

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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December 23, 2003

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Subject: ***B-Line, L.L.C. v. Federal Deposit Insurance Corp.***
(In re The Credit Store, Inc.)
Adversary No. 03-4039
Chapter 7; Bankr. No. 02-40922

Dear Counsel:

The matter before the Court is the Federal Deposit Insurance Corporation's ("FDIC") Motion to Dismiss the above-referenced adversary proceeding. This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052. As set forth below, the Court will grant the FDIC's motion.

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Summary of facts. In April 2001, The Credit Store, Inc. ("Debtor") sold B-Line, L.L.C. ("B-Line") certain accounts (the "Accounts"). In October 2001, Debtor and B-Line entered into a rescission agreement, pursuant to which B-Line was to return the Accounts to Debtor upon receipt of a specified sum. On August 15, 2002, Debtor filed for relief under chapter 11 of the bankruptcy code. At that time, Debtor still owed B-Line some \$30,000 pursuant to the rescission agreement. As a result, B-Line was still the owner of the Accounts.

On December 2, 2002, B-Line commenced an adversary proceeding against Debtor (Adv. No. 02-4076). On December 12, 2002, pursuant to a stipulation between B-Line and Debtor, the Court entered an Order for Permanent Injunction and for Accounting, which required Debtor to place all funds collected on the Accounts in a segregated interest-bearing account and provide an accounting of the Accounts to B-Line. Both the parties' stipulation and the Court's order specifically provided that Debtor "has no legal interest in the Accounts and they are not property of [Debtor's] estate under 11 U.S.C. § 541(a)(1)." On March 21, 2002, pursuant to a second stipulation between B-Line and Debtor, the Court entered an Order for Final Settlement and for Dismissal with Prejudice, which provided, among other things, that the Court's Order for Permanent Injunction and for Accounting would remain in effect. Both the parties' second stipulation and the Court's order included the same specific provision regarding the Accounts as the earlier stipulation and order.

On February 4, 2003, Debtor's case was converted to chapter 7. John S. Lovald ("Lovald") was appointed as the chapter 7 trustee. In March 2003, Debtor revealed that the funds collected on the Accounts had been "swept" by secured creditor Coast Business Credit ("Coast"), a division of Southern Pacific Bank, Torrance, California ("Southern Pacific"). On April 16, 2003, B-Line filed a Motion and Affidavit for Release of Funds, by which it sought an order of the Court directing Trustee Lovald to disburse to it, from funds held for the benefit of Coast "and/or the Varde Fund, L.P.," the funds collected on the Accounts. Trustee Lovald and the FDIC¹ objected to B-Line's motion. On May 22, 2003, the Court denied B-Line's motion.

On June 20, 2003, B-Line commenced this adversary proceeding, seeking a permanent injunction requiring the FDIC to place all

¹ The FDIC accepted an appointment as receiver of Southern Pacific on February 7, 2003.

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funds generated by the accounts into a segregated account.² On July 24, 2003, the FDIC filed an answer, asserting lack of subject matter jurisdiction and a number of other defenses. On October 9, 2003, the FDIC filed a motion to dismiss for lack of subject matter jurisdiction and a brief in support of its motion. On November 3, 2003, B-Line filed a brief in opposition to the FDIC's motion. The matter was taken under advisement.

Discussion. A plaintiff must include a sufficient allegation of the basis for subject matter jurisdiction in its complaint. *Bowe v. Northwest Airlines, Inc.*, 974 F.2d 101, 103 (8th Cir. 1992) (citations omitted). If a defendant challenges the sufficiency of a plaintiff's allegation, a court must distinguish between a "facial attack" and a "factual attack." *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990).

In the first instance, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). The general rule is that a complaint should not be dismissed "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." In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Id. (citations omitted).

In this case, while the FDIC's motion to dismiss refers broadly to "the files and records in this case, and such other evidence, testimony and argument as may be filed or presented hereafter and/or at the hearing on this motion," the parties have not in fact relied upon matters outside the pleadings in making their arguments, and the Court has therefore not considered any such matters. Thus, the FDIC's motion is best characterized as a facial attack. When such a facial attack shows there is no basis for subject matter jurisdiction, the court must dismiss the case. *Wheeler v. St. Louis Southwestern Railway Company*, 90 F.3d 327, 329 (8th Cir. 1996).

² While B-Line's prayer for relief did not specifically refer to it, B-Line's complaint included a second cause of action for damages caused by the FDIC's alleged conversion of the funds collected on the accounts.

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Pursuant to 28 U.S.C. §§ 157 and 1334 and the District Court's July 27, 1984 Order of Reference, this Court has subject matter jurisdiction over all cases arising under Title 11 and all proceedings arising under Title 11 or arising in or related to a case under Title 11.³ The Court's subject matter jurisdiction extends to both "core" and "non-core, related" proceedings. See *Abramowitz v. Palmer*, 999 F.2d 1274, 1277 (8th Cir. 1993).

Core proceedings "arise only in bankruptcy or involve a right created by federal bankruptcy law." *Speciality Mills, Inc. v. Citizens State Bank*, 51 F.3d 770, 773-74 (8th Cir. 1995). Non-core, related proceedings "do not invoke a substantive right created by federal bankruptcy law and could exist outside of a bankruptcy, although they may be related to a bankruptcy." *Id.*

In both its complaint and its brief, B-Line appears to claim this adversary proceeding is a core proceeding. In the former, B-Line refers the Court to 28 U.S.C. § 157(b)(2)(E) ("[Core proceedings include] orders to turn over property of the estate[.]"). In the latter, it refers the Court to § 157(b)(2)(E) and (O) ("[Core proceedings include] other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.").

B-Line's stipulations with Debtor, the Court's Order for Permanent Injunction and for Accounting, and the Court's Order for Final Settlement and for Dismissal with Prejudice in Adv. No. 02-4076 all state unambiguously that Debtor has no legal interest in the Accounts and that the Accounts are not property of the bankruptcy estate. In addition, B-Line specifically claims ownership of the Accounts in its complaint. Thus, § 157(b)(2)(E) does not operate to confer subject matter jurisdiction in this

³ The United States district courts have "original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), 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(b). In addition, "[t]he district court in which a case under title 11 is commenced or pending [has] exclusive jurisdiction of all of the property . . . of the debtor . . . and of property of the estate." 28 U.S.C. § 1334(e). A district court may refer "any or 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." 28 U.S.C. § 157(a).

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adversary proceeding.⁴

Section 157(b)(2)(O) is clearly intended to be something of a "catch-all" provision. However, B-Line has pled no facts that would support a finding that the outcome of this adversary proceeding would affect either the liquidation of the assets of the estate or the adjustment of the debtor-creditor relationship in this bankruptcy case. Without such a finding, the Court cannot conclude that § 157(b)(2)(O) operates to confer subject matter jurisdiction in this adversary proceeding, either.

That leaves only the possibility that this adversary proceeding could be considered a non-core, related proceeding.⁵ Neither § 1334(b) nor § 157(b) defines "related to" jurisdiction. However, the Eighth Circuit Court of Appeals has held that:

for courts to assert jurisdiction over a proceeding "related to" a bankruptcy case, the proceeding must "have some effect on the administration of the debtor's estate."

Speciality Mills, 51 F.3d at 774 (citations omitted).

[T]he test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in the bankruptcy . . . An action is related to a bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action . . . which in any way impacts upon the handling and administration of the bankruptcy estate.

Id.

B-Line has pled no facts that would support a finding that any outcome in this adversary proceeding would either alter Debtor's

⁴ For the same reason, 28 U.S.C. § 1334(e), referred to in B-Line's brief but not its complaint, does not operate to confer subject matter jurisdiction in this adversary proceeding, either.

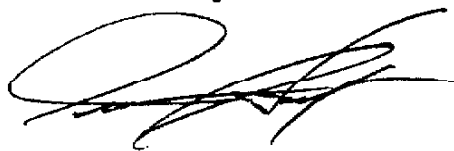
⁵ While B-Line does not appear to have considered this possibility, the FDIC did discuss it in its brief. Moreover, the Court has an independent duty to determine whether a proceeding is a core proceeding or a non-core, related proceeding. See 28 U.S.C. § 157(b)(3).

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rights, liabilities, options, or freedom of action or in any way impact upon the handling and administration of the bankruptcy estate. Without such a finding, the Court cannot conclude that this adversary proceeding is a non-core, related proceeding. Therefore, the Court cannot assert subject matter jurisdiction over this adversary proceeding on that basis, either.⁶

The Court will enter an appropriate order.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

cc: case file (docket original; serve copies on counsel for each party and U.S. Trustee)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

DEC 23 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By MW

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

DEC 23 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

⁶ Having concluded that it does not have subject matter jurisdiction under §§ 157 and 1334 and the District Court's July 27, 1984 Order of Reference, the Court does not reach the question of whether in a case in which the Court had subject matter jurisdiction, 12 U.S.C. § 1821 would operate to divest the Court of jurisdiction. For the same reason, the Court does not reach the question of the preclusive effect of the Court's Order for Permanent Injunction and for Accounting and Order for Final Settlement and for Dismissal with Prejudice in Adv. No. 02-4076.

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