Appendix 1a - Order Denying Rehearing by Panel

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 19-2113

Donald Henderson Scott and Carolyn Yvonne Scott
Appellants
v.
U.S. Bank National Association as Trustee, for Bayview Financial Mortgage Pass-Through Certificates, Series 2005, et al.
Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00308-DGK)

ORDER

The petition for rehearing by the panel is denied.

September 13, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix 2a - Judgment Dismissing the Appeal

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 19-2113

Donald Henderson Scott; Carolyn Yvonne Scott
Appellants
v.
U.S. Bank National Association as Trustee, for Bayview Financial Mortgage Pass-Through Certificates, Series 2005; M&T Bank; Bayview Loan Servicing LLC; David Boman, Southlaw, P.C.; Rob Clifton; Anderson Law, LLC; Mortgage Electronic Registration Systems, Inc.; Mila Homes, LLC; Corinthian Mortgage Corporation; Security Land Title Company
Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:19-cv-00308-DGK)

JUDGMENT

Before LOKEN, SHEPHERD, and GRASZ, Circuit Judges.

The court has carefully reviewed the original file of the United States District Court and grants the motion to dismiss this appeal for lack of jurisdiction.

August 07, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix 3a - Order Denying Appeal from Bankruptcy Court

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Donald Henderson Scott and Carolyn Yvonne Scott,	)
Plaintiffs/Appellants,	)
v.	) No. 4:19-cv-00308-DGK
U.S. Bank National Association Trustee For Bayview Financial Mortgage Pass-Through Certificates, Series 2005, et al.,	) Bk. Case No. 18-42696) Adversary Proceeding) No. 19-04006
Defendants/Appellees.	)

ORDER DENYING APPEAL FROM BANKRUPTCY COURT

This bankruptcy appeal arises from a state-court foreclosure. Pro se appellants Donald H. Scott and Carolyn Y. Scott sought to avoid the imminent loss of their home by filing suit in the Circuit Court of Clay County, Missouri. They notably did not seek shelter under an automatic bankruptcy stay. After several adverse rulings, they commenced a bankruptcy proceeding and removed the state-court action to the bankruptcy court. They did not consent to the bankruptcy court entering a final judgment on

the removed claims and demanded a jury trial. The bankruptcy court permissively abstained from hearing the adversary proceeding and remanded the state-law causes of action.

Now before the Court is Appellants' appeal (Doc. 4) of the bankruptcy court's order. They contend that abstention deprives them of their right to a jury trial under the Seventh Amendment.[1] The order is AFFIRMED, however, because the bankruptcy court has broad discretion to abstain from hearing state-law claims and because the Seventh Amendment does not guarantee a federal jury trial absent an independent basis for jurisdiction.

Background

Facing foreclosure, Appellants sued Appellee Corinthian Mortgage in state court. They alleged that the company forged a modified deed of trust, which nullified the original deed. Appellants' home was sold to Appellee Mila Homes, LLC, and Appellants amended their complaint to assert a claim of wrongful foreclosure. Appellants sought an order declaring that they own their former residence; declaring that they owe nothing under the original deed; voiding the trustee sale, note, and deed of trust; and awarding them $539,073.52—the principal and interest they allegedly paid on the loan.

Appellants filed a chapter 13 bankruptcy petition and, as the state court prepared to rule on dispositive motions, removed their state-law claims to

[1] Appellants state that "[i]t is in the public interest that jury trials under the Seventh Amendment of the Constitution remain inviolate at the federal level." Although it not clear from Appellants' briefing—a two-page collection of bullet points—they appear to argue that the Seventh Amendment grants them an absolute right to a jury trial in federal court.

the bankruptcy court, where they demanded a jury trial. The bankruptcy court decided that even though it could exercise its "non-core" jurisdiction over the removed claims, it should abstain under 28 U.S.C. § 1334(c)(1). The bankruptcy court remanded the adversary proceeding to state court, and Appellants appealed.

Standard

A district court acts as an appellate court with respect to bankruptcy orders. *In re Falcon Prods., Inc.*, 497 F.3d 838, 841 (8th Cir. 2007). It reviews the bankruptcy court's "legal determinations *de novo* and findings of fact for clear error." *Id.* (quoting *In re Fairfield Pagosa, Inc.*, 97 F.3d 247, 252 (8th Cir. 1996)). Issues committed to the bankruptcy court's discretion are reviewed for "an abuse of that discretion." *In re Farmland Indus., Inc.*, 397 F.3d 647, 650 (8th Cir. 2005) (citation omitted). "The bankruptcy court abuses its discretion when it fails to apply the proper legal standard or bases its order on findings of fact that are clearly erroneous." *Id.* at 651 (citation omitted).

