THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: October 27, 2017

G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

David A. Novoselsky, Case No. 14-29136-GMH

Debtor. Chapter 7

Virginia E. George, trustee,

Plaintiff, Adv. Proc. No. 17-02187-GMH

v.

Charmain J. Novoselsky,

Defendant.

DECISION AND ORDER
(1) DENYING DEFENDANT'S MOTION FOR
RECUSAL, ABSTENTION, AND DISMISSAL AND (2) STRIKING JURY DEMAND

Virginia George, the chapter 7 trustee of debtor David Novoselsky's bankruptcy estate, commenced this adversary proceeding against the debtor's wife, Charmain Novoselsky, who is not a debtor. The trustee seeks a judgment declaring that the Bankruptcy Code invalidates a post-petition quitclaim deed by which debtor Novoselsky transferred his interest in his marital residence to Mrs. Novoselsky.

Mrs. Novoselsky, represented by her debtor-lawyer-husband, filed a motion in response to the trustee's adversary complaint. Adv. Proc. No. 17-2187, CM-ECF Doc. No. 8. Mrs. Novoselsky's motion requests that the bankruptcy court abstain from deciding the trustee's claim that the Bankruptcy Code invalidates the deed and that the bankruptcy judge recuse himself from deciding the adversary proceeding based on rulings he made in debtor Novoselsky's bankruptcy case, Case No. 14-29136. *Id.* Mrs. Novoselsky also requests that the district court withdraw the reference. *Id.* And she demands trial by jury. Adv. Proc. No. 17-2187, CM-ECF Doc. No. 7.

This decision and order denies Mrs. Novoselsky's requests for relief, except for her request that the district court withdraw the reference, which the court refers to the district court. It also strikes her jury demand, orders her to file an answer, and orders a pretrial conference.

I

Debtor Novoselsky is an Illinois lawyer who lives in Wisconsin. He filed a bankruptcy petition under chapter 11 in July 2014. Debtor Novoselsky proposed a plan of reorganization. See Case No. 14-29136, CM-ECF Doc. No. 446. When he sought to confirm the plan in July 2015, he projected that he would gross $1.127 million practicing law in the first year of the plan and between $1.8 million and $2.3 million a year for the following four years. Case No. 14-29136, CM-ECF Doc. No. 448 at 42. His law practice,

which he operated through a personal corporation, consisted largely of contingency-fee cases. *Id.* at 5–6.

The debtor's creditors, including several of his former clients and the IRS, vigorously opposed his reorganization plan. They disputed the plausibility of debtor Novoselsky making enough money to fund the plan, since, among other things, he was then litigating with the Illinois Attorney Registration and Disciplinary Commission over alleged disciplinary infractions that threatened suspension of his law license.

Debtor Novoselsky ultimately abandoned his attempt to reorganize. He moved to convert the case to a chapter 7 liquidation on July 23, 2015. Case No. 14-29136, CM-ECF Doc. No. 556. The court converted the case on July 27, 2015, and, that same day, the United States trustee appointed Ms. George to serve as the chapter 7 trustee. Case No. 14-29136, CM-ECF Doc. No. 567.

Ms. George examined the debtor about his assets at a meeting of creditors held pursuant to 11 U.S.C. §341 on September 1, 2015. Case No. 14-29136, CM-ECF Doc. No. 569. On December 17, 2015, after examining the debtor and reviewing his bankruptcy schedules and other information she had requested, the trustee served a notice on all creditors of her intent to abandon certain estate assets, as §554(a) requires before the trustee abandons property that creditors might contend has liquidation value. Case No. 14-29136, CM-ECF Doc. No. 752. The trustee's notice of proposed abandonment included the Novoselskys' Wisconsin residence, which according to the debtor's bankruptcy schedules and other information provided to the trustee, was estimated to be worth $1 million but subject to an $867 thousand mortgage lien. *Id.* at 2. The trustee concluded that the remaining $133 thousand of equity was insufficient to justify liquidation once she considered the costs of sale, the current year's property taxes, and

the debtor's homestead exemption. *Id.* No creditor contested the trustee's conclusion or opposed her abandonment of the Novoselskys' residence. On June 23, 2016, after the court resolved creditors' objections to the trustee's proposal to abandon other estate assets, the trustee filed her statement of abandonment, which included the Novoselskys' residence. Case No. 14-29136, CM-ECF Doc. No. 926.

