

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE: *
*
INFOTOPIA, INC., *
* CASE NUMBER 02-44356
Debtor. *
*

*
MARC P. GERTZ, TRUSTEE, *
*
Plaintiff, *
*
vs. * ADVERSARY NUMBER 05-4021
*
DLD HOLDINGS, *
*
Defendants. *
*

M E M O R A N D U M O P I N I O N

The matter before the Court is the Motion to Dismiss filed by Defendant DLD Holdings ("Defendant") on April 7, 2005. The Motion seeks dismissal of the Complaint or, alternatively, for this Court to order Plaintiff Trustee Marc P. Gertz ("Trustee") to amend the Complaint to set forth more information concerning the alleged fraudulent transfers. The Trustee has not responded to the Motion to Dismiss.

This Court must take all of the facts set forth in the Complaint as true in determining a motion to dismiss pursuant to FED. R. CIV. P. 12(b)(6), made applicable to this proceeding through FED. R. BANKR. P. 7012. *Nisselson v. Drew Indus., Inc. (In re White Metal Rolling & Stamping Corp.)*, 222 B.R. 417, 420 (Bankr. S.D. N.Y. 1998).

The test most often applied to determine whether a complaint warrants dismissal for failure to

state a claim upon which relief could be granted originated in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957):

In appraising the sufficiency of the complaint we follow, of course, the accepted 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.

Davidson v. Bank of New England, N.A. (In re Hollis & Co.), 86 B.R. 152, 155 (Bankr. E.D. Ark. 1988).

Defendant argues that the Complaint must be dismissed because the Trustee has failed to plead with specific facts the allegations of fraudulent transfer, as required by FED. R. CIV. P. 9(b), made applicable to this proceeding through FED. R. BANKR. P. 7009.

Rule 9(b) requires that "in all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Fed.R.Civ.P. 9(b). . . . Although a plaintiff must plead with particularity the circumstances of the alleged fraud, a plaintiff need not plead the "date, place or time" of the fraud so long as they use an "alternative means of injecting precision and some measure of substantiation into their allegations of fraud." [Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3rd Cir. 1984).] Especially in bankruptcy cases, where the plaintiff is a trustee acting on behalf of the estate or a group of creditors, courts apply Rule 9(b) with greater flexibility recognizing that trustees often lack knowledge or have only secondhand knowledge of prepetition fraudulent acts involving the debtor and third parties.

Pardo v. Avanti Corporate Health Sys., Inc. (In re APF Co.), 274 B.R. 634, 638 (Bankr. Del. 2001).

Rule 8 of the FED. R. CIV. P., applicable to this proceeding through FED. R. BANKR. P. 7008, only requires a "a short and plain statement of the claim showing that the pleader is entitled to

relief." "Reading Rule 9 in conjunction with Rule 8, Plaintiff's Complaint must provide a short and simple description of the factual basis to support an allegation of fraud." *In re Hollis & Co.* 86 B.R. at 156. In the instant Complaint, the Trustee has pled that during the one year period prior to the filing of the bankruptcy petition, while the Debtor was insolvent (or that the Debtor became insolvent as a result of such transfers), the Debtor transferred money or property having the approximate value of Two Hundred Thousand Dollars (\$200,000.00). The Trustee has also pled the other requisite elements of a cause of action for fraudulent transfer. Defendant argues that, because the Trustee fails to allege whether the allegedly fraudulent transfer consist of a single or multiple transfers and when such transfers were made, the Complaint must be dismissed. As set forth in *In re APF Co., supra*, it is not necessary for the Trustee to plead the date, place and time of the alleged fraudulent transfers. Here, the Trustee has pled sufficient facts to withstand a motion to dismiss.

Defendant also argues that the Complaint is deficient because the Trustee has pled allegations based upon information and belief. The Trustee alleges that, "[u]pon information and belief, the Debtor made the Transfers with the actual intent to hinder, delay or defraud any entity to which the Debtor was or became indebted, on or after the date the Transfers were made." (Complaint, ¶ 8.)

Ordinarily, a pleader cannot allege fraud based upon information and belief unless the facts are "peculiarly within the opposing party's knowledge." *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), cert. denied, 421 U.S. 976, 44 L. Ed. 2d 467, 95 S. Ct. 1976 (1975); accord *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d at 664. . . . Since a bankruptcy trustee rarely has personal knowledge of the events preceding his

appointment, he can plead scienter based upon information and belief provided he pleads the basis of his belief. See *Devaney v. Chester*, 813 F.2d 566, 569 (2d Cir. 1987); *Davidson v. Twin City Bank (In re Hollis & Co.)*, 83 B.R. 588, 590 (Bankr. E.D. Ark. 1988); *Hassett v. Weissman (In Re O.P.M. Leasing Servs., Inc.)*, 35 B.R. 854, 862-63 (Bankr. S.D.N.Y. 1983), *rev'd* on other grounds, 48 B.R. 824 (S.D.N.Y. 1985); *Hassett v. Zimmerman (In re O.P.M. Leasing Servs., Inc.)*, 32 B.R. 199, 202 (Bankr. S.D.N.Y. 1983).

In re White Metal Rolling & Stamping Corp., 222 B.R. at 428.

In the instant case, the Trustee has pled the elements of a cause of action pursuant to 11 U.S.C. § 548. The facts, although sketchy, are sufficient to withstand a motion to dismiss because they support a cause of action against the Defendant. This Court finds that dismissal is not proper because this Court cannot conclude that there is no set of facts that would entitle the plaintiff to recover.

The Complaint meets the bare requirements for notice pleading. This Court directs Defendant to answer the Complaint on or before October 26, 2005.

An appropriate Order will follow.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

