

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

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE  
CORPORATION, et al.,

Jointly Administered Under  
Case No.: 3:09-bk-7047-JAF  
Chapter 11

Debtors.

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NEIL F. LURIA, as Trustee for the TAYLOR,  
BEAN & WHITAKER PLAN TRUST,

Plaintiff,

v.

Adversary No.: 3:11-ap-520-JAF

GMAC MORTGAGE, LLC,

Defendant.

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**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**

This proceeding is before the Court on Defendant GMAC Mortgage, LLC's ("GMAC") Motion to Dismiss the Complaint (Doc. 5; *see also* Doc. 1, Complaint), Plaintiff Neil F. Luria's response in opposition thereto (Doc. 15, the "Response"), and GMAC's reply brief (Doc. 16, the "Reply"). For the reasons stated herein, the Motion to Dismiss (Doc. 5) will be denied.

**I. BACKGROUND**

On August 24, 2009, Taylor, Bean & Whitaker Mortgage Corporation (the "Debtor"), filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, thereby commencing Case No. 3:09-bk-7047-JAF. On July 21, 2011, a joint plan of liquidation (the "Plan") was confirmed by this Court (Case No. 3:09-bk-7047-JAF [Doc. 3420]). The Plan

provides for the establishment of a liquidating trust and the appointment of Plan Trustee, Neil F. Luria, to administer the liquidating trust.

On August 19, 2011, Mr. Luria (hereinafter referred to as “Plaintiff”), commenced the instant adversary proceeding (Doc. 1, Complaint). Count I of the Complaint, brought pursuant to 11 U.S.C. § 547(b), seeks the avoidance of alleged preferential payments (in the aggregate amount of \$132,115.29) made to GMAC by the Debtor (Doc. 1 at 3-5; *see also* Ex. A). Counts II, III, IV, V, and VI seek to avoid, under both the Bankruptcy Code and the statutes of Florida, alleged fraudulent transfers (in the aggregate amount of \$238,410.88) made to GMAC by the Debtor (Doc. 1 at 5-10; *see also* Ex. B). Count VII seeks to recover such amounts, *supra*, by way of 11 U.S.C. § 550 (Doc. 1 at 10).

GMAC moved to dismiss the Complaint on the basis that Plaintiff failed to allege sufficient facts to support the instant preference and fraudulent transfer claims (Doc. 5). For the reasons stated below, the Court is not persuaded.

## **II. MOTION TO DISMISS STANDARD**

A motion to dismiss pursuant to Rule 12(b) 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.” To survive a Rule 12(b) 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). A “formulaic recitation of the elements of a cause of action will not do.” *Id.* Thus, 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. Preferential Transfers**

Count I of Plaintiff’s Complaint seeks to avoid two alleged preferential transfers pursuant to 11 U.S.C. § 547(b) (Doc. 1 at 3-5). This section of the Bankruptcy Code provides, in relevant part, for the avoidance of any transfer of an interest of the debtor in property—

- (1) to or for the benefit of a creditor;
- (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
- (3) made while the debtor was insolvent;
- (4) made—
  - (A) on or within 90 days before the date of the filing of the petition; [ . . . ]and
- (5) that enables such creditor to receive more than such creditor would receive if—
  - (A) the case were a case under chapter 7 of this title;
  - (B) the transfer had not been made; and
  - (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

Regarding Plaintiff's 11 U.S.C. § 547(b) claim, the Complaint alleges: (1) GMAC was a creditor of the Debtor at the time of the transfers; (2) at the time of the subject transfers, GMAC had or claimed a right to payment on account of an obligation owed to GMAC by the Debtor; (3) the transfers were made within 90 days of the Petition Date; (4) the transfers were made for, or on account of, antecedent debt(s) owed by the Debtor prior to the transfers being made; (5) the transfers related to the antecedent debt(s) are identified by Exhibit A; and (6) as a result of the transfers, GMAC received more than it would have received if: (i) the Debtor's case were a case under Chapter 7 of the Bankruptcy Code, (ii) the transfers had not been made, and (iii) GMAC received payment of its claims under the provisions of the Bankruptcy Code (Doc. 1 at 3-5, Ex. A).