The following day, June 24, 2016, Mrs. Novoselsky filed a complaint in the Circuit Court for Kenosha County against Old Second National Bank, the bank holding the mortgage liens on the Novoselsky residence, and joined debtor Novoselsky as a "Nominal Defendant." Case No. 14-29136, CM-ECF Doc. No. 1150 at 18–20. Mrs. Novoselsky alleges in the Kenosha County case that her signatures on the mortgages are forgeries; thus, the mortgages are invalid. *Id.* at 19.

About a month later, debtor Novoselsky and Mrs. Novoselsky entered into a settlement agreement. Case No. 14-29136, CM-ECF Doc. No. 1236 at 9–10. The agreement provides that in May 2016 Mrs. Novoselsky "first became aware of a mortgage supposedly in her name as well as that of David [Novoselsky] and which encumbered [her] interest in" the Novoselsky residence. *Id.* at 9. The agreement further provides that debtor Novoselsky will transfer his interest in the residence to Mrs. Novoselsky and that the Novoselskys intend that the residence will be Mrs. Novoselsky's individual property. *Id.* at 9–10. Debtor Novoselsky executed a quitclaim deed transferring his interest in the residence to Mrs. Novoselsky on August 4, 2016, and the Kenosha County Register of Deeds recorded the deed on August 5. *Id.* at 4.

On February 28, 2017, based on these facts, the trustee moved under Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60(b), to vacate the estate's abandonment of the residence. Case No. 14-29136, CM-ECF

Doc. No. 1150. Debtor Novoselsky opposed the motion. Case No. 14-29136, CM-ECF Doc. No. 1179.

The court held an evidentiary hearing on the motion on May 10, 2017. Case No. 14-29136, CM-ECF Doc. Nos. 1271 & 1359. At that hearing, debtor Novoselsky testified that he first saw a complete set of the executed mortgage documents in May 2016 when he was negotiating with Old Second National Bank to reaffirm the debt purportedly secured by Old Second's mortgage liens. Case No. 14-29136, CM-ECF Doc. No. 1359 at 140–42. He noticed that the signature on the documents did not appear to be his wife's signature. *Id.* at 143. He told his wife. *Id.* He did not tell trustee George. The day after trustee George filed her statement of abandonment, Mrs. Novoselsky filed her quiet-title case in Kenosha County.

For the reasons stated in an oral ruling announced May 19, 2017, the court granted trustee George's motion to vacate the estate's abandonment of the residence. Case No. 14-29136, CM-ECF Doc. Nos. 1273 & 1318 (transcript). A May 25, 2017 order memorializes the oral ruling. Case No. 14-29136, CM-ECF Doc. No. 1276. Debtor Novoselsky appealed that order to the district court. Case No. 14-29136, CM-ECF Doc. No. 1277. The appeal is pending.

On June 29, 2017, trustee George commenced this adversary proceeding against Mrs. Novoselsky. Based on the court's order vacating the estate's abandonment of the residence, the trustee seeks a judgment declaring that the Bankruptcy Code invalidates the August 4, 2016 quitclaim deed because the deed constitutes an unauthorized post-petition transfer of bankruptcy-estate property. See 11 U.S.C. §549(a). The trustee seeks to preserve the residence's equity for the benefit of the bankruptcy estate. As explained above, Mrs. Novoselsky, through her counsel, debtor Novoselsky, filed a motion to

dismiss and a jury demand. Adv. Proc. No. 17-2187, CM-ECF Doc. Nos. 7 & 8.

II

Mrs. Novoselsky contends that 28 U.S.C. §455(a) disqualifies the bankruptcy judge. Section 455(a) of title 28 provides that a federal judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Mrs. Novoselsky argues that rulings the judge made in the course of presiding over debtor Novoselsky's bankruptcy case meet §455(a)'s impartiality standard. She points to trustee George's allegation that the court "has already opined that [Mrs. Novoselsky] is not an innocent owner for value who lacks knowledge and who would not be prejudiced by placing [Mrs. Novoselsky] (and the debtor) in exactly the same position they were at the commencement of this case". Adv. Proc. No. 17-2187, CM-ECF Doc. No. 1 at 3. Ms. George's complaint quotes a passage from the court's May 19, 2017, oral decision vacating abandonment:

> In addition, vacating the abandonment order will not work undue prejudice on Mrs. Novoselsky and she is not an innocent owner as those terms are described in *Lintz*, 655 F.2d 786[] (7th Cir. 1981)[,] and similar cases. Mr. Novoselsky told Mrs. Novoselsky about the signature issue before Ms. George abandoned the property. Mrs. Novoselsky filed a lawsuit seeking to vacate the mortgage the day after the trustee filed her statement of abandonment. This litigation was commenced by a lawyer who also represented Mr. Novoselsky. The lawyer asked for a conflict waiver. He made Mr. Novoselsky a defendant. He sent Mr. Novoselsky a copy of the pleading. None of these parties told Ms. George about any of this. Moreover, Mrs. Novoselsky is a statutory insider. See 11 [ ]U.S.C[.] [§]101 (31). Insiders are not the type of third parties dealing at arm's length to which cases like *Lintz* are referring.

