Dated: June 20, 2017
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re	)	
THE LAW OFFICES OF T. ROBERT HILL, P.C., f/k/a Hill Boren P.C.	)	**Case No. 17-10597**
	)	**Chapter 11**
Debtor.	)	

MEMORANDUM OPINION RE MOVANT'S MOTION FOR ABSTENTION UNDER 11 U.S.C. § 305

At issue in this proceeding is whether the Court should abstain from the bankruptcy proceedings under 11 U.S.C. § 305. Movants urge this court to either dismiss or suspend the proceedings, arguing that abstention is in the best interests of both the debtor and creditors. Debtor asserts that abstention would not be in the Debtor's best interest and, therefore, the Movants have not met the burden required by § 305.

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(1) and (b)(2)(A). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. Thus, the Court may enter a final order in this matter. This memorandum opinion shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052 and 9014.

I. FACTS

The Law Offices of T. Robert Hill P.C. f/k/a Hill Boren P.C. ("Debtor") is a law firm in Jackson, Tennessee. T. Robert Hill ("Mr. Hill") is the firm's majority shareholder, owning an 80 percent share. (ECF no. 47 at p. 2). Ricky L. Boren ("Mr. Boren") holds the remaining 20 percent share, which is a fact disputed by Debtor in its petition for bankruptcy. (ECF no. 1 at p. 31). The partners have worked together since 1979. In 2012, Mr. Hill wished to reduce his role in the firm and began making arrangements for retirement. (Tr. Ex. 1, at p. 1). As a result, Mr. Hill and Mr. Boren executed an Agreement for Future Transfer of Controlling Interest in Hill Boren, P.C. ("STA") on June 6, 2012. (*Id*.). Under the terms of the STA, Mr. Hill agreed to transfer 40 percent interest in Debtor to Mr. Boren on December 31, 2016, giving him a controlling interest. Mr. Hill's remaining 20 percent interest would be divided equally amongst Tamara Hill ("Mrs. Hill"), Jeffrey Boyd ("Mr. Boyd"), and James Krenis, provided that each attorney was still employed by Debtor and in good standing at the time of transfer. (*Id*. at 2). As consideration, Mr. Boren agreed to, inter alia, create a fee schedule wherein Mr. Hill would receive a percentage of the firm's fees generated by cases for a set period of time. (*Id*. at 2).

On November 21, 2016, approximately one month before the date of the stock transfer specified in the STA, Mr. Hill sent Mr. Boren a notice for a stockholder's meeting to be held on December 1, 2016, to vote on a "Presentation of plan for the dissolution of the Corporation." (Tr. Ex. 2 at p. 1). The date for the meeting was subsequently extended to December 15, 2016. (Tr. Ex. 4 at p. 2). As was stated in a letter to Mr. Boren's attorney Lewis Cobb ("Mr. Cobb"), Mr. Hill believed that Mr. Boren breached the terms of the STA,

and the only recourse was to dissolve the Debtor. (Tr. Ex. 3). Conversely, Mr. Boren believed that Mr. Hill breached the terms of the STA. In response to the purported breach, Mr. Boren and Mr. Boyd filed a complaint for damages against Mr. Hill and Debtor on December 6, 2016, as a well as a petition for a Temporary Restraining Order ("TRO") in Madison County Chancery Court. (*Id*. at 5). After an ex parte hearing, the court granted the TRO on December 8, 2016, which enjoined Mr. Hill and Debtor from dissolving Debtor until after the court had an opportunity to hear the breach of contract claims. (Tr. Ex. 4 at p. 3).

Since the filing for the TRO, the state court proceeding has remained highly litigious. In an order dated January 9, 2017, the Chancery Court noted that Debtor and Mr. Hill suggested postponing the issue of dissolution until after the parties could resolve the underlying breach of contract issues upon which stock ownership determinations rested. (Tr. Ex. 5 at p. 2). In reliance on that suggestion, the court dissolved the TRO, but ordered that there would be no dissolution of Debtor until the underlying case could be resolved. (*Id*.). Debtor and Mr. Hill followed up the hearing with a "Motion for Summary Judgment on the Issue of Ricky Boren's Eligibility to Continue to Own Stock in Hill Boren, P.C.," to which Mr. Boren filed his response on March 2, 2017. (Tr. Ex. 19 at p. 1).

