



IT IS ORDERED as set forth below:

Date: January 06, 2011

Mary Grace Diehl

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

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

In re:	:	
	:	BANKRUPTCY CASE NUMBER
SISKEY HAULING COMPANY, INC.,	:	10-77265-MGD
	:	
Debtor.	:	
	:	
JEFFREY K. KERR, CHAPTER	:	
7 TRUSTEE,	:	
	:	ADVERSARY CASE NUMBER
Plaintiff,	:	10-06493-MGD
	:	
v.	:	CHAPTER 7
	:	
COMMERCIAL CREDIT GROUP,	:	
INC., SISKEY & SONS HAULING	:	
COMPANY, ATLANTA FUEL	:	
COMPANY, AND FLEETONE	:	
FACTORING, LLC,	:	
	:	
Defendants.	:	
	:	

ORDER DENYING DEFENDANT CCG's MOTION TO DISMISS

The above-styled adversary proceeding is before the Court on Commercial Credit Group,

Inc.'s ("CCG") Motion to Dismiss ("Motion"). The first issue is whether the Chapter 7 Trustee ("Plaintiff") has stated a claim for which relief can be granted, and the second issue is whether Plaintiff's Complaint is so vague or ambiguous that CCG cannot reasonably prepare a response. (Docket No. 5). For the reasons stated below, the Court **DENIES** CCG's Motion. The Plaintiff sufficiently alleges specific facts for the Court to infer that Debtor sought to intentionally hinder, delay, or defraud creditors pursuant to 11 U.S.C. § 548(a)(1)(A). And the Plaintiff's Complaint is sufficiently intelligible for CCG to reasonably prepare a response.

I. BACKGROUND

A. Factual History

Plaintiff's Complaint sets forth the following facts. Siskey Hauling Company, Inc. ("Debtor") filed its petition under Chapter 11 of the Bankruptcy Code ("Code") on June 11, 2010. *Complaint* ¶ 7. Debtor's case was converted to a case under Chapter 7 on July 2, 2010, and the section 341 meeting was held and concluded on July 27, 2010. *Id.* at ¶ 8.

Siskey & Sons Hauling Company ("Siskey & Sons"), not to be confused with Debtor, was indebted to CCG prior to October 2010. *Id.* at ¶ 16. The CEO and Secretary of Siskey & Sons, Sharleen Siskey, is the daughter-in-law of Debtor's Vice-President, Michael Siskey. *Id.* Additionally, the CFO of Siskey & Sons, Marjean Siskey, is the ex-wife of Debtor's Vice-President, Michael Siskey. *Id.* As defined in § 101(31) of the Code, "Siskey & Sons is an 'insider' of Debtor." *Id.* at ¶ 18. Siskey & Sons had ceased doing business by October 2010, and CCG was pursuing Siskey & Sons' CFO, Marjean Siskey, on her personal guaranty. *Id.* at ¶ 17.

On October 29, 2010, CCG loaned \$880,740.00 to Debtor (the "Loan"). *Id.* at ¶ 11. Debtor signed a promissory note and security agreement in that amount, and also granted CCG a

first lien on the titles of various trucks and trailers. *Id.* CCG filed a UCC-1 Financing Statement in Coweta County on November 4, 2009, covering Debtor’s accounts receivable. *Id.*

According to the Plaintiff, “The Primary reason that Debtor borrowed funds from CCG was to enable CCG to use the loan proceeds to pay down the debt owed by Siskey & Sons.” *Id.* at ¶ 17.

Plaintiff next alleges that on October 29, 2010, Debtor transferred \$703,195.29 of the Loan proceeds to or for the benefit of Siskey & Sons and/or to or for the benefit of CCG (Proceeds Transfer). *Id.* at ¶ 29. On November 21, 2009, Debtor transferred \$25,215 by check to CCG (November Transfer). *Id.* at ¶ 30.

B. Procedural History

On September 2, 2010, the Chapter 7 Trustee (“Plaintiff”) filed his Complaint for Order (1) Determining the Extent, Validity and Priority of Liens and Claims Against Debtor’s Accounts Receivable and Certain Equipment (2) Avoiding Monetary Transfers to Siskey & Sons Hauling Company and Commercial Credit Group, Inc.; (3) Avoiding Liens of Commercial Credit Group, Inc.; and (4) Avoiding Garnishment Lien of Atlanta Fuel Company. (Docket No. 1). CCG filed its Motion on September 13, 2010, seeking to either dismiss counts III, V, and VI of Plaintiff’s Complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) or, in the alternative, for more definitive statements pursuant to Fed. R. Civ. P. 12(e).¹ (Docket No. 5). Plaintiff filed a Response to CCG’s Motion to Dismiss on September 29, 2010 (Docket No. 11), and CCG then filed a final Reply on October 5, 2010. (Docket No. 15).

Count III of Plaintiff’s Complaint alleges that the “Proceeds Transfer and November Transfer were made with the actual intent to hinder, delay or defraud the creditors of Debtor to

¹ In the body of its Motion, CCG did not address the dismissal of counts IV or VI..

which Debtor was indebted or became indebted on or after the dates that the Proceeds Transfer and the November Transfer were made.” The Trustee therefore seeks to avoid both transfers pursuant to 11 U.S.C. §§ 548(a)(1)(A) and 550 of the Code.

Count V of Plaintiff’s Complaint alleges that the “CCG Lien Transfer was made with the actual intent to hinder, delay or defraud the creditors of Debtor to which Debtor was indebted or became indebted on or after the date that the Lien Transfer was made.” The Trustee therefore seeks to avoid the CCG Lien Transfer pursuant to 11 U.S.C. §§ 548(a)(1)(A).

