

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-50044
	)	Chapter 7
JEFFREY DOYLE OFSTAD)	
SSN/ITIN xxx-xx-1441)	
)	
Debtor.)	
)	
JEFFREY DOYLE OFSTAD	)	Adv. No. 21-5003
)	
Plaintiff)	
-vs-	)	DECISION RE: <i>SUA SPONTE</i>
	)	ABSTENTION FROM HEARING
WILMINGTON SAVINGS	)	THIS ADVERSARY PROCEEDING
FUND SOCIETY, FSB)	
)	
Defendant.)	

The matter before the Court *sua sponte*¹ is whether to abstain from hearing this adversary proceeding pursuant to 28 U.S.C. § 1334(c)(1). For the reasons discussed below, the Court will abstain.

I.

Jeffrey Doyle Ofstad ("Debtor") filed a chapter 7 petition in bankruptcy on April 21, 2021. He listed his address as 1332 4th Street, Rapid City, South Dakota. The Bankruptcy Noticing Center served the notice of the commencement of the case on Wilmington Savings Fund Society, FSB ("Wilmington Savings") at an electronic mailing address Wilmington Savings had on file with the noticing center.²

The same day he filed his petition, Debtor filed an Initial Statement About an

¹ "*Sua sponte*" is a frequently used legal phrase that means "on its own motion."

² Pursuant to 11 U.S.C. § 342(f) and Fed.Rs.Bankr.P. 2002(g)(4) and 9036, Wilmington Savings had registered an electronic mailing address with the Bankruptcy Noticing Center to use in all bankruptcy cases involving Wilmington Savings.

Eviction Judgment Against You, Official Form 101A, dated April 21, 2021. In the certification required therein by 11 U.S.C. § 362(l)(1)(A), Debtor said his landlord's name was Wilmington Savings. He certified under penalty of perjury: "Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount." Immediately following this statement on the form, he added "zero delinquency[.]" In this statement, Debtor also certified, as required by § 362(l)(1)(B), under penalty of perjury: "I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101)." Immediately following this statement on the form, he added "zero dollars due[.]" The bankruptcy clerk did not receive any rent funds from Debtor.

Two days later, Debtor filed a Statement About Payment of an Eviction Judgment Against You, Official Form 101B, also dated April 21, 2021. Therein, Debtor again certified under penalty of perjury: "Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount." He also certified, as required by 11 U.S.C. § 362(l)(2), under penalty of perjury: "Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*)." The bankruptcy clerk advised Debtor he needed to serve his two statements on Wilmington Savings and file a certificate of service.

Several days later, Debtor filed two new statements regarding an eviction judgment, each dated April 28, 2021. His April 28, 2021 Initial Statement About an Eviction Judgment Against You again had the extra notes typed on it stating there was "zero delinquency" and "zero dollars due" for rent in the 30 days after his petition. Debtor also filed a certificate of service indicating he had served the statements on Wilmington Savings at 500 Delaware Avenue, Delaware 19801. Since no city was included in the address, it is unknown whether Wilmington Savings ever received these statements. Wilmington Savings did not file an objection to either statement.

On his statement of intention, Debtor indicated Wilmington Savings had a "disputed claim" secured by his Rapid City residence, and he stated he intended to "Retain the property and redeem it." He also checked the "No" box on this form where it asked whether he had claimed this property exempt on schedule C.

On his schedule A/B, Debtor stated he was the owner of a single-family home at 1332 4th Street in Rapid City, the same address as his mailing address on his petition. Debtor listed the home's value at \$50,000.00 and described the nature of his ownership as "adverse possession over 20 years[.]" On schedule C, in Part 1 at question 1, Debtor checked the box indicating he was claiming federal exemptions, but in Part 1 at question 2, he inserted "N/A" where he was instructed to list the property claimed exempt. In Part 1 at question 3, when asked if he was claiming a homestead exemption of more than \$170,350.00, Debtor checked the "Yes" box indicating he acquired the property covered by the exemption within 1,215 days before he filed his bankruptcy case.

