



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 26, 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, AND
DJJ&J ENTERPRISES, LLC

THIRD PARTY DEFENDANTS

**ORDER GRANTING MOTION TO DISMISS THIRD PARTY
COMPLAINT AGAINST GARY WILBURN, RICK TAYLOR,
GRANT TAYLOR, JANE SEARS, AND DJJ&J ENTERPRISES, LLC**

This matter came before the Court at a hearing held on May 13, 2015 (the "Hearing") on the Motion to Dismiss Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor,

Jane Sears, and DJJ&J Enterprises, LLC (the “Motion”) (Adv. Dkt. 152)¹ filed by Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJJ&J Enterprises, LLC (the “Former Shareholders”); the Memorandum in Support of the Motion to Dismiss Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJJ&J Enterprises, LLC (Adv. Dkt. 153) filed by the Former Shareholders; the Response in Opposition to Motion to Dismiss Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJ&J [sic] Enterprises, LLC (Adv. Dkt. 162) filed by Great Southern Investment Group, Inc. (“GS”); the Memorandum Brief in Support of Response in Opposition to Motion to Dismiss Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJ&J [sic] Enterprises, LLC (Adv. Dkt. 163) filed by GS; the Rebuttal to GSIG’s Response in Opposition to Motion to Dismiss Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJJ&J Enterprises, LLC (Adv. Dkt. 167) filed by the Former Shareholders; and the Memorandum Brief in Support of Rebuttal to GSIG’s Response in Opposition to Motion to Dismiss Third Party Complaint Against Gary Wilburn, Rick Taylor, Grant Taylor, Jane Sears, and DJJ&J Enterprises, LLC (Adv. Dkt. 168) filed by the Former Shareholders in the Adversary. At the Hearing, the Former Shareholders were represented by Penny B. Lawson, and GS was represented by Melanie T. Vardaman. Having considered the matter and being fully advised in the premises, the Court finds as follows:²

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 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, the Court accepts all factual allegations in the Third Party Complaint (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, Delta Investments & Development, LLC d/b/a Grand Station Casino, Vicksburg, MS (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, J. Michael Caldwell (“Caldwell”) was the controlling member of the Debtor. (*Id.* ¶ 13).

2. On May 31 and June 2, 2011, GS distributed \$1,356,000.00 to the Former Shareholders.³ (*Id.* ¶¶ 14-16).

3. On August 4, 2011, GS paid \$300,000.00 to Gateway Gaming, LLC (“Gateway”), an entity controlled by Caldwell. (*Id.* ¶ 25) GS now suggests that it paid these funds to Gateway as compensation for Caldwell’s key role in the transfer from the Debtor to GS of \$1,357,635.00. (*Id.*).

4. On April 2, 2012, the Debtor filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the “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 standing chapter 7 trustee initiated the Adversary against GS by filing a Complaint to Set Aside a Fraudulent Conveyance (the “Complaint”) (Adv. Dkt. 1) on April 2,

³ GS distributed \$1,356,000.00, in equal amounts, to Rick Taylor, Jane Sears (through her Company DJJ&J Enterprises), and Gary Wilburn. Grant Taylor is Rick Taylor’s son and is named as a third party defendant based on GS’s assertion that Rick Taylor transferred his interests in GS to Grant Taylor.

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. With permission from the Court, GS filed the Third Party Complaint on December 31, 2014 against the Former Shareholders, Gateway and Caldwell. In the Third Party Complaint, GS alleges that the Former Shareholders were the actual recipients of the Debtor's transfer of \$1,357,635.00, and they conspired with Caldwell and Gateway to facilitate that transfer. (Third Party Compl. ¶¶ 11, 24-25). GS asserts claims against the Former Shareholders, Caldwell, and Gateway for unjust enrichment and indemnification under Mississippi law (the "Third Party Claims") and alleges that the Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. GS does not cite any provision of the Code as a basis for relief in the Third Party Complaint.

7. The Former Shareholders filed the Answer to Third Party Complaint and Affirmative Defenses (Adv. Dkt. 119) on January 30, 2015.

