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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

IN RE WALTER L. SPRINKLE, JR. and REBECCA F. SPRINKLE,

Debtors.

APPALACHIAN POWER COMPANY, ETC.,	)	Case No. 1:04CV00134
Appellant,	)	**OPINION**
v.	)	By: James P. Jones
WALTER L. SPRINKLE, JR.,	)	Chief United States District Judge
Appellee.	)	

Mark D. Loftis and B. Webb King, Woods Rogers PLC, Roanoke, Virginia, for Appellant; John M. Lamie, Browning, Lamie & Gifford, P.C., Abingdon, Virginia, for Appellee.

The historic facts presented by this bankruptcy appeal are uncontested. In April of 1999, the debtor and appellee, Walter L. Sprinkle, Jr., filed a lawsuit in the Circuit Court of Smyth County, Virginia, against the appellant, Appalachian Power Company, doing business as American Electric Power ("AEP"), seeking damages in

the amount of $1,600,000 allegedly caused by AEP's electric distribution lines.[1] The case has been set for trial three times, and each time continued. It is now set for trial to begin February 8, 2005.[2] It is alleged that no substantive rulings have been made by the state court during the time the case has been pending.[3]

On April 9, 2004, Sprinkle and his wife filed a joint Chapter 11 petition in the bankruptcy court of this district. AEP was not given notice of the filing and did not learn of it until on or about August 25, 2004. On September 14, 2004, AEP filed in the bankruptcy court a Notice of Removal of State Court Civil Action, as well as a Motion to Extend Time to File Notice of Removal. The debtor promptly objected on the ground that the notice of removal had not been timely filed. *See* Fed. R. Bankr. P. 9027(a)(2) (requiring that notice of removal of pending action be filed within ninety days after the order for relief in the bankruptcy case). The debtor also moved the bankruptcy court to abstain. *See* 28 U.S.C.A. § 1334(c)(2) (West Supp. 2004)

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[1] More particularly, Sprinkle contends that since 1995, the power lines have caused "electric shocks" to his dairy cattle, resulting in loss of milk production and additional veterinary services and other increased costs to his farming business. (Mot. for J. ¶¶ 6, 7.)

[2] The last time it was continued it was set to begin on February 7, 2005, but the appellant has advised that recently the state court moved the beginning date by one day, to February 8, because of a scheduling conflict. The trial is scheduled to last one week.

[3] That in and of itself is not unusual, since Virginia's legislature has severely restricted the ability of state trial courts to consider pretrial motions for summary judgment. *See* Va. Code Ann. § 8.01-420 (Michie 2000) (providing that a motion for summary judgment shall not be granted on the basis of discovery depositions).

(requiring abstention by bankruptcy court of certain pending state law claims where the action can be "timely adjudicated" in state court).

A hearing was held by the bankruptcy court on the issues presented by these motions on October 6, 2004. On October 26, 2004, the bankruptcy court (Stone, J.) issued its decision denying the Motion to Extend the Time to File Notice of Removal and remanding the case to state court. It made no ruling on the debtors' Motion to Abstain.

AEP timely noted an appeal to this court from the decision of the bankruptcy court.[4] In addition, AEP has filed a motion seeking the withdrawal of reference to the bankruptcy court of the state court action. It is agreed by the parties that this latter motion is contingent on the reversal of the bankruptcy court's decision to remand the case to state court. If that decision was correct, the issue of the transfer of the case from the bankruptcy court to this court is moot.

AEP does not dispute that the deadline for a notice of removal in this case was July 8, 2004, and thus its notice was over two months late. The bankruptcy court considered the Motion to Extend Time to File Notice of Removal pursuant to Bankruptcy Rule 9006(b)(2) (providing that extension of time limit after the period

[4] Jurisdiction of this court exists pursuant to 28 U.S.C.A. § 158(a)(1) (West Supp. 2004). The issues have been briefed by the parties and they have waived oral argument. The appeal is thus ripe for decision.

has expired may be made where the failure to act was the result of "excusable neglect"), in accord with the standard prescribed in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993). AEP agrees that the bankruptcy court was correct in utilizing the *Pioneer* standard, but argues that the court improperly weighted the relevant factors.

The factors set forth in *Pioneer* for determining excusable neglect are (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith. 507 U.S. at 395. Enlargement of time is a matter of discretion, *see* Fed. R. Bankr. P. 9006(b)(1), and a court abuses its discretion only if its ruling is based "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990). A factual finding is clearly erroneous if there is no evidence to support it or "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

The bankruptcy court heard evidence from Mr. Sprinkle, who testified that he had no intention of authorizing his attorneys in the state court action to consent to any further continuances and that it was important financially that his claim against AEP

be resolved. (Tr. 27-28.)[5] In its decision, the bankruptcy court found that to delay the state court trial by virtue of the removal would likely delay the prosecution of the pending Chapter 11 case and thus prejudice the debtors. The bankruptcy court also noted that the reason for the delay could not be laid at the lap of the debtors, since they had no legal duty to advise AEP of the bankruptcy filing. While the bankruptcy court found no evidence of lack of good faith on AEP's part, it pointed out that AEP could have learned of the bankruptcy case earlier through discovery in the state action.[6]

AEP contends that the bankruptcy court erred in finding prejudice to the debtors, since if the case were removed, the action could be quickly resolved in federal court, and thus no substantial harm would befall the debtors' interests.

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[5] In the Disclosure Statement filed by the debtors in the bankruptcy court, they recognized liabilities in the amount of $1,202,509, and as their principal asset, the claim against AEP.

[6] The bankruptcy court suggested that AEP could have served an interrogatory on Sprinkle at the beginning of the state litigation requiring him to disclose any bankruptcy filing. Even if the initial answer to the interrogatory had been that no such filing had occurred, Sprinkle's duty to supplement the answer when he later filed the Chapter 11 proceeding would have shifted the equitable balance in AEP's favor, in the event Sprinkle had failed to promptly notify AEP. *See* Va. R. Sup. Ct. 4:1(e) (requiring supplemental response to interrogatories when party learns response is incomplete). AEP's rebuttal to this suggestion is that "no defendant would reasonably send such discovery." (Br. of Appellant 6 n.3.) Why AEP believes that is so is not evident. The interrogatory certainly would be relevant to Sprinkle's damages, at the least.

The factors set forth in *Pioneer* are not exclusive and the court must take into account "all relevant circumstances surrounding the party's omission." 507 U.S. at 395. It is in essence a factual determination and I cannot say that the bankruptcy court erred here in its equitable balancing of the circumstances. Particularly since the state court action is scheduled to go to trial very shortly, the bankruptcy court acted reasonably in placing heavy reliance on that fact in judging the prejudice to the debtors resulting from the transfer of the case to a new court. While the case could doubtless be resolved in federal court in relatively short order, it certainly could not be determined as quickly as if the case is tried as scheduled in state court.[7]

For these reasons, the order of the bankruptcy court remanding the case to state court will be affirmed. In addition, the Motion to Withdraw Reference will be denied.

DATED: January 18, 2005

/s/ JAMES P. JONES
Chief United States District Judge

[7] AEP argues that the bankruptcy court should have assumed that the state trial would again be continued, since it has been continued three times in the past. It would appear, however, that the reverse presumption would be more apt—since the case has been continued before, the presiding state judge is more likely to deny a further postponement.