UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JENAY MARIE STOUT,	)	CASE NO. 09-34354 HCD
	)	CHAPTER 7
DEBTOR.	)	
	)	
	)	
JACQUELINE S. HOMANN, TRUSTEE,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 11-3024
	)	
BREANNA PERRY and BRETT PERRY,	)	
	)	
DEFENDANTS.	)	

Appearances:

Jacqueline S. Homann, Esq., attorney for plaintiff, Jones Obenchain, LLP, P.O. Box 4577, South Bend, Indiana 46634; and

Mark P. Telloyan, Esq., attorney for defendants, O'Brian & Telloyan, P.C., P.O. Box 449, South Bend, Indiana 46624-0449.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 20, 2012.

Before the court is the Motion to Dismiss Plaintiff's Adversary Proceeding, filed by the defendants Breanna Perry and Brett Perry ("defendants"), against the plaintiff Jacqueline S. Homann, Trustee ("Trustee" or "plaintiff") of the chapter 7 bankruptcy estate of Jenay Marie Stout ("debtor" or "Stout"). After the plaintiff responded to the Motion, the court directed the parties to submit briefs on the question whether the bankruptcy court had the constitutional authority to enter final judgment concerning the breach of contract claim brought by the Trustee in light of the Supreme Court's ruling in *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). The briefs having been filed, the court took the matter under advisement. For the reasons stated below, the court affirms the defendants' Motion to Dismiss, but

on a different ground: It denies dismissal based on the court's lack of constitutional authority but grants dismissal based on the court's lack of subject-matter jurisdiction.[1]

BACKGROUND

On September 26, 2007, almost two years before filing bankruptcy, Jenay Marie Stout sold real property on Barclay Street in Logansport, Indiana, to the defendants. The parties executed a Contract for Conditional Sale of Real Estate ("Contract"). *See* R. 1, Ex. A. Under its terms, the defendants agreed to purchase the property for $60,850.00 by making 12 monthly payments of $520.00 and by obtaining financing for the remaining balance. According to the Trustee's Amended Complaint, they were unable to do so within the 12-month period. *See* R. 14, ¶¶ 14, 15. However, Stout allowed them to continue making the payments until they were successful in arranging financing. *See id.*, ¶ 15. After making 15 payments of $520.00 each, the Amended Complaint alleged, the defendants notified Stout that they would stop payments and leave the residence. *See id.*, ¶ 16.

The defendants added factual allegations, in their pro se Answer, that further described their relationship with Stout. *See* R. 8. They alleged (as affirmative defenses) that Stout had failed to tell them that there was an additional payment, in excess of $10,000.00, required for conversion of the house's well and septic systems to city water and sewer. *See id.*, ¶ 1. Moreover, they asserted, the underlying Contract was cancelled in September 2008, when they could not obtain a loan to refinance the house. On November 14, 2008, however, the parties signed a Lease Agreement, an exhibit of which was attached to the Answer. *See id.*, Ex. B. Pursuant to that Agreement, the defendants rented the same real estate for $549.00 a month.

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[1] The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The plaintiff has asserted that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). Because "it is always a federal court's responsibility to ensure it has jurisdiction," *Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 427 (7th Cir. 2009), this court determines its subject-matter jurisdiction and its constitutional authority to enter a final judgment in this adversary proceeding.

Stout filed a chapter 7 voluntary petition on September 10, 2009, and Trustee Homann was appointed as the chapter 7 Trustee of the bankruptcy estate. In her bankruptcy schedules, the debtor listed the Barclay Street property as a single family home she owned in fee simple. She reported that Citimortgage Inc. held a secured claim on that property in the amount of $59,200.22. In the "Statement of Intention" the debtor declared her plan to surrender that property to Citimortgage. Under Part B of that Statement, she did not list anyone holding an unexpired lease on the property. Likewise, under Schedule G, the debtor stated that she had no executory contracts or unexpired leases. The defendants Breanna and Brett Perry were not listed anywhere in the schedules or on the matrix.

On October 13, 2009, the Trustee filed her Preliminary Inventory Report, stating that she anticipated receiving "monies representing property shown on the Schedules filed by the Debtor." R. 9, ¶ 2. She "adopt[ed] the same as [her] preliminary inventory" and stated that she "anticipate[d] receiving from Debtor potential monies from litigation settlement representing non-exempt assets of the Debtor's bankruptcy estate."[2] *Id.* On October 14, 2009, the Trustee filed her Notice of assets recovered and invited creditors who wished to share in any distribution of funds to file a proof of claim by March 9, 2010. The defendants did not file a claim.[3] Although the debtor received her Order of Discharge on December 14, 2009, the Order stated that it neither dismissed the bankruptcy case nor determined the amount of distribution, if any, the trustee would pay to creditors. The Trustee then commenced this adversary proceeding seventeen months later.

The Trustee's Complaint for Damages, filed on May 9, 2011, and amended on August 12, 2011, alleged that the defendants' failure to continue making payments under the Contract for Conditional Sale

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[2] The only suit listed in the debtor's Schedules was Citimortgage v. Stout, a civil collection suit pending in state court. However, as indicated above, the debtor surrendered the property to Citimortgage. In addition, the Trustee successfully objected to the claim filed by the Cass County Treasurer; that claim was disallowed. The court found no litigation settlement reported in the debtor's Schedules.

[3] Claims were filed by Target National Bank; Dell Financial Services LLC; Cass County Treasurer (whose claim was disallowed by the court's Order of May 25, 2011); American Express Centurion Bank; PRA Receivables Management, LLC; and Chase Bank USA. The defendants filed no proof of claim.

of Real Estate or to obtain financing for the balance of the obligation constituted a breach of contract. *See* R. 1, 14, ¶ 17. She charged that the defendants were obliged to pay the unpaid balance plus interest from September 1, 2007, in the amount of $66,859.25. The Trustee asserted her right to prosecute the defendants on the ground that their obligation to Stout, as a chapter 7 debtor, was property of the debtor's estate pursuant to 11 U.S.C. § 541. *See* R. 14 at ¶ 21. She sought judgment against the defendants for their debt under the breached contract and requested damages, attorney's fees, and other costs.

The defendants, in their pro se Answer, responded by denying the Trustee's material allegations and by presenting affirmative defenses. *See* R. 8, ¶¶ 1, 2. They argued that, because of the material omission concerning the required cost of conversion to city water and sewer systems, the Contract was invalid or its breach was justified. They further asserted that the underlying Contract had been cancelled when they were unable to obtaining financing and that they had entered into a lease agreement with Stout on November14, 2008. *See id.,* ¶ 3. Finally, they countered that Stout, as landlord, had a duty to mitigate damages. *See id.,* ¶ 4. After a pre-trial hearing on the matter, the court set the Complaint for trial at the completion of discovery. *See* R. 17.

The defendants, later having employed counsel, filed a Motion to Dismiss the adversary proceeding on the ground that, pursuant to the Supreme Court's ruling in *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011), the plaintiff's breach of contract state law claim was "not within the constitutional jurisdiction of the bankruptcy court." R. 24, ¶ 4. In her Response, the Trustee argued that the narrow holding in *Stern* was not applicable to this case. *See* R. 29 at 1. The court ordered the parties to file briefs concerning the court's authority to issue a final judgment in this adversary and to discuss any implicated jurisdictional concerns. *See* R. 31. After the briefing period, it took the matter under advisement.

DISCUSSION

The defendants have moved to dismiss this adversary proceeding on the ground that "[b]reach of contract is [a] state law claim not within the constitutional jurisdiction of the bankruptcy court, and is better heard by a state court judge." R. 24, ¶ 4. Federal Rule of Civil Procedure 12(b), the rule customarily cited in motions to dismiss, was not invoked herein.[4] The defendants did not charge that this court lacks subject-matter or personal jurisdiction to adjudicate the adversary proceeding. (In fact, they conceded the existence of the court's jurisdiction in their pro se Answer.) Rather, they sought dismissal of the cause of action based upon a lack of the court's "constitutional jurisdiction" as the Supreme Court framed it in *Stern v. Marshall*, 564 U.S. _, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). However, the court, *sua sponte*, has found it appropriate, in considering dismissal of this adversary, also to discuss the procedural errors found herein and the jurisdictional questions that have arisen.

A. Procedural Errors

First, the plaintiff's original Complaint sought relief from the wrong defendant on behalf of the wrong debtor. The Complaint alleged a breach of the Contract executed between the defendants Breanna and Brett Perry and the debtor Jenay Marie Stout. However, the "Wherefore" paragraph of the Complaint sought a judgment against a defendant named Deborah L. White on behalf of a debtor named Terrance S. Archer. The prayer of the Complaint, with erroneously identified parties, had not been corrected by proof-reading, and thus was fatally defective. It certainly required an amendment.

However, the plaintiff responded by filing an Amended Complaint without asking for the court's leave to file it. Amendments are governed by Rule 7015 of the Federal Rules of Bankruptcy Procedure, which makes Rule 15 of the Federal Rules of Civil Procedure applicable in adversary proceedings. Under Rule 15(a)(1), the right to amend as a matter of course extends for 21 days after service of the responsive pleading. Once the 21-day period is over, however, a party may amend its pleading "only with the opposing

[4] Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(i) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b) provides seven defenses that can be asserted against a plaintiff's claims.

party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2); Fed. R. Bankr. P. 7015. The plaintiff, filing the Amended Complaint well past the 21-day period, provided neither. She notified the court's deputy clerk of the intended amendment, and then filed it 63 days after the Answer was filed,[5] without the consent of the defendants or leave of court.

The defendants, then acting pro se, did not challenge the filing. The court, recognizing the necessity of amending the prayer of the Complaint, implicitly gave its leave to file. *See* Fed. R. Civ. P. 15(a)(2) (stating that a court "should freely give leave when justice so requires"); *see also Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962) (considering such criteria as undue delay, bad faith or dilatory motive on part of a movant when deciding whether leave should be freely given); *Joseph v. Elan Motorsports Technologies Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011).

The second procedural error, however, was more serious. The plaintiff failed to comply with the court's Order of March 13, 2012, which required the parties to submit simultaneous briefs and replies on the impact of the Supreme Court's *Stern v. Marshall* decision on this adversary proceeding. The plaintiff filed no initial brief. In her Reply Brief, she apologized that she "misread the court's Order" and had "calendared her brief to be due on April 26, 2012." R. 34 at 1. The court's Order clearly states:

> Parties are directed to file simultaneous briefs on or before April 11, 2012. Simultaneous replies are to be filed on or before April 26, 2012. Upon receipt of all briefs and replies or, in the alternative, when the last day for filing has passed, the court will take this matter under advisement.

R. 31 at 2. The plaintiff's explanation simply does not qualify as excusable neglect. *See Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395-97, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993) (listing factors for excusable neglect, holding clients responsible for acts and omissions of chosen counsel);

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[5] The court noted that the pro se defendants filed their Answer to the Complaint belatedly. *See* Fed. R. Bankr. P. 7012 (requiring defendant to serve an answer within thirty days after issuance of a summons). However, the Trustee had granted the defendants a 30-day extension for filing the Answer, and they did file it within that allotted period. *See* R. 8, Ex. A. Neither the defendants nor the Trustee notified the court of this agreement, however. Because the court found no willful flaunting of the deadline or disregard for the rules, and because the plaintiff clearly was not prejudiced by the late filing (since she gave permission for it), the court allowed the tardily filed pro se Answer.

Telesphere Commc'ns, Inc. v. 900 Unlimited, Inc., 177 F.3d 612, 617 (7th Cir 1999) (affirming dismissal of action and imposition of sanctions after appellants' failure to file timely brief).

The plaintiff advised the court that she would rely on her Response to the Motion to Dismiss as her initial brief. However, the court had requested briefs to supplement, not repeat, the arguments set forth in the Motion to Dismiss and Response. The defendants stated, in their Reply Brief, that they were prejudiced by the fact that she neither filed a brief nor communicated with them or their counsel. *See* R. 35, ¶¶ 4, 5. They were unable to respond to any argument she might have raised. In addition, they pointed out that they had expended time and expense not borne by the plaintiff. *See id.*

The court finds that the plaintiff's failure to file an initial brief was damaging to the defendants and to the court. *See Matter of Weaver*, 93 B.R. 172, 174 (N.D. Ind. 1988) (stating that, when a party fails to file a brief, "the court is forced to become a board of legal research and inquiry, rather than an impartial decision maker"). When considering, as well, the mistakes in the plaintiff's original Complaint and her filing of an amended pleading without leave, it finds such conduct inappropriate and inexcusable. Nevertheless, the court has determined that a review of the merits of the Motion to Dismiss filed by the defendants is the appropriate course, in part because it found that counsel for the plaintiff withdrew his appearance, leaving the plaintiff to repair the first mistake, and because the errors did not suggest bad faith on the part of the plaintiff. The issue of this court's constitutional authority under *Stern v. Marshall* is central to the defendants' Motion to Dismiss and deserves the court's thorough review and discussion. The court therefore turns to their request for dismissal of the adversary proceeding based upon a lack of the court's constitutional jurisdiction as the Supreme Court framed it in *Stern v. Marshall*, 564 U.S._, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011).

