UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	
	)	Chapter 11
Oakwood Homes Corporation, *et al.*,	)	
	)	Case No. 02-13396 (PJW)
Debtors.	)	Jointly Administered
	)	
OHC Liquidation Trust, by and through Alvarez & Marshal, LLC, the OHC Liquidation Trustee,	)	Adversary Proceeding No.
	)	
Plaintiff,	)	Adv. No. 04-56928 (PBL)
v.	)	
American Bankers Insurance Co.,	)	
	)	Related Documents: 18, 19, 29, 32
Defendant.	)	

MEMORANDUM OPINION

Before the Court is the Motion of American Bankers Insurance Company (hereafter referred to as "Defendant") for Dismissal in Favor of Arbitration. For the reasons stated herein, the Motion will be denied.

I. BACKGROUND

The Debtors, Oakwood Homes Corporation, and certain of its affiliates (hereafter referred to as "Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on November 15, 2002. Debtors' Second Amended Joint Consolidated Plan of Reorganization was confirmed on March 31, 2004. The Plan provided for the creation of a liquidating trust and vested the trust with the right to pursue and prosecute any and all avoidance actions on behalf of

the beneficial interests in the trust.

The OHC Liquidation Trust (hereafter referred to as "Plaintiff"), commenced this adversary proceeding by filing a complaint on November 12, 2004 against Defendant. Plaintiff seeks to avoid and recover certain allegedly preferential transfers pursuant to § 547(b), or alternatively, to avoid and recovery any fraudulent transfers pursuant to §§ 548 and 544(b); to preserve any avoidable transfers for the benefit of Debtors' estates pursuant to § 551; and to disallow any claims of Defendant until the amount of the avoidable transfers are repaid to the OHC Liquidation Trust pursuant to § 502(d).[1] The complaint prayed for recovery of an amount not less than $9,760,004.62. Defendant responded to the complaint with this Motion to Dismiss which was filed on December 20, 2004. Briefing has been completed and on February 15, 2005, Defendant appropriately filed a Notice of Completion of Briefing. The Motion is therefore, ripe for disposition at this time.

II. JURISDICTION AND VENUE

This Court has jurisdiction over this adversary proceeding and the parties thereto, pursuant to 28 U.S.C. §§ 1334 and 157 (b)(1), and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (A), (B), (F), (H) and (O). Venue is proper in this jurisdiction pursuant to 28 U.S.C. § 1409.

III. DISCUSSION

Defendant American Bankers Insurance Company has filed its Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to this adversary

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[1] Hereinafter, references to statutory provisions by section number only will be to provisions of the Bankruptcy Code unless the contrary is clearly stated.

proceeding by Federal Rule of Bankruptcy Procedure 7012(b), seeking an order dismissing this action in favor of arbitration. Defendant asserts that it and Oakwood Mobile Homes, Inc., one of the debtors in this bankruptcy case, are parties to a certain Insurance Services Agreement (hereafter, the "Agreement"). Section V of the Agreement provides, in material part, that "[i]f any dispute shall arise between the [Debtor] and [Defendant] with reference to the interpretation of this Agreement or their rights with respect to any transaction involved, the dispute shall be settled by arbitration in accordance with the rules of the American Arbitration Association." (Exhibit A to American Banker Insurance Co.'s Opening Brief in Support of the Motion to Dismiss in Favor of Arbitration, at 6)

Defendant argues that all of the claims made by Plaintiff are covered by § V of the Agreement, and therefore, the complaint fails to state a claim upon which relief can be granted "because all of the claims purportedly asserted in the Complaint are subject to mandatory arbitration and must be referred to arbitration pursuant to 9 U.S.C. §§ 2 and 3." (Defendant's Brief in Support of the Motion to Dismiss, at 2)

Alternatively, Defendant asserts that it is well established in this district, that this Court is permitted to exercise its discretion to dismiss an adversary proceeding in favor of arbitration, notwithstanding the fact that this is a core proceeding.[2] (Id, at 5) Defendant has urged this Court therefore, to use that discretion and dismiss in favor of arbitration because it will be more cost effective, more expeditious than litigation, and the panel of arbitrators will presumably be more

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[2] *See, SFC New Holdings, Inc. v. Earthgrains Co. (In re GWI, Inc.)*, 269 B.R. 114, 117 (Bankr. D. Del. 2001) (holding that "where a matter is a core proceeding, it is left to the bankruptcy court's discretion to decide whether to refer the matter to arbitration.")

familiar with the insurance industry and the relationships involved in this dispute.

