

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

In re: Case No. 00-16984-8G1

NUMED HOME HEALTH CARE, INC.,

Debtor.

Chapter 11

NUMED HOME HEALTH CARE, INC.,

Plaintiff,

vs.

Adv No. 02-908

TURKEY VULTURE FUND XIII, LTD.,

Defendant.

ORDER ON MOTION TO DISMISS

THIS CASE came before the Court for hearing to consider the Motion to Dismiss filed by the Defendant, Turkey Vulture Fund XIII, Ltd.

The Plaintiff, NuMed Home Health Care, Inc., commenced this adversary proceeding by filing a Complaint against Turkey Vulture Fund XIII, Ltd. (TVF).

The Complaint contained seven Counts: (1) an action to avoid preferential transfers under §547 of the Bankruptcy Code; (2) an action to avoid fraudulent transfers under §548(a)(1)(A) of the Bankruptcy Code; (3) an action to avoid fraudulent transfers under §548(a)(1)(B) of the Bankruptcy Code; (4) an action to avoid fraudulent transfers under §544 of the Bankruptcy Code and §726.105(1)(a) of the Florida Statutes; (5) an action to avoid fraudulent transfers under §544 of the

Bankruptcy Code and §726.105(1)(b) of the Florida Statutes; (6) an action for damages for breach of a Mediation and Settlement Agreement; and (7) an action for damages for breach of fiduciary duty.

TVF filed a Motion to Dismiss the Complaint pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure, and Rule 12(b)(6) of the Federal Rules of Civil Procedure.

At the hearing on the Motion to Dismiss, the Plaintiff stipulated to the dismissal of Count I, Count II, and Count III of the Complaint. Consequently, only Counts IV, V, VI, and VII remain for consideration by the Court.

Background

The Plaintiff is a Nevada corporation authorized to conduct business in the state of Florida. TVF is a *limited liability company incorporated in Ohio*. (Complaint, ¶¶ 3, 4).

In 1998, the Plaintiff and TVF entered into negotiations involving the potential purchase by TVF of certain of the Plaintiff's stock. The proposed transaction would also include the removal of the Plaintiff's existing Chief Executive Officer, and TVF's right to elect a majority of the Plaintiff's Board of Directors.

On November 17, 1998, the Plaintiff filed an action against TVF in the United States District Court for the Middle District of Florida, and alleged that TVF had violated the Securities Exchange Act of 1934 by failing to disclose its intent to gain control of the Plaintiff through a proxy contest. (Complaint, ¶ 16).

On January 6, 1999, the parties entered into a Mediation and Settlement Agreement to resolve the litigation. (Complaint, ¶ 18). The Mediation and Settlement Agreement provided in part that a slate of six directors, three designated by the Plaintiff and three designated by TVF, would be proposed for the Plaintiff. The Agreement further provided:

4. The parties agree to take all appropriate steps pursuant to applicable law necessary to enter into a Stock Purchase Agreement for the purchase of 744,680 shares of common stock in NuMed Home Health Care, Inc., directly from the Company from its currently authorized but unissued stock for \$350,000.00 cash with the closing to occur within two days of the shareholders' approval.

...

8. The parties shall each dismiss their claims with prejudice, each party to bear its own fees and costs.

(Mediation and Settlement Agreement, Exhibit C to Complaint). An Annual Shareholders Meeting was scheduled for January 28, 1999. (Mediation and Settlement Agreement, ¶ 1).

TVF did not pay the purchase price of \$350,000.00 to the Plaintiff.

The Plaintiff filed a petition under chapter 11 of the Bankruptcy Code on November 1, 2000.

The Plaintiff subsequently filed the Complaint against TVF that is currently under consideration.

