IT IS ORDERED as set forth below:

Date: May 18, 2016

Barbara Ellis-Monro
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	
ROHRIG INVESTMENTS, LP et al.,	CASE NO. 13-53483-BEM
Debtors.	CHAPTER 11

O R D E R

This matter comes before the Court on Debtor's "Motion, Pursuant to 11 U.S.C. § 350 and F.R.B.P. 5010, to Reopen the Bankruptcy Case of Rohrig Investments, LP for the Limited Purpose of Enforcing the Settlement Agreement and Release Between the Rohrig Parties and the Loudermilk Parties" (the "Motion to Reopen") [Doc. 1108], The Knuckle Partnership, LLLP and Robert C. Loudermilk, Jr.'s "Objection to Motion to Reopen Case" [Doc. 1116], the "Objection of 3110 Roswell Road, LLC to Motion to Reopen Case" [Doc. 1117], and 3116-3136 Roswell Road, LLC's "Objection to Motion to Reopen Case" [Doc. 1118]. The Motion to Reopen and Objections thereto were heard on January 13, 2016. David L. Bury, Jr. and Ward Stone appeared on behalf of Debtor; Michael J. King appeared on behalf of 3116-3136 Roswell Road, LLC; George M. Geeslin appeared on behalf of 3110 Roswell Road, LLC; and Gary W.

Marsh appeared on behalf of The Knuckle Partnership, LLLP and Robert C. Loudermilk, Jr. At the conclusion of the hearing, the Court asked the parties to file supplemental briefs on the issue of abstention. Having considered the pleadings, the arguments, and the legal authorities, the Court now concludes that in this case, it should not abstain and further that the case should be reopened.

I. Background

The Motion to Reopen arises out of a settlement agreement (the "Settlement Agreement" or the "Agreement") that resolved an adversary proceeding styled 3116-3136 Roswell Road LLC v. Rohrig Investments, LP and George W. Rohrig, Jr., AP No. 14-5329. The Agreement amounted to a global resolution between the parties because it effectuated a "business divorce," and further, provided for: dismissal of an appeal of an order granting stay relief, withdrawal of certain proofs of claims and objections thereto, and withdrawal of certain objections to confirmation of Debtor's chapter 11 plan of reorganization. [Doc. 1054]. The Settlement Agreement identified the parties to the Agreement as follows: Rohrig Investments, LP ("Debtor"), George W. Rohrig, Jr. ("George Rohrig" and collectively with Debtor, the "Rohrig Parties"), The Knuckle Partnership, LLLP ("Knuckle"), 3116-3136 Roswell Road, LLC ("3116"), and Robert C. Loudermilk, Jr. ("Loudermilk Jr." and collectively with Knuckle and 3116, the "Loudermilk Parties") [Doc. 1054, Exhibit A at 1.]

The Agreement provides in relevant part:

> **3.0 <u>Conveyance of 8 at 8 Property</u>.** Within three (3) business days of Authorization, the Loudermilk Parties will obtain from 3110 Roswell Road, LLC and deliver to [Debtor] a Limited Warranty Deed granting title to [Debtor] of property known as the 8 at 8 space subject to encumbrances of record. The 8 at 8 space (the "8 at 8 Property") is currently part of property numbered in Fulton County, Georgia as 3110 Roswell Road. In consultation with [Debtor]'s surveyors and attorneys, and to the extent it is

> legally possible, the Loudermilk Parties will obtain from 3110 Roswell Road, LLC and convey to [Debtor] by limited warranty deed an extension of the property lines for the 8 at 8 Property westward to Early Street subject to documentation and surveys, as necessary. Any extension of the property lines will include cross easements for the benefit of 3110 Roswell Road, LLC and the Loudermilk Parties. In addition, the Loudermilk Parties will obtain from 3110 Roswell Road and convey to [Debtor] an easement for pedestrian traffic to the portion of the 3110 Roswell Road property commonly known as the "breezeway." The Rohrig Parties and the Loudermilk Parties will split the costs of documentation and surveys related to the conveyance of the 8 at 8 Property, and any extension or relocation of property lines, up to $10,000 on a 50-50 basis.