Debtor amended his case mailing list on May 3, 2021. He listed Wilmington

Savings, "UNKNOWN MORTGAGE CREDITOR (TBD)[,]" and Zachary Nesbit. The amendment indicates Zachary Nesbit is an attorney for either Wilmington Savings or Debtor's "to be determined" mortgage creditor.

Upon the case trustee's request, the Court entered an order requiring Debtor to amend schedule A/B to better describe his personal property. In the order, the Court also gave Debtor a deadline to file any amended schedule C. Debtor amended his schedule A/B, but he did not amend his schedule C. To the extent Debtor actually claimed any property exempt, no party in interest timely objected to Debtor's claim of exemptions.

On his schedule D, Debtor checked the box indicating he did not have any creditors with claims secured by property. On his schedule E/F, Debtor checked the box indicating he did not have any creditors with priority unsecured claims against him. On his schedule E/F, Debtor checked the box indicating he did not have any creditors with nonpriority unsecured claims against him. In sum, Debtor did not schedule any creditors holding any claims against him.

On his schedule G, Debtor checked the box indicating he did not have any executory contracts or unexpired leases. In his statement of financial affairs, Debtor did not list any prior addresses within three years of his petition date. Therein, he also stated Wilmington Savings had a "forcible entry & detainer" action against him in state court that was "Pending" and Wilmington Savings had foreclosed on his house—address not stated—within one year of his petition.

On May 13, 2021, Debtor commenced this adversary proceeding against

Wilmington Savings by filing a complaint entitled "Action to Quiet Title[.]"³ Therein, Debtor challenged Wilmington Savings's standing to bring a foreclosure action regarding the unidentified "subject premises" and made claims for "Unjust Enrichment" and "Right of First Refusal." The bankruptcy clerk issued a summons, but the record does not indicate Debtor served the summons and his complaint on Wilmington Savings in compliance with Federal Rule of Bankruptcy Procedure 7004(h) before the summons became stale. Wilmington Savings did not answer Debtor's complaint.

The Court entered orders setting a status conference for July 15, 2021 in Debtor's bankruptcy case and in this adversary proceeding. In the bankruptcy case order, the Court advised the parties it would address two issues at the status conference: (1) the status of property of the bankruptcy estate, including the apparent lack of any property claimed exempt; and (2) the lack of any scheduled creditors. In the adversary proceeding order, the Court raised three concerns: (1) whether Debtor's service of his complaint and summons on Wilmington Savings complied with Fed.R.Bankr.P. 7004(h); (2) whether this Court had jurisdiction under 28 U.S.C. § 1334 to quiet title to the subject property; and (3) whether Debtor had standing to bring his complaint against Wilmington Savings if the subject property was now property of the bankruptcy estate in Debtor's main bankruptcy case. In the adversary proceeding order, the Court directed Wilmington Savings to appear at the status conference through counsel.

³ On the bottom half of page four of Debtor's complaint and again on page 5, it appears Debtor may have erroneously used "Defendant" when referring to himself and "Plaintiff" when referring to Wilmington Savings.

The Court conducted the July 15, 2021 status conferences concurrently. Debtor, Amanda Ferguson, the attorney for Wilmington Savings, Acting United States Trustee James L. Snyder, and Trustee Forrest C. Allred participated. The Court discussed its concerns with the parties and advised them the Court would enter a show cause order in each matter. During the joint conference, Wilmington Savings admitted service of Debtor's complaint in this adversary proceeding, and the Court advised the parties Wilmington Savings's admission would be without prejudice to its later filing an answer.

Following the status conferences, the Court entered an Order to Show Cause Why Case Should Not Be Dismissed in Debtor's main bankruptcy case. Therein, the Court noted Debtor had not scheduled any creditors, thus creating a bankruptcy case in which there were no known creditors who may receive a distribution of nonexempt assets and no known claims regarding which Debtor's personal liability could be discharged. The Court set forth the factors to be considered before a case is dismissed under 11 U.S.C. § 305(a)(1) because dismissal better serves the interests of the debtor and any creditors. The Court also set a deadline for any party in interest to file a response arguing why the case should not be dismissed under § 305(a)(1). No party filed a response. By separate decision and order entered this day, Debtor's bankruptcy case is being dismissed.

