UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re: Chapter 7
Case Nos. 8:13-bk-06864-CED, et al.

Able Body Temporary Services, Inc., et al.,

Debtors.
_____/

Christine L. Herendeen,
As Chapter 7 Trustee,

Plaintiff,

v. Adv. Pro. No. 8:15-ap-118-CED
LEAD CASE

Regions Bank,

Defendant.
_____/

ORDER GRANTING REGIONS BANKS' MOTIONS TO DISMISS CERTAIN COUNTS OF PLAINTIFF'S AMENDED COMPLAINTS

Defendant Regions Bank ("Regions") has filed motions to dismiss (the "Motions to Dismiss") Plaintiff's claims for the avoidance and recovery of alleged constructive fraudulent transfers in her amended complaints (the "Amended Complaints")[1] filed in four of the above-captioned adversary proceedings: Professional Staffing-A.B.T.S., Inc. ("Professional Staffing"), USL&H Staffing, LLC ("USL&H"), YJNK III, Inc. ("YJNK III"), and Able Body Gulf Coast, Inc. ("Able Body") (together "Debtors").[2]

Having carefully considered the Motions to Dismiss, Plaintiff's responses, Regions' replies, and the arguments of counsel at a hearing conducted on April 2, 2018, the Court will grant the Motions to Dismiss.

I. THE AMENDED COMPLAINTS

Plaintiff's Amended Complaints are virtually identical.[3] Many of the facts are not in dispute; they are described in detail in this Court's prior ruling on Plaintiff's motion for partial summary judgment.[4] Briefly, Debtors' principals, Frank and Anne Mongelluzzi, owned numerous businesses (the "Mongelluzzi Entities"). The Mongelluzzi Entities maintained deposit accounts at Regions (the "Regions Accounts"). Some of the Mongelluzzi Entities also had lending relationships with Regions. Plaintiff alleges that Debtors each maintained more than one deposit account at Regions from 2007 until the accounts were closed in 2010.[5]

Plaintiff alleges that starting in 2008, Debtors began having significant cash flow issues, and that to cover their shortfalls, the Mongelluzzi Entities and Debtors engaged in a check-kiting scheme within the Regions Accounts.[6] In Paragraph 45 of the Amended Complaints, Plaintiff alleges that:

> The Mongelluzzis continuously issued checks drawn on accounts which lacked

[1] The parties stipulated to the filing of the Amended Complaints (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 470). The Court had previously consolidated, for discovery purposes only, the above-captioned adversary proceedings with Adv. Pro. No. 8:14-ap-653-CED (the lead adversary proceeding). (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 200.) Thereafter, the joint administration was terminated. (Adv. Pro. No. 8:14-ap-653-CED, Doc. No. 587.) The above-captioned adversary proceedings are now jointly administered with Adv. Pro. No. 8:15-ap-118-CED as the lead adversary proceeding.

[2] Adv. Pro. Nos. 8:15-ap-116-CED, 8:15-ap-121-CED, 8:15-ap-125-CED, and 8:15-ap-126-CED.

[3] Adv. Pro. No. 8:15-ap-116-CED, Doc. No. 45; Adv. Pro. No. 8:15-ap-121-CED, Doc. No. 45; Adv. Pro. No. 8:15-ap-125-CED, Doc. No. 47; and Adv. Pro. No. 8:15-ap-126-CED, Doc. No. 44.

[4] *In re Mongelluzzi*, 587 B.R. 392 (Bankr. M.D. Fla. 2018).

[5] Doc. No. 45, ¶ 26. (Unless otherwise indicated, for ease of reference, citations to identical allegations in the Amended Complaints are to Adv. Pro. No. 8:15-ap-116-CED.)

[6] Doc. No. 45, pp. 16-18.

