IT IS ORDERED as set forth below:

Date: June 19, 2014

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: CONTINENTAL CASE COMPANY, LLC, Debtor.	CASE NO. 13-67727-WLH CHAPTER 7
JEFFREY K. KERR, Chapter 7 Trustee, Plaintiff, v. SUPERMARKET PARTS WAREHOUSE, INC., Defendant.	ADVERSARY PROCEEDING NO. 13-5442

ORDER ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

Plaintiff, Jeffrey Kerr ("Plaintiff"), in his capacity as Chapter 7 Trustee, filed a Complaint on Open Account and for Turnover ("Complaint") against Defendant, Supermarket Parts Warehouse, Inc. ("Defendant"), on December 13, 2013. In this adversary proceeding, Plaintiff

seeks to recover $441,682.68, plus prejudgment interest and costs, for amounts owed for goods and services provided by Debtor to the Defendant prepetition. Defendant filed a Motion to Dismiss on February 28, 2014 pursuant to Fed. R. Civ. P. 12(b)(6), made applicable hereto by Fed. R. Bankr. P. 7012 (Docket No. 7). Specifically, Defendant argues turnover under Section 542(b) may not be used to collect on prepetition accounts receivable. Plaintiff responded and also filed a Motion for Leave to File an Amended Complaint ("Motion to Amend Complaint") (Docket Nos. 8 & 9). Both matters are now fully briefed and before the Court for ruling.

The Court has jurisdiction pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157(a) and (b). Upon consideration of the pleadings and for the reasons discussed more fully below, the Court finds that this is not a turnover action under Section 542(b); however, this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Accordingly, Defendant's Motion to Dismiss is denied. Plaintiff's Motion to Amend Complaint is granted.

I. Background

An involuntary petition was filed against the Debtor and an order for relief was entered as of September 6, 2013. The Plaintiff initiated this adversary proceeding demanding turnover of funds under 11 U.S.C. § 542(b) in connection with a prepetition account receivable. Defendant filed a proof of claim in the bankruptcy case based upon the same transactions underlying the account receivable and the Debtor scheduled a "disputed" debt owed to the Defendant. In its Motion to Dismiss, Defendant attacks the facial sufficiency of the Complaint;[1] however, the crux

[1] Defendant argues that the Complaint fails to state a claim for relief in the first instance because the Complaint does not specifically recite the statutory elements under Section 542, i.e., the debt owed is "property of the estate," and is "matured, payable on demand, or payable on order." However, the Complaint is also titled "Complaint on Open Account." Under the liberal notice pleading standards of Fed. R. Civ. P. 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief" and the complaint must contain sufficient factual content to allow a court to infer "that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Here, there are sufficient facts to suggest the Plaintiff may be entitled to relief even though the Court finds this is not a turnover action and any defects may be cured by the proposed amendments. Consequently dismissal for failure to state a claim is not warranted at this time.

of Defendant's argument is that this matter is improperly styled as one for turnover, so the Court has no authority to enter a final order.

II. Actions to Turn Over Estate Property

Generally speaking, an action for turnover related to a debt requires a showing that (a) the debt "is property of the estate" and (b) "is matured, payable on demand, or payable on order." 11 U.S.C. § 542(b). As to the first prong, property is defined broadly to encompass "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541; Howell v. Bank of Am., N.A. (In re Dorsey), 497 B.R. 374, 383 (Bankr. N.D. Ga. 2013). As to the second element, a debt that is "presently payable," i.e., "where payment is not subject to any condition precedent" is matured, payable on demand, or payable on order. Miller v. Jannetta (In re Irwin), 2014 WL 1456270 (Bankr. E.D. Pa. Apr. 15, 2014). As the cases cited by both parties indicate, there is a split of authority over when prepetition accounts receivable may be subject to turnover. See, e.g., DHP Holdings II Corp. v Home Depot, Inc. (In re DHP Holdings II Corp.), 435 B.R. 264, 271 (Bankr. D. Del. 2010) ("Many courts have wrestled with the question of whether an account receivable falls within the parameters of § 157(b)(2).... [N]o clear consensus exists." (citation omitted) (alteration in original)); United Methodist Youthville, Inc. v. Lutheran Soc. Servs. (In re United Methodist Youthville, Inc.), 289 B.R. 754, 757 & n.15 (Bankr. D. Kan. 2003) (noting the split of authority and collecting cases).

Courts in the Eleventh Circuit generally follow the majority rule that a debt must be undisputed to be subject to turnover. See, e.g., In re Fontainebleau Las Vegas Holdings, LLC, 417 B.R. 651, 666 (S.D. Fla. 2009) aff'd sub nom. Ave. CLO Fund Ltd. v. Bank of Am., NA, 709 F.3d 1072 (11th Cir. 2013) ("The turnover provision of [the] Bankruptcy Code applies only to tangible property and money due to debtor *without dispute* which are fully matured and

payable on demand." (emphasis in original)). The debt here is clearly disputed. The Defendant has already filed a claim for damages and costs related to the work performed by the Debtor, and labeled it a set off. Debtor has listed the claim as disputed. The action is therefore not one for turnover under Section 542(b). "The label a party attaches to a claim does not require the court to wear blinders as to that claim's true substance." AmeriCorp, Inc. v. Hamm, 2012 WL 1392927, at *5 (M.D. Ala. Apr. 23, 2012). This action is more properly characterized as a counterclaim to the Defendant's proof of claim.

