

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-2242

ADVERSARY PROCEEDING NO: 09-80067

Order

The relief set forth on the following pages, for a total of 10 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
07/17/2009



Entered: 07/20/2009


US Bankruptcy Court Judge
District of South Carolina

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

In re: Glassmaster Company, <p style="text-align:right">Debtor(s).</p>	C/A No. 07-02242-HB Adv. Pro. No. 09-80067-HB Chapter 7
Michelle L. Vieira, <p style="text-align:right">Plaintiff(s),</p>	ORDER
v. Kathryn B. Trehwella, Personal Representative of the Estate of Stephen W. Trehwella, Sr., <p style="text-align:right">Defendant(s).</p>	

This matter comes before the Court on the Motion to Dismiss filed by Stephen W. Trehwella, Sr. (“Trehwella”) on May 1, 2009. Subsequent to the filing of the Motion to Dismiss, Trehwella died, and Michelle L. Vieira, Chapter 7 Trustee (“Plaintiff”), filed a Motion to Hold Litigation in Abeyance Pending Substitution of Party Defendant (“Abeyance Motion”). The Abeyance Motion was resolved by an order substituting Kathryn B. Trehwella, Personal Representative of the Estate of Stephen W. Trehwella, Sr. (“Defendant”), as Defendant pursuant to Fed. R. Civ. P. 25. The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (F) and (K).

Background

The following facts are a summary of the allegations of Plaintiff’s Complaint. On April 27, 2007, Glassmaster Company (“Debtor”) filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Thereafter, the case was converted to a case under

chapter 7 by order entered on February 22, 2008. Plaintiff was appointed as the Chapter 7 Trustee in this case on February 22, 2008. Debtor owned and operated a facility in Lexington County, South Carolina, which housed three divisions: a monofilament division, a composites division, and a marine division. Debtor was also the sole shareholder of Glassmaster Controls, Inc., which operates a plant in Kalamazoo, Michigan.

Plaintiff alleges that Trehwella is an insider of Debtor, who transacted business with Debtor and received transfers of Debtor's property during the ninety (90) days preceding the commencement of this case. According to the Complaint, Trehwella was a creditor of Debtor by virtue of three (3) unsecured promissory notes. The three unsecured notes were entered into on the following dates and in the following amounts: February 17, 2007 - \$108,144.25; February 22, 2007 - \$75,309.45; and February 27, 2007 - \$19,288.99. These three notes were converted into a single Note, entered into on March 8, 2007, for the sum of the three unsecured notes: \$202,742.69 ("March Note"). The March Note was then secured by a UCC1 on the stock of Glassmaster Controls, Inc. ("Transfer"). Plaintiff alleges that the Transfer was made to or for the benefit of Defendant; Debtor made the Transfer for, or on account of, antecedent debts owed by Debtor; at the time of the Transfer, Debtor was insolvent; and the Transfer enabled Defendant to receive more than he would have received as a creditor in this case had the Transfer not been made. Plaintiff further alleges that Defendant caused the Transfer to be made with the intent to hinder, delay or defraud the creditors and Trustee of the Debtor; Debtor received less than a reasonably equivalent value in exchange for the Transfer; the Transfer was made to an insider; that no new consideration was provided for the conversion of the unsecured notes to a secured note; and that no corporate resolution was executed authorizing the secured note and UCC1 filing in favor of

Defendant. Plaintiff initiated this adversary proceeding to seek avoidance of the Transfer pursuant to 11 U.S.C. § 547 (“First Cause of Action”), disallowance of Defendant’s claim pursuant to 11 U.S.C. § 502(d) (“Second Cause of Action”), avoidance of the Transfer as a fraudulent conveyance (“Third Cause of Action”), and a determination of the extent, validity, and priority of Defendant’s lien (“Fourth Cause of Action”).

Defendant moves pursuant to Federal Rule of Civil Procedure 12(b)(6), which is made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012, that the Court dismiss the First and Third Causes of Action against Defendant, or in the alternative, require Plaintiff to plead the First and Third Causes of Action with specificity.

