

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

| | | |
|---------------------------------|---|-------------------------------|
| In re: |) | Chapter 7 |
| |) | |
| WORLDSPACE, INC., et al., |) | Case No. 08-12412 (PJW) |
| |) | |
| Debtors. |) | Jointly Administered |
| |) | |
| _____ |) | |
| |) | |
| MATHEWKUTTY SEBASTIAN, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Adv. Proc. No. 14-50365 (PJW) |
| |) | |
| DONALD J. FRICKEL, ROBERT A. |) | |
| SCHMITZ, QUEST TURNAROUND |) | |
| ADVISORS LLC, and SHEARMAN |) | |
| & STERLING LLP, |) | |
| |) | |
| Defendants, |) | |
| |) | |
| and |) | |
| |) | |
| CHARLES M. FORMAN, as chapter 7 |) | |
| Trustee of WorldSpace, Inc., |) | |
| et al., |) | |
| |) | |
| Nominal Defendant. |) | |

MEMORANDUM OPINION

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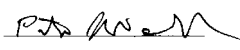
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Dated: September 17, 2014

WALSH, J. 

This opinion is with regard to the motions to dismiss filed by Defendants Donald J. Frickel, Robert A. Schmitz, Quest Turnaround Advisors LLC, Shearman and Sterling LLP, and Charles M. Forman as Chapter 7 Trustee of WorldSpace, Inc., *et al.* (hereinafter "Trustee"). (Doc. ## 11, 13 and 16.) The motions seeks to dismiss the verified derivative complaint (the "Complaint") filed by Mathewkutty Sebastian ("Plaintiff") on three grounds: lack of standing, the statute of limitations, and failure to state a claim upon which relief can be granted.

For the reasons detailed below, the Court finds that Plaintiff lacks standing and the motions to dismiss are granted.

Background

This adversary proceeding arose from the chapter 11 bankruptcy case of WorldSpace, Inc. ("WorldSpace") and two of its affiliates (collectively, "Debtors"). Before Debtors sold substantially all of their assets, WorldSpace and its affiliates provided satellite-based radio and broadcasting services to more than 170,000 (as of June 20, 2008) paying subscribers in ten countries and throughout Europe, India, the Middle East, and Africa.

Plaintiff filed a proof of claim in the amount of \$170,705.90 for unpaid salaries and wages for service rendered as an employee. On May 4, 2011 Debtors filed two omnibus claims

objections. One of the claims objections objected to Plaintiff's administrative expense claim on the ground that no amount was due to Plaintiff because the claim was seeking payment from a non-debtor entity. On June 13, 2011 the Court entered orders sustaining the objections.

Plaintiff initiated the instant adversary proceeding against Defendants. The Complaint is a proof of claim based on alleged administrative wages and other charges, in the amount of \$170,705.90, related to Plaintiff's employment as Managing Director of WorldSpace Middle East FZCo, a non-debtor affiliate of the Debtors.

To the Complaint, Plaintiff affixed Exhibit 1, which contains Plaintiff's proof of claim. (Doc. #15-1, Ex. 1.) The proof of claim identifies three debtors: WorldSpace, Inc., (Case No. 08-12412), WorldSpace Systems Corporation (Case No. 08-12413) and AfriSpace, Inc. (Case No. 08-12414). The proof of claim identifies WorldSpace, Inc. as the entity obligated to Plaintiff. The attached document which Plaintiff labels as an employment contract is an October 29, 2010 letter to Plaintiff from a Gregory Armstrong who is identified as Chief Operating Officer of WorldSpace, Inc. The claim form states the basis for Plaintiff's claim are "Salaries/Wages for services rendered as employee." (Doc. #15-1, Ex. 1, p. 2.) Along with the claim form Plaintiff submitted through WorldSpace Inc. Claims Processing Center,

Plaintiff certified that he has been an employee of WorldSpace since January 2004 stationed at Dubai, United Arab Emirates.

(Doc. #15-1, Ex. 1, p. 3.)

