

**IT IS ORDERED as set forth below:**



**Date: August 28, 2012**

*Mary Grace Diehl*

**Mary Grace Diehl  
U.S. Bankruptcy Court Judge**

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

In re	)	Case No. 10-43405-MGD
	)	
MORAN LAKE CONVALESCENT	)	Chapter 7
CENTER, LLC,	)	
	)	
Debtor.	)	Judge Mary Grace Diehl
	)	
SAS-Moran Lake, Inc.; SAS-Moran Lake	)	
Holding Company, LLC; SAS-Mount Berry, Inc.;	)	
and Richard W. Wolfe,	)	
	)	
Plaintiffs,	)	Adversary Proceeding
	)	Nos. 12-4015
v.	)	
	)	
Roswell Holdings Mortgage, LLC; Roswell	)	
Holdings, LLC; Bagel Law Firm, LLC; and	)	
Tracey L. Montz, as Trustee of Moran Lake	)	
Convalescent Center, LLC,	)	
	)	
Defendants.	)	
	)	

**ORDER GRANTING ROSWELL HOLDINGS, LLC'S AND  
ROSWELL HOLDINGS MORTGAGE, LLC'S MOTION TO DISMISS**

The Debtor in the underlying Chapter 7 case owns real property and leases a nursing home facility located on a parcel of that property to one Plaintiff in this action. The complaint seeks two main determinations. First, Plaintiffs seek to determine to whom the nursing home rents should be paid. Plaintiffs have alleged that there are four entities that have been paid post-petition rents on the facility. The parties agree that the estate has an interest in the rents pursuant to the lease agreement between Debtor and the Plaintiff nursing home tenant. Second, Plaintiffs seek to rescind a post-petition note sale and collateral assignment, including rescission of the guaranties. As to these state law rescission claims, two non-debtor entities dispute whether and what terms, if any, of a post-petition note sale and collateral assignment are in effect and enforceable as between themselves.

Two related Defendants have moved to dismiss. These Defendants are a non-institutional lender, Roswell Holdings Mortgage, LLC ("RHM"), and a related entity, Roswell Holdings, LLC. RHM was the original lender on the underlying note from Debtor and financed the sale of that note to Plaintiff SAS-Moran Lake Holding Company, LLC ("Moran Holding"). As part of the note sale, RHM took a security interest in the Debtor's note, deed to secure debt, and the rent assignment. In the motion to dismiss, RHM asserts that the Court lacks subject matter jurisdiction over the claims for rescission. Defendant Roswell Holdings moves to dismiss for failure to state a claim. For the reasons stated below, the Motion to Dismiss is **GRANTED**.

The Motion to Dismiss came on for hearing on August 10, 2012. Present at the hearing were Scott Jacobson for the Movants RHM and Roswell Holdings; Bill Rothschild for the Plaintiffs SAS-Moran Lake, Inc. and SAS-Mount Berry, Inc. (collectively, "Plaintiff Tenants"); James Boone for

Plaintiffs Moran Holding and Richard Wolfe; Michael Dominy for Defendant Bagel Law Firm, LLC; and Dennis Connolly and Heather Asher for Tracey Montz, Chapter 7 Trustee. At the close of the hearing, the Court took the matter under advisement.

The disputes before the Court are whether there is subject matter jurisdiction over the rescission claims and whether Plaintiffs state a claim against Defendant Roswell Holdings, LLC.<sup>1</sup> A short history of the various, relevant agreements between these parties is helpful to the analysis of whether the Court has subject matter jurisdiction.

## **I. FACTUAL BACKGROUND**

Moran Convalescent Center, LLC (“Debtor”) is the owner of real property and a nursing home facility on the property (“Moran Lake Facility”). The Moran Lake Facility is leased to Plaintiff SAS-Moran Lake, Inc. (“Moran Lake Tenant”) under a 10-year renewable term lease agreement (“Lease Agreement”) that provides for payment of a fixed base rent and additional rent, which varies based on the monthly revenues of the Moran Lake Facility. (Complaint, Exhibit 2). Plaintiff SAS-Mount Berry, Inc. operates another nursing home at a separate location that is not owned by Debtor. Plaintiff SAS-Mount Berry, Inc. is in a similar lease agreement with a non-debtor property owner.<sup>2</sup>

In April 2008, Debtor and RHM entered into a two-year loan agreement (“Debtor’s Note”) in the original principal amount of \$3,065,000.00. (Complaint, Exhibit 4). The Note is secured by a deed to secure debt on the Moran Lake Facility. An Assignment of Rents Agreement (“Rent

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<sup>1</sup> Defendant RHM also moves to dismiss based on improper venue under Rule 12(b)(3). Based on the jurisdictional ruling, there is no need to assess whether Rule 12(b)(3) provides a proper avenue for a party's request for dismissal based on a forum-selection clause.

<sup>2</sup> The Trustee has alleged that Debtor’s principal controlled the non-debtor entity that is property owner and the lessor at the Mount Berry facility. (Docket No. 16, ¶¶ 95-97). An amendment to the Lease Agreement includes Mount Berry rents. (Complaint, ¶ 29 & Exhibit 3).

Assignment”) was executed along with the Note. (Main Case No. 10-43405; Docket No. 30, p.32). Under the Rent Assignment, rents generated at the Moran Lake Facility that are due to Debtor under the Lease Agreement with SAS-Moran Lake also secure repayment of Debtor’s Note. Subsequent amendments were entered into and the parties dispute the validity and/or effect of the purported modifications to the Lease and Rent Assignment. Count I of the complaint seeks a determination as to whom rents should be paid.

Debtor filed Chapter 11 bankruptcy on August 31, 2010. Post-petition, in January 2011, RHM and Moran Holding entered into a Note Purchase and Sale Agreement (“Note Sale”). (Complaint, Exhibit 8). Moran Holding purchased Debtor’s Note and its related security instruments for \$3,500,000.00 from RHM. In the Note Sale transaction, RHM transferred to Moran Holdings: (1) RHM’s interest in Debtor’s Note and (2) RHM’s interest in the deed to secure debt on Debtor’s Moran Lake real property, the Rent Assignment, and a Mount Berry deed to secure debt. RHM financed \$3,450,000.00 of the Note Sale (“Moran Holding Note”) with Moran Lake also paying \$50,000.00 in cash to RHM. As security for the Moran Holding Note, RHM was granted a security interest in Debtor’s Note, the deed to secure debt on Moran Lake real property and other security documents, including the Rent Assignment (“Collateral Assignment”). (Complaint, Exhibit 11). Plaintiff Tenants and Richard Wolfe executed guaranties for the Moran Holding Note.

Plaintiffs brought this action seeking relief as to three counts. Count I seeks a ruling by the Court as to what party should receive Moran Tenant’s rent payments held in escrow and future rent payments. Count II is for rescission of the Note Sale and a determination that Moran Holding is entitled to certain sums paid in connection with the transaction. These amounts include the \$50,000.00 deposit and attorneys’ fees paid as provided under the Note Sale in the amount of

\$297,788.97. Count III seeks a determination that, based on the rescission, the guarantees in the Note Sale are void as well. Counts II and III will collectively be referred to as the “Rescission Claims.”

Roswell Holdings and RHM move to dismiss on several bases. First, Roswell Holdings moves to dismiss this action based on Debtor’s failure to state a claim against it. Roswell Holdings asserts that the Complaint fails to identify any cause of action against Roswell Holdings or to seek any relief from Roswell Holdings. Second, RHM moves to dismiss on a lack of subject matter jurisdiction as to the Rescission Claims, or, alternatively seeks abstention.<sup>3</sup>

## **II. JURISDICTION**

The bankruptcy court’s jurisdiction is limited to “any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11.” 28 U.S.C. § 157(a); 28 U.S.C. § 1134(b). In the Northern District of Georgia, the District Court has referred all proceedings within its bankruptcy jurisdiction to the bankruptcy court. 28 U.S.C. § 157(a); Local Rule 83.7, N.D. GA. A proceeding “arising under” title 11 involves a substantive right created by the Bankruptcy Code. *In re Toledo*, 170 F.3d 1340, 1344-1345 (11th Cir. 1999). A proceeding “arising in” title 11 typically includes administrative matters that can only arise in a bankruptcy. *Id.* “Arising under” and “arising in” provide the Court with “core” jurisdiction, allowing it to exercise full judicial power. *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 787 (11th Cir.

