IT IS ORDERED as set forth below:

Date: May 05, 2008

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
LAMAR NOBLE JANET NOBLE, Debtors.	: : : : :	BANKRUPTCY CASE 07-10268-WHD
GRIFFIN HOWELL, III, Chapter 7 Trustee, Plaintiff, v.	: : : : : : :	ADVERSARY PROCEEDING NO. 07-1060
JOSH R. NOBLE Defendant.	: : :	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Dismiss filed by Josh Noble (hereinafter

the "Defendant") against Griffin Howell, III (hereinafter the "Trustee"). The Motion seeks dismissal of a complaint filed by the Trustee in connection with the bankruptcy case of Lamar and Janet Noble (hereinafter collectively referred to as the "Debtors"). Also pending at this time are the Trustee's Motion to Compel Appearance at a Deposition and for Sanctions and the Defendant's Motion for Clarification and Reconsideration. All matters pending in this adversary proceeding are related to the Trustee's complaint to avoid and recover a fraudulent conveyance and, accordingly, constitute core proceedings, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(H); § 1334.

PROCEDURAL HISTORY

On February 2, 2007, the Debtors filed a voluntary petition under chapter 11 of the Bankruptcy Code. The United States Trustee filed a motion to convert the Debtors' case to one under chapter 7. The Court entered an order converting the Debtors' case to chapter 7 on July 24, 2007. The Trustee was appointed on July 27, 2007.

On October 19, 2007, the Trustee filed a complaint against the Defendant. In the complaint, the Trustee seeks the avoidance and recovery of certain interests in real property allegedly transferred to the Defendant. The Defendant filed a

motion to dismiss the complaint and an answer to the complaint on November 19, 2007. On December 12, 2007, the Court denied without prejudice the Defendant's initial motion to dismiss for lack of proper service. The Defendant filed and served properly a renewed motion to dismiss on December 13, 2007 and set the motion for a hearing to be held on January 18, 2008. In accordance with Bankruptcy Local Rule 7007-1(c), the Trustee's response to the motion was due ten days from the date of service of the motion. The Trustee did not file a response prior to the scheduled hearing date.

Pursuant to Bankruptcy Local Rule 7007-1(f), the Court resolves motions filed in an adversary proceeding without a hearing unless the Court orders otherwise. *See* BLR 7007-1(f). Additionally, the Court's open-calendar procedure, which is available on the Chambers section of the Court's website, states clearly that the Court does not permit self-calendaring of hearings on motions filed in adversary proceedings. ("The Court does not hear motions filed in adversary proceedings. If you would like a hearing on a motion filed in an adversary proceeding, you must file a motion requesting a hearing. If the Court grants the motion, you will receive a Notice of Assignment of Hearing."). For this reason, when the Court discovered that the Defendant's counsel had self-calendared a hearing on the Defendant's motion to dismiss, the Court contacted

the parties to advise them that the Court would not hear the motion on January 18, 2008 and that the Court would resolve the matter on the briefs unless one of the parties made a proper and justified request for oral argument. At that time, assuming that the Trustee's failure to respond to the motion to dismiss may have resulted from the Trustee's counsel's intention to appear at the hearing and defend against the motion without a written response, the Court extended the time for the Trustee to file a written response to the motion to dismiss for ten days from the date of the scheduled hearing. Subsequently, the Trustee filed his response on January 23, 2008, within the extended time period.

On January 25, 2008, the Defendant filed a Motion for Clarification and Reconsideration of the January 18th Order in which the Court extended the time for filing a response to the Defendant's motion to dismiss. In the motion for reconsideration, the Defendant takes issue with the Court's granting the Trustee additional time to file a response. The Defendant asserts that the Trustee's failure to file a response indicates, under Bankruptcy Local Rule 7007-1(c), that the Trustee had no opposition to the motion to dismiss and that the Court should not have granted the Trustee additional time to file a brief without the filing by the Trustee of a motion to extend time and a demonstration of facts to support a finding of excusable neglect on the Trustee's part. The Defendant also submits

that, once the Court reconsiders its January 18th Order, rendering the Trustee's response untimely, the Court will be required to ignore the Trustee's response and grant the Defendant's motion to dismiss. For the reasons stated below, the Court disagrees.

