

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 05-04184

ADVERSARY PROCEEDING NO: 06-80086

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION
TO DISMISS

The relief set forth on the following pages, for a total of 6 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
09/13/2006



Entered: 09/13/2006

US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

In re, John S. Ducate, <div>Debtor(s).</div>	C/A No. 05-04184-DD Adv. Pro. No. 06-80086-DD Chapter 7
Ryan W. Hovis, v. Anne L Ducate, <div>Plaintiff(s), Defendant(s).</div>	ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

THIS MATTER is before the Court on Anne L. Ducate’s (“Defendant”) Motion to Dismiss (“Motion”) an adversary complaint filed by Ryan W Hovis’ (“Trustee” or “Plaintiff”). A hearing was held in this matter August 29, 2006. Both Plaintiff and Defendant, by and through their counsel, attended to argue the Motion. Defendant bases her motion to dismiss on Fed. R. Civ. P. 12(b)(6), applicable in adversary proceeding pursuant to Fed. R. Bankr. P. 7012, alleging that the pleadings fail to state a claim for which relief can be granted.

Motion to Dismiss Standard

"In making a determination under Rule 12(b)(6) of the Federal Rules of Civil Procedure, this Court must consider the complaint, matters of public record, orders, items appearing in the record of the case and the exhibits attached to the complaint." *Tolemac, Inc. v. McCullough (In re United Trading Co.)*, C/A No. 93- 76076-W; Adv. Pro. 94-8277-W (Bankr. D.S.C. 4/13/1995). A motion to dismiss “should only be granted if, after accepting all well-pleaded allegations in the plaintiff’s complaint as true, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.” *Migdal*

v. Rowe Price-Fleming Int'l, 248 F.3d 321 (4th Cir. 2001). *See also GE Investment Private Placement Partners II v. Parker*, 247 F.3d 543, 548 (4th Cir. 2001)(“[A] court must accept the factual allegations of the complaint as true and must view the complaint in the light most favorable to the plaintiff”); *Baron Fin. Corp. v. Natanzon*, 2006 U.S. Dist. LEXIS 46854 (D. Md. 2006)(citing *Eastern Shore Mkts. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)))(“When the legal sufficiency of a complaint is challenged under a Rule 12(b)(6) motion, the court assumes ‘the truth of all facts alleged in the complaint and the existence of any fact that can be proved, consistent with the complaint's allegations’”). “The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Rather, Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief.” *Migdal*, 248 F.3d 321 (4th Cir. 2001). *See also Colleton Regional Hosp. v. MRS Medical Review Sys.*, 866 F. Supp. 896, 899 (D.S.C. 1994)(quoting Fed.R.Civ.P. 8(a)(2))(The court's inquiry is limited to whether Plaintiffs' allegations constitute "'a short and plain statement of the claim showing that the pleader is entitled to relief'"); *Official Comm. of Unsecured Creditors of Heilig-Meyers Co. v. Wachovia Bank, N.A. (In re Heilig-Meyers Co.)*, 297 B.R. 46 (Bankr. D. Va. 2003)(“Fed. R. Civ. P. 8(a)(2) states that a claim for relief in a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. The United States Supreme Court has recently referred to the standard of pleading as one of ‘simplified notice;’ a plaintiff must give the defendant ‘fair notice of the basis’ for the claim”).

Defendant's Motion to Dismiss

During argument Defendant offered three (3) grounds in support of dismissal. First, the Defendant argues that the complaint fails to allege that there has been a transfer within a one

(1) year period provided by 11 U.S.C. § 548 (“Count I”). Defendant asserts that the allegations in the pleadings must be pled “with particularity.” Plaintiff counters Defendant’s argument by stating that while the complaint does not mention specific instances, it does reasonably apprise the Defendant of the claims against her and that is all that is required under the Federal Rules.

While the complaint is far from specific, reading it in light most favorable to the Plaintiff, it does contain short and plain statements of the claims, and reasonably apprises the Defendant of the allegations against her. Under the applicable standard the Court is unable to conclude that the Plaintiff cannot prove any set of facts in support of his claim entitling Plaintiff to relief. The Trustee may or may not be able to prove the allegations contained within the complaint, however, that is a matter for trial or summary judgment, not a motion to dismiss. The motion to dismiss Count I is DENIED.