Id.; compare with Case No. 14-29136, CM-ECF Doc. No. 1318 at 44 (transcript of oral ruling). Based on this part of the court's ruling, Mrs. Novoselsky argues that a

reasonable person might question the bankruptcy judge's impartiality.

Mrs. Novoselsky's argument—that the judge's reasoning in vacating abandonment is sufficient to call into question his impartiality—is foreclosed by *Liteky v. United States*, 510 U.S. 540 (1994); see also *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). *Liteky* instructs that "judicial rulings alone almost never constitute a valid basis for a bias or [§455(a)] partiality motion." 510 U.S. at 555. *Liteky* further directs that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion *unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible*." *Id.* (emphasis added).

Liteky thus requires Mrs. Novoselsky to demonstrate that the bankruptcy judge's impartiality can be reasonably questioned based either on an extrajudicial source or by demonstrating that judicial rulings "display deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* In this context, the Seventh Circuit has concluded that not even a judge's statement that he "may have had some 'predisposition' in the matter is even remotely sufficient evidence of the required 'deep-seated and unequivocal antagonism that would render fair judgment impossible.'" *In re Huntington Commons Assocs.*, 21 F.3d 157, 159 (7th Cir. 1994) (quoting *Liteky*, 510 U.S. at 556).

This bankruptcy judge's statements that vacating abandonment would not work an "undue prejudice on Mrs. Novoselsky" and that "she is not an innocent owner as those terms are described in [*Lintz*] and similar cases" (Case No. 14-29136, CM-ECF Doc. No. 1318 at 44) do not show "'deep-seated and unequivocal antagonism that would render fair judgment impossible.'" *In re Huntington Commons Assocs.*, 21 F.3d at

159 (quoting *Liteky*, 510 U.S. at 556). The statements were based on testimony presented at the May 10, 2017, evidentiary hearing and the application of law to facts supported by that testimony. Mrs. Novoselsky does not suggest otherwise, nor does she argue that the judge's ruling shows a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555.

Instead, Mrs. Novoselsky relies on *GMAC Associates, Inc. v. Devon Bank (In re Huntington Park Associates)*, No. 91-B-10100, 1993 WL 86802 (N.D. Ill. 1993), and *Frates v. Weinshienk*, 882 F.2d 1502, 1504 (10th Cir. 1989), to argue that a court's prior ruling may require recusal if the "court is 'boxed in' by its ruling or what appears to be its ruling indicating prejudgment". Adv. Proc. No. 17-2187, CM-ECF Doc. No. 8 at 25 (quoting *GMAC Assocs.*, 1993 WL 86802, at *1). Both decisions predate *Liteky*. The "boxed-in" theory of recusal under §455 that Mrs. Novoselsky finds in *GMAC Associates* and *Frates* does not survive *Liteky*, as shown by the Seventh Circuit's decision in *Huntington Commons*.

Mrs. Novoselsky has not argued that she can show that the bankruptcy judge reasonably appears to harbor a deep-seated and unequivocal antagonism. Nor has she suggested any fact or circumstance that would reasonably support that conclusion. She thus has not shown grounds for recusal under §455(a).

III

Mrs. Novoselsky also asks the bankruptcy court to abstain from adjudicating the trustee's adversary complaint. Her motion does not explain the statutory authority for the request—it refers only in passing to 11 U.S.C. §305 and 28 U.S.C. §1334.

