

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-01888

ADVERSARY PROCEEDING NO: 09-80085

ORDER VACATING ORDER ENTERED ON AUGUST 5, 2009 AND GRANTING
ORAL MOTION TO AMEND COMPLAINT

The relief set forth on the following pages, for a total of 8 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
12/16/2009



Entered: 12/16/2009

A handwritten signature in cursive script, appearing to read "John L. Currie".

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re,

Lee Holt Judd,

Debtor(s).

Carol A. Simpson,

Plaintiff(s),

v.

Robert F. Anderson, Trustee,

Defendant(s).

C/A No. 06-01888-HB

Adv. Pro. No. 09-80085-HB

Chapter 7

**ORDER VACATING ORDER
ENTERED ON AUGUST 5, 2009, AND
GRANTING ORAL MOTION TO
AMEND COMPLAINT**

The Court entered its Order on August 5, 2009 (the “August 5 Order”), dismissing the Complaint filed by Plaintiff, Carol A. Simpson (“Simpson”) and granting the Motion for Sanctions filed by Defendant/Trustee, Robert F. Anderson, (“Anderson”).¹ This matter comes before the Court on Simpson’s Motion for Rehearing.

BACKGROUND AND RELEVANT FACTS

Lee Holt Judd (“Judd”) is the Debtor in the above captioned case. The matter was initiated by Judd as a Chapter 11 proceeding but was converted a year later to Chapter 7 and Anderson was appointed Trustee. Simpson’s original Complaint demanded a judgment for conversion against Anderson, because “Defendant [Anderson] converted . . . \$20,384.69 for the estate’s use.” However, the Complaint failed to allege that Anderson ever possessed the funds, and in fact stated that the funds in question, rental income from real property, were sent by a third party collecting the rent to Judd, not to Anderson. Anderson filed a Motion

¹ See Order on Motion to Dismiss and for Sanctions entered August 5, 2009, incorporated herein by reference.

to Dismiss pursuant to Rule 12(b)(6), made applicable to these proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure, and a Motion for Sanctions pursuant to Rule 9011 (collectively “Anderson’s Motions”).

Simpson did not appear at the hearing on Anderson’s Motions that resulted in the August 5 Order, but subsequently filed her Motion for Rehearing. At that rehearing Simpson stated that she missed the prior hearing for medical reasons. She provided some evidence to support this representation and Anderson did not challenge this excuse. Therefore, the Court allowed Simpson to present her opposition to Anderson’s Motions. At the rehearing Simpson also requested leave to amend her Complaint, if necessary. The Court directed Simpson to file her Amended Complaint for consideration by the Court. The Amended Complaint was filed and it includes a more thorough recitation of alleged facts and added a cause of action for constructive trust to the prior conversion claim.

CONCLUSIONS OF LAW

12(b)(6) Dismissal

Simpson’s initial Complaint clearly failed to state a cause of action for conversion as it did not allege that Anderson took possession of Simpson’s property. The prior dismissal pursuant to Rule 12(b)(6), as set forth in the August 5 Order, was appropriate. However, had Simpson attended the hearing on Anderson’s Motions the Court would have considered her request for leave to file an Amended Complaint. Rule 15 of the Rules of Civil Procedure, made applicable by Federal Rule of Bankruptcy Procedure 7015, provides that amendments may be made “with the opposing party’s written consent or the court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. Pro. 15(a)(2). Given the medical excuse for her absence, the Court vacates that the portion of August 5 Order that

dismissed this adversary proceeding. The Court grants Simpson's oral Motion to amend her Complaint. As noted, the Amended Complaint has been filed with the Court.

To reach this decision, the Court considered whether the proposed amendments would survive a Rule 12(b)(6) motion. *Quality Botanical Ingredients, Inc. v. Triarco Indus., Inc. (In re Quality Botanical Ingredients, Inc.)*, 249 B.R. 619, 629 (Bankr. D.N.J. 2000); see also *NuMed Home Health Care, Inc. v. Taneja (In re NuMed Home Health Care, Inc.)*, 326 B.R. 859, 864-65 (Bankr. M.D. Fla. 2005); see also *Anderson v. Citizens Fid. Mortg. Corp. (In re Money)*, 375 B.R. 704, 708 (Bankr. N.D. Ga. 2007). A pleading should provide facts allowing the court to find "that all the required elements of the cause of action are present." *City of Charleston, S.C. v. Hotels.com, LP*, 520 F.Supp.2d 757, 763-64 (D.S.C. 2007). "[P]leadings are not an end in themselves, but are only a means to the proper presentation of a case; and that at all times they are to assist, not deter, the disposition of litigation on the merits." 10-7015 Collier on Bankruptcy-15th Edition Rev. P 7015.03. Rule 12(b)(6) relief is appropriate when there is only a "formulaic recitation of the elements of a cause of action" *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). Further, the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . that all the allegations in the complaint are true (even if doubtful in fact)" *Id.* at 1965 (citations omitted).