On February 11, 2008, the Trustee filed a motion to compel the Defendant's appearance at a deposition and for payment of expenses. In this motion, the Trustee alleges that, after repeated, failed attempts to schedule a deposition with Defendant's counsel by telephone, the Trustee served upon the Defendant a notice scheduling a deposition for Tuesday, February 5, 2008. The Trustee further contends that, after the close of business on Friday, February 5, 2008, the Defendant's counsel informed the Trustee's counsel by facsimile that the Defendant would not be able to attend the scheduled deposition due to a conflict of Defendant's counsel involving a deposition scheduled for Monday, February 4, 2008. According to the Trustee, he was unable to reschedule the deposition because the Defendant's counsel determined that the Defendant's deposition would be premature and refused to discuss alternative dates. The Trustee seeks an order compelling the Defendant to attend a deposition and payment of $570 in attorney's fees for the two hours' time the Trustee's counsel spent preparing for the Defendant's deposition.

FACTUAL BACKGROUND

According to the Trustee's complaint, the Defendant is the son of the Debtors. On July 1, 2005, Lamar Noble transferred his interest in real property located in Franklin County, Georgia (hereinafter the "Franklin County Property") to the Defendant for no valuable consideration. In 2000, Janet Noble transferred her interest in real property in Haralson County, Georgia (hereinafter the "Haralson County Property"), with the exception of a life estate in favor of the Debtors, to the Defendant and Jason Noble for no valuable consideration. A warranty deed transferring Mrs. Noble's interest in the Franklin County Property was recorded on July 19, 2005, and a warranty deed transferring a portion of Mrs. Noble's interest in the Haralson County Property was recorded on December 4, 2000. On or about October 27, 2004, Jason Noble and the Debtors transferred their remaining interests in the Haralson County Property to the Defendant for no valuable consideration. The Defendant remains in possession of his interest in the Franklin County Property and the Haralson County Property. The Defendant holds the Franklin County Property free and clear of any liens, claims, and encumbrances and holds the Haralson County Property subject only to a lien in favor of Wachovia, which secures a debt in the approximate amount of $210,000.

The Trustee also alleges that, on the date of all of these transfers, the Debtors owed unsecured debts to creditors who would have had a state law right to avoid these transfers as fraudulent under state law. Furthermore, the Trustee contends that the Debtors made these transfers with the actual intent to hinder, delay, or defraud these creditors and that the Defendant had knowledge of the Debtor's intent at the time of the transfers. The transfers, the Complaint alleges, were either made at a time when the Debtors were insolvent or rendered the Debtors insolvent. Finally, the Trustee asserts that the Debtors retain control over the Properties, that the Debtors concealed the transfers, and that the Debtors had been threatened with a lawsuit prior to making the transfers. Consequently, the Trustee seeks to avoid and recover the transfers for the benefit of the Debtors' bankruptcy estate pursuant to section 544 of the Bankruptcy Code and section 550(a) of the Code.

CONCLUSIONS OF LAW

A. *The Trustee's Failure to File a Timely Response to the Defendant's Motion to Dismiss Does Not Require the Court to Grant the Defendant's Motion to Dismiss*

The purpose of the Defendant's motion to reconsider is to persuade the

Court that it may not consider the Trustee's brief and that it is constrained to grant the Defendant's motion to dismiss as unopposed. This reasoning fails for several reasons.

The Defendant is correct that Bankruptcy Local Rule 7007-1(c) requires a response to a motion within ten days and provides that the failure to file a response shall indicate no opposition. BLR 7007-1(c). However, Rule 7007-1(h) further states that the Court *in its discretion, may* decline to consider any motion or brief that fails to conform to the requirement of these Rules. BLR 7007-1(h) (emphasis added). Accordingly, the Court is not required to ignore a brief that is not timely. Furthermore, even if the Court were required to ignore the Trustee's brief, the Court is not required to grant a motion simply because it is unopposed. The Court has the duty to review the relief requested and to ascertain that the relief is justified. In this case, the Defendant's motion to dismiss so clearly lacks any merit that, whether the Court considers the Trustee's brief is of no consequence. And, in any event, the Court has not relied on the Trustee's brief. For these reasons, even if the Court were to determine that its *sua sponte* extension of the response deadline was improper, such a finding would not change the ultimate disposition of this case. Because such an act would have no impact on the case, the Court declines to reconsider its order extending the response

deadline.

