IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
DYNAMERICA MANUFACTURING, LLC,	)	
	)	Case No. 08-11515 (KG)
	)	
Debtor.	)	
DYNAMERICA MANUFACTURING, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adv. Proc. No. 10-50759 (KG)
	)	
JOHNSON OIL COMPANY, LLC,	)	
	)	
Defendant.	)	**Re: Adv. Docket Nos. 1, 5, 6, 7**

MEMORANDUM ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FOR IMPROPER VENUE

The issue before the Court is whether the dollar limitation venue provision of amended 28 U.S.C. § 1409(b) is applicable to avoidance actions. For the reasons that follow, the Court finds that the limitation does apply to avoidance actions.

1. Dynamerica Manufacturing, LLC, (the "Debtor"), brought this adversary proceeding to avoid and recover a preferential transfer pursuant to 11 U.S.C. §§ 547 and 550 of the United States Bankruptcy Code. (the "Complaint" or "Compl." at 3).

2. The Debtor seeks to avoid an alleged preferential transfer totaling $6,599.85 made by the Debtor to Johnson Oil Company, LLC (the "Defendant") on account of an antecedent debt during the ninety-day period preceding the filing of the Debtor's bankruptcy. (Compl. at 3). Defendant filed a Rule 12(b)(3) motion (the "Motion") seeking to dismiss the adversary proceeding for improper venue based on 28 U.S.C. § 1409(b). Section 1409(b) restricts venue to the district in which the defendant resides for proceedings to recover money or property from a noninsider of less

than $10,950. *See* 28 U.S.C. § 1409(b).

3. Debtor concedes that Section 1409(b) is the proper venue statute governing this adversary proceeding, but denies that the proceeding should be dismissed based on improper venue because Section 1409(b) refers only to proceedings "arising in" or "related to" a case and therefore excludes avoidance actions "arising under" Title 11. (Adversary Docket No. 6, referred to as "Debtor's Reply" at 2). Based upon the legislative history to and notable commentaries on Section 1409(b), the Court will grant the Motion.

4. The Court's jurisdiction rests upon 28 U.S.C. §§ 157(b)(1) and 1334(b) and (d). The adversary proceeding is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B) and (O).

5. Defendant has moved pursuant to Fed.R.Civ.P. 12(b)(3), made applicable here pursuant to Fed. Bank. R. 7012(b)(3), to dismiss the Complaint based on improper venue. "[T]he movant has the burden of proving the affirmative defense asserted by it." *Myers v. Am. Dental Ass'n,* 695 F.2d 716, 724 (3d Cir.1983). *See Bayview Plaza Assocs., L.P. v. Town of N.E., Md.* (*In re Bayview Plaza Assocs., L.P.*), 209 B.R. 840, 843 (Bankr.D.Del.1997) ("Where a defendant raises the defense of improper venue, the plaintiff has the burden of proving that venue is proper.").

6. Venue in an adversary proceeding filed in connection with a bankruptcy case is governed by 28 U.S.C. § 1409(a). *See Ehrlich v. American Express Travel Related Services Co., Inc. (In re Guilmette),* 202 B.R. 9, 11 (Bankr.N.D.N.Y.1996) (noting that "[t]he general venue statute for bankruptcy proceedings is 28 U.S.C. § 1409(a)."). Section 1409(a) provides:

> Except as otherwise provided in subsections (b) and (d), a proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.

7. The exception to the general venue statute is found in 28 U.S.C. § 1409(b) which provides:

> Except as provided in subsection (d) of this section a trustee in a case under title 11 may commence a proceeding arising in or related to such case to recover a money judgment of or property worth less than $1,100 or a consumer debt of less than $16,425, or a debt (excluding a consumer debt) against a noninsider of less than $10,950, only in the district court for the district in which the defendant resides.

8. In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Act of 2005 ("BAPCPA"). Among the many changes Congress made was the amendment to 28 U.S.C. §1409(b). Section 1409(b), as amended, gives substantially greater protection to creditor defendants by making noninsider defendants on non-consumer debts subject to suit where they reside if the debt is less than $10,000 (which has since been amended to $10,950). Charles J. Tabb, *The Brave New World of Bankruptcy Preferences*, 13 ABI L. REV. 425, 428, 437-39 (2005).

