UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE

REVSTONE INDUSTRIES, LLC, ET AL. **CASE NO. 12-13262**

DEBTORS **(JOINTLY ADMINISTERED)**

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON DIVISION

FRED C. CARUSO, SOLELY IN HIS CAPACITY AS THE REVSTONE/SPARA LITIGATION TRUSTEE OF THE REVSTONE/SPARA LITIGATION TRUST **PLAINTIFF**

V. **ADV. NO. 15-5123**

KEENELAND ASSOCIATION, INC. AND NELSON CLEMMENS **DEFENDANTS**

ORDER

This matter is before the Court on Clemmens' Motion to Determine Adversary Proceeding is Non-Core [ECF No. 96] ("Clemmens Motion"). Clemmens seeks a ruling that the Trustee's actions, filed pursuant to § 544 and § 550 of the Bankruptcy Code and § 1305 of the Delaware Uniform Fraudulent Transfer Act, DEL. CODE. ANN. tit. 6, §§ 1301-12 (the "DUFTA"), are *Stern* claims[1] that must be treated as non-core matters. *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). The Trustee objects, arguing that (1) Clemmens effectively consented to the Court's jurisdiction, or (2) that the matters are "core" claims to which *Stern* does not apply.

[1] *See Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. ----, 134 S.Ct. 2165, 2168, 189 L.Ed.2d 83 (2014).

Briefing on this issue is complete. [Objection to Motion to Determine Adversary Proceeding is Non-Core, ECF No. 108 ("Trustee's Objection"); Reply to Objection to Motion to Determine Adversary Proceeding is Non-Core, ECF No. 114 ("Clemmens' Reply").] A hearing was held on June 6, 2017. After argument, the Court orally deferred a ruling pending a decision on cross-motions for summary judgment. Having now fully considered the summary judgment motions, this matter is ready for decision.

I. Core, Non-Core, and *Stern* Claims.

Matters referred to the bankruptcy court are classified by Congress as either "core" or "non-core" proceedings. 28 U.S.C. § 157(b). Core proceedings include matters "arising under title 11, or arising in a case under title 11," while non-core proceedings include matters that merely "relate to" a case under title 11. *Compare* 28 U.S.C. § 157(b)(1) *with* 28 U.S.C. § 157(c)(1). A bankruptcy court is vested with authority to "hear and determine" and to "enter appropriate orders and judgments" in all cases under title 11 and in any core proceeding, subject to ordinary appellate review. 28 U.S.C. § 157(b)(1). But in non-core proceedings, a bankruptcy court is directed to "submit proposed findings of fact and conclusions of law to the district court," subject to *de novo* review by the District Court prior to entry of final judgment. 28 U.S.C. § 157(c)(1). A bankruptcy court may finally adjudicate non-core claims with the parties' consent notwithstanding § 157(c)(1). 28 U.S.C. § 157(c)(2).

Examining this statutory scheme, the Supreme Court in *Stern* held that a bankruptcy court lacked authority under Article III of the U.S. Constitution to enter a final judgment on a state-law counterclaim filed by the estate against one of its creditors, despite the counterclaim's designation as a core proceeding. Essentially, *Stern* recognized that bankruptcy courts lack the constitutional authority to decide a subclass of statutorily core claims. *See Exec. Benefits Ins.*

Agency v. Arkison, 573 U.S. ----, 134 S.Ct. 2165, 2168, 189 L.Ed. 2d 83 (2014) (describing such a claim as a "*Stern* claim"). More recently, the Supreme Court determined a bankruptcy court may decide a *Stern* claim if all parties consent. *Wellness Intern. Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939, 191 L. Ed. 2d 911 (2015). Absent consent, a bankruptcy court facing a *Stern* claim may treat the claim as it would a non-core claim under § 157(c), and "should hear the proceeding and submit proposed findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment." *Exec. Benefits*, 134 S.Ct. at 2173.