The Chancery Court was set to hear dispositive motions related to the case on March 17, 2017, until Debtor filed its chapter 11 petition for bankruptcy relief on March 15, 2017. In its Summary of Assets and Liabilities for Non-Individuals, Debtor valued its assets at $6,455,839.02 and its liabilities at $185,691.34. In its Schedule E/F: Creditors Who Have Unsecured Claims, Debtor attributed just three creditors as accounting for approximately 83 percent of the Debtor's total liabilities: $42,000 to Hill Boren Properties for three months of unpaid rent, $30,000 to T. Robert Hill for funds loaned to Debtor for attorney's fees, and $82,650 to Mrs. Hill for attorney's fees.

On April 10, 2017, Movants filed a Motion for Abstention Under 11 U.S.C. § 305 ("Motion"). Debtor subsequently filed Debtors' Response to Motion for Abstention Under 11 U.S.C. § 305 ("Response") on May 1, 2017. Before this Court held a hearing on the Motion, Debtor filed an Adversary Complaint against Movants, raising the same business

tort claims the parties have asserted against each other in Chancery Court. A hearing was subsequently held on the abstention issue on May 25, 2017.

II. ANALYSIS

Section 305(a)(1) of the Bankruptcy Code provides that "(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—(1) the interests of creditors and debtors would be better served by such dismissal or suspension[.]" 11 U.S.C. § 305(a)(1). A court's decision to dismiss or suspend pursuant to § 305(a) "is discretionary and must be made on a case-by-case basis." *In re Fortran Printing, Inc.*, 297 B.R. 89, 94 (Bankr. N.D. Ohio 2003). While various courts have established and applied different factor-tests to determine whether abstention is appropriate, there is not a particular balancing test that must be applied. Rather, the only finding required by statute is that abstention be in the best interests of both the creditors and the debtor. *In re Dzierzawski*, 528 B.R. 397, 406 (Bankr. E.D. Mich. 2015). The moving party bears the burden of establishing that such relief better serves both. *In re Naartjie Custom Kids, Inc.*, 534 B.R. 416, 425 (Bankr. D. Utah 2015).

Because § 305(c) limits the reviewability of a bankruptcy court's decision to dismiss or suspend under § 305(a), the Sixth Circuit Court of Appeals has not established precedent for the applicable standard to be applied in making an abstention determination. Although a district court may review an appeal of a § 305(a) abstention order, no district court in the Sixth Circuit has expressly established a particular test. Notwithstanding a lack of controlling precedent or statutory instruction on how to determine whether abstention would better serve the interests of debtor and creditor, the statute's legislative history does provide some guidance for when abstention under § 305(a) is appropriate. The 1978 Senate Report provides, as an example, that abstention is warranted:

> [I]f an arrangement is being worked out by creditor and the debtor out of court, there is no prejudice to the rights of creditors in that arrangement,

> and an involuntary case has been commenced by a few recalcitrant creditors to provide a basis for future threats to extract full payment.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 325 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 35 (1979). Prior to 1990, many courts interpreted this legislative guidance to mean that a limiting approach should be taken when deciding whether to invoke § 305(a) abstention. For instance, some courts read the statute, along with the accompanying legislative history, as confining § 305(a) to involuntary bankruptcy proceedings. *GMAM Investment Funds Trust I v. Globo Comincacoes E. Participacoes S.A. (In re Globo Comunicacoes E Participacoes)*, 317 B.R. 235 (S.D.N.Y. 2004)(citing *In re Grigoli,* 151 B.R. 314, 319-20 (Bankr. E.D.N.Y. 1993)). However, the legislative history does not expressly limit § 305(a)'s application only to cases resembling its example. *In re Spade*, 258 B.R. 221, 230 (Bankr. Colo. 2001); *see also In re Whitby*, 51 B.R. 184, 186-87 (Bankr. E.D. Mich. 1985)("the legislative history was clearly intended to be illustrative rather than restrictive; if Congress had intended to limit dismissal and suspension to involuntary cases in which the enumerated factors are found, it could have easily done so.").

