IT IS ORDERED as set forth below:

Date: September 26, 2013

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	:	CASE NUMBER
CITRUS TOWER BOULEVARD IMAGING CENTER, LLC,	:	**11-70284-MGD**
Debtor.	:	CHAPTER 11
CITRUS TOWER BOULEVARD IMAGING CENTER, LLC,	:	**ADVERSARY PROCEEDING NO. 12-05346**
Plaintiff,	:	
v.	:	
SKY TOP ENTERPRISES, LLC,	:	
Defendant.	:	

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action brought by Debtor against its former landlord. The parties entered into a build-out lease agreement in 2008. Debtor completed the build-out on a delayed schedule and obtained financing from a third party, Key Equipment Finance. The parties have a fundamental

disagreement as to the interpretation of the lease at issue and how, if at all, it relates to other dealings between and among the parties' principals and other entities owned by those principals.

This matter is before the Court on Defendant Sky Top Enterprises, LLC's ("SkyTop") Motion for Summary Judgment. (Docket No. 30). Debtor commenced this adversary proceeding by filing a multi-count complaint against SkyTop. SkyTop now seeks judgement on all counts of the complaint, asserting both collateral estoppel and Debtor's failure to make out the following claims as a matter of law: Equitable Subordination, Equitable Disallowance of SkyTop's Claim, Breach of Contract, Unjust Enrichment, Equitable Return of Post-Petition Payments, and an Objection to SkyTop's Proof of Claim. Debtor filed a Response. SkyTop's counterclaim relating to Debtor's assumption and later rejection of the Lease is not at issue in this Motion.[1]

This is a core proceeding as to which the bankruptcy court has authority to issue an order and judgment. Jurisdiction and venue are proper in this action. 28 U.S.C. §§ 157(b), 1334(b).

There are material factual disputes and SkyTop has not met its burden that it is entitled to judgment as a matter of law. Therefore, SkyTop's Motion for Summary Judgment is **DENIED**.

I. Facts

The material procedural facts are as follows. SkyTop owned and constructed an office building and originally intended to sell the building to a hospital. SkyTop borrowed funds for construction and had an approximate monthly mortgage obligation of $20,000 to its lender. Docket No. 40; Exhibit E ("Dr. Ray Deposition," pp. 10-15). SkyTop's construction resulted in a shell office building that had been vacant for approximately four years prior to the lease agreement with Debtor. *Id.* at 14-15. In September 2008, the parties entered into a lease agreement for two floors

[1] SkyTop seeks a determination of its administrative expense claim and an imposition of such liability onto Debtor's principal, Mr. Overend, personally.

of a Clermont, Florida medical office building ("Lease"), which served as Debtor's sole location and operation ("Facility"). When the Lease was executed, the Facility had a dirt ground floor and some walls. Under the Lease, both parties expected Debtor to build out the Facility for use as a medical imaging center to be used by private medical practices. The Lease had a ten-year term with two renewable 3-year extensions and a purchase option. The monthly rent owed to SkyTop was $40,299.16. The parties dispute how many months of pre-petition rent payments were past due, but they agree that Debtor did not make the $40,299.16 monthly payments to SkyTop each month.

The Lease was later amended to change the commencement date from October 1, 2008 to February 1, 2009, as Debtor had difficulty obtaining financing for the build-out. Key Equipment Finance, Inc. ("Key") eventually financed the build-out, which included two MRI machines, valued at approximately $1.2 million each. Key has filed a claim in Debtor's Chapter 11 proceeding for approximately $5.5 million and asserts a blanket lien on the furniture, fixtures, and equipment in the Facility.

After the financing delays and some delays due to repermitting the Facility, a certificate of occupancy was issued in August 2010, and the Facility began operating in November 2010 through Debtor's sole sublessee, National Training Center Sports Medicine Institute, P.A. ("NTC"). NTC is wholly-owned and operated by Dr. James M. Ray. Dr. Ray was also the managing member and president of SkyTop during the period relevant to this dispute.

SkyTop issued a notice of default to Debtor in February 2011, and on March 21, 2011, SkyTop filed a complaint for eviction and damages in the Fifth Judicial Circuit in and for Lake County, Florida ("Florida Court"). Debtor filed a petition under Chapter 11 on July 12, 2011 following the Florida Court's Order to deposit more than $500,000 in outstanding rents into the

Florida Court registry to avoid eviction.

On September 19, 2011, this Court held that the Lease was not terminated pre-petition and modified the stay to allow the Florida Court to make a determination as to the amount of the pre-petition rent owing. Debtor and Sky Top participated in a two-day hearing before the Florida Court on February 2-3, 2012. On February 13, 2012, the Florida Court entered its Order Determining Amount of Pre-Petition Rent Owing (the "Rent Order") determining the unpaid pre-petition rent to be $941,878,07. In its ruling, the Florida Court determined that section 20 of the Lease[2] was ambiguous and considered parol evidence. The Florida Court determined that the purported tenant construction allowance should not reduce the rent arrearage. (Docket No. 7, pp. 33-41, "Rent Order"). Specifically, section 20 of the Lease does not provide how the allowance becomes operative. *Id.* The Florida Court did indicate several times that its charge from this Court was limited to determining the amount of "pre-petition rent owed" and questioned whether Debtor's arguments for a credit or reimbursement were within the scope of the determination it was instructed to make. *Id.*; Docket No. 39, "Florida Rent Hearing Transcript," original transcript pages 476-78, 498-504, 519 and 525.

Debtor timely filed an appeal of the Rent Order (the "Appeal") with the Fifth District Court

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[2] 20. TENANT IMPROVEMENTS
Landlord hereby agrees to grant to Tenant an allowance of $50.00 per square foot of the Premises toward the cost of construction and tenant improvements. All Tenant improvements must be performed by a Contractor acceptable to Landlord and Landlord must approve all Tenant's plans and specifications. The Landlord shall be obligated to cooperate in good faith in the review of the plans and specifications and shall not unreasonably delay or withholder its consent to such plans and specifications[.] "Notwithstanding the foregoing, the parties hereto acknowledge that Landlord is obtaining financing for completion of the construction of the Tenant improvements described in this paragraph 20. The Landlord's obligations pursuant to this paragraph 20 shall be contingent on the disbursement of funds related to such financing. In the event the funds are not disbursed through no fault of Landlord, the Landlord shall have the option to terminate this Lease and the parties shall be relieved of any further obligations hereunder."

of Appeal for the State of Florida ("Florida Appellate Court"). The Appeal was later dismissed for lack of jurisdiction based upon the remaining intertwined issues not yet decided. Docket No. 41, Debtor's Exhibits J & K ("Appellate Show Cause and Dismissal Orders").

Later, in April 2012, as part of Debtor's Chapter 11 bankruptcy proceeding, Debtor's motion to assume the Lease was approved over SkyTop's objection. (Main Case No. 11-70284; Docket No. 165). Debtor subsequently obtained an order to reject the previously assumed Lease. (*Id.*; Docket No. 178).

Debtor has expended at least $8 million to complete and equip the Facility. Docket No. 37; Overend Affidavit. The value of the Facility has increased as a result of the build-out. Docket No. 36, Exhibit E & F (Appraisals); Dr. Ray Deposition, p. 92.

The other relevant facts are those regarding the conduct of the parties, their principals, and the entities related to those principals that have some involvement with the course of conduct between these parties. The parties vigorously dispute the implications of the non-party actions. The parties agree that SkyTop was the sole lessor under the Lease. Dr. Ray served as SkyTop's representative during the Lease negotiations and in disputes arising after the Lease was executed. Dr. Ray reported, in some way, to the other SkyTop members and was authorized to act and to bind SkyTop. Dr. Ray shared his approximate 17% membership interest with his wife, Joy Ray.[3] Three other SkyTop members were Mrs. Ray's family members. Debbie Williams and another medical doctor, Dr. Florin, were non-familial SkyTop members. Dr. Ray was the president of SkyTop until his resignation in January of 2013 and the managing member during the time the Lease was negotiated and executed. Dr. Ray Deposition, pp. 89-90; Docket No. 40, Exhibit B; "Resignation

[3] This membership interest is now in dispute in Dr. and Mrs. Ray's divorce proceeding.

Letter" - Exhibit 3 to Joy Ray Deposition.

Although SkyTop contests the relevance of any other agreement, Debtor submits that it entered into the Lease as a two-part agreement. The second part of the agreement included Dr. Ray in his capacity as owner of NTC. Debtor entered into a lease/usage agreement with NTC at the end of 2008. NTC had a suite in the Facility after the certificate of occupancy was obtained and NTC performed scans on patients.

NTC, with Dr. Ray as sole member and president, entered into what has been termed the "Equipment Lease" with Debtor, as sublessor, on December 16, 2008. Docket No. 1; Exhibit B. The Equipment Lease provided that Dr. Ray would remit "an amount equal to $250,000"per month based upon a calculation factoring in the number of MRI scans. However, the monthly amount was due regardless of equipment use and number of scans. The term was 10 years. The Equipment Lease commenced "on the first day the Imaging Center is functionally operational." The parties disagree as to when, if ever, the Facility was "functionally operational."

NTC's monthly payment to Debtor was in exchange for use of the MRI Equipment and use of a suite in the Facility. Debtor also employed and paid technicians and other staff to operate the MRI machines and assist patients. Debtor is engaged in separate litigation with Dr. Ray[4] and NTC regarding the Equipment Lease. (Docket Nos. 41 & 44).

The parties agree that NTC made no payment to Debtor under the Equipment Lease. NTC used the Facility and conducted scans after the certificate of occupancy was obtained. Dr. Ray explains that the funds he generated for NTC were used to pay the SkyTop mortgage on the Facility. Dr. Ray Deposition, pp. 60-61; Florida Rent Hearing Transcript, p. 464. Dr. Ray also testified that

[4] Dr. Ray personally guaranteed the Equipment Lease. Docket No. 1; Exhibit B.

he was using all funds available to him, including his own personal funds, retirement funds, and money from his wife and her family, to continue to make the SkyTop mortgage payments since Debtor was not performing under the Lease. Dr. Ray Deposition, p.78.

Dr. Ray and SkyTop were aware that Debtor's ability to pay under the Lease was dependent on collection of rents under the Equipment Lease with NTC, although Debtor hoped to have more usage agreements with other practices.[5] Dr. Ray has testified that the Lease and Equipment Lease would not have been executed by SkyTop and NTC, respectively, without the presence of the other lease. Dr. Ray Deposition, p. 37. The negotiation period for the Lease and Equipment Lease overlapped and Dr. Ray executed and negotiated both agreements for the respective non-Debtor entities. The Florida Court also considered the Equipment Lease in its two-day hearing once parol evidence was introduced because it was deemed to be the impetus to the Lease. Florida Rent Hearing Transcript, p. 202.

The projected profit margins on the MRI scans were based upon estimated insurance reimbursement rates and federal regulations. One of Debtor's principals, Franklin Trell, held himself out as an expert and provided the now-determined erroneous reimbursement rate per scan. Dr. Ray admitted that he conducted no due diligence on his own behalf regarding the projected reimbursement rate before NTC entered into the Equipment Lease. Debbie Kuminka, NTC's chief financial officer, officer manager, or bookkeeper, testified in her deposition regarding the discovery of the erroneous reimbursement rate. Docket No. 40; Exhibit C "Kuminka Deposition," p. 26. Ms.

[5] Dr. Ray assisted in marketing the Facility and attempting to attract additional practices by writing letters to numerous practices requesting a letter of reservation in the Facility. Dr. Ray Deposition, p. 96. The preliminary interest resulting from Dr. Ray's actions lead Debtor to install two MRI machines to accommodate the projected demand for the Facility. The parties dispute whether Dr. Ray took subsequent actions to discourage other practices from entering into similar sublease agreements with Debtor.

Kuminka testified that NTC engaged a health care attorney upon its discovery and also engaged in failed attempts to renegotiate the Equipment Lease with Debtor. *Id.* at pp. 26-29.

