

MAR - 7 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF: : CASE NUMBER: A06-62966-PWB

INTERNATIONAL MANAGEMENT :
ASSOCIATES, LLC, INTERNATIONAL :
MANAGEMENT ASSOCIATES :
ADVISORY GROUP, LLC, :
INTERNATIONAL MANAGEMENT :
ASSOCIATES PLATINUM GROUP, LLC, :
INTERNATIONAL MANAGEMENT :
ASSOCIATES EMERALD FUND, LLC, :
INTERNATIONAL MANAGEMENT :
ASSOCIATES TAURUS FUND, LLC, :
INTERNATIONAL MANAGEMENT :
ASSOCIATES GROWTH & INCOME :
FUND, LLC, INTERNATIONAL :
MANAGEMENT ASSOCIATES :
SUNSET FUND, LLC, IMA REAL :
ESTATE FUND, LLC, PLATINUM II :
FUND, LP, EMERALD II FUND, LP, :

Debtors.

IN PROCEEDINGS UNDER
CHAPTER 11 OF THE
BANKRUPTCY CODE

WILLIAM F. PERKINS, TRUSTEE,
in his Capacity as Chapter 11 Trustee
for International Management Associates
LLC,

Plaintiff

v.

ADVERSARY PROCEEDING
NO. 06-6421

CROWN FINANCIAL, LLC,

Defendant.

ORDER

The Trustee of International Management Associates, LLC ("IMA"), and related Debtors (the "Debtors") seeks to avoid and recover an alleged transfer of an interest of the Debtors in property to Crown Financial, LLC ("Crown") as a fraudulent transfer pursuant to 11 U.S.C. §§ 544,

548(a), 550 and O.C.G.A. §§ 18-2-74(a), 18-2-75(a) and 18-2-77(a). Crown contends that the actual fraudulent transfer claims should be dismissed because the Trustee has failed to plead fraud with particularity; that the Trustee should be required to submit a more definite statement with respect to his constructive fraudulent transfer claims because these allegations are too vague or ambiguous; and that immaterial matters should be stricken from the complaint. The Trustee opposes all grounds of Crown's motion.

The Trustee alleges that in Spring 2004, Lloyd Geddes, Jr., M.D. ("Geddes"), formed Atlanta Verve, LLC, for the purpose of developing a nightclub in Atlanta. Geddes, through his medical practice, Oncology & Hematology Center of Atlanta, P.C. ("Oncology") invested in certain hedge funds, including the IMA Platinum Group, for which IMA and IMA Associates Advisory Group, LLC ("IMA Advisory"), provided investment management services. The Trustee contends that Kirk Wright, the founder and chief executive officer of IMA, and a founder and chief executive officer of IMA Advisory, used \$450,000 of IMA investor funds to fund the construction of Verve's nightclub, but failed to fund a remaining \$300,000 owed by him according to an operating agreement entered into by Wright.

The Trustee alleges that in order to complete construction of Verve, Geddes and Oncology entered into a loan agreement with Crown by which Crown lent them \$550,000. In exchange, Geddes and Oncology executed a promissory note in favor of Crown and a security agreement by which Oncology granted Crown a security interest in Oncology's interest in the IMA Platinum Group. The Trustee alleges that on September 12, 2005, IMA, Wright, IMA Platinum Group, Geddes, Oncology, and Crown entered into a letter agreement by which IMA consented to the grant of the security interest in Oncology's interest in IMA Platinum Group, and which indicated the value of Oncology's interest was not less than \$1,123,438 as of June 30, 2005.

The Trustee contends that on October 5, 2005, Geddes asked Wright to liquidate the investment and deliver the proceeds to Crown. Later, Crown asked IMA to liquidate the investment and deliver the proceeds to Crown. On both occasions, the request was refused. On December 9, 2005, after Geddes and Oncology defaulted on the note to Crown, Crown filed a lawsuit against IMA Platinum Group, IMA, Wright, Geddes, and Oncology in a state superior court which, the Trustee contends, contained allegations of fraud on the part of Wright. The Trustee alleges that on or about January 5, 2006, IMA, Wright, IMA Platinum Group, and Crown entered into a settlement agreement whereby Crown assigned the loan to Wright and Crown dismissed the lawsuit against IMA, Wright, and Geddes. In exchange, Wright, IMA, and IMA Platinum Group agreed to pay Crown \$590,000 upon approval of the settlement, and \$40,000 to Crown over nine months. With respect to the transfer of the payment, the Trustee's complaint alleges that Crown took the payment knowing that Wright was operating IMA and its affiliates as a "Ponzi scheme;" the superior court approved the settlement and the settlement payment was subsequently delivered to Crown; and the settlement payment to Crown was paid out of an IMA account.