Exhibit A provides detailed information with respect to the subject transfers (Doc. 1, Ex. A). Specifically, Exhibit A delineates: (1) the name of the transferee (GMAC); (2) the check numbers related to the transfer(s); (3) the date the check(s) "cleared"; and (4) the precise amount of each transfer (\$69,518.91 and \$62,596.38, respectively) (Doc. 1, Ex. A).

In support of its Motion to Dismiss, GMAC maintains the Complaint fails to state a cause of action under § 547 that is plausible on its face because the factual allegations of the Complaint "fail to identify or plausibly suggest" that GMAC was a creditor of the Debtor, the nature and amount of an antecedent debt, or that GMAC would receive less than 100% payout in a hypothetical Chapter 7 liquidation (Doc. 5 at 8). The Court, however, finds these arguments unpersuasive.

Specifically, claims brought pursuant to § 547 are subject to the notice pleading standard of Rule 8(a)(2) of the Federal Rules of Civil Procedure, made applicable by Rule 7008 of the Federal Rules of Bankruptcy Procedure. *Tousa Homes, Inc. v. Palm Beach Newspapers, Inc. (In re Tousa, Inc.)*, 442 B.R. 852, 856 (Bankr. S.D. Fla. 2010). Accordingly, under Rule 8(a)(2), a plaintiff must provide only a “short and plain statement of the claim showing that [he or she] is entitled to relief.” Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8(a)(2) is to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly, supra*, 127 S.Ct. at 1959.

Here, attached to the Complaint is Exhibit A, which indicates GMAC received particular transfers from the Debtor, in specific amounts, on specific dates (Doc. 1, Ex. A). Further, Exhibit A identifies the transactions that relate to the purported antecedent debt(s) (Doc. 1, Ex. A). Plaintiff also pleads facts in support of his claim that such transfers were made while the Debtor was either insolvent or rendered insolvent thereby (Doc. 1 at 4). Specifically, Plaintiff incorporates by reference the Second Amended and Restated Disclosure Statement, filed in the underlying bankruptcy case (3:09-bk-7047-JAF [Doc. 2144]) (Doc. 1 at 4). This document lends factual support to Plaintiff’s claim(s) of insolvency. On a motion to dismiss, the Court may consider documents attached to the complaint or directly referred to in the complaint. *Jordan v. Miami-Dade County*, 439 F. Supp. 2d 1237, 1240 (S.D. Fla. 2006) (citing *Solis-Ramirez v. United States Dep’t of Justice*, 758 F. 2d 1426, 1430 (11th Cir. 1985)).

With respect to GMAC’s contention that Plaintiff has failed to set forth facts in support of the assertion that GMAC did not provide reasonable equivalent value in exchange for the subject transfers, as stated in *Schnelling v. Crawford (In re James River Coal Co.)*:

The presence or absence of reasonably equivalent value is a question of fact which does not [typically] appear upon the face of [a] complaint and which therefore does not require dismissal. As with other affirmative defenses and fact questions, the issue will be decided after discovery upon the filing of a properly supported motion for summary judgment or at trial.

360 B.R. 139, 167 (Bankr. E.D. Va. 2007).

Likewise, whether GMAC received more by way of the subject transfers than it would have under a Chapter 7 liquidation is a factual question inappropriate for resolution on a motion to dismiss. See *HLI Creditor Trust v. Export Corp. (In re Hayes Lemmerz Int'l, Inc.)*, 313 B.R. 189 (Bankr. D. Del. 2004).

Based on the foregoing, the Court finds the allegations of the Complaint, taken in conjunction with the factual assertions included in Exhibit A, provide sufficient information under Rule 8(a)(2) for GMAC to admit or deny the allegations and assert any affirmative defenses. Accepted as true, the assertions in Count I adequately state a claim that is plausible on its face under *Twombly*, *supra*, and its progeny. See *In re Touse, Inc.*, 442 B.R. at 856. Therefore, GMAC's Motion to Dismiss Count I of the Complaint is denied.