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<sup>3</sup> Plaintiffs Moran Holding and Richard Wolfe have moved to strike the amended motion to dismiss on procedural grounds. (Docket No. 30). Plaintiffs did not advocate this position at the August 10, 2012 hearing, and there is ample authority that allows the court to consider its jurisdiction or abstention on its own terms. *E.g., Gober v. TerraCorp. (In re Gober)*, 100 F.3d 1195, 1207 n.10 (5th Cir. 1996); *Bricker v. Martin (In re Bricker)*, 265 Fed. Appx. 141 (3d Cir. 2008). Plaintiffs’ request is denied.

1990).

Bankruptcy courts may hear non-core matters, but there is limited authority to enter a final order or judgment in non-core matters. 28 U.S.C. § 157(c)(1). In the Eleventh Circuit, “determining whether a civil proceeding is related to bankruptcy is whether the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy.” *In re Lemco Gypsum, Inc.*, 910 F.2d at 788 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). “The proceeding need not necessarily be against the debtor or the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.” *Id.* at 788 (quoting *Pacor*, 743 F.2d 984 at 994); *Celotex Corp.*, 115 S. Ct. at 1499 & n. 6 (expressing approval of the *Pacor* test). “The key word in the *Lemco Gypsum /Pacor* test is ‘conceivable,’ which makes the jurisdictional grant extremely broad.” *Continental Nat'l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999).

“Related to” jurisdiction is not unlimited, and the Eleventh Circuit has explained that there is not “related to” jurisdiction when the “[o]verlap between the bankrupt's affairs and another dispute is insufficient unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors. The mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of § 1334(b).” *In re Lemco Gypsum, Inc.*, 910 F.2d at 789.

A plaintiff has the burden of “showing by a preponderance of the evidence that subject matter jurisdiction exists.” *Lunney v. U.S.*, 319 F.3d 550, 554 (2d Cir. 2003) (citation omitted); see *Hedges v. U.S.*, 404 F.3d 744, 750 (3d Cir. 2005) (stating that the burden of persuasion rests with the

plaintiff "[w]hen subject matter jurisdiction is challenged under Rule 12(b)(1)").

### **III. Discussion**

#### **A. Roswell Holdings Mortgage**

The parties do not contest that the Court has subject matter jurisdiction as it relates to Count I. A determination of to whom rents should be paid is a matter that implicates property of the estate and is a core matter that “arises in” this bankruptcy case because it involves estate property under the Lease Agreement. The Lease Agreement between Debtor and Moran Lake Tenant remains in effect and the Debtor’s interest in the Lease Agreement is property of the estate under § 541(a). In fact, the parties agree that some rents have been remitted by Moran Lake Tenant to the Trustee during the pendency of this case. The rents result from the use of property of the estate and this claim is within the Court’s core jurisdiction.

As to the Rescission Claims, Plaintiffs have failed to establish that subject matter jurisdiction exists. Plaintiffs aver that jurisdiction over the Rescission Claims exists because it is a core matter for a determination as to the validity, extent, and priority of liens as provided by 28 U.S.C. § 157(b)(2)(K). Although the Rescission Claims involve liens on Debtor’s property, the validity, extent, and priority of those liens are not in dispute. The Rescission Claims merely put in dispute which entity holds the liens or interest in Debtor’s property. Reliance on § 157(b)(2)(K) to create jurisdiction would be misplaced. The adjudication of whether Plaintiffs or Defendants have an interest in property of the estate does not affect the validity or enforceability of the underlying Debtor’s Note and corresponding liens. As such, the substance and outcome of the Rescission Claims does not fall within subsection (b)(2)(K). *Continental Nat’l Bank v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1347 (11th Cir. 1999) (subsection (b)(2)(K) only encompasses proceedings to

determine the validity, extent, or priority of liens on the estate's or the debtor's property).

