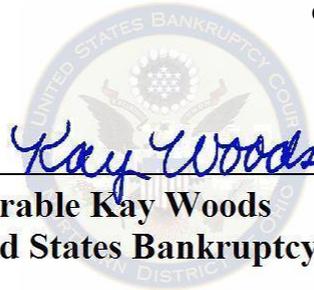


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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	
*****	*	
ELM ROAD DEVELOPMENT, CO.,	*	
et al.,	*	ADVERSARY NUMBER 08-04020
	*	
Plaintiffs,	*	
	*	
vs.	*	
	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD., et al.,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	

MEMORANDUM OPINION CONCERNING MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE,
MOTION FOR JUDGMENT ON THE PLEADINGS

The following Memorandum Opinion addresses Motion to Dismiss for Lack of Subject Matter Jurisdiction [sic] or in the Alternative,

Motion for Judgment on the Pleadings ("Motion to Dismiss") (Doc. # 35) filed by Buckeye Retirement Co., LLC, Ltd. ("Buckeye") on July 3, 2008. Plaintiffs Elm Road Development Co. ("Elm Road"), Tuller Brookfield Associates, Inc. ("Tuller Brookfield"), Woodland Park Retirement Housing Limited Partnership ("Woodland Park"), CI Residential Property Corp., and Daniel Daniluk (collectively, "Plaintiffs") commenced the instant Adversary Proceeding against Mark Gleason, chapter 7 trustee ("Trustee"), Buckeye, Randall J. Hake Contracting Corp. ("Hake Contracting") and Randall Joseph Hake ("Mr. Hake") (collectively, "Defendants") on February 4, 2008, by filing a Complaint seeking declaratory judgment. The Complaint prays for the following relief: "that this court enter its order declaring and determining that such property [identified in paragraph 11 of the Complaint] is not property of the estate or, alternatively, is property of the estate but not subject to assignment or sale in contravention of the agreement existing with respect to these business entities[.]" (Complaint at unnumbered 5.)

On May 12, 2008, Buckeye and Trustee each filed documents styled Answer and Affirmative Defenses to Complaint, which were docketed at Doc. # 31 and Doc. # 32, respectively. On July 3, 2008, Buckeye filed Motion to Dismiss. On July 16, 2008, Plaintiffs filed Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Motion of Judgment on the Pleadings ("Response") (Doc. # 36). On July 24, 2008, Buckeye filed Motion for Leave to Reply to Plaintiffs' Response to Motion to Dismiss for Lack of Subject Matter Jurisdiction, or in the Alternative, Motion for

Judgment on the Pleadings ("Motion for Leave") (Doc. # 37). By separate order, entered this date, this Court denied the Motion for Leave.

This adversary proceeding is related to the bankruptcy case (Case No. 04-41352 and hereafter referred to as "Main Case") of Debtors Randall J. Hake and Mary Ann Hake (collectively, "Debtors"), which was commenced on March 25, 2004 ("Petition Date"). The Main Case was originally filed as a chapter 11 case and converted to chapter 7 on April 26, 2006. Mary Ann Hake was denied discharge pursuant to Denial of Discharge for Mary Ann Hake (Main Case, Doc. # 777) on October 26, 2007. Mr. Hake was denied discharge pursuant to Order Denying Discharge (Adv. Pro. Case No. 06-4153, Doc. # 264) on March 21, 2008.

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157 and General Order 84, entered July 16, 1984, which referred "any and all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 to the Bankruptcy Judges for the District." Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(A),(N) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. STANDARD FOR REVIEW

A. Motion to Dismiss

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether a

cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.¹ To withstand dismissal, the complaint must (i) provide a short and plain statement of the claim that shows the plaintiff is entitled to relief, (ii) give the defendant fair notice of the claim, and (iii) state the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

FED. R. CIV. P. 12(b)(6), which is applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).² Referring to *Twombly*, the Court of Appeals for the Sixth Circuit noted that

[t]he Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. . . . The Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the

¹The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

²In *Twombly*, the Supreme Court held that the following language from *Conley* had earned its retirement: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct. at 1969.

complaint are true."