8. On February 4, 2015, Caldwell and Gateway filed the Motion to Dismiss Third Party Complaint (the "Caldwell Motion") (Adv. Dkt. 121) seeking dismissal of the Third Party Claims on the ground, *inter alia*, that the Court lacked subject matter jurisdiction.

9. On March 24, 2015, the Court entered the Order Granting Motion to Dismiss Third Party Complaint Against Gateway Gaming, LLC and J. Michael Caldwell (the "Caldwell Order") (Adv. Dkt. 146). As a result of the Caldwell Order, Caldwell and Gateway were dismissed from the Adversary.

10. On April 2, 2015, the Former Shareholders filed the Motion, asserting essentially the same jurisdictional ground for dismissal alleged by Caldwell and Gateway in the Caldwell Motion.

Discussion

The Court treads familiar ground. Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b), the Court must dismiss the Third Party 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 GS to show that jurisdiction is proper. *Wolcott v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011).

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, may refer such proceedings to the bankruptcy courts under 28 U.S.C. § 157(a).

As mentioned previously, GS does not cite any provision of the Code as a basis for relief in the Third Party Complaint but asserts state law claims for unjust enrichment and indemnification against the Former Shareholders. The Third Party Claims, therefore, do not arise in or under the Code. GS argues, however, that the Third Party Claims meet the lesser “related to” jurisdictional standard of 28 U.S.C. § 1334.

The Code does not define “related to” jurisdiction. In its seminal decision analyzing 28 U.S.C. § 1334, *Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987), the Fifth Circuit Court of Appeals adopted the definition used by the Third Circuit Court of Appeals in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In *Pacor*, the Third Circuit held that an action is related to a bankruptcy case if “the outcome of that proceeding could *conceivably* have any effect on the estate being administered in bankruptcy.” *Id.* at 994 (emphasis added); *Wood*, 825 F.2d at 93; *see also Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1022 (5th Cir. 1999) (finding

“related to” jurisdiction “if the outcome could alter the debtor’s rights, liabilities, options or freedom of action (either positively or negatively) and . . . in any way impacts upon the handling and administration of the bankruptcy estate”) (footnote omitted). The Third Circuit in *Pacor* ruled that “related to” jurisdiction did not extend to a products liability claim brought against a distributor of the debtor’s product. *Pacor*, 743 F.2d at 995. In response to the original action, the distributor had filed a third party indemnification claim against the debtor.

GS argues that “related to” jurisdiction in 28 U.S.C. § 1334(b) reaches the Third Party Claims because the Former Shareholders “were the actual recipients of the transfer of the subject funds, which is the basis for the Trustee’s fraudulent conveyance action.” (GS Br. at 2). This fact, according to GS, distinguishes the Third Party Claims asserted against the Former Shareholders from those alleged against Caldwell and Gateway that were dismissed under the Caldwell Order. Caldwell and Gateway did not actually receive any of the funds disbursed by the Debtor to GS but instead purportedly received \$300,000.00 from GS for their role in facilitating the transfer in question. According to GS, this difference is sufficient to defeat the Motion by the Former Shareholders.

As it found in the Caldwell Order, the Court finds here that the jurisdictional issue regarding the Third Party Claims against the Former Shareholders is governed squarely by *Walker v. Cadle Co. (In re Walker)*, 51 F.3d 562 (5th Cir. 1995). In *Walker*, the debtor brought an adversary proceeding against the Cadle Company for its alleged violation of the automatic stay under 11 U.S.C. § 362. *Walker*, 51 F.3d at 569 (citation omitted). The Cadle Company filed a third party complaint seeking contribution and/or indemnity from the individuals who removed the personal property from the mobile home allegedly in violation of the stay. In other

words, the Cadle Company maintained that the individuals should be held solely responsible for any damages to the debtor's property.