[Doc. 1054, Exhibit A at 9]. The Agreement further provides for a release of all the Rohrig Parties' claims against R. Charles Loudermilk, Sr. ("Loudermilk Sr.") and his affiliated limited liability companies, among others. *Id.* at 11. Finally, the Agreement provides:

> Until such time as all undertakings and obligations of the Parties under this Agreement are fully performed and complete, the Bankruptcy Court shall have and retain jurisdiction to the maximum extent legally permissible to hear and determine any dispute between or among the Parties arising out of or related to this Agreement; to construe and to take any other action to enforce this Agreement; to issue such orders as may be necessary for the implementation, execution, performance and consummation of this Agreement, and all matters referred to herein.

Id. at 15. The Agreement was announced on the record on October 28, 2014 at the hearing on confirmation of Debtor's second amended chapter 11 plan of reorganization (the "Plan"). It was then formalized and subject of a Rule 9019 motion to compromise or settle. [Doc. 1040]. The Rule 9019 motion was heard on December 3, 2014, and the Agreement was approved by the Court on December 4, 2014. [Doc. 1054]. The order approving the Agreement provides: "its [the Agreements] terms are hereby incorporated herein as substantive provisions of this Order and as an order of this Court, and are binding on all parties thereto." *Id.* at 2. The order further provides

for retention of jurisdiction by the Court to resolve disputes arising out of or related to the Settlement Agreement. *Id.* at 2-3.

The Settlement Agreement was signed by George Rohrig in his individual capacity and as sole general partner of Debtor. *Id.*, Exhibit A at 16. The Agreement was also signed by Loudermilk Jr. in his individual capacity, as manager of 3116, and as manager of the Knuckle Company, LLC, a general partner of Knuckle. *Id.*, Exhibit A at 16-17.

The 8 at 8 Property described in the Agreement is owned by 3110 Roswell Road, LLC ("3110" and together with the Loudermilk Parties, the "Respondents"), which in turn is owned by Loudermilk Sr., neither of whom is a named party to the Agreement. After the Settlement Agreement was approved by the Court, 3116 tendered to Debtor a warranty deed for the 8 at 8 Property that failed to fully extend the property lines to Early Street. Debtor did not accept the deed.

Debtor filed the Motion to Reopen to pursue further proceedings to enforce the Settlement Agreement. Debtor's proposed "Motion to Enforce Settlement Agreement and Release" (the "Motion to Enforce") names Knuckle, 3116, Loudermilk Jr., and 3110 as respondents. The motion requests relief in the form of specific performance of delivery of a warranty deed for the 8 at 8 Property with property lines extended to Early Street. Respondents oppose reopening the case.

II. Abstention

As the underlying dispute currently before the Court arises post-confirmation in a chapter 11 case and raises questions of state contract and property law, the Court *sua sponte* raised the question of abstention. A bankruptcy court may abstain from hearing a proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law …."

28 U.S.C. § 1334(c)(1). In deciding whether to abstain, courts consider a variety of factors, none of which is determinative in and of itself. The factors include: (1) effect of abstention on the efficient administration of the bankruptcy estate; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable law; (4) the presence of a related proceeding in a nonbankruptcy forum; (5) the basis of the bankruptcy court's jurisdiction other than 28 U.S.C. § 1334; (6) the degree of remoteness or relatedness to the main case; (7) substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state-law claims from core bankruptcy matters; (9) the burden on the bankruptcy court's docket; (10) the existence of a right to jury trial; (11) the likelihood commencement of the case in bankruptcy court involves forum shopping; (12) the presence of non-debtor parties in the proceeding; (13) comity; and (14) the possibility of prejudice to other parties in the action. *See Anderson v. Patel (In re Diplomat Constr. Inc.)*, 512 B.R. 721, 724 (Bankr. N.D. Ga. 2014) (Diehl, J.); *Rayonier Wood Prods., LLC v. Scanware, Inc. (In re Scanware, Inc.)*, 411 B.R. 889, 897-98 (Bankr. S.D. Ga. 2009).