Ms. Kuminka also testified as to her role with respect to Dr. Ray. She stated she was an employee of NTC. She received no money from SkyTop, yet she provided financial and administrative services to them as a "friend." *Id.* at 33-34. SkyTop's books and records are maintained at the NTC office and she engaged in joint communication with Debtor on behalf of both NTC and SkyTop. *Id.* at 34-35.

Although the parties contest the relevance of such evidence, the record includes evidence that Dr. Ray discussed with Debtor a waiver of the 2009 rent under the Lease in exchange for Debtor providing furniture and equipment for NTC's suite at the Facility. Florida Rent Hearing Transcript, pp. 100-106. It is disputed whether this agreement was ever finalized and, if so, in what form and to what effect. Debtor characterizes the underlying cause for the discussions regarding the SkyTop rent waiver as NTC's inability to obtain financing to furnish its office suite, including essential medical equipment, like a x-ray machine and an ultrasound machine. Florida Rent Hearing Transcript, pp102-104. The 2009 Rent under the Lease totaled approximately $289,000, and NTC provided furnishing specifications to Debtor that totaled between $270,000-$280,000. *Id.* at 100-101. Debtor caused NTC's suite to be furnished according to the specifications. There are liens and outstanding debts on the equipment and furnishings used by NTC. *Id.* at 126.

The record also includes evidence that Debtor's principal, Mr. Trell, and Debtor's Chief Operating Officer, Cynthia Vinson, created Medical Development Group, LLC ("MDG") as a separate entity to purportedly assist SkyTop in obtaining financing to fund the build-out allowance under the Lease. *Id.* at 293, 331. MDG's members, Mr. Trell and Ms. Vinson, stated it was in

Debtor's interest to assist SkyTop because SkyTop, according to the Lease terms, could terminate the Lease in the event it could not obtain financing for the build-out. There is evidence in the record that this MDG's offer may have been intended to only obligate SkyTop to pay the $50.00 per square foot allowance upon the sale or refinancing of the Facility. *Id.* at 501-502. Ultimately, MDG was unable to obtain the funds it offered SkyTop and SkyTop did not obtain financing for the build-out from any other source.

II. Summary Judgment Standard

Rule 7056 of the Federal Rules of Bankruptcy Procedure, which incorporates Federal Rule of Civil Procedure 56, provides that the court will only grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id*. The moving party has the burden of establishing the right of summary judgment. *Clark v. Coats & Clark, Inc*., 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982). The moving party also has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). In determining whether a genuine issue of material fact exists, the court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 11th Cir. 1985).

A party moving for summary judgment that does not have the ultimate burden of persuasion

at trial (usually the defendant) has the initial burden of producing evidence negating an essential element of the nonmoving party's claims or showing that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial. *E.g*., *Nissan Fire & Marine Ins. Co. v. Fritz Cos*., 210 F.3d 1099, 1102 (9th Cir. 2000).

At the summary judgment stage, the court may not make credibility determinations or weigh evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.E.2d 105 (2000). The court's only task is to assess whether "a genuine issue of material fact" remains for resolution at trial. *Celotex*, 477 U.S. at 322-23.

III. Discussion

Although SkyTop characterizes this action as a simple two-party Lease default and dispute, the record indicates otherwise. The essence of Debtor's equitable claims include the conduct of the parties, their principals, and other arguably-related entities. Debtor's breach of contract claim requires interpretation of the Lease. The record includes evidence that supports that the tenant improvement allowance provision of the Lease is ambiguous, as it does not provide for key terms regarding when and in what manner the allowance would be given or credited to Debtor, if at all.

Debtor has also successfully created a factual record to defeat SkyTop's motion for summary judgment on all counts. The voluminous record regarding the conduct and intentions of Debtor and SkyTop, in addition to their respective principals and agents, as well as affiliated (or non-affiliated) entities creates many factual disputes relevant to Debtor's claims in this action.

A. Collateral Estoppel is Not Available in this Action Because the Rent Order is not a Final Judgment for Purposes of Preclusion.

