

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

CASE NO. 6:08-bk-10159-ABB
(Jointly Administered Under Chapter 7)

LAND RESOURCE, LLC,
et al.,¹
Debtors.

LEIGH R. MEININGER,

Chapter 7 Trustee,

Plaintiff,

v.

Adversary No. 6:10-ap-276-JAF

J. ROBERT WARD,

Defendant.

ORDER GRANTING IN PART
MOTION TO DISMISS TRUSTEE'S AMENDED COMPLAINT

This proceeding is before the Court on Defendant J. Robert Ward's Motion to Dismiss the Amended Complaint (Doc. 38; *see also* Doc. 37, Amended Complaint) and the Trustee's Response in opposition thereto (Doc. 42). For the reasons stated herein, the Court finds the Motion to Dismiss is due to be granted in part.

I. BACKGROUND

This adversary proceeding arises out of and relates to the Chapter 7 case of Land Resource, LLC, Case No. 6:08-bk-10159-ABB, and the jointly administered cases. Plaintiff, Leigh R.

¹ The jointly administered cases are listed in footnote one of the Amended Complaint (Doc. 37 at 1-2 n.1).

Meininger, is the Trustee for the jointly administered cases.² In the Amended Complaint (Doc. 37, the “Complaint”),³ Plaintiff maintains Defendant facilitated, and benefitted from, transactions that are alleged to have been conducted in a fraudulent manner. More particularly, it is alleged that Defendant made various transfers in furtherance of a ponzi-type scheme, in which Land Resource, LLC and its many subsidiary affiliates (which were operated and controlled by Defendant) defrauded land purchasers in North Carolina, Georgia, Tennessee, West Virginia, and Florida (*see* Doc. 37 at 12-21). The Complaint collectively refers to Land Resource, Inc., the authorized manager of Land Resource, LLC, f/k/a Land Resource Companies, LLC (hereinafter referred to as “Land Resource”) and its affiliate subsidiaries as the “Debtors” (Doc. 37 at 4).

It is alleged that the Debtors were in the business of acquiring undeveloped parcels of land and developing them into residential communities consisting of private lots and amenity areas (Doc. 37 at 4-5). The subject land was marketed and sold prior to and during the construction of necessary infrastructure improvements and amenities (Doc. 37 at 4). It is claimed that Land Resource, LLC was the “parent company” of not less than twenty-six (26) of the debtor entities created to facilitate the marketing, sale, and infrastructure improvements of the developments (Doc. 37 at 4). It is further alleged that Defendant was an “insider” of one or more of the aforementioned entities, and that he used such entities as conduits for facilitating the transactions at issue (*see* Doc. 37 at 12-21).

² On October 30, 2008, Land Resource, LLC filed a voluntary petition under Chapter 11, thereby commencing Case No. 6:08-bk-10159-ABB. On March 20, 2009, the Court entered an Order Converting Cases to Proceedings Under Chapter 7 of the Bankruptcy Code (Doc. 441, Case No. 6:08-bk-10159-ABB), which converted the Debtors’ cases into separately administered cases under Chapter 7. On July 21, 2009, the Court entered an Order Granting Trustee’s Motion for Order Directing Joint Administration of Related Chapter 7 Cases (Doc. 522, Case No. 6:08-bk-10159-ABB), directing that the related cases pending in Chapter 7 be jointly administered with Land Resource, LLC (Case No. 6:08-bk-10159-ABB) as the primary case.

³ On December 30, 2010, Defendant filed a motion to dismiss the original complaint (Doc. 8). On May 27, 2011, Plaintiff moved to amend the complaint in an effort to resolve the matters raised in Defendant’s motion to dismiss (Doc. 27). This motion was unopposed. On May 31, 2011, the Court entered an Order permitting the filing of the amended complaint (Doc. 30), which was filed on June 30, 2011 (Doc. 37).

