



IT IS ORDERED as set forth below:

James E. Massey

Date: May 10, 2013

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____|
IN RE: CASE NO. 09-79795

Mykel Ann Hackney,
CHAPTER 7

Debtor. JUDGE MASSEY

_____|

Jeffrey K. Kerr, Trustee,

Plaintiff,

v. ADVERSARY NO. 13-5056

Stephen John Roeser, Amy Lindsey Roeser and
Fidelity Bank,

Defendants.

_____|

ORDER DENYING MOTION TO DISMISS

Defendants Stephen John Roeser and Amy Lindsey Roeser purchased a house in October 2010 from Alexis Hackney in her capacity as executor of the estate of her grandmother, Susie Ann McCoy White. Mykel Ann Hackney, whose mother is Alexis, had transferred the property

to Mrs. White for no consideration in February 2008. Mrs. White died in May 2009. On July 31, 2009, Mykel filed this bankruptcy case in which Jeffery Kerr serves as Chapter 7 Trustee. In Adversary Proceeding No. 10-6537 the Trustee first sued Alexis, later removed as executor by the probate court, and then in her place Mary Margaret Oliver as representative of Mrs. White's estate, to avoid the transfer of the house from Mykel to Mrs. White as fraudulent, and the court entered a judgment in April 2012 in favor of the Trustee.

In this adversary proceeding, the Trustee seeks to recover the property or its value from the Roesers as the immediate transferee of the property pursuant to 11 U.S.C. § 550(a). (The complaint also names as a defendant Fidelity Bank, which holds a security deed on the property to secure a loan to the Roesers to enable them to purchase the property.)

The Roesers move to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), made applicable by Fed. R. Bankr. P. 7012. When considering a motion to dismiss, "all facts set forth in the plaintiff's complaint are to be accepted as true and the court limits its consideration to the pleadings and exhibits attached thereto." *GSW, Inc. v. Long County*, 999 F.2d 1508, 1510 (11th Cir. 1993). Further, the court should draw "all reasonable inferences in the non-moving party's favor." *DeKalb County Sch. Dist. v. J.W.M.*, 445 F.Supp.2d 1371, 1374 (N.D.Ga. 2006).

The complaint is grounded on section 550(a) of the Bankruptcy Code, which provides:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

The Roesers do not contend that the transfer from Mykel to Mrs. White was not avoidable under 11 U.S.C. § 548 or that the facts alleged by the Trustee fail to satisfy 11 U.S.C. § 550(a).

Instead, they base their motion on section 550(b), which provides:

(b) The trustee may not recover under section (a)(2) of this section from--

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

In asserting that the complaint fails to state a claim upon which relief can be granted, the Roesers advance two theories. First, they argue (or appear to argue) that the complaint fails to state a claim because it does not allege facts that would show the absence of the conditions set out in section 550(b). Memorandum of Law Doc. No. 8, p. 10. This argument assumes that the elimination of a defense under section 550(b) is necessary to state a claim under section 550. Second, they argue that the complaint alleges facts showing that they provided value, acted in good faith and lacked knowledge of the voidability of the transfer, thereby establishing that the complaint does not state a claim for relief. Memorandum of Law, Doc. 8, pp. 10-16; Reply Brief, Doc. 17, p. 2-4.

The first argument is that to state a claim under section 550, a complaint must allege that facts showing that the defendant either did not provide value, did not act in good faith or had knowledge of the voidability of the transfer. The court disagrees.

Section 550(b) is uniformly recognized as a defense to a claim under section 550(a)(2). *See, e.g., In re Nieves*, 648 F.3d 232, 237 (4th Cir. 2011) (“Any immediate or mediate transferee of the initial transferee, however, has an affirmative defense to recovery if such transferee ‘takes for

