UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	**FRED H. WEINER**	:	**Chapter**
		:	
	Debtor(s)	:	**Bky. No. 05-17302**
		:	
	OMICRON SYSTEMS, INC.	:	
		:	
	Plaintiff(s)	:	
		:	
	V.	:	
		:	**Adv. No. 05-566**
	FRED H. WEINER	:	
	Defendant(s)	:	
		:	

ORDER

AND NOW, upon consideration of the Memorandum of Omicron Systems, Inc. and PBR Consulting Group, Inc. in response to the court's Order entered March 28, 2006,

AND for the reasons set forth in the accompanying Memorandum,

It is hereby **ORDERED** that the above captioned adversary proceeding is **DISMISSED** for lack of jurisdiction.

Date: April 19, 2006

/s/ Eric L. Frank
ERIC L. FRANK
U.S. BANKRUPTCY JUDGE

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	FRED H. WEINER	:	
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		:	

MEMORANDUM

BY: **ERIC L. FRANK, United States Bankruptcy Judge**

I.

In this adversary proceeding, Plaintiffs Omicron Systems, Inc. and PBR Consulting Group, Inc. ("the Plaintiffs") seek a determination that their judgment lien against a certain piece of real estate owned by the Debtor has priority over a mortgage held by National City Mortgage Co. ("NCM") and a mortgage held by National City Bank ("NCB"). The Complaint alleges that the Plaintiffs' judgment against the Debtor was recorded in the Montgomery County Prothonotary's Office before the NCM and NCB mortgages were recorded in the office of the Montgomery County Recorder of Deeds.

In their Answer to the Complaint, NCM and NCB allege that their respective mortgages were delivered to the office of the Montgomery County Recorder of Deeds before the entry of the Plaintiffs' judgment and that the county officials failed to record the mortgages through inadvertence or neglect until after the entry of the Plaintiffs' judgment. NCM and NCB assert

that under applicable state law, the delivery of the mortgages before the entry of the judgment, suffices to give the mortgages priority over the judgment lien.

On March 28, 2006, I raised sua sponte the question whether this court has subject matter jurisdiction over the dispute between the parties in this adversary proceeding. I entered an Order giving the parties 20 days to make any appropriate submissions to establish that this court has jurisdiction. Plaintiffs Omicron Systems, Inc. and PBR Consulting Group, Inc. filed a Memorandum in response to the court's Order. No other party has filed any documents in response to the court's Order.

In the Memorandum which accompanied the March 28, 2006 Order, I expressed the view that this dispute (between two (2) creditors of the Debtor with respect to the priority of their liens against the Debtor's property in a no-asset, chapter 7 bankruptcy case) will not have any effect on the administration of the bankruptcy estate. The absence of any effect on bankruptcy case administration caused me to conclude preliminarily that there is no bankruptcy jurisdiction to decide this dispute. See, e.g., Pacor v. Higgins, 743 F.2d 984 (3d Cir. 1984).

In their Memorandum, the Plaintiffs argue that I should retain jurisdiction of this adversary proceeding. For the reasons elaborated below and set forth in the Memorandum which accompanied the Order entered on March 28, 2006, I will dismiss this adversary proceeding for lack of jurisdiction.

II.

The Plaintiff's primary argument is that notwithstanding the jurisdictional concerns I identified in the March 28, 2005 Memorandum, I should retain jurisdiction of this adversary proceeding based upon the "law of the case" doctrine. The Plaintiffs characterize this court's Order dated January 17, 2006 as "deciding jurisdiction and the proper forum for resolving the lien priority dispute." Plaintiffs' Memorandum at 5. In making this argument, the Plaintiffs also refer me to two (2) Motions for Relief from the Automatic Stay filed by NCM and NCB in the main bankruptcy case and the transcript of a hearing on those Motions held on October 31, 2005. In addition, I have reviewed the transcript of the hearing held on November 30, 2005.

The law of the case doctrine directs courts from re-deciding issues that were previously decided in the litigation, thereby promoting finality and judicial economy. It is a prudential doctrine and not one that limits a court's power. Further, even when the doctrine applies, there are circumstances that may warrant a departure from the doctrine. See International Poultry Processors, Inc. v. Wampfler Foods, Inc., 1999 WL 213369, at *1-2 (E.D. Pa. April 8, 1999).