In its Response, Debtor claims that abstention should rarely be granted because a court's decision to abstain is not subject to judicial review. Although § 305(a) abstention orders were at one time immune from any judicial review, such is not the case anymore. *See* 11 U.S.C. § 305(c). Prior to 1990, § 305(c) prohibited all appellate review of an abstention order under Section 305(a). Collier on Bankruptcy ¶ 305.05 (Alan J. Resnick & Henry J. Sommer eds., 16th ed.). However, in response to the United States Supreme Court's decision in *Marathon Pipe Line*, and other appellate court decisions that determined Article I courts did not have the constitutional authority to enter unreviewable abstention orders, Congress amended the statute to allow for review of abstention orders by the district court or bankruptcy appellate panel. *Id.*, n.2 (*citing Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982));(*Goerg v. Parungao (In re Georg)*, 930 F.2d 15634, 1565-66 (11th Cir. 1991)). As a result, many courts have since expressly rejected the narrow application, instead choosing to take a broader approach when determining whether abstention would be in the best interests of the creditors and debtors. *In re Spade*, 258 B.R. 221, 230 (Bankr. D. Colo. 2001).

The various tests courts have developed to analyze motions for abstention contain similar factors. One of the most expansive tests adopted by the bankruptcy courts weighs seven factors, and is the same test both Debtor and Movants urge this Court to adopt. These factors are generally enumerated as follows:

> (1) economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less-expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which the bankruptcy jurisdiction has been sought.

In re Fortran Printing, Inc., 297 B.R. at 93. An additional factor courts occasionally weigh is the effect the bankruptcy proceeding will have on the debtor's ongoing business. *Id*. (citing *In re Ceiling Fan Distrib., Inc.*, 37 B.R. 701, 703 (Bankr. M.D. La. 1983)). While a court may afford more weight to any factor it deems most relevant, many courts have held that the first factor, the economy and efficiency of administration, is the paramount concern when determining if abstention under § 305(a) is appropriate. *In re NNN Realty Advisors, Inc*., 2016 Bankr. LEXIS 1777, *6 (Bankr. S.D. Fla. Apr. 15, 2016)(quoting *In re Iowa Trust*, 135 B.R. 615, 623-24 (Bankr. N.D. Iowa 1992)).

In their Motion, Movants argue that the first four factors weigh in favor of granting abstention when there is already pending state court litigation. While Debtor correctly notes in its Response that the presence of state court litigation alone is not dispositive, ongoing state court litigation does weigh in favor of a court's choice to abstain when accompanied by other factors. Such factors include considerations of comity, whether the proceeding is essentially a two-party dispute, the economy and efficiency of administering the bankruptcy proceeding, the adequacy of the alternative forum, and the debtor's motivations for filing the bankruptcy petition.

When faced with a situation similar to the one in this case, the court in *In re Mazzocone*, 183 B.R. 402 (Bankr. E.D. Penn. 1995) found abstention appropriate under

§ 305(a). Like this case, the bankruptcy proceeding in *Mazzocone* involved highly contentious litigation over property in a law partnership. *Id.* at 405-06. When the debtor split from the partnership, his two former partners filed claims in state court relating to distribution of the firm's client files and other assets relating to a real estate partnership jointly owned by the former partners. *Id* at 406. The bankruptcy court initially dismissed the case under § 1112(b). On appeal, however, the district court remanded the case with instructions to consider additional evidence the bankruptcy court had either previously overlooked or failed to mention in its order granting dismissal. *Id* at 407-09.

While the court noted that, even on remand, it had sufficient grounds for permanently dismissing the case, the court chose instead to suspend the proceedings pursuant to § 305(a). *Id* at 420. In its holding, the court reasoned:

> Because a bankruptcy court is often not the proper forum in which to adjudicate non-bankruptcy issues, litigation of such issues is frequently best left to the state courts and should not be imposed upon this specialty court unless necessary to resolve a bankruptcy-centered dispute. Indeed bankruptcy courts have resorted to § 305 when they have determined that they are not the proper forum to decide private management and partnership disputes.

Id. at 421 (citations omitted). In determining that it was not the proper forum to hear the issues centered on partnership disputes, the court noted that many of the protections sought by one of the major creditors, a former law partner of Debtor, were also available under state law. *Id* at 421-22. Additionally, the court cited the fact that the Debtor clearly favored resolution of all the underlying issues in the state court and believed it would be cheaper to litigate there. *Id* at 422. Looking to the first factor of economy and efficiency of administration, the court stated that the time and resources of the bankruptcy court, being a specialty court, should not be utilized by a case that no longer involved bankruptcy issues unless absolutely necessary. *Id*.