Section 305 of title 11 provides that a court "may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time if—(1) the interests of

creditors and the debtor would be better served by such dismissal or suspension". 11 U.S.C. §305(a)(1). Mrs. Novoselsky does not seek dismissal of debtor Novoselsky's bankruptcy case; she seeks only dismissal of this adversary proceeding. Section 305, therefore, does not apply. *Andrus v. Ajemian (In re Andrus)*, 338 B.R. 746, 750 (Bankr. E.D. Mich. 2006); see also 2 COLLIER ON BANKRUPTCY ¶305.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

Section 1334 of title 28 grants the district courts jurisdiction over cases under title 11 and proceedings arising in, under, or related to cases under title 11. See 28 U.S.C. §1334(a) & (b). Section 157 authorizes the district courts to refer those cases and proceedings to the bankruptcy courts. 28 U.S.C. §157(a). The District Court for the Eastern District of Wisconsin has referred all bankruptcy-related matters to this court. See Order of Reference (E.D. Wis. July 10, 1984), *available at* http://www.wied.uscourts.gov/local-rules-and-orders. Section 1334(c)(1) authorizes courts to abstain from hearing proceedings arising under, in, or related to a title 11 case under certain circumstances. It states, "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." 28 U.S.C. §1334(c)(1).

Mrs. Novoselsky casts her argument for abstention in terms of several factors that courts routinely examine in determining whether a bankruptcy court should abstain from deciding a state-law cause of action under §1334(c)(1). Those factors principally address whether the party seeking relief is asking a federal court to decide state-law issues or disputes that are better left to state courts for reasons of comity or efficiency. See *In re Chi., Milwaukee, St. Paul & Pac. R.R.*, 6 F.3d 1184, 1189–1190 (7th Cir.

1993). In the context of §1334(c)(1) abstention, however, the Seventh Circuit has cautioned, "federal courts generally should exercise their jurisdiction if properly conferred and that abstention is the exception rather than the rule." *Id.* at 1189.

Section 1334(c)(1)'s text—allowing for abstention when the court concludes that abstention is "in the interest of justice, or in the interest of comity with State courts or respect for State law"—invites consideration of whether the court is being asked to abstain from deciding federal law issues or matters that affect administration of the bankruptcy case. Mrs. Novoselsky asks this court to abstain from deciding a claim filed in the bankruptcy court by a bankruptcy trustee. The trustee alleges that federal law voids debtor Novoselsky's attempt to transfer property of that estate to Mrs. Novoselsky, the defendant, while his bankruptcy case is pending. The trustee's purpose in this is to carry out her duty under the Bankruptcy Code to liquidate property of the estate to pay creditors who have filed claims in the bankruptcy case. If the Bankruptcy Code entitles the trustee to void the quitclaim deed as a post-petition transfer of estate property, the trustee will remove one potential obstacle to selling the residence, which the debtor has valued at over $1 million, to pay the debtor's creditors. See 11 U.S.C. §363(f) (authorizing the bankruptcy trustee to sell estate property free and clear of other interests under particular circumstances).

A

Mrs. Novoselsky argues that one of the factors that favors abstention in this proceeding is that the Constitution forecloses the bankruptcy court from entering a final judgment. Her motion to dismiss announces that she does not consent to entry of a final order by the bankruptcy court. Her consent is unnecessary for this court to adjudicate her motion to dismiss or the trustee's adversary complaint.

The trustee's adversary complaint seeks a judgment "making voidable" under 11 U.S.C. §549 the quitclaim deed by which debtor Novoselsky transferred his interest in the Novoselsky residence to Mrs. Novoselsky. Section 549 provides that, with exceptions not applicable here, "the trustee may avoid a transfer of property of the estate—(1) that occurs after the commencement of the case" and is unauthorized by the Code or the bankruptcy court. 11 U.S.C. §549(a). The trustee alleges that the residence was property of the estate and debtor Novoselsky executed the quitclaim deed while his bankruptcy case was ongoing.

The trustee's proceeding is a core proceeding arising under title 11 that 28 U.S.C. §157(b)(1) authorizes the bankruptcy court to "hear and determine", i.e., finally adjudicate. 28 U.S.C. §157(b)(1). "[C]ore proceedings are those that arise in a bankruptcy case or under Title 11." *Stern v. Marshall*, 564 U.S. 462, 476 (2011). The trustee's complaint alleges relief arising under title 11, specifically under §549 of title 11.

Presumably, if the bankruptcy trustee is successful in this adversary proceeding, she will seek to liquidate the bankruptcy estate's interest in the residence to pay the debtor's creditors—a central function of debtor Novoselsky's chapter 7 case:

> A debtor's voluntary commencement of a bankruptcy case automatically creates an estate. *See* 11 U.S.C. § 541(a). Establishment of the estate is central to a bankruptcy's collective debt-collection scheme. The estate serves (1) as the receptacle of all property that is to be subject to the proceeding and (2) as the vehicle through which that property is to be administered and then distributed. The Code directs the bankruptcy trustee to "collect and reduce to money the property of the estate[.]" See 11 U.S.C. § 704(a)(1). The trustee may distribute this property pursuant to § 726(a) without order from any court. See 11 U.S.C. § 726(a). Therefore, a controversy over whether a particular asset of the debtor is subject to the trustee's powers to collect and distribute under the Bankruptcy Code stems directly from the bankruptcy filing itself.