#### B. Actual Fraud

Counts II and IV of the Complaint seek to avoid alleged fraudulent transfers under both the Bankruptcy Code and the Statutes of Florida (Doc. 1 at 5-8, Ex. B). Section 548(a)(1)(A) of the Bankruptcy Code provides for the avoidance of transfers of property of the debtor made with "actual intent to hinder, delay or defraud" within two years of the petition date. 11 U.S.C. § 548(a)(1)(A). Florida Statutes § 726.105(1)(A) provides for the avoidance of transfers of property of the debtor made with "actual intent to hinder, delay or defraud" within four years of the petition date. Fla. Stat. § 726.105(1)(A).

In the Motion to Dismiss, GMAC contends the Complaint fails to satisfy the heightened pleading standard for actual fraud pursuant to Rule 9(b) of the Federal Rules of Civil Procedure (Doc. 5 at 6-8; Doc. 16 at 5-6). For the reasons that follow, the Court does not agree.

Attached to the Complaint is Exhibit B, which delineates a multitude of transfers that purportedly transpired from August 31, 2005 through December 22, 2008 (Doc. 1, Ex. B). Exhibit B provides: (1) the name of the transferor; (2) the name of the transferee (GMAC); (3) the check or wire numbers related to the subject transfers; (4) the last four digits of the originating account number; (5) the date the transferred amounts “cleared”; and (6) the precise amount of each transfer (Doc. 1, Ex. B).

Rule 9(b), made applicable by Rule 7009 of the Federal Rules of Bankruptcy Procedure, requires a party alleging fraud to state with particularity the circumstances constituting fraud. Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009. A claim asserting an actual fraudulent transfer under section 548 “must satisfy the particularity requirement of Rule 9(b).” *Morris v. Zelch (In re Regional Diagnostics, LLC)*, 372 B.R. 3, 17 (Bankr. N.D. Ohio 2007) (a plaintiff is required to “state with particularity the circumstances constituting fraud according to the requirements imposed by [R]ule 9(b)” when he or she alleges a fraudulent transfer based on actual fraud). Malice, intent, knowledge, and other conditions of a person’s subjective intent, however, “may be alleged generally.” Fed. R. Civ. P. 9(b).

Additionally, the requirements of Rule 9(b) may be “relaxed” when a plaintiff alleges facts particularly within the knowledge of the defendant. *Gold v. Winget (In re NM Holdings Co., LLC)*, 407 B.R. 232, 258 (Bankr. E.D. Mich. 2009). This principle has been applied in bankruptcy cases where a trustee brings the claim and, as such, is a third-party outsider with

limited information. *Id.* While “badges of fraud” may help to establish the fraudulent intent of a debtor, “it is not the fraudulent intent of the debtor that must be pled with particularity; rather it is the ‘circumstances constituting fraud.’” *Id.* at 262. Such alleged circumstances must, at a minimum, identify the transferor and transferee, the date of the transfer, and the amount of the transfer. *See id.*

In this instance, the Court finds Exhibit B, taken in conjunction with the allegations in the body of the Complaint, sets forth with particularity the circumstances that constitute the alleged fraud. Thus, the Court finds Plaintiff has stated a plausible claim for relief under both 11 U.S.C. § 548(a)(1)(A) and Florida Statutes § 726.105(1)(A). Accordingly, the Motion to Dismiss Counts II and IV are denied.

### C. Constructive Fraud

Count III of the Complaint is brought pursuant to § 548(a)(1)(B) of the Bankruptcy Code, which provides for the avoidance of constructive fraudulent transfers of property of a debtor: (1) made within two years of the petition date; and (2) made for less than reasonably equivalent value while the transferor was insolvent or was rendered insolvent thereby. Counts V and VI are brought pursuant to Florida Statutes §§ 726.105(1)(b) and 726.106(1), which provide for the avoidance of constructively fraudulent transfers made within four years of the petition date.<sup>1</sup>

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<sup>1</sup> Florida Statutes § 726.105(1)(b) prohibits those transfers that, regardless of whether a creditor’s claim arose before or after the subject transfer: (1) were made without reasonably equivalent value; and (2) leave the transferor with either an unreasonably small capital or debts beyond its ability to repay. As to a creditor whose claim arose before the subject transfer, Florida Statutes § 726.106(1) prohibits those transfers that were made: (1) without reasonably equivalent value; and (2) when the debtor was either insolvent at the time of the transfer or became insolvent as a result of the transfer.