Discussion

Appellants argue that the bankruptcy court erred in abstaining. They claim doing so denied them their right to a jury trial under the Seventh Amendment. This argument lacks merit. 28 U.S.C. § 1334(c)(1) accords bankruptcy courts broad discretion to refrain from hearing proceedings in the interests of justice or comity with state courts. *See Greenpond S., LLC v. Gen. Elec. Capital Corp.*, No. 14-cv-1214 (SRN/TNL), 2015 WL 225227, at *5 (D. Minn. Jan. 16, 2015). The right to a jury is just one factor courts consider when deciding whether to abstain, *see In re Foss*, 328 B.R. 780, 783-84 (B.A.P. 8th Cir. 2005), and here the bankruptcy court properly found that it

weighs in favor of remand. *See In re Loewen Grp. Int'l, Inc.*, 344 B.R. 727, 731 (Bankr. D. Del. 2006) ("Where such right exists, whether waived or not, it is indicative that, in the absence of federal issues which give a right to a jury trial, a state law claim lies at the heart of the action." (internal quotations and citation omitted)). Moreover, although the Seventh Amendment does generally confer a right to a jury trial, it does not itself grant Appellants the right to litigate in federal court. *See Nalls v. Countrywide Home Servs., LLC*, 279 Fed. Appx. 824, 825 (11th Cir.2008).

The Court has reviewed the rest of the bankruptcy court's order and finds it well reasoned. The bankruptcy court correctly concluded that the clear majority of *Foss* factors favor abstention. The Court agrees, for example, that remand would more efficiently resolve the removed claims, given Appellants' demand for a jury trial and their lack of consent to the bankruptcy court's authority. In addition, the removed claims present predominately state-law issues, and hearing them would unnecessarily burden the dockets of both the bankruptcy and district courts. Also significant is that 28 U.S.C. § 1334 serves as the only basis for federal jurisdiction over the claims. Thus, even if Appellants' demand for a jury trial did not support abstention, the bankruptcy court would still be well within its bounds to remand the proceeding.

Conclusion

The bankruptcy court did not abuse its discretion. The order abstaining from and remanding Appellants' adversary proceedings to the Circuit

Court of Clay County, Missouri, is therefore AFFIRMED.[2]

IT IS SO ORDERED.

Date: May 14, 2019 /s/ Greg Kays
Greg Kays, Judge United States District Court

[2] In light of this result, Appellants' other motions are DENIED AS MOOT. These include a motion to stay (Doc. 2) and three motions to remove Appellees (Docs. 8, 9, and 10).

Appendix 4a - Order Abstaining and Remanding Adversary Proceeding to the Circuit Court of Clay County Missouri

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI

IN RE:	)
	) Case No. 18-42696
Donald Henderson Scott	)
and	)
Carolyn Yvonne Scott	) Chapter 13
Debtors	)
	)
Donald Henderson Scott	)
and	)
Carolyn Yvonne Scott,	)
Plaintiffs,	)
v.	) Adversary No. 19-4006
U.S. Bank National	)
Association Trustee for	)
Bayview Financial	)
Mortgage Pass-Through	)
Certificates, Series 2005,	)
M&T Bank,	)
Bayview Loan Servicing,	)
LLC, Rob Clifton,	)
Anderson Law, LLC,	)
Mila Homes, LLC,	)
Corinthian Mortgage	)
Corporation, Security	)
Land Title Company, and	)
South Law, P.C.,	)
Defendants.	)

ORDER ABSTAINING AND REMANDING ADVERSARY PROCEEDING TO THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI

Plaintiffs Donald and Carolyn Scott were facing the imminent foreclosure of their home in early August 2018. Instead of seeking shelter under the bankruptcy automatic stay, the Scotts commenced this action in the Circuit Court of Clay County, Missouri (as case number 18CY-CV07714), seeking "cancellation of written instruments, quiet title, declarative relief, [and] to assert the non-existence of a default on a loan."

Only after a series of unfavorable rulings in state court did the Scotts finally file their bankruptcy petition. Later, as the state court prepared to rule on dispositive motions, the Scotts removed the state court action to this court. Here, the Scotts expressly do not consent to this court entering a final judgment on the removed causes of action, and they demand a trial by jury—potentially requiring multiple trials in the District Court and this court on some of the same matters.

Defendants Mila Homes, LLC; Rob Clifton; and Anderson Law, LLC move for the court to dismiss or remand this action. They argue the court should dismiss for lack jurisdiction or, alternatively, abstain and remand on equitable grounds. Having considered the arguments the parties advanced in their filings and at hearings in this adversary proceeding, and for the reasons explained below, the court agrees with the defendants and sends this action back to state court.