9. In recent years, however, there has been debate as to whether Congress intended Section 1409(b) to include avoidance actions due to the absence of the words "arising under" in the statute. Some courts have construed this absence as intentional and thus have permitted an avoidance action to proceed in the jurisdiction where the bankruptcy was filed. *See Moyer v. Bank of America, N.A.* (*In re Rosenberger*), 400 B.R. 569 (Bankr. W.D. Mich. 2008), in which the court carefully analyzed and discussed the distinction of proceedings "related to," "arising in," and "arising under" the Code. Section 1409(b) uses the words "arising in" and "related to" but omits "arising under." The learned court concluded on the basis of legislative history and case law that avoidance actions "arise under" the Code. *Id.* at 573. The court further concluded that the omission of "arising under" from the amendment was "deliberate." *Id.* The court therefore found venue was proper in the district where the bankruptcy case was pending.

The Court disagrees with the *Moyer* decision. First, *Moyer* relied upon pre-BAPCPA legislative history and case law in arriving at its decision. Indeed, Debtor also largely relies on pre-BAPCPA case law in support of its position. The Court finds the *Moyer* and Debtor's textual interpretations inconsistent with the statute's clear legislative history.

10. The purpose of Section 1409(b), as amended, is to protect small claim creditor defendants who do not reside in the district where the bankruptcy case is filed from having to defend an adversary proceeding in the "home court." *Muskin, Inc. v. Strippit Inc. (In re Little Lake Industries, Inc.),* 158 B.R. 478, 480 (9th Cir.BAP1993) (framing the issue presented by referencing 28 U.S.C. § 1409(b) as the section "which protects the small claim defendant from the home court advantage granted to a bankruptcy trustee by § 1409(a)"). As stated in the legislative history, amending Section 1409(b) was to "prevent unfairness to distant debtors of the estate, when the cost of defending would be greater than the cost of paying the debt owed." H.R. Rep. No. 595, 95th Cong., 1st Sess. 446 (1977), *reprinted in* App. Pt. 4(d)(I), *infra*, pertaining to superseded 28 U.S.C. §1473(b). *See also* House Report No. 109-31, Pt. 1, 109th Cong., 1st Sess. 88 (2005):

> Section 1409(b) of title 28 of the United States Code provides that a proceeding to recover money judgment of, or property worth less than, certain specified amounts must be commenced in the district where the defendant resides. Section 410 [of the 2005 Act] amends section 1409(b) to provide that a proceeding to recover a debt (excluding a consumer debt) against a non-insider of the debtor that is less than $10,000 must be commenced in the district where the defendant resides.

The American Bankruptcy Institute reaffirms this contention in its report submitted to the National Bankruptcy Review Committee, stating that one of the considerations in amending Section 1409(b) was to "[a]mend the venue rules to protect defendants from having to defend in a distant forum, at least when the amount in controversy is below a stated amount." Charles J. Tabb, *The Brave New World of Bankruptcy Preferences*, 13 ABI L. REV. 425, 426 (2005). The *Tabb* article describes the dilemma that defendants in any avoidance action face: "The concern that preference defendants would be pressured to settle coercive suits is particularly great not only when the amount in controversy is relatively modest, but the creditor defendant would have to travel a considerable distance to defend as well." *Id.* at 437. The amended venue provision, as the Court interprets it, protects creditors by enabling them to choose litigation or settlement without the coercion of having to defend in a distant forum.

11. Therefore, consistent with legislative intent expressed in the legislative history, the Court finds that the venue provisions of Section 1409(b) apply to avoidance actions. The absence of the "arising under" language in Section 1409(b) was unintentional. Requiring creditors to incur the substantial costs for small avoidance actions is unreasonable and contrary to Congressional intent, as it pressures creditors to settle in order to save on costs regardless of the merits of any potential defense. Congress did not intend by its amendment to Section 1409(b) to continue to permit plaintiffs to use venue as unfair leverage over creditors when the amounts at issue are modest.

IT IS THEREFORE ORDERED for the reasons set forth herein, that the Defendant's Motion is GRANTED and the adversary proceeding is dismissed.

Dated: May 10, 2010

KEVIN GROSS, U.S.B.J.