In this adversary proceeding between Debtor and Wilmington Savings, the Court entered a combined notice and order to show cause. In the order, the Court recognized Debtor, in a response to the just-held conference, had highlighted Wilmington Savings's failure to file a responsive document to his complaint. The

Court's notice advised the parties to this adversary proceeding the Court intended to take judicial notice the "subject premises" referenced in Debtor's complaint was the same property listed by Debtor on his amended schedule A/B as his principal residence. The Court's notice also advised the parties the Court would take judicial notice of several specific documents from two earlier state court proceedings between Debtor and Wilmington Savings and a federal district court proceeding between Debtor and Wilmington Savings. The Court's order set a deadline for the parties to file their written arguments why the Court—the bankruptcy court—should not abstain *sua sponte* from hearing this adversary proceeding under 28 U.S.C. § 1334(c)(1) and grant Debtor and Wilmington Savings relief from the automatic stay so they could continue the state court proceeding that was pending when Debtor filed his bankruptcy petition.⁴

Only Debtor timely filed a response in this adversary proceeding.⁵ He expressed frustration with the earlier legal proceedings before this and other courts, argued the state court lacks jurisdiction over the subject matter in the adversary proceeding, and contended Wilmington Savings lacks standing before the state court. Debtor also again correctly noted Wilmington Savings has not filed an answer in the adversary proceeding.

⁴ Because Debtor's main bankruptcy case is being dismissed, whether Debtor and Wilmington Savings need relief from the automatic stay to continue their state court litigation becomes moot.

⁵ In his response, Debtor indicated he is a veteran. The Court urges him to contact the Pennington County Veterans Services Office to see what assistance they may be able to provide him regarding his current housing issues.

II.

Under 28 U.S.C. § 1334(c)(1), a bankruptcy court has broad discretion to abstain from hearing a particular proceeding in the interest of justice or comity with state courts. *Foss v. Hall County Child Support Office (In re Foss)*, 328 B.R. 780, 783 (B.A.P. 8th Cir. 2005). Section 1334(c)(1) may be applied to a proceeding "arising under title 11 or arising in or related to a case under title 11."⁶ 28 U.S.C. § 1334(c)(1). Factors to consider include:

- (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;

⁶ A proceeding "arises under" the bankruptcy code if it asserts a cause of action created by the bankruptcy code. *Redmond v. Gulf City Body & Trailer Works, Inc. (In re Sunbridge Capital, Inc.)*, 454 B.R. 166, 169 (Bankr. D. Kan. 2011). A proceeding "arising in" a bankruptcy case is one that could not exist outside of the bankruptcy case but is not a cause of action created by the bankruptcy code. *Id.* If a proceeding could have been commenced in federal or state court independently of the bankruptcy case, but the outcome of that proceeding could conceivably have an effect on the administration of a bankruptcy estate, the adversary proceeding is "related to" the bankruptcy case. *GAF Holdings, LLC v. Rinaldi (In re Farmland Industries, Inc.)*, 567 F.3d 1010, 1017 (8th Cir. 2009); *Sunbridge Capital*, 454 B.R. at 169 (quotations therein omitted). This adversary proceeding is a "related to" 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.

Id. at 783-84 (citations in attendant footnote omitted). Perhaps even paramount to these factors, the Court considers whether the pending state court proceeding sounds in state law and bears only a limited connection to the debtor's bankruptcy case. *Loos v. Koperski (In re Koperski)*, 540 B.R. 394, 401-02 (Bankr. D. Minn. 2015). If those circumstances are present, the bankruptcy court's "abstention is particularly compelling." *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Titan Energy, Inc. (In re Titan Energy, Inc.)*, 837 F.2d 325, 332 (8th Cir. 1988), *quoted in Koperski*, 540 B.R. at 402.

III.

