

ORDERED in the Southern District of Florida on _____.



Steven H. Friedman, Judge
United States Bankruptcy Court

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE:

Case No. 04-35264-BKC-SHF
Chapter 7 Proceeding

THOMAS O'CONNELL,

Debtor (s) /

MEMORANDUM OPINION DISMISSING CASE DUE TO IMPROPER VENUE

THIS CAUSE came on to heard on July 25, 2005, upon the Motion by Creditor, National Union Fire Insurance Company of Pittsburgh, P. A., to Dismiss Chapter 7 Case as Filed in Improper District (“Motion to Dismiss”) (C. P. 47). The Court, having considered the evidence presented, the argument of counsel, and the record herein, and being otherwise fully advised in the premises, issues this Memorandum Opinion Dismissing Case due to Improper Venue, incorporating its findings of facts and conclusions of law pursuant to Federal Rules of Bankruptcy Procedure 9014 and 7052.

JURISDICTION

This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§157 and 1334(b), and Bankruptcy Rule 9014.

PROCEDURAL BACKGROUND

This case was commenced on November 16, 2004 with the Debtor's filing of his voluntary chapter 7 petition. Contemporaneously, the Clerk of Court issued a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (C. P. 3), whereby an initial Meeting of Creditors was scheduled for December 17, 2004. Deborah Menotte was designated the chapter 7 trustee. The Debtor filed his initial bankruptcy schedules, listing his assets and liabilities, on November 30, 2004 (C. P. 5), and thereafter filed amended schedules on January 3, 2005 (C. P. 7). The Debtor estimated the aggregate value of his assets at \$2,630.00, consisting of cash, two televisions, clothing, assorted jewelry, a wedding ring, fishing rods and equipment, and a 1984 Mercedes-Benz automobile.

The Debtor listed no secured or priority creditors in his bankruptcy schedules, and listed four general unsecured creditors on his Amended Schedule F, holding aggregate claims of \$1,697,946.21. Among the unsecured creditors listed is National Union Fire Insurance Company of Pittsburgh, P. A. ("National Union") listed as the holder of a liquidated and undisputed debt in the amount of \$197,946.21, based upon a judgment issued by United States District Court for the Southern District of New York on March 9, 1999.

On June 10, 2005, National Union filed its Motion to Dismiss. By way of the Motion to Dismiss, National Union asserts that the Debtor is not qualified to file the instant chapter 7 bankruptcy proceeding in the Southern District of Florida, because he does not satisfy the venue requirements mandated under Federal law. Pursuant to 28 U. S. C. § 1408 (1), a bankruptcy case filed 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...

National Union asserts that, based upon the record established at the July 25, 2005 hearing, the Debtor does not satisfy the venue requirements of 28 U. S. C. § 1408 in order to file and maintain a chapter 7 proceeding in the Southern District of Florida.

FACTUAL BACKGROUND

The Debtor, on his petition initiating this case, listed his address as 5130 Francis Street, Jupiter, Florida. Although the Debtor amended his bankruptcy schedules on January 3, 2005 (C. P. 7), he has never amended his bankruptcy schedules to reflect his residence as being an address other than 5130 Francis Street, Jupiter, Florida. However, at the § 341 Meeting of Creditors conducted by Deborah Menotte, chapter 7 trustee, on December 17, 2004, the Debtor acknowledged that his current address is 6130 Francis Street, Jupiter, Florida, and that he had resided at 6130 Francis Street, Jupiter, Florida, for a period of thirty days prior to the commencement of this case. The Debtor further testified that, prior to moving to the referenced Jupiter, Florida address, he resided at 4801 Bethel Creek Drive, Vero Beach, Florida (National Union Fire Insurance Company (“NUFIC”) Exhibit 2 - pgs. 4-5); (NUFIC Exhibit 3 - pgs. 5-6). The Debtor further testified that he had lived at the Jupiter address, and prior thereto, at the Vero Beach address, on a part-time basis, during the 2½ years immediately preceding the petition date (NUFIC Exhibit 3 - pg. 6). The Debtor explained that he is retired, and thus has no principal place of business, and that he previously was an insurance agent, operating his own insurance agency known as Associated Managing Agents, in Dallas, Texas, until his agency closed in 1990 (NUFIC Exhibit 3 - pg. 9). The Debtor neither owns

nor leases real property in the State of Florida (C. P. 5 - Summary of Schedules - Schedule A and Schedule G). Rather, the Debtor testified that, as of the petition date, he was residing in a home owned by a friend, one Dwight Libby, who allowed the Debtor to utilize the premises without paying rental (NUFIC Exhibit 5 - pg. 5), and that prior thereto, the Debtor was allowed to reside at 4801 Bethel Creek Drive, Vero Beach, Florida, in premises owned by another friend, one Michael Monahan, without charge (NUFIC Exhibit 3 - pgs. 5-6).

