court *sua sponte*.").

It is to be noted that abstention is an "'extraordinary and narrow exception' to the federal

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[12] Debtor's arguments were made prior to conversion of the case from chapter 11 to chapter 7. The formulation of a plan of reorganization is, therefore, no longer at issue.

court's duty to adjudicate a controversy properly before it." *See In re Ionosphere Clubs, Inc.*, 108 B.R. 951, 954 (Bankr. S.D.N.Y. 1989) (citations omitted). In making the determination, courts have examined several factors, including

> (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 difficulty or unsettled nature of the applicable state law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. Sec. 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of the asserted "core" proceeding, (8) the feasibility of severing state law claims or bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy judge's] docket, (10) the likelihood that the commencement of the proceeding in the bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceedings of nondebtor parties.

See id., quoting *In re Republic Reader's Service, Inc.*, 81 B.R. 422, 429 (Bankr. S.D.Tex. 1987). These factors are to be applied flexibly "for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative." *See In re Chicago, Milwaukee, St. Paul & Pacific R.. Co.,* 6 F.3d 1184, 1189 (7th Cir. 1993).

In this case, the Court has already made the determination that the Debtor's causes of action are non-core, involving predominately the application of state law. The issues of law consisting of alleged legal malpractice and breach of contract are not what the Court would consider to be unsettled. Furthermore, at the time the Debtor filed her complaint on September 3, 1996, there was no related proceeding pending in state court.[13] There is no evidence that

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[13] The Court notes that effective September 4, 1996, § 214(6) of New York Civil Practice Law & Rules ("NYCPLR") was amended to provide for a three year statute of limitations for

commencement of the adversary proceeding in this Court constituted any type of forum shopping on the part of the Debtor. At the time the adversary proceeding was commenced, apparently Debtor deemed its successful litigation as essential to reorganization. The success or failure of the litigation remains an important factor in the administration of the chapter 7 estate as well since the Debtor appears to have no other assets with which to satisfy the claims of the Fund and the taxing authorities.

Crumb asserts that the Court cannot hear a matter which is "related to" the Debtor's case if he has a Seventh Amendment right to a jury trial. However, the Court is unaware of any request for a jury trial. Plaintiff contends that Crumb has waived any right he might have to a jury trial by failing to make a timely demand as required by Fed.R.Civ.P. 38. Whether or not Crumb has, indeed, waived his right to a jury trial is not presently before the Court. However, because he has not as yet requested one, the Court need not consider the issue in weighing the various factors for abstention.

Admittedly, the Court's docket is crowded and its resources strained. However, the Court also feels a responsibility to see that this matter is expeditiously addressed. The Debtor commenced the adversary proceeding on September 3, 1996. With the amendment of NYCPLR § 214(6) during the pendency of this adversary proceeding, a three year statute of limitations in bringing a cause of action asserting legal malpractice is applicable in this case. Crumb was retained to represent the Debtor on or about April 23, 1994. Chief Judge McAvoy determined that July 7, 1994, was the last date on which arbitration could have been sought by the various

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nonmedical malpractice actions seeking to recover damages, whether based on contract or tort. *See Ruffolo v. Garbarini & Scher*, -- N.Y.S.2d --, 1998 WL 16083 (N.Y.A.D. 1st Dept.).

defendants in the District Court action. Chief Judge McAvoy signed the judgment against the Debtor and the Canny Defendants on October 17, 1995. Crumb informed the Debtor of Chief Judge McAvoy's decision in a letter dated November 8, 1995. *See* Exhibit I of Debtor's Motion for Partial Summary Judgment.