On appeal, the Fifth Circuit in *Walker* 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 not "related to" the bankruptcy case. "It is difficult to imagine that whether [the individuals] should be required to reimburse [the] Cadle [Company] for any money [the] Cadle [Company] pays to [the debtor] could somehow affect the estate." *Walker* 51 F.3d at 569 (citation omitted). The Fifth Circuit also rejected any argument that bankruptcy courts may exercise supplemental jurisdiction over third party claims under 28 U.S.C. § 1367.

Recognizing that *Walker* constitutes binding precedent in this judicial district and that its application would mandate the dismissal of the Third Party Claims, GS insists that *Walker* is factually distinguishable. GS relies on *Brown v. Cantey & Hanger, LLP (In re Forth Worth Osteopathic Hospital, Inc.)*, No. 4:07-CV-206-Y, 2008 WL 2522528, at *13-14 (N.D. Tex. June 25, 2008) (unpublished), for the proposition that "at least one federal district court has found that the bankruptcy court enjoys jurisdiction over third-party claims." (GS Br. at 2).

In *Cantey*, a chapter 7 trustee filed an adversary complaint against Cantey & Hanger, L.L.P. ("Cantey & Hanger") alleging that it assisted or encouraged breaches of fiduciary duty by the officers and directors of the debtor, the Fort Worth Osteopathic Hospital, Inc. (the "Hospital"), and thereby contributed to its "catastrophic" financial failure. Cantey & Hanger then filed a third-party complaint against MBIA Insurance Corporation ("MBIA") asserting a right of contribution on the ground that MBIA assisted or encouraged any such breaches of

fiduciary duty. Citing *Walker*, MBIA filed a motion to dismiss the third party complaint for lack of subject matter jurisdiction.

The bankruptcy court in *Cantey* concluded that the facts presently before it were insufficient to determine whether the third party claim against MBIA was related to the Hospital's bankruptcy case because it was unsure about whether the third party claim would affect the trustee's ultimate recovery. *Brown v. Cantey & Hanger, LLP (In re Forth Worth Osteopathic Hosp., Inc.)*, No. 07-04015, 2008 WL 2553066, at *3 (Bankr. N.D. Tex. Mar. 6, 2008). Although the bankruptcy court believed that "related to" jurisdiction probably existed pursuant to 28 U.S.C. § 1334(c), it was sensitive to MBIA's concerns about "the potential for wasted time and litigation expense" should the jurisdictional issue be overturned on appeal. Therefore, the bankruptcy court, *sua sponte*, recommended to the district court that it withdraw the reference of the third party proceeding. *Id.* at *4.

On appeal, the district court agreed that the bankruptcy court had proper jurisdiction over the third party claim against MBIA. *Cantey*, 2008 WL 2522528, at *2-3. The district court, however, disagreed with the bankruptcy court that jurisdiction existed only until it became possible to determine whether the third party claim would ultimately affect the bankruptcy estate. The "conceivable effect" standard, according to the district court, is applied when the jurisdiction of the federal court is first invoked, and, therefore, the later outcome of the third party claim is irrelevant to that inquiry. *Id.* at *3 (quoting *Randall & Blake, Inc. v. Evans (In re Canion)*, 196 F.3d 579, 586 n.29 (5th Cir. 1999)). Even so, the district court shared the bankruptcy court's concern as to whether "related to" jurisdiction under 28 U.S.C. § 1334 would be upheld on appeal and, therefore, accepted the bankruptcy court's recommendation to withdraw the reference of the third party claim against MBIA. *Cantey*, 2008 WL 2522528, at *5.

The Court notes at the outset that *Cantey* is an unpublished opinion and was rendered in the Northern District of Texas. *Cantey*, therefore, does not constitute binding precedent in the Southern District of Mississippi. The Court further notes that the jurisdictional finding in *Cantey* was not necessary. *See Centennial Ins. Co. v. Ryder Truck Rental, Inc.*, 149 F.3d 378, 385-86 (5th Cir. 1998) (defining “obiter dictum” as stating only “by the way” to the holding of a case). Moreover, apart from its limited precedential value, the Court finds that *Cantey* does not support the extension of jurisdiction to the Third Party Claims.