The pending but stayed state court matter between Debtor and Wilmington Savings appears based in state law, just like Debtor's complaint in this adversary proceeding. Because Debtor did not schedule any creditors and because Debtor's main bankruptcy case is being dismissed, letting the parties continue their state court action will not impact Debtor's main bankruptcy case. Thus, "abstention is particularly compelling." *See Titan Energy*, 837 F.2d at 332.

The same conclusion is reached if the factors set forth in *Foss* are considered.

Nine of the *Foss* factors weigh in favor of this Court's—the bankruptcy court's—abstaining from hearing Debtor's quiet title action against Wilmington Savings. One factor is neutral. And only two *Foss* factors do not weigh in favor of abstention.

First, just as with the "paramount" consideration discussed in *Titan Energy*, if the bankruptcy court abstains from hearing this adversary proceeding between Debtor and Wilmington Savings, there will be no effect on the administration of the bankruptcy estate in Debtor's main bankruptcy case. Debtor's bankruptcy case is being dismissed under 11 U.S.C. § 305(a)(1) because Debtor's bankruptcy case has no identified creditors to receive the bankruptcy estate's liquidated nonexempt assets and because Debtor has not identified any claims against him to be discharged. Thus, no bankruptcy administration will take place. Further, if this adversary proceeding does not go forward, the state court would not be taking over the jurisdiction of this adversary proceeding; instead, the state court would continue with the matter that was pending before it when Debtor's bankruptcy case was filed. Accordingly, the first *Foss* factor weighs in favor of abstention.

Second, state law issues predominate over bankruptcy law issues because Debtor's complaint does not raise *any* bankruptcy law issues. This factor weighs in favor of abstention.

Considering the third *Foss* factor, there is no known difficult or unsettled applicable law. From the present record, it appears neither the bankruptcy court nor the state court would be presented with new or novel issues of law or fact. This factor is neutral.

Fourth, there *is* a state court proceeding pending to which Debtor and

Wilmington Savings may return. The issues presented by Debtor to the state court are virtually identical to those he presented in this adversary proceeding. The state court can and should determine its jurisdiction and the standing of each party before it. Thus, this factor weighs in favor of abstention.

Fifth, the bankruptcy court would not have jurisdiction over the issues raised by Debtor in his adversary complaint except through 28 U.S.C. § 1334. Thus, this factor weighs in favor of abstention.

The sixth factor discussed in *Foss* is the degree of relatedness or remoteness of the adversary proceeding to the main bankruptcy case. Because Debtor's chapter 7 bankruptcy case—where there will be no typical administration of assets and claims nor any discharge of debts due to the lack of scheduled creditors and where the case is resultantly being dismissed—the Court is unable to discern any type of adversary proceeding that would be closely related to the main bankruptcy case. Thus, this factor weighs in favor of abstention.

The seventh factor the Court must consider is "the substance rather than the form of an asserted core proceeding[.]" A core proceeding is one which arises only in a bankruptcy case or involves a right created by federal bankruptcy law. *Specialty Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773 (8th Cir. 1995). Congress has set forth a non exhaustive list of core proceedings at 28 U.S.C. § 157(b)(2).⁷ Debtor's complaint against Wilmington Savings in this adversary proceeding is not a core

⁷ While the proceedings listed in 28 U.S.C. § 157(b)(2) remain "core" proceedings, the Supreme Court has made clear those listed may not all be adjudicated by a bankruptcy court in the same manner. *See, e.g., Stern v. Marshall*, 564 U.S. 462 (2011), and *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25 (2014).

proceeding because Debtor seeks recovery of the subject property for himself, not the bankruptcy estate, and seeks that relief under nonbankruptcy law. Accordingly, this factor weighs in favor of abstention.

The eighth factor is 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. Because Debtor has not presented any core bankruptcy matters in this adversary proceeding, as noted above, there would be no core matters to sever from the state law claims. Debtor only presented state law or common law claims. Thus, this factor weighs in favor of abstention.

The ninth factor is the burden this adversary proceeding places on the bankruptcy court's docket. This adversary proceeding places absolutely no burden on the bankruptcy court. Because new bankruptcy case filings and attendant adversary proceeding filings are presently very low, the bankruptcy court has ample time to resolve this adversary proceeding. Thus, this factor does not weigh in favor of abstention.