II. Clemmens Did Not Impliedly Consent To Bankruptcy Court Review.

The Trustee's argument that Clemmens impliedly consented to bankruptcy court review is unconvincing. The Trustee asserts that Clemmens waived any argument that the claim against him is non-core by continuing to litigate this matter, recounting several affirmative actions taken by Clemmens over the course of this litigation (*e.g.*, his recent motions for summary judgment). But the Supreme Court has held that even implied consent must be "knowing and voluntary," such that " 'counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case' before the non-Article III adjudicator." *See Wellness Int'l Network*, 135 S.Ct. at 1948 (quoting *Roell v. Withrow*, 538 U.S. 580, 590, 123 S.Ct. 1696, 155 L.Ed.2d 775 (2003)).

Clemmens did not restate his constitutional concerns in every pleading or paper filed in this Court and the transferor court in Delaware. He has, however, denied that these matters are core from the outset and objected to the authority of the bankruptcy court to issue a final decision. [*See, e.g.*, Clemmens' Answer, ECF No. 1-3 at pp. 2, 5 ("Jurisdiction is improper and this Court does not have constitutional authority to enter a final order or judgment. Clemmens does not consent to the entry of a final order of judgment by this Court."] His consistent stance

now culminates in the pending motion. Accordingly, there is no basis to conclude that Clemmens waived his right to a decision from an Article III court.

III. The Trustee's Claim is Statutorily Core, but Constitutionally Non-Core.

There is no dispute between the parties that the Trustee's claim is statutorily core. *See* 28 U.S.C. § 157(b)(2)(H) ("Core proceedings include, but are not limited to . . . proceedings to determine, avoid, or recover fraudulent conveyances . . . ."). The parties dispute whether a bankruptcy court can decide such claims, particularly when asserted against a third-party that has not filed a proof of claim seeking recovery from the bankruptcy estate.

The Supreme Court has not precisely defined the scope of claims eligible for decision by non-Article III bankruptcy judges, but has generally distinguished between the adjudication of private rights ("the liability of one individual to another") and public rights (certain bankruptcy functions, including "the restructuring of debtor-creditor relations"). *See, e.g.*, *Stern*, 564 U.S. at 488-90; *see also Waldman v. Stone*, 698 F.3d 910, 918-19 (6th Cir. 2012) (discussing Supreme Court precedent regarding the distinction between the adjudication of public rights and private rights). The Court observed in *Stern*: "[T]he question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Stern*, 564 U.S. at 499.

Lower courts in both the Third Circuit and the Sixth Circuit have reached potentially conflicting conclusions regarding the bankruptcy courts' authority to decide fraudulent conveyance claims.[2] Absent precedent in either Circuit Court, the decision of any particular district or bankruptcy court within either judicial circuit is not binding. *See, e.g., In re Romano*,

[2] Clemmens asserts that Third Circuit and Delaware law determines the resolution of this question because the case was transferred for the convenience of the parties pursuant to 28 U.S.C. § 1412. *Cf. K-TEX, LLC, v. Cintas Corp.*, Case No. 16-6435, 2017 WL 2241816, at *3 (6th Cir. May 22, 2017) (holding that if a case is transferred "for the convenience of the parties" via 28 U.S.C. § 1404(a), which is the analogous provision for cases filed in United States District Courts, "the law of the transferor court applies."). Whether or not he is correct is irrelevant because decisions from the lower courts in both circuits have reached mixed results.

350 B.R. 276, 281 (Bankr. E.D. La. 2005) ("[A] single decision of a district court in this multi-judge district is not binding upon this court."). *See also In re Gonzalez*, 550 B.R. 711, 719 n.18 (Bankr. E.D. Pa. 2016)*; In re Ulrich*, 517 B.R. 77, 87 (Bankr. E.D. Mich. 2014)*; In re James*, 489 B.R. 731, 745 (Bankr. E.D. Tenn. 2013)*; First of America Bank v. Gaylor (In re Gaylor)*, 123 B.R. 236, 241–43 (Bankr. E.D. Mich. 1991).