As a preliminary matter, SkyTop asserts that the Rent Order should preclude relitigation of the issues raised and decided by the Florida Court. Issue preclusion, historically labeled as collateral

estoppel, precludes the re-litigation of the same issues between the same parties in different causes of action. *In re St. Laurent, II*, 991F.2d 672, 675 (11th Cir. 1993). Issue preclusion relies upon the findings of fact actually litigated in one lawsuit, and the effect of those findings upon subsequent litigation which involves a different cause of action but arising out of the same or virtually same nexus of operative facts. *Brown v. Felsen*, 442 U.S. 127 n.10 , 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). "Collateral estoppel is a legal doctrine that 'bar[s] the relitigation of factual or legal issues that were determined in a prior ... court action,' and applies to bar relitigation in federal court of issues previously determined in state court." *Johnson v. Miera*, 926 F.2d 741, 743 (8th Cir.1991); *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011) *cert denied*, 133 S. Ct. 101 (2012). The doctrine of collateral estoppel is based on the efficient use of judicial resources and on a policy of discouraging parties from ignoring actions brought against them. *Gonzalez v. Moffitt*, 252 B.R. 916, 920 (B.A.P. 6th Cir. 2000).

In reviewing whether a prior judgment ought to be given preclusive effect in a subsequent federal proceeding, the preclusion law of the state in which the judgment was rendered controls. *Colo. W. Transp., Inc. v. McMahon*, 380 B.R. 911, 916 (N.D. Ga. 2007) ("Pursuant to 28 U.S.C. § 1738, the judicial proceedings of any State are granted "the same full faith and credit" in federal court as they would receive in the State's courts."); *In re Lowery*, 440 B.R. 914, 924 (Bankr. N.D. Ga. 2010). "Under Florida law, the following elements must be established before collateral estoppel may be invoked: (1) the issue at stake must be identical to the one decided in the prior litigation; (2) the issue must have been actually litigated in the prior proceeding; (3) the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision; and (4) the standard of proof in the prior action must have been at least as stringent as the

standard of proof in the later case." *In re St. Laurent*, 991 F.2d 672, 676 (11th Cir. 1993).

Preclusion doctrines only apply to final judgments. The doctrine of collateral estoppel prohibits re-litigation of issues already adjudicated by a valid and final judgment of another court. *In Re Bilzerian*, 100 F.3d 892 (11th Cir. 1996). For issue preclusion to apply, the issue must have been "determined in a contest that result[ed] in a final decision of a court of competent jurisdiction." *Cook v. State*, 921 So.2d 631, 634 (Fla. 2d Dist. App. 2005).

SkyTop asserts that the Rent Order should preclude Debtor from relitigating the issues of setoff and other equitable defenses. According to SkyTop, this case exemplifies the purpose of the preclusive doctrines. Debtor, however, argues that the Florida Court did not consider all the issues in this action and that the Rent Order is not a final order. Debtor appealed the Rent Order and the Florida Appellate Court dismissed the appeal as premature and for lack of jurisdiction. Docket No. 41; Exhibits J & K. The Florida Appellate Court found that the Rent Order was not a final, appealable order because the remaining counts involve "intertwined issues." Exhibit J: Appellate Show Cause Order. Further, the Trial Transcript and the Rent Order also designate the limited determination the Florida Court made based upon this Court's Relief from Stay Order. Florida Rent Hearing Transcript, pp. 476-78, 498-504, 519 & 525. Accordingly, SkyTop is not entitled to preclude litigation of the claims in this action at this time because the Rent Order, on which they rely, does not constitute a final judgment for purposes of collateral estoppel.

B. There are Genuine Issues of Material Fact with Respect to the Alleged Inequitable Conduct that Serves as the Underlying Basis for Debtor's Equitable Claims.

SkyTop asserts that Debtor cannot make out its equitable claims: equitable subordination, equitable disallowance of a claim, and equitable return of post-petition rent payments. SkyTop

argues that Debtor's arguments are insufficient as a matter of law because Debtor's allegations of inequitable conduct, an essential element to each claim, rely on the individual actions of Dr. Ray, not SkyTop. SkyTop submits evidence that Dr. Ray was not a controlling member of SkyTop and that decisions were made in concert with the other active members and in accordance with their business judgment.