Accordingly, the court (1) DENIES defendants' motion to dismiss, (2) permissively ABSTAINS from deciding the removed causes of action in this

adversary proceeding, and (3) REMANDS the removed causes of action to the Circuit Court of Clay County, Missouri.

FINDINGS OF FACT

The court described much of the applicable history to this dispute in detail in its December 18, 2018, order denying the Scotts' motion to stay rulings and orders pending appeal in the Scotts' lead bankruptcy case. No. 18-42696, ECF No. 130. The court incorporates by reference the findings of fact in that order, and makes the following additional findings of relevant facts in connection with this proceeding:

Plaintiffs Donald and Carolyn Scott filed their state court petition on August 2, 2018, alleging that after they executed a note and deed of trust in favor of Defendant Corinthian Mortgage in August 2000, Corinthian Mortgage forged and recorded a modified deed of trust without the Scotts' consent. Though they do not assert the allegedly forged deed of trust altered any material terms, they argue the alleged forgery nullified the original deed of trust, invalidated the promissory note the Scotts executed to finance the purchase of their home, and "discharged [their] obligations" to repay the amount they borrowed. The Scotts also request the court order U.S. Bank (the most recent loan servicer) to pay the Scotts $539,073.52—the amount of principal and interest the Scotts allege they paid on the loan from its inception.

Despite their clear goal of retaining their home, it appears the Scotts did not ask the state court to enjoin the foreclosure sale. Consequently, the foreclosure sale occurred as scheduled on August 9, 2018, and the home sold to Mila Homes, LLC. On

August 17, 2018, the Scotts amended their state court petition to add a count for wrongful foreclosure and to add defendants Rob Clifton; Anderson Law, LLC; and Mila Homes, LLC. At an evidentiary hearing before this court on November 7, 2018, Mr. Scott reported that matters in the state court case were ripe for ruling.

The Scotts filed their chapter 13 bankruptcy petition on October 16, 2018. After conducting an evidentiary hearing on November 7, 2018, concerning the automatic stay and the state court litigation, this court determined that, based on the limited facts presented, the automatic stay likely did not apply to the state court action. Nevertheless, the court terminated any automatic stay that might apply to the state court action to allow the parties to proceed with the litigation the Scotts initiated against the defendants. Moreover, because the Scotts stated at the November 7 hearing that they preferred this court resolve all the state law issues, the court exercised its discretion under 28 U.S.C. § 1334(c)(1) to permissively abstain from determining any issue in the state court action.

Thereafter, the state court scheduled a hearing on several dispositive motions—including a motion to dismiss the state court action—for January 15, 2019. However, the day before the scheduled hearing, on January 14, 2019, the Scotts filed with this court and the state court a notice of removal of the state court action. But for reasons unknown, the clerk of the state court failed to enter the notice of removal on the state court docket before the January 15, 2019, hearing. Apparently unaware of the removal, the state court judge held the hearing on January 15, 2019, and

dismissed the state court action. The Scotts did not attend that hearing.

In the removed causes of action, among other relief, the Scotts request orders or judgments (1) declaring the Scotts own their former residence free and clear of any lien; (2) voiding the trustee sale, note, and deed of trust; (3) declaring the Scotts owe nothing under the note they executed to finance the purchase of their residence; and (4) awarding the Scotts $539,073.52, together with prejudgment interest, in restitution on the allegedly rescinded note and deed of trust. The Scotts demand a jury trial on the removed causes of action. They expressly do not consent to this court entering a final judgment on the removed causes of action.

With this background in mind, the court now addresses the motion to dismiss or abstain and remand.

DISCUSSION

A. The Court Denies Defendants' Motion to Dismiss

The defendants first ask the court to dismiss this proceeding, alleging this court lacks jurisdiction for two reasons: (1) "because the [Scotts] failed to effectuate the removal of the State Court Action prior to the January 16, 2019[,] Dismissal order entered by the State Court"; and (2) because the court lacks subject matter jurisdiction under 28 U.S.C. § 1452 and Fed. R. Bank. P. 9027.

Now that the Scotts have provided sufficient proof that they filed the notice of removal in state court on January 14, Mila Homes concedes the Scotts effected removal before the state court dismissed the case. *See Anthony v. Runyon*, 76 F.3d 210, 214 (8th Cir. 1996). Once a party effects removal, the court where the action originates loses jurisdiction over the

removed causes of action, and any decision that court makes post-removal is void. *See Ward v. Resolution Tr. Corp.*, 972 F.2d 196, 198 (8th Cir. 1992) (holding post-removal state court dismissal void). Thus, the state court lost jurisdiction on January 14, 2019, and the state court's January 16, 2019, order dismissing the case is void.

