



IT IS ORDERED as set forth below:

Date: February 13, 2015

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:
THE S&Q SHACK, LLC, 09-67151-MGD
Involuntary Debtor. CHAPTER 7

In re: Case Number:
RAVING BRANDS, INC., 09-68410-MGD
Involuntary Debtor. CHAPTER 7

**DARYL DOLLINGER and
H. MARTIN SPROCK,**

Movants,

v.

CONTESTED MATTER

BV RETAIL, LLC,

Respondent.

ORDER OVERRULING OBJECTION TO BV RETAIL, LLC'S CLAIMS, IN PART, BY

DETERMINING THAT BV RETAIL, LLC HAS VALID CLAIMS AGAINST DEBTORS

This Order resolves a threshold issue presented by Movants, the principals of the Debtors, in their Objections to BV Retail, LLC, a Delaware LLC's ("BV Retail") claims. This Order determines that BV Retail holds valid claims against the above-named involuntary Debtors.

BV Retail filed claims in these cases based upon a 2007 transaction described in more detail below. With respect to S&Q Shack, BV Retail filed a claim based on a January 22, 2007 Assignment, Assumption and Lease Agreement where S&Q Shack was the assignee and tenant and BV Retail, LLC, a North Carolina LLC, served as the landlord. (Exhibit 8). As to Raving Brands, BV Retail's claim is based upon a Guaranty of S&Q Shack's obligations under the Assigned Lease. Raving Brands also executed a promissory note in favor of BV Retail, LLC, a North Carolina LLC in connection with this transaction (Exhibit 10).

In 2013, the principals of the Debtors, Daryl Dollinger and H. Martin Sprock, and the Chapter 7 Trustee filed a joint motion requesting that Messrs. Dollinger and Sprock be permitted to object to BV Retail's claims. (Case No. 09-67151; Docket No. 133). BV Retail did not oppose the motion and it was granted. (*Id.* at Docket No. 134). Mr. Dollinger was the president of S&Q Shack and a director of Raving Brands. Mr. Sprock wholly owned Raving Brands and had the largest equity stake in S&Q Shack. Mr. Sprock was also a Raving Brands' director. For purposes of this Order, collectively Messrs. Dollinger and Sprock are referred to as the "Objectors."

A trial was scheduled in November 2013 to determine BV Retail's claims, and, at the request of the parties, briefing commenced to narrow the issues for trial. The objection is to both the validity

of BV Retail's claims as well as to the amount. This order only determines that BV Retail has valid claims against Debtors.

The Court has subject matter jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157 & 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), & (O).

I. Relevant Factual Background

The parties agree as to the following facts and have submitted joint exhibits.

BV Retail's claims arise from a lease transaction. The Lease was executed in 2005 by Ballantyne Village, LLC, as landlord, and Doc Green's, as restaurant tenant, for the Premises.¹ Doc Greene's was related to Debtors but was a separate entity. Doc Greene's never opened as a restaurant at the Premises and defaulted under the Lease.

Later in 2006, BV Retail was formed as a limited liability company under North Carolina law. Through two transfers, BV Retail, a North Carolina LLC, became the owner of the Premises at Ballantyne Center.

BV Retail asserts that it converted to a Delaware LLC at the request of its lenders sometime in 2006. Objectors believe that there are two distinct BV Retail entities - a Delaware LLC and a North Carolina LLC. Both purported entities have the same manager, Robert Bruner. The record includes the North Carolina Secretary of States' Articles of Conversion certificate filed on July 24, 2006, which names the converting entity as BV Retail, LLC a domestic limited liability company and names the resulting entity as BV Retail, LLC, a foreign limited liability company incorporated in

¹ The Premises were located in a mall in Charlotte, North Carolina; the mall was known in the community as "Ballantyne Center." Ballantyne Center was owned and operated by Ballantyne Village LLC.

Delaware. (Exhibit 6).

The transactions at issue occurred in January 2007. On January 22, 2007, an Assignment, Assumption and Amendment of Lease Agreement ("Lease Assignment") was executed by BV Retail, LLC, a North Carolina LLC, successor to Ballantyne Village, LLC, and Doc Greene' s, Raving Brands, Inc., and The S&Q Shack, LLC. (Exhibit 8). The Lease Assignment assigned to S&Q Shack all rights and obligations under the Lease.

Raving Brands executed a Guaranty, which guaranteed all S& Q Shack' s obligations under the Lease. (Exhibits 8 & 9). Raving Brands also executed a Promissory Note, for \$57,804.88, in favor of BV Retail, to account for Doc Green' s material rent arrearage. (Exhibit 10). S&Q Shack paid some rent under the Assigned Lease until April of 2008, and the proposed restaurant never opened. S&Q Shack sold substantially all of its assets in January 2009. BV Retail terminated the Lease and partially relet the Premises in December of 2009.

Prepetition, BV Retail, LLC, a Delaware LLC, sued Raving Brands in the District Court for the Western District of North Carolina for breach of contract. (Exhibit 11). A consent judgment was entered on March 4, 2009 between the parties in the amount of \$206,051.50 plus attorneys' fees and costs in the amounts of \$8,085 and \$350 respectively. (Docket No. 12).

