



IT IS ORDERED as set forth below:

Date: February 10, 2015

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro".

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

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

IN RE:

GREGORY BERNARD BRYANT,

Debtor.

CASE NO. 14-61205-BEM

CHAPTER 7

MELVIN BRATTON and EUGENIA
BRATTON,

Plaintiffs,

ADVERSARY PROCEEDING NO.
14-5311-BEM

v.

GREGORY BERNARD BRYANT and BANK
OF AMERICA, N.A., SERVICER FOR BANK
OF AMERICA HOME LOANS,

Defendants.

**ORDER ON MOTION TO DISMISS AND MOTION FOR LEAVE TO AMEND
COMPLAINT**

This matter comes before the Court on Defendant Bank of America's ("BOA") Motion to Dismiss Plaintiffs' Complaint (Doc. No. 4, hereinafter "Motion to Dismiss") and

Plaintiffs' request for Leave to Amend the Complaint (Doc. No. 10, hereinafter "Motion to Amend"). Plaintiffs filed the Complaint commencing this proceeding against Debtor seeking damages for fraud and a determination of nondischargeability under 11 U.S.C. § 523(a)(2) and against BOA seeking a refund of certain payments made to BOA. BOA seeks dismissal of the claim against it based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Plaintiffs seek leave to amend their Complaint to request injunctive relief against Debtor and BOA.

I. Entry of Final Order

Pursuant to 28 U.S.C. § 157(b)(1), the Court may enter final orders in core proceedings. In non-core proceedings, the Court may enter final orders with the consent of the parties. *Id.* § 157(c)(2). For the reasons explained in subsequent parts of this Order, the Court has determined the claim against BOA for damages and the proposed claims against BOA and Debtor for an injunction are non-core. Plaintiffs allege that the proceedings are core. (Doc. No. 1 ¶¶ 5, 44, hereinafter "Complaint.") Debtor admitted the allegation in his answer and counterclaim. (Doc. No. 5, ¶¶ 5, 44.) BOA disputed the allegation in its Motion to Dismiss but expressly consented to entry of a final order. (Motion to Dismiss, Memorandum of Law, p.5 n.4.)

Some courts imply a plaintiff's consent to entry of a final order by the bankruptcy court when the plaintiff alleges the proceeding is a core proceeding and the opposing party admits the allegation. *See Philadelphia Newspapers, LLC v. Review Pub'g, LP (In re Philadelphia Newspapers, LLC)*, No. 09-11204, AP No. 09-264, 2009 WL 5178333, at *5 (Bankr. E.D. Pa. Dec. 17, 2009) (collecting cases). Even if the Court were inclined to apply a rule of implied consent to Plaintiffs, the record in this case is too ambiguous to do so. In their response to BOA's Motion to Dismiss, Plaintiffs argued that the Court has jurisdiction under 28

U.S.C. § 157(a). However, they also note that even if the Court finds the proceeding to be non-core, it can submit proposed findings of fact and conclusions of law to the district court. (Doc. no. 11, p. 4-5.) In these circumstances, the Court cannot conclude that all parties have consented to entry of a final order by this Court. Therefore, the Court submits the following proposed findings of fact and conclusions of law to the District Court for de novo review pursuant to 28 U.S.C. § 157(c)(1) and Federal Rule of Bankruptcy Procedure 9033.

II. Proposed Findings of Fact

Plaintiffs allege that on November 12, 2010, Debtor obtained a mortgage loan from BOA and granted BOA a security deed on real property located at 7240 Weber Street, Atlanta, Georgia (the “Property”). (Complaint ¶¶ 7, 45). On March 20, 2012, Debtor entered into an agreement to sell the Property to Plaintiffs for \$190,000. (Complaint ¶ 8). On July 23, 2012, Debtor executed a quitclaim deed transferring the Property to Plaintiffs, but did not satisfy the note and security deed to BOA prior to or upon the conveyance.¹ (Complaint ¶¶ 12, 47). Plaintiffs made mortgage payments directly to BOA from April 2012 to August 2013. (Complaint ¶ 48). Plaintiffs made mortgage payments to Debtor from September 2013 to February 2014. (Complaint ¶ 48). Upon receiving a Notice of Right to Cure Default and Intent to Accelerate dated February 18, 2014, Plaintiffs stopped sending mortgage payments to Debtor. (Complaint ¶ 51). Plaintiffs sent mortgage payments to BOA from March 2014 through July 2014. (Complaint ¶ 48). BOA has refunded only those mortgage payments tendered by Plaintiffs