Conversely, Plaintiff opposes the Motion to Dismiss arguing that a trustee cannot be compelled to arbitrate fraudulent conveyance claims under §§ 544(b) and 548, as well as, any other type of claim that the trustee brings on behalf of the creditors of the bankruptcy estate, including preference claims. (Plaintiff's Answering Brief in Opposition to Defendant's Motion for Dismissal in Favor of Arbitration, at 2) Plaintiff asserts that a trustee, who stands in the shoes of the creditors, cannot be required to arbitrate disputes pursuant to an agreement that neither the creditors nor the trustee entered into. Plaintiff also contends that "[b]ankruptcy courts enjoy significant discretion to deny arbitration of core bankruptcy-created claims." (Id, at 4) Plaintiff then discusses certain factors that courts have typically looked to when determining whether to exercise their discretion in favor of dismissal. Those factors include: the importance of a centralized resolution of purely bankruptcy issues, the degree to which specialized bankruptcy knowledge is required to resolve the dispute, the need to protect creditors from piecemeal litigation, whether the parties have commenced arbitration outside of bankruptcy, and whether arbitration would cause undue delay in the administration of the case. (Plaintiff's Answering Brief, at 4) (citations omitted)

The leading Third Circuit precedent on the issue of mandatory arbitration in the bankruptcy context is *Hays and Company v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3rd Cir. 1989). In that case, the Chapter 11 trustee brought an action against a securities broker-dealer, asserting various claims under federal and state securities laws, as well as common law claims for breach of contract and fiduciary duties, gross negligence and conversion, claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), and

equitable claims pursuant to § 544(b) of the Bankruptcy Code under the Uniform Fraudulent Conveyances Act as adopted by New York, New Jersey and Pennsylvania. The broker-dealer/defendant filed a motion to compel arbitration under its pre-petition agreement with the debtor. The District Court denied the motion, holding that it had discretion to nullify a mandatory arbitration clause, and stating that since neither the trustee nor the creditors represented by him signed the arbitration clause, they should not be bound by its terms. *Hays*, 885 F.2d at 1151.

On appeal, the Third Circuit Court of Appeals held that the District Court was correct denying the motion with respect to the § 544(b) claims, because those claims were not derivative of the debtor and therefore not subject to arbitration. Initially, *Hays* noted that the United States Supreme Court held that an arbitration agreement binds the parties who execute it and it is the parties' intentions that must then be carried out. *Id.*, at 1155 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 1242, 84 L.Ed.2d 158 (1985)). The *Hays* Court therefore held that "there is no justification for binding creditors to an arbitration clause with respect to claims that are not derivative from one who was a party to it." *Id.*, at 1155. The Court noted that its conclusion in this regard was supported by *Allegaert v. Perot*, 548 F.2d 432 (2nd Cir.), *cert. denied*, 432 U.S. 910, 97 S.Ct. 2959, 53 L.Ed.2d 1084 (1977), where the trustee's complaint also contained several causes of action unique to the trustee under the Bankruptcy Act and not derivative of the bankrupt. In its discussion of *Allegaert*, the Court stated:

> (With respect to those of the trustee's claims, such as fraudulent and preferential transfers, that arose under the Bankruptcy Act, the court stated that "[t]hese are statutory causes of action belonging to the trustee, not to the bankrupt, and the trustee asserts them for the benefit of the bankrupt's creditors, whose rights the trustee enforces."). It follows that the trustee cannot be required to arbitrate its section 544(b) claims and that the district court was not obliged to stay them pending arbitration.

Hays, 885 F.2d at 1155 (quoting *Allegaert,* 548 F.2d at 436).

With regard to the remaining issues, i.e., the non-core securities law, common law and RICO claims, *Hays* refers to a number of decisions in which debtors in bankruptcy had been held bound by mandatory arbitration agreements entered into by them pre-petition, and held "that the trustee is bound to arbitrate all of its claims that are derived from the rights of the debtor under section 541." *Id.*, at 1154.

Hays next examined the provisions of the Bankruptcy Code and determined that the Code does not conflict with the Arbitration Act or with the enforcement of a valid arbitration clause in a non-core adversary proceeding. *Id.*, at 1156. Therefore, *Hays* found that the District Court lacked discretion to deny enforcement in such a case.

While it is clear that bankruptcy courts do not possess discretion with respect to enforcement of an arbitration clause in a non-core adversary proceeding, it does appear manifest that such discretion exists with respect to core adversary proceedings. *In the Matter of National Gypsum Company*, 118 F.3d 1056 (5th Cir. 1997) (core declaratory judgment action by debtor against liability insurer to collect pre-confirmation debts); *In re Mintze*, 288 B.R. 95 (Bankr. E.D.Pa. 2003) (core proceeding to determine validity, priority and extent of lien); *In re APF Co.*, 264 B.R. 344 (Bankr.D.Del.2001) (core proceeding to recover capitation payments withheld by

HMO); *American Freight Sys. v. Consumer Prods. Assocs. (In re American Freight Sys.)*, 164 B.R. 341, 347 (D. Kan., 1994) (core proceeding to collect freight undercharges); *Sacred Heart Hosp. v. Independence Blue Cross (In re Sacred Heart Hosp.)*, 181 B.R. 195, 202 (Bankr. D. Pa., 1995) (core proceeding).

