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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

FRANCHISE MANAGEMENT SERVICES, INC.,

vs.
RIGHETTI LAW FIRM, P.C.

Plaintiff,

Defendant.

CASE NO. 09cv1578 BTM (RBB)
ORDER DENYING THE MOTION TO WITHDRAW THE REFERENCE

Before the Court is Defendant Righetti Law Firm, P.C.’s Motion to Withdraw the Reference to Bankruptcy Court. For the reasons set forth below, the Court DENIES Defendant’s Motion to Withdraw the Reference without prejudice.

I. BACKGROUND

On March 4, 2009, Franchise Management Services, Inc., (“Plaintiff” or “Debtor-in-Possession”) filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code. (Def.’s Request for Judicial Notice (“RJN”), Ex. A at 3.)

On April 8, 2009, Plaintiff filed a Complaint in bankruptcy court against Defendant the Righetti Law Firm, P.C. (“Defendant” or “Righetti”). (Def.’s RJN, Ex. A.) The Complaint arises out of alleged transfers to Defendant during the preference period in an amount not less than \$501,511.75. (Def.’s RJN, Ex. A at 3.) Plaintiff brought five causes of action including claims: (1) to avoid a transfer of an interest of the debtor property under 11 U.S.C.

1 § 547; (2) to avoid a fraudulent conveyance under 11 U.S.C. § 548(a)(1)(B); (3) to recover
2 a post-petition transfer under 11 U.S.C. § 549; (4) to recover an avoided transfer under 11
3 U.S.C. § 550; and (5) to disallow all claims by Defendant under 11 U.S.C. § 502(d) and (j).
4 (Id.)

5 On July 21, 2009, Defendant filed a Motion to Withdraw the Reference.

6 7 **II. DISCUSSION**

8 Defendant argues that the Court should withdraw the reference in this case because
9 it wishes to exercise its right to a jury trial by the district court in this action. Plaintiff opposes
10 Defendant's Motion on the grounds that Defendant waived its right to a jury trial. In the
11 alternative, Plaintiff contends that Defendant's motion is premature.

12 13 A. Did Defendant waive its right to a jury trial?

14 Although district courts have original jurisdiction over cases arising under the
15 Bankruptcy Code, 28 U.S.C. § 1334(b), they may refer these cases to the bankruptcy judges
16 for the district pursuant to 28 U.S.C. § 157(a). District courts also have the authority to
17 withdraw the reference to bankruptcy court. 28 U.S.C. § 157(d). Withdrawal may be
18 mandatory if "resolution of the proceeding requires consideration of both title 11 and other
19 laws of the United States regulating organization or activities affecting interstate commerce,"
20 or permissive upon "timely motion of any party, for cause shown." Id. Defendants do not
21 contend that withdrawal is mandatory here. Rather, Defendants argue that good cause
22 exists to withdraw the reference.

23 In determining whether cause exists to withdraw the reference, district courts consider
24 (1) the efficient use of judicial resources, (2) delay and costs to the parties, (3) uniformity of
25 bankruptcy administration, (4) the prevention of forum shopping, and other related factors.
26 Security Farms v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers, 124
27 F.3d 999, 1008 (9th Cir. 1997). Courts should also determine whether "core" or "non-core"
28 issues predominate. Withdrawing the reference typically enhances efficiency where non-

1 core issues predominate. Id. There is no dispute that core issues predominate here. See
2 28 U.S.C. § 157(b)(2) (listing core proceedings). One related factor that courts must
3 consider, however, is the parties' entitlement to a jury trial. If a party to a proceeding in
4 bankruptcy court has the right to a jury trial, the bankruptcy court may only conduct the trial
5 if all parties expressly consent. 28 U.S.C. § 157(e). Without the parties' express consent,
6 therefore, the district court must withdraw the reference in a case where a party has the right
7 to a jury trial and the case proceeds to trial.

8 In an action by a bankruptcy trustee to recover allegedly preferential transfers, a
9 defendant that has not filed a claim against the estate preserves its right to a jury trial under
10 the Seventh Amendment to the United States Constitution. See Langenkamp v. C.A. Culp,
11 498 U.S. 42, 45 (1991) (per curiam); see also Granfinanciera, S.A. v. Nordberg, 492 U.S. 33,
12 58–59. Thus, “a creditor’s right to a jury trial on a bankruptcy trustee’s preference claim
13 depends upon whether the creditor has submitted a claim against the estate.”
14 Granfinanciera, 492 U.S. at 58.

15 Plaintiff alleges that Defendant has filed claims against the estate, thereby waiving its
16 right to a jury trial. Defendant contends, however, that it only filed claims by and on behalf
17 of clients it successfully represented in a pre-petition state court class action suit against
18 Plaintiff. Defendant argues that the Court should not construe its clients’ claims for attorney’s
19 fees as its own claims against Plaintiff’s bankruptcy estate. The Court agrees with
20 Defendant.

21 It appears that Defendant filed claims against the estate only on behalf of its clients
22 and acting as their attorney, to recover unpaid wages, the amount of the state court judgment
23 in their favor, and attorney’s fees, costs, and interest. (See, e.g., Pl.’s RJN, Ex. 2.)
24 Defendant’s clients’ claims for attorney’s fees indicate that they seek this compensation
25 under the fee shifting provisions of the California Labor Code, § 1194, *et seq.* Section 1194
26 provides that “any *employee* receiving less than the legal minimum wage or the legal
27 overtime compensation applicable to the employee is entitled to recover in a civil action . .
28 . reasonable attorney’s fees, and costs of suit.” Id. (emphasis added). Thus, the *employee,*

1 not his or her attorney, may state a claim for reasonable attorney's fees under the fee shifting
2 provision of the California Labor Code. Defendant would not have a viable claim to assert
3 against Plaintiff's bankruptcy estate under Section 1194.