B. *The Trustee's Complaint Does Not Fail to State a Claim Upon Which Relief Can Be Granted*

Pursuant to Federal Rule of Bankruptcy Procedure 7012(b), which makes Federal Rule of Civil Procedure 12(b) applicable to this proceeding, dismissal is proper when the plaintiff's complaint fails to state a claim upon which relief can be granted. FED. R. BANKR. P. 7012(b); FED. R. CIV. P. 12(b)(6). When reviewing a complaint for purposes of adjudicating a motion to dismiss for failure to state a claim, the Court must accept as true all of the factual allegations contained in the complaint and, on the basis of those facts, determine whether the plaintiff is entitled to relief. *See Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp*., 459 F.3d 1249 (11th Cir. 2006) (court must "view the complaint in the light most favorable to the plaintiff and accept the well-pleaded facts as true"). The facts asserted in the complaint need only comprise a "short and plain statement," which shows that the plaintiff has a claim to relief that is "plausible on its face." *See* FED. R. BANKR. P. 7008; Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S. Ct. 1955 (2007); *see also Schaaf v. Residential Funding Corp*., 517

F.3d 544 (8th Cir. 2008) ("The plaintiffs need not provide specific facts in support of their allegations, *Erickson v. Pardus*, --- U.S. ----, 127 S. Ct. 2197 (2007) (per curiam), but they must include sufficient factual information to provide the 'grounds' on which the claim rests, and to raise a right to relief above a speculative level. *Twombly,* 127 S.Ct. at 1964-65 & n. 3."). "Conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss." *South Fla. Water Mgmt. Dist. v. Montalvo,* 84 F.3d 402, 408 n. 10 (11th Cir. 1996).

In this case, the Trustee seeks to avoid and recover three transfers of real property. The first transfer occurred on July 1, 2005, when Debtor Lamar Noble transferred his interest in the Franklin County Property to the Defendant. The second transfer consists of the conveyance of a portion of Mrs. Noble's interest in the Haralson County Property to the Defendant and Jason Noble that occurred in December 2000. The third transfer occurred on or about October 27, 2004 when the Debtors quit claimed their life estate interests in the Haralson County Property to the Defendant.

The Trustee's chosen vehicle for avoiding these transfers and recovering the property interests at issue is section 544 of the Bankruptcy Code. Pursuant to section 544(b), a trustee may avoid a transfer of an interest of the debtor in

property that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of the Code. *See* 11 U.S.C. § 544(b)(1). The applicable law in this case is the Georgia fraudulent transfer statute. The Georgia fraudulent transfer statute applicable to transfers occurring prior to July 1, 2002 formerly appeared at O.C.G.A. § 18-2-22, and the statute applicable to transfers occurring after July 1, 2002 is now contained in O.C.G.A. 18-2-70, et seq. *See In re Terry Mfg. Co., Inc.*, 2007 WL 1560087 (Bankr. M.D. Ga. May 29, 2007) (citing *Chepstow, Ltd. v. Hunt*, 381 F.3d 1077 (11th Cir. 2004)). Assuming that the Trustee's allegations satisfy the requirements of these fraudulent transfer statutes, the Trustee need only allege that the Debtors had unsecured creditors at the time of each transfer.

Under former O.C.G.A. § 18-2-22, a creditor had the power to avoid a voluntary transfer of property that was not made "for a valuable consideration," by a debtor who was insolvent at the time of the transfer. *See* O.C.G.A. § 18-2-22 (repealed 2002). To establish the avoidability of such a transfer, a plaintiff has the burden of proving by a preponderance of the evidence that: 1) a bona fide creditor existed at the time the transfer was made; 2) the transfer was made for inadequate consideration; and 3) the debtor was insolvent at the time of the transfer or was rendered insolvent as a result of the transfer. *See Loeb v. Dante (In re Dante)*, 1

B.R. 547, 548 (Bankr. N.D.Ga. 1979); *Carey v. U.S.A. (In re Carey),* 1992 WL 12004363, at *5 (Bankr. S.D.Ga. May 14, 1992). This version of Georgia law is applicable to the transfer of Mrs. Noble's interest in the Haralson County Property.