In Counts IV and V of the Complaint, the Plaintiff seeks the avoidance of certain transfers under §726.105(1)(a) and §726.105(1)(b) of the Florida Statutes. Specifically, the Plaintiff asserts that it made transfers to TVF within four years of the petition date. The Plaintiff further asserts that the transfers were made with the actual intent to hinder, delay, or defraud the Plaintiff's creditors (Count IV), or that the Plaintiff did not receive reasonably equivalent value in exchange for the transfers (Count V). The Plaintiff describes the transfers as follows:

(1) the Debtor released Turkey Vulture from any and all liability pursuant to the Settlement Agreement. The release constituted a transfer within the scope of the term transfer, as defined in 11 U.S.C. § 101; and (2) any and all transfers made by the Debtor to Turkey Vulture within four years of the Petition Date.

(Complaint, ¶ 55). The "release" apparently refers to the dismissal of the Plaintiff's claims against TVF regarding the alleged violations of the Securities Exchange Act, as provided by the Mediation and Settlement Agreement.

In Count VI of the Complaint, the Plaintiff contends that TVF "breached the Settlement Agreement by, *inter alia*, failing to pay to the Debtor \$350,000 for the sale of its stock." (Complaint, ¶ 63).

In Count VII of the Complaint, the Plaintiff asserts that TVF "as controlling shareholder of Debtor owed a fiduciary duty to the Debtor," and that it breached the fiduciary duty "by, *inter alia*, (1) failing to timely make payments under the Settlement Agreement." (Complaint, ¶¶ 67, 68).

In response, TVF contends that the fraudulent transfer actions should be dismissed, in part because no transfer of "property" occurred within the meaning of Florida Statute §726.105. Specifically, TVF asserts that the Plaintiff's dismissal of its claim against TVF pursuant to the Mediation and Settlement Agreement only involved the Plaintiff's surrender of its right to enforce proper disclosure under the Securities Exchange Act. (Motion to Dismiss, pp. 5-8). TVF contends that such a right is not an "interest of the debtor in property" within the meaning of §726.105 of the Florida Statutes.

TVF also asserts that the fraudulent transfer actions should be dismissed because (1) the Plaintiff did not intend to hinder, delay, or defraud any creditor; (2) the actions are the subject of a claim preclusion defense; and (3) the Plaintiff received reasonably equivalent value in exchange for the dismissal, since the dismissal was negotiated during a court-mandated mediation proceeding.

As to the action for breach of the Mediation and Settlement Agreement, TVF apparently acknowledges that it never paid the \$350,000 purchase price for the Plaintiff's stock. TVF contends that Count VI should be dismissed, however, because TVF's obligation to pay the purchase price for the stock was conditioned upon approval of the purchase by the Plaintiff's shareholders. In other words, the Mediation and Settlement Agreement provided that the closing of the transaction was to

occur "within two days of the shareholders' approval." According to TVF, such shareholder approval was never obtained. TVF concludes, therefore, that the "contract plainly and unambiguously conditions the Fund's obligation of purchase on shareholder approval. Since shareholder approval was not obtained, the agreement to purchase never ripened into an enforceable obligation." (Motion to Dismiss, p. 23).

Finally, TVF asserts that Count VII of the Complaint, in which the Plaintiff seeks damages for breach of fiduciary duty, should be dismissed because TVF was only a shareholder of the Plaintiff, and shareholders do not owe a fiduciary duty to the corporation. On the contrary, TVF contends that shareholders are "perfectly free to engage in what by a director or officer might be considered an impermissible conflict of interest." (Motion to Dismiss, p. 23).

Discussion

TVF filed its Motion to Dismiss pursuant to Rule 7012 of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure. The standard for determining whether a complaint should be dismissed under these rules is well-established.

It has long been the rule . . . that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Moreover, in evaluating the sufficiency of the pleading attacked on the motion, both the district court and this court are required to construe the complaint in the light most favorable to the plaintiff and to take the allegations contained therein as true.

Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (5th Cir. 1977)(quoted in Harris v. Procter & Gamble Cellulose Co., 73 F.3d 321, 324 (11th Cir. 1996) and In re Nana's Petroleum, Inc., 234 B.R. 838, 850 (Bankr. S.D. Fla. 1999)). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief." In re Johannessen, 76 F.3d 347, 349 (11th Cir. 1996)(quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

The standard imposed on defendants under Rule 12(b)(6) is a stringent one, particularly in view of the clear purpose of the Federal Rules of Civil Procedure to adopt the principle of "notice pleading," and also because of the general preference of courts to decide cases on the merits, rather than on technical deficiencies in the pleadings. Consequently, motions to dismiss under Rule 12(b)(6) are viewed with disfavor and rarely granted. Bender v. Centrust Mortgage Corp., 833 F.Supp. 1525, 1528 (S.D. Fla. 1992); In re Jones, 279 B.R. 370, 374-75 (Bankr. M.D. Ga 2001).

A Motion to Dismiss under Rule 12(b)(6) is typically a vehicle to challenge the facial sufficiency of the claim for relief. "Thus the examination of a 12(b)(6) motion is primarily limited to the face of the complaint and attachments thereto." Tapken v. Brown, 1992 WL 178984, at 9 (S.D.Fla.).

In this case, the Court finds that the issues raised in TVF's Motion to Dismiss are not suitable for disposition under Rule 12(b)(6), and that the Motion should therefore be denied.

In Counts IV and V, for example, the Plaintiff alleged that it "made certain transfers to Turkey Vulture," and that the transfers were transfers of "property" or an "interest in property." (Complaint, ¶¶ 55, 58). The transfers included the Plaintiff's release of TVF from certain claims that it had asserted in a federal district court action. In response, TVF contends (among other arguments) that the claims were not "property" or an "interest in property" within the meaning of Florida's fraudulent transfer statute, but were instead only the assertion of a right to enforce a regulatory statute. The Court finds that TVF's argument in this regard extends beyond the facial sufficiency of the Complaint, and is directed to the merits or substance of the Plaintiff's allegations involving the term "property."

Similarly, the Plaintiff alleges in Count VI that TVF breached the Mediation and Settlement Agreement by refusing to pay the agreed purchase price for the Plaintiff's stock. (Complaint, ¶ 63). In response, TVF contends that it was not obligated to pay the purchase price, because a condition precedent to the obligation had never been satisfied. Finally, the Plaintiff alleges in Count VII that TVF's failure to pay the purchase price was a breach of the fiduciary duty owed by TVF to the Plaintiff as its controlling shareholder. In response, TVF denies that it owed a fiduciary duty to the Plaintiff, and argues that shareholders are not bound by the same fiduciary standards as officers or directors.

In each of these instances, it is clear that TVF is not testing the sufficiency of the allegations set forth in the Complaint. Rather, TVF is raising factual or legal defenses to the substantive allegations made by the Plaintiff. Such defenses may properly be the subject of a Motion for Summary Judgment under Rule 56 of the Federal Rules of Civil Procedure. See Tapken v. Brown, 1992 WL 178984, at 9.

For purposes of a Motion to Dismiss, however, the Court is asked only to view the allegations contained in the Complaint in the light most favorable to the Plaintiff, and to determine whether it is beyond doubt that the Plaintiff can prove no set of facts that would entitle it to relief. In this case, the Court cannot conclude from the Complaint that it is impossible for the Plaintiff to show any set of facts that would entitle it to a recovery.

The Motion to Dismiss should be denied as set forth in this Order.

Accordingly:

IT IS ORDERED that:

1. Count I, Count II, and Count III of the Complaint are dismissed in accordance with the Stipulation of the Plaintiff, NuMed Home Health Care, Inc.

2. The Motion to Dismiss filed by the Defendant, Turkey Vulture Fund XIII, Ltd., is denied as to Count IV, Count V, Count VI, and Count VII of the Complaint.

3. Turkey Vulture Fund XIII, Ltd. shall file an answer or responsive pleading to Counts IV through VII of the Complaint within twenty (20) days of the date of this Order.

DATED this 13 day of May, 2003.

BY THE COURT



PAUL M. GLENN
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded to the Bankruptcy Noticing Center (BNC) on May 13, 2003 for service by U. S. Mail to the parties listed below:

by: Charo
Deputy Clerk

Service list:

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