In support of his allegations, *supra*, Plaintiff attaches to the Complaint a schedule which delineates a multitude of transfers made to Mr. Ward (Doc. 37, Exhibit E). Said schedule specifies the transferor, the transferee (Mr. Ward), the check number, the date of the transfer, the invoice number, and the amount of the transfer (*id.*). The first transfer noted on the schedule is dated January 13, 2005 (*id.*). The final transfer on the schedule is dated December 13, 2007 (*id.*). The aggregate amount of the transfers, over this approximate three-year period, equals \$17,465,952.98 (*id.*).

In general, it is claimed that the subject transfers were fraudulent in that they were made in exchange for little or no value (Doc. 37 at 12, 19-21). Plaintiff maintains the instant transfers left the subject companies with unreasonably small capital, rendering them unable to complete the promised infrastructure improvements (Doc. 37 at 14-21). As a result, it is alleged that many of the land purchasers did not receive the benefit of their respective purchase agreements since infrastructure improvements (such as certain amenities, paved roads, electric, telephone, and water service lines) were never completed (Doc. 37 at 14-17; *see also* Doc. 42 at 4). Plaintiff claims many purchasers were even left without access to their purchased land as there are no roads or other means of ingress to such properties (Doc. 42 at 4). Plaintiff attaches to the Complaint financial documentation which supports Plaintiff's allegations of insolvency (*see* Doc. 37, Exhibits A, B, C, D).⁴

Plaintiff also alleges the Debtors purchased "whole life" insurance policies, and that "Defendant is the owner and/or beneficiaries [sic] of these life insurance policies" (Doc. 37 at 32).

⁴These exhibits correspond to the Debtors' audited Consolidated and Combined Financial Statements for the years 2004, 2005, 2006, and 2007. It should be noted, however, that the financial statement for the year 2007 is incomplete.

Plaintiff maintains the insurance policies have accumulated cash surrender values, and that Mr. Ward testified to withdrawing funds from these policies (*id.*).

Based on the foregoing, Plaintiff seeks, among other forms of relief, to avoid the subject transfers. In the Motion to Dismiss, Defendant seeks dismissal of Counts I, II, III, IV, V, X, XIII, and XIV of the Complaint (Doc. 38 at 7). These counts can generally be divided into three categories. The first group, Counts III, IV, V, and X, allege avoidable transfers under the Bankruptcy Code (the “Avoidance Claims”). The second group of claims, set forth in Counts I and XIV, seek: (1) a declaratory judgment that the subject transfers be deemed initial transfers for purposes of sections 544, 548, 549 or 550 of the Bankruptcy Code, regardless of which Debtor made the transfer (Count I); and (2) recovery of any avoidable transfers (Count XIV) (the “Avoidance-Related Claims”). The final group of claims consists of Counts II and XIII, which respectively seek an accounting (Count II) and assert a claim for conversion (Count XIII) (the “Remaining Claims”).

II. MOTION TO DISMISS STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. When evaluating whether a plaintiff has stated a claim, a court must determine whether the complaint satisfies Rule 8(a)(2), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” In addition, if a complaint contains claims of intentional fraud, the complaint must satisfy the more stringent pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

To survive a Rule 12(b)(6) motion, the complaint must contain enough factual matter (taken

as true) to “raise [the] right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “[N]aked assertions devoid of further factual enhancement” will not satisfy Rule 8(a)(2)’s requirement of a short plain statement of the claim showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 557) (*internal quotations omitted*). In addition, “a formulaic recitation of the elements of a cause of action will not do.” *Id.* A plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged.” *Twombly*, 550 U.S. at 555. A mere possibility that the defendant acted in contravention to the law will not suffice. *Id.* Although a court must accept all well pleaded facts as true, it is not required to accept legal conclusions. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949.

III. ANALYSIS

A. The Avoidance Claims

Counts III, IV, V, and X of the Complaint allege avoidable transfers under the Bankruptcy Code.

1. Actual and Constructive Fraud

Count III of the Complaint seeks to avoid certain transfers pursuant to section 548(a)(1)(A) of the Bankruptcy Code, which provides for the avoidance of transfers of property of the debtor made with the actual intent to hinder, delay, or defraud within two years of the petition date. 11 U.S.C. § 548(a)(1)(A). Count IV of the Complaint seeks to avoid various transfers pursuant to section 548(a)(1)(B) of the Code, which provides for the avoidance of transfers made within two

years of the petition date for less than reasonably equivalent value while the transferor was insolvent or was rendered insolvent thereby (*i.e.*, constructively fraudulent transfers).