> sufficient funds to cover them (the "Check Kite Accounts") so that the Debtor would have access to interest free loans of the fictitious account balances during the float period and thereby hinder, delay, or defraud the Debtor's creditors in the period 2008 through 2010.[7]

And in Paragraph 121 of the Amended Complaints, Plaintiff alleges:

> . . . In the period 2008 through 2010, Regions intended the negative cash balances in the Debtor's bank accounts to constitute loans for which [Regions] perceived a credit risk. As a result, Regions demanded that the Mongelluzzis transfer funds from the Debtor's bank accounts at Regions to repay overdrafts in other accounts at Regions. These transfers are the "**Overdraft Loan Repayment Transfers**" which are transfers from the Debtor's bank accounts to Regions to repay overdrafts which constituted mini-loans made by Regions within the four year period preceding the Petition Date. These Overdraft Loan Repayment Transfers constituted transfers of an interest of the Debtor in property within the meaning of Chapter 726 of the Florida Statutes and other applicable law over which Regions obtained sole dominion and control. . . . A true and correct copy of the Overdraft Loan Repayment Transfers is attached as **Exhibit A** and is incorporated herein by this reference. [8]

Although Plaintiff alleges that "Regions demanded that the Mongelluzzis transfer funds from the Debtor's bank accounts at Regions to repay overdrafts **in other accounts** at Regions,"[9] this allegation appears to be contradicted by the information set forth on the Exhibits A to the Amended Complaints. For example, Exhibit A in the Professional Staffing adversary proceeding lists 73 separate "Overdraft/Overdraft Loans" for three different bank accounts, totaling $6,178,483.48 with a corresponding "Date of Repayment in Full."[10] The three bank accounts referenced on Exhibit A appear to be those of Professional Staffing, not "other accounts." Similar information, varying only as to the account numbers and the dates and amounts of the overdrafts and repayments, is provided on the Exhibits A to the Amended Complaints in the USL&H, YJNK III, and Able Body adversary proceedings.

In Count 1 of the Amended Complaints, Plaintiff seeks to avoid the Overdraft Loan Repayment Transfers as actual fraudulent transfers under Florida Statute § 726.105(1)(a) and as constructive fraudulent transfers under § 726.105(1)(b).[11] In Count 2, Plaintiff seeks to avoid the Overdraft Loan Repayment Transfers as constructive fraudulent transfers under Florida Statute § 726.106(1). And in Count 3 in the Professional Staffing and the USL&H adversary proceedings and Count 5 in the YJNK III and Able Body adversary proceedings, Plaintiff seeks to recover the avoided the transfers under 11 U.S.C. § 550.

II. ANALYSIS

A. Motion to Dismiss Standard

Under Federal Rule of Civil Procedure 12(b)(6), incorporated by Federal Rule of Bankruptcy Procedure 7012, a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted.[12] To satisfy the pleading requirements of Federal Rule of Civil Procedure 8, as incorporated by Federal Rule of

[7] Doc. No. 45, ¶ 45.

[8] Doc. No. 45, ¶ 121 (emphasis in original). Paragraph 121 of the Amended Complaints further alleges the amount of the Overdraft Loan Repayment Transfers for each Debtor as follows: Professional Staffing: $6,176,598.50; USL&H: $586,411.24, YJNK III: $543,790.03; and Able Body: $4,261,137.12.

[9] Doc. No. 45, ¶ 121 (emphasis supplied).

[10] Doc. No. 45, p. 49.

[11] 11 U.S.C. § 544(b) permits bankruptcy courts to avoid transfers that are avoidable under state law.

[12] Fed. R. Civ. P. 12(b)(6).

Bankruptcy Procedure 7008, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief."[13] To survive a motion to dismiss, a complaint must include "enough facts to state a claim to relief that is plausible on its face."[14] A claim is plausible on its face when the plaintiff includes "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[15] The moving party bears the burden of showing that no claim has been stated.[16]

During this threshold review, the court "must accept the allegations of the complaint as true and must construe the facts alleged in the light most favorable to the plaintiff."[17] This requires the court to consider "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."[18] That said, the plaintiff must do more than raise a sheer possibility of the defendant's liability.[19]

B. Constructive Fraudulent Transfer Claims under §§ 726.105(1)(b) and 726.106(1)

Chapter 726 of the Florida Statutes is the Florida Uniform Fraudulent Transfer Act ("FUFTA"). Under § 726.105(1)(b), a transfer is fraudulent as to present or future creditors if the debtor made the transfer without receiving a reasonably equivalent exchange of value and the debtor (1) was engaged, or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due. Likewise, under § 726.106(1), a transfer is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Under § 726.104, value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied.[20] Courts considering the issue of reasonably equivalent value under FUFTA frequently look to analysis under the Bankruptcy Code.[21] Similar to FUFTA, 11 U.S.C. § 548(a)(1) provides for the avoidance of transfers for which less than reasonably equivalent value was received.