I have not been persuaded by the Plaintiff's Memorandum. Based on my review of the record, I do not believe that in the proceedings prior to the entry of my Order on March 29, 2006, the court issued any decision on the merits on the question whether this court has jurisdiction over the adversary proceeding.[1] Therefore, I do not believe that the law of the case doctrine has any applicability in this matter.

In order to evaluate the Plaintiff's "law of the case" argument, it is helpful to review the procedural history in the main bankruptcy case.

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[1]Prior to February 14, 2006 this bankruptcy case and the adversary proceeding were assigned to the Honorable Kevin J. Carey, then sitting as a bankruptcy judge in this district. Judge Carey is now a bankruptcy judge in the District of Delaware.

On August 19, 2005, NCM and MCB filed a Motion for Relief from the Automatic Stay, seeking permission to foreclose on the Debtor's real property on August 19, 2005 ("the §362 Motion"). On August 23, 2005, NCB and NCM filed a second Motion for Relief from the Automatic Stay, seeking permission to file an action to quiet title in order to determine the lien priority dispute with the Plaintiffs ("the Second §362 Motion"). The Plaintiffs filed response to both the §362 Motion and the Second §362 Motion.[2] This adversary proceeding was then commenced on September 6, 2005.

After several continuances, the two (2) §362 motions came before the court on October 31, 2005. On that day, a colloquy was held with the court, during which counsel for NCM and NCB National City withdrew the Second §362 Motion and the docket so reflects.[3] Counsel and the court then discussed a new hearing date for the §362 Motion, I have reviewed transcript of the colloquy and I find there was no discussion of the issue whether the court has subject matter jurisdiction of the adversary proceeding. The docket states that the §362 Motion was continued to November 16, 2005 and continued again to November 30, 2005.

On November 30, 2005, the §362 Motion again came before the court and another colloquy took place. The issue of jurisdiction was raised on November 30, 2005. Counsel for NCM and NCB suggested that the matters raised in this adversary proceeding "should be hashed

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[2] All of this activity occurred after the chapter 7 trustee had already conducted the §341 meeting of creditors and filed a report stating that he believed that there are no assets in this case available for the distribution to unsecured creditors.

[3] I may take judicial notice of the dockets in this case and the content of the bankruptcy schedules for the purpose of ascertaining the timing and status of events in case and facts not reasonably in dispute. See Fed. R. Evid. 201; In re Scholl, 1998 WL 546607 (Bankr. E.D. Pa. 1998).

out in any foreclosure action, rather than in the bankruptcy court." (N.T. 3).[4] Later in the colloquy, after the Plaintiffs' counsel described to the court the nature of the lien priority dispute, the court immediately asked, "What possible impact, if any, would my resolution of the dispute between the two alleged lienholders have on the administration of the bankruptcy case?" (N.T. 5). After counsel for NCM and NCB again suggested that the adversary proceeding was "misplaced" in the bankruptcy court, the court commented:

> [A]s you can tell from the questions I've asked . . . I might agree with you about that, but until a dispositive motion is filed, I don't have the issue before me. And again, don't take my remarks today to be a prejudgment of the issue either. But I will tell you it strikes me that the dispute between the two lienholders . . . doesn't meet the controlling test under decisional law, which says Bankruptcy Courts only hear things which can have a conceivable outcome on the administration of the estate. And I'm not convinced that this does.

(N.T. 9). The court then suggested that the §362 Motion be consolidated with the adversary proceeding and the parties agreed.

Approximately 6 weeks after the November 30, 2005 hearing, the parties effectuated their agreement by submitting a consent order which was signed by the court on January 17, 2006 as an "Agreed Order." The January 17, 2006 Order consolidated the §362 Motion with the adversary proceeding.[5] The Order does state that "the priority of any liens held by [NCM or NCB] will be determined in conjunction with the resolution of the claims set forth by the parties in the adversary proceeding."

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[4] The transcript of the hearing held on November 30, 2006 will be referred to as "N.T."

[5] The Order purports to consolidate the Second §362 Order with the adversary proceeding as well. However, the docket reflects that the Second §362 Order was withdrawn on October 30, 2005.