Attached to the proof of claim is a letter from Sebastian to the Claims Agent in which he represented that "I have been an employee of WorldSpace since January 2004; stationed at Dubai, United Arab Emirates (Copy of the employment contract is attached)." The attached "employment contract" is a July 1, 2008 letter from Gregory Armstrong, the Chief Operating Officer of WorldSpace, Inc. In the letter, Mr. Armstrong states: "I am pleased to reconfirm your employment with WorldSpace Middle East FZCo (the "Company"), located in Dubai, United Arab Emirates that you have held beginning in January 2004. Your employment will be in the position of Managing Director, WorldSpace Middle East FZCo." The letter goes on to state:

Entire Agreement: This letter is the complete offer for employment and may not be amended or altered in any way by oral statements, and can only be altered by a written amendment signed by an authorized signatory of the Company.

(Doc. #15-1, Ex. 1, p. 5.) The letter further outlines Plaintiff's compensation as a basic rate of AED 40,275 per month, housing allowance of AED 9,000 per month, and conveyance allowance of AED 3,000 per month. (Doc. #15-1, Ex. 1, p. 5.)

In three separate email communications sent March 8, 2012, November 16, 2009, and March 18, 2010 Plaintiff was addressed as follows:

Mathewkutty Sebastian
Managing Director
WorldSpace Middle East FZCO
Dubai

(Doc. #15-1, Ex. 1, pp. 9, 11, 13.) WorldSpace Middle East FZCo is not a party to this chapter case.

Jurisdiction

This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334. As follows, this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(F). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

Standard of Review

Pursuant to FRCP 12(c), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012, the standard of review is evaluated by the same standard as a FRCP 12(b)(6) motion to dismiss. Caprio v. Healthcare Revenue Recovery Grp., LLC, 709 F.3d 142, 146 (3d Cir. 2013). As such, the pleadings and inferences to be drawn are viewed in the light most favorable to the plaintiff. Leamer v. Fauver, 288 F.3d 532, 535 (3d Cir. 2002). The moving party is entitled to judgment as a matter of law if they can establish that there is no material issue of fact to resolve. Id. To survive a motion to dismiss, the

pleadings must contain factual allegations which are enough "to raise the right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Bistrrian v. Levi, 696 F.3d 352, 365 (3d Cir.2012).

Discussion

The Bankruptcy Code provides no guidance for what a proof of claim must contain and therefore Rule 3001 is the definitive authority concerning the contents. 9 Collier on Bankruptcy ¶ 3001.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012). Rule 3001 of the Federal Rules of Bankruptcy Procedure provides, in relevant part, that if a claim is based on a writing a copy of the writing shall be filed with the proof of claim. Fed. R. Bankr. P. 3000(c)(1). The written proof of claim will only constitute prima facie evidence of a claim if it complies with Bankruptcy Rule 3001. See Fed. R. Bankr. P. 3001(c)(1) and 3001(f).

As a threshold matter, however, a proof of claim must be "executed by a creditor." Fed. R. Bankr. P. 3001(b). Bankruptcy Code section 101(10) defines the term creditor to mean an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 28 U.S.C. § 101(10)(A).

Plaintiff argues that he is a creditor of the Debtors because his employment agreement is signed by Gregory Armstrong,

Chief Operating Officer of WorldSpace, and thus he has a claim against WorldSpace as the counterparty to the agreement. (Doc. #20, p. 20.) This argument is not supported by the employment letter. Plaintiff claims that WorldSpace guaranteed FZCo's obligations. I find nothing in the record to support that claim. Indeed the employment letter is inconsistent with that assertion. (Doc. #19, ¶57.)

However, the evidence that was filed with the proof of claim indicate Plaintiff does not have creditor standing because Plaintiff's claim is against his employer WorldSpace Middle East FZCo, a non-debtor entity. In the proof of claim form filed with the Court, Plaintiff listed the basis for the proof of claim as "Salaries/Wages for service rendered as an employee." (Doc. #15-1, Ex. 1, p. 3.)

Although Plaintiff contends he is an employee of WorldSpace his employment contract makes it clear that his employment was with the WorldSpace subsidiary WorldSpace Middle East FZCo. Additionally, any oral statements made to Plaintiff by WorldSpace employees does not amend or alter Plaintiff's employment position with the WorldSpace subsidiary WorldSpace Middle East FZCo.

Furthermore, in an email to Plaintiff Donald J. Frickel, executive vice president of WorldSpace, Inc., stated,

"On behalf of WorldSpace, Inc., the majority shareholder of WorldSpace Middle East FZCO, I hereby

communicate our assent to your proffered resignation from the position of **Managing Director of WorldSpace Middle East FZCO**. You have worked professionally and tirelessly for the good **for the Dubai subsidiary...**"

(emphasis added) (Doc. # 15-1, Ex. 1, p. 9.)

In three separate email communications sent March 8, 2012, November 16, 2009, and March 18, 2010 Plaintiff was addressed as follows:

Mathewkutty Sebastian
Managing Director
WorldSpace Middle East FZCO
Dubai

(Doc. #15-1, Ex. 1, pp. 9, 11, 13.)

In several other email communications Plaintiff was also referred to as the managing director of WorldSpace Middle East FZCO.

All of this evidence clearly shows that Plaintiff was an employee of WorldSpace Middle East FZCo. Even if Plaintiff's employment agreement was signed by Mr. Armstrong and was supervised by Mr. Schmitz, both of which are employees of the debtor WorldSpace, it is clear from the employment contract and subsequent communications detailed above that Plaintiff was an employee of the subsidiary WorldSpace Middle East FZCo.

Plaintiff claims that he should be deemed to be an employee of WorldSpace because (a) Plaintiff took direction from and reported to an officer of WorldSpace; (b) Plaintiff wound up the operations of non-debtor affiliate WorldSpace Middle East FZCo; and (c) Plaintiff purportedly "paid money from his own

pocket to complete his task and avoid litigation by terminated employees against WorldSpace, which had guaranteed FZCo's obligations." (Opp. Br. 2.) These arguments, however, do not establish that Plaintiff was employed by WorldSpace. That Plaintiff may have taken direction from an officer of WorldSpace is irrelevant; Plaintiff's employment agreement provided that Plaintiff was to report to an officer of WorldSpace, while making it equally clear that he was not a WorldSpace employee. And Plaintiff cites no authority that holds that merely reporting to an officer of a corporate affiliate creates an employment relationship with that affiliate. Nor does he cite any law or provide any analysis demonstrating how winding up a non-debtor's operations creates an employment relationship with the Debtor. Plaintiff similarly fails to demonstrate that the obligations he purportedly paid were those of a Debtor or that a Debtor guaranteed such debts. Nor does he provide any support for the proposition that he should be deemed to be an employee of a Debtor simply because he paid such obligations.

Since WorldSpace Middle East FZCo is not a debtor in this case, and since Plaintiff is not an employee of any of the Debtors in this case, Plaintiff does not have standing to pursue the Complaint.

It is not necessary to address the other two grounds in the defendants' motion to dismiss. Plaintiff in this case lacks

creditor standing and thus cannot bring a claim against the Debtors.

Conclusion

For the reasons described above, I will grant the motions to dismiss the Complaint for lack of standing.

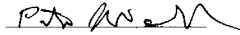
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ORDER

For the reasons set forth in the Court's memorandum opinion of this date, the motions of Defendants Donald J. Frickel, Robert A. Schmitz, Quest Turnaround Advisors LLC, Shearman and Sterling LLP, and Charles M. Forman as Chapter 7 Trustee of WorldSpace, Inc., et al. (Doc. ## 11, 13 and 16) to

dismiss for lack of standing is **granted** and the Complaint is dismissed.

A handwritten signature in black ink, appearing to read "P.J. Walsh", written over a horizontal line.

Peter J. Walsh
United States Bankruptcy Judge

Dated: September 17, 2014