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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:)	Case No. 03-18559
)	
MIDWEST FIREWORKS MFG. CO.,)	Chapter 11
INC., II,)	
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
COLONIAL FIREWORKS CO.,)	Adversary Proceeding No. 03-1220
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	<u>REGARDING MOTIONS TO DISMISS</u>
LAURENCE D. LOMAZ, et al.,)	<u>AND MOTION TO STRIKE</u>
)	
Defendants.)	

Colonial Fireworks Company filed this complaint against chapter 11 debtor Midwest Fireworks Manufacturing Co., Inc. II (Midwest) and its principal Laurence Lomaz. The complaint asks for injunctive relief and damages related to the defendants' alleged removal and conversion of fireworks inventory located on property in Deerfield, Ohio. Both defendants filed counterclaims. Colonial moves to dismiss the counterclaims and also requests that certain defenses and matters be stricken from Mr. Lomaz's answer. (Docket 14, 23). Midwest and Mr. Lomaz oppose those motions. (Docket 25, 28).

DISCUSSION

Midwest filed a chapter 11 petition on June 13, 2003; on July 1, 2003, the court entered an agreed order appointing a trustee. David Simon is the chapter 11 trustee. Colonial filed this adversary proceeding on July 1, 2003 and named Midwest and Mr. Lomaz as defendants.

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Midwest filed an answer and counterclaim on August 13, 2003. Mr. Lomaz, who is not an attorney and is representing himself in this matter, filed an answer and counterclaim on October 14, 2003.

I. Midwest's Counterclaim

Midwest's counterclaim seeks to avoid certain transfers of its assets to Colonial as fraudulent conveyances under bankruptcy code § 548. (Docket 12). *See* 11 U.S.C. § 548(a). Return of the property or a judgment of \$1,350,000.00 is the relief requested. Colonial moves to dismiss the counterclaim under civil rules 12(b)(1) and (b)(6), arguing that the debtor lacks standing to assert it now that a trustee has been appointed. *See* FED. R. CIV. P. 12(b)(1) and (6) (made applicable by FED. R. BANKR. P. 7012(b)).

Bankruptcy code § 548(a) provides that a trustee may avoid certain transfers. A chapter 11 debtor in possession may act with the rights and powers of a trustee and may pursue bankruptcy avoidance actions on behalf of the bankruptcy estate. *See* 11 U.S.C. § 1107(a). Midwest, however, is no longer a debtor in possession within the meaning of this statute because a trustee has been appointed. *See* 11 U.S.C. § 1101(1) (defining the term "debtor in possession" to mean the debtor except when a trustee is serving in the case). The chapter 11 trustee is now the representative of Midwest's chapter 11 estate. *See* 11 U.S.C. § 323(a). As a result, the trustee is the party with authority to bring § 548 actions. *See Rooney v. Thorson (In re Dawnwood Properties/78)*, 209 F.3d 114, 116 (2d Cir. 2000). *Cf. Waldschmidt v. Commerce Union Bank (In re Bauer)*, 859 F.2d 438 (6th Cir. 1988) (affirming the substitution of the chapter 7 trustee as plaintiff in an action filed by the debtors because the trustee as representative of the

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estate has the capacity to sue). Consequently, Midwest does not have standing to assert the counterclaim.

Midwest argues that it has direct standing based on § 1109(b) which provides that “[a] party in interest, including the debtor . . . may raise and may appear and be heard on any issue in a case under [chapter 11].” 11 U.S.C. § 1109(b). Section 1109’s general right to be heard cannot, however, be read to give the debtor the right to bring bankruptcy avoidance actions that belong to the estate. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) (citing *Collier on Bankruptcy* for the proposition that §1109 “does not bestow any right to usurp the trustee’s role as representative of the estate with respect to the initiation of certain types of litigation that belong exclusively to the estate.”).

Midwest also argues that it has derivative standing. In some circumstances, creditors may be given derivative standing to prosecute issues that a debtor is not pursuing. *See Canadian Pacific Forest Prods. Ltd. v. J.D. Irving, Ltd. (In re Gibson Group, Inc.)*, 66 F.3d 1436 (6th Cir. 1995) (discussing what a creditor must show in order to obtain derivative standing to pursue bankruptcy avoidance actions). Midwest, however, has not: (1) provided legal authority for the proposition that a chapter 11 debtor may have such standing; or (2) demonstrated that it has met the requirements for such standing even if it is eligible to request it. *Id.* This argument is unavailing.

Because Midwest does not have standing to assert the § 548 actions set forth in its counterclaim, Colonial’s motion to dismiss the counterclaim for failure to state a claim is granted.