Having determined this case survived the state court's purported dismissal, the court must next determine whether it may exercise jurisdiction over the removed causes of action under 28 U.S.C. §§ 1334 and 157. Specifically, a bankruptcy court must possess both statutory and constitutional authority to enter a final judgment in a case. *Stern v. Marshall*, 564 U.S. 462, 482–503 (2011).

Analysis of a bankruptcy court's statutory authority to exercise jurisdiction over a removed cause of action begins with 28 U.S.C. § 1452, which permits removal if there is jurisdiction over the removed cause of action under 28 U.S.C. § 1334. Sections 1334 and 157 authorize district courts and, by extension through reference under 28 U.S.C. § 157(a), bankruptcy courts to exercise jurisdiction over "core proceedings" and "non-core related" proceedings.[3] 28 U.S.C. §§ 157, 1334. *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1940 (2015). A court may not adjudicate a cause of action if it lacks both core and non-core "related to" statutory jurisdiction over the cause of action. *See The Foley Co. v. Aetna Casualty & Surety Co. (In re S & M Constructors, Inc.),* 144 B.R.

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[3] The Unites States District Court for the Western District of Missouri referred all bankruptcy matters on August 15, 1984. *Order Regarding Reference of Bankruptcy Matters to United States Bankruptcy Judges*, available on the court's website at www.mow.uscourts.gov/bankruptcy/rules.

855, 860–63 (Bankr. W.D. Mo. 1992) (determining court lacked authority to adjudicate case).

Core proceedings include those that arise under title 11 or arise in a case under title 11. *Stern*, 564 U.S. at 476. Section 157 provides a nonexclusive list of sixteen examples of statutorily "core proceedings," including "orders to turn over property of the estate;" "determinations of the validity, extent, or priority of liens;" and "other proceedings affecting . . . the adjustment of the debtor-creditor or the equity security holder relationship." *Sharif*, 135 S. Ct. at 1940; 28 U.S.C. §§ 157(b)(2)(E), (K), (O).

In contrast, a state law cause of action that would "exis[t] without regard to any bankruptcy proceeding" is a non-core proceeding and may be "related to" a bankruptcy case if the cause of action seeks to "augment the bankruptcy estate." *See Stern*, 564 U.S. at 499 (explaining *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989)). In the Eighth Circuit, a court has non-core "related to" jurisdiction over a proceeding if "the outcome of that proceeding could conceivably have any [e]ffect on the estate being administered in bankruptcy." *Dogpatch Props., Inc. v. Dogpatch U.S.A., Inc. (In re Dogpatch U.S.A., Inc.)*, 810 F.2d 782, 786 (8th Cir. 1987) (explaining non-core jurisdiction in case predating *Stern v. Marshall*).

However, even if §§ 1334 and 157 authorize a bankruptcy court to exercise statutory jurisdiction, Article III of the Constitution and separation of powers prevent a bankruptcy court from entering final judgment on any cause of action that "from its nature, is the subject of a suit at common law, or equity, or admiralty" and any statutorily "non-core" cause of action. *See Stern*, 564 U.S. at 484 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855)); *Sharif*, 135 S. Ct. at 1951–52.

Absent the parties' consent, in a non-core related cause of action, the bankruptcy court may submit a report and recommendation with proposed findings of fact and conclusions of law to a district court for *de novo* review. *Stern,* 564 U.S. at 475; *Sharif,* 135 S. Ct. at 1940. However, parties may expressly or impliedly consent to the bankruptcy court hearing and issuing a final judgment in a non-core related cause of action. *Sharif,* 135 S. Ct. at 1947–49.

In this case, the court has non-core "related to" jurisdiction over the removed causes of action, but the court lacks constitutional authority to enter a final judgment. The removed causes of action are non-core because they are purely state law causes of action that existed independent of—in fact, were filed months before—the Scotts' bankruptcy case. Among other relief, the Scotts request orders quieting title to their former residence; declaring the note, deeds of trust, and trustee sale void; and requiring the defendants to return the residence to the Scotts. Though an order resolving those requests may affect the administration of the bankruptcy estate— namely, whether the residence is property of the estate, whether any of the defendants have a lien or other interests in the residence, and the nature of any debtor-creditor relationship between the Scotts and the defendants—the removed causes of action themselves are not core proceedings. In fact, the Scotts expressly state they do not consent to the court entering a final judgment on the removed causes of action. Thus, the Scotts recognize the non-core nature of the removed causes of action.

