



IT IS ORDERED as set forth below:

Date: June 21, 2010

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

In re:	:	
	:	
CM VAUGHN, LLC,	:	BANKRUPTCY CASE NUMBER
	:	08-64060-MGD
Debtor.	:	
_____	:	
	:	
In re:	:	
	:	
CHARLES MICHAEL VAUGHN,	:	BANKRUPTCY CASE NUMBER
	:	08-64071
Debtor.	:	
_____	:	
	:	
NEIL C. GORDON, Chapter 7 Trustee	:	ADVERSARY CASE NUMBER
for the Estates of CM Vaughn, LLC, and	:	10-06105-MGD
Charles Michael Vaughn,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
DAVID W. GRAYBEAL, JR.,	:	
	:	
Defendant.	:	

ORDER DENYING MOTION TO DISMISS

The above-styled adversary proceeding is before the Court on David W. Graybeal's ("Defendant") Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted. (Docket No. 7). Neil C. Gordon ("Trustee") has filed a Response to Defendant's Motion. (Docket No. 8). For the following reasons, Defendant's Motion to Dismiss is DENIED.

Defendant seeks to dismiss the complaint for failure to state a claim. Trustee, as the Chapter 7 Trustee in the underlying bankruptcy cases, filed his original Complaint on March 2, 2010. Trustee then filed an Amended Complaint on March 30, 2010. (Docket No. 4). Defendant filed his Answer and his Motion to Dismiss on March 31, 2010. (Docket Nos. 6–7). It is clear from Defendant's citations to the Complaint that Defendant referred to the original Complaint. The Court has identified two factual allegations included in the Amended Complaint that were not part of the original Complaint: paragraphs 12 and 29 of the Amended Complaint. (Docket No. 4). Neither of those allegations impact the Court's finding that Trustee has alleged sufficient facts to survive a motion to dismiss for failure to state a claim. The Court will refer to the Amended Complaint for the purpose of evaluating Defendant's Motion.

Federal Rule of Bankruptcy Procedure 7012(b)(6) permits a defendant in an adversary proceeding to move for dismissal in the event that a plaintiff fails to state a claim upon which relief can be granted. When reviewing a complaint to determine whether a claim upon which relief can be granted has been stated, the Court must accept as true the factual allegations of the complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249 (11th Cir. 2006). To survive a motion to dismiss, the Trustee's complaint must state sufficient factual allegations to infer each element of the applicable cause of action. *In re Money*, 375 B.R. 704, 707 (Bankr. N.D. Ga.

2007).

Trustee's Complaint encompasses four counts: (1) the avoidance of preferential transfers pursuant to 11 U.S.C. § 547; (2) the avoidance of fraudulent transfers pursuant to 11 U.S.C. § 548(a)(1)(A); (3) the avoidance of fraudulent transfers pursuant to 11 U.S.C. § 544 and O.C.G.A. § 18-2-74(a)(1); and (4) the recovery of avoided transfers pursuant to 11 U.S.C. § 550. The Court will evaluate each count in turn.

I. AVOIDANCE OF PREFERENCES

To state a claim upon which relief can be granted pursuant to § 547, Trustee must allege “a transfer of an interest of the debtor in property,” and that the transfer was

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made
 - (A) on or within 90 days before the date of the filing of the petition; or
 - (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
- (5) that enables such creditor to receive more than such creditor would receive if—
 - (A) the case were a case under chapter 7 of this title;
 - (B) the transfer had not been made; and
 - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547. Trustee has alleged that the debtors in the underlying bankruptcy cases transferred \$5,000.00 to Defendant out of the debtors' bank account. (Docket No. 4, ¶ 28).

Trustee alleged that the transfer was made to or for the benefit of Defendant and on account of an antecedent debt owed by the debtors to Defendant. (*Id.* at ¶¶ 31–32). Trustee further alleged that the transfer occurred on July 2, 2007, that the debtors filed their petitions on March 3, 2008,

and that the transfer occurred within one year prior to the filing of the petitions. (*Id.* at ¶¶ 5, 28, 35). Trustee also alleged that Defendant was an insider of the debtors. (*Id.* at ¶ 32). Defendant admitted each of the above allegations in his Answer. (Docket No. 6). Finally, Trustee alleged that the transfer was made while the debtors were insolvent and that Defendant received more than he would have if the transfer had not been made and Defendant had been paid in accordance with the Bankruptcy Code's provisions in a Chapter 7 case. (Docket No. 4, ¶¶ 31, 34). It appears that Trustee has pled sufficient facts and is entitled to offer evidence in support of his claim for the avoidance of a preference pursuant to 11 U.S.C. § 547.