The facts surrounding MBIA’s alleged involvement in the “catastrophic” financial failure of the Hospital are not analogous to those alleged by GS against the Former Shareholders. Unlike GS, *Cantey & Hanger* did not assert a third party claim against its former partners. There was no similar allegation of “conduit” liability in *Cantey*, but, rather, *Cantey & Hanger* argued that MBIA caused injury to the financial health of the Hospital apart from its own purported role in breaching its fiduciary duty.

Cantey is the only legal authority cited by GS that even suggests that “related to” jurisdiction may exist over a third party claim notwithstanding the Fifth Circuit’s decision in *Walker*. Although GS cites three (3) other cases that allegedly have recognized “related to” jurisdiction over third party actions, none of them was rendered by the Fifth Circuit or a court bound by Fifth Circuit precedent. (GS Br. at 4). Thus, none of them discusses or cites *Walker*. All three (3) cases apply the “conceivable” effect standard pronounced in *Pacor*, but the Court finds none of them persuasive.

In the first case cited by GS, *Kaonohi Ohana, Ltd. v. Sutherland*, 873 F.2d 1302 (9th Cir. 1989), the Ninth Circuit Court of Appeals applied the *Pacor* formula to determine whether a third party claim for specific performance was “related to” the bankruptcy case of Kaonohi

Ohana, Ltd. (“Kaonohi”). *Kaonohi*, 873 F.2d at 1306-07. Nancy Sutherland (“Sutherland”) filed an adversary proceeding alleging that Kaonohi breached its agreement to sell her 5.5 acres of Hawaiian beach front property. She sought monetary damages against Kaonohi and specific performance against Sylvester Stallone (“Stallone”) who purchased the property after Kaonohi had agreed to sell it to her. The bankruptcy court dismissed Sutherland’s specific performance claim against Stallone on the ground it was not sufficiently related to Kaonohi’s bankruptcy case to create jurisdiction under 28 U.S.C. § 1334(b). On appeal, the Ninth Circuit reversed the lower court’s dismissal on the ground that the disposition of Sutherland’s claim against Stallone could reduce the amount of damages owed by Kaonohi’s bankruptcy estate for breach of its contract to sell the land to Sutherland. The Court finds *Kaonohi* inapposite. Unlike Stallone’s potential liability to Sutherland, the potential liability of the Former Shareholders to GS will have no conceivable effect on the Debtor’s bankruptcy estate.

In the second case cited by GS, *8300 Newburgh Road Partnership v. Time Construction, Inc. (In re Time Construction, Inc.)*, 43 F.3d 1041 (6th Cir. 1995), an arbitration panel awarded Time Construction, Inc. (“Time”) \$1,474,644.33 in damages against 8300 Newburgh Road Partnership (“NRP”) and its named partners. Thereafter, NRP filed a state court action seeking to vacate the arbitration award and compel an accounting. Time filed a bankruptcy petition, and the pending state court action was transferred to the bankruptcy court. After the arbitration award was affirmed by the bankruptcy court, NRP moved to dismiss the adversary proceeding for lack of subject matter jurisdiction under the *Pacor* formula. On appeal, the Sixth Circuit Court of Appeals held that “related to” jurisdiction was proper, noting that the arbitration award was the largest asset of Time’s bankruptcy estate.

GS cites *Time* for its holding that an action against a debtor's sole shareholder will directly impact the value of that debtor. (GS Br. at 4). GS does not explain why the holding supports the "related to" jurisdictional reach of 28 U.S.C. § 1334(b) over the Third Party Claims. The Court finds no reason why the disposition of the unjust enrichment and indemnification claims between GS and the Former Shareholders would directly impact the Debtor's value (as opposed to GS's value).