Based on the sequence of events described above, I conclude that the court made no determination prior to the entry of my Order entered March 28, 2006 that there is bankruptcy jurisdiction over the dispute which is the subject of this adversary proceeding. At the November 30, 2006 hearing, scheduled on a motion for relief from stay in the main bankruptcy case, the court specifically stated that the issue of jurisdiction in the adversary proceeding had not been raised and was not yet before the court. Without prejudging the issue, the court expressed substantial doubt about the existence of jurisdiction for reasons which were almost identical to those later set forth in the Memorandum which accompanied the Order I entered on March 28, 2005. The court noted the issue and left its resolution for another day. Thus, the March 28, 2005 Order and Memorandum are consistent with the prior proceedings in the case.[6]

Nor does the entry of the January 17, 2006 Order change the outcome. The effect of that Order was only to consolidate for trial the stay relief contested matters with this adversary proceeding. It was not a judicial determination on the merits that subject matter exists in this adversary proceeding. It was a consent order and it is well established that the parties to a case cannot confer jurisdiction on a federal court by agreement. E.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104 (1982); Carlsberg Resources Corp. v. Cambria Savings. & Loan Association, 554 F.2d 1254, 1256 (3d

[6] I recognize that the court did suggest during the colloquy November 30, 2006 that it would await the filing of a dispositive motion before considering the issue of jurisdiction. I, on the other hand, raised the issue sua sponte. I ascribe Judge Carey's reluctance to confront the issue on November 30, 2005 to the fact that the scheduled hearing was on a motion for relief from the automatic stay and the adversary proceeding was not before him that day. Given the unequivocal authority for the proposition that a federal court has an obligation to raise sua sponte the issue of its subject matter jurisdiction, see this court's Memorandum dated March 23, 2006, at 3, I have no doubt that Judge Carey would have addressed the issue of jurisdiction in subsequent proceedings had this adversary proceeding remained assigned to him.

Cir. 1977); In re H&L Developers, Inc., 178 B.R. 71 (Bankr. E.D. Pa. 1994).

Since there was no prior judicial determination on the issue of jurisdiction, my preliminary determination of the issue on March 28, 2006 was the first ruling on the issue in this case. Accordingly, the doctrine of "law of the case" has no applicability.

III.

The Plaintiffs make three other arguments, challenging the preliminary conclusion set forth in my prior Memorandum that I lack jurisdiction to hear this adversary proceeding.

First, the Plaintiffs contend that jurisdiction exists pursuant to 28 U.S.C. §157(b)(2)(K), which provides:

> (b)(2) Core proceedings include, but are not limited to –
> . . .
> (K) determinations of the validity, extent or priority of liens . . . .

In making this argument, the Plaintiffs misunderstand the basic statutory framework of bankruptcy court jurisdiction. Section 157(b)(2)(K) is not the source of the bankruptcy court's jurisdiction. Bankruptcy jurisdiction is provided in 28 U.S.C. §1334. Section 157 relates only to the division of responsibility for the exercise of bankruptcy jurisdiction as between the district court and the bankruptcy court.[7] Section 157 applies only if there is jurisdiction in the first place under 28 U.S.C. §1334. See In re Foundation for New Era Philanthropy, 201 B.R. 382 (Bankr. E.D. Pa. 1996). See generally 1 Collier on Bankruptcy ¶3.01 (15th rev. ed. 2005). Since, for the reasons set forth in my prior Memorandum, I have concluded that no jurisdiction over this

[7] Section 157 also identifies those cases in which bankruptcy courts may enter final orders and final judgments and those cases in which bankruptcy courts may only enter proposed findings of fact and conclusions of law. See 28 U.S.C. §157(c).

proceeding exists under §1334, §157 is of no help to the Plaintiffs.

Second, the Plaintiffs assert that bankruptcy jurisdiction exists over their lien priority dispute "even where it is clear that the debtor and/or the estate will have no remaining entitlement to the proceeds of the asset subject to the dispute." Plaintiffs' Memorandum at 8. However, I do not read the cases cited by the Plaintiffs[8] to stand for the broad proposition asserted by the Plaintiffs.

