

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

BALLING CONSTRUCTION, INC.

Case No. 90-11894B

Debtor

BALLING CONSTRUCTION, INC. by
Thomas J. Gaffney, Trustee

Plaintiff

-vs-

AP 92-1182K

JOSEPH DAVIS, INC. and
ADAPTIVE BUILDERS, INC.

Defendant

BALLING CONSTRUCTION, INC. by
Thomas J. Gaffney, Trustee

Plaintiff

-vs-

AP 92-1184K

DAVIS REFRIGERATION, et al.

Defendant

The issue presented to the Court is whether an action by the Chapter 7 Trustee to recover accounts receivable alleged to be owed for goods and services provided by the Debtor is a "core" proceeding under 28 U.S.C. § 157.

Despite the failure of counsel for Defendants Adaptive Builders, Inc., Joseph Davis Inc., and Davis Refrigeration to submit a memorandum of law addressing this issue, the Court must agree that by their nature, these adversary proceedings are not core. This Court is bound by the Second Circuit's decision in *In re Orion Pictures Corp.*, 4 F.3d 1095 (2d Cir. 1993), which mandates that ordinary pre-petition breach of contract suits are not core proceedings under 28 U.S.C. § 157. *Id.* at 1102.

However, Defendants Joseph Davis Inc. and Davis Refrigeration have filed proofs of claim in the Balling Construction bankruptcy case, effectively consenting to adjudication of their claims by this Court. As to these two Defendants, the Court treats the adversary

proceedings as objections by the Trustee to their claims, along with counterclaims. 28 U.S.C. § 157(b)(2)(C).

As of January, 1995, Defendant Adaptive Builders had not filed a proof of claim, and so apparently has not consented to this Court's jurisdiction. The adversary proceeding against it is therefore not core by simple application of the rule set forth in *Orion*. The Trustee may offer any evidence he has that Adaptive Builders has also consented to jurisdiction. For example, the Trustee may try to argue that Adaptive Builders is an alter ego of one of the other Defendants, and that it consequently has also consented to this Court's jurisdiction.

These adversary proceedings are hereby scheduled for further pre-trial conference on March 13, 1995 at 9:00 a.m. Defendant Adaptive Builders shall decide by that date whether it will consent to this Court rendering a final decision in its adversary proceeding.

SO ORDERED.

Dated: Buffalo, New York
February 14, 1995

/s/Michael J. Kaplan

U.S.B.J.