The circumstances presented all indicate Debtor, by filing his bankruptcy case, was seeking an alternative forum in which to litigate with Wilmington Savings. Thus, the tenth factor from *Foss* weighs in favor of abstention.

The eleventh factor under *Foss* for the Court to consider is the existence of a right to a jury trial. The parties have a right to a jury trial before this Court—the bankruptcy court—if the cause of action is legal in nature and involves a matter of private right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42-47 (1989). Before the state court, the parties have a constitutional right to a jury trial if the action is

determined to be one "at law." *First Nat'l Bank of Philip v. Temple*, 642 N.W.2d 197, 201 (S.D. 2002). The state court looks

"to the common law" to determine whether a claim is an action at law triable to a jury as a matter of right or whether it is an equitable action for trial to the court. *Grigsby v. Larson*, 24 S.D. 628, 124 N.W. 856, 858 (1910). The question is whether the "subject" of the action "is the type of case in which [the movant] would have been entitled to a jury trial in the common-law courts of [territorial South Dakota]." *State v. One 1969 Blue Pontiac Firebird*, 2007 S.D. 63, ¶ 18, 737 N.W.2d 271, 276 (quoting *State v. One 1990 Honda Accord*, 154 N.J. 373, 712 A.2d 1148, 1150-51 (1998)).

Granite Buick GMC, Inc. v. Ray, 856 N.W.2d 799, 803 (S.D. 2014).

Case law indicates a quiet title action is an equitable action under federal common law if the plaintiff is in possession of the property; if instead an ejectment and damages are sought, the action is legal and the defendant has a right to a jury trial. *Golden Cycle Min. Co. v. Christmas Gold Min. Co.*, 204 F. 939, 940 (8th Cir. 1913). Case law indicates a similar result in South Dakota.

[W]here the action is possessory only, brought for the purpose of obtaining possession of real property, in substance the same as common-law ejectment, both parties, as a matter of right, are entitled to trial by jury. In all those cases which at common law came on the equity or chancery side of the court, such as actions to quiet title and cancel instruments, where the equity power of the court was invoked as the principle of primary cause of action, neither party is entitled to trial by jury as a matter of right.

Peters v. Lohr, 124 N.W. 853, 854 (S.D. 1910) (citations therein omitted). Thus, it appears Debtor and Wilmington Savings would not have a right to a jury trial before this Court but may have a right to a jury trial before the state court, where possession is at issue. Accordingly, this factor weighs in favor of abstention and returning the parties to state court.

The final *Foss* factor is the presence in the proceeding of nondebtor parties. The present record indicates this adversary proceeding and the pending but stayed state court matter both involve only Debtor and Wilmington Savings. Thus, this factor does not weigh in favor of abstention.

When all twelve factors are considered, a hefty majority weighs in favor of abstention. Accordingly, under 28 U.S.C. § 1334(c)(1) this Court will abstain from hearing this adversary proceeding. With the concurrent dismissal of Debtor's bankruptcy case, the parties are free, when the dismissal order and this abstention order are final, to return to their pending state court litigation.

Dated: September 14, 2021.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Charles L. Nail, Jr.", is positioned above the printed name.

Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 21-50044
	)	Chapter 7
JEFFREY DOYLE OFSTAD)	
SSN/ITIN xxx-xx-1441)	
)	
Debtor.)	
)	
JEFFREY DOYLE OFSTAD	)	Adv. No. 21-5003
)	
Plaintiff)	
)	
-vs-)	
	)	ORDER ABSTAINING
WILMINGTON SAVINGS	)	UNDER 28 U.S.C. § 1334(c)(1)
FUND SOCIETY, FSB)	
)	
Defendant.)	

In recognition of and compliance with the decision entered this day; now, therefore,

IT IS HEREBY ORDERED this Court abstains from hearing this adversary proceeding pursuant to 28 U.S.C. § 1334(c)(1), and it may be closed.

So ordered: September 14, 2021.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota