

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:	:	CASE NO. A11-68463-REB
	:	
LEE'S FAMOUS RECIPES, INC.,	:	
	:	
Debtor.	:	
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CUSTOMIZED DISTRIBUTION, LLC,	:	ADVERSARY PROCEEDING
	:	NO. 11-5482
Plaintiff,	:	
	:	
v.	:	
COASTAL BANK AND TRUST,	:	CHAPTER 11
a Division of Synovus Bank,	:	
	:	
Defendant,	:	JUDGE BRIZENDINE
	:	
and	:	
LEE'S FAMOUS RECIPES, INC.,	:	
	:	
Intervenor Defendant.	:	
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LEE'S FAMOUS RECIPES, INC.,	:	
	:	
Counter-claimant,	:	
	:	
v.	:	
CUSTOMIZED DISTRIBUTION, LLC,	:	
	:	
Counterclaim Defendant.	:	
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ORDER

Before the Court is the motion of Coastal Bank and Trust to dismiss pursuant to Fed.R.Bankr.P. 7012, as incorporating Fed.R.Civ.P. 12(b)(1) and 12(b)(6), and same having come on for hearing, and

the parties having submitted legal briefs that the Court has reviewed, upon consideration of same, and for the reasons stated in the written memorandum attached hereto, which are incorporated herein under Fed.R.Bankr.P. 7052, adopting Fed.R.Civ.P. 52, accordingly, it is

ORDERED that the motion of Coastal Bank and Trust to dismiss pursuant to Fed.R.Bankr.P. 7012, as incorporating Fed.R.Civ.P. 12(b)(1) and 12(b)(6) be, and the same hereby is, **denied**, and the parties are directed to proceed in the preparation of this adversary proceeding for trial.

The Clerk is directed to serve a copy of this Order upon counsel for Plaintiff-Counterclaim Defendant Customized Distribution, LLC, counsel for Defendant Coastal Bank and Trust, counsel for Debtor-Intervenor Defendant-Counter-claimant Lee's Famous Recipes, Inc., and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 12th day of December, 2011.


ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE

***Customized Distribution, LLC, Plaintiff v. Coastal Bank & Trust, Defendant,
Lee's Famous Recipes, Inc., Intervening Party Defendant and Counterclaimant
(Adversary Proceeding No. 11-5482)
In re Lee's Famous Recipes, Inc., Chapter 11 Case No. A11-68463-REB***

Coastal Bank & Trust's Motion to Dismiss

Coastal presents **three** arguments in support of its motion as follows –

1. **First**, citing *Stern v. Marshall*, 564 U.S. ___, 131 S.Ct. 2594 (2011) and Fed.R.Bankr.P. 7012(b), which incorporates Fed.R.Civ.P. 12(b)(1), **Coastal** contends that this Court lacks subject matter jurisdiction to hear **CDI's** marshaling claim with regard to seven real properties in which Coastal also asserts a security interest, because this claim arises under state law and concerns two non-debtor parties. It also states that it does not consent to jurisdiction in this Court.

Subject matter jurisdiction in bankruptcy is codified at 28 U.S.C. § 1334. There are **three** types of subject matter jurisdiction in bankruptcy—

- matters **arising under** title 11;
(where the substantive right at issue *is created by* title 11, e.g. an avoidance action, recovery of a fraudulent transfer or unauthorized post-petition transfer).
- matters **arising in a case** under title 11; and
(where the matter is not created by title 11, *but could not* have been prosecuted except for the existence of a bankruptcy case as it is part of the process of its operation, e.g. filing a proof of claim (claim allowance), obtaining credit, determining dischargeability, assuming or rejecting contracts, confirmation orders).
- matters **related to** a case under title 11.
(where resolution of same could have a material effect on the administration of the case or claims against the bankruptcy estate, but such a claim *could exist outside of* bankruptcy).

See generally Schroeder v. New Century Holdings, Inc. (In re New Century Holdings, Inc.), 387 B.R. 95, 104 (Bankr. D.Del. 2008) (cites omitted).

Procedures for hearing and deciding such matters, distinguishing between core and non-core proceedings, and determining the relative finality of bankruptcy court decisions are set forth in 28 U.S.C. § 157. Section 157(a) states that the district courts may refer all such matters to the bankruptcy court, while Section 157(b)(1) provides that bankruptcy judges may hear and enter orders and judgments in cases under title 11 and core proceedings “arising under title 11, or arising in a case under title 11” that is referred to the bankruptcy court. Section 157(b)(2) contains an illustrative list of such “core proceedings.” Non-core, related matters are addressed in Section 157(c). Finally, if the matter is *not* “related to,” such that it is neither core nor non-core, *then* the court has no

jurisdiction to decide the matter.