As described in *Matter of Lemco Gypsum, Inc*., 911 F.2d 1553, 1556 (11th Cir. 1990), there are three required elements for an equitable subordination claim: (1) the claimant must have engaged in some type of inequitable conduct; (2) the misconduct must have resulted in injury to the creditors or conferred an unfair advantage on the claimant; and (3) subordination of the claim must not be inconsistent with the provisions of the Bankruptcy Act. Here, the record reflects that Debtor has submitted evidence when viewed in favor of the nonmoving party could result in a determination that SkyTop's actions, by and through its agent Dr. Ray, regarding the build-out, financing, and Lease negotiations constituted inequitable conduct.

Although SkyTop characterizes the dispute as limited to the Lease provisions, the record presented by Debtor provides a sufficient basis that inequitable conduct could be inferred. SkyTop asserts that Dr. Ray's conduct, as it related to his wholly owned medical practice, NTC cannot be attributed to SkyTop. The record, however, provides sufficient evidence that Dr. Ray conflated the interests of SkyTop and NTC in ways that are pertinent to Debtor's claims. For purposes of SkyTop's Motion, Debtor has successfully raised material issues of fact regarding potential imputed or actual inequitable conduct.

The record reveals that Dr. Ray, by his own admission, used NTC's profit from scans, which resulted from Debtor's build out, use of Facility, and office suite space and furnishings, and applied

such funds to SkyTop's mortgage obligations without regard to the distinct obligation of NTC to Debtor under the Equipment Lease. This decision is further compounded when the record shows that Dr. Ray knew that Debtor's sole sublesee was NTC and Debtor's opportunity to perform under the Lease would be impacted by NTC's performance under the Equipment Lease. The record also shows that Dr. Ray and Debtor had extensive discussions regarding an exchange of benefit to NTC – providing furnishings for the on-site medical suite – to reduce Debtor's obligation to SkyTop – 2009 rent under the Lease. There is no dispute that NTC operated in the Facility as a result of Debtor's actions, and in accordance with NTC's specifications, although the record does not include any formal amendment to Lease. The record also indicates that the furnishings are encumbered. Lastly, based on the totality of the circumstances, Ms. Kuminka's joint role with NTC and SkyTop, coupled with Dr. Ray's role as president for SkyTop, bolster a factual record to substantiate Debtor's claims in this action and raise material disputes of fact that Dr. Ray's actions are relevant for the purposes of considering, at least, the equitable claims in this action. A determination as to whether there was sufficient inequitable conduct by SkyTop requires the Court to weigh the credibility of the evidence, which is not proper in ruling on a motion for summary judgment.

Debtor also establishes material issues of fact with respect to the second and third required elements of an equitable subordination claim. There is evidence that Debtor spent $8 million on improvements to the Facility and that SkyTop enjoyed the benefit of a completed or nearly completed building and the corresponding increased value.

SkyTop correctly points out that equitable subordination is an extraordinary remedy and seldom successful against non-insiders and non-fiduciaries, but the likelihood of success is not relevant to the summary judgment standard. The issues of fact raised above regarding the

inequitable conduct requirement also satisfy the Court that SkyTop has not met its burden that it is entitled to judgment as a matter of law based on Debtor's failure to establish facts in support of its equitable claims.

C. SkyTop Has Not Met Its Burden of Showing Debtor Failed to Establish Its Breach of Contract and Unjust Enrichment Claims.

SkyTop first argues that it is entitled to summary judgment as to Debtor's breach of contract and unjust enrichment claims based upon the Florida Court's Rent Order. The determination that the Rent Order has no preclusive effect, *supra,* pp. 10-12 , leaves SkyTop with two remaining arguments. First, SkyTop asserts that Debtor cannot seek relief for both a breach of contract claim and an unjust enrichment claim under Florida law. Although Debtor may not obtain judgment for both a breach of contract claim and an unjust enrichment claim under Florida law, there is no prohibition against pleading in the alternative in this action. FED. R. BANKR. P. 7008. Second, SkyTop contends that Debtor is unable to make out the essential elements of these claims as a matter of law.