B. Dismissal: Constitutional Authority of an Article I Court

1. *Stern v. Marshall*

Stern, very briefly summarized, began as a dispute over the estate of a wealthy Texas oilman, J. Howard Marshall, between Howard's wife Vickie Lynn Marshall (more widely known as Anna Nicole Smith) and Howard's son E. Pierce Marshall. Howard did not include Vickie in his will; the beneficiary was his son Pierce. Before Howard died, Vickie sued Pierce in Texas state probate court, claiming that Pierce fraudulently induced his father to sign a living trust agreement that excluded her from receiving an inheritance under her husband's will. The state court rejected her claim, and when Howard died Vickie did not inherit anything under his will.

Vickie then filed bankruptcy in California. Pierce filed a proof of claim against Vickie and a nondischargeability complaint alleging defamation. Vickie, the debtor, counterclaimed that Pierce had tortiously interfered with her expectancy of an inherited gift from her husband's estate. The bankruptcy court ruled in favor of Vickie and awarded her both compensatory and punitive damages. The Court of Appeals reversed, holding that the bankruptcy court lacked authority to enter judgment on Vickie's counterclaim because that counterclaim, based solely on state law, was not a core proceeding. The Supreme Court affirmed but on different grounds. It concluded that the bankruptcy court had the statutory authority to issue a final judgment on Vickie's counterclaim, because it was a "core" proceeding under 28 U.S.C. § 157(b)(2)(C), but that it lacked the constitutional authority to decide the state law counterclaim.

2. "Constitutional Jurisdiction"

The renowned United States Bankruptcy Judge William L. Norton, Jr., referred to a bankruptcy court's "constitutional jurisdiction" when he reviewed motions to dismiss in numerous adversary proceedings filed after the Supreme Court decided *Northern Pipeline Construction Company v. Marathon Pipe Line Company*, 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982). Weighing whether to dismiss or transfer the proceedings to the district court, he examined whether a proceeding "possesses jurisdiction over state common law and other actions found by the Supreme Court to be beyond the constitutional

jurisdiction of this non-Article III Bankruptcy Court." *Anderson v. CBS, Inc.*, 31 B.R. 161, 163 (Bankr. N.D. Ga. 1982) (Norton, J.) (emphasis added). He described the issue to be addressed after *Northern Pipeline*:

> [T]he principles enunciated by the Supreme Court are precise. Bankruptcy Judges who are not afforded the protection of Article III are constitutionally prohibited from adjudicating rights involving the liability of one individual to another as defined under the law. Adjudication of the rights of individuals in property or individual claims to property in bankruptcy proceedings certainly often, if not always, involves determination of the liability of one party to another. Consequently, granting the non-Article III Bankruptcy Court actual or constructive possession of the property in question does not resolve a constitutional prohibition. . . . The Supreme Court, as with others of us, finds it difficult to define what is the minimum authority which will constitute "the judicial power" and when some Article III judicial power may be permissibly exercised by non-Article III judges.

Id. at 168.[6] Now, in the aftermath of the Supreme Court's decision in *Stern*, bankruptcy judges again are faced with motions to dismiss and again are asked to weigh the court's "constitutional jurisdiction."

3. "Constitutional Authority"

The Supreme Court did not use the term "constitutional jurisdiction" in *Stern.* It made reference to a bankruptcy court's "constitutional authority" arising from Article III and its "jurisdiction" to render a final judgment on particular causes of action. Courts have recognized the distinction.

> Although sometimes referred to as a reference of "jurisdiction," the issue of constitutional authority of a non-Article III judge to enter final orders pursuant to 28 U.S.C. § 157 is not a question of constitutionality of subject matter jurisdiction, a defect of which could not be "cured" by consent. Subject matter is constitutionally conferred upon the United States District Court by 28 U.S.C. § 1334. The issue addressed in the opinion in *Stern v. Marshall* is to what extent[,] by reference under 28 U.S.C. § 157, a non-Article III judge may exercise final order power over such matters.

In re TMST, Inc., 2012 WL 589572 at *3, n. 14 (Bankr. D. Md. Feb. 22, 2012). The *Stern* Court, focusing on the bankruptcy court's constitutional authority, described the issues before it as twofold:

> (1) whether the Bankruptcy Court had the statutory authority under 28 U.S.C. § 157(b) to issue a final judgment on Vickie's counterclaim; and

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[6] Judge Norton denied the motions to dismiss based upon a lack of jurisdiction during the *Northern Pipeline* stay. He vowed to continue hearing and adjudicating the issues in all proceedings "under the full expectation that the Bankruptcy Court constitutional problems will be solved by the Congress . . . [which] will act responsibly and promptly to carry out the mandate to 'reconstitute the bankruptcy courts' [so] that Title 11 chaos will be avoided." *Id.* at 173.

(2) if so, whether conferring that authority on the Bankruptcy Court is constitutional.

Stern, 131 S. Ct. at 2600. The Court, after stating that its decision was "narrow," pronounced its holding:

> Article III of the Constitution provides that the judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in that Article. We conclude today that Congress, in one isolated respect, exceeded that limitation in the Bankruptcy Act of 1984. The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim.

Id. at 2620.

To reach that conclusion, the Court first set out the statutory framework by which title 11 bankruptcy matters end up in the hands of bankruptcy judges. It underscored that Congress established that the United States district courts, not the United States bankruptcy courts, have "original and exclusive jurisdiction of all cases under title 11," the bankruptcy statute. *Id.* at 2603 (citing 28 U.S.C. § 1334(a)). The district courts, in turn, may refer any or all bankruptcy proceedings to the bankruptcy judges of their district. *See id.* A bankruptcy judge's handling of a matter before the court depends on whether the matter is "core" or "non-core."

> The manner in which a bankruptcy judge may act on a referred matter depends on the type of proceeding involved. Bankruptcy judges may hear and enter final judgments in "all core proceedings arising under title 11, or arising in a case under title 11." § 157(b)(1). "Core proceedings include, but are not limited to" 16 different types of matters, including "counterclaims by [a debtor's] estate against persons filing claims against the estate." § 157(b)(2)(C). Parties may appeal final judgments of a bankruptcy court in core proceedings to the district court, which reviews them under traditional appellate standards. *See* § 158(a); Fed. Rule Bkrtcy. Proc. 8013.

Id. at 2603-04.

The Supreme Court then focused on Vickie's counterclaim against Pierce for tortious interference. As a counterclaim by a debtor against a claimant, it was a core proceeding under § 157(b)(2)(C). When Pierce challenged the bankruptcy court's jurisdiction under § 157(b) to enter final judgment on his defamation claim, however, the Court pointed out that § 157(b) makes no reference to jurisdiction:

> Section 157 allocates the authority to enter final judgment between the bankruptcy court and the district court. *See* §§ 157(b)(1), (c)(1). That allocation does not implicate questions of subject matter jurisdiction. *See* § 157(c)(2) (parties may consent to entry of final judgment by bankruptcy judge in non-core case).

Id. at 2607. Noting that Pierce had consented to the bankruptcy court's resolution of the defamation claim, the Court concentrated on the issue of the bankruptcy court's authority to enter final judgment on the counterclaim. The *Stern* Court then held:

> Although we conclude that § 157(b)(2)(C) permits the Bankruptcy Court to enter final judgment on Vickie's counterclaim, Article III of the Constitution does not.

Id. at 2608.[7]

Reaffirming *Granfinanciera*'s[8] distinction between actions seeking to increase the bankruptcy estate and those seeking a pro rata share of the bankruptcy *res*, the *Stern* Court found that Vickie's counterclaim for tortious interference was a common law claim "that simply attempts to augment the bankruptcy estate – the very type of claim that we held in *Northern Pipeline* and *Granfinanciera* must be decided by an Article III court." *Id.* at 2616. The Court then propounded a two-pronged test to determine whether a bankruptcy court has the constitutional authority to adjudicate an action:

> Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case; the question is whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process.

Id. at 2618. It concluded that Vickie failed to demonstrate that her counterclaim either derived from or was dependent upon bankruptcy law. *See id.* It then affirmed the appellate court's ruling that the bankruptcy court lacked authority to enter a final judgment. Courts that have followed this test have determined that a

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[7] The four dissenting Justices reframed the question before the Court to be "whether the Bankruptcy Court possessed jurisdiction to adjudicate Vickie Marshall's counterclaim" and concluded that the bankruptcy statute, § 157(b)(2)(C), was "consistent with the Constitution's delegation of the 'judicial Power of the United States' to the Judicial Branch of Government. Art. III, § 1." *Id.* at 2622.

[8] *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S. Ct. 2782, 106 L.Ed.2d 26 (1989). Therein, the Supreme Court "rejected a bankruptcy trustee's argument that a fraudulent conveyance action filed on behalf of a bankruptcy estate against a noncreditor in a bankruptcy proceeding fell within the 'public rights' exception." *Stern*, 131 S. Ct. at 2614. The *Stern* Court explained that, in *Granfinanciera*, the Court "reasoned that fraudulent conveyance suits were 'quintessentially suits at common law that more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res.'" *Id.* (quoting *Granfinanciera*, 492 U.S. at 56). The Court then held that fraudulent conveyance actions were "'more accurately characterized as a private rather than a public right as we have used those terms in Article III decisions.'" *Stern*, 131 S. Ct. at 2614 (quoting *Granfinanciera*, 492 U.S. at 55).

bankruptcy court may render a final judgment when the matter before it stems from the bankruptcy or from resolution of a claims allowance issue. *See, e.g., In re Pulaski*, 2012 WL 3264075 at *4 (Bankr. W.D. Wis. July 13, 2012); *In re Black, Davis and Shue Agency, Inc.*, 471 B.R. 381, 401-02 (Bankr. M.D. Pa. 2012).

The Seventh Circuit Court of Appeals has discussed *Stern* in a few cases. In *In re USA Baby, Inc.*, the appellate court found that *Stern* did not apply to the case before it, but described the holding in *Stern* to be that "bankruptcy judges may not enter final judgments on common law claims that are independent of federal bankruptcy law." *Id.*, 674 F.3d 882, 883-84 (7th Cir. 2012). In *Townsquare Media, Inc. v. Brill*, the actual issues before the circuit court were removal and remand in the bankruptcy context. In the development of the discussion, however, the court considered whether bankruptcy courts have supplemental jurisdiction. The court first pointed out that districts courts have jurisdiction over proceedings "related to" bankruptcy under 28 U.S.C. § 1334(b), but that "28 U.S.C. § 157(c)(1) withholds authority from the bankruptcy judge to make the decision in a 'related to' case; he can only recommend a decision to the district court." *Id.*, 652 F.3d 767, 771 (7th Cir. 2011). It then remarked:

> It would be odd to think a bankruptcy judge could do more in the case of a supplemental state-law claim. And bankruptcy judges are awfully busy (in the year ending on March 31, 2011, there were more than 1.5 million bankruptcy filings in the United States . . . and only about 350 bankruptcy judges); they shouldn't be bothered with resolving [state-law] claims that bear only remotely on the bankruptcy proceeding, as in the case of [a claimant's] claim against [the bankruptcy estate] arising out of the confidentiality agreements.

Id. Once it noted that courts of appeals were divided over the issue and that the Seventh Circuit had not ruled on it, the circuit court again commented:

> But we note parenthetically the oddity that the cases that permit bankruptcy judges to exercise supplemental jurisdiction allow them to make and not just recommend the decision resolving the supplemental claim. This is inconsistent with the statutory treatment of "related to" jurisdiction (and why should supplemental jurisdiction be broader?) and is in tension with the Supreme Court's reluctance to allow bankruptcy judges dispositive authority over state-law claims. But that's another issue we need not resolve.

Id. at 772 (citing *Stern*, 131 S. Ct. at 2609-13, and *Northern Pipeline*, 458 U.S. at 83-84 (plurality opinion)).

In *In re Ortiz*, however, the Seventh Circuit confronted *Stern* head-on. It dismissed the appeal before it on the ground that it lacked appellate jurisdiction because the bankruptcy judge, "[l]ike the bankruptcy judge in *Stern v. Marshall*, . . . lacked Article III authority to enter final judgment on the debtors' state-law claims." *Id.*, 665 F.3d 906, 915 (7th Cir. 2011). In the underlying bankruptcy case, the debtors had filed class action lawsuits against a medical provider that had filed claims disclosing confidential information about the debtors. The bankruptcy judge issued summary judgment to the medical provider.

On appeal, the Seventh Circuit found that the debtors' claims, "[l]ike the debtor's counterclaim in *Stern v. Marshall*, . . . are based on a state law claim that is 'independent of the federal bankruptcy law' and 'not necessarily resolvable by a ruling on the creditor's proof of claim in bankruptcy.'" *Id.* at 909 (quoting *Stern*, 131 S. Ct. at 2611). It concluded that only an Article III judge could decide the debtors' claims; the Article I bankruptcy judge lacked the constitutional authority to enter any form of final judgment on those claims. *See id.* The circuit court commented that, even though *Stern* claimed to be a "narrow" decision, it was "quite significant[,] as Congress 'may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.'" *Id.* at 911 (quoting *Stern*, 131 S. Ct. at 2620). It then found that the debtors' claims, like Vickie's counterclaim, involved private parties in a private matter disputing state law interests in which one individual might be liable to another. In other words, the debtors' claims were "simply ordinary state-law claims." *Id.* at 914 (citing *Stern*, 131 S. Ct. at 2609). Because the bankruptcy court entered a final judgment without constitutional authority, the Seventh Circuit dismissed the appeal of that case for lack of appellate jurisdiction.

4. <u>Dismissal of This Adversary Proceeding for Lack of Constitutional Authority</u>

Like *Ortiz*, the case now before this court involves an ordinary state-law claim. In addition, it is a claim that "seek[s] 'to augment the bankruptcy estate – the very type of claim that . . . must be decided by an Article III court.'" *Id.* (quoting *Stern*, 131 S. Ct. at 2616); *see also, e.g., In re Emerald Casino, Inc.*, 467 B.R. 128, 133 (N.D. Ill. 2012) (concluding that *Stern* precluded the bankruptcy judge's "entry of a final

judgment on any state law counterclaim that would bring assets into the bankruptcy estate"); *In re CCI Funding, I, LLC*, 2012 WL 3421173 at *6 (Bankr. D. Colo. Aug. 15, 2012) ("under *Stern*, bankruptcy courts may . . . not [decide] cases seeking to augment the estate"). Moreover, like the cause of action in *Ortiz*, this action "owes its existence to [Indiana] state law and will not necessarily resolve in the claims allowance process." *Ortiz*, 665 F.3d at 914. Those factors suggest that this court lacks authority to enter a final judgment herein.

But *Stern* was more specific: It held that the bankruptcy court lacked that authority with respect to "a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Stern*, 131 S. Ct. at 2620. It concluded that Article III of the Constitution trumped the statutory grant of authority under § 157(b)(2)(C), which permitted the bankruptcy court to enter final judgment on a counterclaim. *See id.* at 2608; 28 U.S.C. § 157(b)(2)(C) (listing as a core proceeding "counterclaims by the estate against persons filing claims against the estate"). To determine whether a bankruptcy court has the constitutional authority to make final determinations, the Supreme Court directed the bankruptcy court to ask "whether the action at issue stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." *Id*. at 2618; *see In re Southeastern Materials, Inc.*, 467 B.R. 337, 348 (Bankr. M.D.N.C. 2012) ("If either prong of the test is met, then the bankruptcy court has constitutional authority to enter a final order.").

When applying the *Stern* principles to this case, the court first finds it significant that the defendants herein are noncreditors. They neither filed a proof of claim in the debtor's bankruptcy case nor sought any recovery from the debtor's estate assets. For that reason, the Trustee's claim against the defendants necessarily would not be resolved in the claims allowance process. *See, e.g., In re SOL, LLC*, 419 B.R. 498, 506 (Bankr. S.D. Fla. 2009) (concluding that one who has not filed a proof of claim does not affect the adjustment of the debtor-creditor relationship).

Moreover, the Trustee's claim in the Amended Complaint is not a counterclaim under § 157(b)(2)(C). Clearly the Trustee did not bring an action by the estate "against persons filing claims against the estate," since the defendants did not file a claim. Although a complaint can be construed as a counterclaim when it objects to a creditor's claim and affirmatively claims a form of relief against that creditor, this Amended Complaint cannot be considered a counterclaim against these defendants who are noncreditors. *See In re Wincopia Farms, L.P.*, 2011 WL 1237651 at *4 (Bankr. D. Md. Mar. 31, 2011) (complaints could not be counterclaims against a creditor's claim when they assert a private, not federally-created public, right); *see also* Fed. R. Civ. P. 13; Fed. R. Bankr. P. 7013. Under *Stern*, "it is unconstitutional for a bankruptcy judge to enter a judgment resolving a counterclaim arising under state law if it cannot be resolved merely by resolving the underlying claim against the estate." 10 *Collier on Bankruptcy* ¶ 7013.02 at 7013-3 (Alan N. Resnick & Henry J. Sommer, Eds., 16th ed. 2012). In this case, there is no counterclaim by the plaintiff, no underlying claim against the estate by the defendants, and no possibility that a resolution would occur in the claims allowance process.

