IT IS ORDERED as set forth below:

Date: December 20, 2013

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
SOUTHERN HOME AND RANCH SUPPLY, INC.,	:	BANKRUPTCY CASE 11-12755-WHD
Debtor.	:	
GRIFFIN HOWELL, III, Chapter 7 Trustee,	:	ADVERSARY PROCEEDING NO. 13-1043
Plaintiff,	:	
v.	:	
JAMES R. FULFORD and SRH HOLDING COMPANY, LLC,	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE
Defendants.	:	

ORDER

Before the Court is the Motion to Dismiss filed by James R. Fulford and

SRH Holding Company, LLC, (hereinafter the "Defendants") 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 Southern Home and Ranch Supply, Inc., (hereinafter the "Debtor"). 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 August 18, 2011 (hereinafter the "Petition Date"), the Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code, and Griffin Howell, III was appointed the Chapter 7 Trustee of the bankruptcy estate. The Section 341 Meeting of Creditors was held on October 20, 2011, but was continued and ultimately concluded on December 2, 2011.

On August 16, 2013, the Trustee filed a complaint against the Defendants. In the complaint, the Trustee seeks the avoidance and recovery of certain interests in property allegedly transferred to the Defendants. The Defendants filed a motion to dismiss the complaint on September 16, 2013. In accordance with Bankruptcy Local Rule 7007-1(c), the Trustee's response to the motion was due fourteen days from the date of service of the motion. The Trustee and the Defendants entered

a joint stipulation extending the time for the Trustee to respond to the Defendants' Motion to Dismiss. The Trustee filed a Response to the Defendants' Motion on October 14, 2013.

FACTUAL BACKGROUND

Prior to the Petition Date, the Debtor operated construction supply and hardware stores at several locations in North Georgia and, in connection therewith, was the owner of various accounts, contracts, furniture, fixtures, machinery, equipment, inventory, and other personal property. Complaint ¶ 8. According to the Trustee's complaint, on or about March 1, 2009, the Debtor executed a promissory note in the original principle amount of $1,350,000.00 made payable to James R. Fulford (hereinafter "Defendant Fulford"). Complaint ¶ 9. The Note required monthly installment payments in the amount of only the interest, commencing on April 1, 2009, and full payment of the balance on March 1, 2010. Complaint ¶ 10. In addition to executing the Note on March 1, 2009, the Debtor executed a Security Agreement in favor of Defendant Fulford. Complaint ¶ 11. The Security Agreement pledges all or substantially all of the Debtor's assets to Defendant Fulford as secuirty for the Note. Complaint ¶ 11. According to the Trustee's complaint, no monthly payments of interest were made on the Note and assumably the full balance was never paid. Complaint ¶ 10. Consequently, on or

about March 22, 2010, SRH Holding Company, LLC (hereinafter referred to as "SRH"), by and through counsel, sent a letter (hereinafter the "Default Letter") to Debtor declaring the Debtor in default of its payments on the Note. Complaint ¶ 12. In the Default Letter, SRH purports to be the holder of the Note and cites a principal interest amount due of $1,480,636.42 as of June 30, 2010. Complaint ¶¶ 12-13. Additionally, the Trustee asserts in his complaint that Defendant Fulford assigned all of his interest in the Note, the Security Agreement, and related financing agreements to SRH pursuant to an Assignment of Note and Other Loan Documents (hereinafter the "Assignment"). Complaint ¶ 14. The Assignment is undated but bears an effective date of June 30, 2010. Id.

The complaint alleges that on June 30, 2010, the Debtor executed an Agreement for Voluntary Surrender of Collateral and Consent to Proposal to Accept Collateral in Full Satisfaction of Obligation (hereinafter the "Collateral Surrender Agreement"). Complaint ¶ 15. The Collateral Surrender Agreement purports to surrender to SRH all or substantially all the property of the Debtor in satisfaction of the amounts due under the Note (hereinafter the "Transfer"). Id.

The Debtor's Petition and Schedules indicate that the Debtor did not have income-producing operations of any kind in 2011. Complaint ¶ 16. Additionally, fourteen months after transferring all of its assets to the Defendants and at least

eight months since conducting any significant business, Debtor filed for Chapter 7 protection, reporting zero assets and almost all "unknown" debts from unsecured creditors. Complaint ¶¶ 16-17.

The complaint alleges that Defendant Fulford is a Director of the Debtor and is a relative of John D. Fulford, who is President and Director of the Debtor, as set forth in the Statement of Financial Affairs filed with the Petition, and therefore an insider of the Debtor within the meaning of 11 U.S.C. § 101(31) and Official Code of Georgia Annotated (hereinafter the "O.C.G.A.") § 18-2-71(7).[1] Complaint ¶ 18. Additionally, the complaint alleges that Defendant SRH is 100% owned and controlled by Defendant Fulford, thereby making Defendant SRH also an insider of the Debtor pursuant to 11 U.S.C. § 101(31) and O.C.G.A. § 18-2-71(7). Id.