The essence of this action (and Debtor's bankruptcy filing) is the purported breach of the Lease. Without its collateral estoppel argument, SkyTop has not established that Debtor is unable to prevail on a breach of contract claim. Debtor has responded to SkyTop's Motion with sufficient evidence in support of its breach of contract claim. Many material facts regarding the interpretation of the Lease and the parties' underlying intentions are in dispute. The parties agree that the purpose of the Lease was for Debtor to build out the Facility. The Lease itself includes a tenant improvement provision. The negotiations before and after the Lease was executed included various discussions regarding the allowance. The undisputed facts include that the Facility was built out and SkyTop

did not directly compensate Debtor or credit Debtor's rent obligation.

Debtor has successfully presented facts from which a reasonable fact finder could determine section 20 of the Lease is ambiguous, including, most significantly, the finding of the Florida Court. Here, the record is replete with conflicting facts regarding the characterization and intention of the parties, including, but not limited to, side dealings and offerings between parties not bound by Lease – NTC, Dr. Ray, MDG, and Mr. Trell. SkyTop is not entitled to summary judgment on Debtor's breach of contract claim.

With respect to the unjust enrichment claim, SkyTop does not establish that Debtor has failed to satisfy the required elements under Florida law.[6] SkyTop asserts that proof of express contract defeats a claim for unjust enrichment. *Solutec Corp. v. Young & Lawrence Assoc., Inc*., 243 So.2d 605 (Fla. 4th Dist. App.1971). Here, however, Debtor has submitted evidence of oral agreements with Mr. Ray and a legal theory that Mr. Ray's actions should be imputed to SkyTop. A determination of the unjust enrichment claim would require the Court to weigh the credibility of the evidence, which is improper with a motion for summary judgment. The record includes evidence that Debtor's improvements to the building increased the value of the building. Under the summary judgment standard, Debtor has satisfied its burden in establishing the elements of the unjust enrichment claim, as well as demonstrating that there are material disputes of fact with respect to the conduct of the parties and whether Debtor's build-out is governed by the Lease itself. Therefore, SkyTop is not entitled to judgment as to Debtor's unjust enrichment claim.

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[6] A successful claim for unjust enrichment requires proof that (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. *See 14th & Heinberg, LLC*, 43 So.3d 877, 881 (Fla.1st Dist. App. 2010).

D. Material Issues of Fact Remain with Respect to the Attorneys' Fees portion of SkyTop's Proof of Claim.

Debtor objects to the attorneys' fees portion of the proof of claim filed by SkyTop. In some form, SkyTop's claim is modified given Debtor's rejection of the Lease following its assumption. Section 503(b)(7) now governs the priority and amount of SkyTop's administrative expense claim. With respect to the attorneys' fees, a determination as to which party prevails in an action enforcing or construing the Lease is a prerequisite to triggering the Lease's attorneys' fees provision. Additionally, Debtor raises an issue that attorney fees relating to pure bankruptcy matters – adequate protection, motion to convert case – are not encompassed by the Lease provision. Further, SkyTop has asserted a counterclaim in this action that is not encompassed by its Motion but directly related to its claim. Therefore, at this point, any ruling on SkyTop's claim is premature.

IV. Conclusion

Based upon the factual record created by Debtor and SkyTop, there are genuine issues of material fact with respect to Debtor's claims. SkyTop has not satisfied its burden, as the moving party, that Debtor cannot establish its claims when the facts are viewed and inferences are made in favor of Debtor. The Court would have to weigh the credibility of the evidence and make inferences to make determinations as to Debtor's claims, and such actions are not appropriate at the summary judgment stage. Accordingly, it is

ORDERED that Defendant's Motion for Summary Judgment is **DENIED**.

It is **FURTHER ORDERED** that Debtor's request for oral argument is **DENIED.**

It is **FURTHERED ORDERED and NOTICE IS HEREBY GIVEN** that a status conference in Courtroom 1201, United States Courthouse, Richard B. Russell Federal Building, 75 Spring Street, Atlanta, Georgia will be held before the undersigned on **October 17, 2013 at 10:00**

a.m.

The Clerk is directed to mail a copy of this Order to Plaintiff, Defendant, and their respective counsel.

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