¹ Debtor listed the transaction on Line 10 of his Statement of Financial Affairs, describing it as “Told and Intended a Lease Purchase on the real estate but actually signed a Quit Claim Deed. Deed is Defective.” (Case No. 14-61205, Doc. No. 1 at p. 9) The alleged defect is apparently premised on Plaintiff Eugenia Bratton serving as both a witness and a party to the quitclaim deed. (A.P. No. 14-5311, doc. no. 5 ¶ 12) Debtor also listed an equitable interest in the Property valued at \$170,000 and subject to a debt of \$154,000 on Schedule A, claimed an exemption of \$2,600 in the Property on Schedule C, and listed BOA as a secured creditor on Schedule D. (Case No. 14-61205, Doc. No. 1 at pp. 14, 18, 19). Debtor filed a statement of intention to surrender the Property. (*Id.* p. 36). On July 16, 2014, the Chapter 7 Trustee filed a Report of No Distribution to which no objections were filed, and on October 9, 2014, the Court entered an order granting Debtor a discharge. (*Id.*, Doc. No. 16).

in June and July 2014.² (Complaint ¶ 54). In the Complaint, Plaintiffs seek return of all money paid to BOA and retained by BOA. (Complaint ¶ 55). In addition, Plaintiffs' Motion to Amend seeks to amend the Complaint to add a claim for injunctive relief which, if granted, would prevent BOA from foreclosing on the Property. (Motion to Amend at p. 4).

III. Proposed Conclusions of Law

A. BOA's Motion to Dismiss for Lack of Subject Matter Jurisdiction

BOA first asserts that this Court lacks subject matter jurisdiction and seeks dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1), made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b). Attacks on subject matter jurisdiction take one of two forms: facial or factual. *McElmurray v. Consolidated Gov't of Augusta-Richmond County*, 501 F.3d 1244, 1251 (11th Cir. 2007) (citing *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981)). On a facial challenge, the court determines whether the complaint sufficiently alleges a basis for subject matter jurisdiction. *Id.* In doing so, the court approaches the motion like a motion to dismiss under Rule 12(b)(6), limiting its consideration to the pleadings and treating the allegations in the complaint as true. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). On a factual challenge, the court determines whether subject matter jurisdiction actually exists regardless of the pleadings. *McElmurray*, 501 F.3d at 1251. In doing so, it may look outside the pleadings and need not extend a presumption of truth to the allegations in the complaint. *Lawrence*, 919 F.2d at 1529 (quoting *Williamson*, 645 F.2d at 412-13); *see also Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001).

Here, BOA has raised a factual challenge to the Court's jurisdiction by contending the claim against it is not, in fact, related to the bankruptcy proceeding. Although the

² Debtor's bankruptcy case was filed on June 6, 2014. Plaintiffs do not allege they made any payments after July 2014.

Court is not required to accept the allegations in the Complaint as true, it will do so for purposes of this analysis because BOA has neither admitted nor denied them. (Motion to Dismiss, Memorandum of Law, p. 3 n. 2). Plaintiffs do not set forth a specific cause of action against BOA in the Complaint, although they request a judgment in an amount equal to the money they paid to BOA after their purchase of the Property from Debtor.

Bankruptcy jurisdiction extends to “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. §§ 157(a), 1334(b). A proceeding “arises under” title 11 when it “invok[es] a substantive right created by the Bankruptcy Code.” *Continental Nat’l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999) (citations omitted). A proceeding “arises in” a case under title 11 when it “involve[s] administrative-type matters” or “matters that could arise only in bankruptcy.” *Id.* (citations and internal quotation marks omitted). Proceedings that fall into one of these two categories are core proceedings pursuant to 28 U.S.C. § 157(b)(2). *Id.* at 1345 n.6. Plaintiffs’ claim against BOA is a dispute between two non-debtors. It neither invokes a substantive right created by the Bankruptcy Code nor involves administration of the bankruptcy case or a matter that can arise only in bankruptcy. Thus, the claim is non-core, and the Court may only exercise jurisdiction if it is “related to” Debtor’s bankruptcy case.

“Related to” jurisdiction requires “some nexus between the related civil proceeding and the Title 11 case.” *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 787 (11th Cir. 1990). In defining that nexus, the 11th Circuit adopted the *Pacor* test, which provides:

The usual articulation of the test for 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. The proceeding need not necessarily

be against the debtor or against 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, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Assuming the *Pacor* test is otherwise satisfied, "related to" jurisdiction may include suits between nondebtor third parties. See *Celotex Corp. v. Edwards*, 514 U.S. 300, 307 n.5, 115 S. Ct. 1493, 1498 n.5 (1995). Indeed, *Lemco Gypsum* involved a dispute between two nondebtors.