C. Regions' Motions to Dismiss

Regions moves to dismiss Plaintiff's constructive fraud claims in the Amended Complaints on three grounds.[22] First, Regions contends that Plaintiff does not plausibly allege that Debtors did not receive reasonably equivalent value in exchange for the Overdraft Loan Repayment Transfers. Second, Regions argues the Overdraft Loan Repayment Transfers were in payment of overdrafts in Debtors' own accounts at Regions, such that they constituted the payment of antecedent debts. Third, Regions contends that dismissal is warranted because "fair consideration" and "good faith" are not incorporated into the Florida Uniform Fraudulent Transfer Act.

(1) Plaintiff has not adequately alleged that less than reasonably equivalent value was received in exchange for the Overdraft Loan Repayment Transfers.

[13] Fed. R. Civ. P. 8(a)(2).
[14] *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007).
[15] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[16] *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) ("[U]nder Rule 12(b)(6) the defendant has the burden of showing no claim has been stated.").
[17] *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996) (quoting *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994)).
[18] *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).
[19] *Iqbal*, 556 U.S. at 678.
[20] Fla. Stat. § 726.104.
[21] *In re Pearlman*, 460 B.R. 306, 316 (Bankr. M.D. Fla. 2011).
[22] Regions does not seek the dismissal of Plaintiff's actual fraudulent transfer claims as alleged in Count I of the Amended Complaints.

Regions' first two grounds for dismissal of the Amended Complaints are intertwined. Essentially, Regions argues that Plaintiff has not and cannot state a claim for the avoidance of constructively fraudulent transfers as to the Overdraft Loan Repayment Transfers because the alleged transfers were in payment of overdrafts in Debtors' own accounts.

Plaintiff argues that in considering the sufficiency of the Amended Complaints, the Court should rely on *Welch v. Synovus Bank*[23] and *Welch v. Highlands Union Bank*.[24] In these cases, the courts considered the legal sufficiency of complaints filed by the trustee to avoid "overdraft loan repayment transfers" in Mr. Mongelluzzi's individual bankruptcy case. In *Synovus*, the district court denied the defendant bank's motion to dismiss, finding the allegations in the complaint sufficient to withstand a motion to dismiss. Likewise, in *Highlands Union*, the district court denied the defendant bank's motion for judgment on the pleadings (applying the same standard as Rule 12(b)(6)), finding that the plaintiff trustee had alleged that the transfers at issue were made for "less than reasonably equivalent value in exchange for such transfers."[25]

Here, as in *Synovus* and *Highlands Union*, Plaintiff has alleged that the Overdraft Loan Repayment Transfers were for less than reasonably equivalent value.[26] However, Plaintiff's allegations that the transfers were used to pay overdrafts in "other accounts at Regions" are contradicted by the information contained on Exhibits A to the Amended Complaints.

This Court previously addressed the issue of Overdraft Loan Repayment Transfers—the repayment of overdrafts in a debtor's own bank account—in a related adversary proceeding.[27] The trustee in Mr. Mongelluzzi's individual Chapter 7 case, Angela Welch ("Trustee Welch"), also sued Regions for the avoidance and recovery of alleged constructively fraudulent transfers (the "Welch Adversary"). In the Welch Adversary, Regions moved for partial summary judgment on Trustee Welch's claims to avoid the Overdraft Loan Repayment Transfers. In granting Regions' motion in part, this Court stated:

> This leaves one remaining issue: whether Debtor received reasonably equivalent value in exchange for the Overdraft Loan Repayment Transfers.
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> Plaintiff's list of the Overdraft Loan Repayment Transfers she seeks to avoid (Exhibit 9 to the Amended Complaint) are in the exact amount of the Overdrafts; Plaintiff does not seek to recover related fees or costs, but seeks to recover only the principal of the amount of the "credit" that Regions extended to Debtor. But when the payment is for the principal amount of a loan, reasonably equivalent value is given.
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> The court in *In re Petters Co., Inc.*, recognized that where the overdraft loan repayments were made in the precise amount of the principal amount extended by the bank, and no fees or interest was paid, reasonably equivalent value was given. In *Petters*, the debtor was involved in a massive Ponzi scheme. The bankruptcy trustee sought to avoid and recover six transfers to a depository bank that had covered overdrafts on the debtor's accounts on the theory that the transfers were payments on short-term loans.
>
> In other words, in *Petters*, as in the facts presented here, the bank would honor a check when the debtor's account had insufficient funds to cover the check by making a short-term "loan." When the debtor deposited funds into the account to cover the check, the bank would apply those funds to the negative balances in the account in the exact amount of the

[23] 517 B.R. 269 (M.D. Fla. 2014).
[24] 526 B.R. 152 (W.D. Va. 2015).
[25] *Highlands Union*, 526 B.R. at 165.
[26] Doc. No. 45, ¶ ¶ 125 and 130.
[27] Adv. Pro. No. 8:14-ap-653-CED, previously jointly administered for discovery purposes with these adversary proceedings.

short-term credit extended. In granting the depository bank's motion to dismiss for failure to state a claim, the *Petters* court found that the repayment of a negative account balance was tantamount to the repayment of a principal indebtedness and that the trustee's complaint failed to establish the element of reasonably equivalent value.

As in *Petters*, Plaintiff alleges that the Overdrafts were loans and has not moved to recover any interest or fees associated with the Overdrafts. Therefore, Debtor's repayment of the principal of the loans to Regions in amounts that are exactly equal to the amount of principal it received constitute reasonably equivalent value.

If Plaintiff were suing Regions to recover Overdraft Loan Repayment Transfers made within the 90-day period prior to Debtor's bankruptcy petition as preferential transfers under 11 U.S.C. § 547, Plaintiff would likely prevail. But under FUFTA and 11 U.S.C. § 548, a constructively fraudulent transfer may be avoided only if the debtor received less than reasonably equivalent value. Here, the Overdraft Loan Repayment Transfers are the satisfaction of indebtedness and constitute reasonably equivalent value, which is not an issue in preference actions.

Although Plaintiff argues that that dismissal of constructive fraudulent transfer claims is improper as a matter of law, relying upon *Welch v. Highlands Union Bank*, that case was decided at the pleading stage of the litigation on a motion for judgment on the pleadings. On a motion for judgment on the pleadings, the court is "obligated to accept all well-pleaded facts and construe those facts in the light most favorable to the pleader." *Highlands Union Bank* arose under similar facts—Plaintiff sought to recover deposits to Debtor's accounts to cover $1.2 million in overdrafts—but, unlike this adversary proceeding, the court's ruling was early in the case and without the benefit of discovery.[28]

Here, the Court concludes, as it did in the Welch Adversary, that the repayment of an overdraft in the debtor's own account is a transfer on account of an antecedent debt such that reasonably equivalent value is received in exchange for the repayment. And when the transfer is in the exact amount of the antecedent debt—as is the case here—the dollar for dollar exchange is, by definition, reasonably equivalent value.

The Court recognizes that it is ruling on Regions' Motions to Dismiss, rather than at the summary judgment stage of these adversary proceedings. However, the contradiction between Plaintiff's allegation that the Overdraft Loan Repayment Transfers were made from Debtors' accounts to "other accounts at Regions" and the data listed on Exhibits A to the Amended Complaints renders her claims for their avoidance implausible on their face and therefore insufficient to defeat a motion to dismiss.

And the Court notes that, unlike the parties in the *Highlands Union* case, the parties here have had the benefit of years of discovery. Indeed, the Amended Complaints are replete with the recitation of deposition testimony from a deposition taken in May 2017,[29] over two years after Plaintiff's original complaints were filed.

