

to the Court regarding the Motion for Stay clarifying which claims would be subject to arbitration and staying the adversary proceeding only as it pertains to those claims. Counsel were unable to reach agreement on the arbitrability of all counts of the Complaint. The agreed order submitted by counsel and entered by the Court on March 21, 2005 [docket #54] sets forth the parties agreement as follows: Count VII shall be submitted for arbitration, Counts IV through VI are not subject to arbitration and shall not be stayed. Counsel remain unable to agree about the arbitrability of Counts I, II and III.

Therefore, the Court conducted another pre-trial conference on March 22, 2005. During the March pre-trial conference, the Court directed the Plaintiff to file its objection, if any, to the arbitrability of Counts I, II, and III. Plaintiff filed its objection (the "Objection") on April 1, 2005 and Defendants filed their response (the "Response") on April 11, 2005.

Based on the Motion for Stay, the Objection and the Response and in consideration of the statements of counsel at the pre-trial conference, the Court makes the following findings of fact and conclusions of law with respect to the arbitrability of Counts I, II and III.

Jurisdiction

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. The District Court has not ruled on the Defendants' motion to withdraw the reference. Therefore, this Court continues to have jurisdiction over this adversary proceeding.

The Court determines Counts I, II and III are core proceedings¹ pursuant to 28 U.S.C. § 157(b)(2)(A), (H) and (O) over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a) and 157(b).

Undisputed Facts

Prior to the Petition Date, Plaintiff and Defendants entered into that certain Asset Purchase Agreement dated May 29, 2001. Paragraph 12.20 of the Asset Purchase Agreement

¹ Defendants argue that Counts I and II are not core proceedings. Defendants arguments seem to be made in the hopes that the Court will agree and will thus, be persuaded by the decision of the United States District Court for the Southern District in *In re Cooker* to reach the conclusion that in non-core proceedings a bankruptcy court is without jurisdiction to deny a motion to stay the proceedings and compel arbitration. *See Cooker Restaurant Corp. v G. Arthur Seelbinder (In re Cooker Restaurant Corp.)*, 292 B.R. 308 (S.D. Ohio 2003). However, the holding in *Cooker* is not applicable to this case. Here, Counts I, II and III are core proceedings.

In Counts I and II, the Plaintiff alleges constructive fraudulent transfer pursuant to Ohio Rev. Code § 1336.04(A)(2)(a) and (A)(2)(b). In Count III, Plaintiff seeks the recovery of those transfers pursuant to 11 U.S.C. §§ 544(b) and 550.

28 U.S.C. § 157(b)(H) provides that “proceedings to ... avoid ... fraudulent conveyances” are core proceedings, and a fraudulent conveyance cause of action based on the combination of state law and Code § 544(b)(1) in both form and substance, clearly fits within this category.

See Unsecured Creditors Committee v. HMI Industries, Inc. (In re Bliss Technologies, Inc.), 307 B.R. 598, 604-06 (Bankr. E.D. Mich. 2004) citing *Michigan Employment Security Commission v. Wolverine Radio Co. Inc., (In re Wolverine Radio)*, 930 F.2d 1132,1144 (6th Cir. 1991) and *XL Sports, Ltd v. Lawler*, 2002 WL 31260355 (6th Cir. Oct. 2002)(finding a proceeding to avoid a fraudulent transfer under 11 U.S.C. § 544(b)(1) and Tennessee common law is a core proceeding). In addition, a § 550 cause of action is one arising under Title 11 and it is also a core proceeding. *See In re Bliss Technologies, Inc.*, 307 B.R. at 606 - 07.

provides:

12.20 Governing Law, Venue and Arbitration. [T]he parties hereby consent and agree that any controversy arising under or out of this Agreement shall be submitted to and settled by binding arbitration

As the parties agree that there is a valid agreement to arbitrate disputes “arising under or out of” the Asset Purchase Agreement, the only question is whether Counts 1 through III are disputes “arising under or out of” the Asset Purchase Agreement.

Discussion

In Counts I and II, Plaintiff alleges that Defendants engaged in acts constituting constructive fraudulent transfer pursuant to Ohio Rev. Code § 1336.04(A)(2)(a). These are claims seeking to recover for the allegedly tortious conduct of the Defendants. They are not claims seeking to recover for breach of contract. The challenged conduct does not “arise out of or under” the asset purchase agreement. The Defendants argue that the Plaintiff’s proof can only be made by reference to the terms, conditions and exhibits to the Asset Purchase Agreement. While Defendants may be correct that the Asset Purchase Agreement may be evidence in the Plaintiff’s case, “[a] tort claim does not become contractual simply because an element of proof may relate to a contract.” *Isports, et al., v. IMG Worldwide, Inc.*, 157 Ohio App.3d 593, 601 (8th D. 2004)

Further, Plaintiff has brought Counts I through III in its capacity as a debtor in possession and thus, pursuant to § 544(b) in the role of an existing unsecured creditor of the Debtor, not a party to the Asset Purchase Agreement. Arbitration is a matter of contract and a party cannot be required to submit to arbitrate any dispute which he or she has not agreed

to so submit. *Council of Smaller Ent. v. Gates, McDonald & Co.*, 80 Ohio St. 3d 665-66 (1998). In the tort claims at issue here, Plaintiff represents creditors that are not parties to the Asset Purchase Agreement, and, therefore, that have not agreed to submit this dispute to arbitration.

Conclusion

For the reasons set forth above, the Court sustains the Plaintiff's objection to the arbitrability of Counts I, II, and III. These Counts will not be sent to arbitration and the adversary proceeding will not be stayed with respect to these counts.

IT IS SO ORDERED.


MARILYN SHEA-STONUM
Bankruptcy Judge

The foregoing opinion should be served electronically on

Jeffrey W. Krueger, counsel for Defendants

Howard Mentzer, counsel for Plaintiff

Michael Kaminski, purported counsel for the Official Committee of Unsecured Creditors