As recently confirmed by the United States Supreme Court, core matters generally implicate the bankruptcy court's "arising under" or "arising in" jurisdiction. *See Stern v. Marshall*, 564 U.S. ___, 131 S.Ct. 2594. Although the Supreme Court acknowledged that a counterclaim for tortious interference asserted therein by a bankruptcy estate against a creditor 'related to' the bankruptcy case and thus, *could* be considered a core matter under the terms of the statute, so that a bankruptcy court could enter a *final* order on such claim, the Court held that the United States Constitution *prohibits* such a result.

The Supreme Court found it determinative that the proof of claim did not affect the character of the estate's common law counterclaim against the creditor. Undoubtedly, the counterclaim 'related to' the estate and, if successfully prosecuted, a recovery would augment the estate. Yet, the counterclaim did not stem from the bankruptcy and as such, only an Article III court could enter a *final* decision on the counterclaim. By contrast, a bankruptcy judge can enter a final judgment on a claim for a voidable preferential transfer asserted in connection with a proof of claim because resolution of that issue would be inherent to the process of allowing or disallowing the creditor's claim. Simply stated, just because a creditor files a claim against the estate, a counterclaim by the estate is not a core proceeding on that basis alone. Rather, resolution of the proof of claim must necessarily affect the determination of the counterclaim for same to constitute a core proceeding.

As an initial matter, this Court observes that contrary to Coastal's assertion, the decision in *Stern* holds only that the bankruptcy court did not have *authority* to enter a *final* judgment on the counterclaim of the bankruptcy estate in ruling on the creditor's proof of claim—the Court did *not* hold that the bankruptcy court lacked *subject matter jurisdiction* to hear the counterclaim and enter a decision subject to *de novo* review.

Among other things, **Coastal** argues herein that marshaling is a creature of state law and is neither a right nor a remedy created under title 11. Moreover, Coastal disputes CDI's contention that this claim falls within the catch-all provisions of either 28 U.S.C. § 157(b)(2)(A) as a matter that "concerns the administration of the estate," or Section 157(b)(2)(O) as a proceeding "affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor" relationship or both. According to Coastal, CDI offers nothing more than self-serving statements in this regard that, if followed, would be an exception that swallows the rule.

A narrow focus on the marshaling claim alone does disclose a state law dispute between two non-debtors. Yet, especially after the Debtor was permitted to intervene, a wider perspective reveals that a substantial relationship exists between this claim and the rights of other *entities* that will be affected by a determination of same, including the bankruptcy estate, junior lienholders, and unsecured creditors. Further, the complaint of CDI and counterclaim of the Debtor also suggest a host of other bankruptcy *issues* with respect to the seven real properties in question that will need to be decided in connection with the resolution of this claim within the context of this Chapter 11 case. Not only does the confluence of so many issues support the Court's authority to enter a final

ruling on the matter, it also argues against dismissing the claim at this early stage. In other words, CDI's claim for marshaling is not an isolated issue, but is subsumed within the overall claims determination and allowance process in this bankruptcy case.

For instance, if CDI is successful on its marshaling argument, Coastal will need to look to the licensee notes to satisfy its claim and CDI would receive all or a portion of the proceeds from the sale of the seven real properties in which these entities assert competing interests. On the other hand, if CDI does not prevail and Coastal is allowed to retain the proceeds from sales of the properties, CDI may only have an unsecured claim. In either event, the outcome of this issue along with several others will determine CDI's status as a claimant as well as the availability of funds to be paid toward the claims of other secured and unsecured creditors.

In addition, as previously mentioned, the **Debtor** has now intervened in this proceeding and its presence more fully reveals and makes clear the extent to which other interests are implicated in deciding CDI's claim. As noted hereafter, Coastal itself recognizes the importance of Debtor's presence in the prosecution of CDI's claim as evidenced by its insistence that the Debtor should be added as a party to this action.

In its counterclaim, Debtor disputes the underlying basis and allowance of any claim by CDI. Further, in its counterclaim Debtor challenges the validity, extent, and priority of various interests in the proceeds from its property, along with issues of relative priorities and bifurcation of claims. There is also an issue concerning which particular obligations the Debtor guaranteed in connection with these parties, as well as the transfer of the underlying real properties to the Debtor before bankruptcy that gave rise to CDI's marshaling argument and whether CDI waived its right to marshaling in connection with the transfers.