value, ... in good faith, and without knowledge of the voidability of the transfer avoided.’ § 550(b)(1).”); *In re Ogden*, 314 F.3d 1190, 1196 (10th Cir. 2002)(“an entity that receives assets from an initial transferee ... may assert a [§ 550(b)] defense against the trustee”); *see, also In re Nordic Village, Inc.*, 915 F.2d 1049 (6th Cir. 1990)(transferee has the burden of proof with respect to § 550(b)), *rev’d on other grounds, U.S. v. Nordic Village, Inc.*, 503 U.S. 30, 112 S.Ct. 1011 (1992); *In re Teleservices Group, Inc.*, 469 B.R. 713, 742 (Bankr.W.D.Mich. 2012); *In re Custom Contractors, LLC*, 439 B.R. 544, 549 (Bankr.S.D.Fla. 2010); *In re Gosine*, 454 B.R. 863, 867 (Bankr.M.D.Fla. 2009) (“Section 550(b) provides a “good faith” equitable defense for immediate and mediate transferees of an avoidable transfer.”); *In re Commercial Loan Corp.*, 396 B.R. 730, 743 (BankrN.D.Ill. 2008).

“[P]laintiff[s] [are] not required to negate an affirmative defense in [their] complaint.” *La Grasta v. First Union Securities, Inc.*, 358 F.3d 840, 845 (11th Cir. 2004)(quoting *Trogenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993)). To the contrary, “the burden of pleading [a defense] rests with the defendant. See Fed.Rule Civ.Proc. 8(c) (defendant must plead any “matter constituting an avoidance or affirmative defense”); 5 C. Wright & A. Miller, Federal Practice and Procedure § 1271 (1969).” *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1924 (1980). The Roesers cite no case to support the contention that the Trustee had to plead that at least one element of section 550(b) could not be established in order to state a claim for relief.

In summary, section 550(b) is not a partial list of elements of a claim for relief under section 550 but rather is a list of elements that, if present, would bar enforcement of an otherwise valid claim under section 550(a). The complaint states a claim for relief under section 550(a)

because it alleges the avoidance of the transfer of the property from Mykel to Mrs. White and the subsequent transfer of the property from Mrs. White's estate to the Roesers.

Second, the Roesers argue that the complaint contains allegations showing that they gave value for the purchase, acted in good faith and had no knowledge of the voidability of the transfer to Mrs. White, thereby establishing the elements of section 550(b) with the result that the complaint fails to state a claim upon which relief can be granted. They are correct only as to value.

The complaint alleges that they purchased the property for \$225,000, as evidenced by the settlement statement attached as Exhibit D. This allegation is sufficient to show that the Roesers gave value for the purchase.

The Roesers state that in purchasing the property they acted in good faith and had no knowledge of the voidable transfer. They say that they bought the property to use as their residence, had no relationship with Mykel, knew nothing about Mykel or her bankruptcy case and therefore had no reason to suspect that her case could impact their purchase of the property, did not violate any legal or ethical duty in purchasing the property, did not improperly retain the property or benefit from the purchase, and made the purchase with an honest and innocent intention. Memorandum of Law, Doc. 8, p. 13. This is merely argument at present, however.

And the complaint concedes none of these contentions, not even that the Roesers purchased the property to use as their residence. Pointing out that the complaint does not allege that they were dishonest or had knowledge of the bankruptcy case, the Roesers assert that the allegations that they failed to ask questions or to review public records prove that they acted in

good faith and lacked knowledge of the voidability of the transfer. Their argument fails because it assumes facts not alleged in the complaint and construes alleged facts solely in their favor.

As indicated above, in ruling on a motion to dismiss under Civil Rule 12(b)(6), a court must construe factual allegations “in the light most favorable to the plaintiff.” *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir.2003). The allegations in the complaint about what the Roesers knew and what they did not do, such as not searching the public records, construed in the light most favorable to the Trustee, do not permit an inference that the Roesers acted in good faith or lacked knowledge of the voidability of the transfer. For example, they might have learned about the avoided transfer from a source other than public records.

The fundamental premise of the motion appears to be that it will be impossible for the Trustee to refute evidence that the Roesers would present that they were innocent purchasers without knowledge of the avoided transfer or clue that anything was amiss. That may well be true, but on a motion to dismiss for failure to state a claim, a plaintiff is not required to disprove a defense yet to be established. Nothing in this order should be interpreted as suggesting that the Roesers could or could not prevail in this matter.

For these reasons, the Roesers’ motion to dismiss is DENIED. Their answer to the complaint should be served within 17 days after the entry of this order. Fed. R. Bankr. P. 2012(a).

The Clerk is directed to serve a copy of this order on counsel for Plaintiff, counsel for the Roesers and counsel for Fidelity Bank.

END OF ORDER