In the case of *In re Forest Hill Funeral Home & Memorial Park*, 364 B.R. 808 (Bankr. E.D. Okla. 2007), the bankruptcy court wrestled with the issue of abstention as it related to a funeral home company located in Tennessee that was concurrently litigating identical issues in state court. The bankruptcy court ultimately chose to dismiss the case under § 1112(b)(1). *Id*. at 823. It stated, however, that even if it had not found cause to

dismiss, the court would nevertheless abstain from hearing the case under § 305(a) because of the deference that should be afforded to the state's interest in litigating matters concerning state law. In justifying its decision to abstain, the court considered the motivation of the parties seeking bankruptcy jurisdiction. *Id*. at 824-25. The court also emphasized how certain aspects of the bankruptcy case involved application of Tennessee state law, "issues the chancery court in Tennessee is far better equipped to analyze and apply." *Id*. Finally, the court reasoned that the interests of the State of Tennessee in regulating funeral homes that are conducting business within its borders was a highly persuasive factor in support of abstention. *Id*.

In another case similar to the one at bar, the bankruptcy court determined abstention was appropriate in light of ongoing litigation in state court. *In re Brookdale Gardens Ass'n, Inc.*, No. 09-41305, 2010 WL 2015264 (Bankr. D.N.J. May 20, 2010). Before the court was a motion to impose sanctions for the bad faith filing of a chapter 11 petition which the bankruptcy court had dismissed pursuant to § 305(a). *Id*. at *1. Using factors similar to the ones the parties urge the Court to use in this case, the court in *Brookdale* found abstention appropriate where no financial restructuring was required, all the management and organization issues raised in the bankruptcy court could be addressed in the state court action, and the real purpose of filing the Chapter 11 case was for the party retaining the controlling share of the Debtor to find a new judicial forum and circumvent the authority of the state court judge. *Id*. at *3-5. Because of the existence of these factors, the court held that, "as a matter of comity, and in deference to the State Court Plaintiff's choice of forum," dismissal of the bankruptcy proceedings under § 305(a) was appropriate. *Id*. at *5.

Although Debtor is correct in asserting that the mere presence of state court litigation does not justify a court's decision to abstain, these cases demonstrate that the presence of state court litigation, if accompanied by additional factors, may establish the need for abstention, especially if the state court action will affect whether the bankruptcy reorganization is necessary. *See, e.g., In re Duratech Indus.*, 241 B.R. 283, 287 (E.D.N.Y. 1999). Here, several of those factors are indeed present. The issues before the Madison County Chancery Court are the same or substantially similar to the issues

presented to this Court in Debtor's adversary complaint. The state court action concerns claims against Movants for, inter alia, breach of fiduciary duty, breach of contract, tortious interference with contractual relations, and conversion. Of the eight counts in Debtor's adversary complaint, only one cites the bankruptcy code as a source of Debtor's entitlement for relief. Moreover, these business tort claims are nearly identical to the counterclaims brought by Debtor against the Movants in its answer and motion to dismiss in state court. Because these issues squarely focus on matters of Tennessee state law, these are issues the Madison County Chancery Court is better equipped to handle. Thus, as a matter of comity, deference to the state court and Plaintiff's choice of forum weighs heavily in favor of abstention under § 305(a).

Abstention is especially appropriate in cases where the bankruptcy proceeding is essentially a two-party dispute involving claims that should be resolved in state court. *In re Efron*, 529 B.R. 396, 406 (B.A.P. 1st Cir. 2015). Movants argue that the present case resembles this kind of two-party dispute for which there are adequate remedies in state court. Debtor asserts that its adversary complaint establishes the multiplicity of parties to this proceeding. The claims brought by Debtor in the adversary complaint, however, reflect the same claims raised by Movants in their chancery court complaint, as well as the counterclaims raised by Debtor in its answer thereto. Moreover, the fact that Debtor has more than one creditor "does not, in itself, overcome the overriding nature of the bankruptcy case as a two-party dispute." *Id*. at 409. Courts have determined that situations in which multiple creditors file an involuntary petition against the debtor are essentially two-party disputes when the creditors' claims arose out of the same transaction or occurrence, and those claims ultimately gave rise to the same collections action concurrently pending in state court. *See In re Spade*, 258 B.R. 221 (Bankr. D. Colo. 2001). Here, the state court case and the bankruptcy case are essentially two-party disputes revolving around state law causes of action arising from claims for breach of contract and other related causes of action. Therefore, the state court is the appropriate forum to hear these claims.

