

**UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Harrisonburg Division**

**IN RE:**

**PENNY M. DUDLEY,**

**Case No. 5-03-02194**

**Debtor**

**DAVID C. DUDLEY  
PENNY M. DUDLEY  
HOMER C, LLC  
JACOB C, LLC,**

**Plaintiffs**

**v.**

**Adversary Proceeding  
No. 5-04-00006**

**BRANCH BANKING & TRUST  
COMPANY OF VIRGINIA,**

**Defendant**

**ORDER**

At Harrisonburg in said District this 8th day of November, 2004:

The matter before the court for determination is a motion by Branch Banking & Trust Company of Virginia (herein BB&T) to dismiss the above-captioned adversary proceeding. The matter was heard in open court on October 25, 2004, and the parties to the adversary proceeding have filed written memoranda in support of their respective positions. The memorandum of law by BB&T in support of the motion to dismiss the amended complaint accurately summarizes the history of this case and related litigation which was pending in the Circuit Court of Rockbridge County prior to the filing of any of the petitions for relief by either

David C. Dudley or Penny M. Dudley (herein the Dudleys). The issues and the facts which form the basis of the amended complaint in this adversary proceeding were framed and ready for trial in the Circuit Court of Rockbridge County on a number of different dates.<sup>1</sup> None of the scheduled trial dates resulted in a trial or decision on the merits in the Circuit Court of Rockbridge County. The failure to go to trial on the merits resulted in part because of the death of two circuit court judges and in part because the Dudleys filed various bankruptcy proceedings immediately prior to the commencement of trial on the merits in the Circuit Court of Rockbridge County. Mrs. Dudley also filed a complaint and then an amended complaint in the bankruptcy court. These complaints mirror the cause of action initiated by the Dudleys against BB&T in the Circuit Court of Rockbridge County. BB&T filed a motion to dismiss under Federal Rule of Civil Procedure 12(b) and (h).<sup>2</sup> As grounds for the motion to dismiss, BB&T asserts that this

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<sup>1</sup> June 15, 2003, October 7, 2003, December 29, 2003, July 23, 2004 and September 13, 2004.

<sup>2</sup> 12(b). How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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12(h). Waiver or Preservation of Certain Defenses. (1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

court lacks subject matter jurisdiction over several of the plaintiffs, specifically Homer C, LLC, Jacob C, LLC and the Earth Care Corporation, Inc. None of these entities is subject to the jurisdiction of the court at the present time. Other grounds for dismissal of the proceeding are that the pleadings fail to state a claim upon which relief can be granted, that Mrs. Dudley lacks standing to bring the complaint proceeding, that Mrs. Dudley has failed to join her trustee in bankruptcy as an essential party, that there are no core issues for adjudication with respect to the non-debtor plaintiffs and that Mrs. Dudley has valued her claim against BB&T at a maximum of \$1.00 on her Schedule B and has exempted a claim of \$1.00 on Schedule C of her Schedules and Statement of Affairs.

This amended complaint proceeding and the identical state court proceedings arise out of a transaction between the Dudleys and their related business entities on the one hand and BB&T on the other, whereby BB&T extended credit to the Dudleys' business entities and obtained personal guarantees of the Dudleys and collateral to secure the indebtedness consisting of real estate owned by one LLC, personally owned real estate, and personal property of another LLC. The Dudleys assert a variety of causes of action against BB&T including breach of contract and violation of laws in connection with Mrs. Dudley's execution of documents to consummate the loan transactions and her liability thereon.

The court reviewed the pleadings and the memorandums of the respective parties and considered the oral arguments presented on October 25, 2004. The court is satisfied that the proceedings brought by Mrs. Dudley are not core proceedings under the definition in 28 U.S.C. § 157(b)(1) and (2). Further, the court is satisfied that the causes of action brought by Mrs. Dudley are not otherwise related to a case under Title 11, pursuant to 28 U.S.C. § 157(c)(1). Even if

some of the causes of action could be deemed to be related proceedings, this court is satisfied that it should abstain under 28 U.S.C. § 1334(c)(1).<sup>3</sup> The court is satisfied that the Circuit Court of Rockbridge County is the proper forum for disposition of the disputes between the parties. Accordingly, it is

**ORDERED:**

That the motion of BB&T to dismiss the proceeding under Federal Rule of Civil Procedure 12(b) and (h) be, and it hereby is **GRANTED**, and it is

**FURTHER ORDERED:**

That to the extent that there are non-core issues raised by Mrs. Dudley in her amended adversary proceeding that it is in the best interest of justice and in the interest of comity with state courts and out of respect for state law that this court abstain from hearing this proceeding; and it is

**FURTHER ORDERED:**

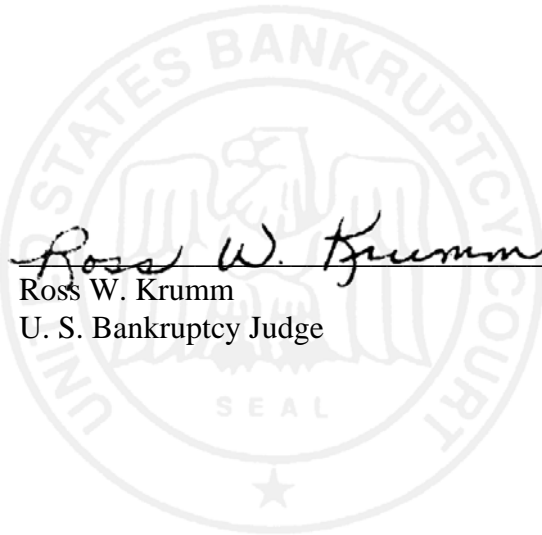
That to the extent necessary the stay imposed by 11 U.S.C. § 362(a) is hereby **MODIFIED** in this case and in the case of David Clinton Dudley, Case No. 5-04-01483-7, to

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<sup>3</sup> 28 U.S.C. § 1334(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

permit BB&T and the Debtors to complete pending litigation in the Circuit Court of Rockbridge County.

Copies of this order are directed to be mailed to Harry W. Brown, Esquire, counsel for Penny M. Dudley; to William E. Shmidheiser, III, Esquire, counsel for Branch Bank & Trust Co. of Virginia; and to W. Stephen Scott, Esquire, Chapter 7 Trustee for Penny M. Dudley.



*Ross W. Krumm*  
Ross W. Krumm  
U. S. Bankruptcy Judge

The seal of the United States Bankruptcy Court is visible in the background, featuring an eagle with spread wings and the text "UNITED STATES BANKRUPTCY COURT" and "SEAL" around a central star.