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II. Mr. Lomaz's Counterclaim

Mr. Lomaz filed an answer which denies all of the allegations in two counts of the complaint (paragraphs twelve through nineteen).¹ He also filed a counterclaim which requests a \$7,500,000.00 judgment against Colonial based on actions taken when it removed property from the Deerfield location. Colonial asserts that the counterclaim should be dismissed for lack of jurisdiction and failure to state a claim. *See* FED. R. CIV. P. 12(b)(1) and (6) (made applicable by FED. R. BANKR. P. 7012(b)).

The counterclaim states:

(1) On or about May 22, 2003 Colonial Fireworks through its president Gregory Tremonti entered into an agreement with reputed organize [sic] crime figures from Youngstown, Ohio and elsewhere.

This Honorable Court should be made aware that organized crime in Youngstown and Canton, Ohio for over 15 years tried to intimidate Midwest and when that did not work used political influence to try and change the fireworks law to eliminate Midwest altogether. (Article attached). Plaintiff has no evidence that Stanley Stein was involved but one must question why no inventory was ever conducted, no appraisals made, and only a hand full of these people were invited to bid. Receiver Stanley Stein at a minimum did not appear to act professionally. The only people that submitted bids all have criminal ties to reputed members of the Mob in Youngstown, Ohio and elsewhere. Someone had to realize when you have 3 bids of \$50,000.00, [\$]100,000.00 and \$150,000.00, with assets worth 1.8 million dollars it must be concluded Stanley Stein did not do his job professionally.

2. Colonial Fireworks, along with attorney Robert Stefancin, mislead [sic] this Honorable Court by stating all the sales tax appeals were dismissed and any underlying issues were moot. This was hardly the case when in fact the 11th District Court of Appeals

¹ Mr. Lomaz's answer does not respond to paragraphs one to eleven of the complaint, although he attempts to do so in his brief in opposition to Colonial's motion. *See* Docket 25.

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reinstated all the appeals and consolidated all of them. Colonial knew at this point their only hope was to “scare” this Court to sell the fireworks. The order made by this Court was a conditional order, instructing that an inventory be made and Colonial did not follow this Honorable Court’s Order and to this day we have not received that inventory. Colonial went ahead and removed the fireworks anyway. Even the fireworks they did not buy were removed along with other assets belonging to Lomaz, which are not subject to this Court[’]s order.

3. When this Honorable Court denied Lomaz access to the Deerfield complex Colonial started a looting process. To expedite the looting of Midwest they even invited Albert Gibel back on the property under this Court[’]s Order. Gibel had been barred from the complex by Judge John Enlow. Albert Gibel was indicted on 6 felony Counts of stealing from Midwest in 1999 even before Colonial was in the picture. Albert Gibel and others on December 21, 2002 went to Midwest and stole over \$250,000.00 worth of fireworks, all records, and personally [sic] property of Laurence Lomaz and others. Midwest would not be in this position if it were not for this madness that started December 21, 2002. The very same people who have tried to destroy this company are well on their way to just that.

These illegal actions that started on December 21, 2002 and continued with Colonial is a well-orchestrated attempt to . . . destroy and loot Midwest Fireworks and Laurence Lomaz. Incredibly [sic] Lomaz and others were ordered shot by Colonial President Greg Tremonti in front of 5 witnesses.

4. Unless the Court stops Colonial from selling the remainder of the fireworks removed and brings the fireworks back and escrow money for fireworks already sold Lomaz will never be able to recoup his loses [sic]. In any event this Honorable Court should order Colonial to post a bond in the amount of 7.5 million Dollars. Colonial may very well be uncollectible and will simply not be able to pay when Lomaz should win his judgment against Colonial.

(Docket 20). Colonial also asks that paragraphs one, two, and three be stricken because they include scandalous material. *See* FED. R. CIV. P. 12(f) (made applicable by FED. R. BANKR. P. 7012(b)).

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The court notes that Mr. Lomaz's pleading is reviewed under a less stringent standard because he is not an attorney. *See Montgomery v. Huntington Bank*, 346 F.3d 693, 698 (6th Cir. 2003); *Herron v. Harrison*, 203 F.3d 410, 414 (6th Cir. 2000).

A party's claim for relief, such as Mr. Lomaz's counterclaim, must contain "a short and plain statement of the claim showing that the pleader is entitled to relief, and . . . a demand for judgment for the relief the pleader seeks." FED. R. CIV. P. 8(a)(2) and (3) (made applicable by FED. R. BANKR. P. 7008(a)). A counterclaim is subject to dismissal for failure "to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6) (made applicable by FED. R. BANKR. P. 7012(b)). In considering Colonial's motion, this court must:

construe the [counterclaim] in the light most favorable to [Mr. Lomaz], accept all well-pleaded factual allegations as true, and determine whether [Mr. Lomaz] can prove no set of facts in support of his claims that would entitle him to relief. *Nieman v. NLO*, 108 F.3d 1546, 1548 (6th Cir. 1997). Dismissal of the [counterclaim] is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed.2d 59 (1984).