Considerations of the economy and efficiency of the administration of the bankruptcy proceeding also weigh in favor of abstention where multiple litigation exists,

and the state court is an adequate forum to protect the interests of the creditors and debtors. *Id*. at 236; *See also In re Efron*, 535 B.R. 505, 513 (Bankr. D.P.R. 2014)("Having multiple litigations does not foster judicial economy. It is a waste of judicial resources and the parties are incurring in needless fees and costs by fighting in several forums."). As noted by Movants, the outcome of this bankruptcy proceeding turns on resolution of the pending state court litigation, specifically on the determination of which party breached the STA. In response, Debtor argues that abstention would be less economical and efficient, largely due to Debtor's need to pay ordinary course expenses. Since the Bankruptcy Code provides special rules for the payment of these expenses, Debtor argues that administration of the case through this bankruptcy proceeding would be much more efficient. Currently, the chancery court has issued an order that requires Debtor to file a motion to pay each and every ordinary course expense. While litigating the same issues concurrently is a waste of the resources of the parties and the courts, the state court's findings will ultimately decide the issues in this case as well. Thus, considerations of the economy and efficiency of administration of the bankruptcy proceeding weigh in favor of abstention.

Finally, filing a bankruptcy petition for a non-bankruptcy purpose is a factor weighing in favor of abstention. When making an inquiry into the bankruptcy purpose, the Court will consider the motivation of the parties who are seeking relief in the bankruptcy court. *In re Spade*, 258 B.R. at 231. "Although the motivation of the parties may not directly affect the consideration of whether the creditors and the debtor would be better served by the dismissal of this case, the motives of the parties can significantly influence the Court's evaluation of other factors and contribute to the Court's decision to dismiss under § 305." *Id*. at 232. Abstention may be appropriate where the court determines that forum shopping has occurred. *Id*. at 231 (citing *In re Heritage Wood ' N Lakes Estates, Inc.*, 73 B.R. 511, 514 (Bankr. M. Fla. 1987)). Similarly, abstention may be warranted where the Debtors filed their bankruptcy petitions purely as a litigation tactic to gain a strategic advantage in a concurrent proceeding in another forum. *In re L&M Video Prods.*, No. 07-31798, 2007 WL 1847387, *7-8 (Bankr. N.D. Ohio June 25, 2007).

Movants argue that Debtor's primary purpose for filing its bankruptcy petition was as a litigation tactic or way to circumvent an unfavorable outcome in state court. In refuting this claim, Debtor states that its purpose in filing its chapter 11 petition is to "allow Debtor to wind down its business relationship with [Movants], ensure that all creditors can be efficiently and equitably paid, and continue its operations as a two-attorney law firm." (ECF no. 62, p. 9). However, as Movants point out, Debtor's prior statements directly conflict with its position of intending to reorganize and continue as a firm. Prior to the ensuing litigation, Mr. Hill, as majority shareholder of Debtor, sent notice to Debtor's other shareholders, conveying his intent to dissolve Debtor. (Tr. Ex. 2 at p. 1). This purported intent is further evidenced by a letter to Mr. Cobb, sent by Mr. Hill the same day as the notice for the shareholder's meeting, which communicated the same intent to dissolve the Debtor. (Tr. Ex. 3 at p. 1).

As further proof that Debtor filed its petition for a non-bankruptcy purpose, Movants cite to Debtor's Emergency Motion to Clarify filed in chancery court on January 23, 2017. In that motion, Debtor claimed the law firm "is basically dead, and the [Chancery] Court has determined that the only real asset of Hill Boren is the fee inventory, it seems that the real issues are who breached the contract and how fees are distributed." (Tr. Ex. 11, p. 10) Furthermore, the assets and liabilities Debtor provided in its schedules reveal that Debtor currently has $6,455,839.02 in assets, yet only $154,650 in liabilities. Of these liabilities, Debtor's schedules show that three unsecured creditors account for approximately 83 percent of these debts: Mrs. Hill, Mr. Hill, and Hill Boren Properties. This evidence, considered in conjunction with the inconsistent positions taken by Debtor between the state court and bankruptcy proceedings, suggests that Debtors' purpose for filing its chapter 11 petition was motivated by non-bankruptcy reasons. Accordingly, this factor weighs in favor of abstention. Therefore, the Court finds that Movants carried their burden of proving that abstention will better serve the interests of Debtor and its creditors.

III. CONCLUSION

The Court concludes that, pursuant to 11 U.S.C. § 305(a)(1), abstention is in the best interest of both the Debtor and creditors. As such, the Court will abstain from the bankruptcy proceeding.

An order will be entered in accordance herewith.

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