Murphy v. Felice (In re Felice), 480 B.R. 401, 417–18 (Bankr. D. Mass. 2012) (internal case citations omitted).

Disputes relating to the content of the bankruptcy estate are matters Congress may constitutionally authorize the bankruptcy courts to adjudicate. The Supreme Court has long recognized that "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights," which an Article III court must adjudicate. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (plurality opinion). And the Court has not suggested that the bankruptcy courts cannot finally determine matters arising under the Bankruptcy Code that involve adjudicating "claims involving 'property in the actual or constructive possession of the [bankruptcy] court[.]'" *Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2170 (2014) (quoting *Northern Pipeline*, 458 U.S. at 53). The trustee's adversary complaint seeks a declaration that the Bankruptcy Code invalidates the debtor's post-petition transfer of bankruptcy estate property. This court has the constitutional authority to adjudicate that complaint.

Moreover, even if the trustee's claim were a so-called "*Stern* claim", this court still would have the authority to deny the defendant's motion to dismiss. *Stern* claims are claims that 28 U.S.C. §157(b) allows final adjudication by bankruptcy courts but which the Constitution requires an Article III court to enter judgment. The Supreme Court held in *Executive Benefits* that bankruptcy courts may adjudicate *Stern* claims employing the methodology of 28 U.S.C. §157(c)(1). 134 S. Ct. at 2173.

Section 157(c)(1) requires the bankruptcy court to submit proposed findings of fact and conclusions of law to the district court for *de novo* review before the entry of a final order by the district court. *Id*. Section 157(c)(1) does not limit the bankruptcy

court's authority to enter *non-final* orders, including an order denying a motion to dismiss. See *Fruehauf Corp. v. Jartran, Inc. (In re Jartran, Inc.)*, 886 F.2d 859, 863–65 (7th Cir. 1989). And, for the reasons explained below, Mrs. Novoselsky is not entitled to dismissal of the complaint. *Stern* thus does not limit this court's ability to deny dismissal even if it were applicable to the trustee's claim.

B

Mrs. Novoselsky also argues that her jury demand favors abstention. But she has no right to trial by jury in this proceeding.

Mrs. Novoselsky has a right to try the trustee's claim to a jury if and only if the Seventh Amendment preserves that right. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58–61 (1989). *Granfinanciera* requires a two-step inquiry to determine whether the Seventh Amendment preserves that right: "First, [one] compare[s] the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, [one] examine[s] the remedy sought and determine[s] whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42 (internal quotations omitted). The Supreme Court has emphasized, however, that "[t]he second stage of this analysis is more important than the first." *Id.*

The trustee's complaint alleges that 11 U.S.C. §549(a) authorizes her to avoid debtor Novoselsky's post-petition quitclaim deed of his interest in the Novoselskys' residence to Mrs. Novoselsky. The trustee's claim is not for damages or other legal relief. The trustee seeks rescission of the deed by operation of §549 of the Bankruptcy Code, and "[r]escission is an equitable, not a legal, remedy." *Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456, 463 (7th Cir. 2014). This is true under both federal law, *id.* (collecting cases), and Wisconsin law, see *Zabel v. Zabel (In re Marriage of Zabel)*,

565 N.W.2d 240, 244 (Wis. Ct. App. 1997); *Little v. Roundy's Inc.*, 449 N.W.2d 78, 81–82 (Wis. Ct. App. 1989). Thus, Mrs. Novoselsky has no right to have the trustee's claim in this adversary proceeding tried to a jury.

C

Mrs. Novoselsky next argues that this court should abstain because a state court *must* adjudicate the trustee's claim that the quitclaim deed is invalid. Mrs. Novoselsky essentially makes two arguments: (1) that "section 542 or another provision of the Code does not allow this Court to resolve a dispute as to the actual ownership of the property" (Adv. Proc. No. 17-2187, CM-ECF Doc. No. 8 at 12); and (2) to the extent the trustee has alleged that the quit-claim deed is invalid based on an incorrect legal description, that dispute may only be resolved in the Circuit Court of Kenosha County. Both of these arguments are wrong.