The Court will now consider each of these factors. Abstention would have little or no effect on the bankruptcy estate because the plan has been confirmed and substantially consummated. The primary issue—interpretation and enforcement of the Settlement Agreement—is an issue of state contract law. The Agreement expressly provides that it "shall be governed by, and construed in accordance with, the laws of the State of Georgia." [Doc. 1054, Exhibit A at 15]. The parties have not raised any novel or unsettled legal issues. No proceedings are pending in a non-bankruptcy forum. The issue involves interpretation of an order of this Court. This Court not only has jurisdiction to interpret its own order, but it expressly retained jurisdiction to do so in the order approving the Settlement Agreement; the parties also consented

to the Court's jurisdiction in the provisions of the Settlement Agreement itself. Further, the order approving the Agreement resolved several core matters, including confirmation of the Plan, and thus interpretation and enforcement of that order is itself a core matter. *See, e.g., Lothian Cassidy, LLC v. Ransom*, 428 B.R. 555, 560 (E.D.N.Y. 2010) ("[M]atters involving the enforcement or construction of a bankruptcy court order fall under 'arise in' jurisdiction."); *In re Motors Liquidation Co.*, 514 B.R. 377, 381 (Bankr. S.D.N.Y. 2014) ("Bankruptcy courts ... have subject matter jurisdiction to enforce their orders in bankruptcy cases and proceedings under those courts' '*airising in*' jurisdiction."); *In re Patriot Coal Corp.*, 539 B.R. 812, 818-819 (Bankr. E.D. Mo. 2015) ("'[T]he enforcement of orders resulting from core proceedings are considered core proceedings.' ... 'Requests for bankruptcy courts to construe their own orders must be considered to arise under title 11 if the policies underlying the Code are to be effectively implemented.'") (quoting *In re Williams*, 256 B.R. 885, 892 (B.A.P. 8th Cir. 2001); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 151, 129 S. Ct. 2195, 2205 (2009)("[T]he Bankruptcy Court plainly had jurisdiction to interpret and enforce its own prior orders.") .

Deciding this matter would not be a burden on the Court's docket, notwithstanding the Loudermilk Parties' contention that Debtor is seeking to streamline the process by initiating a contested matter to enforce the Settlement Agreement when the relief sought requires an adversary proceeding. *See* Fed. R. Bank. P. 7001(1), (2), (7). Such a procedural defect, to the extent it exists, can be remedied without burden to the Court. The parties disagree as to whether Respondents have a right to a jury trial. Debtor contends there is no right to a jury trial to enforce a settlement agreement, citing *Ford v. Citizens and So. Nat. Bank*, 928 F.2d 1118, 1121-22 (11th Cir. 1991) (a motion to enforce a settlement agreement is an action for specific performance, which is a purely equitable claim); *Oasis Oil & Refining Corp.*

v. Armada Transp. & Refining Co., 719 F.2d 124, 126 (5th Cir. 1983) (no right to jury trial in an action for specific performance of a contract). The Loudermilk Parties contend breach of contract cases give rise to a right to jury trial, a right they intend to assert if the case goes to trial in state court, citing Ga. Const. art. I, § 1, ¶ XI; *Raintree Farms, Inc. v. Stripping Ctr. Ltd.*, 166 Ga. App. 848, 848, 305 S.E.2d 660, 661 (1983) (the Georgia Constitution provides civil litigants with a right to jury trial in most cases). It is not clear which party is correct when the issue is enforcement of a settlement agreement, especially if the existence of the agreement is not in dispute. *See Peacock v. Spivey*, 278 Ga. App. 338, 342 n.4, 629 S.E.2d 48, 53 n.4 (2006). However, even if the Loudermilk Parties are entitled to a jury trial in state court, it is only one factor in the abstention analysis.

All the disputes resolved by the Settlement Agreement were first raised in the Bankruptcy Court and the Agreement itself contemplates any disputes arising from the Agreement will be decided in the Bankruptcy Court; accordingly, seeking enforcement of the Agreement in Bankruptcy Court does not raise questions of forum shopping. While the proceeding involves nondebtor parties, and a non-signatory to the Settlement Agreement, the long history of business dealings among the parties and their principals was a part of the lengthy proceedings in Debtor's case in this Court. The dispute raises no issues of comity. Finally, because Debtor is seeking to enforce contractual obligations, there is no prejudice to those parties that agreed to undertake those obligations and who agreed to have this Court adjudicate the same.

The abstention factors do not weigh heavily either in favor of or against abstention. However, because the Settlement Agreement was incorporated into an order of this

Court and because core matters were resolved within the Settlement Agreement, the Court concludes that it should not abstain if reopening the case is appropriate.