Additionally, Plaintiffs assert that jurisdiction is proper because the Court has *in rem* jurisdiction over Debtor's property under 28 U.S.C. § 1334(e)(1), which allows the Court to grant the relief requested in the Rescission Claims. Section 1334(e)(1) confers jurisdiction to the district court of "all property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e)(1). Debtor's reliance on this *in rem* jurisdiction conflates the security interest given in the Note Sale transaction with property of the estate. The holder of the security interest or note that relates to the property is not captured by § 1334(e)(1). The Rescission Claims do not impact the Debtor's property or the claims against property of the estate. Rather, the Rescission Claims merely determine which entity would assert such interests.

Plaintiffs present a novel argument that the Rescission Claims are akin to a claims transfer dispute under Rule 3001 and § 501, over which the Court could adjudicate the rightful holder of a claim under § 157(b)(2)(A) or (B). While the Rescission Claims present factual similarities to a disputed assignment of claim, the procedure of this action is distinct. Here, Defendants are contesting jurisdiction. In addition, the plaintiff has the burden to prove jurisdiction, and the court is charged with inquiring as to its jurisdiction independently. *Lunney v. U.S.*, 319 F.3d at 554; Fed. R. Civ. P. 12(h)(3). Plaintiffs have not satisfied its burden of proving jurisdiction under this theory. The Rescission Claims involve two non-debtor parties of a post-petition transfer disputing the validity of the Note Sale under state law. The outcome of these Rescission Claims and determined holder of Debtor's Note does not impact the estate in any meaningful way. Therefore, the Rescission Claims present no conceivable effect on the administration of the bankruptcy estate, and the court does not have jurisdiction over the rescission action.



Undeniably, the estate is impacted by the transaction between RHM and Moran Holding. This is evidenced by the Trustee's cross and counterclaims that seek avoidance and recovery in a variety of areas. However, the Rescission Claims asserted by Plaintiffs essentially only determine the party that holds Debtor's Note and the other related interests in property of the estate. The identity of that party does not have an impact on the estate. Here, there are common issues of fact with the bankruptcy, the rent determination, and the Rescission Claims. However, the state law Rescission Claims cannot be brought under the jurisdiction of the bankruptcy court based on common facts alone. *In re Lemco Gypsum, Inc.*, 901 F.2d at 789. The Court recognizes that there may be cases where a state law action between non-debtors would effect a debtor's estate. This case, however, is not one of them.

Notably, even if the Court had "related to" jurisdiction over the Rescission Claims, the Court would abstain. Discretionary abstention is governed by 28 U.S.C. § 1334(c)(1), which provides that a bankruptcy court may abstain from hearing a proceeding arising in or related to cases under title 11, when to do so is in the interest of justice, or in the interest of comity with state courts or respect for state law. There are fourteen factors that courts have considered for discretionary abstention, including: (1) the 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 commenced in state court or other non-bankruptcy court; (5) the basis of bankruptcy jurisdiction, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than form of an asserted "core" proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with

enforcement left to the bankruptcy court; (9) the burden of the bankruptcy court's docket; (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; (12) the presence in the proceeding of non-debtor parties; (13) comity; and (14) the possibility of prejudice to other parties in the action. *E.g., In re United Container LLC*, 284 B.R. 162, 176-77 (Bankr. S.D. Fla. 2002); *In re Fulton*, 2000 WL 33952875, at \* 3 (Bankr. S.D. Ga. June 29, 2000).