In the cases cited by the Plaintiffs, the bankruptcy courts exercised jurisdiction because either the estate continued to claim an interest in the property which was the subject of the creditors' lien dispute or the determination of the lien dispute could have affected the distributions to be made to creditors pursuant to a chapter 11 plan. Thus, in those cases, resolution of the creditors' dispute could have had some possible impact on case administration.[9] That factor distinguishes those cases from the instant case. In this case, the estate claims no interest in the property that is subject to the lien dispute. Further, there is no other property being administered in this case. The trustee has concluded that all of the Debtors' property is either encumbered by liens, or exempt, in the exercise of his business judgment, any non-exempt

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[8] In re Chicago Cement Company, 1990 WL 168950 (N.D. Ill. 1990); Gavel and Shea v. Vermont National Bank, 162 B.R. 961 (Bankr. D. Vt. 1993); In re Pittsburgh Cut Flower Co., Inc., 118 B.R. 31 (Bankr. W.D. Pa. 1990); In re Zachman Homes, Inc., 83 B.R. 633 (Bankr. D. Minn. 1985).

[9] The Zachman Homes decision, rendered shortly after the enactment jurisdictional amendments of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, might be read to hold that simply because the property subject to the creditors' competing claims was property of the estate, a bankruptcy court may exercise jurisdiction. If so, I am not persuaded that it was correctly decided and I decline to follow it. In my view, it is inconsistent with settled, binding appellate precedent in this circuit. Also, it does not explicitly address the propriety of exercising jurisdiction in a no-asset case.

property is of insufficient value to be worth administering. In effect, there is no case administration activity taking place at all.[10] In the absence of any administration, the creditors' lien dispute cannot affect case administration.

Finally, the Plaintiffs suggest that the value of the property which is subject of the lien priority dispute has not been "determined." Plaintiffs' Memorandum at 10. I take this statement to mean that the Plaintiffs believe, or hope, that the Debtor and the Trustee have erred in their valuation of the subject property and that, even after the resolution of the lien dispute, there might be non-exempt value available for distribution to unsecured creditors.

This argument fails to take into account the proper role of a chapter 7 case trustee and the trustee's statutory duty to "collect and reduce to money the property of the estate for which such trustee serves and close such estate as expeditiously as is compatible with the best interests of parties in interest . . . ." 11 U.S.C. §704(a)(1). It is the case trustee who represents the interests of the bankruptcy estate and who is given statutory authority to administer the estate for the benefit of creditors. In that capacity and in the exercise of his discretion and the fulfillment of his duties, the Trustee in this case has filed a report stating his conclusion that there is no non-exempt equity of sufficient value to justify liquidation of the property which is the subject of the lien priority dispute. The Plaintiffs' subjective belief, by itself, that the Trustee's conclusion is

[10] If there were assets being distributed in this case other than the property which is the subject of the lien priority dispute, the resolution of the lien dispute arguably would affect case administration because it would affect how much the parties to the lien dispute would receive from the secured property and how much they would receive from the assets being distributed by the Trustee. But see In re Foundation for New Era Philanthropy, 201 B.R. at 395 (change in identity of party entitled to distribution from estate but not total amount of property available for distribution is insufficient basis for exercise of non-core bankruptcy jurisdiction under §1334(a)).

incorrect is not a sufficient basis to conclude that resolution of the lien priority dispute will have some effect on case administration, justifying the exercise of jurisdiction over the adversary proceeding. No party has made a showing that the Trustee has abused his discretion in proposing to abandon the estate's interest in the subject property, see 11 U.S.C. §554. In these circumstances, I remain convinced that this is a no-asset case and the determination of the lien priority dispute between the creditors will have no effect on case administration.

IV.

I recognize that the parties have expended significant effort in preparing for trial in this adversary proceeding. Unfortunately for the parties, the bankruptcy court is a court of limited jurisdiction and the question of subject matter jurisdiction is not one that is left its discretion. Perhaps the parties can take some comfort in the realization that their pretrial preparation work product in this court should be fully transferable to the state court proceeding that will need to be initiated to resolve their dispute.

For the reasons set forth above and in my prior Memorandum entered on March 28, 2005, I will enter an order dismissing this adversary proceeding for lack of jurisdiction.

Date: April 19, 2006

/s/ Eric L. Frank
ERIC L. FRANK
U.S. BANKRUPTCY JUDGE