During his May 25, 2005 Rule 2004 Examination, the Debtor testified that he has been married to Linda O'Connell for forty-five years (NUFIC Exhibit 3 - pg. 8). Mrs. O'Connell permanently resides at 1295 Broadway, Unit 209, in Chula Vista, California (NUFIC Exhibit 3 - pg. 8). The Debtor resides at the Chula Vista, California location, approximately four months each year (March, April, May, and December). The Debtor spends another four months each year at the home previously owned by his late mother, which home is located at 7 Carlson Lane, Harwich, Massachusetts. Upon the passing of the Debtor's mother, the home was bequeathed to the O'Connell Family Trust, of which William Dial, the Debtor's son-in-law, is trustee, and of which Patty Lynn Dial, the Debtor's daughter, is the beneficiary (NUFIC Exhibit 3 - pgs. 42-43). The Debtor spends the remaining four months of each year in Florida, having previously resided at 4801 Bethel Creek Drive, in Vero Beach, Florida for the five-year period immediately preceding his move to Jupiter, Florida.

Although the Debtor claims to be a resident of Florida, he has filed a joint federal income tax return with his wife for 2002, 2003, and 2004, reflecting the Chula Vista, California address (NUFIC Exhibits 4, 5, and 6). The Debtor maintains life insurance policies through John Hancock Life Insurance Company, and the premiums notices for his policy are mailed to him at the Chula

Vista address (NUFIC Exhibit 7). Correspondence from at least one of his creditors, Great/Bank of New York, was mailed to the Debtor at the Chula Vista address (NUFIC Exhibit 9) as were an Offer in Compromise, and related correspondence, from the Internal Revenue Service (NUFIC Exhibits 10 and 11).

ANALYSIS

Sub judice, the record is clear that, of the 180 days immediately preceding the Debtor's filing of his chapter 7 petition on November 16, 2004, he resided a maximum of 46 days in the Southern District of Florida. He spent the majority of the 180-day period immediately preceding the petition date in the home formerly owned by his mother in Harwich, Massachusetts, and at the residence maintained by his wife in Chula Vista, California. The Debtor utilized the Chula Vista location as his residence for purposes of filing tax returns and receiving correspondence. "A person has only one domicile at a particular time even though he or she may have several residences." *In re Lordy*, 214 B. R. 650, 662 (Bankr. S. D. Fla. 1997); *In re Hodgson*, 167 B. R. 945, 950 (D. Kan. 1994). Although reasonable minds may differ as to the exact location of the Debtor's domicile during the 180 days immediately preceding the commencement of this case, it is clear that the Debtor's domicile **was not located** within the Southern District of Florida. Both with regard to the residence occupied at 4801 Bethel Creek Drive, Vero Beach, Florida, and with regard to the residence occupied at 6130 Francis Street, Jupiter, Florida, the Debtor can be deemed as having been nothing other than a temporary visitor. A similar factual scenario is presented by *In re Micci*, 188 B. R. 697 (S. D. Fla. 1995). In affirming the Bankruptcy Court, District Court Judge Aronovitz noted:

Based on his own testimony, the debtor was in Florida for only one week during the six months prior to filing this case. Micci's time spent in Florida was

sporadic, varying between three or four months to three or four weeks a year.

Id. at page 699.

Similarly, during the 180-day period preceding the commencement of this case, the Debtor spent only forty-six days in the Southern District of Florida. While this Court could opine as to the situs of the proper venue for this case, Movant, National Union Fire Insurance Company of Pittsburgh, P. A., makes no request for a change of venue as a form of an alternate relief. This Court concludes that venue of this bankruptcy proceeding is not the Southern District of Florida. Accordingly, pursuant to 28 U. S. C. § 1408(1), together with the case authority recited herein, it is **ORDERED** that the **Motion to Dismiss is granted with prejudice** to the filing of a subsequent bankruptcy case within the Southern District of Florida for a 180-day period.

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Copies to:

Joey E. Schlosberg, Esq.
Shutts & Bowen LLP
201 S Biscayne Blvd
1500 Miami Ctr
Miami, FL 33131

Thomas O'Connell, Debtor
6130 Francis Street
Jupiter, Florida 33458

Deborah Menotte, Trustee
P. O. Box 211087
West Palm Beach, Florida 33421

Sean F. Monahan, Esq.
703 W. Boynton Beach Blvd.
Boynton Beach, Florida 33426