In this instance, Debtors filed their respective bankruptcy petitions on October 30, 2008. Thus, in order to state a claim under either section 548(a)(1)(A) or section 548(a)(1)(B), Plaintiff must allege fraudulent transfers occurring on or subsequent to October 30, 2006. *See Gold v. Winget (In re NM Holdings Co., LLC)*, 407 B.R. 232, 258 (Bankr. E.D. Mich. 2009) (finding, to state a claim under section 548, a plaintiff must identify a specific transfer made to the defendant, occurring on or subsequent to the two year look-back period, in order to satisfy the limitations period and place the defendant on notice as to the precise misconduct with which he or she is being charged).

Here, only a portion of the transactions alleged by Plaintiff occurred on or subsequent to October 30, 2006. Specifically, the transfers from January 13, 2005 through August 3, 2006 fall outside the statutory look-back period. Thus, as to these transfers, Counts III and IV will be dismissed. The remaining transfers, however, fall within the statutory period. Therefore, Counts III and IV of the Complaint, as to these transfers (*i.e.*, those that occurred from November 9, 2006 to December 13, 2007), will be sustained.

2. *Excessive Insider Compensation*

Count V of the Complaint seeks to avoid transfers pursuant to section 548(a)(1)(B)(ii)(IV) of the Bankruptcy Code, which provides for the avoidance of transfers made within two years of the Petition date, pursuant to an employment agreement, outside the ordinary course of business (Doc. 37 at 32-34). In support of this allegation, Plaintiff states that a March 31, 2004 Employment Agreement, entered into between Defendant and Land Resource Companies, LLC, provides that Defendant was to receive an annual salary of \$500,000 plus a bonus of 1.5 percent of gross revenues

from lot sales (Doc. 37 at 33). Plaintiff maintains that Defendant's reported annual salary for the year 2007 was \$2,000,000, which exceeds the contractual amount noted above (*id.*). In addition, Plaintiff maintains that Defendant received bonuses that exceed 1.5 percent of the reported gross revenues from lot sales (*id.*).

In the Motion to Dismiss, Defendant states, *inter alia*, that Plaintiff has failed to state a claim because "[an] amendment to the 2004 Employment Contract increased Mr. Ward's salary," and that there are no allegations that payments received during the statutory period exceed the amounts provided for by the Amended Employment Contract (Doc. 38 at 5-6).

This assertion, however, raises a factual question that is not appropriate for resolution on a motion to dismiss. Nonetheless, only a portion of the transactions alleged by Plaintiff occurred on or subsequent to October 30, 2006. Specifically, as listed in Exhibit E, the transfers from January 13, 2005 through August 3, 2006 fall outside the statutory look-back period. Thus, as to such transfers, Count V will be dismissed. The remaining transfers, however, fall within the statutory period. Therefore, Count V, as to these transfers (*i.e.*, those that occurred from November 9, 2006 to December 13, 2007), will be sustained.

3. *Count X—Postpetition Transfers*

The Court finds Plaintiff's claim for recovery of postpetition transfers is premature. To illustrate, in addition to asserting no facts to plausibly state a claim for the requested relief, Plaintiff makes his claim conditional by stating "in the event" Defendant has made, or accepted, any postpetition transfers, Plaintiff reserves the right to avoid and recover such transfers (Doc. 37 at 47). Should Plaintiff ultimately discover that Defendant indeed made postpetition transfers, he may then

file an appropriate motion with the Court. For the foregoing reasons, Count X will be dismissed without prejudice for failure to state a claim.

B. The Avoidance-Related Claims

The second group of claims, as set forth in Counts I and XIV of the Complaint (Doc. 37) seek: (1) a declaratory judgment deeming the subject transfers initial transfers for purposes of sections 544, 548, 549 or 550 of the Code, regardless of which Debtor made the transfer (Count I); and (2) recovery of any avoidable transfers (Count XIV).

