



SO ORDERED,

A handwritten signature in blue ink, reading "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: March 24, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

DELTA INVESTMENTS &
DEVELOPMENT, LLC D/B/A GRAND
STATION CASINO, VICKSBURG, MS,

CASE NO. 12-01160-NPO

DEBTOR.

CHAPTER 7

J. STEPHEN SMITH, TRUSTEE AND
DELTA INVESTMENTS & DEVELOPMENT,
LLC D/B/A GRAND STATION CASINO,
VICKSBURG, MS

PLAINTIFFS

VS.

ADV. PROC. NO. 14-00021-NPO

GREAT SOUTHERN INVESTMENT
GROUP, INC.

DEFENDANT/
THIRD PARTY PLAINTIFF

VS.

GARY WILBURN, RICK TAYLOR,
GRANT TAYLOR, JANE SEARS,
DJJ&J ENTERPRISES, LLC, GATEWAY
GAMING, LLC, AND J. MICHAEL
CALDWELL

THIRD PARTY DEFENDANTS

**ORDER GRANTING MOTION TO DISMISS THIRD PARTY
COMPLAINT AGAINST GATEWAY GAMING, LLC AND J. MICHAEL CALDWELL**

This matter came before the Court at a hearing held on March 23, 2015 (the “Hearing”) on the Motion to Dismiss Third Party Complaint (the “Motion to Dismiss”) (Adv. Dkt. 121)¹ filed by Gateway Gaming, LLC (“Gateway”) and J. Michael Caldwell (“Caldwell”); the Memorandum Brief in Support of Motion to Dismiss Third Party Complaint (Adv. Dkt. 122) filed by Gateway and Caldwell; the Response in Opposition to Motion to Dismiss Third Party Complaint (the “Response”) (Adv. Dkt. 136) filed by Great Southern Investment Group, Inc. (“GS”); the Memorandum Brief in Support of Response in Opposition to Motion to Dismiss Third Party Complaint (Adv. Dkt. 137) filed by GS; and the Reply Brief in Support of Motion to Dismiss Third Party Complaint (Adv. Dkt. 140) filed by Gateway and Caldwell in the Adversary. At the Hearing, GS was represented by John D. Moore; Gateway and Caldwell were represented by Kevin A. Rogers; and the chapter 7 trustee was represented by R. Andrew Taggart, Jr. Having considered the matter and being fully advised in the premises, the Court ruled from the bench granting the Motion to Dismiss.² This Order memorializes and supplements the Court’s bench ruling.³

¹ Citations to docket entries in the above-referenced adversary proceeding (the “Adversary”) are cited as “(Adv. Dkt. ____)” and in the above-styled bankruptcy case (the “Bankruptcy Case”) are cited as “(Bankr. Dkt. ____)”.

² The day after the Hearing and before entry of this Order, GS filed the Defendant’s Motion to Withdraw the Reference, in Whole, As to Adversary Proceeding and Memorandum in Support Thereof (the “Motion to Withdraw”) (Adv. Dkt. 144). Under MISS. BANKR. L.R. 5011-1, a response or objection is due within fourteen (14) days of the service of a motion for withdrawal of the reference, and upon expiration of the fourteen (14)-day period, the Bankruptcy Clerk transmits the motion and any response or objection to the Clerk of the District Court. MISS. BANKR. L.R. 5011-1(a)(4)-(5). The filing of the Motion to Withdraw in this Bankruptcy Case does not stay the administration of the case or the Adversary. FED. R. BANKR. P. 5011(c). Contemporaneously with this Order, the Court has entered the Second Amended Scheduling Order. (Adv. Dkt. 147).

³ The following constitutes the findings of fact and conclusions of law of the Court pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Facts

For purposes of the Motion to Dismiss, the Court accepts all factual allegations in the Third Party Complaint (Adv. Dkt. 93) as true. *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981).

1. On May 27, 2011, the Debtor transferred \$1,357,635.00 to a bank account owned by GS and controlled by Rick Taylor. (Third Party Compl. ¶ 11). At the time of the transfer, Caldwell was the controlling member of the debtor, Delta Investments & Development, LLC d/b/a/ Grand Station Casino, Vicksburg, MS (the “Debtor”). (*Id.* ¶ 13).