Whatever the time frame of the transfers, Debtor now owns the properties in question. The security interests variously asserted by Coastal and CDI in those properties undoubtedly affect estate interests, and as noted above, distribution of the proceeds of same will be partially consummated through the sale of such assets, which will take place under the authority of this Court. Moreover, the outcome of the marshaling claim will influence the structure and terms of any reorganization plan proposed by the Debtor herein.

The Court further observes another factor showing the intertwined nature of the interests at stake herein is demonstrated by the fact that the Debtor joins in Coastal's opposition to the merits of CDI's claim. This position reflects that the Debtor perceives an advantage to its interests in preventing CDI from seeking to satisfy its claim from the sale of the seven properties, as well as in reorganizing its estate and its effort to pay its creditors.

Based on the above analysis, the Court concludes that it has subject matter jurisdiction over CDI's claim for marshaling under the circumstances and facts presented herein as intertwined with the associated issues raised by the Debtor, as same is a matter "arising in a case under title 11." Further, it is a core proceeding under 28 U.S.C. § 157(b)(2)(A) & (O) for which the Court may enter

a final order, as a matter “concerning the administration of the estate” and/or a proceeding “affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor...relationship.” While the Court is mindful that these provisions should not be used in a way as to swallow the rule, given the foregoing observations, such a threat is not a viable concern herein. Even if this were a non-core proceeding and “related to” the case, the Court still has jurisdiction to hear the matter and submit proposed findings and conclusions to the district court. In any event, the nature of the claim is not a sufficient ground for dismissal under Fed.R.Civ.P. 12(b)(1).

The Court believes its ruling is consistent with the rationale in *Stern* and that this Court has authority to enter a final ruling on CDI’s claim for marshaling because resolution of same bears substantively upon the issues of claim allowance and the distribution of estate property with an attendant effect on the creditors of this estate. A central tenet of bankruptcy jurisdiction is the responsibility of this Court to manage and oversee the administration of the estate, reorganization of the debtor, and payment on allowed claims of its creditors. This Court is also the appropriate forum to sort out competing claims and relative priorities of alleged secured claims.

Lastly, this Court observes that determining all the issues raised by the marshaling claim on a final basis will streamline the matters to be heard, allowing the Court to grant complete relief to all affected parties. It will also prevent an unseemly piecemeal effect, along with possibility of inconsistent results, if these issues were forcibly and artificially severed in terms of the relative finality of the Court’s decision. It will also serve to avoid unnecessarily wasting judicial resources or unduly adding to the administrative expenses of this estate.

2. Next, Coastal contends CDI’s complaint fails to state a claim upon which relief can be granted herein under Fed.R.Bankr.P. 7012(b), which adopts Fed.R.Civ.P. 12(b)(6), and should be dismissed because it does not meet the standards for marshaling under Georgia law. According to Coastal: (1) CDI does not hold a secured claim against the Debtor such that Coastal and CDI share a common debtor; (2) the property transfers from nondebtor LLC’s to the Debtor do not create a right of marshaling (the requirement of two funds or assets of the Debtor, from which the senior creditor may satisfy its claim, is not satisfied because but for the pre-petition transfer, Debtor would not have owned both); (3) CDI cannot show that marshaling will not impair or delay Coastal’s right to complete satisfaction; (4) marshaling will prejudice third parties; and (5) CDI has waived any right to marshaling.

The Court finds that these arguments are more appropriate to a motion for summary judgment and are not a reason for dismissal. Recently, the United States Supreme Court ruled that “to survive a motion to dismiss, a complaint must now contain factual allegations which are ‘enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.’” *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555, 127 S.Ct. at 1965, 167 L.Ed.2d 929, as quoted in *Berry v. Budget Rent A Car Systems, Inc.*, 497 F.Supp.2d 1361, 1364 (S.D.Fla. 2007); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). Upon review of the pleadings, under this standard the Court concludes that CDI has set forth sufficient allegations to support a claim for relief, and the Court will proceed to decide this matter on the merits.

3. **Finally**, Coastal asserts CDI has failed to join an indispensable party herein. As mentioned above, however, the Debtor has now filed a motion to intervene as well as a counterclaim against CDI. The Court concludes that the failure to add other parties is not a basis for dismissal of CDI's claim, as such entities may be added to this law suit.

In sum, for all of the above reasons, Coastal's motion will be denied.