IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

IN RE: DELMORE TRULY and	**3:03-bk-11737E**
PEARLIE MAE TRULY, DEBTORS	**CHAPTER 13**
STACY BRYANT, et al.	**PLAINTIFFS**
v.	**AP NO. 3:05-ap-1038**
ROSSLARE FUNDING, INC., et al.	**DEFENDANTS**

ORDER REMANDING ADVERSARY PROCEEDING

Now before the Court is the *Order to Show Cause Why Adversary Proceeding Should Not Be Remanded to State Court* entered on February 24, 2005 (the "**Order to Show Cause**"), the *Plaintiffs' Response to the Court's Order to Show Cause and in Support of Motion to Remand and for Costs and Attorneys' Fees*, and the responses filed thereto. On July 8, 2005, the Court heard oral arguments on these matters and took them under advisement. Roger Rowe and Mark Olthoff appeared on behalf of Bank of New York and Wells Fargo Bank (the "**Removing Bank Defendants**") and Ocwen Federal Bank FSB. Herb Rule, along with Robert Thompson and Paul Decef, appeared on behalf of Wilmington Trust Company, as Owner Trustee for and on behalf of First Plus Home Loan Owner Trust 1998-4, and U.S. Bank National Association, as Co-Owner Trustee and Indenture Trustee for and on behalf of

FirstPlus Home Loan Owner Trust 1998-4 (the "**Removing Trust Defendants**"). (The Removing Bank Defendants and the Removing Trust Defendants are collectively referred to herein as the "**Defendants**.") Clare Hancock appeared on behalf of Countrywide Home Loans. Mart Vehik appeared on behalf of the Plaintiffs.

Upon consideration of the pleadings filed, oral argument at hearing, and applicable law, the Court exercises its powers of discretionary abstention under 28 U.S.C. § 1334(c)(1) and remands this case to the Greene County Circuit Court on equitable grounds under section 1452(b).

In its Order to Show Cause, the Court stated it had non-core "related to" jurisdiction over this matter. However, the Court also concluded that both discretionary abstention and equitable remand appeared to be appropriate in this case where although the outcome of this lawsuit could conceivably affect the Debtor's bankruptcy case, the likelihood of that happening was remote. Because the Court raised the issues *sua sponte*, the parties were given the opportunity to be heard on the matter prior to a final decision by this Court. The Defendants requested that oral argument be scheduled, and in the interim (between the request for oral argument and the presentation of oral argument), the Defendants moved to withdraw the reference to bankruptcy court. The Motion to Withdraw was transferred to District Court in accordance with Federal Rule of Bankruptcy Procedure 5011, and ultimately assigned

to Judge George Howard, Jr., who declined to withdraw the reference on August 2, 2005.[1]

At the hearing on this matter, the following two issues were presented to the Court: (1) whether federal preemption mandates that the case remain in federal court, and (2) whether the proceeding was core such that the Court has "arising under" rather than merely "relating to" jurisdiction as described in the Court's Order to Show Cause. As to the first issue, the Defendants asserted that any claim of usury that purported to be brought under state law was entitled to complete preemption and could be brought only in a federal court (either this bankruptcy court or the district court upon withdrawal of the reference). In support of this argument, the Defendants directed this Court to the National Bank Act ("**NBA**") codified in 12 U.S.C. §§ 85 and 86, *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), and the Depository Institutions' Deregulation and Monetary Control Act ("**DIDA**") codified in 12 U.S.C. § 1831(d). In response to the Defendants' preemption argument, Plaintiffs asserted that in the Fourth Amended Complaint the banks were sued in their capacity as trustees and not in their individual capacity.

On August 2, 2005, Judge Howard entered an order determining that the

[1]U.S. Bank previously filed a notice of removal to District Court; however, in an order entered March 29, 2004, Judge Howard remanded the case to State Court.