Under the present statute, Georgia's version of the Uniform Fraudulent Transfer Act (UFTA), "[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 or incurred the obligation . . . [w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor . . .[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or . . . . [i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." O.C.G.A. § 18-2-74. This version of Georgia law is applicable to Mr. Noble's transfer of the Franklin County Property and the Debtors' transfer of their retained life estate interests in the Haralson County Property.

In the instant motion to dismiss, the Defendant asserts that the Trustee's complaint fails to state a claim upon which relief can be granted because it does

not assert fraud with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. Rule 9(b) is made applicable to this proceeding by Rule 7009 of the Federal Rules of Bankruptcy Procedure. Rule 9(b) requires that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," but provides that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." FED. R. CIV. P. 9(b).

First, the Court notes that Rule 9(b) does not apply to an action to avoid a constructively fraudulent conveyance. *See Kipperman v. Onex Corp*., 2007 WL 2872463 (N.D. Ga. Sept. 26, 2007). Accordingly, the Trustee need not plead constructive fraud with particularity. *See id*. With regard to the constructive fraud claim, the Trustee has asserted sufficient facts to survive a motion to dismiss. He has alleged that Mr. Noble transferred his interest in the Franklin County Property to the Defendant for no valuable consideration, that Mrs. Noble transferred most of her interest in the Haralson County Property to the Defendant for no valuable consideration, and that later, the Debtors transferred their retained life estate interests in the Haralson County Property to the Defendant for no valuable consideration. The Trustee also alleges that, on the date of all three transfers, the Debtors owed unsecured debts to creditors and that the transfers were either made

at a time when the Debtors were insolvent or rendered the Debtors insolvent. These allegations are sufficient to support a finding that all three transfers were constructively fraudulent under either version of Georgia law.

Second, although Rule 9(b) does apply to an action to avoid an "intentionally fraudulent" transfer, a pleading complies with the requirement of Rule 9(b) if it alerts the defendant "to the 'precise misconduct with which they are charged.'" *Kipperman,* 2007 WL 2872463 at *6 (N.D. Ga. Sept. 26, 2007). Such precision can be achieved with: "(1) an allegation of jurisdiction, (2) a statement of the date and the conditions of the indebtedness involved (often with the document itself attached), (3) the amount owed, (4) a statement that the defendant conveyed real and personal property of a given description to another for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness described prior, and (4) a demand for judgment." *Id*.

Additionally, when pleading an intentionally fraudulent conveyance action, the plaintiff is not required to plead fraudulent intent with particularity. *See id*. The plaintiff is permitted to plead intent by pleading factual allegations that would support the existence of traditional badges of fraud. *See id*. These include the fact that the transfer was made to an insider; that the debtor has retained possession or control of the property transferred after the transfer; that the transfer was

concealed; that the transfer was made after the debtor had been sued or threatened with suit; and the fact that the debtor transferred the property for less than its reasonably equivalent value; that the transfer was made while the debtor was insolvent or that the debtor became insolvent shortly after the transfer was made. *See id*. at *9.

Here, the Defendant contends that the Trustee has not properly stated any affirmative misrepresentations that were relied upon by any of the Debtors' creditors. The Defendant simply misapprehends the requirements of Rule 9(b) in this regard and possibly misunderstands the elements that the Trustee must establish to prevail. The Trustee has pled facts with sufficient particularity to put the Defendant on notice as to the fraudulent conduct that he alleges occurred. The complaint provides the Defendant with specific information about the transfers, including the dates and the nature of the property. The Trustee has also pled sufficient badges of fraud to enable the Defendant to formulate a defense to the allegation that the Debtors had the intent to hinder and delay their creditors. For example, the Trustee alleges that the transfers were made to an insider, that the transfers were made for no valuable consideration, that the transfers were made while the Debtors were insolvent or rendered the Debtors insolvent, and that the Debtors had been threatened with suit prior to making the transfers. Accordingly,

the Court finds that the Trustee's complaint does not run afoul of Rule 9(b).