In *Lemco Gypsum*, the debtor owned assets, including buildings and equipment, located on real property it leased. The chapter 7 trustee sold the assets during the bankruptcy case with approval of the bankruptcy court. The landlord filed a motion for damages against the buyer based on the buyer's failure to remove the assets. *Lemco Gypsum*, 910 F.2d 785-86. The bankruptcy court granted the motion and ordered the buyer to pay damages to the landlord. *Id.* at 786. The circuit court found the bankruptcy court lacked "related to" jurisdiction over the landlord's motion.³ *Id.* at 789. The court noted that sale of the assets by the trustee with court approval gave the buyer title "clear of all claims in bankruptcy" and such assets could "not be hauled back into the [bankruptcy] estate" *Id.* at 788. And, the debtor's prior ownership of the property did not confer jurisdiction over the dispute. *Id.* at 789.

The dispute here is between the debtor's landlord and [the buyer]; there is no suggestion that the proceeds, if recovered, would be turned over to the trustee. The judgment of the bankruptcy court orders [the buyer] to pay damages directly to debtor's landlord, so we fail to see how recovery could conceivably have an effect on debtor's estate. This dispute does not involve the identification of the debtor's property interests and cannot affect other creditors. There is no reason for the bankruptcy court's jurisdiction to linger.

Id. at 789 (internal footnotes omitted).

³ Jurisdiction was determined as of the date the landlord's motion was filed. *Lemco Gypsum*, 910 F.2d at 788 n.20.

Here, although it is possible that Plaintiffs' claim against BOA could affect the amount of Debtor's liabilities by increasing the debt secured by the Property in an amount commensurate with any amount returned to Plaintiffs, it cannot affect the bankruptcy estate. This so because the chapter 7 Trustee, with full knowledge of the alleged defects in the quit claim deed to Plaintiffs, has filed a report of no distribution. Thus, the Trustee has determined that there are no nonexempt assets in the estate to distribute to creditors and there is insufficient nexus between Plaintiffs' claims against BOA and the bankruptcy case to confer related to jurisdiction. *See Barnhardt v Demarco (In re Demarco)*, 454 B.R. 343, 347 (Bankr. E.D. Pa. 2011) (noting that "[i]t is generally recognized that upon entry of a report of no distribution, a bankruptcy court is divested of its related to jurisdiction)(citations omitted); *SAS-Moran Lake Holding Co., LLC, et. al. v. Roswell Holdings Mortgage, LLC, et. al. (In re Moran Lake Convalescent Center, LLC)*, No. 10-43405; AP No. 12-4015, 2012 Bankr. LEXIS 4552 (Bankr. N.D. Ga. Aug. 28, 2012)(Diehl, J.) (common nexus of fact between claims between nondebtors and debtor not sufficient to create related to jurisdiction). Consequently, the Court concludes it lacks "related to" jurisdiction over Plaintiffs' claim against BOA. Because no subject matter jurisdiction lies with the Bankruptcy Court, the Court need not consider whether Plaintiffs have stated a claim against BOA upon which relief may be granted.

B. Plaintiffs' Motion for Leave to Amend Complaint

Plaintiffs filed their Motion to Amend 15 days after BOA filed its Motion to Dismiss and Debtor filed his answer. Under Federal Rule of Civil Procedure 15(a)(1)(B), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7015, Plaintiffs may amend their pleading once as a matter of course if it is done within 21 days after service of the earlier of a responsive pleading or a motion under Rule 12(b). However, parties who are

represented by counsel waive that right if counsel files a motion to amend within the prescribed period rather than filing an amended pleading. *Coventry First, LLC v. McCarty*, 605 F.3d 864, 869-70 and n.2 (11th Cir. 2010). By filing a Motion to Amend, Plaintiffs invited a review of their proposed amendments, and the Court has discretion to rule on the motion. *Id.* at 870. Leave to amend should be freely granted “when justice so requires.” Fed. R. Civ. P. 15(a)(2). However, the Court need not allow a futile amendment, such as “when the complaint as amended would still be properly dismissed.” *Coventry First*, 605 F.3d at 870 (quoting *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007)); *see also Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001).

Plaintiffs’ did not attach a proposed amended complaint to their motion, but the motion states:

In the instant case, the Plaintiffs are not seeking to recite or rely upon additional facts not originally asserted. Instead, Plaintiffs merely seek the court [sic] assistance in staying any efforts by Debtor or BOA to sell, foreclose, transfer or otherwise convey the Property which is titled to Plaintiffs but being surrendered by Debtor in satisfaction of his mortgage loan being serviced by BOA.