(2) Good faith is irrelevant to the Court's consideration of good faith in the context of dollar for dollar consideration.

The Court concurs with Regions' contention that good faith is irrelevant to the Court's consideration of whether reasonably equivalent value was received in exchange for the Overdraft

[28] *In re Mongelluzzi*, No. 8:14-ap-653-CED, 2018 WL 3854415, at *11-12 (Bankr. M.D. Fla. July 18, 2018) (internal citations omitted).

[29] Doc. No. 45, pp. 16-17.

Loan Repayment Transfers. The Court addressed this very issue in the Welch Adversary, stating

> [In] *Welch v. Highlands Union Bank, . . .* the court explained that reasonably equivalent value is determined by a variety of factors including the good faith of the parties, the disparity between the fair value of the property and what the debtor actually received, and whether the transaction was at arm's length.
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> But as the Eleventh Circuit explained in *In re Caribbean Fuels America, Inc.*,[30] while these factors may apply where the purported benefits to the debtor are indirect, they do not apply where the debtor directly received the benefit of the transfer at issue. The court noted that:
>
> > This framework [the factors of good faith, disparity in value, and whether the transaction was arm's length] may apply where the purported benefits to the debtor are indirect. But in cases like this one, where the debtor directly received property, goods, or services as a result of the transfers at issue, that test cannot be squared with *Federated Title's* demand that "value" be measured by the objective "value of the goods and services provided rather than on the impact that the goods and services had on the bankrupt enterprise."[31]
>
> The Court finds that although reasonably equivalent value may in certain cases be a factual determination, here, Debtor directly received dollar for dollar credit for the Overdraft Loan Repayment Transfers. By definition, dollar for dollar credit is reasonably equivalent value.[32]

III. CONCLUSION

For the foregoing reasons, the Court finds that the Amended Complaints fail to state a claim for the avoidance and recovery of the Overdraft Loan Repayment Transfers as constructive fraudulent transfers. Therefore, the Court will grant the Motions to Dismiss as to the constructive fraudulent transfer claims in Count 1 of the Amended Complaints, as to Count 2 of the Amended Complaints, and as applicable, to the recovery claims under 11 U.S.C. § 550. However, because of the inconsistency between the allegation in Paragraph 121 of the Amended Complaints regarding the transfers from Debtors' accounts at Regions to "repay overdrafts in other accounts at Regions" and the Exhibits A attached to the Amended Complaints, which appear to relate only to transfers to repay overdrafts in Debtors' own accounts at Regions, Plaintiff is granted leave to file an amended complaint.

Accordingly, it is

ORDERED:

1. The Motions to Dismiss are **GRANTED.**

2. The constructive fraudulent transfer claims in Count 1 of the Amended Complaints are dismissed, without prejudice.

3. Count 2 of the Amended Complaints are dismissed, without prejudice.

4. Plaintiff may file a second amended complaint no later than 21 days from the date of this Order limited solely to clarify her allegations that funds were transferred from Debtors' accounts at Regions to other accounts at Regions.

5. The recovery claims pleaded in Count 3 of the Amended Complaints in the Professional Staffing and USL&H adversary proceedings and Count 5 in the YJNK III and Able Body adversary proceedings are dismissed as they apply to constructive fraudulent transfer claims.

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[30] 688 F. App'x 890, 895 (11th Cir. 2017).

[31] *Id.* at 895 n.3 (citing *In re Financial Federated Title & Trust, Inc.*, 308 F.3d 1325, 1332 (11th Cir. 2002)).

[32] *In re Mongelluzzi*, No. 8:14-ap-653-CED, 2018 WL 3854415, at *13 (Bankr. M.D. Fla. July 18, 2018) (some internal citations omitted).

6. This Order shall be filed in Adv. Pro. Nos. 8:15-ap-118-CED (lead adversary), 8:15-ap-116-CED, 8:15-ap-121-CED, 8:15-ap-125-CED, and 8:15-ap-126-CED.

DATED: October 10, 2018.

/s/ Caryl E. Delano

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Caryl E. Delano
United States Bankruptcy Judge