However, the removed causes of action could conceivably affect the Scotts' bankruptcy estate. The outcome of the removed causes of action will determine whether the residence is property of the

bankruptcy estate, and whether a debtor-creditor relationship exists between the Scotts and any defendant. Thus, the removed causes of action are non-core related.

Because the removed causes of action are non-core, Article III of the Constitution and separation of powers prevent this court from entering a final judgment on those matters. Generally, the court could issue a report and recommendation with proposed findings of fact and conclusions of law to the District Court as to any issue that does not invoke the Scotts' Seventh Amendment right to trial by jury.

However, the Scotts limit this court's authority to issue a report and recommendation by invoking their Seventh Amendment right to a jury trial on the removed causes of action. A bankruptcy court may conduct a jury trial only if, among other prerequisites, all parties expressly consent to the bankruptcy court conducting a jury trial. 28 U.S.C. § 157(e); Fed. R. Bankr. P. 9015(a); Fed. R. Civ. P. 38(b)(1), (d) (listing four prerequisites). Absent all prerequisites, this court's local rules provide that the action will remain in the bankruptcy court until the conclusion of all pretrial proceedings and then transfer to the District Court for the jury trial. L.R. 9015-1.F.

Here, this court cannot conduct a jury trial because the parties have not expressly consented. Instead, as to all matters that invoke the Scotts' right to a jury trial, this court may only conduct pretrial proceedings. When those matters are ready for trial, this court must transfer them to the District Court for jury trial.

Overall, dismissal for lack of jurisdiction is not appropriate because, as stated above, this court could exercise non-core "related to" jurisdiction. The court therefore denies the defendants' motion to dismiss.

However, for the reasons the court will explain below, the court declines to exercise that jurisdiction and instead abstains from considering the removed causes of action and remands them back to the state court.

B. The Court Abstains from Hearing the Removed Causes of Action

A bankruptcy court has the power to abstain from hearing certain disputes under 28 U.S.C. § 1334. A court may permissively abstain under § 1334(c)(1). In contrast, § 1334(c)(2) mandates abstention in certain proceedings. While mandatory abstention under § 1334(c)(2) might have applied here, no party has made a timely motion for the court to abstain pursuant to § 1334(c)(2). Consequently, only permissive abstention applies in this proceeding.

1. Permissive Abstention

As an alternative to dismissal, the defendants ask the court to permissively abstain from hearing the Scotts' removed causes of action. A party or the court, sua sponte, may raise the issue of whether the court should permissively abstain from considering a cause of action. *Stabler v. Beyers (In re Stabler)*, 418 B.R. 764, 769 (B.A.P. 8th Cir. 2009).

Under the permissive abstention doctrine, a bankruptcy court has "broad discretion to abstain from hearing state law claims whenever appropriate in the interest of justice, or in the interest of comity with State courts or respect for State law." *Gober v. Terra + Corp. (In re Gober)*, 100 F.3d 1195, 1206 (5th Cir. 1996); 28 U.S.C. § 1334(c)(1) (2012). "Because [28 U.S.C. § 1334(c)(1)] speaks in general concepts, *i.e.*, the 'interest of justice' and 'interest of comity,' courts have developed specific criteria to determine whether abstention is warranted." *Stabler*, 418 B.R. at 769.

In *In re Foss*, the Eighth Circuit Bankruptcy Appellate Panel (BAP) explained a bankruptcy court should consider the following twelve factors when deciding whether to permissively abstain:

> (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 difficult or unsettled nature of the applicable 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. § 1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than the form of an asserted core proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden [on] the bankruptcy court's docket;

(10) the likelihood that the commencement of the proceeding involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of nondebtor parties.

328 B.R. 780, 783–84 (B.A.P. 8th Cir. 2005).

If a bankruptcy court determines a majority of these factors are present, then the court should abstain. *Stabler*, 418 B.R. at 770. "'Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative.'" *Williams v. Citifinancial Mortg. Co. (In re Williams)*, 256 B.R. 885, 894 (B.A.P. 8th Cir. 2001) (quoting *Matter of Chicago, Milwaukee, St. Paul & Pacific Railroad Co.*, 6 F.3d 1184, 1189 (7th Cir. 1993)).

For the reasons stated below, in the interest of comity with state courts and respect for state law, and because the vast majority of the twelve abstention factors are present and favor permissive abstention, the court exercises its discretion to permissively abstain from considering the removed causes of action under 28 U.S.C. § 1334(c)(1).