1. *Count I—Declaratory Judgment*

By way of Count I, Plaintiff requests that the transfers at issue be collapsed and treated as a single transaction for purposes of the fraudulent conveyance laws (Doc. 37 at 21-23). Pursuant to the doctrine of collapsing, under appropriate circumstances, multilateral transactions may be “collapsed” and treated as a single transaction. *M. Farbrikant & Sons, Inc. v. JP Morgan Chase Bank, N.A. (In Re Farbrikant)*, 394 B.R. 721, 731 (Bankr. S.D.N.Y. 2008); *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir. 1993).

A party seeking to collapse a series of transactions, however, must satisfy two prongs. *In Re Farbrikant*, 394 B.R. at 731. First, “the consideration received from the first transferee must be reconveyed by the debtor for less than fair consideration or with an actual intent to defraud creditors.” *Id.* Second, the initial transferee must have actual or constructive knowledge of the entire scheme that renders the exchange with the debtor fraudulent. *Id.*

Actual knowledge exists where the parties are intimately involved in the formulation or implementation of the plan. *Id.* at 732. “Constructive knowledge, on the other hand, will be found

where the initial transferee became aware of circumstances that should have led it to inquire further into the circumstances of the transaction, but failed to make the inquiry.” *Id.*

Here, with respect to the first prong, *supra*, Plaintiff’s general allegations of inadequate consideration are sufficient. *See id.* at 737. With respect to the second prong, the Court finds Plaintiff has pleaded a plausible claim that Defendant implemented a single, integrated ponzi-type scheme. Therefore, Count I of the Complaint will be sustained.

2. *Count XIV–Recovery of Property*

Section 550 of the Bankruptcy Code provides that once a transfer has been avoided pursuant to, *inter alia*, sections 544, 547, or 548, a trustee may recover the property that was transferred from the party for whose benefit the transfer was made. As the Court has permitted, to the extent provided herein, Counts III, IV, and V to stand, Plaintiff has alleged sufficient facts to survive the motion to dismiss the claim for recovery of avoided transfers (Count XIV). *See Vaughn v. Graybeal, Jr., (In re CM Vaughn, LLC)*, 2010 WL 3397425, at *3 (Bankr. N.D. Ga. 2010).⁵

C. The Remaining Claims

Plaintiff’s final group of claims, Counts II and XIII, respectively seek an accounting and assert a claim for conversion (Doc. 37 at 23-25, 52-54).

1. *Count II–Accounting*

By way of Count II, Plaintiff brings a separate claim for an accounting (Doc. 37 at 23-25). An accounting is a restitutionary remedy, which the Court has the power to grant under appropriate circumstances. Indeed, section 542 of the Bankruptcy Code expressly provides for an accounting in a turnover action when property of the estate is in the possession of a person or entity who is not

⁵ Unpublished opinions are not considered binding authority; however, they may be cited as persuasive authority pursuant to the Eleventh Circuit Rules. 11th Cir. R. 36-2.

a custodian of such property. Plaintiff, however, seeks an equitable accounting (*see* Doc. 37 at 23-25). In support, Plaintiff avers that, as the founder, majority owner, CEO, and principal, Defendant owed a fiduciary duty to the Debtors and land purchasers (*id.*).

In order to obtain an equitable accounting, however, Plaintiff must show: (1) the existence of a fiduciary duty or that the transactions at issue are complex; and (2) that there is no adequate remedy at law. *Kee v. Nat'l Res. Life Ins. Co.*, 918 F.2d 1538, 1540 (11th Cir. 1990). Such a claim is “typically viewed as a remedy rather than an independent cause of action.” *Kore Holdings, Inc. v. Rosen (In re Rood)*, 426 B.R. 538, 556 (Bankr. D. Md. 2010). An accounting “is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate.” *Id.*

While Plaintiff asserts a fiduciary duty and that the subject transactions were complex, the Court is not convinced that there is no adequate remedy at law. More particularly, what Plaintiff seeks by way of an accounting appears to be available through regular discovery channels. *See Cont'l Cas. Co. v. First Fin. Employee Leasing*, 716 F. Supp. 2d 1176, 1194 (M.D. Fla. 2010) (“an equitable accounting is not a substitute for discovery available and permitted under the Federal Rules of Civil Procedure”).

