



IT IS ORDERED as set forth below:

Date: June 16, 2014

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. 08-43724-MGD
	:	
Linda Coty Bullock,	:	Chapter 7
	:	
Debtor.	:	Judge Diehl
	:	
Kyle A. Cooper, Trustee,	:	
	:	
Plaintiff,	:	Adversary Proceeding
v.	:	
	:	No. 14-4003
Generation Mortgage Company,	:	
	:	
Defendant.	:	

ORDER DENYING MOTION TO DISMISS

Before the Court is Defendant, Generation Mortgage Company’s (“Defendant”) Motion to Dismiss Plaintiff’s Complaint (“Motion”). Docket No. 5. Defendant also filed a Brief in support of the Motion (“Brief”). Docket No. 6. Plaintiff, the Chapter 7 Trustee (“Plaintiff” or “Trustee”), filed an amended Response to the Motion (“Response”). Docket No. 15.

I. Background

This adversary proceeding arises out of a November 3, 2008 Chapter 11 bankruptcy filing by Debtor, Linda Coty Bullock. Case No. 08-43724. The case was converted to Chapter 7 on December 17, 2009 and the Chapter 7 Trustee was appointed. Case No. 08-43724, Docket Nos. 115 and 122. On Schedule A, Debtor listed ownership of the property located at 411 Billy Bullock Road, Dallas, Georgia (“the Property”). Case No. 08-43724, Docket No. 26. After the petition was filed, and without Court authorization, Debtor executed a Closed-End Fixed Rate Home Equity Secured Deed (“the Security Interest”) in favor of Lenox Financial Mortgage, LLC (“Lenox”) in an amount up to \$430,500. Lenox assigned this interest to Defendant.¹ On December 21, 2010, the Trustee filed a complaint against Debtor, Lenox, and Debtor’s daughter. A.P. No. 10-4111. The Trustee sought, among other things, to avoid the transfer of the Security Interest to Lenox. On January 30, 2013, the Court entered a Consent Order avoiding the transfer to Lenox pursuant to 11 U.S.C. § 549. A.P. No. 10-4111, Docket No. 81. On October 18, 2013, the Trustee filed a Notice of Proposed Abandonment of the Property, and the Court entered an Order allowing the abandonment on December 20, 2013. Case No. 08-43724, Docket Nos. 252 and 260.

The current adversary proceeding was filed on January 28, 2014. The Complaint seeks to recover from Defendant either its interest in the Property or the value of that interest, under 11 U.S.C. § 550. The Motion seeks dismissal pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, made applicable to this proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012. Defendant asserts that the Court lacks subject matter jurisdiction over this proceeding under Rule 12(b)(1) because the Property was abandoned and is no longer property of

¹ Plaintiff asserts that the Security Interest was assigned by Lenox to Defendant. As discussed further herein, Defendant appears to take the position that the Security Interest was assigned directly from Debtor to Defendant.

the estate. Defendant further argues that once property leaves the bankruptcy estate, the Court no longer has jurisdiction to determine disputes concerning that property, unless the administration of the bankruptcy case would be affected. Using similar logic, Defendant asserts that Plaintiff has failed to state a claim for relief because the abandonment of the Property defeats his claim that the Property is subject to recovery under 11 U.S.C. § 550. Alternatively, Defendant argues that the Complaint fails as a matter of law because “evidence presented by Lenox in [adversary proceeding No. 10-4111] indicates that Generation was the initial transferee of Debtor.” Accordingly, Defendant states that Plaintiff would have needed to avoid the initial transfer to Generation under 11 U.S.C. § 549, in order to now recover from Generation pursuant to 11 U.S.C. § 550.

The Response asserts that the Court retains subject matter jurisdiction because this is a “related to” case under title 11. That flows from the fact that Section 550 allows recovery of the value of the avoided security interest, which value would impact the bankruptcy estate. The Defendant posits that the Court’s jurisdiction over this action seeking recovery from Generation does not depend on the Property being property of the bankruptcy estate. According to the Response, Plaintiff has stated a plausible claim for relief, which is also unaffected by the Property no longer being property of the estate. As to the alternative argument, Plaintiff disputes that Generation is not a subsequent transferee. Plaintiff also argues that this is a fact dispute and that consideration of “evidence” is not appropriate in the context of a motion to dismiss.

II. Standard for Motion to Dismiss

1. Rule 12(b)(6)

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*, 129 S. Ct 1937, 1949 (2009); FED. R. CIV. P. 12(b)(6). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must 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 factual allegations as true and construe them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 129 U.S. at 1949. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949-1950.

“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.” *Id.* at 1949. The rule “does not impose a probability requirement at the pleading stage,” but instead “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of” the necessary element. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is “improbable” that a plaintiff would be able to prove those facts; even if the possibility of recovery is extremely “remote and unlikely.” *Id.* “Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555). 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.” *Ashcroft v. Iqbal*, 129 U.S. at 1950 (citation omitted).