The court therefore turns its attention to the *Stern* test's other prong and asks whether the Trustee's claim stems from the bankruptcy itself. The defendants assert that they are strangers to the bankruptcy and that only Indiana state law, and not bankruptcy law, is implicated in the resolution of this dispute. *See* R. 33 at 5. The Trustee, on the other hand, argues that the breach-of-contract claim is an asset that is property of the bankruptcy estate, property that she as Trustee intends to liquidate for the benefit of the bankruptcy estate's creditors. *See* R. 29 at 2; R. 34 at 2-3. She further contends that her Amended Complaint is a core proceeding under § 157(b)(2)(O), a matter affecting the liquidation of estate assets.[9]

In the Amended Complaint the plaintiff seeks to recover from the defendants $66,859.25, the outstanding balance on the Contract she claims the defendants breached, "to compensate the bankruptcy estate

[9] Section 157(b)(2)(O), the catch-all provision of the core proceedings listed in 28 U.S.C. § 157(b)(2), grants the court statutory authority to decide "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship . . . ."

for the debtor's losses." R. 14 at 4. As was discussed above, both *Stern* and *Ortiz* concluded that a claim intending to augment a bankruptcy estate must be decided by an Article III rather than an Article I court. Following that position, some courts have held that bankruptcy courts have no authority to determine such claims. *See, e.g., In re Emerald Casino, Inc.*, 467 B.R. at 133 (concluding that *Stern* prohibits a bankruptcy judge from entering judgment "on any state law counterclaim that would bring assets into the bankruptcy estate"). Even though the disposition of such a recovery might have an impact on the funds available to the debtor's creditors, courts that read *Stern* broadly conclude that a state-law contract claim involves private rights and must be finally adjudicated by an Article III judge. *See, e.g., In re Arbco Capital Mgmt., LLP*, _ F.Supp.2d _, 2012 WL 2852619 at *8 (concluding that an Article III court must enter final judgment on private rights claims based on fraudulent conveyances, preferential transfers, and contracts).

The majority of courts, however, have read *Stern* narrowly, insisting that Congress exceeded the limitation of Article III of the Constitution in only "one isolated respect," and that bankruptcy courts have the constitutional authority to enter final judgments on all core proceedings in § 157(b)(2) except "a final judgment on a state law counterclaim [under § 157(b)(2)(C)] that is not resolved in the process of ruling on a creditor's proof of claim." *Stern*, 131 S. Ct. at 2620. Our sister court in this district forcefully and persuasively articulated that position. *See In re Merrillville Surgery Ctr., LLC*, 474 B.R. 618, 623 (Bankr. N.D. Ind. 2012) (reading *Stern* as a "strict constructionist," concluding that "*Stern* very clearly does not implicate" a trustee's claims under §§ 544, 547, and 548, which arose under title 11). Many other courts, including this one, agree. *See, e.g., In re Deitz*, 469 B.R. 11, 23 (9th Cir. BAP 2012) (agreeing with "the ample authorities that counsel against a broad interpretation of *Stern*"); *In re Pulaski*, 2012 WL 3264075 at *6 (Bankr. W.D. Wis. July 13, 2012) (concluding that *Stern* held that Congress gave too much authority to Article I courts in only "one specific respect"); *In re Black, Davis and Shue Agency, Inc.*, 471 B.R. at 401 (following the line of cases concluding that *Stern* was narrowly decided); *In re Safety Harbor Resort and Spa*,

456 B.R. 703, 705 (Bankr. M.D. Fla. 2011) (concluding that the "Supreme Court merely held that Congress exceeded its authority under the Constitution in one isolated instance").

Returning to this adversary proceeding, then, the question is whether the plaintiff's Amended Complaint satisfies *Stern*'s other prong: Does the Trustee's claim stem from the bankruptcy itself? The Trustee asserts that the contractual obligation due to the debtor from the defendants is property of the bankruptcy estate under 11 U.S.C. § 541, and she specifies that it is a core proceeding affecting the liquidation of an asset of the bankruptcy estate under § 157(b)(2)(O). The court finds that the issue whether the breached Contract is an asset of the estate certainly stems from the bankruptcy case. *See In re Cedar Funding, Inc.*, 2012 WL 3309683 at *5 (N.D. Cal. Aug. 13, 2012) (finding that court's determination of what is property of the estate is an issue stemming from the bankruptcy itself); *see also In re BankUnited Fin'l Corp.*, 462 B.R. 885, 893-94 (Bankr. S.D. Fla. 2011) ("the concept of what is property of a bankruptcy estate does not exist outside of a bankruptcy case"). In the view of this court, deciding whether an asset is "property of the estate" is a fundamental responsibility of a bankruptcy court. *See, e.g., In re Antonie*, 2011 WL 5913725 at *4 (Bankr. D. Idaho Nov. 28, 2011) ("[D]eterminations by the bankruptcy court of the nature and extent of the property of a debtor's bankruptcy estate, and for turn over of that property to the trustee, are essential to the administration of the bankruptcy estate and are quintessentially core proceedings.") (citations omitted). Nothing in *Stern*'s analysis of the constitutional infirmity of § 157(b)(2)(C) requires courts to extend that holding to other core subsections such as § 157(b)(2)(O). *See In re AFY, Inc.*, 461 B.R. 541, 547 (8th Cir. B.A.P. 2012) (holding that the authority granted to bankruptcy judges by Congress in 28 U.S.C. § 157(b)(2) is constitutional, except only for § 157(b)(2)(C)); *In re Webb*, 2012 WL 3638005 at *1 (Bankr. N.D. Ohio Aug. 22, 2012) (stating that the core proceeding before it under § 157(b)(2)(O) was within its constitutional authority as analyzed in *Stern*). This court believes that it, even though an Article I court, is constitutionally authorized to consider whether this matter qualifies as a core proceeding and whether this property at issue qualifies as property of this debtor's estate. *See Southern Elec. Coil, LLC v. FirstMerit*

Bank, N.A., 2011 WL 6318963 at *4 (N.D. Ill. 2011) (declining to withdraw the reference, finding that "the Bankruptcy Court is best poised to perform the analysis when the parties involved dispute the potential outcome's effect on the Debtor's estate").

The court therefore analyzes whether this adversary proceeding constitutes a core proceeding affecting the liquidation of the assets of the estate under § 157(b)(2)(O). It notes that the plaintiff is the duly appointed Trustee in the case of the chapter 7 debtor Jenay Marie Stout, with all the rights and duties of a trustee. She seeks to marshal an asset of the debtor's estate. *See* 11 U.S.C. § 704(a)(1). The Amended Complaint, which identified the breached Contract between the debtor and the defendants as estate property and which sought judgment against the defendants in the amount remaining under the Contract, is therefore fairly and properly characterized as a core proceeding affecting the liquidation of assets of the estate pursuant to § 157(b)(2)(O). *See In re AFY, Inc.*, 461 B.R. at 547.