2. On May 31 and June 2, 2011, GS distributed \$1,356,000.00 in equal amounts of \$452,000.00 each to its then shareholders: Rick Taylor, Jane Sears (through her company DJJ&J Enterprises), and Gary Wilburn (together, the “Former GS Shareholders”). (*Id.* ¶¶ 14-16).

3. On August 4, 2011, GS transferred \$300,000.00 to Gateway and a few months later reclassified the loan as “bad debt.” (*Id.* ¶ 25) GS suggests that \$300,000.00 was paid to Caldwell through Gateway as consideration for Caldwell’s role in the initial transfer of \$1,357,635.00. (*Id.*).

4. On April 2, 2012, the Debtor filed a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code. (Bankr. Dkt. 1). On November 30, 2012, the Debtor’s chapter 11 Bankruptcy Case was converted to chapter 7 (Bankr. Dkt. 280).

5. The Trustee initiated the Adversary against GS by filing a Complaint to Set Aside a Fraudulent Conveyance (the “Complaint”) (Adv. Dkt. 1) on April 2, 2014. In the Complaint, the Trustee seeks recovery of \$1,357,635.00 from GS based on theories of actual and constructive fraud under 11 U.S.C. § 548(a)(1)(A) and § 548(a)(1)(B).

6. GS filed the Answer and Affirmative Defenses of Great Southern Investment Group, Inc. to the Complaint to Set Aside a Fraudulent Conveyance and Motion to Dismiss (Adv. Dkt. 7) on May 2, 2014. Then, on December 11, 2014 GS filed the Motion for Leave to File Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, DJJ&J Enterprises, LLC, J. Michael Caldwell, and Gateway Gaming, LLC (Adv. Dkt. 70) in which GS sought permission to file third party claims for indemnification and unjust enrichment. Finding that the third party claims generally fell within the type of claims for which impleader under Rule 7014 of the Federal Rules of Bankruptcy Procedure is available and finding further that any affirmative defenses would be raised more appropriately by the third parties, the Court on December 31, 2014 entered the Order: (1) Granting Motion for Leave to File Third Party Complaint against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, DJJ&J Enterprises, LLC, J. Michael Caldwell, and Gateway Gaming, LLC and (2) Denying Limited Notice of Appearance for the Sole Purpose of Responding in Opposition to Great Southern Motion for Leave to File Third Party Complaint and Motion to Continue Hearing So As to Allow Gary Wilborn [*sic*], Rick Taylor and Any Other Parties Against Whom a Third Party Complaint Is Sought Who Has Not Been Served Any Notice Twenty (20) Days to More Thoroughly and Further Respond to Great Southern's Motion for Leave to File Third Party Complaint (Adv. Dkt. 95).⁴

7. GS filed the Third Party Complaint on December 31, 2014. In the Third Party Complaint, GS alleges the Former GS Shareholders were the actual recipients of the

⁴ Third party practice in adversary proceedings is governed by Rule 7014 of the Federal Rules of Bankruptcy Procedure, which incorporates by reference Rule 14 of the Federal Rules of Civil Procedure ("Rule 14"). Pursuant to Rule 14, a defendant may serve a summons and complaint on a nonparty "who is or may be liable" to the defendant "for all or part of the claim" against the defendant. FED. R. CIV. P. 14(a)(1).

\$1,357,635.00 transfer in question, and Gateway and Caldwell conspired with the Former GS Shareholders to facilitate that transfer.⁵ (Third Party Compl. ¶¶ 11, 24-25). GS seeks restitution and indemnification from Gateway, Caldwell, and the Former GS Shareholders. For the sake of brevity and clarity, the third party claims for unjust enrichment and indemnification against Gateway and Caldwell are referred to in this Order as the “Third Party Claims.”

8. The Former GS Shareholders filed the Answer to Third Party Complaint and Affirmative Defenses (Adv. Dkt. 119) on January 30, 2015 but have not filed a separate motion seeking dismissal of the third party claims asserted against them.

9. Gateway and Caldwell filed the present Motion to Dismiss seeking dismissal of the Third Party Claims on the grounds: (1) the Court lacks subject matter jurisdiction; (2) the unjust enrichment claim is not derivative of GS’s alleged liability; (3) the unjust enrichment claim is barred by the three-year statute of limitations; (4) GS may not obtain indemnification because GS was itself actively at fault; (5) the Third Party Claims fail to state a cause of action for relief.