(Motion to Amend, p.3). Thus, it appears Plaintiffs seek to add claims for injunctive relief against BOA and Debtor based solely on the facts alleged in the original Complaint.⁴

No bankruptcy purpose would be served by allowing the amendment because the Property is property of the estate only if Debtor is correct that the quit claim deed is defective and Plaintiffs are incorrect that they own the Property. The Trustee has filed a report of no distribution with full knowledge of the alleged defects in the quit claim deed, thus the Trustee has determined that this claim will not result in nonexempt assets for distribution. As a result,

⁴ Plaintiffs’ request for injunction assumes the automatic stay either did not apply to the Property or has been terminated as to the Property. The Court notes that BOA has not sought stay relief in the main case.

even if the Property is property of the estate, administration of the case will not be affected by Plaintiffs' proposed amended claim. And, as with Plaintiffs' claim for damages against BOA, an injunction against BOA would have no conceivable effect on the bankruptcy estate. Thus, the amendment is futile due to the Court's lack of subject matter jurisdiction.

For the same reasons the Court is without jurisdiction over Plaintiffs' claim for injunctive relief against Debtor. This is true because enjoining a transfer of the Property will not create any distribution for unsecured creditors and thus, will not affect administration of the bankruptcy estate. The injunction claim against Debtor appears to share a factual basis with Plaintiffs' claim to determine dischargeability of a debt under 11 U.S.C. § 523(a)(2). Although the § 523(a) claim is a core claim, the common factual basis is not sufficient to bring the injunction claim within the Court's jurisdiction under § 1334(b). *See Lemco Gypsum*, 910 F.2d at 789; *Community Bank of Homestead v. Boone (In re Boone)*, 52 F.3d 958, 961 (11th Cir. 1995). "To fall within the court's jurisdiction, the plaintiff's claims must affect the estate, not just the debtor." *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (11th Cir. 1987).

Further, even if Plaintiffs could establish some basis for jurisdiction over the injunction claims against Debtor and BOA, the Court would permissively abstain from hearing the claims. A bankruptcy court may abstain from hearing a proceeding "in the interest of justice, or in the interest of comity with State courts or respect for State law ..." 28 U.S.C. § 1334(c)(1). In deciding whether to abstain, courts consider a variety of factors, none of which is determinative in and of itself. The factors include: (1) effect of abstention of 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 in a nonbankruptcy forum; (5) the basis of the bankruptcy court's

jurisdiction other than 28 U.S.C. § 1334; (6) the degree of remoteness or relatedness to the main case; (7) substance rather than form of an asserted “core” proceeding; (8) the feasibility of severing state-law claims from core bankruptcy matters; (9) the burden on the bankruptcy court’s docket; (10) the existence of a right to jury trial; (11) the likelihood commencement of the case in bankruptcy court involves forum shopping; (12) the presence of non-debtor parties in the proceeding; (13) comity; and (14) the possibility of prejudice to other parties in the action. *See Anderson v. Patel (In re Diplomat Constr. Inc.)*, 512 B.R. 721, 724 (Bankr. N.D. Ga. 2014) (Diehl, J.); *Rayonier Wood Prods. V. Scanware, Inc. (In re Scanware, Inc.)*, 411 B.R. 889, 897-98 (Bankr. S.D. Ga. 2009).

In this case, the applicable factors weigh in favor of abstention. As previously explained, the injunction claims will have no effect on the administration of the estate. The injunctive relief sought is based entirely on state law and involves Property that has been surrendered by Debtor and that the Trustee has determined does not contain equity to distribute to creditors. Further, the injunction claims appear to be entirely based on the parties’ rights under nonbankruptcy law as they relate to alleged fraud by Debtor in connection with a real estate transaction. Consequently, any jurisdiction the Court has over the injunction claims is “related to” jurisdiction and is not rooted in the Bankruptcy Code or the bankruptcy case. Severing the claims for injunctive relief from the sole bankruptcy question raised in the Complaint (dischargeability) does not pose a feasibility problem as the Court regularly considers state court judgments in determining dischargeability of a particular debt. Although judicial economy may be served by hearing the injunction claim against Debtor along with Plaintiffs’ § 523(a)(2) claim, that is an insufficient reason to hear the case in light of the other factors militating in favor of abstention.

IV. Conclusion

Plaintiffs' claim and proposed amended claim against BOA are not within the Court's jurisdiction. Further, Plaintiffs' proposed amended claim against Debtor is not within the Court's jurisdiction. Even if the proposed injunction claims were within the Court's jurisdiction, the Court would permissively abstain from hearing them. Based upon the proposed findings of fact and conclusions of law contained herein, the undersigned respectfully recommends that the District Court grant BOA's Motion to Dismiss and deny Plaintiffs' Motion to Amend.

The Clerk is directed to transmit these proposed findings of fact and conclusions of law along with the record in this adversary proceeding to the Clerk for the United States District Court for the Northern District of Georgia, to serve a copy of the same on the parties and to note the date of service on the parties on the docket in this proceeding.

END OF ORDER

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