Factor 1: Effect or Lack Thereof on the Efficient Administration of the Estate if the Court Recommends Abstention

Here, permissive abstention fosters the efficient administration of the Scotts' bankruptcy estate. The Scotts do not consent to the court's authority to enter

any final decision relating to their removed causes of action. Instead, the Scotts would have this court (a) hear all proceedings relating to matters for which the Scotts do not have a right to a jury trial and issue a report and recommendation with proposed findings of fact and conclusions of law for the District Court's *de novo* review and (b) conduct all pretrial proceedings on issues for which the Scotts have a right to a jury trial and then transfer those causes of action to the District Court for the jury trial. Alternatively, if the court permissively abstains from considering the removed causes of actions and remands them back to state court, the state court can conduct a jury trial and sits ready to hear and rule on several dispositive motions that have been pending for several months. Though the outcome of the removed causes of action might affect the bankruptcy estate, the court may efficiently administer the bankruptcy estate without adjudicating the removed causes of action. Therefore, it is more efficient for the administration of the estate if the court permissively abstains. This factor favors permissive abstention.

Factor 2: Extent to Which State Law Issues Predominate over Bankruptcy Issues

"[P]ermissive abstention is most appropriate when a case is dominated by state law issues or raises unsettled issues of state law." *In re G–I Holdings*, 580 B.R. 388, 426 (Bankr. D.N.J. 2018) (quoting *U.S. Home Corp. Los Prados Cmty. Ass'n, Inc. (In re U.S.H. Corp. of New York)*, 280 B.R. 330, 337 (Bankr. S.D.N.Y. 2002) (citing *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483 (1940)). *See also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325, 332 (8th Cir. 1988) (opining that "abstention is particularly compelling" when proceeding is based on

state law and bears a limited connection to the bankruptcy case).

Here, state law issues dominate the removed causes of action. The Scotts demand a jury trial on all counts of the removed causes of action: cancellation of written instruments, quiet title, declarative relief, asserting the non-existence of default on a loan, common-law restitution, and wrongful foreclosure under Mo. Rev. Stat. § 443.320 (2000). All claims in this action are state law claims. There are no claims based on the Bankruptcy Code. Therefore, this factor favors permissive abstention.

Factor 3: Difficult or Unsettled Nature of Applicable Law

The claims asserted in this action are purely state law causes of action that do not appear to raise difficult or unsettled issues of law. The state court can, and should, adjudicate them easily and quickly. This factor favors permissive abstention.

Factor 4: Presence of Related Proceeding Commenced in State Court or Other Non-Bankruptcy Court

Although there was a separate unlawful detainer action in the Associate Circuit Court of Clay County, Missouri (18-CY-CV08708), the state court has already issued a final judgment in that action. The court is aware of no other related proceeding commenced in state court or other nonbankruptcy forum. This factor does not apply.

Factor 5: Jurisdictional Basis Other than 28 U.S.C. § 1334

Jurisdiction under § 1334 is the only basis for jurisdiction. This factor favors permissive abstention.

Factor 6: Relatedness/Remoteness to the Main Bankruptcy Case

The removed causes of action involve only state law issues and arguably only remotely relate to the Scotts' main bankruptcy case. But if the Scotts are successful on some or all of their theories, it could alter the landscape of the Scotts' main bankruptcy case by increasing the property of the estate and adding creditors with claims against the estate. At a minimum, the outcome should determine who will receive the excess proceeds of the foreclosure sale. Thus, the Scotts' causes of action might have more than a contingent or peripheral impact on their bankruptcy estate.

Cf. Titan Energy, 837 F.2d at 332. This factor weighs against permissive abstention.

Factor 7: Substance Rather than Form of an Asserted Core Proceeding

There are no core proceedings in this removed cause of action. This factor favors permissive abstention.

Factor 8: The Feasibility of Severing State Law Claims from Core Bankruptcy Matters to Allow Judgments to Be Entered in State Court with Enforcement Left to the Bankruptcy Court

None of the claims in this action are core matters, a position the Scotts conceded when they expressly declined to consent to the bankruptcy court entering a final judgment on any of the removed causes of action. This factor favors permissive abstention.

Factor 9: Burden on the Bankruptcy Court's Docket

It would unnecessarily burden the bankruptcy court's—as well as the District Court's—docket to hear the removed causes of action for the following reasons: (1) the removed causes of action are noncore related proceedings raising only state law issues; (2)

the removed causes of action will likely require evidentiary hearings, legal briefing, and significant pretrial motions practice; (3) the court will have to prepare a report and recommendation with proposed findings of fact and conclusions of law for the District Court to review *de novo* on any issues not tried to a jury; and (4) the District Court will have to conduct a jury trial on all issues that may be tried before a jury. For all these reasons, this factor favors permissive abstention.