Finally, GS cites *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993). There, Dr. Ken Palmer ("Dr. Palmer") sold his dental practice to Dr. James Abramowitz ("Dr. Abramowitz"), and Dr. Palmer and his wife, Toni Palmer (together, the "Palmers"), used the sales proceeds to purchase a new home. *Abramowitz*, 999 F.2d at 1275. Dr. Palmer then filed a chapter 7 bankruptcy case. Toni Palmer did not join in her husband's petition. Dr. Abramowitz filed an adversary proceeding against the Palmers seeking damages for breach of contract and fraud arising out of the sale of the dental practice. Dr. Abramowitz also asked that any assets purchased by the Palmers using the sale proceeds be held in a constructive trust. The bankruptcy court ruled in favor of Dr. Abramowitz on his fraud claim, holding not only that the debt was nondischargeable in Dr. Palmer's bankruptcy case but also that the Palmers held the new home in a constructive trust for the benefit of Dr. Abramowitz.

In *Abramowitz*, Toni Palmer argued on appeal that the bankruptcy court lacked subject matter jurisdiction over Dr. Abramowitz's claims against her. According to Toni Palmer, because the chapter 7 trustee failed to object to the exemption of the home from the bankruptcy case, the home was not an asset of Dr. Palmer's estate and any claim regarding the home was outside the jurisdiction of the bankruptcy court.

Turning to the “conceivable effect” test pronounced in *Pacor*, the Eighth Circuit Court of Appeals in *Abramowitz* concluded that the bankruptcy court had “related to” jurisdiction over the claims against Toni Palmer because the bankruptcy court could not fully and fairly adjudicate the rights and liabilities of Dr. Palmer without also determining Toni Palmer’s interest in the home. By including a determination of Toni Palmer’s fraud, the bankruptcy court was able to determine whether the home was subject to levy in satisfaction of Dr. Palmer’s debt to Dr. Abramowitz under state law. Thus, according to the Eighth Circuit, the bankruptcy court acted within its “related to” jurisdiction “given the unusual factual record in this case.” *Id.* at 1279.

GS cites *Abramowitz* for its holding that “related to” jurisdiction extends to a third party action when the debtor’s rights in jointly held property otherwise may not be determined. (GS Br. at 4). GS fails, however, to point to any property jointly held by GS and the Former Shareholders that creates state law issues similar to those in *Abramowitz*.

At the Hearing, the Court asked counsel for GS to apply the “conceivable effect” standard pronounced in *Wood* to the Third Party Claims. (Hr’g Tr. at 10:07:56).⁴ Counsel responded that it is “conceivable” that if the Third Party Claims against the Former Shareholders are allowed to proceed: (1) the Trustee may locate additional assets for the benefit of the Debtor’s estate, and (2) the Trustee may determine that GS is not a proper party in the Adversary. (Hr’g Tr. at 10:08:05–10:09:12). Counsel then raised two (2) questions in applying the “conceivable effect” standard to the present facts: Who should the Trustee sue? How much should the Trustee recover? (*Id.*). The Court finds, however, that these matters may be fully explored without the Former Shareholders being named as third party defendants in the Adversary.

⁴ Because the Hearing was not transcribed, the citation is to the time stamp of the recording.

In summary, the Court finds that *Cantey* does not remove the Third Party Claims from *Walker*'s reach, and *Kaonohi*, *Time*, and *Abramowitz* do not support GS's attempt to distinguish *Walker* from the Third Party Claims. In *Walker*, the Fifth Circuit noted that the vast majority of cases had found that "related to" jurisdiction was lacking in connection with third party complaints. The potential liability of the Former Shareholders to GS has no more conceivable effect on the Debtor's bankruptcy estate than the third party claims by the Cadle Company against the individuals in *Walker*. "[B]ankruptcy courts have no jurisdiction over proceedings that have no effect on the estate of the debtor." *Celotex*, 514 U.S. at 308 n.6. Accordingly, the Court finds that the Third Party Claims for unjust enrichment and indemnification are not proceedings "related to" the Debtor's Bankruptcy Case.

Conclusion

For the above and foregoing reasons, the Court concludes that the Motion should be granted and the Third Party Claims against the Former Shareholders should be dismissed for lack of subject matter jurisdiction.

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

##END OF ORDER##