III. This Matter is Within the Court's "Arising Under" Jurisdiction and is "Core"

Bankruptcy courts are courts of limited jurisdiction and federal courts have an independent duty to inquire into subject matter jurisdiction. Galindo-Del Valle v. Attorney Gen., 213 F.3d 594, 598 n.2 (11th Cir. 2000). Bankruptcy courts have subject matter jurisdiction over "civil proceedings arising under title 11, or arising in or related to cases under title 11." See 28 U.S.C. § 1334(a)(b); see also L.R. 83.7A N.D. Ga. "Arising under" jurisdiction involves "a substantive right created by the Bankruptcy Code," while "arising in" jurisdiction pertains to claims that are "not based on any right expressly created by title 11, but nevertheless could have no existence outside of bankruptcy." Grausz v. Englander, 321 F.3d. 467, 471 (4th Cir. 2003). Typically, the facts giving rise to a claim "arising in" a bankruptcy case occur during the course of the bankruptcy case. See Mercer v. Allen, 2014 WL 185252 (M.D. Ga. Jan. 15, 2014); In re Taylor, 2006 WL 6591616 (Bankr. N.D. Ga. May 4, 2006). "Related to" jurisdiction exists over proceedings where the outcome "could alter the debtor's rights, liabilities, options, or freedom of action" and would "impact[] upon the handling and administration of the bankrupt estate." Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.), 910 F.2d 784, 788 (11th Cir. 1990). This matter "arises under" the bankruptcy code because the Trustee's counterclaim must be

adjudicated in order to rule on the Defendant's proof of claim, which claims a set off to a trade payable. Oxford Expositions, LLC v. Questex Media Grp., LLC (In re Oxford Expositions, LLC), 466 B.R. 818, 830 (Bankr. N.D. Miss. 2011). Consequently, this matter is based on a substantive right created by the Code. See 11 U.S.C. §§ 501 & 502.

The next question is whether the cause of action is "core". Actions to adjudicate the "allowance or disallowance of claims against the estate" are core within the statute. 28 U.S.C. § 157(b)(2)(B). But as the recent Supreme Court decision in Stern v. Marshall reminds courts, the statutory delineation of core is insufficient to determine whether the Constitution permits a bankruptcy court to decide the matter. A matter is constitutionally core if "the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Stern v. Marshall, 131 S. Ct. 2594, 2618 (2011). Bankruptcy courts may enter final orders only in those matters that are "core." The Court finds that this matter is a core proceeding. Defendant has filed a proof of claim based upon the same debt at issue in this adversary proceeding and even labeled it a set off. Thus, under both the statute and the test in Stern this matter is core because this matter "would necessarily be resolved in the claims resolution process."

IV. Leave to Amend the Complaint

Fed. R. Civ. P. 15(a), made applicable hereto by Fed. R. Bankr. P. 7015, states in pertinent part, "A party may amend its pleading once as a matter of course ... [i]n all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave." The rule further provides leave should be freely given "when justice so requires." The trial court has broad discretion to determine whether leave to amend is appropriate and a denial of leave to amend is reviewed for abuse of discretion. E.g., Garfield v. NDC Health Corp., 466

F.3d 1255, 1270 (11th Cir. 2006). Leave should be given absent a showing of "undue delay, bad faith or dilatory motive . . . repeated failure to cure deficiencies by amendments previously allowed [or] undue prejudice to the opposing party". Id. (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

There is no evidence of undue delay, bad faith, or a dilatory motive on the part of the Plaintiff. Plaintiff sought leave to amend twenty one days after Defendant filed the Motion to Dismiss. Plaintiff's previous amendment as a matter of course was filed before a responsive pleading or motion. The second proposed amendment seeks to cure many of the defects outlined in the motion to dismiss and would add causes of action in addition to turnover. Rule 15(a)'s liberal standard is based upon the "strong preference" for judgment on the merits, "rather than making decisions based upon procedure or technicality." Eason v. Owens (In re Owens), 483 B.R. 262, 264-65 (Bankr. N.D. Ga. 2012). The amendment is based on the same set of facts outlined in the complaint and will not cause undue prejudice to the Defendant.

V. Conclusion

Although the debt at issue is not subject to turnover, the Complaint alleges sufficient facts that Defendant may be liable to the estate. This matter is a core proceeding to adjudicate the estate's counterclaim to the Defendant's proof of claim filed in the case which will necessarily be determined in the claims allowance process. Thus, dismissal is not warranted. Permitting Plaintiff to amend the Complaint may cure any deficiencies so as to permit judgment on the merits. Accordingly, it is hereby

ORDERED the Defendant's Motion to Dismiss is DENIED;

ORDERED FURTHER Plaintiff's motion to amend its Complaint is GRANTED. Plaintiff is directed to file an amended complaint within fourteen days of the date hereof.

END OF DOCUMENT

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