The result of the analysis is clear. The court has the statutory authority to enter a final judgment in this core proceeding under § 157(b)(2)(O). It has the constitutional authority to enter a final judgment because the action at issue (whether the breached Contract is property of the debtor's bankruptcy estate) stems from the bankruptcy itself and falls clearly within the first prong of *Stern*'s test. Accordingly, *Stern* does not bar this court's constitutional authority to enter a final judgment on the Trustee's Complaint.

The court therefore concludes that it can determine and decide whether the Contract at issue is or is not property of the bankruptcy estate and whether damages from any breach of that Contract are property of the estate that may be recovered for the benefit of the debtor's creditors. For this reason, the court denies dismissal on the ground raised in the defendants' Motion to Dismiss Plaintiff's Adversary Proceeding.

C. Dismissal: Subject-Matter Jurisdiction

Although the defendants sought to dismiss the Amended Complaint on constitutional grounds, based upon the Supreme Court's decision in *Stern v. Marshall*, bankruptcy courts have the inherent authority to

determine whether they have subject-matter jurisdiction over a proceeding and to dismiss causes of action for lack of jurisdiction. *See Hukic v. Aurora Loan Servs.*, 588 F.3d 420, 427 (7th Cir. 2009) ("[I]t is always a federal court's responsibility to ensure it has jurisdiction."); *Hawxhurst v. Pettibone Corp.*, 40 F.3d 175, 179 (7th Cir. 1994) (a bankruptcy court may raise the issue of subject-matter jurisdiction *sua sponte* at any point in the proceedings). This court questions its jurisdiction over the § 541 claim raised by the Trustee in the Amended Complaint before it.

When responding to a motion to dismiss, a plaintiff has the burden of alleging facts which, if proven, would entitle her to the relief sought in her pleading. *See In re Saybart Prods.*, 175 F.2d 15, 16 (7th Cir. 1949); *McPherson-Moses v. Autumn Home Care*, 2012 WL 3041813 at *3 (N.D. Ill. July 23, 2012); *see also Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) ("The burden is on the plaintiff to frame a complaint with enough factual material (taken as true) to suggest that he or she is entitled to relief."). In this case, even though the defendants' dismissal motion was based on a constitutional rather than a jurisdictional ground, the Trustee responded with both jurisdictional and constitutional defenses. She stated that the adversary proceeding was "a core proceeding subject to this court's jurisdiction in accordance with [28] U.S.C. § 157(b)" and was "a matter affecting the liquidation of the assets of the bankruptcy estate" under 28 U.S.C. § 157(b)(2)(O). R. 29 at 2. In her Reply Brief, the Trustee further explained that she, as the Trustee, was acting for the benefit of the bankruptcy estate, and that "she own[ed] the asset that is part of the bankruptcy estate." R. 34 at 2. She then asserted:

> Although the underlying dispute here involves state law, the basic dispute is the extent to which there is an asset that is property of the bankruptcy estate and the value or the amount of that asset. That was not the case in *Stern* where the Trustee was not involved. The bankruptcy estate is implicated in the resolution of this dispute because the amount that the trustee seeks to recover from the Defendants is an asset of the bankruptcy estate.

Id. at 2-3.

In the earlier section of the Memorandum of Decision the court, agreeing with the Trustee's analysis, concluded that it had the constitutional authority to make the final determination in this adversary proceeding

because "the action at issue stems from the bankruptcy itself," *Stern*, 131 S. Ct. at 2618, and because this proceeding did not require "a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim." *Id.* at 2620. The court now considers whether it has subject-matter jurisdiction over the Trustee's Amended Complaint.

A complaint is subject to dismissal under Federal Rule of Civil Procedure 12(b)(1) if the court lacks subject-matter jurisdiction. *See United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012). A challenge to jurisdiction can be "premised on either facial or factual attacks on jurisdiction." *Kalamazoo Realty Venture Ltd. P'ship v. Blockbuster Entm't Corp.*, 249 B.R. 879, 884 (N.D. Ill. 2000). A facial attack challenges the sufficiency of the allegations in the complaint itself. If a factual attack is made, "it is proper for the court to look beyond the jurisdictional allegations in the complaint, and 'view whatever evidence has been submitted on the issue to determine whether in fact subject matter evidence exists.'" *Id.* (citation omitted); *see also United Phosphorus*, 322 F.3d at 946 (stating that, "if the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion"); *Tucker v. Closure Sys. Int'l*, 2011 WL 4479112 at *3 (S.D. Ind. Sept. 27, 2011) (reviewing debtor's schedules to determine assets of debtor's estate, denying dismissal under Rule 12(b)(1)). The burden of establishing the existence of subject-matter jurisdiction rests with the party asserting jurisdiction, in this case the Trustee/plaintiff. *See United Phosphorus*, 322 F.3d at 946.

In this case, the court questions whether the plaintiff has put forth competent proof, in the form of sufficient factual information, to support her right to relief and to prove that this court has subject-matter jurisdiction. *See Kalamazoo*, 249 B.R. at 880. The defendants cast doubt on the plaintiff's claim and the court's jurisdiction by alleging that the Contract was invalid or was canceled by the subsequent lease agreement between the same parties. Such affirmative defenses can raise genuine issues of material fact or

a jurisdictional challenge. The court therefore examines the allegations in the plaintiff's Amended Complaint to determine whether a trial or dismissal for lack of jurisdiction is appropriate.

The Trustee asserts that the obligation due to the debtor under the breached Contract for Conditional Sale of Real Estate, in the amount of $66,859.25, is property of the bankruptcy estate under § 541. Section 541(a) of the Bankruptcy Code defines "property of the estate" as "all legal and equitable interests of the debtor in property as of the commencement of the case."

> The question whether an interest claimed by the debtor is "property of the estate" is a federal question to be decided by federal law; however, courts must look to state law to determine whether and to what extent the debtor has any legal or equitable interests in property as of the commencement of the case.

In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993). Once a trustee is appointed, he or she "has the sole responsibility to represent the estate, by bringing actions on its behalf to marshal assets for the benefit of the estate's creditors." *Fisher v. Apostolou*, 155 F.3d 876, 879 (7th Cir. 1998). The trustee succeeds to the rights of the debtor, including the right that the debtor has against a third party who may have injured the debtor. *See Koch Refining v. Farmers Union Center Exchange, Inc.*, 831 F.2d 1339, 1348 (7th Cir. 1987) ("It is axiomatic that the trustee has the right to bring any action in which the debtor has an interest."); *In re Marston*, 417 B.R. 766, 770 (Bankr. N.D. Ill. 2009) (stating that a trustee may bring any action the debtor could have brought under state law at the commencement of the case). Whether a particular asset is § 541 property is measured by the property interests held by the debtor on the date the petition was filed.