Courts have held that Rule 9(b)'s particularity requirement does not apply to claims of constructive fraud. *See, e.g., In re NM Holdings Co., LLC*, 407 B.R. at 259; *State Bank & Trust Co. v. Spaeth (In re Motorwerks, Inc.)*, 371 B.R. 281, 295 (Bankr. S.D. Ohio 2007). Such courts reason that constructive fraudulent transfer claims,

do not necessarily require proof that the defendant engaged in some form of deceit, misrepresentation or fraudulent activity. In fact, a fraudulent transfer claim based on constructive fraud need only allege that the transfer was made without reasonably equivalent value while the debtor was insolvent. In other words, there is no reason to require a trustee to plead a defendant's fraud or misconduct with specificity if such fraud or misconduct is not an element of the trustee's fraudulent transfer claim.

*Motorwerks*, 371 B.R. at 295 (citing *Giuliano v. U.S. Nursing Group (In re Lexington Healthcare Group, Inc.)*, 339 B.R. 570, 574–75 (Bankr. D. Del. 2006)) (internal citations omitted).

Florida Statutes §§ 726.105(1)(b) and 726.106(1) are similar to § 548(a)(1)(B) of the Bankruptcy Code in that they do not require an element of scienter. Consequently, the Court finds Rule 8(b)(2)'s more liberal standard of notice pleading is also applicable to the state law constructive fraud counts. Rule 8(b)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief.

In applying the aforementioned principals, the Court finds Plaintiff has met the minimal pleading requirements as to Counts III, V, and VI. More specifically, by way of Exhibit B, Plaintiff describes the alleged fraudulent transfers with particularity by providing the name of both the transferor and transferee (GMAC), the dates and amounts of each transfer, the check or wire number associated with each transfer, and the last four digits of the originating account for each transfer (Doc. 1., Ex. B).

As noted above, reasonably equivalent value is a factual question inappropriate for resolution at this stage of the proceedings. *In re James River Coal Co.*, 360 B.R. at 167. In addition, Plaintiff incorporates by reference a document that lends factual support to his claim of Debtor's insolvency (Doc. 1 at 4; *see* 3:09-bk-7047-JAF [Doc. 2144]).

Based on the foregoing, the Court finds Counts III, V, and VI assert plausible claims for constructive fraud. Moreover, the pleading in this regard adequately places GMAC on notice as to what Plaintiff's constructive fraud claims are and the basis upon which they rest. Accordingly, GMAC's Motion to Dismiss these counts for failure to state a claim will be denied.

#### D. Recovery of Property

Count VII of the Complaint is brought under § 550 of the Bankruptcy Code, which 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. 11 U.S.C. § 550.

Here, Plaintiff has alleged that the transfers at issue are avoidable pursuant to the aforementioned Bankruptcy Code sections. As the Court has permitted Counts I through VI to stand, it follows that Plaintiff has sufficiently pleaded his claim for recovery of any avoided transfers. *See Vaughn v. Graybeal, Jr. (In re CM Vaughn, LLC)*, No. 10-06105-MGD, 2010 WL 3397425, at \*3 (Bankr. N.D. Ga. June 21, 2010).<sup>2</sup> Thus, GMAC's Motion to Dismiss Count VII is denied.

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

#### **IV. CONCLUSION**

For the foregoing reasons, it is **ORDERED**:

1. Defendant GMAC Mortgage, LLC's Motion to Dismiss the Complaint (Doc. 5) is denied.
2. Defendant GMAC Mortgage, LLC shall file an answer within twenty-one (21) days from the date of this Order.

**DATED** this 24th day of January, 2012 in Jacksonville, Florida.

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

**Copies to:**

Laura R. Fernandez, Attorney for Defendant  
Kristopher E. Aungst, Attorney for Plaintiff  
Elena L. Escamilla, United States Trustee