

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re:

No. 01-17223
Chapter 7

THOMAS N. MOORE
PATRICIA ANN MOORE

Debtors

RICHARD P. JAHN, JR., TRUSTEE

Plaintiff

v

Adversary Proceeding
No. 02-1040

CHATTANOOGA FEDERAL EMPLOYEES
CREDIT UNION

Defendant

MEMORANDUM

Appearances: Richard P. Jahn, Jr., Chattanooga, Tennessee, Attorney for Trustee

Marty M. Stone, McCalla, Raymer, Padrick, Cobb, Nichols & Clark, LLC,
Roswell, Georgia, Attorneys for Chattanooga Federal Employees Credit
Union

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

Chattanooga Federal Employees Credit Union (“Credit Union”) has filed a motion to transfer bankruptcy case and this adversary proceeding to the Bankruptcy Court for the Northern District of Georgia. Richard P. Jahn, Jr., the chapter 7 trustee (“Trustee”), opposes the change of venue. For the reasons stated, the motion will be denied as to transfer of the case as well as transfer of the adversary proceeding.

Neither party submitted affidavits or other evidence in support of their respective positions. The court will take judicial notice of documents filed in the bankruptcy case, including but not limited to the debtors’ schedules and statement of affairs, notices sent by the court, and claims of creditors, including the claims of Credit Union. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201; *see, e.g., Rickel & Assoc., Inc. v. Smith (In re Rickel & Assoc., Inc.)*, 272 B.R. 74 (Bankr. S. D. N. Y. 2002); *Northwestern Institute of Psychiatry, Inc. v. Travelers Indemn. Co. (In re Northwestern Institute of Psychiatry, Inc.)*, 268 B.R. 79 (Bankr. E. D. Pa. 2001); *In re Blum*, 255 B.R. 9 (Bankr. S. D. Ohio 2000); *Smith v. Weissfisch (In re Muzquiz)*, 122 B.R. 56 (Bankr. S. D. Tex. 1990).

On November 5, 2001, Thomas N. Moore and wife, Patricia Ann Moore (“Debtors”) filed a voluntary petition for relief pursuant to chapter 7 of Title 11. The Debtors listed their address as 106 Brandon Lane, Rossville, Georgia. They listed their county of residence as Walker, which the court takes to mean Walker County, Georgia, where Rossville is located. *Slone v. Integra Bank/Pittsburgh (In re International Building Components)*, 159 B.R. 173 (Bankr. W. D. Pa. 1993), *on reconsideration* 161 B.R. 764 (Bankr. W. D. Pa. 1993)(judicial notice of geographic facts). On the bankruptcy petition under “Venue”, the Debtors checked the box indicating that they had been domiciled or had a residence, principal place of business, or principal assets in this district for 180

days immediately preceding the date of the petition or for a longer part of such 180 days than in any other district. Credit Union has offered no evidence to challenge this statement although it may be contrary to the actual facts. Furthermore, Credit Union does not assert that it was misled by this statement. It appears from the proofs of claims filed by Credit Union that it knew the Debtors did not reside in this district at the time the case was filed and that they may have resided in Walker County, Georgia, for at least the 180 days preceding the filing of the petition.

In the Debtors' schedules, Credit Union was listed as a creditor holding secured claims on a house and lot at 106 Brandon Drive, Rossville, Georgia, on a 1993 Toyota Paseo, and on a 1993 Pontiac Grand Am. The address of Credit Union was listed as Post Office Box 22205, Chattanooga, Tennessee.

Notice of the chapter 7 case was sent to all listed creditors, including Credit Union, on November 10, 2001. Initially, this case was treated as a no asset case. Secured creditors were directed to file claims, but unsecured creditors were advised not to file claims unless notified to do so. Fed. R. Bankr. P. 2002(e). Richard P. Jahn, Jr., a panel trustee, was appointed to serve in this case. 11 U.S.C. §§ 701 & 702. The deadline to file a complaint objecting to discharge or to determine dischargeability of certain debts was February 12, 2002. 11 U.S.C. §§ 523(c) & 727; Fed. R. Bankr. P. 4004(a) & 4007(b), (c).

On December 10, 2001, Credit Union filed four claims in this case (claims 1-4). Claim 1 is an unsecured claim for the amount of \$5,845.70. Claim 2 is a claim in the amount of \$1,182.27 which Credit Union asserts is secured by a 1993 Pontiac Grand Am. Claim 3 is a claim

in the amount of \$800.79 which Credit Union asserts is secured by a 1993 Toyota Paseo. Finally, claim 4 is a claim in the amount of \$30,728.42 which Credit Union asserts is secured by real property, specifically the house and lot at 106 Brandon Lane, Rossville, Georgia.

The meeting of creditors was scheduled and held on December 14, 2001. 11 U.S.C. §§ 341–343; Fed. R. Bankr. P. 2003, 2002(a)(1). It appears from the trustee’s proceeding memo of the meeting that a representative of Credit Union appeared at the meeting of creditors.

On December 19, 2001, the Trustee filed a report of abandoned property by which he abandoned all property of the estate except restaurant equipment and the house and lot at 106 Brandon Lane, Rossville, Georgia. On December 21, 2001, he filed an amended report of abandoned property by which he abandoned all property except the house and lot located at 106 Brandon Drive, Rossville, Georgia. There is no indication that Credit Union was sent a copy of either report of abandoned property.