As a plaintiff claiming an ownership interest in property of the estate, the Trustee bears the initial burden of establishing that the particular asset is included in "property of the estate" as it is defined in 11 U.S.C. § 541. *See In re Bullock Garages, Inc.*, 2006 WL 437397 at *1 (Bankr. C.D. Ill. 2006) ("The burden of proof is upon the Trustee/Plaintiff by a preponderance of the evidence to show that the property in question is property of the estate and that there is an amount due and owing from the Defendant to the Debtor"). Also, as a plaintiff seeking to recover damages, the Trustee must demonstrate that the amounts due

under the breached Contract are in fact § 541 property. *See In re Dunn*, 436 B.R. 744, 747 (Bankr. M.D. Ga. 2010) (citation omitted).

When the court examined the debtor's bankruptcy petition and schedules to ascertain the assets and liabilities in which she claimed to have an interest on the petition date, it discovered that the debtor did not claim any interest in the Contract for Conditional Sale of Real Estate. Nowhere in her schedules or statement of financial affairs did she list the Contract or a breach of contract cause of action. Nor was there any reference to the defendants. She affirmatively stated in the schedules that she claimed no executory contracts or unexpired leases. Nothing in the bankruptcy filings suggested any relationship whatsoever between the defendants and the debtor. However, the debtor did list the Barclay Street real estate (the real estate being sold under that Contract) as residential property that she owned in fee simple. She stated that she intended to surrender the property to Citimortgage Inc. in satisfaction of its secured claim on the property. It appears, therefore, that as of the commencement of the bankruptcy case the debtor did not think she held a legal or equitable property interest against the defendants.

Nevertheless, the Trustee alleged in her Amended Complaint that the Contract was property of the debtor's estate under § 541. Moreover, in her Preliminary Inventory Report, filed with the court in the debtor's main bankruptcy case, the Trustee claimed that she anticipated receiving "monies representing property shown on the Schedules filed by the Debtor" and "monies from litigation settlement representing non-exempt assets of the Debtor's bankruptcy estate." R. 9, ¶ 2.

Because the Trustee did not specify the "property shown on the Schedules" or the schedules on which the property appeared, the court reviewed the debtor's schedules in this case to find the source of the estate property claimed by the Trustee. It found no litigation settlement listed. The court could see no other property in the schedules from which the Trustee could collect monies. The court discovered no evidence, in the debtor's petition, schedules, statement of financial affairs, or anywhere in the record, to indicate that the debtor had an interest in the Contract for Conditional Sale on the date the petition was filed. Nor was

there anything to suggest that the debtor had any legal claims or settlement negotiations for which she could potentially recover money damages. The debtor did not amend her schedules, at a later date, to disclose the existence of the contractual relationship between her and the defendants, and the Trustee did not challenge the debtor's failure to reveal this alleged asset as estate property in her schedules. The record simply does not support the existence of this Contract as property of the bankruptcy estate, as the Amended Complaint alleged. *See Fisher*, 155 F.3d at 880 ("The trustee, acting on behalf of the estate or the creditors as a whole, obviously may not roam around collecting whatever property suits her fancy. Her task instead is to recover and manage the 'property of the estate,' which is defined in § 541."); *In re Kana*, 2011 WL 1753208 at *2 (Bankr. D.N.D. May 6, 2011) (stating that a trustee had the burden of establishing at least a *prima facie* case that he was entitled to turnover of property that constitutes estate property). There is no evidence that the Trustee has succeeded to any cause of action that the debtor had a right to pursue, or indeed to any legal or equitable contract interest held by the debtor, on the specific date when she commenced the bankruptcy.

The court therefore determines that the plaintiff has failed to meet her burden of establishing a *prima facie* case that the Contract was § 541 property of the estate or that the debtor had any interest in the Contract on the date the bankruptcy petition was filed that would qualify it as property of the estate. It necessarily follows that she has failed to demonstrate that the defendants' "obligations due to the Debtor [under that Contract] are property of the Bankruptcy Estate [pursuant to] 11 U.S.C. § 541." R. 14, ¶ 21. The Trustee's sole claim in the Amended Complaint is therefore not viable and the cause of action against the defendants is invalid.

The court concludes that the plaintiff has no claim remaining in the Amended Complaint on which to prosecute against these defendants. *See* R. 14, ¶ 21. Because she based her pleading solely on 11 U.S.C. § 541 and asserted a state law claim to collect damages for a pre-petition breach of a Contract that is not § 541 property of the debtor's estate, the court finds that the damages claim does not constitute property of the estate. *See In re Guild & Gallery Plus, Inc.*, 72 F.3d 1171, 1181 (3d Cir. 1996) (stating that, "if the

action does not involve property of the estate, . . . it is an unrelated matter completely beyond the bankruptcy court's subject-matter jurisdiction"). Consequently, this court lacks jurisdiction over the claimed subject-matter of the Trustee's Amended Complaint, the breached Contract. *See* Fed. R. Civ. P. 12(b)(1). Without that jurisdiction, the court cannot grant the relief sought by the plaintiff in the Amended Complaint.

"If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3) (applied in adversary proceedings pursuant to Fed. R. Bankr. P. 7012). Accordingly, this adversary proceeding must be dismissed for lack of jurisdiction.

CONCLUSION

For the reasons set forth in this Memorandum of Decision, the court concludes that it has both constitutional authority under *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011), and statutory authority pursuant to 28 U.S.C. § 157(b)(2)(O) to enter a final judgment on the plaintiff's Amended Complaint. Accordingly, the Motion to Dismiss Plaintiff's Adversary Proceeding, brought by the defendants Breanna Perry and Brett Perry against the plaintiff Jacqueline S. Homann, Trustee, is denied on the ground that the court lacks constitutional authority but is granted on the alternate ground that the court lacks subject-matter jurisdiction. The plaintiff's Amended Complaint is dismissed.

SO ORDERED.

Harry C. Dees, Jr., Judge
United States Bankruptcy Court