C. *The Defendant Has Failed to Assert Any Other Ground Upon Which the Complaint Should be Dismissed*

The Defendant next asserts that the Trustee's complaint should be dismissed because the Defendant is entitled to a trial by jury on the Trustee's claim and, because this Court cannot conduct a jury trial, the Trustee has simply filed his complaint in the wrong forum and it must, consequently, be dismissed. Setting aside the issue of whether the Defendant is in fact entitled to a jury trial and, assuming for purposes of this motion that he is, the fact that a jury trial is required is not a basis for the dismissal of a complaint or even for the immediate withdrawal of the reference by the district court. This Court's local rules provide a procedure applicable to cases in which a jury trial must be held and in which the parties do not consent to the Court holding such a trial. Specifically, pursuant to Bankruptcy Local Rule 9015-3, "[i]f the parties do not consent to jury trial in Bankruptcy Court . . . the Bankruptcy Judge shall transfer the adversary proceeding to the District Court *when the Bankruptcy Judge determines that the case is ready for trial*." BLR 9015-(3)(a) (emphasis added). Prior to the transfer, the "Bankruptcy Judge shall Rule on all discovery motions, other pretrial motions,

and summary judgment motions, as provided by law, and shall enter the pretrial order." *Id*.

D. *The Trustee's Motion to Compel is Procedurally Defective*

The Trustee has filed a motion to compel the Defendant's appearance at a deposition and for sanctions for the Defendant's failure to appear at a previously scheduled deposition. As noted above, the Trustee alleges that his counsel made repeated attempts to schedule the Defendant's deposition with Defendant's counsel by telephone, but received no response. Accordingly, he scheduled a deposition for Tuesday, February 5, 2008. He further contends that, after the close of business on Friday, February 1, 2008, the Defendant's counsel informed the Trustee's counsel by facsimile that the Defendant would not be able to attend the deposition due to the Defendant's counsel's conflict. According to the Trustee, he was unable to re-schedule the deposition because the Defendant's counsel determined that the Defendant's deposition would be premature and refused to discuss alternative dates in the month of February. The Trustee claims that his counsel tried to resolve this discovery dispute by sending a written request for three alternative dates for a rescheduled deposition, but received no response. Thereafter, the Trustee filed his motion to compel in which he seeks payment of

$570 in attorney's fees for the two hours' time spent preparing for the Defendant's deposition.

Discovery in this adversary proceeding is controlled by Rule 7037 of the Federal Rules of Bankruptcy Procedure, which incorporates Rule 37 of the Federal Rules of Civil Procedure. Rule 37(a) provides that, "[o]n notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery." FED. R. CIV. P. 37(a)(1). Such a motion "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." *Id*. Otherwise, the rule simply requires that the movant filed its motion to compel "in the court where the action is pending." FED. R. CIV. P. 37(a)(2). Further, Rule 37(d) provides that the "court where the action is pending may, on motion, order sanctions if . . . a party . . . fails, after being served with proper notice, to appear for that person's deposition." FED. R. CIV. P. 37(d)(1)(A)(i). A motion for such a sanction must "include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action." FED. R. CIV. P. 37(d)(1)(B). Further, Bankruptcy Local Rule 7037-1(b) requires that the moving party "attach to the motion a statement certifying that counsel for movant,

or the movant, if unrepresented, has in good faith conferred or attempted to confer with the party not making disclosure or discovery in an effort to secure disclosure or discovery by agreement but that such efforts were not successful."

Although the Trustee has described the efforts undertaken in this regard in the body of the motion and has attached a copy of correspondence to demonstrate the nature of these efforts, he has not attached a separate statement as required by the local rule and by Rule 37. *See In re Spears*, 265 B.R. 219 (Bankr. W.D. Mo. 2001). Accordingly, the Court will not rule on the Trustee's motion until such time as it is amended to include the separate certification.

CONCLUSION

For the reasons stated above, the Court finds that the Defendant's Motion for Reconsideration and the Defendant's Motion to Dismiss the Trustee's Complaint should be, and hereby are, **DENIED**. The Court further finds that the Trustee's Motion to Compel is **DENIED** without prejudice to the filing of an amended motion.

END OF DOCUMENT