By notice dated January 9, 2002, creditors were notified that a proof of claim should be filed due to recovery of assets. Fed. R. Bankr. P. 3002(c)(5). On February 15, 2002, the Debtors received a discharge of their debts. 11 U.S.C. § 524.

On February 21, 2002, the Trustee commenced this adversary proceeding to avoid the lien of Credit Union on the house and lot in Rossville, Georgia. Service of the summons and a copy of the complaint were mailed the same day to the attorney for Credit Union who had filed the proofs of claims. Credit Union filed its answer to the complaint on March 22, 2002, asserting, in part, that the complaint should be dismissed because venue is improper. The present motion was

filed April 5, 2002. It seeks a change of venue for both the adversary proceeding and the bankruptcy case. The trustee opposed dismissal or a change of venue. Both parties have filed briefs in support of their respective positions.

The venue of the adversary proceeding could be affected by the court's decision with respect to the venue of the case. 28 U.S.C. § 1409(a). Therefore, the court must first address venue in the case.

Section 1408 of the Judicial Code provides, in relevant part:

[A] case under title 11 may be commenced in the district court for the district –

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one hundred and eighty day period than the domicile, residence, or principal place of business, in the United States, or principal assets in the United States, of such person were located in any other district.

28 U.S.C. §1408(1).

Both of the parties have taken the position in their briefs that this is an improper district for this case to have been filed. Fed. R. Bankr. P. 1014(a)(2) provides:

If a petition is filed in an improper district, on timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as direct by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties.

Fed. R. Bankr. P. 1014(a)(2)

Although Credit Union filed a motion to transfer the case pursuant to Fed. R. Bankr. P. 1014(a)(2), it did not give notice of the motion to the debtors. Of course, as previously stated, the debtors had already received a discharge in this case.

Assuming this district is an improper venue for this bankruptcy case, the court can still deny a motion to transfer or dismiss if the motion was not timely filed. Whether such a motion was timely filed depends on the facts and circumstances presented in each particular case. *In re McCall*, 194 B.R. 590, 592 (Bankr. W.D. Tenn. 1996) (“what constitutes a timely filing of such a motion is not governed by a statutory or rule definition.”). One court attempted to establish a bright line rule of sixty (60) days within which to file a motion based on improper venue, but found such a rule impractical in its application. *In re Boca Raton Sanctuary Associates*, 105 B.R. 273 (Bankr. E.D. Pa. 1989); *In re 1606 New Hampshire Avenue Associates*, 85 B.R. 298 (Bankr. E.D. Pa. 1988); *In re Deabel, Inc.*, 193 B.R. 739, 743 (Bankr. E. D. Pa. 1996).

The reasons for requiring a timely motion to transfer or dismiss the case include (1) avoiding duplication of administrative expenses, *In re Jones*, 39 B.R. 1019 (Bankr. S. D. N. Y. 1984), (2) the effect a transfer or dismissal would have on the deadline for complaints objecting to discharge or to determine the dischargeability of debts, *In re McCall*, 194 B.R. 590, and (3) promoting efficient case administration by a trustee.

Venue, like jurisdiction over the person, may be waived. *Panhandle Eastern Pipe Line Co. v. Federal Power Commission*, 324 U.S. 635, 65 S.Ct. 821, 89 L.Ed. 1241 (1945). Failure to raise the venue issue in a timely manner results in a waiver of any objection to venue. *Bryan v.*

Land (In re Land), 215 B.R. 398, 402, 3 (8th Cir. BAP 1997). Objection to venue may be waived by conduct of the party. *Lomanco, Inc., v. Missouri Pacific Railroad Company*, 566 F. Supp. 486, 489 (E.D. Ark. 1983).

Here, Credit Union participated in the case by filing claims and attending the meeting of creditors. Only after it was sued in this adversary proceeding did Credit Union move to transfer venue. Such a transfer would necessitate the appointment of a new trustee. Further, the new trustee would more than likely require new or additional counsel. The debtors having received their discharge, and the trustee having abandoned all other property, there is nothing left to administer in this case except the property that is the subject of this adversary proceeding. Clearly, Credit Union waived any objection it may have had to the venue of this case.

Accordingly, the venue of this case is now properly in this district.

Venue of this adversary proceeding is controlled by 28 U.S.C. § 1409. While there could be factors which would cause the court to transfer venue of an adversary proceeding while retaining the case, those factors do not appear to be present in this proceeding. The security deed (deed of trust) at issue in this proceeding was prepared by a Tennessee attorney and notarized by a Tennessee notary public. According to the deed of trust, Credit Union is organized and exists pursuant to the laws of the State of Tennessee with its principal address in this district. To the extent witnesses may be required, it appears that this venue is more convenient than the Northern District of Georgia.

Indeed, this proceeding does involve an issue of Georgia law. If an issue of Georgia law could be certified to the Supreme Court of Georgia by any bankruptcy court, this court would consider transferring the proceeding to the Northern District of Georgia for that reason alone. Unfortunately, it appears that Georgia law does not permit certification from bankruptcy courts. This court is not unfamiliar with the underlying issue of law, having recently been called upon to decide a similar case. *Farinash v. First Union National Bank (In re Blackmon)*, 283 B.R. 910 (Bankr. E. D. Tenn. 2002).

Therefore, the motion to transfer the adversary proceeding will likewise be denied.

The foregoing constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*. The court shall enter an order.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 12/9/02]