1

This court has "exclusive jurisdiction over a debtor's property, wherever located, and over the estate." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). See also 28 U.S.C. §1334(e)(1) (granting the district court "exclusive jurisdiction—(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate"); *Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*, 757 F.3d 1044, 1050 (9th Cir. 2014). Property of the bankruptcy estate, which in this case includes the debtor's interest in his homestead that he transferred to Mrs. Novoselsky, "cannot be removed from the bankruptcy court's exclusive jurisdiction except by appropriate proceedings in the bankruptcy court." *Ford v. A.C. Loftin (In re Ford)*, 296 B.R. 537, 548 (Bankr. N.D. Ga. 2003).

The fact that debtor Novoselsky executed the quitclaim deed and Mrs.

Novoselsky commenced her quiet-title action in state court after the trustee abandoned the residence in June 2016 does not oust this court of jurisdiction over the residence. This court vacated the trustee's abandonment no later than May 25, 2017, when it docketed a written order memorializing its May 19, 2017 oral ruling. Case No. 14-29136, CM-ECF Doc. No. 1276. The order vacating abandonment nullifies the abandonment; it is as if abandonment had never occurred. *Geiger v. Allen*, 850 F.2d 330, 332 (7th Cir. 1988) ("'[T]he general rule is that where a court, in the discharge of its judicial functions, vacates an order previously entered, the legal status is the same as if the order had never existed.' *Mitchell v. Joseph*, 117 F.2d 253, 255 (7th Cir. 1941)"). Consequently, there has been no permitted transfer of the residence out of the bankruptcy estate.

The debtor did execute a quitclaim deed of his interest in the residence: whether §549 of the Bankruptcy Code invalidates that deed is the subject of this adversary proceeding. The answer to that question depends on the application of §549 to the unique circumstances of debtor Novoselsky's bankruptcy case. Those circumstances include the fact that the trustee is attempting to avoid a post-petition transfer of estate property that occurred after the trustee abandoned the property. Additionally, debtor Novoselsky transferred his interest in the residence as part of a settlement of Mrs. Novoselsky's asserted claim of marital waste—a presumptively pre-petition debt owed by debtor Novoselsky. Case No. 14-29136, CM-ECF Doc. No. 1236 at 9–10. Section 362(a) of the Bankruptcy Code prohibits, among other things, "any act to collect . . . a claim against the debtor that arose before the commencement of the case under this title" and "any act to . . . exercise control over property of the estate". 11 U.S.C. §362(a)(6) & (a)(3). The Bankruptcy Code issues woven into the unusual circumstances created by the debtor's transfer of his interest in the residence, which the Novoselskys owned as

marital property before debtor Novoselsky filed for bankruptcy, are plentiful and the proper work of the bankruptcy court under 28 U.S.C. §157.

What is more, the trustee has moved in the debtor's main bankruptcy case for an order that Mrs. Novoselsky's continuation of the state-court proceedings offends §362(a)'s automatic stay on acts to exercise control over property of the estate. The trustee argues that the claim Mrs. Novoselsky asserts in state court—that Old Second National Bank's mortgages are invalid because her signatures were forged—is itself property of the bankruptcy estate. By operation of §541 of the Bankruptcy Code the bankruptcy estate contains, in addition to a debtor's individual property, "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case", as long as the debtor enjoys "sole, equal, or joint management and control of" the property. 11 U.S.C. §541(a)(2)(A). Determining whether Mrs. Novoselsky's claim against Old Second is a community property interest that §541 of the Bankruptcy Code makes part of the bankruptcy estate is also a matter Congress delegated to the bankruptcy court. See generally *In re Hunter*, 970 F.2d 299 (7th Cir. 1992). Mrs. Novoselsky's argument for abstention largely ignores the presence of these related core bankruptcy issues.

2

Mrs. Novoselsky suggests that the existence of core bankruptcy issues is irrelevant because, pursuant to Wis. Stat. §847.07(1), the state court has "exclusive jurisdiction" to decide whether the quitclaim deed from debtor Novoselsky to Mrs. Novoselsky is valid under state law. Adv. Proc. No. 17-2187, CM-ECF Doc. No. 8 at 13–15. The trustee raised the question of whether the quitclaim deed complies with state law in a footnote in her complaint, suggesting that the deed might have a material

omission in the legal description making it invalid under Wisconsin law. Adv. Proc. No. 17-2187, CM-ECF Doc. No. 1 at 2 n.1. Mrs. Novoselsky's reliance on this comment to argue that the bankruptcy court must abstain to allow a state court to decide whether the deed has a material omission is an attempt to have a docked tail wag a very large dog.

