No. 23-729

In the
Supreme Court of the United States

ROEE KIVITI, ET AL.,

Petitioners,

v.

NAVEEN BHATT,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

JUSTIN FASANO
Counsel of Record
MCNAMEE HOSEA, P.A.
6404 Ivy Lane, Suite 820
Greenbelt MD 20770
301-441-2420
301-982-9450 (facsimile)
jfasano@mhlawyers.com

Counsel for Respondent

April 5, 2024

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The question presented is: Whether bankruptcy courts remain bound by the case-or-controversy requirement of Article III of the Constitution after a properly referred Article III case or controversy becomes moot.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

STATEMENT OF THE CASE

Introduction

The opinion of the Fourth Circuit should represent the end of a long-lasting, expensive, fact-specific dispute over a relatively small amount of money. Respondent has been subject to scorched earth litigation brought by far wealthier adversaries over a $58,770.00 claim, and has prevailed in the United States Bankruptcy Court for the Eastern District of Virginia, the United States District Court for the Eastern District of Virginia, and the United States Court of Appeals for the Fourth Circuit. While Petitioner largely won on the merits in the Bankruptcy and District Court, the Fourth Circuit appeal was dismissed on procedural grounds seemingly unique to this dispute, and not in contravention of the case law of any other circuit. The facts as described below are unique and unlikely to repeat themselves. Finally, the Fourth Circuit ruling could be affirmed on numerous other grounds. Every consideration therefore favors denial of certiorari.

Factual and Procedural Background

On December 3, 2020, Naveen Bhatt ("Respondent") filed for Chapter 7 bankruptcy, commencing Case No. 20-bk-12637-KHK (Bankr. E.D. Va.). On February 28, 2021, Roee and Adiel Kiviti ("Petitioners") filed the two-count complaint ultimately giving rise to this appeal, commencing Adversary Proceeding 21-01018-KHK (Bankr. E.D. Va.). Count I of the Complaint sought a judgment to disgorge, pursuant to 16 D.C. Mun. Reg. 800.1, a $58,770.00 deposit the Petitioners paid to Diya

Companies, LLC ("Diya"), the home renovation company of Respondent. Count II went further, seeking to hold such judgment non-dischargeable in Respondent's bankruptcy, based on fraud, pursuant to 11 U.S.C. § 523.

The Petitioners did not allege that Respondent did not intend to perform the work or that Diya used the deposit for work other than the renovation. Given the nearly year-long history of work on the project and the payment of over 85% of the deposit to subcontractors and materialmen, the Petitioners could not have made those allegations. Instead, the Petitioners' grievances related to the quality of the work performed, traditionally an issue of contract. Rather than sue for any actual minor damages incurred, however, the Petitioners requested only that the Bankruptcy Court hold the asserted statutory damages non-dischargeable. Those damages were only allowable pursuant to an intentionally draconian strict liability statute, 16 D.C. Mun. Reg. 800.1, which requires unlicensed contractors to disgorge any deposit they received without defense of setoff, knowledge, or quantum meruit. *See Djourabchi v. Self*, 571 F. Supp. 2d 41, 47 (D.D.C. 2008) (holding 16 D.C. Mun. Reg. 800.1 requires an unlicensed contractor to disgorge the entire deposit he receives for a home renovation, regardless of quality of work, regardless of any fraudulent intent by contractor, regardless of the amount of work done on the project, and regardless of how the deposit was used.)

The Petitioners alleged that their right to disgorgement was non-dischargeable because Respondent supposedly fraudulently informed the

Petitioners that he was licensed in the District of Columbia. In fact, Respondent never informed the Petitioners that he was licensed in the District of Columbia and never knew that a separate license was required for the District of Columbia (he was licensed in Virginia, where he had passed the contractor's examination). But even if he made such representation, Count II of the Petitioners' complaint was properly dismissed, because, as had been found by the United States Bankruptcy Court for the District of Columbia under substantially identical facts, any such representation could not have been the proximate cause of the damage alleged by the Petitioners. *See In re Carpenter*, 453 B.R. 1 (Bankr. D.D.C. 2011). The Complaint alleged only a dispute about the competence of the work performed. But unlike Virginia, where Respondent is licensed, the District of Columbia does not require any level of competence or skill or knowledge in order to obtain a contractor's license. The purpose of the licensing statute is to prevent "fly-by-night" contractors from running off with money of unsuspecting customers without intending to perform work. Because there was nothing in the D.C. statute that would render a misrepresentation unrelated to Respondent's competence non-dischargeable in bankruptcy, the Bankruptcy Court dismissed Count II of the Complaint.