Trzebuckowski v. City of Cleveland, 319 F.3d 853, 855 (6th Cir. 2003).

Mr. Lomaz's counterclaim is not easy to decipher. Construing the pleading in Mr. Lomaz's favor, it appears that he is asserting these claims against Colonial: (1) Colonial (prior to the bankruptcy filing) conspired to put Midwest out of business; (2) Colonial restrained the bidding for Midwest's assets in the pre-filing sale conducted by the state court receiver; and (3)

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Colonial stole Mr. Lomaz's personal property.²

One party generally does not have standing to assert the rights of another party. *See Powers v. Ohio*, 499 U.S. 400, 410 (1991). Mr. Lomaz's claims that Colonial conspired to put Midwest out of business and that it restrained bidding in the pre-bankruptcy sale of Midwest's assets are claims which belonged to Midwest at the filing of its chapter 11 case. *See* 11 U.S.C. § 541(a)(1) (providing that the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."). To the extent these causes of action exist, the chapter 11 trustee has succeeded to them. *See Guinn v. Lines (In re Trans-Lines West, Inc.)*, 203 B.R. 653, 659 (Bankr. E.D. Tenn. 1996). These claims are, therefore, properly dismissed under rule 12(b)(6) as Mr. Lomaz does not have standing to assert them.

Mr. Lomaz's counterclaim also asserts a claim that Colonial stole property which belonged to him. This cause of action clearly belongs to Mr. Lomaz and he has standing to assert it. The issue with respect to this claim is this court's jurisdiction to hear it. Title 28, § 1334 provides for "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §§ 1334(a) and (b). To come within the jurisdictional grant of § 1334, "a proceeding need only be 'related to' a case under title 11." *Sander's Confectionery Prods., Inc. v. Heller Financial, Inc.*, 973 F.2d 474, 482 (6th Cir. 1992).

² In his brief in opposition to Colonial's motion to dismiss, Mr. Lomaz also asserts that he owns 100% of Midwest's stock and that Colonial's actions made that stock worthless. The counterclaim, however, does not state a claim for relief on that basis.

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A proceeding is related to a case under title 11 if “the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *In re Dow Corning Corp.*, 86 F.3d 482, 489 (6th Cir. 1996) (quoting with approval *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Related to jurisdiction exists “if the outcome could alter the debtor’s rights, liabilities, options or freedom of action . . . and which in any way impacts upon the handling and administration of the bankrupt estate.” *Id.* Despite this broad jurisdictional grant, “situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement[.]” *In re Dow Corning Corp.*, 86 F.3d at 489 (quoting *Robinson v. Michigan Consol. Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir. 1990)). Suits between non-debtor parties may come within the related to jurisdiction, but only if the suit has an effect on the bankruptcy estate. *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). The mere existence of common questions of fact does not give rise to related to jurisdiction; there must instead be some nexus between the related proceeding and the title 11 case. *In re Dow Corning Corp.*, 86 F.3d at 489.

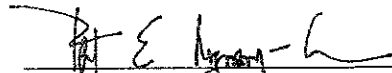
Mr. Lomaz’s theft claim against Colonial is not related to Midwest’s chapter 11 case. The claim involves only Colonial and Lomaz and although it may involve common questions of fact, there is no evidence that a determination of that claim will have any impact on the Midwest bankruptcy estate. Therefore, Mr. Lomaz’s counterclaim against Colonial is dismissed for lack of subject matter jurisdiction insofar as it asserts his personal claim against Colonial. This decision makes Colonial’s motion to strike certain principles of the counterclaim moot.

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CONCLUSION

For the reasons stated, Colonial's motions to dismiss Midwest's counterclaim and Mr. Lomaz's counterclaim are granted. A separate order will be entered reflecting these decisions.

Date: 19 June 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Robert Stefancin, Esq.
Morris Laatsch, Esq.
Mr. Laurence Lomaz
David Simon, Trustee

By: Joyce L. Gordon, Secretary
Date: 12/19/03

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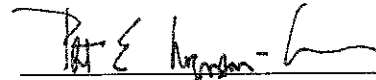
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MIDWEST FIREWORKS MFG. CO.,)	Chapter 11
INC., II,)	
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Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
COLONIAL FIREWORKS CO.,)	Adversary Proceeding No. 03-1220
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
LAURENCE D. LOMAZ, et al.,)	
)	
Defendants.)	

For the reasons stated in the memorandum of opinion filed this same date, Colonial Fireworks Co.'s motions to dismiss the counterclaims filed by Laurence Lomaz and Midwest Fireworks Manufacturing Co., Inc. II are granted. (Docket 14, 23).

IT IS SO ORDERED.

Date: 19 Dec 2003



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Robert Stefancin, Esq.
Morris Laatsch, Esq.
Mr. Laurence Lomaz
David Simon, Trustee

By: Joyce R. Gordon, Secretary
Date: 12/19/03