The Trustee alleges that the Transfer of the Debtor's assets was made with the actual intent to hinder, delay, or defraud the creditors of the Debtor. The Trustee further alleges that the Transfer was made to an insider of the Debtor and the Debtor retained actual possession or control of the Collateral after the

[1] Section 101(31) defines an insider of a corporate debtor to include "(i) director of the debtor; (ii) officer of the debtor; (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor." 11 U.S.C. § 101(31)(B). See also O.C.G.A. § 18-2-71(7)(B).

Transfer. Additionally, the Trustee contends that the Transfer was of all, or substantially all, of the Debtor's assets and that the consideration received by the Debtor was not reasonably equivalent to the value of the Collateral involved in the Transfer. Furthermore, the Trustee alleges that the Debtor was insolvent at the time the Transfer was made or became insolvent as a result of the transfer. Consequently, the Trustee seeks to avoid and recover the Transfer for the benefit of the Debtor's bankruptcy estate pursuant to sections 544, 548 and 550(a) of the Bankruptcy Code, as well as O.C.G.A. section 18-2-77.

CONCLUSIONS OF LAW

A. *Standard on Motion to Dismiss*

Pursuant to Federal Rule of Bankruptcy Procedure 7012(b), which incorporates and 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, 550 U.S. 544, 127 S. Ct. 1955 (2007); Daewoo Motor America, Inc. v. General Motors

Corp., 459 F.3d 1249 (11th Cir. 2006) (holding that a 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, 550 U.S. 544 127 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, . . . 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."(citing Twombly, 127 S.Ct. at 1964-65 & n. 3. (citing Erickson v. Pardus, 551 U.S. 89, 127 S. Ct. 2197 (2007) (per curiam)).). "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). Where a party alleges fraudulent conduct, the pleading standard is heightened, requiring the party to "state with particularity the circumstances constituting fraud."FED. R. BANKR. P. 7009(b); Fed. R. Civ. P. 9(b). However, "malice, intent, knowledge and other conditions of a person's mind may be alleged generally." Id.

I. *The Trustee's Count I Pleads Allegations of Fraud with Sufficient Level of Particularity to Satisfy Rule 9(b).*

As the Defendants note in their brief, "a trustee may seek to avoid a prior transfer of assets made by the debtor with the 'actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted . . . .'" Defs.' Br. at pg. 9. (quoting 11 U.S.C. § 548(a)(1)(A)); see also O.C.G.A.§ 18-2-74(a)(1). To successfully plead a fraudulent transfer cause of action under section 548(a)(1)(A) and O.C.G.A. section 18-2-74(a)(1), the plaintiff must meet the heightened standards of Rule 9(b) of the Federal Rules of Civil Procedure. A pleading complies with the requirement of Rule 9(b) if it alerts the defendant "to the 'precise misconduct with which they are charged.'" In re Noble, 2009 WL 6499363, *5-6 (Bankr. N.D. Ga. Aug. 21, 2009) (B.J. Drake) (quoting In re Kipperman, 2007 WL 2872463, *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 (5) a demand for judgment." In re Noble, 2009 WL 6499363, *5-6 (Bankr. N.D. Ga. Aug. 21, 2009) (B.J. Drake).

The Court finds that the Trustee's complaint, in regard to Count I, sufficiently sets forth specific facts required under Rule 9(b) and alerts the Defendants to the precise misconduct with which they are charged. See, e.g., Id. Specifically the Court finds that the complaint contains: (1) an allegation of jurisdiction (Complaint ¶ 1); (2) a statement of the date and conditions of the indebtedness (Complaint ¶¶ 9-11); (3) the amount owed (Complaint ¶ 9); (4) a statement that property of the Debtor was transferred with intent to hinder, delay, and defraud the creditors of the Debtor (Complaint ¶ 22); and (5) a demand for judgment (Complaint ¶ 28). The Court, therefore, finds that the Trustee satisfied the requisite criteria. See e.g. Id.

The Defendants argue in the Motion to Dismiss that the Trustee failed to plead intent on the part of the Debtor to defraud creditors. As this Court has previously articulated, "when pleading an intentionally fraudulent conveyance action, the plaintiff is not required to plead fraudulent intent with particularity." Id.; see also FED. R. BANKR. P. 7009(b); Fed. R. Civ. P. 9(b) ("Malice, *intent*, knowledge, and other conditions of a person's mind may be alleged generally.") (emphasis added). The plaintiff is permitted to plead intent by pleading factual

allegations that would support the existence of traditional "badges" of fraud. See Noble, 2009 WL 6499363, *5-6. Such badges include the fact that the transfer was made to an insider; that the debtor has retained actual possession or control of the property supposedly transferred; that the transfer was concealed; that the transfer was made after the debtor had been sued or threatened with suit; that the debtor transferred the property for less than its reasonably equivalent value; and that the transfer was made while the debtor was insolvent or that the debtor became insolvent because of or shortly after the transfer was made. See Id., *9.

