ORDERED.

Dated: June 29, 2016

Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
CARBIDE INDUSTRIES, LLC,	)	Case No. 6:14-bk-09894-KSJ
	)	Chapter 11
Debtor.	)	
	)	
CARBIDE INDUSTRIES, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adversary No. 6:15-ap-00159-KSJ
	)	
LECESSEE CONSTRUCTION SERVICES, LLC,	)	
	)	
Defendant.	)	

ORDER PARTIALLY GRANTING
AND PARTIALLY DENYING DEFENDANT'S MOTION TO DISMISS

The Reorganized Debtor, Carbide Industries, LLC, supplied cabinets to Lecessee Construction Services, LLC. The parties each argue the other owes them money under their contract. Lecessee had sued the Debtor in state court before they filed this Chapter 11 case. Carbide Industries filed this adversary proceeding against Lecessee arguing it is due monies.

Lecessee now asks the Court to dismiss or to abstain from this adversary proceeding. The Court will partially grant and partially deny the Motion to Dismiss and, by separate order, direct the parties to mediate their dispute.

Carbide Industries, a cabinet manufacturer and installer, is a Florida corporation that filed its Chapter 11 petition on August 28, 2014.[1] Lecessee is a New York corporation who contracted with Carbide to install cabinets in a large project it completed in Indiana.[2] The project went awry, and both parties claim monies are due to them under the contract.

Debtor listed Lecessee early as a creditor with a large unsecured claim[3] and also disclosed a pending lawsuit filed by Lecessee against the Debtor[4] in Monroe County, New York as a contingent, unliquidated, and disputed claim for approximately $400,000.[5] Defendant again is listed twice as a party to lawsuits in which the Debtor is also a party in its Statement of Financial Affairs.[6] Lecessee filed a proof of claim seeking payment of $233,522.[7]

Debtor successfully confirmed a Plan of Reorganization[8] with an effective date of June 29, 2015.[9] At a post-confirmation status conference, the Court ordered the parties to file any adversary proceeding by November 20, 2015.[10] The Reorganized Debtor timely filed the Complaint initiating this adversary proceeding.[11]

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[1] Main Case 6:14-bk-09894-KSJ, Carbide Industries, LLC, Doc. No. 1 [hereinafter "Main Case Doc. No. ___"].
[2] Doc. No. 22-1, ¶ 3.
[3] Main Case Doc. No. 1, P. 5. Defendant also is listed on Plaintiff's Schedule F. Main Case Doc. No. 1, P. 62.
[4] In the New York lawsuit, Lecessee is the Plaintiff, and Carbide is the Defendant. This case is styled *Lecessee Construction v. Carbide Industries, LLC*, Case No. 2013-14249, and was filed on December 18, 2013.
[5] *Id.* Debtor later amended its schedules to specify that the amount of the contingent claim due to Lecessee was "unknown." Main Case Doc. No. 47, at P.3.
[6] Main Case Doc. No. 1. P. 81. The other case is styled *Steelcore Construction Co., Inc. v. Lecesse Construction Services, LLC et al.*
[7] Main Case Claims Register, Claim No. 34. The claim was filed late on December 16, 2014. The claim later was disallowed as untimely. See, Main Case Doc. Nos. 111, 123, and 206.
[8] Main Case Doc. No. 150.
[9] Doc. No. 16, P. 7.
[10] Main Case Doc. No. 214.
[11] Doc. No. 1.

The Complaint alleges Plaintiff and Defendant entered into a contract[12] where Plaintiff "was to provide labor and materials for the installation of cabinets and countertops" for a construction project in Indiana[13] (the "Contract"). Plaintiff alleges it completed all of its contractual obligations but Defendant refused (and still refuses) to pay Plaintiff for its work.[14] Plaintiff demands payment for the job and attorneys' fees and costs under the Contract and applicable law,[15] asserting four causes of action: (1) breach of contract; (2) unjust enrichment; (3) *quantum meruit*; and (4) foreclosure of mechanic's lien against surety bond.[16] The Contract provides New York law applies.[17]

Defendant filed a Motion to Dismiss making five primary arguments: (1) the Court lacks subject matter jurisdiction over this adversary proceeding; (2) the Court should abstain from hearing this adversary proceeding; (3) Counts II and III are precluded under applicable New York law; (4) *res judicata* bars the commencement of this adversary proceeding; and (5) judicial estoppel should bar the complaint.[18] Defendant also points to Debtor's express retention of its "avoidance actions" and contrasts that express retention with its failure to list the claims against Lecessee as a means for implementation of the confirmed plan.[19] The Court will dismiss Counts II and III but otherwise reject Defendant's arguments.

The Court has Subject Matter Jurisdiction

"Bankruptcy court jurisdiction potentially extends to four types of title 11 matters, pending referral from the district court: '(1) cases under title 11, (2) proceeding arising under

[12] On September 13, 2012. Doc. No. 22-1, ¶ 6.
[13] Doc. No. 22-1, ¶ 6.
[14] Doc. No. 22-1, ¶¶ 8-9.
[15] *See generally* Doc. No. 22-1.
[16] Count IV is first raised in the Amended Complaint permitted by separate order. The Court reserves ruling on whether Count IV states a claim.
[17] Doc. No. 16-1, P. 16.
[18] *See generally* Doc. No. 16-1.
[19] Doc. No. 16-1, PP. 8-9.

title 11, (3) proceedings arising in a case under title 11, and (4) proceedings related to a case under title 11.'"[20] The distinction between core and non-core is irrelevant in determining jurisdiction. "Under 28 U.S.C. § 157, a bankruptcy court might have jurisdiction over a proceeding but still might not be able to enter final judgments and orders [in a non-core matter]."[21] Because determining whether this dispute is "core" or not is unnecessary and because Plaintiff alleges entirely state law claims, the jurisdictional hook for this adversary proceeding is the "related to" prong to establish jurisdiction.

The Eleventh Circuit Court of Appeals adopted the *Pacor*[22] test for "related to" jurisdiction.[23] The *Pacor* test provides that a civil proceeding is related to bankruptcy when "the outcome of the proceeding could conceivably have an effect on the estate being administered in bankruptcy."[24] Because Plaintiff filed this adversary proceeding post-confirmation, Lecessee argues this Court's "related to" jurisdiction is substantially narrowed[25] relying on the "close nexus" test articulated by the Third and Ninth Circuit Courts of Appeal.[26] Defendant maintains the "'close nexus' analysis focuses on whether this adversary proceeding will affect 'the interpretation, implementation, consummation, execution or administration of' [the Plaintiff's]

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[20] *Fla. Dev. Assocs. Ltd. v. Knezevich & Assocs., Inc. (In re Fla. Dev. Assocs. Ltd.)*, No. 04-12033-BKC-AJC, 2009 WL 393870, at *3 (Bankr. S.D. Fla. Feb. 4, 2009) (internal citations and quotations omitted).
[21] *Id.* at 4 (internal citations omitted).
[22] *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984).
[23] *Miller v. Kemira, Inc. (Matter of Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th Cir. 1990) (adopting the *Pacor* test); *See also Cont'l Nat'l Bank of Miami v. Sanchez (In re Toledo)*, 170 F.3d 1340, 1345 (11th Cir. 1999) (discussing the adoption of the *Pacor* test).
[24] *In re Toledo*, 170 F.3d at 1345 (*citing Matter of Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d. Cir. 1984))).
[25] *In re Superior Air Parts, Inc.*, 516 B.R. 85, 95 (Bankr. N.D. Tex. 2014) ("In the post-confirmation context, however, a court's related to jurisdiction is significantly less than it is in the pre-confirmation context because there is no longer a bankruptcy estate to administer."); *In re New Century TRS Holdings, Inc.*, 505 B.R. 431, 441 (Bankr. D. Del. 2014) ("However, this adversary proceeding was filed post-confirmation and 'related to' jurisdiction narrows post-confirmation.").
[26] *In re Pegasus Gold Corp*., 394 F.3d 1189 (9th Cir. 2005); *In re Resorts Int'l, Inc.*, 372 F.3d 154 (3d Cir. 2004).

Final Confirmed Plan."[27] The "close nexus" test also contemplates "[t]he Court … [weighing] the potential to increase recovery for creditors with other contributing factors, including whether the suit is post-confirmation and its relatedness to the Plan."[28]

The Eleventh Circuit has not adopted the "close nexus" test.[29] Judge Cristol from the Bankruptcy Court for the Southern District of Florida, however, discussed the "close nexus" test in *In re Florida Development Associates Ltd*.[30] Judge Cristol noted, "Defendants assert that because this Adversary Proceeding was filed post-confirmation, the Court should decline to exercise jurisdiction over this matter. However, if a case has a 'close nexus' to the bankruptcy plan or proceeding, a bankruptcy court's jurisdiction at the post-confirmation stage does not disappear."[31] In finding that the adversary proceeding had a close nexus to the bankruptcy plan and proceeding, Judge Cristol noted the Plaintiff was the Debtor (like in this case) and the alleged causes of action occurred pre-petition and pre-confirmation (like in this case).[32] Judge Cristol also found the "failure to list specifically potential litigation targets does not otherwise waive a debtor's right to pursue all causes of action."[33]

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[27] Doc. No. 16-1, P. 10. *See also Golf Club at Bridgewater, L.L.C. v. Whitney Bank*, No. 8:09-BK-10430-CED, 2013 WL 1193182, at *2 (M.D. Fla. Mar. 22, 2013) ("In the post-confirmation context, however, bankruptcy court subject matter jurisdiction is less broad, and is limited to 'matters pertaining to the implementation or execution of the plan.' More specifically, bankruptcy courts retain subject matter jurisdiction to implement and enforce confirmed plans of reorganization that have not been fully consummated. Accordingly, bankruptcy court post-confirmation jurisdiction is necessarily limited because as a plan progresses towards consummation, 'there are necessarily fewer plan issues which might arise.' Nonetheless, while a bankruptcy court's jurisdiction can be invoked less frequently post-confirmation, 'the court is not without jurisdiction to enforce the remaining unperformed terms of the confirmed plan.'") (internal citations omitted).

[28] *BWI Liquidating Corp. v. City of Rialto (In re BWI Liquidating Corp.)*, 437 B.R. 160, 166 (Bankr. D. Del. 2010) (internal citations omitted).

[29] Doc. No. 18, P. 6.

[30] No. 04-12033-BKC-AJC, 2009 WL 393870, at *1 (Bankr. S.D. Fla. Feb. 4, 2009).

[31] *In re Fla. Dev. Assocs. Ltd*., 2009 WL 393870, at *4.

[32] *Id.* at 5.

[33] *Id.* at 5.

Plaintiff repeatedly disclosed potential claims against Defendant in its amended schedules including the litigation pending in New York. Defendant filed a Proof of Claim in this case.[34] The basis for Defendant's claim was "breach of contract and damages,"[35] involving the same contract at issue in this adversary proceeding and presumably the New York action. Defendant never sought relief from the automatic stay to continue with the New York state court litigation and still lacks the ability to proceed. All parties agree a dispute exists who owes the other party and for how much, and a court must resolve the disagreement. The parties differ however over whether this Court or the New York state court is the proper forum.

I conclude this is the appropriate forum and this adversary proceeding easily satisfies the *Pacor* test to establish subject matter jurisdiction. And, even if the Court applied the "close nexus" test, it still has jurisdiction over this adversary proceeding because the potential to recover property allegedly due to the Reorganized Debtor/Plaintiff would and will substantially affect the administration of the confirmed plan.

Further, in the order confirming the Plan of Reorganization, the Court retained jurisdiction "for any and all matters that may come before the Court in the administration of the Plan of Reorganization and pursuant to the Order of Confirmation, specifically including but not limited to, the jurisdiction … *to hear and determine all questions concerning the assets or property of the Debtor, including any questions relating to any sums of money, services, or property due to the Debtor*."[36] Again, this adversary proceeding concerns property allegedly due

[34] Main Case Claims Register, Claim No. 34. By filing a proof of claim, Lecessee submitted to this Court's jurisdiction. *In re Scrub Island Dev. Grp. Ltd.*, 523 B.R. 862, 873 (Bankr. M.D. Fla. 2015) ("[Bank] submitted itself to the jurisdiction of this Court by filing proofs of claim and seeking other affirmative relief in this bankruptcy.") *See also In re Pearlman*, 493 B.R. 878, 886 (Bankr. M.D. Fla. 2013) ("Once a claim is filed, the creditor is entitled to a resolution in equity only. The cause of action becomes part of the larger bankruptcy scheme because the proof of claim triggered the claim allowance and disallowance process.") (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)).

[35] *Id.*

[36] Main Case Doc. No. 150, P. 8 (emphasis supplied).

to the Reorganized Debtor/Plaintiff, and the Court reserved jurisdiction to hear and determine this dispute post-confirmation.

Abstention is Not Merited

Defendant alternatively argues this Court should abstain from hearing this adversary proceeding. "'[C]ourts have broad discretion to abstain from hearing state law claims whenever appropriate in the interest of justice, or in the interest of comity with state courts or respect for state law.'"[37] This Court can just as easily resolve these issues as the New York state court. This Court is already familiar with the parties and the proceedings and is overseeing the distribution of assets to creditors. The Court concludes, using its broad discretion, which abstention would not serve the interests of justice or comity with state courts.

Counts II and III Fail to State a Claim

Defendant next argues that Plaintiff fails to state a claim in Counts II and III of the Complaint. Rule 12(b)(6) provides that before an answer is filed a defendant may seek dismissal of a complaint if the complaint fails to state a claim.[38] Disposition of a motion to dismiss under Rule 12(b)(6) focuses only upon the allegations in the complaint and whether those allegations state a claim for relief. In reviewing a motion to dismiss, courts must accept the allegations in the

[37] *VonGrabe v. Mecs (In re VonGrabe)*, 332 B.R. 40, 44 (Bankr. M.D. Fla. 2005) (internal citations omitted). "The factors a court should consider when determining whether it should abstain from hearing a particular proceeding include the following: (1) The effect or lack thereof on the efficient administration of the estate if a court abstains, (2) The extent to which state law issues predominate over bankruptcy issues, (3) The difficulty or unsettled nature of applicable law, (4) The presence of a related proceeding commenced in state court or other non-bankruptcy court, (5) The jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) The degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) The substance rather than form of an asserted "core" proceeding, (8) The feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) The burden of the bankruptcy court's docket, (10) The likelihood that the commencement of the proceeding in bankruptcy court involved forum shopping by one of the parties, (11) The existence of a right to a jury trial, and (12) The presence in the proceeding of non-debtor parties." *Brook v. Ford Motor Credit Co., LLC, (In re Peacock)*, 455 B.R. 810, 813-14 (Bankr. M.D. Fla. 2011) (citing In re Wood, 216 B.R. 1010, 1014 (Bankr. M.D. Fla. 1998) (internal citations and quotations omitted)).

[38] Fed. R. Civ. P. 12(b)(6).

complaint as true and construe them in the light most favorable to the plaintiff.[39] Under Rule 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[40] Rule 8(a)(3) requires a "demand for the relief sought."[41] "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[42] For a complaint to survive a motion to dismiss, it must contain sufficient factual matter to "state a claim to relief that is plausible on its face."[43] Facial plausibility is present "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[44]

The Parties agree their dispute arises under the Contract governed by New York law. Count I states a claim for the breach of this Contract. Plaintiff's second and third counts raise claims for quasi-contractual relief asserting claims for unjust enrichment and *quantum meruit*. New York law provides "[i]t is impermissible to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of

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[39] *Brophy v. Jiangbo Pharm., Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015) (quoting *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 769 F.3d 1291, 1293 (11th Cir. 2014) (quoting *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003))).
[40] Rule (8)(a) is made applicable in adversary proceedings under Bankruptcy Rule 7008(a).
[41] Fed. R. Civ. P. 8(a)(3).
[42] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal citations omitted).
[43] *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).
[44] *Id.*

which is undisputed, and the scope of which clearly covers the dispute between the parties."[45] Pleading relief in the alternative does not save these two counts. When "both parties agree that a valid and enforceable contract exists between them, Plaintiff [normally] may not plead … quasi-contractual theor[ies]."[46]

Plaintiff alleges a contract exists between the Parties and that Plaintiff fully performed its obligations under the Contract.[47] Defendant does not dispute the existence of the Contract.[48] Because the Parties agree the Contract governs this dispute, the impermissible quasi-contractual counts—Counts II and III—are dismissed.[49]

Res Judicata & Judicial Estoppel Raise Factual Issues

Defendant's arguments of *res judicata* and judicial estoppel are not properly considered on this Motion to Dismiss. They raise factual disputes. If the Defendant wishes, it may plead them as affirmative defenses in its answer or in future dispositive motions.[50]

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[45] *Clark-Fitzpatrick, Inc. v. Long Island R. Co.*, 70 N.Y.2d 382, 516 N.E.2d 190 (1987). *See also New Paradigm Software Corp. v. New Era of Networks, Inc.*, 107 F. Supp. 2d 325, 329 (S.D.N.Y. 2000) ("'[U]njust enrichment is a quasi-contractual remedy, so that such a claim is ordinarily unavailable when a valid and enforceable contract governing the same subject matter exists.'") (internal citations omitted); *M. Farbman & Sons, Inc. v. Columbia Univ. in City of New York*, 280 A.D.2d 402, 720 N.Y.S.2d 787 (2001) ("The quantum meruit and unjust enrichment causes of action were properly dismissed on the basis of plaintiff's allegations that it fully performed its obligations under an express contract.")

[46] *New Paradigm Software Corp. v. New Era of Networks, Inc.*, 107 F. Supp. 2d at 329.

[47] Doc. No. 22-1.

[48] Doc. No. 16-1, P. 21.

[49] *Morgan Stanley & Co. Inc. v. Peak Ridge Master SPC Ltd.*, 930 F. Supp. 2d 532, 545 (S.D.N.Y. 2013) ("New York state courts, federal courts in our district, and the Second Circuit have held the existence of a valid and enforceable contract precludes an unjust enrichment claim relating to the subject matter of the contract.")

[50] "Although res judicata is not a defense under Rule 12(b), and generally should be raised as an affirmative defense under Rule 8(c), it may be raised in a Rule 12(b)(6) motion where the existence of the defense can be determined from the face of the complaint." *Solis v. Glob. Acceptance Credit Co., L.P.*, 601 F. App'x 767, 771 (11th Cir. 2015). Here, the Court concludes the existence of the defense cannot be determined from the face of this complaint. Additionally, "[t]he issue of judicial estoppel … focus[es] on … intent, which is a factual inquiry. In order to show the requisite intent for judicial estoppel purposes, there must be 'intentional contradictions, not simple error or inadvertence.' Here, the Court is unwilling to make factual findings regarding … intent on a motion to dismiss." *Schreiber v. Ocwen Loan Servicing, LLC*, No. 5:11-CV-211-32TBS, 2011 WL 6055425, at *2 (M.D. Fla. Oct. 17, 2011), report and recommendation adopted, No. 5:11-CV-211-OC-32TBS, 2011 WL 6055417 (M.D. Fla. Dec. 6, 2011). Similarly, this Court will not make factual findings regarding judicial estoppel at the Motion to Dismiss stage.

Accordingly, it is ordered Defendant's Motion to Dismiss is **partially granted and partially denied.** Counts II and III are dismissed. Defendant's other grounds for dismissal are rejected, and the Motion to Dismiss is otherwise denied.

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Copies furnished to:

Attorney, James D. Dati, is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.