UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Lonnie/Susan Miller	)	
	)	Case No. 08-3345
Debtor(s)	)	
	)	(Related Case: 08-30460)
Lonnie Miller, et al.	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
Federal Deposit Ins. Co.	)	
	)	
Defendant(s)	)	

ORDER

This cause comes before the Court on the Motion of the Defendant to Dismiss. (Doc. No. 5). Said Motion is brought against the Complaint of the Plaintiffs to Determine Amount of Debt and Validity of Lien. (Doc. No. 1). In support of their respective positions, each of the Parties submitted written arguments to the Court. The Court has now had the time review these arguments, and finds that the Motion of the Defendant to Dismiss should be treated, pending a reasonable time for discovery, as a motion for summary judgment.

DISCUSSION

The Motion of the Defendant to Dismiss is brought pursuant to Federal Rule of Civil Procedure 12(b)(6), as made applicable to this proceeding by Bankruptcy Rule 7012. This rule provides that, upon motion, a court may dismiss a party's complaint for "failure to state a claim upon

which relief can be granted[.]" The purpose of this rule is to test the sufficiency of the pleadings. *Davis H. Elliot Co., Inc. v. Caribbean Utilities Co., Ltd.*, 513 F.2d 1176, 1182 (6th Cir. 1975).

In looking at the sufficiency of the pleadings, the question for purposes of Rule 12(b)(6) is simply whether the "plaintiff has stated a claim for which the law provides relief." *Petty v. County of Franklin, Ohio*, 478 F.3d 341 (6th Cir. 2007). Therefore, when ruling on a motion brought under Rule 12(b)(6), the court is not concerned with the truth of the allegations contained in a complaint. To the contrary, when considering a motion to dismiss pursuant to Rule 12(b)(6), this Court must accept as true all the factual allegations contained in the Plaintiff's complaint, construing those allegations in the light most favorable to the Plaintiff. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir.1983), *cert. denied*, 469 U.S. 826, 105 S.Ct. 105, 83 L.Ed.2d 50 (1984); *Bower v. Fed. Express Corp.*, 96 F.3d 200, 203 (6th Cir. 1996).

In this matter, the Plaintiffs in their complaint sought two overall forms of relief:

> (1) A reduction of the Defendant's claim against the Plaintiffs' bankruptcy estate; and
>
> (2) the avoidance of certain transfers made to the Defendant on account of the transfers being preferential for purposes of 11 U.S.C. § 547, and the Defendant's lack of authority to make the transfers.

Regarding the first form of relief, the Plaintiffs alleged a failure of consideration as the basis for their position that the Defendant's claim against their bankruptcy estate should be reduced. In particular, the Plaintiffs averred that, despite the existence of a promissory note showing a principal balance of $139,094.15, the original balance on the note should be determined to be $85,572.82, representing the amount of proceeds they actually received in the transaction. For their second form of relief, the avoidance of certain transfers made to the Defendant, the Plaintiffs made a number of averments: ineffectiveness of a financing statement due to its lapses under O.R.C. § 1309.515(C); filing of a

financing statement within the preference period of 11 U.S.C. § 547; and the Defendant's lack of authorization to file a financing statement pursuant to O.R.C. § 1309.509.

When ruling on 12(b)(6) motion, the form and sufficiency of a party's pleadings, including a complaint, are often assessed against Rule 8(a) of the Federal Rules of Civil Procedure. See 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1203 (3d ed. 2004) (discussing interplay between the two rules). This Rule, which embodies notice pleading, simply calls for a "short and plain statement of the claim showing that the pleader is entitled to relief." Also, under Rule 8, "[p]leadings must be construed so as to do justice." FED.R.CIV.P. 8(e).

On their face, the allegations made by the Plaintiffs are sufficient in both form and substance to support their requests for relief. First, a failure of consideration is a fundamental defense against a party seeking to enforce a contract. *See Rhodes v. Rhodes Indus., Inc. (1991)*, 71 Ohio App.3d 797, 807, 595 N.E.2d 441 ("Failure of consideration exists when a promise has been made to support a contract, but that promise has not been performed. Where a failure of consideration exists, the other party is thereby excused from further performance.") (internal citations omitted). Second, if the Plaintiffs are correct in their assertion that the Defendant failed to properly perfect its security interests in their property, or if the perfection occurred within the preference period of § 547, the Defendant's security interests are subject to avoidance under the Bankruptcy Code. *In Re General Coffee Corp.*, 828 F.2d 699, 705 (11th Cir. 1987); *McCarthy v. BMW Bank of North America*, 509 F.3d 528, 529-30 (C.A.D.C. 2007).

In opposition to the Plaintiffs' first request for relief, regarding a reduction in principal, the Defendant raised two issues: laches and the statute of frauds as set forth in 12 U.S.C. § 1823(e).[1]

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[1] "No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the

These matters, however, are better resolved after the record in this case has been more fully developed. First, the applicability of the doctrine of laches, which among other things looks to whether a party was prejudiced, will normally require consideration of matters beyond the pleadings, thus making resolution of the matter on a motion to dismiss under Rule 12(b)(6) improper. *See Brooks v. Bank of Boulder*, 891 F.Supp. 1469, 1482 (D.Colo. 1995). Second, the defense of the statute of frauds, such as that raised by the Defendant by way of 12 U.S.C. § 1823(e), does not preclude a party from raising defenses to contract formation, such as a lack of consideration. *Federal Deposit Ins. Corp. v. Leach*, 772 F.2d 1262, 1266-67 (6th Cir. 1985); *DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat. Bank of DiVall Insured Income Fund Ltd. Partnership v. Boatmen's First Nat. Bank of Kansas City*, 69 F.3d 1398 (8th Cir. 1995).

The record in this case should also be more fully developed on the second form of relief, concerning the validity of the Defendant's security interests. The issue of whether the Defendant holds valid security interests in the Plaintiffs' property will likely center on the timing of transfers made by the Plaintiffs. Specifically, when there is a lapse, but then a subsequent renewal, of a perfected Article 9 security interest, when does a transfer occur: at the time of the filing of the original financing statement; or when the subsequent financing statement is filed? Resolution of this issue, however, may have factual underpinnings – for example, the extent of the Defendant's authorization to make the transfers. O.R.C. § 1309.509.

For these reasons, it would appear that matters outside the pleadings are necessary to resolve the merits of the Plaintiffs' complaint. As a result, disposition of the Plaintiffs' complaint is not appropriate on the Defendant's Motion to Dismiss. At the same time, it would also appear that, after discovery is completed, some or all of the matters raised by the Plaintiffs' complaint may be adjudicated without the necessity for trial.

Corporation . . ."

To this end, it is established precedent in this Circuit that a court may, *sua sponte*, convert a motion under Rule 12(b)(6) into one for summary judgment. *Tackett v. M & G Polymers*, USA, LLC, — F.3d — , 2009 WL 874459 * 7 (6th Cir. 2009). For the reasons outlined above, the Court finds that such an action is appropriate. No ruling, however, will be made until the Parties have completed discovery and had the opportunity to submit supplemental arguments in support of their positions.

Accordingly, it is

ORDERED that the Defendant's Motion to Dismiss, be, and is hereby, STAYED.

IT IS FURTHER ORDERED that, in accordance with Bankruptcy Rules 7026 through 7037, the Parties may proceed with discovery.

IT IS FURTHER ORDERED that by Monday, June 8, 2009, the Parties Report to the Court regarding the disposition of this adversary proceeding. Thereafter, pursuant to FED.R.CIV.P. 12(d), and pending a further review by the Court, the Defendant's Motion to Dismiss will treated as one for summary judgment under Rule 56.

Dated: April 8, 2009

Richard L. Speer
United States
Bankruptcy Judge