

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re: Nicole Energy	:	
Services, Inc.,	:	
	:	
Debtor,	:	
	:	
v.	:	Case No. 2:06-cv-0162
	:	
Larry J. McClatchey,	:	JUDGE SMITH
Trustee for Nicole	:	
Energy Services, Inc.,	:	MAGISTRATE JUDGE KEMP
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
Nicole Energy Marketing,	:	
Inc., et al.,	:	
	:	
Defendants.	:	

OPINION AND ORDER

On March 24, 2009, Nicole Energy Marketing, Inc. ("NEM") and Fred Fulson filed an expedited motion in this Court seeking withdrawal of the reference of an adversary proceeding from the United States Bankruptcy Court for the Southern District of Ohio for cause pursuant to 28 U.S.C. §157(d). The movants further requested that upon withdrawal of the reference this Court dismiss the adversary proceeding and award them damages of \$50 million. On March 31, 2009, the movants filed an addendum to their motion. Mr. Fulson, then, submitted a "second" request to withdraw the reference on May 4, 2009. All of the various filings were made by Mr. Fulson, acting pro se, on behalf of himself and/or NEM.

This Court previously denied a motion to withdraw the reference that was filed by the present movants as well as

certain other related entities. See Opinion and Order entered March 26, 2007 (doc. 9). In rendering that decision, the Court analyzed the prior motion under 28 U.S.C. §157(d) and concluded that the movants had not demonstrated that mandatory withdrawal applied. The Court also determined that the movants had not shown cause for permissive withdrawal. Accordingly, the motion to withdraw was denied at that time with the condition that the movants could again petition the Court for the withdrawal of the reference if it appeared that a jury trial would be conducted by the bankruptcy court without the consent of all parties.

The facts of this case are straightforward. In 2003, Columbia Gas of Ohio and several related entities filed an involuntary Chapter 7 proceeding naming Nicole Energy Services, Inc. as the debtor. Nicole Energy Services ("NES") is one of a number of companies owned or controlled by Fred Fulson, and is related in some way to all of the movants in this case. Mr. Fulson initially contested the involuntary proceeding but later filed a voluntary Chapter 11 petition, resulting in a consolidation of the two bankruptcy proceedings in what was then treated as a voluntary Chapter 11. Larry J. McClatchey was appointed as the Chapter 11 Trustee.

In his capacity as trustee, Mr. McClatchey filed an adversary proceeding against the original movants, alleging that they engaged in a related series of transactions from 1989 through 2003 which could not be unraveled or separated. As a result, he asked the bankruptcy court to order a "substantive consolidation" of all of the entities and also requested that one or more of them be designated as a successor-in-interest to the debtor. As alternative relief, the complaint in the adversary proceeding requested the bankruptcy court to undo certain alleged preferential transfers or fraudulent conveyances between the debtor and one or more of the defendants.

In the present motion, the movants do not argue that

mandatory withdrawal applies, but contend that the Court should exercise its discretion to withdraw the adversary proceeding from the bankruptcy court. The sole argument is that the trustee has failed to prosecute his complaint for substantive consolidation and that, as a result, the adversary proceeding has lain dormant for over a year. In their view, this constitutes "cause" for permissive withdrawal.

The permissive withdrawal provision of §157(d) is not intended to permit the wholesale withdrawal of references of matters to the bankruptcy courts. Rather, there must be some compelling or extraordinary circumstances which would compel the district court to take such an extraordinary step. Typically, the Court considers such factors as whether the withdrawal would contravene the goal of uniformity and efficiency in the administration of bankruptcy law, whether it would prevent a dissatisfied litigant from engaging in forum shopping, whether the parties' resources would be unnecessarily expended if the matter were withdrawn, and whether the withdrawal would facilitate the bankruptcy process. Holmes v. Grubman, 315 F.Supp.2d 1376, 1381 (M.D. Ga. 2004). The movants do not address any of these factors, and it is evident to this Court, as it was earlier, that it would contravene the orderly and efficient administration of this case by the bankruptcy court to withdraw this particular adversary proceeding where the bankruptcy court is intimately familiar with the details of the parties and the transactions involved and the litigation is so closely related to other matters which have already been adjudicated by the bankruptcy court. Consequently, the requisite showing of cause has not been made and permissive withdrawal is not appropriate.

The trustee suggested in his objection to the earlier motion to withdraw the reference that it was likely that the claims in the adversary proceeding would be addressed during the course of liquidating NES's assets in the consolidated bankruptcy case.

The trustee has submitted a proposed plan of liquidation and filed an accompanying disclosure statement. The bankruptcy court has scheduled a hearing on approval for the disclosure statement for May 20, 2009. In the event the plan of liquidation is ultimately approved, the trustee will then be in a position to determine whether to continue to pursue his claims for substantive consolidation in the adversary proceeding.

The other possible developments which the trustee specifically identified included a potential compromise of NES's claim against Columbia Gas Transmission Corporation and a subsequent order for relief, either voluntarily or involuntarily, against one or more of the entities related to NES. The trustee further suggested that if he were able to achieve a compromise of NES's claims against Columbia Gas, the defendants' creditors might then take over prosecution of the trustee's fraudulent conveyance claims.

The record reflects that the trustee was, in fact, able to negotiate a settlement of NES's claims against Columbia Gas. This settlement was structured as a sale of NES's assets to Columbia Gas. After notice and hearing, the bankruptcy court approved the sale of NES's assets and denied a stay sought by Mr. Fulson. The sale closed in April 2008. Mr. Fulson filed various appeals with the district court and the court of appeals from both the sale order and the order denying a stay. These appeals have been dismissed pursuant to 11 U.S.C. §363(m) on grounds of statutory mootness. See Fulson v. McClatchey (In re Nicole Energy Services, Inc.), slip op. No. 09-3366 (6th Cir. Apr. 14, 2009).

The record also reflects that on March 23, 2009, an involuntary petition under chapter 7 of the Bankruptcy Code was filed against Nicole Energy Marketing, Inc. The bankruptcy court subsequently entered an order for relief on behalf of NEM on May 4, 2009. Consequently, the adversary proceeding from which the movants seek withdrawal of the reference is now subject to the

automatic stay. See 11 U.S.C. §362(a).

Based upon the foregoing, the expedited motions to withdraw the reference of the underlying adversary proceeding from the bankruptcy court (docs. 11, 16) are DENIED.

/s/ George C. Smith
George C. Smith
United States District Judge