Standard for Determining a Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) permits a party to move for dismissal if the opposing party fails to state a claim for which relief can be granted. Federal Rule of Civil Procedure 8(a) sets forth a liberal pleading standard, which requires only a “ ‘short and plain statement of the claim showing the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what . . . the claim is and the grounds upon which it rests.’ ” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). “To survive a Rule 12(b)(6) motion to dismiss, the facts alleged ‘must be enough to raise a right to relief above the speculative level’ and must provide ‘enough facts to state a claim to relief that is plausible on its face.’ ” Robinson v. American Honda Motor Co., Inc., 551 F.3d 218, 222 (4th Cir. 2009) (quoting Twombly, 127 S.Ct. at 1965). Accordingly, a complaint does not require detailed facts; however, a “formulaic recitation of the elements of a cause of action will not do.” Twombly, 127 S.Ct. at 1964-65. Furthermore, a complaint is insufficient if it

provides bare assertions lacking additional factual support. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (U.S. 2009) (citing Twombly, 127 S.Ct. at 1959). When determining a motion to dismiss pursuant to Rule 12(b)(6), the Court must take all well-pled material allegations of the complaint as admitted and view them in the light most favorable to the non-moving party. See De Sole v. U.S., 947 F.2d. 1169, 1171 (4th Cir. 1991) (citing Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848 (1969)).

Avoidance of Preferential Payments

Defendant asserts that Plaintiff has failed to state a claim under § 547(b)(2) because she has failed to allege that (1) there was a transfer of an interest of Debtor in property and (2) a transfer was made on account of an antecedent debt. Defendant argues that the Defendant's receipt of a transfer of an interest in stock of Glassmaster Controls, Inc. does not constitute a transfer of an interest of Debtor because Glassmaster Controls, Inc., is a separate corporation. For the purpose of determining a preferential transfer, "property of the debtor" is property that would have been property of the estate had it not been transferred prior to the commencement of the case. Begier v. Internal Revenue Service, 496 U.S. 53, 58, 110 S.Ct. 2258, 110 L.Ed. 2d 46 (1990). Plaintiff has alleged that Debtor was the sole shareholder of Glassmaster Controls, Inc. Based on the broad definition of property of the estate under 11 U.S.C. § 541, the Court finds Plaintiff's allegation regarding a transfer of an interest of Debtor to be sufficient to overcome a Defendant's motion to dismiss on this ground. See 11 U.S.C. § 541 (defining property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case").

Defendant further argues that Plaintiff has failed to allege the existence of an antecedent debt. In response, Plaintiff argues that the Complaint does sufficiently allege an

antecedent debt by asserting that the debt to Defendant was incurred when the three unsecured notes were executed and that no additional consideration was given for the conversion of the three unsecured notes into the single secured note. Therefore, Plaintiff argues that the transfer of the security interest was on account of the antecedent debt represented by the three unsecured notes. However, because the Complaint alleges that the transfer was the perfection of a lien, Defendant argues that the safe harbor provision of § 547(e)(2)(A) may apply to deem the transfer made on account of a simultaneous debt, not an antecedent debt as required by § 547(b)(2).

Section 547(e)(2) defines when a “transfer is made” for purposes of § 547. It states, in relevant part, that a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time...;

(B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of ... (i) the commencement of the case; or (ii) 30 days after such transfer takes effect between the transferor and the transferee.

All three subsections of § 547(e) require information regarding the time of perfection to determine when the transfer is made and to compare that transfer date to the timing of the antecedent debt. The Complaint states that “[t]he March 8, 2007 Note was then secured by a UCC1 on the stock of Glassmaster Controls, Inc.,” but does not indicate when the UCC1 was filed, thus the Court is unable to determine when the transfer was perfected. Without knowing the time the security interest was perfected, the Court cannot determine when the transfer was made pursuant to § 547(e)(2) in order to determine whether Plaintiff has

adequately alleged a transfer that was made on account of any antecedent debt. Therefore, the Court grants Defendant's Motion to Dismiss as to the Second Cause of Action, but grants Plaintiff leave to amend her complaint to sufficiently allege facts regarding the timing of the perfection of Defendant's security interest in the stock of Glassmaster Controls, Inc. and any other facts relevant to that cause of action.

Avoidance of Fraudulent Conveyance

Defendant further argues that Plaintiff's Third Cause of Action, Avoidance of Fraudulent Conveyance, is subject to dismissal because Plaintiff failed to plead fraud with particularity. When pleading fraud, Federal Rule of Civil Procedure 9(b) requires a party to "state with particularity the circumstances constituting fraud Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The complaint must specify such details as the time, place, particular individuals involved, and the specific conduct at issue. Harrison v. Westinghouse Savannah River Co., 176 F.3d. 776, 784 (4th Cir. 1999). Plaintiff has alleged the following in support of her avoidance of fraudulent conveyance claim:

26. The Defendant caused the transfer to be made with intent to hinder, delay or defraud the creditors and Trustee of the Debtor.