III. Motion to Reopen

The Court may reopen a case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). Here, Debtor seeks to reopen the case for cause. The Court has broad discretion based on consideration of all relevant facts to determine whether the movant has shown cause to reopen the case. *In re Tarrer*, 273 B.R. 724, 731-32 (Bankr. N.D. Ga. 2001) (Drake, J.). "In making the decision to reopen a case, the bankruptcy court should exercise its equitable powers with respect to substance over technical considerations to ensure substantial justice." *In re Chandler*, No. 02-65783, 2008 WL 7842073, at *2 (Bankr. N.D. Ga. May 23, 2008) (Mullins, J.) (citing *In re Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991)).

Courts consider a number of factors in deciding whether to reopen a case, including: (1) the benefit to the debtor; (2) the prejudice to the opposing party; (3) the benefit to the creditors; (4) the length of time that the case has been closed; (5) whether relief is available if the case is reopened; and (6) whether nonbankruptcy courts are available to consider the claims. *Id.* (citing *In re Rochester*, 308 B.R. 596, 601 (Bankr. N.D. Ga. 2004); *In re Lewis*, 273 B.R. 739, 744 (Bankr. N.D. Ga. 2001)); *Redmond v. Fifth Third Bank*, 624 F.3d 793, 798 (7th Cir. 2010). However, the Court will not reopen a case when doing so would be futile because it cannot provide relief to the moving party. *In re Phillips*, 288 B.R. 585, 587 (Bankr. M.D. Ga. 2002).

The type of circumstances in which courts decline to reopen a bankruptcy case due to futility include: (1) When the substantive relief requested would be time-barred. *In re Frazer/Exton Dev., L.P.*, 503 B.R. 620, 635-36 (Bankr. E.D. Pa. 2013); *In re Fellheimer*, 443

B.R. 355, 377 (Bankr. E.D. Pa. 2010). (2) When the movant cannot show it is entitled to any relief. *In re Owsley*, 494 B.R. 321, 326 (Bankr. E.D. Tenn. 2013) (case not reopened to allow debtor to pursue contempt action for discharge violation when the debt at issue was nondischargeable). (3) When granting the relief requested would not alter the status quo. *In re Serge*, 285 B.R. 632, 635-36 (Bankr. M.D.N.C. 2002) (no-asset chapter 7 case not reopened to allow the debtor to add an omitted creditor, when dischargeability of the debt would not be affected by doing so); *In re Clary*, 440 B.R. 122, 123 (Bankr. E.D. Va. 2010) (case not reopened to allow the trustee to administer an asset that was not property of the estate). (4) When the movant can obtain the relief in another forum. *In re Jenkins*, 330 B.R. 625, 630-31 (Bankr. E.D. Tenn. 2005) (case not reopened when state court had concurrent jurisdiction over a dischargeability claim). (5) When the court has no authority to grant the relief requested. *In re Buker*, No. 05-14084, 2007 WL 3171951, *1-2 (Bankr. E.D. Va. 2007) (case not reopened when court lacked jurisdiction to enforce a settlement agreement because the terms of the agreement had not been incorporated into a court order).

Here, Debtor seeks to reopen the case to enforce the Agreement. The Agreement not only resolved multiple disputes in the bankruptcy case, but unlike *Buker*, it was incorporated into an order of the Court. Debtor alleges that it has satisfied all its obligations under the Agreement but the Loudermilk Parties have not. As such, Debtor would benefit from reopening the case to enforce the Agreement.

The Respondents oppose reopening the case and argue that doing so would be futile because the relief sought is barred by the statute of frauds since the owner of the 8 at 8 property is not a signatory to the Agreement. They argue further that delivery of the deed Debtor seeks is not possible because 3110 is not willing to give the deed Debtor wants, that Debtor was

entitled to receive the 8 at 8 deed within three business days after approval of the Settlement Agreement and because Debtor did not receive the deed within three days Debtor could have sought relief prior to closing of the bankruptcy case.

The Settlement Agreement was approved on December 4, 2014. The Loudermilk Parties had three business days thereafter, through December 9, 2014, to deliver the 8 at 8 deed. The bankruptcy case was closed on March 3, 2015. On March 17, 2015, the Loudermilk Parties tendered the rejected deed. Debtor filed the motion to reopen on November 25, 2015. To the extent Respondents are arguing the motion to reopen should be denied based on laches, the Court is not persuaded. At the January 13, 2016 hearing, counsel for Debtor represented that they were attempting to negotiate a resolution with the Loudermilk Parties and only filed the Motion to Reopen when they were unsuccessful in doing so. The Loudermilk Parties do not dispute this. Accordingly, the Court is satisfied that any time lapse between the date Debtor was entitled to receive the 8 at 8 deed and the filing of the Motion to Reopen did not prejudice Respondents. *See In re Tarkington*, 301 B.R. 502, 506 (Bankr. E.D. Tenn. 2003).