Defendants were being sued in their capacity as trustees and rejecting the Defendants' argument in support of withdrawal of the reference that the NBA and the DIDA would be applicable in this case. Thus, the District Court concluded that the Defendants' complete preemption arguments must fail, and the Defendants' Motion for Withdrawal of Reference from the bankruptcy court was denied. This Court adopts Judge Howard's ruling and finds that the Defendants' claims are not completely preempted by federal law. Thus, federal preemption does not provide the basis for the bankruptcy court to retain jurisdiction over this case.

As to the second issue, while the Court's Order to Show Cause provided the Defendants with the opportunity to present oral argument at the hearing as to whether this Court should exercise its powers of discretionary abstention and equitable remand, apparently the Defendants made the decision to forfeit their opportunity to address this issue during oral argument.[2] Instead, the Defendants, with the basis of their argument being that there were several Plaintiffs in the present case who have or have had a bankruptcy case pending in this Court, attempted to convince the Court that the case is a core proceeding under 28 U.S.C. § 157. The Defendants argued that

[2]The Court notes that the issue of discretionary abstention and equitable remand was argued in the Removing Trust Defendants' Response to the Court's Order to Show Cause; however, the issue was not addressed during oral presentation at the hearing.

there were potential bankruptcy issues in those filings and that, therefore, this lawsuit was a core proceeding and must be addressed by the bankruptcy court. Plaintiffs responded to the Defendants' arguments by asserting that the Defendants conceded that this lawsuit was non-core in their Notice of Removal, never argued that this was a core proceeding in their briefs filed in preparation for the hearing, and could not now assert that this lawsuit is a core proceeding for the first time. The Court finds that Defendants' argument that this case is a core proceeding was not made in the Defendants' Notice of Removal[3], the Defendants' Motion for Withdrawal of Reference[4], the Defendants' Memorandum of Points and Authority in Support of Defendants' Withdrawal of Reference[5], or the Removing Trust Defendants' Response to the Court's Order to Show Cause[6]. In fact, each of the four pleadings specifically

[3]The Defendants' Notice of Removal specifically states that, "[t]he plaintiffs' alleged cause of action is non-core."

[4]The Defendants' Withdrawal of Reference specifically states that, "[t]he claims identified in the Proceeding are non-core matters. . ."

[5]The Defendants' Memorandum of Points and Authority in Support of Defendants' Withdrawal of Reference specifically states that, "[n]on-core, related proceedings are those that do not invoke a substantive right created by federal bankruptcy law and could exist outside of a bankruptcy. . . The claims raised by the plaintiffs in the Proceeding are not claims or causes or action that were created by or based upon a provision of the Bankruptcy Code nor are they dependent on the bankruptcy case's existence."

[6]The Removing Trust Defendants' Response to the Order to Show Cause specifically states that, "the claims raised in the proceeding are non-core. . ."

states that this is a non-core proceeding. Therefore, the Court finds that Defendants were therefore estopped[7] from making the argument that this is a core proceeding during oral presentation at the hearing[8].

The Court finds that, despite having "related to" jurisdiction in this matter, based on its reasoning set forth in its Order to Show Cause, the Court will exercise its discretion to abstain and remand the case to State Court on equitable grounds. The Court heard nothing at the hearing on this matter to persuade it otherwise.

The adversary proceeding will not be closed until the Court issues a separate order addressing the issue of whether the removal of the class-action lawsuit to the bankruptcy court constituted forum shopping, and if so, whether attorneys fees and/or costs will be awarded and in what amount.

For these reasons, it is hereby,

ORDERED that the Plaintiffs' Motion to Remand is **GRANTED**; and it is further

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[7]The Court uses the term "estopped" in the most general sense. *See* Blacks Law Dictionary 570 (7th ed. 1999) (defining "estoppel" as "[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true.").

[8]Even if the Defendants were not estopped from arguing that this is a core proceeding, the arguments presented at hearing were not sufficient to convince the Court that this is a core matter.

ORDERED that the above-captioned adversary proceeding and all matters filed therein are **REMANDED** to the Circuit Court of Greene County, Arkansas.

IT IS SO ORDERED.

HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATE: August 26, 2005

cc: Mart Vehik, Attorney for Plaintiffs
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