In contrast to her original Complaint, Simpson's Amended Complaint advances two causes of action: (1) conversion and (2) constructive trust. To state a claim for conversion, Simpson must allege that Anderson took or assumed ownership of the funds that she seeks to recover. "Conversion is a tortious act and 'may arise either by a wrongful taking of the chattel or by some other illegal assumption of ownership, by illegally using or misusing it,

or by wrongful detention.” *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 50-51 (1964); *Williams-Garrett v. Murphy*, 106 F.Supp.2d 834, 839 (D.S.C. 2000); *City of Charleston SC v. Hotels.com LP*, 520 F.Supp.2d 757, 771 (D.S.C. 2007). Similar statements regarding the elements of conversion have been stated by this Court. *In re Ducane Gas Grills*, 320 B.R. 324 (Bankr. D.S.C. 2004); *In re Shaffer*, 305 B.R. 771 (Bankr. D.S.C. 2004); *In re Derivium Capital, LLC*, 380 B.R. 429 (Bankr. D.S.C. 2006). A conversion action has several elements that a plaintiff must show. First, a “plaintiff must prove either title or right to possession of the property at the time of the conversion.” *Oxford Finance Companies, Inc. v. Burgess*, 303 S.C. 534, 539 (1991). Second, it must be shown that the other party exercised ownership over the thing being converted, and that this occurred to the exclusion of the plaintiff’s rights. *Owens v. Andrews Bank & Trust Co.*, 265 S.C. 490, 496 (1975). Finally, the conversion or use of plaintiff’s property must have occurred without the plaintiff’s permission. *See Oxford Finance*, 303 S.C. at 539; *see also* Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil § 3-2* (2002). Further, “[m]oney may be the subject of conversion when it is capable of being identified . . . even though specific coins and bills are not identified.” *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 498 (1990).

“A constructive trust arises when the circumstances under which property was acquired make it inequitable that it should be retained by the one holding legal title.” *Halbersberg v. Berry*, 302 S.C. 97, 106 (S.C. Ct. App. 1990) (citing *Lollis v. Lollis*, 291 S.C. 525 (1987)). A relevant example of a constructive trust would be a situation where a party obtains money that “does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach

of trust or the violation of a fiduciary duty.” *McNair v. Rainsford*, 330 S.C. 332, 356 (S.C. Ct. App. 1998) (citing *SSI Medical*, 301 S.C. at 500).

After a review of Simpson’s Amended Complaint, the Court finds that it contains sufficient allegations to avoid dismissal under the minimal standards of Rule 12(b)(6), supporting the Court’s decision to grant her oral motion to amend.

Rule 9011 Sanctions

Anderson has alleged that this adversary proceeding is frivolous in that the alleged facts do not have sufficient evidentiary support and/or do not support a viable cause of action under any legal theory. After a review of the initial Complaint, and without opposition, the Court agreed. However, after vacating the portion of the August 5 Order that dismisses this action and allowing the Amended Complaint, the Court must now consider the effect of those decisions on the portion of the August 5 Order awarding sanctions.

Rule 9011 provides in part as follows:

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. . . .

. . . .
. . . (c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the

attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

“Rule 9011 sanctions are warranted where it is clear that (1) reasonable inquiry into the basis for the pleading has not been made; (2) under existing precedents there is no chance of success; and (3) no reasonable argument has been advanced to extend, modify, or reverse the law as it stands.” *Gray v. Weber-Stephens Products Co. (In re Ducane Gas Grills, Inc.)*, C/A No. 3:05-1364-MBS, 2007 WL 2199553, at *2 (D.S.C. July 26, 2007). (citing *In re Frankel*, 191 B.R. 564, 575 (S.D.N.Y.1995)).

While Simpson’s Amended Complaint contains allegations sufficient to withstand dismissal under Rule 12(b)(6), at this point in time the Court cannot yet determine if Simpson’s initiation of and/or continuation with this adversary proceeding is in violation of Rule 9011.² A court may defer its ruling on whether to impose Rule 9011 sanctions, even until the end of an adversary proceeding. 10-9011 Collier on Bankruptcy P 9011.06; *see also* 10-9011 Collier on Bankruptcy P 9011.RH (discussing the 1997 Amendments to Rule 9011); *see also In re Whitney Place Partners*, 123 B.R. 117, 120 (Bankr. N.D. Ga. 1991) (holding that a bankruptcy court retains jurisdiction to here a motion for Rule 9011 sanctions even after a case is dismissed).

THEREFORE, IT IS ORDERED

That the August 5 Order on Motion to Dismiss and Motion for Sanctions is hereby vacated;

That Anderson’s Motion to Dismiss is denied;

² Anderson has not yet had an opportunity to answer the Amended Complaint or to adequately challenge the factual allegations stated therein. The Court notes that Anderson filed an Affidavit indicating a difference of opinion as to the facts, but it does not completely negate Simpson’s allegations or conclusively indicate behavior on the part of Simpson that is sanctionable under Rule 9011.

That Simpson's oral Motion for Leave to Amend her Complaint is granted. Anderson shall file an Answer to the Amended Complaint within 30 days from entry of this Order;

That Anderson's Motion for Sanctions is held in abeyance and may subsequently be raised by Anderson in this adversary proceeding if appropriate.

AND IT IS SO ORDERED.