Motion to Dismiss

Crown contends that the Trustee's actual fraud claims should be dismissed pursuant to FED. R. CIV. P. 12(b)(6), made applicable by FED. R. BANKR. P. 7012, because they fail to state a claim for fraud with particularity. Specifically, Crown contends that the Trustee's actual fraud claims set forth in Count I (§ 548(a)(1)(A)) and Count III (O.C.G.A. § 18-2-74(a)) are deficient as a matter of law because they fail to make specific factual allegations related to the actual transfer, namely the specific conveyance, the transfer of the property, the time of the transfer, and the instrument by which the transfer was accomplished.

Rule 8 of the Federal Rules of Civil Procedure, made applicable by Rule 7008 of the

Federal Rules of Bankruptcy Procedure, provides that a claim for relief shall include a "short and plain statement of the claim showing that the pleader is entitled to relief" and that "each averment of a pleading shall be simple, concise, and direct." In addition, Federal Rule 9(b) requires that all averments of fraud be stated with "particularity." "Because the Federal Rules embody the concept of liberalized 'notice pleading,' a complaint need contain only a statement calculated to 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *United States v. Baxter Intern., Inc.*, 345 F.3d 866, 881 (11th Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Nevertheless, "[w]here Rule 9 is implicated, plaintiffs must plead not only the general nature of their injuries but also the specifics of how and when they were injured." *Id.* at 883.

The Court has reviewed the complaint and concludes that, even under the heightened standard of Rule 9(b), the complaint sets forth the claims with sufficient detail to permit Crown to answer and defend. The Trustee has alleged that a settlement was reached among the parties whereby Crown would receive \$590,000; a payment was made to Crown out of an IMA account pursuant to a settlement agreement; and that this settlement was reached on or about January 5, 2006. The Trustee has identified the parties, an approximate date, the source of the payment, and the transaction. This information is sufficient for Crown to answer and defend, a point which is made by Crown itself in its response, in which it identifies the transaction and certain details of the transaction (Crown's Brief in Support of Motion to Dismiss at 6 [Doc. No. 8]; Declaration of Richard D. Tribe [Doc. No. 9]).

Kipperman v. Onex Corp., Civ. Action no. 1:05-CV-1242-JOF (N.D. Ga. Sept. 15, 2006) (slip op.) does not require a different outcome. In *Kipperman*, the Plaintiff, the trustee of a litigation trust for a chapter 11 debtor, brought fraudulent transfer actions under the Bankruptcy

Code and Georgia law against 15 defendants for transfers made over a four year period. The court granted the defendants' motion to dismiss certain of the actual fraudulent transfer claims brought under § 548(a)(1)(A) or O.C.G.A. § 18-2-74 unless the plaintiff re-pled the complaint with particularity to specify the dates and amounts of each alleged transfer and the instruments by which the conveyances were made. *Kipperman*, at 29-34. Unlike *Kipperman*, this proceeding involves one named defendant and one alleged transfer of funds out of an account of one of the Debtors. The parties' own pleadings indicate that they are aware of the transaction at issue. As a result, the Court concludes that requiring the Trustee to re-plead the complaint is not necessary.

As to whether the complaint sufficiently sets forth allegations of fraud as required by the actual fraudulent transfer statutes, the Court finds that, for purposes of Rule 8 and Rule 9(b), the Trustee's allegations that "Wright operated IMA and IMA Advisory as a classic Ponzi scheme" (Complaint, ¶ 21) and that the transfer to Crown from IMA "was made in furtherance of Wright's operation of the IMA Ponzi scheme" (Complaint, ¶¶ 34, 48) state a claim under § 548(a)(1)(A) and O.C.G.A. § 18-2-74(a) with sufficient particularity. Courts have generally recognized that "establishing the existence of a Ponzi scheme is sufficient to prove a [d]ebtor's actual intent to defraud." *Bauman v. Bliese (In re McCarn's Allstate Finance, Inc.)*, 326 B.R. 843, 850 (Bankr. M.D. Fla. 2005); see *Gredd v. Bear, Stearns Securities Corp. (In re Manhattan Inv. Fund, Ltd.)*, —B.R.—, 2007 WL 60843 (Bankr. S.D.N.Y. Jan. 9, 2007); *Rieser v. Hayslip (In re Canyon Systems Corp.)*, 343 B.R. 615, 637 (Bankr. S.D. Ohio 2006); *S.E.C. v. Cook*, 2001 WL 256172 (N.D. Tex. 2001). Whether the Trustee can ultimately prove that the Debtors were operated as a Ponzi scheme is not before the Court. At this stage, however, the complaint sets forth fraud with sufficient particularity for purposes of the § 548(a)(1)(A) and O.C.G.A. § 18-2-74(a) claims.

Motion for More Definite Statement

Crown contends that the Trustee's claims for avoidance and recovery of the payment to Crown as a constructively fraudulent transfer as set forth in Count II (§ 548(a)(1)(B)), Count IV (O.C.G.A. § 18-2-75(a)), and Count V (§ 550(a)(1)) are ambiguous and that the Trustee should be required to file a more definite statement pursuant to FED. R. CIV. P. 12(e), made applicable by FED. R. BANKR. P. 7012. Crown contends that these claims are ambiguous because the Trustee has failed to identify the date of the transfer; the instrument by which the transfer was accomplished; the account from which the funds came; and the identification of the initial recipient or subsequent recipients of the funds. Without such information, Crown contends that it can neither ascertain the basis of the constructive fraudulent transfer claims, nor frame a responsive pleading.

Rule 12(e) provides that "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Rule 12(e) "is designed to strike at unintelligibility in a pleading, not just a claimed lack of detail." *Stanton v. Manufacturers Hanover Trust Co.*, 388 F.Supp. 1171, 1174 (S.D.N.Y. 1975). A pleading is not "vague or ambiguous" if the responding party has existing knowledge which would permit it to file a response. *See Concepcion v. Bomar Holdings, Inc.*, 1990 WL 13257 (S.D.N.Y. 1990); *Wheeler v. U.S. Postal Service*, 120 F.R.D. 487 (M.D. Pa. 1987).

The Court concludes that the Plaintiff's complaint is not unintelligible, nor is it so vague that Crown cannot identify the transaction at issue and frame a response. As stated *supra*, this complaint names one defendant and a transfer made in conjunction with a settlement agreement. Crown's Brief and the Declaration of Richard Tribe indicate that it can identify the transaction at

issue. If Crown believes that the Trustee has misstated certain facts (Crown's Brief at 7), then it may craft a response which addresses this. If Crown believes that there are intermediate transferees which are relevant to the transaction (Crown's Brief at 6), then Crown may raise whatever affirmative defenses it believes are relevant. But as to whether the Trustee has adequately pled claims for a constructively fraudulent transfer, the Court finds no basis for requiring the Trustee to make a more definite statement.

Motion to Strike Immaterial Matters

Rule 12(f) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure, provides that on motion, the court may order stricken from any pleading "any redundant, immaterial, impertinent, or scandalous matter." Crown contends that Paragraphs 11 through 21 of the Trustee's complaint are immaterial to the facts and issues of this proceeding and should be stricken. The party seeking to have material stricken from a pleading must show that the material has "no bearing on the subject matter of the litigation and that its inclusion will prejudice the defendant." *Grunwald v. Bornfreund*, 668 F.Supp. 128, 133 (E.D.N.Y. 1987) (citations omitted); see *National Organization for Women, Inc. v. Scheidler*, 897 F.Supp 1047, 1087 n.28 (N.D. Ill. 1995); see JAMES WM. MOORE ET AL., 2 MOORE'S FEDERAL PRACTICE ¶ 12.37[3] (3d ed. 2006).

Paragraphs 11 through 21 of the Complaint set forth circumstances precipitating and following the filing of the debtors' bankruptcy cases, including the institution of litigation against the Debtors by hedge fund investors and the Securities and Exchange Commission; the appointment of a receiver for the Debtors by the United States District Court; the apprehension of Wright by the Federal Bureau of Investigation; and his subsequent indictment for mail and wire fraud, including specific factual allegations contained in the indictment. In addition, this portion of the complaint alleges that "[i]t is believed that Wright fabricated financial statements relating

to the Hedge Funds and diverted a substantial amount of money from the Hedge Funds for his own personal use as part of an elaborate Ponzi scheme” and that “Wright operated IMA and IMA Advisory as a classic Ponzi scheme.” (Complaint, ¶ 21).

Crown has not demonstrated that the allegations contained in Paragraphs 11 through 21 have no bearing on the litigation or that it is prejudiced by their inclusion. The allegations in paragraphs 11 through 21 are general background information regarding the conduct of the Debtors and their manner of operation which may be relevant to the element of fraud. Crown has shown no prejudice. Rule 8(b) of the Federal Rules of Civil Procedure, made applicable herein by Rule 7008 of the Federal Rules of Bankruptcy Procedure, provides that “[i]f a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial.” Crown may craft its responses as it sees fit.

In conclusion, the Court finds that the allegations of the Complaint are sufficient for purposes of Rules 8 and 9 of the Federal Rules of Civil Procedure and that there is no basis for dismissal or requiring the Trustee to set forth a more definite statement of his claims. Further, there is no basis for striking paragraphs 11 through 21 from the Complaint.

IT IS ORDERED that Crown’s motion to dismiss actual fraud claims is denied; the motion for more definite statement due to ambiguity is denied; and the motion to strike immaterial matter is denied.

The Clerk is directed to serve copies of this Order on the persons on the attached Distribution List.

At Atlanta, Georgia, this 6 day of March, 2007.



PAUL W. BONAFFEL
UNITED STATES BANKRUPTCY JUDGE

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