4 Furthermore, Plaintiff cites no legal authority to support its argument that the Court
5 should construe a creditor's claim for attorney's fees arising out of a court judgment as a
6 claim by the creditor's law firm itself. Defendant additionally points out that it is not listed as
7 a creditor on the debtor's schedules. (MacDonald Decl. ¶ 5.) Finally, "as the right of a jury
8 trial is fundamental, courts indulge every reasonable presumption against waiver." Aetna Co.
9 v. Kennedy, 301 U.S. 389, 393 (1937); see also Beacon Theatres, Inc. v. Westover, 359 U.S.
10 500, 510 (1959) (quoting Federal Rule of Civil Procedure 38(a) to reinforce that "the right of
11 trial by jury as declared by the Seventh Amendment to the Constitution or as given by a
12 statute of the United States shall be preserved . . . inviolate.") Therefore, the Court finds that
13 Plaintiff has not shown that Defendant gave up its right to a jury trial by subjecting himself
14 to the bankruptcy court's equitable power. As a result, because Defendant has not
15 consented to trial by jury in the bankruptcy court, the district court must withdraw the
16 reference if it is not premature.

17
18 B. Is Defendant's Motion premature?

19 Plaintiff alternatively argues that Defendant's Motion to Withdraw the Reference is
20 premature. Plaintiff asserts that because the case may not proceed to trial, the Court should
21 delay withdrawal. The Court agrees.

22 Defendant correctly contends that its Motion was timely. "A motion to withdraw is
23 timely 'if it was made as promptly as possible in light of the developments in the bankruptcy
24 proceeding.'" Security Farms, 124 F.3d at 1007 n. 3 (quoting In re Baldwin-United Corp., 57
25 B.R. 751, 754 (S.D. Ohio 1985)). Defendant's Answer to Plaintiff's Complaint demanded a
26 jury trial, putting Plaintiff on notice that Defendant may move to withdraw the reference.
27 Furthermore, Defendant filed its Motion to Withdraw within thirty days of filing its Answer.
28 Thus, Defendant's Motion to Withdraw was timely made.

1 District courts “have the option of withdrawing the entire adversary matter, or
2 withdrawing only the trial portion, leaving the pre-trial and discovery matters to be handled
3 by the bankruptcy judge.” In re Lars, Inc., 290 B.R. 467, 469 (D. Puerto Rico 2003). As
4 Plaintiff argues, some courts have declined to immediately withdraw a case in its early
5 stages, even where one party demands and has a right to a jury trial with the district court.
6 See, e.g., In re Orion Pictures Corp., 4 F.3d 1095, 1101–02 (2d Cir. 1993) (“A district court
7 might . . . decide that a case is unlikely to reach trial, that it will require protracted discovery
8 and court oversight before trial . . . and therefore might conclude that the case at that time
9 is best left in the bankruptcy court.”); Barlow & Peek, Inc. v. Manke Truck Lines, Inc., 163
10 B.R. 177, 179 (D. Nev. 1993) (finding withdrawal of reference premature where the case was
11 intertwined with bankruptcy case and bankruptcy judge was better equipped to conduct
12 proceedings short of jury trial); In re Enron Corp., 295 B.R. 21, 28 (S.D.N.Y. 2003) (“[I]t
13 serves the interests of judicial economy and efficiency to keep an action in Bankruptcy Court
14 for the resolution of pre-trial, managerial matters, even if the action will ultimately be
15 transferred to a district court for trial.”). The Fourth Circuit has noted that “[t]he decision
16 whether or not to withdraw the referral immediately ‘is frequently more a pragmatic question
17 of efficient case administration than a strictly legal decision.” In re Stansbury Poplar Place,
18 Inc., 13 F.3d 122, 128 (4th Cir. 1993).

19 The Court finds it appropriate to postpone withdrawing the reference until it becomes
20 clear that this case will proceed to trial. This matter remains in its early stages, and it is
21 possible that dispositive motions may resolve the case short of trial. Moreover, the
22 bankruptcy court is uniquely qualified to conduct discovery and pre-trial proceedings in this
23 case since core proceedings are at issue. Furthermore, if Plaintiff’s action against Defendant
24 succeeds, it may affect the amount of funds available for distribution in the administration of
25 the estate.

26 For all these reasons, the Court **DENIES without prejudice** Defendant’s Motion to
27 Withdraw. The Court grants Defendant leave to refile its Motion if it becomes clear that the
28 case will proceed to trial.

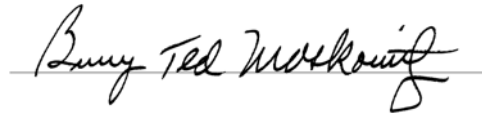
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III. CONCLUSION

For the reasons explained above, the Court **DENIES** Defendant's Motion to Withdraw the Reference from Bankruptcy Court without prejudice.

IT IS SO ORDERED.

DATED: September 30, 2009



Honorable Barry Ted Moskowitz
United States District Judge