Docket #0005 Date Filed: 4/26/2019

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In Re: WELDED CONSTRUCTION, L.P., et al. *et al,* Debtors and Debtor in Possession.	Chapter 11 Case No. 18-12378 (KG) (Jointly Administered)
WELDED CONSTRUCTION, L.P., Plaintiff, **v.** PRIME NDT SERVICES, INC., Defendant.	Adversary Proceeding Adv. Pro. No. 19-50180 (KG)

PRIME NDT SERVICES, INC.'S MOTION TO WITHDRAW THE REFERENCE OF THE ADVERSARY PROCEEDING

Defendant Prime NDT Services, Inc., by and through counsel, files this Brief in Support of its Motion to Withdraw the Reference of the Adversary Proceeding.

I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDING

1. Plaintiffs Welded Construction, L.P. and Welded Construction Michigan, LLC (collectively "Welded") have filed an Adversary Proceeding Complaint against Defendant Prime NDT Services, Inc. ("Prime"), regarding Prime's alleged breach of a subcontract with Welded. Prime has filed a Partial Motion to Dismiss and Motion to Compel Arbitration, which remains pending at this time.

II. SUMMARY OF ARGUMENT

2. This Court should withdraw the reference of the Adversary Proceeding because

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withdrawal of this non-core proceeding is consistent with principles of judicial economy.

III. CONCISE STATEMENT OF FACTS

3. Welded's Adversary Proceeding Complaint concerns Prime's alleged breach of a subcontract with Welded regarding a pipeline project owned by Sunoco Marketing Partners and Terminals L.P. and Sunoco Pipeline L.P. (collectively "Sunoco"). (Adversary Proceeding Complaint [D.I. 1] at 2.) The Complaint alleges that Welded discovered Prime's allegedly inadequate work in or around June 2018. (Adversary Proceeding Complaint at ¶ 22). Welded filed for bankruptcy on October 22, 2018. (*See In re Welded Construction*, No. 18-12378-KG, Chapter 11 Voluntary Petition [D.I. 1].) The Complaint asserts causes of action for breach of contract and breach of warranty. (Adversary Proceeding Complaint at ¶¶ 33-40 (breach of contract); ¶¶ 41-49 (breach of warranty)). The Complaint does not concern Welded's bankruptcy estate. (*See* Adversary Proceeding Complaint.)

4. Prime has filed a Partial Motion to Dismiss regarding Welded's claim of consequential damages, which is precluded by the Subcontract between Welded and Prime. [D.I. 5] Prime's Partial Motion to Dismiss also incorporates a Motion to Compel Arbitration, based upon an arbitration clause in the Subcontract. [D.I. 5]

IV. LEGAL ARGUMENT

A. Withdrawal of the Reference of this Non-Core Adversary Proceeding Would Serve the Interests of Judicial Economy.

5. Federal bankruptcy law authorizes federal district courts to refer cases or proceedings relating to bankruptcy matters to bankruptcy judges. *See* 28 U.S.C. § 157(a). The United States District Court for the District of Delaware has entered an omnibus order referring all bankruptcy cases to the United States Bankruptcy Court for the District of Delaware. (*See* Feb. 29, 2012 Amended Standing Order of the United States District Court for the District of Delaware.)

Under federal bankruptcy law, a district court "may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." 28 U.S.C. § 157(d).

6. Factors that may be considered in determining whether there is "cause" to withdraw a reference include: "the goals of promoting uniformity in bankruptcy administration, reducing forum shopping and confusion, fostering the economical use of the debtors' and creditors' resources, and expediting the bankruptcy process." *In re Pruitt*, 910 F.2d 1160, 1168 (3d Cir. 1990). These issues concern "whether withdrawal would serve judicial economy[.]" *NDEP Corp. v. Handl-It Corp.*, 203 B.R. 905, 913 (D. Del. 1996). Courts have also examined whether a proceeding is "core" or "non-core,"[1] and whether parties have requested a jury trial.[2]

7. Courts have recognized that a proceeding will be determined "core" if "it invokes a substantive right provided by Title 11, or if it is a proceeding which, by its very nature, could arise only in the content of a bankruptcy case." *Beard v. Braunstein*, 914 F.2d 434, 444 (3d Cir. 1990) (citations and internal quotation marks omitted). Courts have therefore held that a proceeding is "non-core" if it "involves only state law claims which existed prior to the filing of bankruptcy, and which could have been brought whether or not bankruptcy was filed[.]" *Mellon v. Del. & Hudson R.R.*, 122 B.R. 887, 893 (D. Del. 1991). The Adversary Proceeding Complaint concerns state law claims of breach of contract and breach of warranty, regarding allegedly inadequate work that occurred several months prior to Welded's bankruptcy filing. These claims existed prior to the bankruptcy filing, and could have been brought regardless of whether Welded instituted bankruptcy proceedings. The Complaint is therefore a "non-core" proceeding.