First, adjudication of the property's title owner under state law may be unnecessary. The Bankruptcy Code authorizes the trustee to avoid transfers and liens on property of the estate that are unenforceable under state law. See 11 U.S.C. §§506(d) & 544(a). The Bankruptcy Code also authorizes the trustee to sell property of the estate free and clear of other interests under a variety of circumstances and allows the trustee to sell both the estate's interest and the interest of a co-owner who has "an undivided interest as a tenant in common, joint tenant, or tenant by the entirety" when partition is impracticable and the trustee cannot realize significant value from the sale of just the estate's interest. See 11 U.S.C. §363(f) & (h). When the trustee sells community property, the Bankruptcy Code affords the debtor's spouse the right to purchase the property at the price for which the trustee can sell the property. 11 U.S.C. §363(i).

Second, Mrs. Novoselsky's suggestion that the Wisconsin circuit court in the county where the property is located has exclusive jurisdiction—at the exclusion of the bankruptcy court—to adjudicate an alleged title defect is mistaken. The Seventh Circuit rejected a materially identical argument in *Albert Trostel & Sons Co. v. Notz*, 679 F.3d 627 (7th Cir. 2012). In *Albert Trostel*, a dissenting shareholder contended that the District Court for the Eastern District of Wisconsin could not hear the corporation's appraisal action because Wis. Stat. §180.1330(2) provides that "'[t]he corporation shall bring [the appraisal action] in the circuit court for the county where its principal office . . . is

located.' Subsection (4) adds that '[t]he jurisdiction of the court in which the special proceeding is brought under sub. (2) is plenary and exclusive.'" *Id.* at 629. The Seventh Circuit read the statute as the state "allocating authority within its own judiciary", *id.*, rather than as an attempt to exclude federal-court jurisdiction. As the Court explained, "Treating the statute as a claim by a state to oust the jurisdiction of the federal courts would simply render it unconstitutional, for no state may contract jurisdiction created by an Act of Congress." *Id.*

The same logic would govern Wis. Stat. §847.07(1)'s direction that the "circuit court of any county in which a conveyance of real estate has been recorded may make an order correcting the description". Even if Wisconsin construes that section to make the county in which the conveyance is recorded the exclusive state-court venue for an action seeking to correct the title, that construction cannot limit federal courts' jurisdiction. The law of Wisconsin cannot countermand the bankruptcy court's authority to adjudicate disputes over ownership of property that the trustee plausibly contends is property of the bankruptcy estate. See *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1871) ("In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court."); see also U.S. Const. art. VI, cl. 2.

D

Mrs. Novoselsky's final abstention argument—that the trustee has forfeited her right to proceed in the bankruptcy court by not removing the state-court case—is also based on an incorrect premise. Under the bankruptcy removal statute, only a "party"

may remove a state-court case to federal court. See 28 U.S.C. §1452(a) (providing that a "party" may remove). And the Supreme Court in construing 28 U.S.C. §1446, which provides the procedure for removing under the general removal statute, 28 U.S.C. §1441, has held that a person's time for deciding whether to remove state-court litigation to federal court does not commence until the person is made a party to the state-court action by being simultaneously served with a copy of the summons and complaint or, when the party receives a complaint "after and apart from service of the summons". See *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347–48 (1999).

The trustee is not a party to Mrs. Novoselsky's state-court case. And Mrs. Novoselsky does not contend that she or anyone else in the state-court case has served the trustee with process. So, regardless of whether the trustee knows about Mrs. Novoselsky's state-court case and whether the trustee has appeared in that case, the trustee's opportunity to remove the state-court action has not arisen. See *Lunan v. Jones (In re Lunan)*, 489 B.R. 711, 720–21 (Bankr. E.D. Tenn. 2012).

IV

Mrs. Novoselsky moves for dismissal under Federal Rule of Civil Procedure 12(b)(6), which Federal Rule of Bankruptcy Procedure 7012 makes applicable to this adversary proceeding. Mrs. Novoselsky's entire argument that the adversary complaint fails to state a claim upon which relief can be granted is:

> The Adversary complaint, as filed, does not state a claim upon which relief can be granted. The relief sought in this complaint asks for the Bankruptcy Court to declare a document (either a deed or title) to be "voidable." Defendant cannot answer a complaint when it fails to state a basis upon which relief can be granted. As the only explicit relief as filed seeks what appears to be a request for an advisory ruling to be applied later either in this Court or in the pending state court proceedings, the Adversary

claim should be dismissed pursuant to F.R.C.P. 12(b)(6).