II. AVOIDANCE OF FRAUDULENT TRANSFERS PURSUANT TO § 548(a)(1)(A)

Section 548(a)(1)(A) provides that the trustee may avoid transfers of an interest of the debtor in property if the transfer was made within two years before the petition date if the debtor made the transfer “with actual intent to hinder, delay, or defraud any entity to which the debtor was or became . . . indebted.” 11 U.S.C. § 548(a)(1)(A). Trustee has alleged that debtors made three transfers of their interests in property to Defendant. (Docket No. 4, ¶ 39). Trustee alleged that the transfers, which were made on September 1, 2006, November 16, 2006, and July 2, 2007, were all made within two years before the filing of the petitions. (*Id.* at ¶¶ 26–28, 40). In his Answer, Defendant has admitted to the existence and timing of all but one of the transfers. (Docket No. 6). Finally, Trustee alleged that the transfers were made pursuant to a fraudulent scheme to use after-acquired investment funds to pay off previous investors to delay the disclosure of the scheme. (Docket No. 4, ¶ 41). Trustee alleged that the transfers were made with the actual intent to hinder, delay, or defraud an entity to which the debtors were or became indebted. (*Id.* at ¶ 42). Trustee's factual allegations regarding the existence, substance, and

timing of the transfers, plus his allegations of a Ponzi-type scheme, are sufficient to survive Defendant's Motion to Dismiss. *See Bayou Superfund, LLC v. WAM Long/Short Fund II, L.P. (In re Bayou Group, LLC)*, 362 B.R. 624, 633–634 (Bankr. S.D.N.Y. 2007) (holding that “the presumption of ‘actual intent’ to hinder, delay and defraud is both intuitive and inescapable” when facts establishing a Ponzi scheme have been alleged).

III. AVOIDANCE OF FRAUDULENT TRANSFERS PURSUANT TO 11 U.S.C. § 544 AND O.C.G.A. § 18-2-74(a)(1)

Section 544 provides that the trustee may avoid any transfer of an interest of the debtor in property “that is avoidable under applicable law.” 11 U.S.C. § 544(b)(1). The Official Code of Georgia § 18-2-74 provides that a transfer made by a debtor “is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.”

O.C.G.A. § 18-2-74(a)(1). A debtor's fraudulent intent may be determined upon consideration of several factors, including whether the debtor was insolvent at the time of the transfer and whether the transfer or obligation was to an insider of the debtor. O.C.G.A. § 18-2-74(b).

Trustee has alleged that all of the transfers were made within four years of the petition date and that the transfers were from the debtors' bank account. (Docket No. 4, ¶¶24–28, 45). Trustee further alleged that several “badges of fraud” indicate the debtors' actual intent to hinder, delay or defraud. (*Id.* at ¶ 46). Specifically, debtors' fraudulent intent is indicated by the debtors' transfers occurring when the debtors were insolvent, by Defendant's status as an insider of debtors at the time of the transfers, and because Defendant knew or should have known that debtors were involved in an unlawful scheme to defraud investors. (*Id.*) Trustee has alleged sufficient facts to suggest that, pursuant to applicable non-bankruptcy law, Defendant received

avoidable fraudulent transfers from debtors.

IV. RECOVERY OF AVOIDED TRANSFERS PURSUANT TO 11 U.S.C. § 550

Section 550 of the Bankruptcy Code provides that once a transfer has been avoided pursuant to §§ 544, 547, and 548, among other sections, a trustee may recover the property that was transferred, or the value of that property, from the party for whose benefit the transfer was made, the initial transferee, or mediate and immediate transferees of the initial transferee. Here, Trustee has alleged that the transfers at issue are avoidable pursuant to the above identified Bankruptcy Code sections. Further, Trustee has alleged and Defendant has admitted¹ that Defendant is “the initial transferee of the Transfers and/or the person for whose benefit the Transfers were made, or the immediate or mediate transferees of the initial transferee of the Transfers.” (Docket No. 4, ¶ 49; Docket No. 6). It appears, therefore, that Trustee has alleged sufficient facts to survive Defendant’s Motion to Dismiss with regard to his claim for recovery of avoided transfers pursuant to § 550.

Taking the complaint in the light most favorable to Trustee, as plaintiff, the Court finds that Trustee has pled sufficient facts with respect to each count of the Complaint and that Defendant has sufficient notice of the claims asserted and the relief sought against him. Accordingly, it is

ORDERED that Defendant’s Motion to Dismiss is hereby **DENIED**.

The Clerk shall serve a copy of this Order upon the Plaintiff, counsel for Plaintiff,

¹ Defendant’s Answer includes a denial of the statement that debtors transferred funds to Defendant on March, 28, 2005, but Defendant nonetheless admitted that he was the person for whose benefit “the Transfers” were made or was the initial, mediate, or immediate transferee. (Docket No. 6). The Complaint and Amended Complaint both identify “the Transfers” as including the March, 28, 2005, transfer. (Docket No. 1, ¶ 27; Docket No. 4, ¶ 28).

Defendant, and counsel for Defendant.

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