By its Motion filed on September 13, 2010, CCG seeks to either dismiss Counts III and V of Plaintiff’s Complaint pursuant to FED. R. CIV. P. 12(b)(6) or, in the alternative, a more definite statement pursuant to FED. R. CIV. P. 12(e). Specifically, CCG asserts that Plaintiff’s claims lack sufficient particularity and do not allow for an inference that CCG is liable.

II. DISCUSSION

A. Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure, permits a defendant in an adversary proceeding to move for dismissal when a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6); FED. BANKR. P. 7012(b). When determining whether a complaint states a claim upon which relief can be granted, the Court must accept as true the complaint’s factual allegations. *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). And the complaint must contain “sufficient factual matter... to ‘state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. ----, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570). “Threadbare recitals of the elements of a cause action, supported by mere conclusory statements, do not suffice.” *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555).

Additionally, when alleging fraud, a plaintiff must comply with FED. R. CIV. P. 9(b). *Perkins v. Crown Financial, LLC (In re International Management Associates, LLC)*, 2007 WL 7141787, *2 (Bankr. N.D. Ga. 2007). Rule 9(b) requires the plaintiff to “state with particularity the circumstances constituting fraud or mistake,” thereby alerting defendants “to the ‘precise misconduct with which they are charged’ and protecting defendants ‘against spurious charges of immoral and fraudulent behavior.’” FED. R. CIV. P. 9(b); *Kipperman v. Onex Corp.*, 2007 WL 2872463, *6 (N.D. Ga. 2007) (quoting *Durham v. Bus. Management Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1998)). As to fraudulent transfers, this heightened pleading standard is generally satisfied when the plaintiff sets forth the parties involved, the date of the transfer, any conditions of indebtedness, the source of payment, and the method of transaction. *Kipperman v. Onex Corp.*, 2007 WL 2872463, *6-*7 (N.D. Ga. 2007); *Perkins*, 2007 WL at *2.

Rule 9(b) further provides that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b). Therefore, proving actual “intent” under § 548(a)(1)(A) does not require direct proof. *In re XYZ Options, Inc.*, 154 F.3d 1262, 1271 (11th Cir. 1998). Rather, plaintiffs may plead circumstantial evidence from which the court may infer intent. *Id.* Courts specifically look for circumstantial evidence recognized as “badges of fraud,” which are “circumstances so frequently attending fraudulent transfers that an inference of fraud arises from them.” *Schilling v. Heavrin (In re Triple S Restaurants, Inc.)*, 422

F.3d 405, 414 (6th Cir. 2005) (quotations omitted).

Badges of fraud include: 1) the transfer was to an insider; 2) the debtor retained possession or control of the property transferred after the transfer; 3) the transfer was disclosed or concealed; 4) before the transfer was made the debtor had been sued or threatened with suit; 5) the transfer was of substantially all the debtor's assets; 6) the debtor removed or concealed assets; 8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred; 9) the debtor was insolvent or became insolvent shortly after the transfer was made; 10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and 11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. *In re XYZ*, 154 F.3d at 1272. Pleading one or more of the badges of fraud sufficiently pleads the required element of intent. *Kipperman*, 2007 WL 2872463 at *9.

Here, Plaintiff has plead facts with sufficient particularity to comply with Rule 9(b) and to alert CCG as to the exact misconduct alleged. The three parties involved and the insider relationships of two of those parties' corporate officers have been alleged. The transfers between the parties and CCG have also been described, including the amounts and dates on which these transfers occurred. Plaintiff has also alleged the method of transfer in all but the Proceeds Transfer. The condition of indebtedness between Siskey & Sons, Inc. and CCG was alleged, as well as the resulting post-transfer condition of indebtedness between CCG and Debtor. In sum, Plaintiff has sufficiently put CCG on notice of exactly which of Debtor's transfers were allegedly made with the intent to hinder, delay, or defraud creditors.

Next, Plaintiff has set forth adequate badges of fraud to allow the Court to infer Debtor's

intent to hinder, delay, or defraud creditors. First, Plaintiff alleged the transfer of estate property to or for the benefit of an insider. The close relationship between the corporate officers of Siskey & Sons and Debtor, and also the fact that CCG was pursuing an officer of Siskey & Sons on her personal guaranty, constitute badges of fraud. Second, Plaintiff's Complaint makes clear that Debtor was insolvent or became insolvent shortly after the transfer was made. This badge of fraud is amplified by the fact that the transfer was for the benefit of an insider. Third, the value of consideration received by Debtor in exchange for the Proceeds Transfer is another badge of fraud. Finally, Plaintiff alleged that Debtor transferred essential assets of its business to CCG, a lienor, who then transferred the value of the assets to or for the benefit of an insider. At the least, these badges of fraud together lead to an inference of intent to hinder, delay, or defraud creditors. While CCG may ultimately prove successful in its denial of Plaintiff's claims, that issue is not yet before the Court. This ruling only establishes that Plaintiff has adequately stated claims for which relief can be granted.

B. Motion for a More Definite Statement

FED. R. CIV. P. 12(e) states that a "party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." FED. R. CIV. P. 12(e). The Rule 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).

Although Plaintiff's Complaint is short on detail, it is not so vague or ambiguous that CCG cannot reasonably prepare a response. The Complaint plainly avers that Debtor made transfers to or for the benefit of CCG, and that these transfers were made with the intent to

hinder, delay, or defraud creditors. The specific circumstances of the transfers are set forth, as well as the Code provisions under which Plaintiff alleges the transfers may be avoided.

Therefore, CCG's Motion for a More Definitive Statement must be denied.

Accordingly, for the reasons stated here, it is

ORDERED that Defendant CCG's Motion to Dismiss is **DENIED**.

The Clerk shall serve a copy of this Order upon Plaintiff, counsel for Plaintiff, Defendants, and counsel for Defendants.

END OF DOCUMENT