Respondents remaining contentions are interrelated. Respondents contend that the Loudermilk Parties satisfied their obligation under the Settlement Agreement by tendering a deed that partially extended the property lines. Respondents contend it is not legally possible for the Loudermilk Parties to do more because the property is owned by 3110, which did not sign any documents agreeing to transfer the 8 at 8 Property with the property lines fully extended to Early Street and because 3110 is not willing to convey the 8 at 8 Property in that manner, the Loudermilk Parties can not legally do so, either. Whether the Loudermilk Parties are correct depends on the meaning of the phrase "legally possible" in the Settlement Agreement. Debtor contends it requires a legal impediment in the nature of a statute, regulation, or ordinance that

would prevent the extension. Respondents contend that the refusal of the owner of the 8 at 8 Property to agree to the requested extension is sufficient, when the owner is not a party to the Settlement Agreement. In response, Debtor contends 3110 is bound by the Settlement Agreement because it was represented by the Loudermilk Parties.

Debtor has sufficiently alleged a basis for a claim under the Settlement Agreement. Although Respondents may have defenses under the statute of frauds or agency principles, such defenses are not certain to succeed, and Debtor need not prove the merits of its claim at this stage in the proceedings. *In re Potes*, 336 B.R. 731, 732 (Bankr. E.D. Va. 2005). At a minimum, Debtor has advanced theories regarding the meaning of "legally possible" in the Settlement Agreement and whether 3110 is bound to the Agreement under principles of agency, promissory estoppel, or ratification. These theories are not frivolous or prima facie invalid, especially taking into account the fact that the Agreement provides for cross easements on 8 at 8 Property[1] "for the benefit of 3110 Roswell Road, LLC and the Loudermilk Parties" and provides for a release as to Loudermilk Sr, the owner of 3110,[2] and as to any affiliated limited liability companies. [Doc. 1054, Exhibit A at 9, 11]. As a result, the Court cannot say reopening the case would be futile. Although an alternate forum is available in state court, this Court has substantial familiarity with the extensive history of the case and with the disputes among the parties. It would be a waste of judicial resources to send the dispute to state court. Because the Settlement Agreement implicates the resolution of multiple disputes in the bankruptcy case and is part of an order of this Court, the Court will exercise its discretion to grant the Motion to Reopen.

[1] The Settlement Agreement does not state the nature or purpose of the easements. However, at the October 28, 2014 hearing, Mr. King said the transfer of the 8 at 8 Property was "subject to necessary cross-easements, as necessary, to also serve the Loudermilk-Knuckle and other Loudermilk properties." [Doc. 1121, Transcript of Oct. 28, 2014 Hearing, p. 4, li. 10-11]. Also at the hearing, Mr. Marsh stated: "And then the reciprocal easement that Mr. King talked about relating to the 8 at 8 would help service the Buckhead Theater. That would be an easement of access for that property." *Id.* at p. 11, li. 19-22.

[2] Debtor also contends Loudermilk Sr. is an owner of 3116. [Doc. 1119 n.8, citing AP 14-5329, Doc. 1 at ¶ 30].

As Respondents point out, Debtor's Motion to Enforce may not be the correct procedural mechanism to seek specific performance. Under Fed. R. Bankr. P. 7001(7), an adversary proceeding is required "to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief[.]" The "other equitable relief" referenced in the Rule may include "[a]ccountings and *specific performance* … as well as requests for marshalling assets, the imposition of a constructive trust, and an order to compel compliance with state law." 10 Collier on Bankruptcy ¶ 7001.08 (16th ed.) (emphasis added). In addition, Debtor indicated an intent to seek alternative relief if the Court determines specific performance is unavailable. Therefore, the Court will allow Debtor to modify its proposed Motion to Enforce to correct any procedural and pleading deficiencies, such as seeking alternative relief, so long as the amendment does go beyond the scope of the proposed Motion to Enforce. In other words, the amendment may not do more than seek relief for Respondents' failure to transfer the 8 at 8 Property with property lines extended to Early Street.

In accordance with the foregoing, it is ORDERED that the Motion to Reopen is GRANTED.

END OF ORDER

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