The Court finds that the complaint sets forth intent by sufficiently alleging facts, accompanied with many traditional badges of fraud, including "that the Transfer was made to an insider of the Debtor, that the Debtor retained possession or control of the Collateral after the Transfer, and that the Transfer consisted of all or substantially all of the Debtor's assets." Complaint ¶¶ 21-25. The Defendants' argument that the complaint does not set forth demonstrative allegations of the requisite intent to defraud is ultimately wanting. The Defendants merely argue that the first purported badge of fraud, transfer to an insider, is not proper because there was no allegation that the actual transferee, SRH, was an insider of the Debtor. However, the Trustee does allege that SRH is 100% owned and controlled by the Defendant Fulford, which allegation meets the definition of

an "insider" according to 11 U.S.C. § 101(31) and O.C.G.A. § 18-2-71(7). Additionally, the Trustee alleges that the Debtor retained possession or control of the collateral after the Transfer, and that the Transfer was for all, or substantially all, of the Debtor's assets. Complaint ¶¶ 21-25. The Court therefore finds that the Trustee's allegations set forth in Count I satisfy the heightened pleading standard established by Federal Rule of Civil Procedure Rule 9(b), as articulated by this Court in In re Noble.

II. *The Trustee's Count II Adequately Alleges a Claim for Fraudulent Transfer under 11 U.S.C. § 548(a)(1)(B) and O.C.G.A. § 18-2-74(a)(2).*

Under section 548(a)(1)(B), a trustee may avoid a transfer made within two years prior to the petition date if the debtor:

> B) Received less than reasonably equivalent value for that transfer and the debtor:
>
> > 1) was insolvent at the time of the transfer or became insolvent as a result of the transfer;
> > 2) was left after the transfer with insufficient capital to operate his or her business; or
> > 3) intended to incur the debt which was beyond the debtor's ability to repay (to obvious detriment of the other prior creditors).

11 U.S.C. § 548(a)(1). Similarly Georgia law defines a constructive fraudulent transfer by the following: "[a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor´s claim arose before or after the

transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (A) Was 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
> (B) Intended 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(a)(2).

This Court has held that "when pleading a constructive fraudulent conveyance, the pleading standard falls under Federal Rule of Civil Procedure 8(a), not Rule 9." In re Haven Trust Bancorp, Inc., 461 B.R. 910, 913 (Bankr. N.D. Ga. 2011) (Diehl, B.J.). "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 the pleader is entitled to relief' and that 'each averment of a pleading shall be simple, concise, and direct.'" In re Int'l Mgmt. Assocs., LLC, 2007 WL 7141787, *2 (Bankr. N.D. Ga. March 7, 2007) (Bonapfel, B.J.). The pleading requirements of Rule 8 do not rise to the level of Rule 9(b) and, therefore, constructively fraudulent claims need not be pled with particularity. See

In re Noble, 2009 WL 6499363, *5 (Bankr. N.D. Ga. 2009) (Drake, B.J.). This Court held in In re Noble, that a trustee's constructively fraudulent claim was sufficient to survive a motion to dismiss when the trustee asserted that (1) the debtor transferred the property to the defendant for no valuable consideration; (2) on the date of the transfer the debtor owed unsecured debts to creditors; and (3) the transfers were made at a time when the debtor was insolvent or rendered the debtor insolvent. See Id.

The Defendants argue that the constructively fraudulent claims in Count II do not meet the requirements set forth in Rule 8. Specifically, the Defendants cite In re Tanglewood Farms, Inc., for the proposition that constructively fraudulent claims must "include a list of the alleged fraudulent transfers, identification of the consideration received by the transferee, and information concerning why the consideration was not equivalent in value." Defs'. Br. pg. 7; See also In re Tanglewood Farms, Inc., 487 B.R. 705, 711(Bankr. E.D.N.C. 2013) (citing In re Caremerica, 409 B.R. 737, 755 (Bankr.E.D.N.C. July 28, 2009) for the proposition that a mere recitation of the three legal elements of a constructively fraudulent transfer is inadequate to establish a plausible factual basis). Even so, the court in In re Tanglewood Farms eventually held that the factual allegations set forth in the complaint before it were sufficient to survive a motion to dismiss. See In re

Tanglewood Farms, Inc., 487 B.R. 705, 711 (Bankr. E.D.N.C. 2013).

