

FILED

Lucinda B. Rauback, Clerk
United States Bankruptcy Court
Augusta, Georgia
By jpayton at 4:15 pm, Jan 17, 2014

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Dublin Division

IN RE:)	Chapter 11 Case
)	Number <u>12-30113</u>
SARALAND, LLLP)	
)	
Debtor)	
_____)	
TODD BOUDREAUX, TRUSTEE)	
)	
Plaintiff)	Adversary Proceeding
v.)	Number <u>13-03007</u>
)	
SAJAHTERA, INC. D/B/A THE)	
BEVERLY HILLS HOTEL, CO.)	
)	
Defendant)	
_____)	

ORDER

Sajahtera, Inc. d/b/a The Beverly Hills Hotel ("Sajahtera") filed a motion to dismiss asserting several affirmative defenses. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2) and the Court has jurisdiction pursuant to 28 U.S.C. §1334. For the following reasons, the motion to dismiss is denied.

FINDINGS OF FACT

Saraland, LLLP filed a chapter 11 bankruptcy petition on March 29, 2012. Todd Boudreaux was appointed as the Chapter 11 Trustee ("Trustee") on March 29, 2013. On April 30, 2013, the

Trustee filed a complaint seeking to avoid certain post-petition transfers from Saraland to Sajahtera totaling \$7,564.55 for travel expenses incurred by Lister Harrell ("Mr. Harrell"), the sole member of Saraland. See Dckt. No. 8, Ex. A. The Trustee alleges the transfers were made outside the ordinary course of Saraland's business and were made for Mr. Harrell's individual benefit.

In his initial complaint, the Trustee listed The Beverly Hills Hotel, Co. as the plaintiff. The Beverly Hills Hotel, Co. filed an answer asserting affirmative defenses of improper service, insufficiency of process, improper venue, and failure to join necessary party. Dckt. No. 9. The parties filed a joint Rule 26(f) Report stating that:

Sajahtera, Inc. d/b/a the Beverly Hills Hotel is the correct entity that should be named in this action. Sajahtera, Inc. has not yet been served. Sajahtera, Inc. d/b/a the Beverly Hills Hotel has consented to accept service of an Amended Complaint and Amended Summons through its attorney.

Dckt. No. 12. The Trustee filed an Amended Complaint naming Sajahtera, Inc. d/b/a the Beverly Hills Hotel Co. as the plaintiff.

Dckt. No. 13. A certificate of service shows the Amended Complaint was served on Sajahtera's counsel on August 20, 2013. Sajahtera answered the complaint, again asserting improper service, failure to state a claim and improper venue. Dckt. No. 16. The Trustee failed

to request that a summons be re-issued for the Amended Complaint and thus failed to serve the amended summons on counsel as set forth in the Rule 26(f) Report. At the hearing held on the affirmative defenses, counsel for Sajahtera stated that she agreed to accept service of an amended complaint, but did not forego the summons requirement. Sajahtera also argues that venue is improper and the case should be dismissed or transferred to the Central District of California.

CONCLUSIONS OF LAW

Service

Federal Rule of Civil Procedure 4(m)¹ states:

Time Limit for Service. If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. . . .

Fed. R. Civ. P. 4. Pursuant to Rule 4(m) if the Trustee shows "good cause" for the failure to serve Sajahtera within 120 days, the Court "must extend the time for service for an appropriate period."

¹ Federal Rule of Civil Procedure 4 is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7004.

Id. "Good cause exists only when some outside factor, such as reliance on faulty advice, rather than inadvertence or negligence, prevented service." In re Trasylol Prod. Liab. Litig.-MDL- 1928, 503 F. App'x 850, 852 (11th Cir. Jan. 14, 2013).

If a plaintiff fails to show good cause for failure to serve the defendant, the district court must still consider whether any other circumstances warrant an extension of time based on the facts of the case. For example, the district court may grant an extension if the applicable statute of limitations would bar the refiled action, or if the defendant is evading service or conceals a defect in attempted service. After considering whether any such factors exist, the district court may exercise its discretion and either dismiss the case without prejudice or direct that service be effected within a specified time.

Id. (internal citations and quotations omitted).

It is undisputed that Sajahtera's attorney agreed to accept service of an amended complaint and amended summons; however, only the amended complaint was served on counsel. Thus, the mode of service did not comply with the parties' agreement or Rule 4. Furthermore, the Trustee failed to accomplish proper service within 120 days after the amended complaint was filed.

If "good cause" is found the Court must extend the time for service. Fed. R. Civil P. 4. In this case, the Trustee timely served The Beverly Hills Hotel, the trade name of Sajahtera. There was an agreement between counsel to accept service of the amended

complaint and amended summons. The Trustee thought his service of the amended complaint was all that was necessary. Furthermore, the Trustee's amended complaint relates back under Rule 15 and given the facts and circumstances of this case the reissuance of an amended summons even outside the 120 days will cause no real prejudice to defendant. See Fed. R. Civ. P. 15; Chumney v. US Repeating Arms Co., Inc., 196 F.R.D. 419, 430 (M.D. Ala. 2000); Rosas v. Subsational, 2012 WL 4891595 (E.D.N.Y. Sept. 11, 2012) (granting leave to amend complaint *and for the summons to be amended* where plaintiff served the trade name of the corporation where complaint related back and no prejudice to defendant as they received actual notice); see also Fed. R. Bankr. P. 7004(f); In re Campbell, 105 B.R. 19, 21 (B.A.P. 9th Cir. 1989) (noting Bankruptcy Rule 7004(f) does not limit the number of summonses a plaintiff may receive for curing defective service). Given the facts and circumstances of this case, I find there is "good cause" to reissue the summons and extend the time for proper service on Sajahtera.

Furthermore, even if there is no "good cause", Rule 4 still allows the Court, in its discretion, to order service be completed within a specified time. See Fed. R. Civ. P. 4(m); In re Trasyol Prod. Liab. Litig.-MDL- 1928, 503 F. App'x at 857. Under the facts and circumstances of this case, it is appropriate to order

that a summons be reissued and that the amended complaint and amended summons be served on counsel for Sajahtera as set forth in the Rule 26(f) Report. The Trustee has made efforts to prosecute this case. There was a misunderstanding of the meaning of the agreement to accept service of an amended complaint and amended summons. There has been no real prejudice to Sajahtera. While actual notice is not sufficient, I find the facts of this case warrant an amended summons be issued to effectuate service in the manner set forth and agreed to in the parties' Rule 26(f) Report.

Venue

Sajahtera also argues if the complaint is not dismissed, the adversary proceeding should be transferred to the Central District of California pursuant to 28 U.S.C. §1409(d) or in the alternative in the interest of justice and convenience of the parties pursuant to 28 U.S.C. §1412. First, I find venue is proper under 28 U.S.C. §1409(a) and the adversary proceeding need not be transferred pursuant to 28 U.S.C. §1409(d) which states:

(d) A trustee may commence a proceeding arising under title 11 or arising in or related to a case under title 11 based on a claim arising after the commencement of such case from the operation of the business of the debtor only in the district court for the district where a State or Federal court sits in which, under applicable nonbankruptcy venue provisions, an action on such claim may have been brought.

28 U.S.C. §1409(d). The Trustee has the burden to prove venue is proper. In re Bayview Plaza Assocs. Ltd. P'ship, 209 B.R. 840, 843 (Bankr. D. Del. 1997).

There are three factors to consider when determining whether to transfer venue under 28 U.S.C. §1409(d):

- 1) The proceeding arises under title 11;
- 2) The claim arose after the petition date; and
- 3) The claim arises from the operation of the Debtor.

In re Tucker, 2011 WL 7704349 *3 (Bankr. S.D. Ga. July 6, 2011). If these three factors are met, then the Court must determine whether a non-bankruptcy case could be brought against Sajahtera in the Southern District of Georgia. Id. at *3-4. It is uncontested that this avoidance action "arises under title 11" and the \$549 claim arose after the commencement of the case. Thus, the first two components of §1409(d) are satisfied. The focus of Sajahtera's argument is on the third factor, whether the claim arose from the operation of Saraland.

The phrase claims arising from the "operation of the business of the debtor" refers to claims "whose facts and legal basis originate from the business operations of the debtor." Appel v. Gable (In re B & L Oil Co.), 834 F.2d 156, 159 (10th Cir. 1987). The focus is on the nature of the claim and the basis for the

Trustee's claim of avoidance. Id. at 160. In Tucker, the debtor was an individual in the business of selling timber and the court stated that when the debtor as sole owner of his business entities caused his business to sell the timberland, that transaction was within the normal scope of the operation of his business. In re Tucker, 2011 WL 7704349 at *3.

Similarly in Bayview, the court reasoned, "Bayview is in the business of developing land. The claims contained in this proceeding relate to the alleged breach of a water service agreement needed to develop land; therefore, the claims arise from the operation of Bayview's business." In re Bayview Plaza Assocs. Ltd. P'ship, 209 B.R. at 843; see also In re PermaLife Prods., LLC., 432 B.R. 503 (Bankr. D.N.J. 2010) (claim asserted by debtor in possession for stay violations had "no indicia of origin in the day to day business activities of the debtor after commencement of the case" therefore §1409(d) venue exception was inapplicable).

In this case, the complaint asserts that this transfer was not from the operation of the business of Saraland, rather it was an unauthorized transfer made for the personal benefit of Mr. Harrell, individually. "Where a defendant raises the defense of improper venue, the plaintiff has the burden of proving that venue is proper. In meeting that burden, the plaintiff may rely upon the well pleaded

factual allegations of the complaint, which the court will assume to be true." In re Tucker, 2011 WL 7704349 at *2; In re Bayview Plaza Assocs. Ltd. P'ship, 209 B.R. at 843. The facts in the Trustee's complaint taken as true indicate the transaction was unauthorized and outside the ordinary course of business. The transaction in question involves Mr. Harrell's post-petition stay at The Beverly Hills Hotel in California. The Trustee alleges this was a personal expense of Mr. Harrell rather than business of expense of Saraland. The complaint further alleges this was an unauthorized use of Saraland's cash. Taking the complaint as true, this claims does not arise from the operation of Debtor's business. Therefore, venue is proper in the Southern District of Georgia under 28 U.S.C. §1409(a) and not subject to the mandatory exception of 28 U.S.C. §1409(d).

Sajahtera next argues that venue should be transferred "in the interest of justice or for the convenience of the parties" pursuant to 28 U.S.C. §1412 which states:

A district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.

28 U.S.C. §1412. There is a strong presumption in favor of the plaintiff's choice of forum. In order to overcome this presumption, the movant must show the balance of convenience is "strongly in favor" of the transfer. Gulf Oil Corp. v. Gilbert, 330 U.S. 501,

508 (1947). The Court must consider the following factors:

1. Location of the plaintiff and defendant;
2. Ease of access to necessary proof;
3. Availability of the subpoena power for the unwilling witness;
4. The expense related to obtaining willing witnesses;
5. The enforceability of any judgment rendered;
6. The ability to receive a fair trial;
7. The state's interest in having local controversies decided within its borders, by those familiar with its laws; and
8. The economics of the estate administration.

In re A.R.E. Mfg. Co., Inc., 124 B.R. 912, 914 (M.D. Fla. 1991).

"A motion to transfer venue of a case or a proceeding lies within the sound discretion of a bankruptcy court based upon an 'individualized, case by case analysis of convenience and fairness.'"

In re Terry Mfg. Co. Inc., 323 B.R. 507, 509 (Bankr. M.D. Ala. 2005);

see also In re Steeley, 243 B.R. 421, 439 (Bankr. N.D. Ala. 1999) (noting that transfer of venue under §1412 requires a case-by-case analysis that is subject to broad court discretion).

The burden of proof is on the moving party to establish by a preponderance of the evidence that transfer is appropriate. In re Terry Mfg. Co. Inc., 323 B.R. at 509. Section 1412 is phrased in the disjunctive, therefore, transfer may be based upon either the interest of justice or the convenience of the parties. Id.

Sajahtera argues that it is a California corporation, with no employees or contacts within the state of Georgia. It argues its

witnesses all reside in California and that California law which requires the defendant to accept all guests who request lodging is at issue and therefore California law should be interpreted by a California court. Notwithstanding these arguments, Sajahtera has not overcome the strong presumption that the Trustee's choice of venue is favored. The Trustee's main witness will likely be Mr. Harrell. Mr. Harrell is a chapter 7 debtor and cannot afford to travel to California. Furthermore, Saraland's bankruptcy estate should not have to pay for that expense of moving the case to California. Furthermore, the documents in this case are mainly electronic and can easily be transferred and reviewed. See Ex. A, Amended complaint, Dckt. No. 8. Finally, it is not uncommon for a federal court to apply the law of various states. To this end, this Court can consider California law to the extent applicable to this adversary proceeding. For these reasons, under the facts of this case, I find venue is proper here in the Southern District of Georgia.

Failure to State a Claim

Sajahtera moves for dismissal for failure to state a claim arguing that because Mr. Harrell used a check card to pay for his lodging, he took sufficient control of the funds as a transferee and therefore the action is really against Mr. Harrell and not Sajahtera. Federal Rule of Civil Procedure 12(b)(6) made applicable to adversary

proceedings by Federal Rule of Bankruptcy Procedure 7012, allows a defendant to bring a motion to dismiss the complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "In ruling on a 12(b)(6) motion, the court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff." Speaker v. U.S. Dept. of Health and Human Servs. Ctrs. for Disease Control and Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010). "To survive a motion to dismiss for failure to state a claim, heightened fact pleading of specifics is not required; instead, a plaintiff must plead only enough facts to state a claim to relief that is plausible on its face." Id. citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

Assuming Mr. Harrell is the initial transferee, suit against Sajahtera would not be barred because 11 U.S.C. §550(a)(2) provides recovery may be had from "any immediate or mediate transferee from an initial transferee." See 11 U.S.C. §550(a)(2). Furthermore, Mr. Harrell may be the transferor and the Trustee cannot recover from the transferor. See In re Big Apple Scenic Studio, Inc., 63 B.R. 85

(Bankr. S.D.N.Y. 1986) (holding the trustee could not recover from the debtor's principal who wrote checks on debtor's account as he was the transferor). For these reasons and for the reasons set forth on the record at the hearing held October 18, 2013, Sajahtera's motion to dismiss for failure to state claim is denied as the facts alleged in the Complaint when taken as true set forth a plausible claim that the Trustee may be able to avoid the transfer from Saraland to Sajahtera pursuant to 11 U.S.C. §549.

It is therefore ORDERED that Sajahtera's Motion to Dismiss is ORDERED DENIED. The Clerk is directed to re-issue the summons to reflect Sajahtera, Inc. d/b/a The Beverly Hills Hotel Co. as the proper defendant. The Trustee is ORDERED to serve counsel for defendant with the Amended Complaint and re-issued summons within 14 days of the date of this order in accordance with the Rule 26(f) Report. It is further ORDERED that Sajahtera's Motion to Transfer Venue is DENIED.



SUSAN D. BARRETT
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 17th day of January, 2014.