BV Retail was a petitioning creditor in both of these Chapter 7 involuntary cases, which were filed on March 19, 2009 (S&Q Shack) and April 1, 2009 (Raving Brands). A trial was held in the Bankruptcy Court in 2010, and Orders for Relief were entered after finding that section 303(b) had been satisfied. Debtors appealed the Orders. The District Court affirmed.

BV Retail filed proofs of claim on September 29, 2011. Updated claim amounts are \$914,902.13 against S&Q Shack and \$1,306,624.54 against Raving Brands.² The Objectors were principals of the respective Debtors during all the relevant transactions and when the involuntary cases were initiated.

Objectors assert that BV Retail does not have valid claims against Debtors because the 2007 Lease Assignment transaction never transferred claims from BV Retail, LLC, a North Carolina Corporation, to BV Retail, LLC, a Delaware Corporation. According to the Objectors, since claimant is BV Retail, LLC, a Delaware corporation, it is not the proper party to assert these claims.

II. Legal Standard: Objection to Claim

If a party objects to a claim, the objecting party carries the burden of going forward with evidence to overcome the prima facie validity and amount of the claim. *Juniper Dev. Group v. Kahn*, 993 F.2d 915, 925 (1st Cir. 1993). If the objecting party produces evidence to refute at least one of the allegations essential to the claim's legal sufficiency, the burden of persuasion shifts back to the claimant. *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173–74 (3d Cir. 1992); *In re Britt*, 199 B.R. 1000, 1008 (Bankr. N.D. Ala. 1996). Although Rule 3001(f) places the burden of going forward on the objecting party, the burden of ultimate persuasion rests with the claimant. *Matter of Fidelity Holding Co., Ltd.*, 837 F.2d 696, 698 (5th Cir. 1988).

III. Discussion

The Objectors contest the validity of BV Retail's claims on the basis that Debtors are not

² These amounts may not reflect all interest amounts asserted by BV Retail.

liable to BV Retail (Del). The Objectors rely upon the statute of frauds to support their position that the 2007 Lease Assignment never transferred claims from BV Retail, a North Carolina LLC (the party to the agreement) to BV Retail, a Delaware LLC (the party asserting claims in this action). However, the inquiry into the state of incorporation at this stage does not invalidate the 2007 Lease Assignment and related documents to that transaction. The statute of frauds was satisfied by the terms of the 2007 Lease Assignment and related transactions. *See Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 524 S.E.2d 591, 594 (N.C. App. 2000) (“A misnomer in the name of a corporate grantee does not render [a] conveyance void.”). North Carolina’s statute of frauds, N.C. Gen. Stat. Ann. § 22-2, requires leases for more than three years be in writing, containing “essential terms”: “(1) the parties’ names (lessor and lessee), (2) a description of the realty demised, (3) a statement of the term of the lease, and (4) the rent or other consideration.” *Fuller v. Southland Corp.*, 290 S.E.2d 754, 759 (N.C. App. 1982).

The Objectors do not contest that these essential terms are included in the documents. The Objectors also do not contest that Debtors had the benefit of the Lease at issue, partially performed under its terms, and incurred liabilities under the terms of the Lease and Guaranty. In 1984, the North Carolina Appellate Court explained the purpose of the statute of frauds and its limits:

The statute of frauds was designed to guard against fraudulent claims supported by perjured testimony; it was not meant to be used by defendants to evade an obligation based on a contract fairly and admittedly made.

House v. Stokes, 311 S.E.2d 671, 675 (N.C. App. 1984). Here, Debtors undoubtedly incurred obligations to BV Retail. Now, the Objectors merely contest whether BV Retail, a Delaware LLC, is

the proper party to assert such claims and the amount of such obligations (which will be address by a separate order).

BV Retail asserts that Objectors are precluded from contesting the validity of BV Retail's claims by the final orders for relief that necessarily determined that the standard for an involuntary case had been satisfied. Section 303(b)(1) requires that an involuntary case can be commenced, where the petitioning creditor, here, BV Retail, held a claim "against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount" BV Retail also relies on the District Court consent judgment against Raving Brands (brought by BV Retail, LLC, a Delaware LLC), to bar the objection to the Raving Brands' claim. The Objectors refute BV Retail's preclusion arguments based upon principals of privity and finality.

The Objectors' legal theory is misguided, however, in this context, and BV Retail carries its until burden of persuasion as to the validity of its claims. Although the Court is not inclined to bar the Objection based upon preclusion doctrines, these facts justify application of judicial estoppel.

The August 27, 2010 Bankruptcy Court Order for Relief in S&Q Shack included an explicit finding that "[t]he evidence presented at trial shows and the Court finds that S&Q was a party to a lease agreement with BV Retail for space in lease in a shopping center in Charlotte, North Carolina. S&Q failed to pay monthly rent on that lease in May 2008 and thereafter." (Case No. 09-64810, Docket No. 30, p. 3). The District Court affirmed, and the order included the finding that "S&Q Shack entered into a lease with BV Retail with the intention of opening a Shane's Rib Shack in Ballantyne Village. (Id. at 3.) Raving Brands, an affiliate of S&Q Shack, guaranteed its obligations.