10. GS filed the Response opposing the dismissal of the Third Party Claims.

Discussion

Federal Rule of Bankruptcy Procedure 7012(b) provides that Rule 12(b)-(i) of the Federal Rules of Civil Procedure applies in adversary proceedings. FED. R. BANKR. P. 7012(b). Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the court must dismiss a complaint if it finds that it lacks subject matter jurisdiction to hear the dispute. FED. R. CIV. P. 12(b)(1). The burden of proof rests on the party asserting subject matter jurisdiction. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

⁵ GS also names Grant Taylor as a third party defendant based on its assertion that Rick Taylor transferred his interests in GS to his son, Grant Taylor.

Subject matter jurisdiction over bankruptcy cases is rooted in 28 U.S.C. § 1334. *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 (1995). Under 28 U.S.C. § 1334(b), district courts have jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b). The district courts, in turn, refer such proceedings to the bankruptcy courts. 28 U.S.C. § 157(a). The Fifth Circuit Court of Appeals does not require that courts distinguish between proceedings “arising under,” “arising in a case under,” or “related to” a case under title 11 of the U.S. Code. *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987). Instead, the Fifth Circuit has noted that the language in 28 U.S.C. § 1334 operates conjunctively to define the scope of jurisdiction. Consequently, “bankruptcy courts need only determine whether a matter is at least ‘related to’ the bankruptcy.” *Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1022 (5th Cir. 1999) (citation omitted).

The Bankruptcy Code does not define “related to” jurisdiction. The Fifth Circuit nevertheless views “related to” as a term of art for purposes of bankruptcy jurisdiction. *Id.* A matter is “related to” a case under title 11 if “the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.” *Wood*, 825 F.2d at 93 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Conversely, “bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.” *Celotex*, 514 U.S. at 319 n.6.

Despite the seemingly broad reach of “related to” jurisdiction pronounced in *Celotex* and *Wood*, the issue here is governed squarely by *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562, 569 (5th Cir. 1995). There, the debtor brought an adversary proceeding against a creditor, the Cadle Company, for its violation of the automatic stay under 11 U.S.C. § 362 arising out of the removal of certain personal property from the debtor’s mobile home. The Cadle Company filed a third party complaint seeking contribution and/or indemnity against the individuals responsible

for actually removing the property. The Cadle Company claimed that the individuals, not the Cadle Company, should be held responsible for any damages to the debtor's property. The Fifth Circuit affirmed the dismissal of the third party complaint, holding that the contribution and/or indemnity claims had no conceivable effect on the administration of the debtor's estate and, therefore, the third party claims were unrelated to the bankruptcy case. The Fifth Circuit also rejected any argument that bankruptcy courts may exercise supplemental jurisdiction over claims unrelated to a bankruptcy case.

The Court finds *Walker* factually analogous to the present matter and, accordingly, finds that the Third Party Claims for unjust enrichment and indemnification are not proceedings "related to" the Debtor's bankruptcy case. "It is difficult to imagine that whether [Gateway or Caldwell] should be required to reimburse [GS] for any money [that GS] pays [the Debtor] could somehow affect the estate." *Walker*, 51 F.3d at 569.

GS does not attempt to distinguish *Walker* but argues that if it prevails, the Former Shareholders will be required to disgorge the funds they received from GS, a remedy that will inure to the benefit of the Trustee. GS's arguments were considered and rejected in *Walker* when the Fifth Circuit held that a determination of which party ultimately is responsible for damages is not a matter "related to" a bankruptcy case. *Id.* (citation omitted). The Court's finding on the jurisdictional issue renders it unnecessary to consider the other defenses raised by Gateway and Caldwell to the unjust enrichment and indemnification claims.

Conclusion

For the above and foregoing reasons, the Court concludes that the Motion to Dismiss should be granted and the Third Party Claims should be dismissed for lack of subject matter jurisdiction. In light of the disposition of the Motion to Dismiss, the Adversary is no longer

stayed. *See* Order Staying Adversary and Cancelling Trial Date (Adv. Dkt. 134). The Court will enter a second amended scheduling order contemporaneously with the entry of this Order and later will set a status conference for the purpose of selecting a date for the trial of the claims that remain in the Adversary.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss hereby is granted.

##END OF ORDER##