Based on the foregoing, the Court will dismiss Plaintiff’s separate claim for an accounting. *See In re Rood*, 426 B.R. at 556 (upholding the bankruptcy court’s dismissal of the plaintiff’s “freestanding” claim for an accounting insofar as it did not properly state a separate cause of action). Plaintiff, however, may request equitable relief at any time during the proceedings, if he believes such is appropriate under the circumstances.

2. *Count XIII–Conversion*

In Count XIII, Plaintiff asserts the common law claim of conversion (Doc. 37 at 52-54). Conversion is defined as unauthorized assumption and exercise of the right of ownership of the goods and personal chattels belonging to another. *Doret Shops, Inc. v. Siegel (In re Siegel)*, 207 B.R. 262, 265 (Bankr. M.D. Fla. 1997) (*citing* BLACK’S LAW DICTIONARY 332 (6th ed. 1990)).

In support of this claim, Plaintiff maintains Defendant misappropriated the subject funds by transferring the funds listed in Exhibit E from the Debtors to himself, rendering the Debtors insolvent (Doc. 37 at 53). Plaintiff claims Defendant used his position as majority owner and CEO to wrongfully assert dominion over the property (or capital) of the Debtors (*id.*). Plaintiff further claims Defendant’s appropriation of the subject funds to his own use was outside the scope of his role as majority owner and CEO and was, therefore, unauthorized (*id.*).

In support of the Motion to Dismiss, Defendant states that Plaintiff failed to identify the property that was allegedly converted (Doc. 38 at 7). This argument is not persuasive as Plaintiff states, “Defendant misappropriated the Debtor’s assets as set forth in Exhibit E” (Doc. 37 at 53). Thus, the Court finds Plaintiff has pleaded a plausible claim for conversion of business assets. As such, Count XIII will be sustained.

IV. CONCLUSION

For the foregoing reasons, Counts III, IV, and V will be dismissed with respect to the transactions made outside the statutory period of two years prior to the Petition date. Otherwise, the Motion to Dismiss these counts is denied. Count X will be dismissed for failure to state a claim. Counts I and XIV are sustained. Count II is dismissed and Count XIII is sustained.

Plaintiff, in addition to opposing Defendant's motion to dismiss the proceeding, makes an alternative request for "leave to amend the Amended Complaint" (Doc. 42 at 29).

A request for affirmative relief, such as a request for leave to amend a pleading, however, is not properly made when simply included in a response to a motion. *See* Fed. R. Civ. P.7(b); *see also Rosenberg v. Gould*, 554 F.3d 962, 965 (11th Cir. 2009) ("Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly.") (*quoting Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222 (11th Cir. 1999)).

Moreover, even if it were proper to include a request for leave to amend in the opposition memorandum, the request is otherwise due to be denied based upon Plaintiff's failure to satisfy the requirement that "[a] motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment." *Long v. Satz*, 181 F.3d 1275, 1279 (11th Cir. 1999); *see also McGinley v. Fla. Dep't of Highway Safety & Motor Vehicles*, No. 10-15240, 2011 WL 3428128, at *2 (11th Cir. Aug. 8, 2011) (affirming denial of leave to amend where plaintiff did not set forth the substance of the proposed amendment).

Consequently, the Court will not entertain Plaintiff's request for relief included in the response in opposition. Plaintiff is advised that, if he wishes to pursue such relief, he is required to file an appropriate motion in accordance with the Federal Rules of Bankruptcy Procedure, the Federal Rules of Civil Procedure, and the Local Rules of this Court.

Accordingly, it is **ORDERED**:

Defendants' Motion to Dismiss the Amended Complaint (Doc. 38) is **GRANTED in part and DENIED in part** as provided herein.

DONE AND ORDERED this 30th day of **November, 2011** in Jacksonville, Florida.

/s/ Jerry A. Funk
Jerry A. Funk
United States Bankruptcy Judge

Copies Furnished To:
All Interested Parties