Second, Defendant moves to dismiss the Trustee’s cause of action under SC Code Ann. § 27-23-10 and the Trustee’s strong-arm powers pursuant to 11 U.S.C. § 544 (“Count II”). Defendant argues that § 544 actions seeking relief under SC Code Ann. § 27-23-10 require the Trustee to specifically state in his complaint the identity of the creditor giving rise to standing. At the hearing Defendant cited *Campbell v. Deans (In re J.R. Deans Co.)* 249 B.R. 121, 131 (Bankr. D.S.C. 2000), for this proposition. The case does not require pleading the identity of a specific creditor, rather it stands for the proposition that there must be at least one creditor on which the trustee can rely. *Id.* In *Campbell* Judge Waites states, “the initial issue before this Court is *whether there are any creditors*, either existing at the time of the subject transfer or subsequent to the transfer, with an allowable unsecured claim that would provide the Trustee standing to pursue the Statute of Elizabeth action, under either an actual or constructive fraud theory. *Id. (Emphasis added)*. The Plaintiff has

reasonably apprized the Defendant of the claims against her, including reasonably appraising the Defendant that a creditor with standing exists. Defendant conceded at the hearing that the complaint generally provides this notice and that Carolina First was identified as a creditor meeting this standard. The Motion to dismiss as to Count II is DENIED. If there is an issue concerning standing, it should be addressed by motion for summary judgment or at trial, not in a motion to dismiss on the pleadings.

The final issue raised by Defendant's motion to dismiss is whether property transferred to Defendant from Jan Investments, Inc., a corporation solely owned by the Debtor, can be avoided pursuant to 11 U.S.C. § 548 ("Count III"). In order to avoid fraudulent transfers under § 11 U.S.C. § 548(a)(1)(B) the plaintiff must establish,

(1) that the debtor had an interest in the property, (2) that a transfer of that interest occurred within one year^[1] of the filing of the bankruptcy estate, (3) that the debtor was insolvent at the time of the transfer, or became insolvent as a result thereof, and (4) that the debtor received less than reasonably equivalent value for the interest transferred.

Miner v. Bay Bank & Trust Co. (In re Miner), 185 B.R. 362 (D. Fla. 1995)(Footnote Added).

Defendant's argument is that Jan Investments, Inc. is a separate legal entity and the transfer by the corporation is not a transfer of property in which the Debtor has an interest.

An essential element in a fraudulent transfer action is that the debtor [sic] have had an interest in the property transferred. A fraudulent transfer may not be avoided under 11 U.S.C.S. § 548(a) if the debtor had no interest in the property transferred... What constitutes "property" and an "interest in property," terms not defined in the Bankruptcy Code, are determined by state law... [E]ven closely held corporations, are distinct legal entities from their stockholders. Corporations are legal entities separate and distinct from the persons compromising them... [T]he stockholders do not hold title to property owned by the corporation. Rather, the corporation, as a legal entity, holds the title.

Id at 366.

¹ The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") amended § 548 to increase the time frame from one (1) year to two (2) years. This case was filed before the enactment of BAPCPA.

In *Miner* the Court concluded that under Florida law, corporations, even ones closely held, are separate entities from the stockholders of such corporation for the purposes of 11 U.S.C § 548. Since the corporation held title to the transferred property, the debtor had no interest in the property transferred, and the § 548 claim fails. *Id.* South Carolina law is that “[a] corporation is not a natural person and maintains a separate and distinct identity apart from its shareholders. *Mangum v. Maryland Cas. Co.*, 330 S.C. 573, 576 (S.C. Ct. App. 1998). *See also Costas v. First Federal Sav. & Loan Asso.*, 283 S.C. 94 (S.C. 1984)(“A corporation is an entity separate and distinct from its officers and stockholders, and its debts are not the individual indebtedness of its stockholders. This is expressed on the presumption that the corporation and its stockholders are separate and distinct and this oft-stated principle is equally applicable, whether the corporation has many or only one stockholder”). The Debtor and Jan Investments Inc. are separate and distinct entities. The Plaintiff has not plead a transfer of property in which the Debtor had an interest in property for purposes of this cause of action. Defendant’s motion to dismiss the cause(s) of action relating to transfers by Jan Investment’s is GRANTED.

Therefore, it is ORDERED that Defendant’s Motion to Dismiss is DENIED as to Counts I and II, and GRANTED as to Count III and is otherwise granted to the extent that the complaint seeks to avoid transfers made by Jan Investments.

AND IT IS SO ORDERED.

Columbia, South Carolina

September 13, 2006