

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION  
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In re )  
 )  
JAMES DOLING, ) Case No. 6:13-bk-06817-KSJ  
 ) Chapter 7  
Debtor. )  
 )  
\_\_\_\_\_ )

**ORDER GRANTING DISH NETWORK, LLC'S MOTION  
TO REOPEN CASE AND GRANTING DEBTOR'S MOTION FOR REMAND**

Creditor, Dish Network, LLC ("Dish"), filed a motion to reopen<sup>1</sup> this Chapter 7 case and a notice of removal<sup>2</sup> regarding an action the Debtor, James Doling, filed against it in small claims court under the Florida Consumer Collection Practices Act ("FCCPA").<sup>3</sup> Dish argues that the Debtor's state law claims are, in reality, claims alleging Dish violated the automatic stay and should be adjudicated by this Court. In response, Debtor filed a motion to remand back to state court, alleging Dish's notice of removal was untimely filed under Federal Rule of Bankruptcy Procedure 9027.<sup>4</sup>

Dish's notice of removal indeed was untimely under Bankruptcy Rule 9027, which requires the removing party to file a notice of removal within 30 days of receiving a copy of the complaint or summons.<sup>5</sup> Debtor served Dish a copy of the state court complaint on January 6,

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<sup>1</sup> Doc. No. 12.

<sup>2</sup> Doc. No. 13.

<sup>3</sup> The case is styled as: *Doling v. Dish Network, LLC*, Case No. 2014-SC-37 (Fla. Orange County Ct.).

<sup>4</sup> Doc. No. 18. Dish responded to the Debtor's motion for remand at Doc. No. 22.

<sup>5</sup> Fed. R. Bankr. P. 9027(a)(3).

2014.<sup>6</sup> Dish filed its notice of removal on February 19, 2014, more than 30 days after receiving service.

Dish's recently substituted<sup>7</sup> counsel argues excusable neglect warrants enlarging the 30-day deadline pursuant to Bankruptcy Rule 9006(b)(1). "Excusable neglect" under Bankruptcy Rule 9006(b)(1) "is to be determined by reference to a four-factor test: 'the danger of prejudice to the [nonmovant], the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.'"<sup>8</sup> As grounds for enlargement, Dish's substituted counsel states that he recently left his long-time firm and the matter was being temporarily handled by his former partner. Further, he was unable to contact Dish after separating from his former law firm due to Florida Bar rules and restrictions. Given this explanation, the Court will find excusable neglect and enlarge the time for filing the notice of removal pursuant to Bankruptcy Rule 9006(b)(1).

Section 350 of the Bankruptcy Code states that a bankruptcy court may reopen a case "to administer assets, to accord relief to the debtor, or for other cause."<sup>9</sup> "The decision on whether to reopen a case is within the sound discretion of the bankruptcy court."<sup>10</sup> The Court here finds sufficient cause to reopen the case to consider Dish's notice of removal and the Debtor's motion to remand. The Debtor's Chapter 7 case is reopened for this limited purpose.

Dish seeks removal based on 28 U.S.C. § 1452, which allows for removal if the federal court "has jurisdiction of such claim or cause of action under [28 U.S.C. § 1334]."<sup>11</sup> In this case,

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<sup>6</sup> Doc. No. 18, Exhibit A.

<sup>7</sup> Doc. No. 26.

<sup>8</sup> *Advanced Estimating Sys., Inc. v. Riney*, 130 F.3d 996, 997-98 (11th Cir. 1997) (citing *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993)).

<sup>9</sup> 11 U.S.C. § 350(b).

<sup>10</sup> *In re Upshur*, 317 B.R. 446, 450 (Bankr. N.D. Ga. 2004)

<sup>11</sup> 11 U.S.C. § 1452.

the Debtor asserts two state law claims against Dish for violation of the FCCPA: 1) a claim under § 559.72(18) of the Florida Statutes for contacting the Debtor individually when Dish knew he was represented by an attorney, and 2) a claim under § 559.72(9) of the Florida Statutes for seeking to collect on a debt Dish knew was “not legitimate,” i.e., subject to the automatic stay.<sup>12</sup> The basis for both alleged violations is a single post-petition, pre-discharge email sent by Dish to the Debtor, individually, which notified him that his auto-payment of his bill failed.<sup>13</sup>

Under 28 U.S.C. § 1452, a case is removable if the bankruptcy court has jurisdiction over the claim. Bankruptcy courts, by way of reference, have jurisdiction over all claims “arising under” the Bankruptcy Code.<sup>14</sup> However, the “well pleaded complaint rule” is applicable to the case at bar. This rule states: “[A] suit arises under [federal law] only when the plaintiff’s statement of his own cause of action shows that it is based upon those laws . . . .” A *defense* however that relies on the preemptive effect of a federal statute normally will not provide a basis for removal.<sup>15</sup> Thus, “[a]s a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.”<sup>16</sup>

Dish essentially argues that the Debtor’s claims are removable because it has a defense -- the Bankruptcy Code preempts the Debtor’s FCCPA claims under state law. As stated above, under the well-pleaded complaint rule, this is not a legitimate basis for removal of the state court action to this Court. Moreover, the Court notes that the Debtor’s first FCCPA claim, that Dish

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<sup>12</sup> Section 559.72(9) of the Florida Statutes mandates that in collecting consumer debts, no person shall: Claim, attempt, or threaten to enforce a debt when such person knows that the debt is not legitimate, or assert the existence of some other legal right when such person knows that the right does not exist. Fla. Stat. § 559.72 (2014).

<sup>13</sup> Doc. No. 13, Composite Exhibit 1.

<sup>14</sup> 28 U.S.C. § 1334(b).

<sup>15</sup> *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6, 123 S. Ct. 2058, 156 L. Ed. 2d 1 (2003)

<sup>16</sup> *Id.*

contacted the Debtor individually when Dish knew he was represented by counsel, is arguably *not* preempted by the Bankruptcy Code.<sup>17</sup>

As such, Dish improperly removed the state case to this Court. The Debtor's motion to remand is granted. The Clerk is directed to remand this dispute to state court, the appropriate forum, and reclose this bankruptcy case.

Accordingly, it is ORDERED:

1. Dish Network, LLC's Motion to Reopen Case (Doc. No. 12) is granted for the limited purpose of considering Dish's notice of removal and the Debtor's Motion for Remand (Doc. No. 18).
2. Debtor's Motion for Remand (Doc. No. 18) is granted.
3. The Clerk is directed to remand the Debtor's claims back to the County Court in the Ninth Judicial Circuit in Orange County, Florida, for full and final resolution.
4. The Clerk is directed to reclose this bankruptcy case.

DONE AND ORDERED in Orlando, Florida, June 12, 2014.

A handwritten signature in black ink, appearing to read "Karen S. Jennemann" with a small "R.O." written above the end of the signature.

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KAREN S. JENNEMANN  
Chief United States Bankruptcy Judge

Roy Kobert, Attorney for DISH Network, is directed to serve a copy of this Order on interested parties and file a proof of service within 3 days of entry of the Order.

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<sup>17</sup> The Eighth Circuit Court of Appeals considered the exact issue under an analogous Iowa law, stating "while federal bankruptcy law is expansive, Congress has not exclusively regulated the relationship of private lawyers and clients and the permissible range of third-party conduct that may properly interfere with that relationship." *Sears, Roebuck and Co. v. O'Brien*, 178 F.3d 962, 966-67 (8th Cir. 1999); *Sturm v. Providian Nat'l Bank*, 242 B.R. 599 (S.D.W. Va. 1999). That court ultimately held that the state-law claim was not preempted by federal bankruptcy law.