Ass'n of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (second alteration in original). See also, *Nicholson v. Countrywide Home Loans*, No. 1:07-CV-3288, 2008 U.S. Dist. LEXIS 20714, *7 (N.D. Ohio March 17, 2008) ("Accordingly, the claims set forth in a complaint must be plausible, rather than conceivable." (citing *Twombly*, 127 S. Ct. at 1974)); *Boling v. Corr. Med. Servs.*, No. 07-11752, 2007 U.S. Dist. LEXIS 80479, *8-9 (E.D. Mich. Oct. 31, 2007) (Noting *Twombly* "is consistent with the holdings of several prior Sixth Circuit opinions. . . . [that a complaint] 'must contain either direct or inferential allegations regarding all the material elements' [and be more than] 'a statement of facts that merely creates a suspicion that the pleader might have a right of action.'" (citations omitted)); and *Reid v. Purkey*, No. 2:06-CV-40, 2007 U.S. Dist. LEXIS 42761, *4-5 (E.D. Tenn. June 11, 2007) ("While a complain[t] need not contain detailed factual allegations, a pleader has a duty . . . to supply, at a minimum, the necessary facts and grounds which will support his right to relief." (citing *Twombly*, 127 S. Ct. at 1964-65)).

In determining the sufficiency of a complaint, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under FED. R. CIV. P. 12(e) for a more definite

statement is the proper avenue rather than under FED. R. CIV. P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (W.D. Tenn. 2003) (citing 5A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990)).

However, "the [c]ourt is not required to accept 'sweeping unwarranted averments of fact,'" *Official Comm. of Unsecured Creditors v. Austin Fin. Servs., Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D.N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction," *KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)). See also *Power & Tel. Supply Co., Inc. v. Suntrust Banks, Inc.*, 447 F.3d 923, 930 (6th Cir. 2006) ("The court need not accept legal conclusions or unwarranted factual inferences as true.").

B. Lack of Subject Matter Jurisdiction

Rule 12(b)(1) permits a court to dismiss a complaint for lack of subject matter jurisdiction. The issue of a court's lack of subject matter jurisdiction "may be raised at any time, by any party, or even *sua sponte* by the court itself." *Superior Bank v. Boyd (In re Lewis)*, 398 F. 3d 735, 739 (6th Cir. 2005); see also FED. R. CIV. P. 12(h)(3). A determination whether subject matter jurisdiction exists must be made before a court reaches a decision on the merits because any ruling made by a court lacking jurisdiction is void *ab initio*. The parties themselves cannot consent to subject matter jurisdiction, "nor can it be waived." *Alongi v. Ford Motor Co.*, 386

F. 3d 716, 728 (6th Cir. 2004). Therefore, "if jurisdiction is lacking, dismissal is mandatory." *Campanella v. Commerce Exch. Bank*, 137 F.3d 885, 890 (6th Cir. 1998).

Where a defendant challenges a court's subject matter jurisdiction, the plaintiff has the burden of proving jurisdiction exists. *Rogers v. Stratton Indus., Inc.*, 798 F. 2d 913, 915 (6th Cir. 1986). There are two ways in which subject matter jurisdiction may be challenged: facially, where defendant challenges the sufficiency of the pleadings; and factually. 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.30[4] (3d ed. 2008). A facial challenge to subject matter jurisdiction provides plaintiff "safeguards similar to those provided in opposing a Rule 12(b)(6) motion. . . . When the attack is factual, however, 'the trial court may proceed as it never could under [Rule] 12(b)(6) or [Rule] 56.'" *Id.*

In reviewing a facial attack, a trial court accepts the allegations in the complaint as true. On the other hand, when a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts.

Id. See also *Ohio Nat'l Life Ins. Co. v. United States*, 922 F. 2d 320, 325 (6th Cir. 1990) (A reviewing court takes the allegations as true in a facial attack but no presumption of truth applies in a factual attack). Thus, unlike a 12(b)(6) motion converted to a motion for summary judgment, the existence of disputed material facts does not preclude a court from dismissing a complaint for lack of subject matter jurisdiction.

C. Judgment on the Pleadings

Judgment on the pleadings is governed by FED. R. CIV. P. 12(c), which is made applicable to this proceeding pursuant to FED. R. BANKR. P. 7012. Rule 12(c) provides, in pertinent part:

After the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings.

FED. R. CIV. P. 12(c) (West 2008).

Judgment on the pleadings is proper when no material issue of fact exists and the moving party is entitled to judgment as a matter of law. *JP Morgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 582 (Sixth Cir. 2007). In determining if a material issue of fact exists, the Court must construe the complaint in the light most favorable to the non-moving party. *Estill County Bd. of Educ. v. Zurich Ins. Co.*, 84 Fed. Appx. 516, 518 (6th Cir. 2003). "For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *JP Morgan Chase Bank*, 510 F.3d at 581 (internal citation and quotation marks omitted).

II. FACTUAL BACKGROUND

On December 21, 2007, Trustee filed Motion for Order Approving the Sale of Estate Assets Outside the Ordinary Course of Business Pursuant to 11 U.S.C. § 363 ("Motion to Sell") (Main Case, Doc. # 784), which, by amended notice, was noticed for hearing on February 5, 2008. On January 24, 2008, Elm Road, Tuller Brookfield,

Woodland Park and others (collectively, "Objecting Parties")³ filed Objection to Proposed Sale of Property and Request for Clarification of Property to be Transferred ("Objection to Sale") (Main Case, Doc. # 794). The Court held a hearing on the Motion to Sell on February 5, 2008 ("Hearing"), at which counsel for Trustee, Objecting Parties, and Buckeye attended and presented argument.

The Motion to Sell sought approval for Trustee to sell all of the bankruptcy estate's non-exempt assets to Buckeye for the total purchase price of \$650,000.00 ("Purchase Price"). The Objection to Sale asserted that certain assets, including the 50% interest in Elm Road, the 32.5% stock ownership in Tuller Brookfield, and the 100% stock ownership interest in Hake Contracting (collectively, the "Carve-Out Assets")⁴ could not be transferred because they all had interests in Woodland Park, which interests could not be transferred without the consent of the Woodland Park general partners.⁵ As a

³Plaintiffs and Objecting Parties significantly overlap, but are not identical.

⁴The assets at issue in the Objection to Sale were identified as the "Carve-Out Assets" in the Order Authorizing Sale and will be so identified throughout this Opinion.

⁵Elm Road, Tuller Brookfield, Woodland Park, and certain interested shareholders and partners raised this same argument on November 13, 2007, when they filed Objection and Request for Clarification of Proposed Compromise by Elm Road Development, Co., Tuller Brookfield, and Woodland Park Retirement Housing Limited Partnership and Certain Interested Shareholders and Partners ("Objection to Compromise") (Main Case, Doc. # 780) to Joint Motion to Approve Settlement of Trustee's Motion to Enforce Sale ("Joint Motion") (Main Case, Doc. # 770). The Objection to Compromise "respectfully request[ed] this court to overrule the joint motion to approve settlement and/or clarify the terms and conditions of the proposed sale of the debtors' assets and exactly what property it is contemplated is subject to transfer or assignment[.]" (Obj. to Compr. at unnumbered 2.) On November 14, 2007, the Court held a hearing on the Joint Motion which was approved, as modified on the record. The Objection to Compromise was deemed to be premature because Trustee was not seeking authority to sell any assets at that time. Despite having notice of Plaintiffs' assertion that certain of Debtors' assets were not transferable, neither Trustee nor Buckeye had any communications with Plaintiffs to try to resolve the issue prior to Trustee filing the Motion to Sell.

consequence, the Objecting Parties asserted that Trustee required the consent of the general partners of Woodland Park in order to be able to transfer the Carve-Out Assets. The day prior to the Hearing, Plaintiffs commenced this Adversary Proceeding.

At the Hearing, the Court questioned the Trustee's ability to sell the assets free and clear of all liens, claims and encumbrances in light of the Objection to Sale. Counsel for Trustee conceded that none of the requirements in 11 U.S.C. § 363(f) applied under these circumstances. (Hearing Trans. at p. 30, line 3 - p. 32, line 9; and p. 33, line 1 - p. 34, line 12.) As a consequence, counsel for Trustee suggested a compromise, with the concurrence of counsel for Buckeye and the Objecting Parties, as follows: (i) Trustee and Buckeye would "carve out" the Carve-Out Assets from the sale by Trustee to Buckeye at this time; (ii) this Court would determine whether Trustee could transfer the Carve-Out Assets; and (iii) whether or not Trustee could sell the Carve-Out Assets to Buckeye, the Purchase Price would not be reduced. This agreement was adopted by the Court and set forth in Order of Court dated March 3, 2008 ("Order Authorizing Sale") (Main Case, Doc. # 809), which authorized Trustee to sell the non-exempt estate assets to Buckeye.⁶ The Order Authorizing Sale specifically provides, as follows:

3. That the assets identified in the Purchase Agreement as the Debtor's interest in and/or to Elm Road Development Company, Tuller Brookfield Associates Incorporated and Randall J. Hake

⁶But for the suggested compromise, the Court would have held Trustee's Motion to Sell the non-exempt assets in abeyance until the instant adversary proceeding could be resolved. Both Trustee and Buckeye acknowledged that Trustee could not sell the assets "free and clear" of the encumbrance asserted by Plaintiffs herein.

Contracting Corporation (the "Carve-Out Assets"), be and they hereby are carved out from the sale[;]

4. The sale to Buckeye Retirement Company, LLC, Ltd. ("Buckeye"), or its assignee or designee, of the Estate Assets (as that term is defined in the Trustee's Motion) and listed in the Purchase Agreement attached to this Order as Exhibit A, but excepting therefrom the Carve-Out Assets for the total purchase price of \$650,000.00 ("Purchase Price") is hereby APPROVED;
5. Subject to the defenses of the Chapter 7 Trustee and Buckeye to the Objecting Parties' adversary proceeding, Case Number 08-04020 (the "Declaratory Judgment Action"), upon a determination by final order of this Court that any of the Carve-Out Assets constitute property of the Estate under Section 541 of the Bankruptcy Code and are legally transferrable by the Trustee, such assets shall immediately and finally be sold and transferred to Buckeye in accordance with the Purchase Agreement, effective as of the date of this Order;
6. Subject to the defenses of the Chapter 7 Trustee and Buckeye to the Declaratory Judgment Action, this Court shall determine, in the Declaratory Judgment Action, whether any of the Carve-Out Assets are property of the Estate, and if determined to be property of the Estate, whether the Debtors' interests in said assets are legally transferable;

* * *

8. . . . [I]n all events and to the extent inconsistent, the terms of this Order shall supersede and control any inconsistent term contained in said Purchase Agreement[.]

Order Authorizing Sale at ¶¶ 3-6, 8.

Trustee and Buckeye drafted the proposed Order Authorizing Sale for the Court's signature. Moreover, no party appealed the Order Authorizing Sale.

III. LEGAL ANALYSIS

A. Are the Carve-Out Assets Property of Estate?

Buckeye's first argument is that, pursuant to 11 U.S.C. § 541(a), the Carve-Out Assets constitute property of Debtors' bankruptcy estate. Buckeye asserts that Plaintiffs' own allegations establish that the Carve-Out Assets are property of the bankruptcy estate. As set forth above, the Court must accept the allegations in Plaintiffs' Complaint as true for purposes of determining this Motion to Dismiss. The Complaint reads, in relevant part, as follows:

11. That the debtors, at the time of their filing of their petition in bankruptcy, were the owners of certain interests in business entities, including the following described interests:

- A. Randall J. Hake, 50% stock holdings in plaintiff, Elm Road Development Co.
- B. Randall J. Hake, 32.5% stock ownership in plaintiff, Tuller Brookfield Associates, Inc.
- C. Randall J. Hake Contracting Corp., Randall J. Hake, 100% stock ownership.

12. Randall J. Hake Contracting Corp. is itself a 49% limited partnership interest in plaintiff, Woodland Park Retirement Housing Limited Partnership.

Complaint, ¶¶ 11-12.

Taking these allegations as true, there does not appear to be any dispute that Mr. Hake owned the Carve-Out Assets as of the Petition Date.⁷

⁷This is confirmed by Debtors' original Schedule B - Personal Property, which lists the following assets of Mr. Hake:

12. Stock and interests in incorporated and unincorporated businesses: Randall J. Hake Contracting Corp. and Elm Road

Section 541 of the Bankruptcy Code provides that:

(a) The commencement of a case under section 301 . . . of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

- (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

The exceptions in subsection (b) do not apply here. Subsection (c), however, is relevant because it provides that "an interest of the debtor in property becomes property of the estate under subsection (a)(1) . . . notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law - (A) that restricts or conditions transfer of such interest by the debtor[.]" 11 U.S.C. § 541(c)(1) (West 2008). Subsection (c)(2) states: "A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. § 541(c)(2) (West 2008).

The Complaint also alleges that the interests of Mr. Hake and Hake Contracting in Elm Road are "subject to restrictions precluding or limiting the sale, transfer, or assignment of the interests held in Woodland Park . . . and Elm Road[.]" (Complaint, ¶ 14.)

Thus, taking all of Plaintiffs' allegations as true, there is no question that Mr. Hake had some legal or equitable interest in the

Development Corp. (50%).

13. Interests in partnerships or joint ventures: Tuller-Brookfield Associates.

Schedule B at 2. Debtors amended Schedule B as of February 15, 2005 (Doc. # 142), and May 24, 2006 (Doc. # 467), but these assets were never removed.

Carve-Out Assets as of the commencement of his bankruptcy case. The Court, as it must for the purposes of the Motion to Dismiss, will accept as true that there are restrictions on the transfer or sale of the Carve-Out Assets. Property of the estate encompasses property in which Mr. Hake had a legal or equitable interest as of the Petition Date even in light of such restrictions. See 11 U.S.C. § 541(c)(1)(A).

In *Denton v. Seals (In re Denton)*, 169 B.R. 612 (Bankr. W.D. Tex. 1994), the bankruptcy court held that certain campaign funds donated by constituents of one of the debtors and held by debtor should be turned over to the chapter 7 trustee, despite restrictions on transfer of such funds in the Texas Election Code. Noting that § 541(c)(1) is often called the anti-alienation provision, the court stated, “[T]he anti-alienation provision requires that the bankruptcy estate include all of the debtors’ property ‘notwithstanding any provision . . . that restricts or conditions transfer of such interest by a debtor.’ § 541(c)(1). Appellant’s argument is better directed at what a trustee of the bankruptcy estate can do with property once placed in the trust.” *Id.* at *6-7. As a consequence, the Court finds that the Carve-Out Assets - assuming the restrictions alleged in the Complaint - are property of this bankruptcy estate.

For the forgoing reason, Buckeye’s motion for judgment on the pleadings is granted, in part, regarding only the issue of whether the Carve-Out Assets are property of the estate.

B. Does this Court have Subject Matter Jurisdiction?

Buckeye next argues that dismissal of the instant adversary

proceeding is required because this Court lacks subject matter jurisdiction. This argument, although convoluted, appears to have several prongs: (i) the Court no longer has subject matter jurisdiction because Debtors have been denied a discharge; as a consequence, the outcome of this adversary proceeding does not have any bearing on the bankruptcy estate or Trustee's responsibility to distribute the sale proceeds in connection with the Order Authorizing Sale; (ii) a determination of the transferability of the Carve-Out Assets is a purely state law issue and should be determined in state court; and (iii) because Buckeye acquired whatever interests the bankruptcy estate had in the Carve-Out Assets, a determination of the transferability of the Carve-Out Assets can have no impact on the bankruptcy estate. The Court has carefully examined each of these arguments and found them to be legally deficient, as well as unpersuasive.

First, Buckeye argues that, as a result of the entry of the April 16, 2008, Order that dismissed Mr. Hake's appeal of the Order Denying Discharge, (i) the "permanent injunction of the Bankruptcy Code no longer applies to the Hakes' debts[;]"⁸ and (ii) the automatic stay in 11 U.S.C. § 362 no longer applies. (Mot. to Dismiss at 8.) Buckeye quotes § 362(c) for the proposition that "denial of the Hakes' discharge acts to terminate the automatic stay by operation of law." (*Id.*) This proposition, however, is just

⁸Buckeye fails to identify the "permanent injunction" to which it refers. The injunction in 11 U.S.C. § 524(a)(2) applies only if a debtor receives a discharge. As a consequence, it is not possible for that injunction to "no longer" apply since it was never applicable to this case.

plain wrong as applied to the Carve-Out Assets. Buckeye has selectively quoted from § 362(c). A reading of this subsection is its entirety demonstrates that "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate[.]" 11 U.S.C. § 362(c)(1) (West 2008). The stay only terminates upon the denial of discharge with respect to "any other act under subsection (a)." 11 U.S.C. § 362(c)(2) (West 2008). As a consequence, the automatic stay remains in place as to property of the bankruptcy estate, such as the Carve-Out Assets.

Buckeye makes the bald - and inaccurate - statement that "[t]he determination of whether the Hake's [sic] interests in the Carve-Out Assets are transferrable has no bearing on, and in no way affects, the Hakes' bankruptcy estate." (Mot. to Dismiss at 8.) Buckeye makes this statement without support or foundation because there is none to be found. The determination of whether the Carve-Out Assets are transferable, or under what conditions they are transferable, directly and necessarily affects this bankruptcy estate. As Trustee expressly recognized at the hearing on the Motion to Sell, he cannot complete his administration of this bankruptcy estate without a determination on the transferability of the Carve-Out Assets. Trustee acknowledged that none of the exceptions in § 362(f) applied to permit him to sell the assets free and clear, which required this Court to determine the validity of Plaintiffs' argument concerning the transferability of the Carve-Out Assets. As set forth above (and as argued by Buckeye), the Carve-Out Assets are property of this

bankruptcy estate. As a consequence, Trustee has an obligation to administer such assets - with or without restriction. If Trustee cannot freely sell the Carve-Out Assets without restriction, he will have to determine if he can sell or transfer the assets under other conditions and/or for other consideration or if he will have to abandon these assets. This is a determination that directly affects the bankruptcy estate and Trustee's obligation to administer it.

As a consequence, Buckeye's first argument is without merit.

Second, Buckeye argues that this Court does not have subject matter jurisdiction because determination of the transferability of the Carve-Out Assets involves "issues [that] are purely state law issues concerning property rights and therefore, they should be determined in state court." (Mot. to Dismiss at 8.) Buckeye makes this argument even though it concedes that the Order Authorizing Sale "contemplated that this Court retain jurisdiction over the determination whether the Carve-Out Assets are transferable[.]" (Mot. to Dismiss at 7.) The Order Authorizing Sale more than "contemplated" that this Court would determine the issues in this adversary proceeding. In fact, the Order Authorizing Sale expressly provided that Trustee cannot complete the sale to Buckeye absent a determination by this Court concerning the transferability of the Carve-Out Assets.

5. Subject to the defenses of the Chapter 7 Trustee and Buckeye to the Objecting Parties' adversary proceeding, Case Number 08-04020 (the "Declaratory Judgment Action"), upon a determination by final order of this Court that any of the Carve-Out Assets constitute property of the

Estate under Section 541 of the Bankruptcy Code and are legally transferrable by the Trustee, such assets shall immediately and finally be sold and transferred to Buckeye in accordance with the Purchase Agreement, effective as of the date of this Order;

6. Subject to the defenses of the Chapter 7 Trustee and Buckeye to the Declaratory Judgment Action, this Court shall determine, in the Declaratory Judgment Action, whether any of the Carve-Out Assets are property of the Estate, and if determined to be property of the Estate, whether the Debtors' interests in said assets are legally transferable;

Order at ¶¶ 5-6 (emphasis added). The Order Authorizing Sale expressly provides that Trustee shall sell and transfer the Carve-Out Assets to Buckeye only after this Court determines that the Carve-Out Assets (i) constitute property of the estate; and (ii) are legally transferable by Trustee. Absent such determination by this Court, Trustee is not authorized to sell the Carve-Out Assets to Buckeye.

This Court clearly has subject matter jurisdiction of this adversary proceeding and the Carve-Out Assets. There are three types of jurisdiction vested in the district courts under 28 U.S.C. § 1334(b). The three types of original, but not exclusive, jurisdiction are: (i) proceedings arising under title 11, (ii) arising in a case under title 11, or (iii) related to a case under title 11. "When a district court has jurisdiction over a case under section 1334(b), the case can be referred to that district court's bankruptcy court in accordance with 28 U.S.C. § 157." *Johnson v. Countrywide Home Loans (In re Johnson)*, 2004 Bankr. LEXIS 2342 at *4 (Bankr. S.D. Ga. Jan. 16, 2004). The United States District Court for the Northern District of Ohio has referred such cases to the

bankruptcy courts of this district, pursuant to General Order 84, entered July 16, 1984.

Buckeye has not argued - nor could it seriously do so - that this adversary proceeding is not a core proceeding, as defined in 28 U.S.C. § 157(b)(2).

(2) Core proceedings include, but are not limited to --

(A) matters concerning the administration of the estate;

* * *

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship[.]

28 U.S.C. § 157(b)(2)(West 2008). As set forth at the hearing on Trustee's Motion to Sell, Trustee was not able to sell the Carve-Out Assets free and clear of all liens, claims and encumbrances without this Court first determining if such assets were transferable. That is the reason the Order Authorizing Sale provides for this Court to make such determination. Without this Court's determination that the Carve-Out Assets are (i) property of the estate, and (ii) transferable by Trustee, Trustee has no authority to sell the Carve-Out Assets to Buckeye. This adversary proceeding is an extension of the Motion to Sell since it provides a mechanism for the Court to determine the scope of Trustee's ability to sell assets of the estate. As such, this adversary proceeding falls squarely within § 157(b)(A), (N) and (O) and constitutes a core proceeding over which

this Court has subject matter jurisdiction.

The instant case is clearly distinguishable from cases that involve parties who are not in bankruptcy and over which the Court could not exercise jurisdiction. See *Weeks v. Ross Concrete and Mortar, Inc. (In re Ross Sand & Gravel, Inc.)*, 289 F.2d 311, 312 (6th Cir. 1961).

At best, Buckeye has established that a state court has concurrent jurisdiction and could determine if the Carve-Out Assets are transferable. There is no merit, however, to Buckeye's argument that a state court should make such determination. Indeed, the Order Authorizing Sale itself demonstrates that Trustee is prohibited from selling the Carve-Out Assets to Buckeye absent a determination by this Court. Moreover, this Court has been presiding over the Main Case for more than four years and has great familiarity with the issues involved herein, which a state court would lack.

The Supreme Court has recognized that once property is property of the bankruptcy estate, the Bankruptcy Court has jurisdiction over such property. "All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction." *Ex Parte Baldwin*, 219 U.S. 610, 615 (1934). See *In re Dialogue*, 241 F. 290, 297 (D.N.J. 1916) ("The case in fact sustains the contention of the trustee, in that the bankruptcy court in the instant case acquired custody of the property which was in the possession of the bankrupt at the time of the filing of the petition

and therefore has exclusive jurisdiction to determine all controversies thereto."). The subject of the instant adversary proceeding is transferability of the Carve-Out Assets. Trustee has possession of the Carve-Out Assets, and they constitute property of the bankruptcy estate. For these reasons, this Court has subject matter jurisdiction to determine the transferability of the Carve-Out Assets in order to authorize Trustee to administer this estate.

Third, Buckeye argues that "[b]ecause Buckeye acquired whatever interests the bankruptcy estate had in the Carve-Out Assets, without any representations to [sic] the estate's interest in these assets, a determination of the transferability of the Carve-Out Assets can have no impact on the bankruptcy estate." (Mot. to Dismiss at 9-10.) Buckeye, however, has deliberately misstated the current state of affairs. In fact, Buckeye has not acquired the Carve-Out Assets at all. Buckeye has merely made an offer to purchase the Carve-Out Assets. The Order Authorizing Sale is explicit that Buckeye's purchase of the estate assets excluded the Carve-Out Assets. As previously set forth at length, this Court's determination concerning the transferability of the Carve-Out Assets directly affects the bankruptcy estate and Trustee's obligations thereunder. See pp. 15-17, *supra*.

For the forgoing reasons, this Court finds that it has subject matter over the instant adversary proceeding; indeed, this Court is required to determine if the Carve-Out Assets are transferable before Trustee may sell such assets to Buckeye.

C. Buckeye's Argument Regarding the Woodland Park Agreement

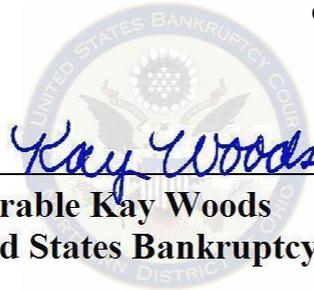
Buckeye makes one final argument to the effect that the provisions in the Woodland Park agreement cannot be imputed to prohibit transfer of the Carve-Out Assets. Although this argument may be appropriate for a motion for summary judgment, it is not appropriately considered in this Motion to Dismiss. As set forth above, this Court must accept all well-pled facts as true. Buckeye's argument fails at this stage because it requires the Court to construe the Woodland Park Partnership Agreement. Buckeye acknowledges that this argument requires the Court to make factual determinations rather than being clear from the face of the Complaint. ("[N]othing in the Woodland Park Partnership agreement can be construed to limit transfers of shares for entities which are, in turn, partners in Woodland Park." (Mot. to Dismiss at 10.)) As a consequence, this Court will not deal with this argument at this time.

IV. CONCLUSION

For the reasons set forth above, this Court finds and holds that the Carve-Out Assets are property of Mr. Hake's bankruptcy estate and, thus, are within the control of Trustee. This Court further finds and holds that it has subject matter jurisdiction of the instant adversary proceeding and can and should determine the transferability of the Carve-Out Assets. This Court is required to make such determination before Trustee can sell the Carve-Out Assets to Buckeye. An appropriate Order will follow.

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IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
RANDALL J. HAKE and	*	
MARY ANN HAKE,	*	CASE NUMBER 04-41352
	*	
Debtors.	*	
	*	
*****	*	
	*	
ELM ROAD DEVELOPMENT, CO.,	*	
et al.,	*	ADVERSARY NUMBER 08-04020
	*	
Plaintiffs,	*	
	*	
vs.	*	
	*	
BUCKEYE RETIREMENT CO., LLC.,	*	
LTD., et al.,	*	HONORABLE KAY WOODS
	*	
Defendants.	*	
	*	

ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION, OR IN THE ALTERNATIVE,
MOTION FOR JUDGMENT ON THE PLEADINGS

Before the Court is Motion to Dismiss for Lack of Subject
Matter Jursidction [sic] or in the Alternative, Motion for Judgment
on the Pleadings ("Motion") (Doc. # 35) filed by Buckeye Retirement

Co., LLC, Ltd. ("Buckeye"). For the reasons set forth in this Court's Memorandum Opinion ("Opinion") entered on this date, the Court hereby grants, in part, and denies, in part, the Motion.

The Court grants, in part, Buckeye's Motion for Judgment on the Pleadings, finding that the Carve-Out Assets (as that term is defined in the Opinion), are property of Debtor's estate.

This Court further finds and holds that it has subject matter jurisdiction of the instant adversary proceeding and can and should determine the transferability of the Carve-Out Assets. This Court is required to make such determination before Trustee can sell the Carve-Out Assets to Buckeye. Therefore, the Court denies Buckeye's Motion to Dismiss.

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