After the Bankruptcy Court's ruling on the motion to dismiss, the parties were faced with a procedural conundrum. In order for Petitioners to appeal, they would have had to take Count One to trial to determine the amount of Petitioners' claim against the Respondent's bankruptcy estate (determining the

amount owed pursuant to the strict liability statute set forth in Count One did not require prove of fraud). This issue, while disputed, was of significantly less financial importance to all parties than the adjudication of Count Two, as the claim in bankruptcy would likely receive a tiny percentage distribution. After the trial on Count One, the Petitioners would then have had to proceed with an appeal as to Count Two (and depending on the result, either party would have then likely appealed the ruling on Count One). If the Petitioners' appeal were successful, then the parties would have to have had a second trial to resolve Count Two of the Complaint.

The stipulation at issue in this appeal was drafted with this background in mind. The parties were seeking to minimize costs and bring this matter to a quicker resolution. As a result of the Stipulation, Petitioners voluntarily dismissed Count One without prejudice and took an appeal to the United States District Court for the Eastern District of Virginia, where the dismissal of Count Two was affirmed on the merits. On appeal to the United States Court of Appeals to the Fourth Circuit, the parties were asked to brief the finality of the dismissal of Count Two. After briefing and oral argument, the Fourth Circuit issued the memorandum opinion that is the subject of this appeal.

REASONS FOR DENYING THE PETITION

I. There is no circuit split because the opinion below does not deviate from the rulings of other circuits.

There is no circuit split on the question presented. The cases cited by petitioners as disagreeing with the opinion below are: *In re Res. Tech. Corp.*, 624 F.3d 376 (7th Cir. 2010); *In re Glob. Indus. Techs., Inc.*, 645 F.3d 201 (3d Cir. 2011); *In re Farmland Indus., Inc.*, 639 F.3d 402 (8th Cir. 2011); *In re Thorpe Insulation Co.*, 677 F.3d 869 (9th Cir. 2012) and *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838 (6th Cir. 2002). Each of these cases stands for the proposition that plaintiffs must have Article III standing to commence an adversary proceeding or contested matter before a bankruptcy court. The Fourth Circuit opinion is in accord. The Fourth Circuit opinion then expands upon those holdings, and holds that, like Article I tax courts, the limitations imposed by Article III do not apply to Article I Bankruptcy Courts if the case becomes moot.

In re Glob. Indus. Techs., Inc., 645 F.3d 201 (3d Cir. 2011) and *In re Thorpe Insulation Co.*, 677 F.3d 869 (9th Cir. 2012) involved a Chapter 11 Debtor's insurers who appealed an order confirming that debtor's plan of reorganization. The Courts in those cases found that while Article III standing was required to object to the plan, and to appeal, the insurers had such standing. *Glob. Indus. Techs., Inc.*, 645 F.3d. at 210-11; *Thorpe Insulation Co.*, 677 F.3d at 886. *Stevenson v. J.C. Bradford & Co. (In re Cannon)*, 277 F.3d 838 (6th Cir. 2002) examined whether a chapter 7 trustee had Article III standing

to pursue transfers made by a bankruptcy lawyer of client funds which he had held in express trust, and found he lacked such standing. *Id.* at 843. *In re Res. Tech. Corp.*, 624 F.3d 376, 382 (7th Cir. 2010) found that a contractual counterparty to a debtor had required Article III standing to object to a proposal to assume and assign and a contract, and to appeal its approval. *In re Farmland Indus., Inc.*, 639 F.3d 402 (8th Cir. 2011) found that an unsuccessful bidder at a bankruptcy auction lacked Article III standing to object to a sale, and to appeal its disqualification as a bidder. None of these cases dealt with what would have happened had the underlying matter before the bankruptcy court become moot. The facts of those cases simply did not require that analysis. The only case that dealt with mootness was *Thorpe Insulation*, which specifically held the appeal was *not* moot. *Thorpe Insulation*, 677 F.3d at 880. Accordingly, the cases cited by Petitioners stand only for the proposition that Article III standing is required at the beginning of a dispute in order for it to be properly referred to a bankruptcy court. They do not address the question of whether an Article I bankruptcy court can continue to hear a properly referred Article III case once Article III jurisdiction is eliminated.

The Fourth Circuit opinion does not contradict the holdings above. Specifically, it states that before a bankruptcy case can be referred to a bankruptcy court, the referring District Court must first have jurisdiction (meaning the case must satisfy Article III of the Constitution). *Kiviti v. Bhatt*, 80 F.4th 520, 532–33 (4th Cir. 2023). The only purportedly new holding of the opinion below is that jurisdiction remains once the litigation is moot, because the

doctrines that *cut off* jurisdiction in Article III Courts do not apply to Article I Courts. This is not a novel concept and has been held to apply to other Article I Courts. *See Baranowicz v. Comm'r*, 432 F.3d 972, 975 (9th Cir. 2005) (stating that the United States "Tax Court is not an Article III court and, therefore, is not fully constrained by Article III's case or controversy limitation."). It has never been addressed in any other circuit court opinion.