Even if their opinions are non-binding, however, the decisions of other courts assist the analysis. Clemmens argues for application of a recent Delaware bankruptcy case that generally recognizes a fraudulent conveyance action is a *Stern* claim. [*See* Clemmens' Reply at p. 4 (citing *Forman v. Kelly Capital, LLC (In re National Service Industries, Inc.)*, Case No. 12-12057, Adv. No. 14-50377, 2015 WL 3827003 (Bankr. D. Del. June 19, 2015)).] The Trustee relies on cases from this Court stating generally that a bankruptcy court can issue a final ruling on a fraudulent transfer claim brought pursuant to § 544. [*See* Trustee's Objection at p. 14 (citing *In re Addington*, Case No. 12-10029, 2015 WL 3404505 at *3 (Bankr. E.D. Ky. May 27, 2015); *In re Marrowbone Clinic Pharmacy, Inc.*, Case No. 12-70065, 2014 WL 1806787 at *6 (Bankr. E.D. Ky. May 7, 2014)).]

The Eastern District of Kentucky bankruptcy court decisions cited by the Trustee featured litigants that did raise any serious challenge to the Court's authority. Further, those cases relied on earlier District Court opinions that were decided without the benefit of subsequent case law that substantially clarified the procedural framework bankruptcy courts apply when deciding these issues, including *Executive Benefits* and *Wellness International*. *See Merv Props., LLC v. Fifth Third Bank (In re Merv Props., LLC)*, No. 5:14–007, 2014 WL 201614, at *3-4 n.5, 6 (E.D. Ky. Jan. 17, 2014) (suggesting that the bankruptcy court could decide fraudulent conveyance claims that were related to the claims allowance process); *Official Comm. Of Unsecured*

Creditors of Appalachian Fuels, LLC v. Energy Coal Res., Inc. (In re Appalachian Fuels, LLC), 472 B.R. 731, 741 (E.D. Ky. 2012) (holding that bankruptcy courts may constitutionally enter final judgment in fraudulent transfer and preference claims).

More recent decisions by other courts within the Sixth Circuit treat fraudulent transfer claims as *Stern* claims, or at least suggest such a conclusion is likely. *See Gocha v. Credit Advocates Law Firm, LLC (In re Werkmeister)*, Adv. No. 14-80302, 2016 WL 758234, at *1 (Bankr. W.D. Mich. Feb. 22, 2016) (issuing a report and recommendation that default judgment be granted while acknowledging that "the Bankruptcy Court's authority to enter a final judgment, by default, in a fraudulent transfer controversy remains uncertain, in the absence of voluntary and knowing consent of the parties."); *Whittaker v. Groves Venture, LLC* (*In re Bolon)*, 538 B.R. 391, 394 (Bankr. S.D. Ohio 2015) (noting possibility that fraudulent transfer claims against third-party defendants who had not filed proof of claim would preclude bankruptcy court from deciding case, but finding sufficient authority based on parties' consent); *Dzierzawski v. Vulpina, LLC (In re Dzierzawski)*, Case No. 13-47986, Civil Action Nos. 14-CV-14615, 14-CV-14734, 2015 WL 3843612 (E.D. Mich. June 22, 2015) (treating fraudulent transfer claims as non-core *Stern* claims in deciding motion to withdraw reference). Decisions by lower courts in the Third Circuit reveal a similar trend. *See, e.g., Carr v. Loeser (In re Int'l Auction and Appraisal Servs. LLC)*, 493 B.R. 460, 463–66 (Bankr. M.D. Pa. 2013) (holding that a bankruptcy court may not decide a fraudulent transfer action while acknowledging the decision was a shift from an earlier-decided case).

IV. Conclusion.

The developing case law supports a conclusion that the fraudulent conveyance claim at issue here is a statutorily core, but constitutionally non-core, *Stern* claim. Therefore, it is ORDERED that Clemmens Motion to Determine Adversary Proceeding is Non-Core is GRANTED.

The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.

Signed By:
Gregory R. Schaaf
Bankruptcy Judge
Dated: Thursday, July 06, 2017
(grs)