Pursuant to New York law, generally the accrual date of a cause of action based on attorney malpractice is fixed when the attorney-client relationship ceases. *See Muller v. Sturman*, 79 A.D.2d 482, 484-5 (N.Y.A.D. 4th Dept. 1981) (citation omitted). Arguably, the Debtor would have at least until November 8, 1998, to commence an action against Crumb in state court under the "continuous representation" doctrine even though the alleged malpractice supposedly occurred between April 23, 1994, and July 6, 1994, since the Debtor indicates that she was served with the Pension Fund's complaint on April 6, 1994. *See id.* at 485; 11 U.S.C. § 108. However, the Court finds that to subject the Debtor to further delay than has already occurred by requiring that the action be recommenced in state court is unwarranted and prejudicial to the creditors in the case. Therefore, after weighing the various factors, it is the opinion of the Court that abstention would be inappropriate under the circumstances

Having concluded that the Court should not abstain from hearing the matter, the Court shall next address Plaintiff's motion for partial summary judgment.

Motion for Partial Summary Judgment

Fed.R.Civ.P. 56, made applicable to the proceeding by Fed.R.Bankr.P. 7056, provides that summary judgment be granted when there is no genuine issue as to any material fact and the moving party is entitled, as a matter of law, to a judgment in its favor. *See Federal Deposit Ins.*

Corp. v. Bernstein, 944 F.2d 101, 106 (2d Cir. 1991). In resolving whether genuine issues of material fact exist, the Court must resolve all ambiguities and draw all inferences in favor of the nonmovant. *See LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 171 (2d Cir. 1995) (citations omitted). The Court's function "is not [ ] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed. 2d 202, 212 (1986).

The Debtor seeks partial summary judgment with respect to her third cause of action in which she alleges that Crumb was negligent in failing to seek arbitration and as a result the Debtor was unable to assert an insolvency defense pursuant to 29 U.S.C. § 1405 for purposes of reducing the withdrawal liability assessed against her. In order to succeed on her motion for summary judgment, the Debtor must present evidence in admissible form that, but for the negligence of Crumb in failing to timely pursue arbitration, the assessment of withdrawal liability against her would have been reduced pursuant to 29 U.S.C. § 1405. As has been noted in the memorandum of law filed on Debtor's behalf, the insolvency defense could only be raised at arbitration. *See* Debtor's Memorandum of Law, filed March 24, 1997, at 12.

The Debtor makes the argument that the factual issue of when the Debtor received notice of the withdrawal liability assessment was previously decided by Chief Judge Thomas J. McAvoy in the District Court action. Specifically, Judge McAvoy found that "[i]t is undisputed that defendants here each were personally served with a copy of the original Complaint between April 1 and April 7, 1994. Because the Complaint was sufficient notice without its exhibits, the Court finds that defendants were required by the MPPAA to initiate arbitration by July 7, 1994, at the latest." *See Canny*, 900 F.Supp. at 594.

The Court interprets the Debtor's request to be one seeking application of the doctrine of collateral estoppel to the finding in the District Court action. This doctrine serves as "a bar to relitigating an issue which has already been tried between the same parties or their privies. (citation omitted). When an issue of ultimate fact has been determined by a valid judgment, that issue cannot be again litigated between the same parties in future litigation (citation omitted)." BLACK'S LAW DICTIONARY (5th ed. 1979) at 237. In order for the doctrine to apply the identical issue necessarily must have been decided in the prior action, and the party against whom it is sought to be applied must have had a full and fair opportunity to litigate the issue. *See Computer Associates Intern., Inc. v. Altai, Inc.*, 126 F.3d 365, 371 (2d Cir. 1997).

In this instance, Crumb was not a party to the District Court action although he did represent the Debtor. In that proceeding, Crumb argued on behalf of the Debtor that the time to seek arbitration had not lapsed. The Pension Fund, on the other hand, asserted that the required notice which would have activated the "arbitration mechanism" had been received through a variety of methods, "including mailing to Canny Trucking, the proof of claim filed in the bankruptcy case, and service of the original Complaint. *See Canny*, 900 F.Supp. at 591. The District Court had to look no further than the original Complaint served on the defendants between April 1 and April 7, 1994. As noted above, Chief Judge McAvoy concluded that arbitration had to have been initiated by July 7, 1994, "at the latest." *See id.* at 593. It was unnecessary for him to determine if and when any other notice had been received by the defendants because they acknowledged that they had not sought arbitration at any time prior to serving their affidavits on September 16, 1994. *See id.*