Petitioners cite one further case they assert is in agreement with the opinion below and in contradiction of the cases cited above. *Matter of Highland Capital Mgmt., L.P.*, 74 F.4th 361 (5th Cir. 2023). What *Highland Capital Mgmt.* actually held was that the standard for standing to appeal a bankruptcy court ruling was *more* exacting than Article III standing. *Id.* at 366-67. In other words, it was unnecessary to determine whether Article III standing was required, because the standard under the Bankruptcy Code was more difficult to attain. This does not create a circuit split with *Kiviti*. *Highland Capital Mgmt.*, like the cases cited above, did not address the issue of a dispute validly referred to the Bankruptcy Court which later became moot.

II. Count I was not actually moot and the Fourth Circuit could have dismissed the appeal on other grounds.

This case can be affirmed on multiple independent grounds. By the time the Bankruptcy Court heard Respondent's motion to dismiss, there had been an asset notice issued, inviting alleged creditors, such as Petitioners, to file claims against the Respondent's bankruptcy estate. While these creditors

would likely receive only a small distribution, even such a tiny economic interest means that the remaining Count One was not moot. *See Microsoft Corp. v. Baker*, 137 S.Ct. 1702 (2017) (voluntary dismissal of class action plaintiff's claim for scratched CD's was not moot and did not give rise to final order for appellate purposes, even after it became economically irrational to pursue such claim when class status was denied); *Keena v. Groupon, Inc.*, 886 F.3d 360 (4th Cir. 2018) (order compelling arbitration filed by putative class could not be immediately appealed even after complaint was voluntarily dismissed). This case is exactly on point with *Microsoft* in that there was a voluntary dismissal of certain remaining, less significant, counts that would been expensive to try, in order to bring this matter to a quicker, more economic, resolution. Further, this case could be affirmed on the merits for the reasons set forth in *In re Carpenter*, 453 B.R. 1 (Bankr. D.D.C. 2011), and the rulings of the Bankruptcy Court and District Court below.

III. The Fourth Circuit's Decision Does Not Block Appellate Review.

Petitioners argue that a District Court would be barred from hearing an appeal. This is not true. If Petitioners had taken Count One to trial, then the loser could have appealed whatever ruling was made. In fact, that was the ruling of the Fourth Circuit – that the Petitioners were required to do so in order to appeal the dismissal of Count Two. It is difficult to envisage any realistic situation where a District Court could not review the decision of a Bankruptcy Court.

IV. This Issue is not Significant Enough to Warrant Review.

The fourth factor the Court should consider is the importance of the issue in dispute. This is a heavily fact-dependent $58,770.00 dispute. It is an issue that has not come up before. The issue seems unlikely to arise again, absent an exactly similar procedural and factual scenario. Future litigants faced with such an issue will have a clear choice: (1) take their undismissed counts to trial, so they can have a final order to appeal; (2) decline further pursuit of litigation; or (3) dismiss the remaining counts with prejudice. The fact that it is economically burdensome to do so would be of no import to litigants in District Court. *Microsoft Corp. v. Baker*, 582 U.S. 23, 34 (2017). It is now simply made clear that it is of no import to litigants in Bankruptcy Court.

V. Disparity In Economic Resources and Harm to the Respondent

Finally, the Court should take into account the vast difference in economic resources between the parties. Petitioners apparently have very significant resources, having now litigated this $58,770 case all the way to the Supreme Court. Although he has largely prevailed at every level, Respondent, a chapter 7 debtor, has few economic resources, and those resources have been significantly drained by this litigation. Hearing this appeal would prolong the Respondent's Chapter 7 case, which was filed December 3, 2020, for at least another year, and likely longer. While the bankruptcy remains open, the Respondent will not be able to rebuild his credit or qualify for most loans to fund his business in Virginia,

where he remains a licensed contractor. The delay and expense caused by these appeals has been extensive and punitive in and of itself. The wide gap between the resources of the parties and the effect of prolonging the Respondent's bankruptcy weigh heavily against granting certiorari in this case.

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be rejected.

Respectfully Submitted,

JUSTIN P. FASANO, Esq.
Counsel of Record
MCNAMEE HOSEA, P.A.
6404 Ivy Lane, Suite 820
Greenbelt MD 20770
301-441-2420
301-982-9450 (facsimile)
jfasano@mhlawyers.com

Counsel for Respondent
Naveen Bhatt