Factor 10: The Likelihood the Commencement of the Proceeding Involves Forum Shopping by one of the Parties

In *In re Stabler*, the Eighth Circuit BAP affirmed the bankruptcy court's decision to permissively abstain when the debtors allowed a state court lawsuit to proceed for a substantial period of time before removing the lawsuit to bankruptcy court. 418 B.R. 764, 770 (B.A.P. 8th Cir. 2009).

Here, the Scotts initially brought this action in state court on August 2, 2018. After the foreclosure sale of their home, the Scotts chose to remain in state court and amended their state court petition to add a wrongful foreclosure count. Additionally, the Scotts chose to stay in state court even after Mila Homes filed a separate unlawful detainer action against them. Indeed, the Scotts did not file their bankruptcy petition until more than two months after initially filing their state court lawsuit, and even then, they did not choose to remove either state court lawsuit when they commenced their bankruptcy case. Finally, the Scotts waited to remove until January 14, 2019, one day before the state court was to hear dispositive motions filed by the defendants, and more than four months after they filed the state court petition.

Considering these facts, the timing and circumstances of the Scotts' removal of their state court lawsuit appear to reflect that removal was merely an "attempt to circumvent decisions of the state court in which they chose to proceed . . . and [to] secure a different or better result in [federal] court." *Stabler*, 418 B.R. at 770.

Therefore, this factor strongly favors permissive abstention.

Factor 11: The Existence of a Right to a Jury Trial

The Scotts demand a jury trial on all the removed causes of action and expressly do not consent to this court entering a final order or judgment. This factor favors permissive abstention.

Factor 12: The Presence in the Proceeding of Nondebtor Parties

Here, the Scotts have named eleven nondebtor parties as defendants in this adversary proceeding. Many of these defendants have not appeared in the Scotts' main bankruptcy case or this adversary proceeding. The presence of eleven nondebtor parties favors permissive abstention.

Overall, the court determines ten of the twelve factors (factors 1, 2, 3, 5, 7, 8, 9, 10, 11, and 12) favor permissive abstention, one factor (factor 4) does not apply, and one factor (factor 6) weighs against abstention. Accordingly, in the interest of comity with state courts and respect for state law, the court exercises its discretion to abstain from hearing the removed causes of action under 28 U.S.C. § 1334(c)(1).

2. Law of the Case

In their motion to dismiss, the defendants correctly state that the court already abstained from

determining the issues in the Scotts' state court lawsuit under
§ 1334(c)(1) in its order entered on November 9, 2018 (No. 18-42696, ECF No. 54). The defendants request the court treat its previous order in the Scotts' main bankruptcy case as the "law of the case," meaning the court's previous decision to abstain should require the court to remand the Scotts' removed causes of action back to state court.

Because the court has already explained why it will permissively abstain from hearing the Scotts' removed causes of action, it is unnecessary for the court to address the defendants' law of the case argument. *See In re G–I Holdings*, 580 B.R. 388, 432 (Bankr. D.N.J. 2018).

C. The Court Remands the Removed Causes of Action to the State Court

The defendants ask the court to remand this case to the state court. Federal Rule of Bankruptcy Procedure 9027 and 28 U.S.C. § 1452(b) authorize a court to remand a removed cause of action on "any equitable ground." Fed. R. Bankr. P. 9027; 28 U.S.C. § 1452(b).

In determining whether any equitable ground justifies remand, courts consider the twelve permissive abstention factors, together with the following four additional "remand factors": "(1) whether remand serves principles of judicial economy; (2) whether there is prejudice to unremoved parties; (3) whether the remand lessens the possibilities of inconsistent results; and (4) whether the court where the action originated has greater expertise." *Zahn Law Firm, P.A. v. Baker (In re Baker)*, 577 B.R. 308, 311 (B.A.P. 8th Cir. 2017) (citing *Sears v. Sears (In re Sears)*, 539 B.R. 368, 372 (D. Neb. 2015)).

In this case, equity justifies remand because the abstention factors and two of the three applicable remand factors favor remand. As to the remand factors, factor two does not apply because there are no unremoved parties. Remand factor three is neutral because this court will administer the Scott's bankruptcy case in conformity with the state court's determination of the causes of action. However, for the following reasons, remand factors one and four heavily favor remand.

As to remand factor one, remand will serve principles of judicial economy. As this adversary proceeding, the state court case, and the Scotts' lead bankruptcy case demonstrate, the Scotts have repeatedly delayed final adjudication and prevented unfavorable rulings by switching forums and judges. These delay tactics have wasted court resources—both at the state level and federal level.