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[1] *See, e.g.*, *NDEP*, 203 B.R. at 908 (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993)).

[2] *See, e.g.*, *Hatzel & Buehler, Inc. v. Orange & Rockland Utilities, Inc.*, 107 B.R. 34, 39 (D. Del. 1989).

8. Simultaneous with the filing of this Motion, Prime has filed a Jury Demand.[3] Pursuant to the Seventh Amendment of the United States Constitution, Prime has a right to a jury trial in "[s]uits at common law, where the value of the amount in controversy exceeds twenty dollars[.]" U.S. Const., amend. VII. An action constitutes a "suit at common law" if "a cause of action is legal in nature and it involves a matter of 'private right.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n. 4 (1989). As the Adversary Proceeding Complaint is an action in law involving matters of private rights, the litigants have a constitutional right to a jury trial.

9. 28 U.S.C. § 157(e) provides that "[i]f the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties." Courts have recognized that "[w]hen there is a jury demand in a non-core proceeding, courts generally find that judicial economy would be served by withdrawal of the reference because the district court must (absent the consent of all the parties) hold the trial." *NDEP*, 203 B.R. at 913. Courts have explained that as "'the District Court judge must eventually preside over the jury trial in this matter, it would constitute a tremendous waste of judicial resources to permit the bankruptcy court to continue to maintain jurisdiction over the issues presented in this litigation.'" *Id.* (quoting *Gumport v. Growth Fin. Corp. (In re Transcon Lines)*, 121 B.R. 837, 838 (C.D. Cal. 1990)). Therefore, withdrawal of the reference in the present case would serve the interests of judicial economy.

10. Furthermore, as this is a non-core proceeding, the Bankruptcy Court may only enter a final judgment with the consent of all litigants and when directed to do so by the District Court.

[3] The Jury Demand is filed in the alternative and without waiving Prime's rights under its arbitration agreement with Welded, as set forth in Prime's Partial Motion to Dismiss and Motion to Compel Arbitration.

See 28 U.S.C. § 157(c)(2). Otherwise, the Bankruptcy Court must "submit proposed findings of fact and conclusions of law to the district court," which shall enter a final judgment "after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected." *See* 28 U.S.C. § 157(c). Courts have concluded that as this procedure would result in "significant duplication of effort" by the Bankruptcy Court and District Court, withdrawal of the reference would further serve the interests of judicial economy. *NDEP*, 203 B.R. at 913; *see also Hatzel & Buehler,* 107 B.R. at 40 (reaching same conclusion).

11. For the reasons set forth above, withdrawal of the reference of this non-core proceeding would advance the interests of judicial economy by avoiding duplication of effort and the waste of judicial resources. Prime's Motion to Withdraw the Reference should therefor4e be granted.

WHEREFORE, for the reasons set forth above and in the underlying Motion, Defendant Prime NDT Services, Inc. respectfully requests that this Honorable Court grant its Motion to Withdraw the Reference of the Adversary Proceeding, and enter an Order withdrawing its reference of this matter to the Bankruptcy Court for the District of Delaware.

Prime NDT Services, Inc. does not consent to the entry of final orders or judgments by the bankruptcy court.

(Signature on Next Page)

Respectfully submitted,

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Dated: April 26, 2019

CERTIFICATE OF SERVICE

I certify that on this 29th day of April, 2019, I electronically filed the foregoing with the Court using the CM/ECF system, and served counsel below via the CM/ECF system.

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FOR THE DISTRICT OF DELAWARE

In Re:	)	
WELDED CONSTRUCTION, L.P., et al. *et al,*	)	Chapter 11
	)	Case No. 18-12378 (KG)
Debtors and Debtor in Possession.	)	(Jointly Administered)
	)	
WELDED CONSTRUCTION, L.P.,	)	Adversary Proceeding
Plaintiff,	)	Adv. Pro. No. 19-50180 (KG)
v.	)	
PRIME NDT SERVICES, INC.,	)	
Defendant.	)	

ORDER GRANTING MOTION TO WITHDRAW REFERENCE

AND NOW, this ___ day of _____, 2019, this Court having considered the Motion to Withdraw Reference to the Bankruptcy Court filed by Defendant Prime NDT Services, Inc., and any response thereto, it is hereby ORDERED that Prime NDT Services, Inc.'s Motion is GRANTED and this matter is transmitted to the United States District of Delaware for adjudication.

BY THE COURT:

_____
J.