(Id.).”

Judicial estoppel is an equitable doctrine invoked at a court's discretion. *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001) (internal citations and quotations omitted). “Under this doctrine, a party is precluded from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding. Judicial estoppel is an equitable concept intended to prevent the perversion of the judicial process. *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002). Although invoking the doctrine does not require set factors, courts have typically considered:

(1) whether the present position is “clearly inconsistent” with the earlier position; (2) whether the party succeeded in persuading a tribunal to accept the earlier position, so that judicial acceptance of the inconsistent position in a later proceeding creates the perception that either court was misled; and (3) whether the party advancing the inconsistent position would derive an unfair advantage on the opposing party.

New Hampshire v. Maine, 532 U.S. at 750-51.

Judicial estoppel is appropriate in this case given the drawn-out history of this litigation and the fundamental nature of BV Retail’s claims against Debtors, as petitioning creditor and as a central player in S&Q Shack’s pre-bankruptcy operations. Objectors’ interests are and have been aligned with Debtors. Also, the prior litigation between Debtors and BV Retail, LLC, a Delaware LLC, and the involuntary proceedings and disclosures in the bankruptcy demonstrate that Debtors have obligations to BV Retail. In the absence of any other competing claim arising from the Assigned Lease and related transactions, this objection to the validity of the claims is an inconsistent position at this stage of these proceedings.

The consent judgment in the District Court was a voluntary agreement between BV Retail, LLC, a Delaware LLC and Raving Brands. Concerns over whether BV Retail, LLC, a Delaware LLC, was the proper party to enforce the obligation could have been raised in the course of that litigation and, certainly, before entering into a voluntary agreement with BV Retail, LLC, a Delaware LLC. Lastly and most significantly, Debtors and Objectors would gain an unfair position if the claims of BV Retail were not allowed and Debtors were not obligated under the terms of the 2007 Lease Assignment and related transactions from which they benefitted. Here, the passage of time and the conduct of these proceedings have created a fixed set of claims against Debtors, which includes those of BV Retail. Again, significantly, no claim has been filed on behalf of any other BV Retail entity.

Debtors have no threat of multiple liability (and this Order ensures as much), as cautioned by the Objectors. The Objectors assert that the claims are made by a party other than its owner. Yet, the joint exhibits include several documents evidencing that BV Retail (Delaware) held property rights and interests to support its claims. In addition to the Articles of Conversion filed by the North Carolina Secretary of State in mid-2006 converting BV Retail from a North Carolina LLC to a Delaware LLC (albeit preceding the Assigned Lease, Guaranty and Promissory Note transaction), the postpetition disposition of the property leased to S&Q Shack and guaranteed by Raving Brands includes transactions where BV Retail, LLC, a Delaware LLC, is the grantor and borrower. Exhibit 27 is a recorded Special Warranty Deed with BV Retail, LLC, a Delaware LLC, as grantor, and the property conveyed is the same property leased to S&Q Shack under the 2007 Assigned Lease. The Special Warranty Deed was recorded in November of 2012. Exhibit 28 is a Deed in Lieu of Foreclosure

Agreement by and among BV Retail, LLC, a Delaware LLC, as borrower, and Wells Fargo Bank, N.A., as lender, regarding the property subject to the 2007 Lease Assignment. Lastly, Exhibit 29 is an Assignment of Leases with BV Retail, LLC, a Delaware Corporation, as assignor and Bix Ballantyne Village, LLC, as assignee regarding the Premises. Accordingly, BV Retail, LLC, a Delaware LLC, held title, right, interest and benefit in the property. The record and the passage of time have revealed that BV Retail holds valid claims against Debtors, and it has satisfied its burden of proof as to the validity of its claims.

Similar to *Adelphia Recovery Trust v. Goldman, Sachs & Co*, 748 F.3d 110 (2d Cir. 2014), the bankruptcy procedures and case history have provided adequate time to litigate BV Retail's role in these bankruptcy cases. In *Adelphia Recovery Trust*, the ownership of an account was not at issue until after a Chapter 11 plan had been substantially consummated. The Second Circuit held that imposing the doctrine of judicial estoppel is a fact-specific decision and does not always require a showing of unfair advantage by the party seeking its application. *Id.* at 117. Here, reliance on the validity of BV Retail's claims is analogous to the reliance on the ownership determination of a certain account in *Adelphia*. Further, the traditional elements for invoking judicial estoppel are also present.

For these reasons, it is

ORDERED that BV Retail, LLC, a Delaware LLC, holds valid claims against Debtors. The amount of such claims will be determined by separate order.

It is **FURTHER ORDERED**, to the extent necessary, this Order bars any further claim against Debtors that could be asserted by BV Retail, LLC a North Carolina LLC.

The Clerk's Office is directed to serve a copy of this order on the parties, their counsel, and all creditors.

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