Furthermore, as explained above, because none of the causes of action are core proceedings and the Scotts demand a jury trial and expressly do not consent to this court entering final orders or judgment, this court cannot enter a final judgment on any matter. Instead, the court must bifurcate the matters in this case into two categories: issues the court must determine and issues a jury must determine. As to all matters the court must determine, the court must issue a report and recommendation with proposed findings of fact and conclusions of law to the District Court for *de novo* review—effectively requiring two courts to consider and rule on those issues, further wasting judicial resources and delaying final judgment. As to all issues a jury must determine, this court would prepare those matters for a jury trial, but the District Court would conduct the jury trial. This process is

unduly cumbersome, and unnecessarily uses both this court's and the District Court's resources. To the contrary, the state court may adjudicate all causes of action and conduct any jury trial. Remand, therefore, minimizes further delay and wastefulness and places all causes of action before a single court, thus serving principles of judicial economy.

Last, remand factor four outweighs any other, and requires remand. The state court, where the Scotts initiated this action, has greater expertise in determining the removed causes of action because state law issues dominate the removed causes of action. Thus, remand will allow the court with the greatest expertise to adjudicate the removed causes of action.

In conclusion, because (1) ten of the twelve abstention factors favor remand, (2) remand serves principles of judicial economy, and (3) remand will allow the court with the greatest expertise to adjudicate the removed causes of action, twelve of the sixteen total factors weigh in favor of remand. Thus, equity compels this court to remand this proceeding to the state court.

CONCLUSION

For the reasons set forth above, the court
DENIES defendants' motion to dismiss, permissively
ABSTAINS from deciding the removed causes of action, and
REMANDS this proceeding to the Circuit Court of Clay County, Missouri.
IT IS SO ORDERED.

Dated: 4/9/19

/s/ Brian T. Fenimore
U.S. Bankruptcy Judge

Appendix 5a - 28 U.S.C. § 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals [1]
(1) from final judgments, orders, and decrees;
(2) from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title; and
(3) with leave of the court, from other interlocutory orders and decrees;
of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.
(b)
(1) The judicial council of a circuit shall establish a bankruptcy appellate panel service composed of bankruptcy judges of the districts in the circuit who are appointed by the judicial council in accordance with paragraph (3), to hear and determine, with the consent of all the parties, appeals under subsection (a) unless the judicial council finds that—
(A) there are insufficient judicial resources available in the circuit; or
(B) establishment of such service would result in undue delay or increased cost to parties in cases under title 11.
Not later than 90 days after making the finding, the judicial council shall submit to the Judicial Conference of the United States a report containing the factual basis of such finding.
(2)
(A) A judicial council may reconsider, at any time, the finding described in paragraph (1).

(B) On the request of a majority of the district judges in a circuit for which a bankruptcy appellate panel service is established under paragraph (1), made after the expiration of the 1-year period beginning on the date such service is established, the judicial council of the circuit shall determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(C) On its own motion, after the expiration of the 3-year period beginning on the date a bankruptcy appellate panel service is established under paragraph (1), the judicial council of the circuit may determine whether a circumstance specified in subparagraph (A) or (B) of such paragraph exists.

(D) If the judicial council finds that either of such circumstances exists, the judicial council may provide for the completion of the appeals then pending before such service and the orderly termination of such service.

(3) Bankruptcy judges appointed under paragraph (1) shall be appointed and may be reappointed under such paragraph.

(4) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(5) An appeal to be heard under this subsection shall be heard by a panel of 3 members of the bankruptcy appellate panel service, except that a member of such service may not hear an appeal originating in the district for which such member is appointed or designated under section 152 of this title.

(6) Appeals may not be heard under this subsection by a panel of the bankruptcy appellate panel service unless the district judges for the district in which the appeals occur, by majority vote, have authorized such service to hear and determine appeals originating in such district.

(c)

(1) Subject to subsections (b) and (d)(2), each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless—

(A) the appellant elects at the time of filing the appeal; or

(B) any other party elects, not later than 30 days after service of notice of the appeal;

to have such appeal heard by the district court.

(2) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d)

(1) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

(2)

(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;
and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.
(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—
(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or
(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);
then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A).
(C) The parties may supplement the certification with a short statement of the basis for the certification.
(D) An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.
(E) Any request under subparagraph (B) for certification shall be made not later than 60 days after the entry of the judgment, order, or decree.

Appendix 6a - 28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.
(c)
(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.
(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court

of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

Appendix 7a - 28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of

this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Appendix 8a - 28 U.S.C. § 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.
(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.
(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.
(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.
(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny

joinder, or permit joinder and remand the action to the State court.

Appendix 9a - 28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.
(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.