Adv. Proc. No. 17-2187, CM-ECF Doc. No. 8 at 27. This conclusory argument does not support dismissal.

The complaint requests a "judgment making voidable the quitclaim deed from the debtor to his wife, the defendant Charmain J. Novoselsky; and preserving the same for the benefit of the Bankruptcy Estate of David A. Novoselsky, Virginia E. George, Trustee." Adv. Proc. No. 17-2187, CM-ECF Doc. No. 1 at 4. While perhaps an unartful description of the relief requested, the complaint claims that the quitclaim deed is a post-petition transfer of estate property that the trustee "may avoid" under §549(a) of the Bankruptcy Code. See 11 U.S.C. §549(a) (". . . the trustee may avoid a transfer of property of the estate . . .").

The trustee alleges that (1) the debtor filed the bankruptcy case on July 18, 2014; (2) the debtor executed a quitclaim deed of his interest in his residence on August 4, 2016; (3) the bankruptcy court vacated the trustee's abandonment of the estate's interest in the residence on May 24, 2017. These facts state a plausible claim that the trustee may avoid the quitclaim deed by which debtor Novoselsky transferred his interest in the residence to Mrs. Novoselsky. As discussed above, Seventh Circuit precedent supports the conclusion that the order vacating abandonment restored the estate to the position it was in before abandonment. See *Geiger*, 850 F.2d at 332. If the residence has remained estate property, the trustee has a plausible claim under §549(a) that the debtor's transfer of his interest in the residence should be adjudged void because the transfer was not authorized under the Bankruptcy Code. That is all that is necessary for the complaint to survive a motion to dismiss under Rule 12(b)(6). See *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 826 (7th Cir. 2015) ("[W]e first accept all well-pleaded facts in the complaint as

true and then ask whether those facts state a plausible claim for relief." (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

V

Mrs. Novoselsky requests withdrawal of the district court's reference of this adversary proceeding to the bankruptcy court. The decision regarding whether to withdraw the reference in this adversary proceeding commenced by the bankruptcy trustee to adjudicate the scope of the bankruptcy estate in this three-year-old-bankruptcy case is one that the district court must make.

Mrs. Novoselsky's request to withdraw the reference does not stay proceedings in the bankruptcy court. See Fed. R. Bankr. P. 5011(c). While Rule 5011 authorizes either the bankruptcy court or the district court to issue a stay, it further provides, "A motion for stay ordinarily shall be presented first to the bankruptcy judge." *Id.*

Mrs. Novoselsky has not filed a motion to stay proceedings. Instead, she makes that request in her reply memorandum. See Adv. Proc. No. 17-2187, CM-ECF Doc. No. 22 at 3. That course is improper. Rule 5011(c) specifically refers to the filing of a motion to stay, and the Bankruptcy Rules generally provide that parties must file motions to request relief. See Fed. R. Bankr. P. 9013. To the extent Mrs. Novoselsky's reply memorandum requests a stay of proceedings until the district court rules on her motion to withdraw the reference, that request is denied without prejudice to her filing a motion to request that relief.

* * * *

For the reasons stated above, the court orders as follows:

1. The defendant's request that bankruptcy judge recuse himself under 28 U.S.C. §455(a) from adjudicating this adversary proceeding is denied.

2. The defendant's request that this court abstain from hearing this adversary proceeding under either 11 U.S.C. §305 or 28 U.S.C. §1334 is denied.
3. The defendant's jury demand in this adversary proceeding is stricken.
4. The defendant's request that this court dismiss this adversary proceeding under Federal Rule of Civil Procedure 12(b)(6) (made applicable by Federal Rule of Bankruptcy Procedure 7012) is denied.
5. The defendant's suggestion that the court stay the proceedings pending a decision by the district court on her motion to withdraw the reference is denied without prejudice to her right to file a motion to stay further proceedings until the district court decides her motion to withdraw the reference.
6. The defendant must file and serve an answer to the complaint within 14 days of the entry of this order.
7. The court will hold a further pretrial conference on December 11, 2017, at 11:00 a.m. Parties may appear by telephone. To appear by telephone, you must call the court conference line at 1-888-684-8852, and enter access code 7183566 before the scheduled hearing time.
8. The Clerk shall forthwith transmit to the district court the defendant's motion requesting that the district court withdraw the reference (Adv. Proc. No. 17-2187, CM-ECF Doc. No. 8), as well as the parties' related briefing (Adv. Proc. No. 17-2187, CM-ECF Doc. Nos. 12 & 22).

# # # # #