Comity and respect for state jurisdiction are compelling considerations in this case. Further, factors 1, 2, 4, 5, 6, 7, 8, 12, 13, and 14 weigh heavily in favor of abstention. There are no factors that strongly favor adjudicating the Rescission Claims in this Court. With respect to the first factor, the effect of abstaining from the Rescission Claims will not effect the efficient administration of the bankruptcy estate. The Rescission Claims do not alter the obligations, liabilities, or administration of the estate. The Note Sale and the related documents are implicated in administering the estate, but the holder of such interests or claims will neither impact nor impede the administration of the estate. The second factor also heavily weighs in favor of abstention. Here, the Rescission Claims are purely state law issues. With respect to the fourth factor, RHM has initiated a suit in the Superior Court of Gwinnett County naming the Plaintiffs in this action as Defendants. As to the fifth factor, there is no arguable alternative basis of bankruptcy jurisdiction other than 28 U.S.C. § 1334. Sixth, the Rescission Claims are remote to the main bankruptcy case. The Rescission Claims do not affect the validity of the Debtor's Note or the estate's interest in Debtor's property. Seventh, the substance of the Rescission Claims are state law causes of action between two non-debtor parties, weighing in favor of abstention. Eighth, there are no barriers to this Court enforcing the state court's judgment on the Rescission Claims. The identity of the party holding the interests and claims relating to

Debtor does not affect the administration of the estate. Under the twelfth factor, the Rescission Claims are exclusively between non-debtor parties. Under the thirteenth factor, the forum selection clause agreed to by the parties, in addition to purely state law claims, favors abstention. In applying the fourteenth factor, there is no prejudice to other parties in the action if the Rescission Claims by two non-debtor parties are adjudicated in the forum selected by the parties. The Rescission Claims do not impair or prejudice any non-parties' rights, only the entity against which those rights may be enforced.

### **B. Roswell Holdings**

Roswell Holdings, LLC moves to dismiss based on Plaintiffs failure to state a claim under Rule 12(b)(6). Rule 12(b)-(i) of the Federal Rules of Civil Procedure apply to adversary proceedings by virtue of Rule 7012 of the Federal Rules of Bankruptcy Procedure. Rule 12(b)(6) states “[a] motion asserting [a defense of failure to state a claim upon which relief can be granted] must be made before responsive pleading is allowed. Here, the answer and motion to dismiss were filed simultaneously. In this scenario, the court has discretion to view the Rule 12(b)(6) motion as having preceded the answer. 5C FED PRAC. & PROC. CIV. (3d ed.) § 1361.

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a “plausible claim for relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950 (2009); FED. R. CIV. P. 12(b)(6). Under Federal Rule of Civil Procedure 8(a)(2), a pleading need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). In ruling on a motion to dismiss, the court must accept all of the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Iqbal*, 129 S. Ct. at 1949. However, “[t]hreadbare recitals of the elements of a cause of

action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949. The complaint “must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory.” *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1969 (2007)(italics in original).

“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal* at 1949. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950 (citation omitted). The movant has the burden of demonstrating that dismissal is appropriate. *Paul v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)*, 496 F. Supp. 2d 404, 408 (D. Del. 2007).

The well plead facts in the complaint do not make out any claims against Defendant Roswell Holdings. There is no viable legal theory for recovery as to Roswell Holdings. Even accepting all the facts as plead as true, the complaint does not identify Defendant Roswell Holdings as a potential entity to which rents could be paid. Therefore, Plaintiffs have failed to state a claim against Roswell Holdings under Count I. Similarly, the Rescission Claims do not implicate Roswell Holdings since the Rescission Claims are a contractual dispute between the parties to the Note Sale. Roswell Holdings is not a party to the Note Sale transaction. Accordingly, Defendant Roswell Holding has met its burden that dismissal of all claims against it is appropriate.

It is **ORDERED** that Defendants Roswell Holdings Mortgage, LLC’s and Roswell Holdings, LLC’s Motion to Dismiss is hereby **GRANTED**. This action is dismissed as to Roswell Holdings, LLC, and Counts II and III are dismissed for lack of subject matter jurisdiction.

The Clerk is directed to serve a copy of this Order on the parties on the below distribution list.

**END OF DOCUMENT**

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