The Defendants also rely upon the language found in In re Agriprocessors, Inc., where that court held that a trustee's mere recitation of the three legal elements (of a constructively fraudulent claim) is inadequate to establish a plausible factual basis. In re Agriprocessors, Inc., 2011 WL 4621741, *5 (N.D. Iowa 2011) (quoting In re Caremerica, Inc., 409 B.R. 737, 755 (Bankr. E.D.N.C. July 28, 2009). However, that case relies on In re Caremerica and its progeny, which has not been followed in this Circuit. See In re Tousa, Inc., 442 B.R. 852 (Bankr. S.D. Fla. 2010).

In Tousa, the court rejected the heightened pleading standard set forth in Careamerica, as it required more than is set forth in Twombly and Iqbal. In re Tousa, Inc., 442 B.R. at 855. Specifically, Tousa held that Rule 8(a)(2), as applied through Federal Rule of Bankruptcy Procedure 7008, requires only a short and plain statement of the claim showing that the pleader is entitled to relief. See id. Further, Tousa pronounced that "so long as the defendant is provided fair notice of what the plaintiff's claim is and the grounds upon which it rests, the complaint should not be dismissed for failure to state a claim." See id. (quoting In re C.R. Stone Concrete Contractors, Inc., 434 B.R. 208 (D. Mass., 2010)).

In the present case, the Trustee has alleged sufficient facts to survive a

motion to dismiss his claims alleging constructive fraud. Specifically, the Trustee has alleged that the Debtor transferred all of its interest in personal property to Defendant SRH in satisfaction of amounts due under the Note. See Complaint ¶ 15. The Trustee further alleged that the Transfer was made with the actual intent to hinder, delay, or defraud the creditors of the Debtor. See Complaint ¶ 22. In addition, he alleged that the Transfer, of all, or substantially all, of the Debtor's assets, was made to an insider of the Debtor without valuable consideration, while the Debtor retained actual possession and control of the Collateral after the Transfer was made. See Complaint ¶¶ 23-26. Finally, the Trustee alleged that the Debtor was insolvent at the time of the Transfer or became insolvent as a result of the Transfer. See Complaint ¶ 27.

Therefore the Court finds that the Trustee has properly met the requirements as set forth in In re Noble and in In re Crown Financial, LLC. See In re Noble, 2009 WL 6499363, *5 (Bankr. N.D. Ga. 2009 (Drake, B.J.); see also In re Crown Financial, LLC, 2007 WL 7141787, *2 (Bankr. N.D.Ga. 2007) (B.J., Bonapfel) (holding that a trustee properly pled a constructively fraudulent claim when the trustee identified the parties, an approximate date, the source of the payment, and the transaction.). The Defendants in this case have been provided fair notice of the claims raised against them and the grounds upon which these claims rest. See, e.g.,

In re Tousa, Inc., 442 B.R. 852 (Bankr. S.D. Fla. 2010) Accordingly, the Court finds that the Trustee's complaint does not run afoul of Rule 8.

B. *The Trustee has alleged sufficient facts to properly name Fulford a defendant*

The Defendant Fulford argues that the Complaint should be dismissed in its entirety as to him because the Complaint fails to allege that he was a transferee of the collateral. Section 550 of the Bankruptcy Code provides that a trustee may recover a fraudulent transfer of property from "the initial transferee of such transfer or the entity for whose benefit such transfer was made. . .". 11 U.S.C. § 550(a)(1). Defendant Fulford argues that merely alleging that a defendant is an "insider" of the purported transferee is insufficient to show that one received the benefit of the transfer. However, the Trustee has alleged that the Defendant SRH and Defendant Fulford are so intertwined that the Defendant SRH has no corporate existence apart from Fulford. See Trustee's Br., pg. 11.

Specifically, the Trustee has alleged that while the Debtor executed a Security Agreement with Defendant Fulford on March 1, 2009, pledging all of its assets to Defendant Fulford as security for the Note, Defendant SRH (who is purportedly the holder of the Note with an amount owed of $1,480,636.42 as of June 30, 2010) sent the Demand Letter on March 22, 2010 declaring the Debtor in default of the payments under the Note. See Complaint ¶¶ 11-12. As stated

above, the Trustee alleges that Defendant Fulford had not assigned his interest in the Note and the Security Agreement to Defendant SRH until the undated Assignment, which has an effective date of June 30, 2010.

The Court finds that there is, at the minimum, a question of fact remaining as to when Defendant Fulford assigned his interest to Defendant SRH, and that the Trustee has set forth sufficient allegations that Defendant Fulford received a fraudulent transfer or the benefit of a fraudulent transfer of assets. Accordingly, it is the further finding of the Court that Defendant Fulford is a properly named defendant in this proceeding.

CONCLUSION

For the reasons stated above, the Court finds that the Defendants' Motion to Dismiss the Trustee's Complaint should be and hereby is **DENIED**.

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