Although the issues before the *Hays* Court, except for the § 544(b) claims, were clearly non-core, and therefore arbitrable, the Court also made reference to circumstances in which discretion could be exercised on the issue of enforcement of an arbitration agreement. After discussing the Bankruptcy Reform Act of 1978, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.W. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (generally ruling the jurisdictional provision of the 1978 Act unconstitutional), the 1984 amendments to the 1978 Act, and various Supreme Court cases interpreting the Arbitration Act, the *Hays* Court stated:

> [W]e can no longer subscribe to a hierarchy of congressional concerns that places the bankruptcy law in a position of superiority over [the Arbitration] Act. The message we get from these recent cases is that we must carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause and that we should enforce such a clause unless that effect would seriously jeopardize the objectives of the Code.

Hays, 885 F.2d at 1161.

In this adversary proceeding, Plaintiff urges this Court to hold that the § 547 and § 548 claims asserted by it in its complaint are entitled to precisely the same treatment as the § 544(b) claims, on the grounds that they are purely core statutory claims not derivative of the Debtor. Plaintiff contends that the § 547 and § 548 claims are those that belong solely to the trustee, and are asserted for the benefit of the creditors of the debtor. As a result, they are not arbitrable.

In *In re EXDS, Inc.*, 316 B.R. 817, (Bankr.D.Del.2004), Judge Peter J. Walsh of this Court held without discussion that a § 548 fraudulent conveyance claim, like a § 544(b) claim, was created by the Bankruptcy Code, and that therefore, under *Hays*, he could not require such claims to be submitted to arbitration. Although the *Hays* Court referred to the trustee's statutory causes of action in *Allegaert,* collectively as claims "such as fraudulent and preferential transfers," Plaintiff does not cite, and this Court has not found, any decisions holding that § 547 preference actions may be equated with § 544(b) and § 548 actions for purposes of disposition under *Hays*. Nevertheless, this Court agrees with Plaintiff that such equation is entirely appropriate.

A preference action under § 547 is clearly a core proceeding under 28 U.S.C. § 157(b)(2)(F), as are fraudulent conveyance actions under §§ 544(b) and 548, pursuant to 28 U.S.C. § 157(b)(2)(H). Neither of these may be brought by a debtor, and under no interpretation could any such action be described or construed as having been derived from the debtor. They are creatures of statute, available in bankruptcy solely for the benefit of creditors of the debtor, whose rights the trustee enforces. The arbitration agreement was entered into by Debtor, pre-petition, and as the courts have made clear, it is the parties to such an agreement who are bound by it and whose intentions must be carried out. Thus, it is the view of this Court that, under *Hays*, as extended by *EXDS*, this Court may not require fraudulent conveyance actions, under either §§ 544(b) or 548, or preference actions under § 547, to be submitted to arbitration.

Moreover, even if the § 547 and § 548 claims set forth in Plaintiff's complaint herein were determined to be derived from Debtor, the interests, policies and objectives of the Bankruptcy Code would be seriously jeopardized by requiring arbitration of such claims. Many,

if not most substantial bankruptcy cases involve numerous preference and fraudulent conveyance claims. The law, and the lore surrounding the adjudication of such claims is extensive, and has been developed over significant periods of time. The result is, that certain fact situations may be expected to bring about fairly consistent results, wherever they are tried. To subject these matters to arbitration, before individuals or tribunals with little or no experience in bankruptcy law or practice, and with little or no concern for the rights and interests of the body of creditors, of which the particular defendant is only one, would introduce variables into the equation which could potentially bring about totally inconsistent results. Such a result would be contrary to the primary policy of the Bankruptcy Code, which is that all classes of creditors of a debtor are entitled to be treated as equitably as possible, and that the remaining assets of a liquidating debtor are to be distributed on a pro rata basis to all creditors of a given class. Thus, even if §§ 547 and 548 were found to be claims derivative of the Debtor, this Court would exercise its discretion in favor of declining to enforce the arbitration agreement as contrary to the objectives of the Bankruptcy Code, and would therefore deny the motion to dismiss filed herein by Defendant.

IV. CONCLUSION

For the foregoing reasons, the Motion of American Bankers Insurance Company for Dismissal in Favor of Arbitration is **DENIED**. An appropriate order follows.

Dated this 18th day of March, 2005.

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE

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ORDER DENYING MOTION OF AMERICAN BANKERS INSURANCE CO. FOR DISMISSAL IN FAVOR OF ARBITRATION

For the reasons set forth in the Memorandum Opinion of even date herewith, it is hereby **ORDERED** that American Bankers Insurance Co.'s Motion for Dismissal in Favor of Arbitration is **DENIED**.

DATED: March 18, 2005

BY THE COURT:

PAUL B. LINDSEY
UNITED STATES BANKRUPTCY JUDGE