Because Crumb was not a party to the District Court action and did not have an fair and

full opportunity to argue his position with respect to any notice that may or may not have been received before Debtor was served with the original Complaint in April 1994, collateral estoppel may not be applied with respect to the conclusions reached by Chief Judge McAvoy in the District Court action. *See Stark v. Greenberg, Dauber & Epstein*, 658 N.Y.S.2d 878 (N.Y.A.D. 1st Dept. 1997). Therefore, the Court concludes that at least one issue of material fact exists which precludes granting the Debtor's motion for partial summary judgment with respect to her third cause of action.

Motion for Leave to Commence a Third-Party Action

Although the Debtor has no objection to the commencement of a third-party action against the Canny Defendants provided that William Canny is included as a third-party defendant, the Court is obligated to consider the appropriateness of the motion before it.

Fed.R.Civ.P. 14 allows a defendant to serve a complaint on a person not a party to the action "who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party." Whether to allow the filing of a third-party complaint is committed to the Court's discretion. *See Audio Services Corp. v. Am. Motorists Insur. Co.*, 1994 WL 71925 at *1 (S.D.N.Y.) (citation omitted); *Bike v. Am. Motors Corp.*, 101 F.R.D. 77, 78 (E.D.Pa. 1984) (citations omitted). Prior to 1946 when Fed.R.Civ.P. 14 was amended, the rule allowed a defendant to implead a person who was or might be liable to the plaintiff. *See* 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1404[1] at 14-16 n. 2 (3d ed. 1997). However, under the current version of the rule, a third-party plaintiff may not implead a third-party defendant on the basis that the third-party defendant is liable to the plaintiff. *See Owen Equip.*

& Erection Co. v. Kroger, 437 U.S. 365, 368, 98 S.Ct. 2396, 2399 n.3 (1978). The rule is intended to eliminate the need for the defendant to bring a separate action to recover from a third party who may be "secondarily liable to the defendant for all or part of plaintiff's original claim. *See Audio Services,* 1994 WL 719725 at *2 (citations omitted). In other words, the proposed third-party defendants' liability to the defendant/third-party plaintiff must be derivative of the outcome of the main claim against the defendant. *See Alexander v. Callanen*, 104 Misc. 762, 763 (N.Y. Sup.Ct. 1979); *Cook v. Cook*, 559 F.Supp. 218, 219-220 (E.D.Pa. 1983).

In this case, there has been no allegation of joint or several liability between Crumb and the Canny Defendants. Crumb has not suggested that there is any basis for contribution, indemnity or subrogation by the Canny Defendants to him. Rather, it is the Debtor that may be entitled to contribution from the Canny Defendants based on the District Court's having found them to be jointly and severally liable, along with the Debtor, to the Pension Fund. The Debtor has not chosen to bring suit against the Canny Defendants up to this point. Crumb cannot force her to bring suit against them by impleading them as third-party defendants in the action now before this Court. *See* 5 F.R.D. at 84. Accordingly, the Court recommends that Crumb's motion seeking authorization to commence a third-party action against the Canny Defendants be denied.

Based on the foregoing, it is hereby

RECOMMENDED to the United States District Court for the Northern District of New York pursuant to 28 U.S.C. § 157(c)(1) that

1) Crumb's motion for dismissal of the Amended Complaint be denied;

2) Crumb's motion requesting that the Court abstain from hearing the adversary proceeding be denied;

3) Crumb's motion seeking authorization to commence a third-party action against the Canny Defendants be denied, and

4) Debtor's motion seeking partial summary judgment with respect to the third cause of action set forth in her Amended Complaint be denied.

Dated at Utica, New York

this 16th day of March 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge