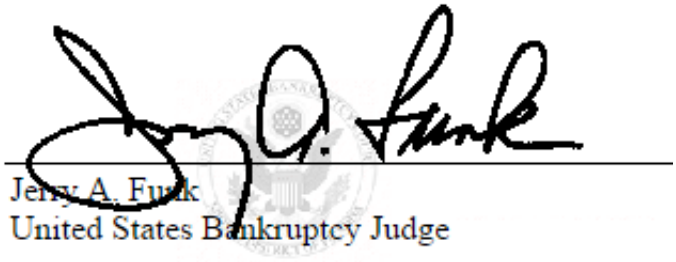
ORDERED.

Dated: July 20, 2018



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

AA READY MIX, LLC,

Debtors.
_____/

Chapter 11
Case No. 3:18-bk-1110-JAF

AA READY MIX, LLC,

Plaintiff,

v.

TNT SOUTHERN HOLDINGS, LLC,

Defendant.
_____/

Adv. Pro. No. 3:18-ap-0050-JAF

ORDER DISMISSING ADVERSARY COMPLAINT WITHOUT PREJUDICE

This adversary proceeding is before the Court upon the motion to dismiss filed by Defendant TNT SOUTHERN HOLDINGS, LLC ("TNT Southern") pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 4). Plaintiff AA READY MIX, LLC (the "Debtor") filed a response in opposition. (Doc. 5). For the reasons set forth herein, the Court determines the complaint should be dismissed with leave to file an amended complaint.

JURISDICTION

The parties disagree on whether this is a core or noncore proceeding, and whether the Court retains subject-matter jurisdiction. The Debtor filed a Chapter 11 petition in April 2018. The Debtor filed this adversary proceeding in May 2018. The adversary complaint alleges three counts, each seeking to invalidate (*ab initio*) a lease agreement between the Debtor and TNT Southern (the "Lease Agreement") pursuant to state common law. The Lease Agreement pertains to both real and personal prepetition property of the Debtor.

This proceeding is not a core proceeding because it does not invoke any right created by Title 11 nor is it a proceeding that could arise *only* in bankruptcy. In re Elec. Mach. Enterprises, Inc., 479 F.3d 791, 797 (11th Cir. 2007) ("A proceeding is not core '[if] the proceeding does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy.'"). While this action pertains to the Debtor's prepetition property (assuming the allegations are true), this is not an *in rem* action against that property. Cf. 28 U.S.C. § 1334(e) (2018). Rather, this is an *in personam* contract action brought pursuant to state law. This action could alter the Debtor's "rights, liabilities, options, or freedom of action (either positively or negatively)" and may conceivably "impact[] upon the handling and administration of the bankruptcy estate." Palaxar Group LLC v. Williams, 714 Fed. App'x 926, 928 (11th Cir. 2017); In re Canion, 196 F.3d 579, 587 (5th Cir. 1999) ("'related to' jurisdiction . . . will attach on a finding of any conceivable effect."). Therefore, this is a noncore "related to" proceeding. This Court retains subject-matter jurisdiction pursuant to 28 U.S.C. § 1334(b) and the standing order of reference.[1] See also 28 U.S.C. § 157(c)(2).

[1] http://pacer.flmb.uscourts.gov/administrativeorders/DataFileOrder.asp?FileID=44.

ALLEGATIONS OF THE COMPLAINT

The Debtor alleges the following facts. In 2017, the Debtor was "heavily in debt" and looking for a qualified investor. Negotiations between the Debtor and TNT Southern began in November 2017 but subsequently "languished." In February 2018, the owners of the Debtor informed TNT Southern of the Debtor's urgent need for capital. TNT Southern then proposed to "purchase the whole company or all its assets." (Doc. 1 at 2, ¶ 11). The Debtor declined this proposal. In March 2018, with the Debtor "on the brink," TNT Southern offered to lease all of the Debtor's real property and most of the Debtor's personal property for eighty (80) years. The Lease Agreement was eventually executed. The real and personal property covered by the Lease Agreement is located in Georgia. The leased property constitutes most of the Debtor's assets.

Under the Lease Agreement, TNT Southern may buy the leased property by paying off the appropriate lienholder/s directly and deducting that amount from the rent owed under the Lease Agreement. "TNT [Southern] rushed to contact [the Debtor]'s lienholders and entered into side-deals to buy out property covered by the Lease." (Doc. 1 at 3, ¶ 16). TNT Southern has not paid any rent to the Debtor but has made at least one payment to a financial institution concerning a small business loan guaranteed by the Small Business Administration. The Debtor contends the Lease Agreement is void as an unreasonable restraint on alienation, is void for unconscionability, and/or is void for lack of consideration. The Lease Agreement is attached to the complaint. The Lease Agreement contains no choice-of-law provision and the complaint does not allege where the Lease Agreement was executed.

STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)

A motion brought under Rule 12(b)(6), made applicable here by Bankruptcy Rule 7012, challenges the sufficiency of the allegations in the complaint. Fed. R. Civ. P. 12(b)(6). In ruling on such a motion, the Court must accept all allegations as true and construe them in a light most favorable to the plaintiff. McCone v. Pitney Bowes, Inc., 582 F. App'x 798, 799-800 (11th Cir. 2014). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). The complaint must "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "[A] court may consider the factual allegations in the complaint, documents attached to the complaint as an exhibit or incorporated therein by reference, [or] matters of which judicial notice may be taken . . . ." In re XO Commc'ns., Inc., 330 B.R. 394, 418 (Bankr. S.D.N.Y. 2005).

ANALYSIS

The threshold issue is whether Florida or Georgia law controls interpretation of the Lease Agreement in light of the absence of a choice-of-law provision in the written contract. The parties have offered only tacit argument on this issue.

Traditionally, a two-step process determines which state's law applies. First, the Court must determine which choice-of-law rules are to be used. Second, the Court must apply the proper choice-of-law rules to determine which state's substantive law controls disposition. Bryan v. Hall Chem. Co., 993 F.2d 831, 834 (11th Cir. 1993); see also Vanston Bondholders Protective Comm.

v. Green, 329 U.S. 156 (1946); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941)); Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

In Klaxon, "the Supreme Court ruled that a federal court in a diversity action must apply the choice of law rules of the forum state." In re Int'l Mgmt. Associates, LLC, 495 B.R. 96, 100 (Bankr. N.D. Ga. 2013). In Vanston, "however, the Supreme Court ruled that federal common law governs choice of law issues in bankruptcy cases in connection with 'how and what claims shall be allowed under equitable principles.'" Id. "Vanston is not controlling here because it . . . dealt with [ ] the allowance of claims in the case, not issues in an [adversary] action asserting rights to affirmative relief based on state law." Id. at 101 (bracketing added).

In analyzing this dichotomy between Klaxon and Vanston, Judge Bonapfel discussed binding[2] Fifth Circuit case law and an unpublished nonbinding Eleventh Circuit opinion. Judge Bonapfel concluded that the proper rule ought to "call[] for the use of the forum state's choice of law rules in the absence of a compelling or significant federal interest." Id. at 102.

Stated more fully:

> To the extent that a bankruptcy court has discretion to choose whether to apply the forum state's or the federal choice of law rules in a bankruptcy proceeding in which state law determines the rights of the parties, this Court concludes that it can exercise its discretion to apply the federal rule only if it identifies an appropriate federal interest that justifies the use of the federal rule.

Id.

Here, the Court sees no federal interest at issue in this proceeding, which is premised on purely state law causes of action, even though the outcome could affect the bankruptcy estate. Therefore, the forum state's—i.e., Florida's—choice-of-law rules should apply here.

[2] Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc).

In contract law cases, Florida applies the *lex loci contractus* choice-of-law rule. Rando v. Gov't Employees Ins. Co., 39 So. 3d 244, 247 (Fla. 2010); State Farm Mut. Auto. Ins. Co. v. Roach, 945 So. 2d 1160, 1163 (Fla. 2006) ("[I]n determining which state's law applies to contracts, we have long adhered to the rule of *lex loci contractus*.").

"[T]he doctrine of *lex loci contractus* directs that, in the absence of a contractual provision specifying governing law, a contract, other than one for performance of services, is governed by law of the state in which the contract is made." Shaps v. Provident Life & Acc. Ins. Co., 826 So. 2d 250, 254 (Fla. 2002); Sims v. New Falls Corp., 37 So. 3d 358 (Fla. 3d DCA 2010) (holding that Florida law applied to a promissory note executed in Florida that was secured by a second mortgage on property located in Georgia).

Here, the complaint fails to state where the Lease Agreement was executed. It appears the Lease Agreement may have been executed in Georgia, but the Court cannot make such an assumption in the absence of any supporting allegations. Thus, at this time, the Court is unable to determine which state's substantive law applies to the Lease Agreement, a threshold question. There may be little or no difference between Georgia and Florida law as applied to these causes of action; yet, the Court cannot be so sure at this early stage. If there is a factual dispute as to the locus of the Lease Agreement, this fact question can be decided at trial—though, the allegations will control disposition of any Rule 12(b)(6) motion. Of course, the parties may also stipulate as to choice of law.

Accordingly, it is hereby ORDERED that the Debtor's adversary complaint is DISMISSED WITHOUT PREJUDICE in light of the complaint's failure to allege the locus of the Lease Agreement. The Debtor may file an amended complaint within fourteen (14) days of the date of this Order.