2. Rule 12(b)(1)

For purposes of ruling on a motion to dismiss under Rule 12(b)(1), for lack of subject matter jurisdiction, “[a] court must accept the material factual allegations in the complaint as true, but need not draw inferences favorable to the plaintiff.” *Maxwell v. HSBC Mortgage Corp. (USA)*, 2012 WL 3678609, *1 (Bankr. N.D. Ga. Aug. 22, 2012). Further, “the Court may consider materials outside

of the pleadings to resolve any jurisdictional disputes, but cannot rely on conclusory or hearsay evidence. The plaintiff has the burden of proving the Court's subject matter jurisdiction by a preponderance of the evidence." *Id.*(internal citations omitted).

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. § 1334(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. *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 787 (11th Cir. 1990). Bankruptcy courts may hear non-core matters if the matter is "related to" the bankruptcy proceeding, but the courts are limited to submitting proposed findings of fact and conclusions of law to the districts courts in such cases. 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)).

III. Analysis

1. Rule 12(b)(6)

Section 550(a)(2) provides that "to the extent that a transfer is avoided under section . . . 549 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from . . . any immediate or mediate transferee of [the]

initial transferee.” Here, the Complaint asserts that Debtor granted the Security Interest in favor of Lenox, who assigned it to Defendant. Complaint at ¶¶ 13 and 15. Thus, Defendant is either an immediate or mediate transferee of the security interest. *Id.* at ¶ 22. The Complaint also states that the transfer of the Security Interest from Debtor to Lenox was avoided by Court Order pursuant to 11 U.S.C. § 549. *Id.* at ¶ 17. Based on these assertions, Plaintiff has stated a plausible claim for relief. Section 550(a) does not require that the subject property be property of the estate. Thus, the abandonment of the Property does not affect Plaintiff’s ability to state a plausible claim for relief.

2. Rule 12(b)(1)

Section 550(a) establishes a Code-created right to relief. Thus, the Court has subject matter jurisdiction over this action because it is a proceeding arising under title 11. 28 U.S.C. § 1334(b); 28 U.S.C. § 157(a). Jurisdiction over this proceeding is not dependent upon the status of the Property as property of the estate.

Defendant relies heavily on *Maxwell v. HSBC Mortgage Corp. (USA)* for the proposition that because the Property was abandoned and is no longer property of the estate, the Court lacks jurisdiction to determine disputes concerning the Property. 2012 WL 3678609. In *Maxwell*, the Court granted the debtor’s motion to compel abandonment of real property. After the property was abandoned, the debtor filed a complaint to determine the validity and extent of an alleged lien against the property. The defendant creditor filed a motion to dismiss for lack of subject matter jurisdiction. The Court found that the proceeding did not arise under or arise in title 11 and further, the Court did not have related to jurisdiction because the abandoned property was no longer property of the bankruptcy estate. The Court explained that as a result of the abandonment, it lost jurisdiction to “determine disputes concerning that property, unless the result of the dispute could have some effect on the bankruptcy case.” *Id.* at 2.

Contrary to the relief sought in *Maxwell*, Plaintiff does not seek a determination as to the status of a lien or any other determination as to rights in the Property. Rather, Plaintiff seeks to impose liability on the Defendant pursuant to a Code-created remedy, for its receipt of property that was the subject of an avoided transfer. The Court's jurisdiction over Plaintiff's claim is not affected by the abandonment of the Property.

3. Issue of Subsequent Transferee Status

The parties dispute whether Defendant was an initial or subsequent transferee. This is a dispute of fact which cannot be adjudicated by the Court on a motion to dismiss. *Page v. Postmaster Gen. and Chief Executive Officer of U.S. Postal Serv.*, 493 F. App'x 994, 995 (11th Cir. 2012). At this stage, the Court must take the facts plead in the Complaint as true and construe those facts in the light most favorable to the Plaintiff. Plaintiff has asserted in the Complaint that Defendant is either a subsequent or mediate transferee. Thus, Defendant's alternative argument does not present a basis for dismissal of the Complaint.

III. Conclusion

The Court has subject matter jurisdiction over this matter, and Plaintiff has plead sufficient facts to withstand the Motion to Dismiss. The alternative argument asserted by Defendant raises a fact issue that is not appropriate for determination at this point in the proceeding. Accordingly, it is

ORDERED that the Motion to Dismiss Plaintiff's Complaint is **DENIED**.

The Clerk's Office is directed to serve a copy of this Order upon Defendant, Defendant's counsel, Plaintiff, Plaintiff's counsel, and the United States Trustee.

END OF DOCUMENT