27. The Debtor received less than a reasonably equivalent value in exchange for the transfer.

28. The Debtor was insolvent on the date of the transfer.

29. The transfer was made to an insider that had knowledge the Debtor was about to file bankruptcy.

Analysis of the sufficiency of this claim is difficult due to the fact that Plaintiff has not specified the statute or statutes upon which her Fourth Cause of Action is based. To the

extent that Plaintiff seeks to avoid a fraudulent transfer pursuant to § 548(a)(1)(A),¹ she is required to satisfy the particularity requirements of Rule 9(b).² In re Derivium Capital, LLC, 380 B.R. 407, 422 (Bankr. D.S.C. 2006). The Complaint fails to include information regarding whether and when funds were actually advanced by Defendant in connection with the execution of the notes and when the Defendant's security interest was perfected. The allegations of the Complaint appear to merely track the language of §§ 548(a)(1)(A) and 548(a)(1)(B). For these reasons, the Court finds that the allegations of the Complaint fail to satisfy the particularity requirements of Rule 9(b). Accordingly, the Court grants the Motion to Dismiss, but grants leave to Plaintiff to amend the Complaint with respect to this claim to properly comply with Rule 9(b).

To the extent that Plaintiff seeks relief under § 548(a)(1)(B), the allegations of the Complaint appear to be sufficient to state a claim because the pleading with particularity requirement of Rule 9(b) does not apply to the § 548(a)(1)(B) cause of action. See id. (stating that Rule 9(b) does not apply to a claim for constructive fraud under § 548(a)(1)(B)

¹ Section 548(a)(1)(A) provides:

The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(A) made such transfer or incurred such obligation with 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.

² It is unclear from the allegations of the Complaint whether Plaintiff seeks relief under § 544(b), which gives the chapter 7 trustee the same rights to avoid fraudulent transfers that an actual unsecured creditor would have under applicable state law, but such a claim would likewise be subject to Rule 9(b).

because § 548(a)(1)(B) is based on the transferor's financial condition and the sufficiency of consideration provided by the transferee).³

Defendant further contests the accuracy of Plaintiff's allegation that Debtor received less than reasonably equivalent value in exchange for the Transfer. Specifically, Defendant argues that the Complaint sets forth \$202,742.69 in consideration paid by Defendant for the lien on the stock of Glassmaster Controls, Inc., but the Court's September 30, 2008 Order Authorizing Sale Free and Clear of Liens approved the sale of the same stock by the Trustee for \$200,000; therefore, the September 30, 2008 Order demonstrates that Defendant paid more than reasonably equivalent value for the lien on the stock since the stock was worth less than the amount loaned by Defendant. The Court has considered its September 30, 2008 Order,⁴ but finds that the Order does not clearly resolve this issue. The September 30, 2008 Order authorizes the sale of unspecified assets of Glassmaster Controls Co., Inc. to GMC Holdings, Inc. and GC Land, LLC for \$200,000 plus assumption of certain liabilities and the payoff of certain indebtedness to Huntington Bank. It does not specifically address

³ Section 548(a)(1)(B) provides:

The trustee may avoid any transfer (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

(B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; and

(II) was engaged in business or a transaction, or was about to engage in business or a transaction for which any property remaining with the debtor was an unreasonably small capital;

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

⁴ The Court notes that it is permitted to take judicial notice of matters of public record without converting the Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment. See General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1080-81 (7th Cir. 1997); Jefferson v. Lead Indus. Ass'n, Inc., 106 F.3d 1245, 1250 n. 14 (5th Cir. 1997).

or value the sale of stock of Glassmaster Controls Co., Inc. Viewing the facts alleged in the light most favorable to the Plaintiff, the Court finds that the allegations of the Complaint appear to be sufficient to state a claim under § 548(a)(1)(B). Therefore, Defendant's motion is denied as it relates to this claim.

Defendant's motion alternatively requested that the Court dismiss the entire Complaint; however, Defendant's motion and oral argument were limited to a discussion of the First and Third Causes of Action. Accordingly, to the extent Defendant's Motion to Dismiss seeks dismissal of the Second and Fourth Causes of Action, the Motion is denied.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss is granted in part and denied in part. Plaintiff shall have fifteen (15) days from the entry of this Order to amend her Complaint in accordance with the findings of this Order.