

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

In re:

TAYLOR, BEAN & WHITAKER MORTGAGE
CORPORATION, HOME AMERICA
MORTGAGE, INC., et al.,

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

Debtors.

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

Plaintiff,

v.

Adversary No.: 3:11-ap-960-JAF

BLUE CROSS BLUE SHIELD OF GEORGIA, INC.,

Defendant.

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

This proceeding is before the Court on Defendant Blue Cross Blue Shield of Georgia, Inc.'s ("BCBS") Motion to Dismiss the Complaint (Doc. 4; *see also* Doc. 1, Complaint), Plaintiff Neil F. Luria's response in opposition thereto (Doc. 8, the "Response"), and BCBS's reply brief (Doc. 9, Reply). For the reasons stated herein, the Motion to Dismiss (Doc. 4) will be granted in part and denied in part.

I. BACKGROUND

On November 25, 2009, Home America Mortgage, Inc. (the "Debtor") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, thereby

commencing Case No. 3:09-bk-10023-JAF (jointly administered under 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 (“Plaintiff”), to administer the liquidating trust.

On November 23, 2011, Plaintiff commenced the instant adversary proceeding (Doc. 1). Counts I through V of the Complaint seek to avoid, under both the Bankruptcy Code and the statutes of Florida, alleged fraudulent transfers (in the aggregate amount of \$198,056.35) made to BCBS by the Debtor (Doc. 1 at 3-8; *see also* Ex. A). Count VI seeks to recover such monies, *supra*, by way of 11 U.S.C. § 550 (Doc. 1 at 8-9).

BCBS moved to dismiss the Complaint on the basis that the Complaint fails to state a plausible claim for relief (Doc. 4 at 7). For the reasons stated below, the Court is only partially 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. Actual Fraud

Counts I and III of the Complaint seek to avoid alleged fraudulent transfers under both the Bankruptcy Code and the statutes of Florida (Doc. 1 at 3-4, 5-6; *see also* Ex. A). 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 both the Motion to Dismiss and the Reply, BCBS 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. 4 at 7-8; Doc. 9 at 2-4). For the reasons that follow, the Court agrees to the extent set forth below.

Attached to the Complaint is Exhibit A, which delineates five (5) specific transfers that purportedly occurred between December 22, 2005 and March 20, 2006 (Doc. 1, Ex. A). Exhibit A provides: (1) the name of the transferee (BCBS); (2) the check or wire number related to the subject transfers; (3) the last four digits of the originating account number; (4) the date the transferred amounts “cleared”; and (5) the precise amount of each transfer (Doc. 1, Ex. A).

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 A, taken in conjunction with the allegations in the body of the Complaint, sets forth with particularity the circumstances that constitute the alleged fraud—to the extent such claims are within the statutory look-back period. While the Court finds Plaintiff has stated a plausible claim for relief under Florida Statutes § 726.105(1)(A), Plaintiff has not stated a plausible claim under 11 U.S.C. § 548(a)(1)(A). More particularly, the transfers delineated in Exhibit A occurred more than two years prior to the Petition Date.¹ Accordingly, the Motion to Dismiss Count I is granted. The Motion to Dismiss Count III, however, is denied since the transfers specified in Exhibit A occurred within four years of the Petition Date.

B. Constructive Fraud

Counts II, IV, and V of the Complaint seek to avoid, under both the Bankruptcy Code and the statutes of Florida, transfers that are alleged to have been conducted by way of constructive fraud. More particularly, Count II is brought pursuant to § 548(a)(1)(B) of the Bankruptcy Code, which provides for the avoidance of constructively 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 IV and V are brought pursuant to Florida Statutes §§ 726.105(1)(b) and

¹ As previously noted, the Petition Date in this case was November 25, 2009; therefore, any claim arising under 11 U.S.C. § 548(a)(1)(A) must pertain to a transfer occurring on or before November 25, 2007. The most recent transfer specified on Exhibit A is alleged to have occurred on March 20, 2006 (*see* Doc. 1, Ex. A).

726.106(1), which provide for the avoidance of constructively fraudulent transfers made within four years of the petition date.²

As noted above, Plaintiff has not specified any transfer(s) occurring within two years of the Petition Date. Therefore, Count II, brought pursuant to § 548(a)(1)(B) of the Bankruptcy Code, shall be dismissed.

With respect to Counts IV and V, 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) do not require an element of scienter. Consequently, the Court finds Rule 8(b)(2)'s more liberal standard of notice pleading is

² 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.

applicable to the state law constructive fraud counts. Rule 8(b)(2) requires only a short and plain statement of the claim showing the pleader is entitled to relief.

In applying the aforementioned principals, the Court finds Plaintiff has met the minimal pleading requirements as to Counts IV, and V. To illustrate, by way of Exhibit A, Plaintiff describes the alleged fraudulent transfers with particularity by providing: (1) the name of the transferee (BCBS); (2) the check or wire number associated with the subject transfers; (3) the last four digits of the originating account number; (4) the date the transferred amounts “cleared”; and (5) the precise amount of each transfer (Doc. 1, Ex. A).

In addition, 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, 8). 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)). Furthermore, whether the instant transfers were made in exchange for reasonably equivalent value is a factual question inappropriate for resolution at this stage of the proceedings. *Schnelling v. Crawford (In re James River Coal Co.)*, 360 B.R. 139, 167 (Bankr. E.D. Va. 2007).

Based on the foregoing, the Court finds Count II of the Complaint is due to be dismissed. Counts IV, and V, however, assert plausible claims for constructive fraud under the statutes of Florida. Exhibit A provides sufficient information under Rule 8(a)(2) for BCBS to admit or deny the allegations and assert any affirmative defenses. Accepted as true, the assertions in Counts IV and V adequately state a claim that is plausible on its face under *Twombly*, *supra*, and

its progeny. Therefore, BCBS's Motion to Dismiss Counts IV and V of the Complaint is denied.

C. Recovery of Property

Count VI of the Complaint is brought under section 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 Code sections. As the Court has permitted Counts III, IV, and V to stand, it follows that Plaintiff has sufficiently pleaded his claim for recovery of any avoided transfers. *See Vaughn v. Graybeal (In re CM Vaughn, LLC)*, No. 10-06105-MGD, 2010 WL 3397425, at *3 (Bankr. N.D. Ga. June 21, 2010).³ Thus, BCBS's Motion to Dismiss Count VI is denied.

IV. CONCLUSION

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

1. Defendant Blue Cross Blue Shield of Georgia, Inc.'s Motion to Dismiss the Complaint (Doc. 4) is granted in part and denied in part.
2. Counts I and II of the Complaint (Doc. 1) are dismissed.
3. Counts III, IV, V, and VI of the Complaint (Doc. 1) are sustained.

³ 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.

4. Defendant Blue Cross Blue Shield of Georgia, Inc. shall file a responsive pleading within twenty-one (21) days of the date of this Order.

DATED this 22nd day of March, 2012 in Jacksonville, Florida.

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

Copies to:

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Elena L. Escamilla, United States Trustee