

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 10-50494
)
FAIR FINANCE COMPANY,) Chapter 7
)
Debtor.) Chief Judge Pat E. Morgenstern-Clarren
)
_____))
)
BRIAN A. BASH, TRUSTEE,) Adversary Proceeding No. 14-1169
)
Plaintiff,)
)
v.)
)
THE SYDNEY JACKSON WILLIAMS, JR.)
IRREVOCABLE TRUST U/A/D 12-27-04,) **MEMORANDUM OF OPINION**
et al.,) **AND ORDER**¹
)
Defendants.)

The defendants² move under Federal Civil Rule 12(b)(6) to dismiss the amended complaint and the plaintiff-trustee opposes that request. (Docket 20, 24, 25). For the reasons stated, the court finds that the trustee adequately pleaded his Bankruptcy Code § 550(a) claim and the motion to dismiss is denied.

¹ This opinion is not intended for publication, either in print or electronically.

² The defendants are: The Sydney Jackson Williams Jr. Irrevocable Trust U/A/D 12-27-04; The Sydney Jackson Williams Jr. Irrevocable Trust of 2006 U/A/D 3-15-06; David Charles, in his capacity as trustee of the two trusts; and Sydney Jackson Williams, Jr., Sydney J. Williams, Jacqueline M. Williams, Jane Doe, and John Does 1-5 in their capacity as beneficiaries of the trust.

JURISDICTION

This adversary proceeding arises in a case referred to this court under the general order of reference entered by the United States District Court for the Northern District of Ohio. *See* General Order No. 2012-7. This court has subject matter jurisdiction under 28 U.S.C. § 1334, and the claim raised by the plaintiff is a core proceeding under 28 U.S.C. § 157(b)(2)(H). As the court's decision on the motion is interlocutory, the jurisdictional concerns underlying *Stern v. Marshall*, 131 S.Ct. 2594 (2011) and related case authority are not presented here.

DISCUSSION

The Amended Complaint

In a separate adversary proceeding, the district court granted the trustee a default judgment against DC Investments, LLC (DCI) avoiding about \$88 million in fraudulent transfers made by the debtor Fair Finance Company to DCI (the avoidance judgment).³ The court avoided the transfers under Ohio Revised Code § 1336.04 and § 1336.05 and Bankruptcy Code § 544. 11 U.S.C. § 544. The defendants were not parties to that proceeding.

In this case, the trustee alleges that after DCI received the money from the debtor, DCI transferred approximately \$762,000.00 of those funds to or for the benefit of the defendants. He seeks to recover the funds from the defendants as immediate or mediate transferees of DCI under Bankruptcy Code § 550(a)(2).

³ The avoidance judgment also (1) provided that the trustee could recover the funds from DCI; and (2) granted default judgment against Fair Holdings, Inc. *See Bash, Trustee v. Fair Holdings, et al.*, case no. 5:12-cv-990 (N.D. Ohio), docket 17. The trustee alleges in the amended complaint now before the court that he has not been able to recover the money from DCI.

Civil Rule 12(b)(6): Dismissal for Failure to State a Claim

The defendants challenge the sufficiency of the amended complaint under Civil Rule 12(b)(6), which raises the issue of whether the trustee stated a cognizable legal claim. *See* FED. R. CIV. P. 12(b)(6) (made applicable by FED. R. BANKR. P. 7012(b)); *Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 517 (6th Cir. 2006). For the complaint to survive the motion—

it must—when the record is construed in the light most favorable to the nonmoving party and when all well-pled factual allegations are accepted as true—contain “either direct or inferential allegations respecting all material elements necessary for recovery under a viable legal theory.” *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc.*, 732 F.3d 645, 649 (6th Cir.2013) (citation and internal quotation marks omitted). Still, this court “need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.” *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 275-76 (6th Cir.2010) (citation and quotation marks omitted). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.’” *Republic Bank & Trust Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 246-47 (6th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). “Rather, ‘[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.’” *Id.* at 247 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)).

D'Ambrosio v. Marino, 747 F.3d 378, 383 (6th Cir. 2014). *See also Johnson v. City of Shelby, Mississippi*, 135 S.Ct. 346, 347 (2014) (noting that a plaintiff “must plead facts to show her claim has substantive plausibility”). If the court chooses to consider matters presented by a party that are outside the pleadings, then generally the motion must be treated as one for summary judgment. FED. R. CIV P. 12(d). However, matters of public record, such as the avoidance judgment and exhibits attached to the complaint, may be considered without doing so. *See*

Ouwinga v. Benistar 419 Plan Servs., Inc., 694 F.3d 783, 796 (6th Cir. 2012) (documents that are integral to the complaint may be considered on a motion to dismiss); *Buck v. Thomas M. Cooley Law School*, 597 F.3d 812, 816 (6th Cir. 2010) (noting that a court may take judicial notice of other court proceedings without converting a motion into one for summary judgment); *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001) (stating that the public record, orders, as well as items appearing in the record of the case, and exhibits attached to the complaint may be considered on a motion to dismiss).

The Motion to Dismiss

The defendants argue that the trustee's prosecution of this claim violates their right to due process of law, conflicts with principles of claim and issue preclusion, and ignores Federal Civil Rule 19 requirements regarding necessary parties. They also argue that dismissal is required because the trustee is time-barred from bringing an avoidance action against them. As dismissal under Rule 12(b)(6) may be appropriate when a claim is time-barred, the court will address that issue first. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012).

To put the statute of limitations argument into perspective, it is helpful to remember that avoidance and recovery are "distinct concepts and processes," which are governed by separate sections of the Bankruptcy Code and which have separate statutes of limitation. *Suhar v. Burns (In re Burns)*, 322 F.3d 421, 427 (6th Cir. 2003). Consequently, the issues of avoidance and recovery, while conceptually related, "must be kept analytically separate." *Taunt v. Hurtado (In re Hurtado)*, 342 F.3d 528, 532 (6th Cir. 2003). Avoidance nullifies a transfer and, in some cases, that is all the relief that is needed. In other cases, further relief is needed to recover the transferred property or its value. In those cases, the transfer must be avoided before the

transferred property or its value can be recovered under 11 U.S.C. § 550. *Burns*, 322 F.3d at 427 n.3. And it is only in that last group of cases that “we . . . look to section 550(a) to determine to whom the trustee may look for recovery of the property.” *Harrison v. Brent Towing Co. (In re H&S Transp. Co.)*, 939 F.2d 355, 358 (6th Cir. 1991).

The trustee unquestionably timely filed the § 544 complaint that led to the district court entering the avoidance judgment. *See* 11 U.S.C. § 546(a). The time limit for bringing a § 550 action to recover transferred property is set by § 550(f). That section states (in relevant part) that the proceeding may not be filed after “one year after the avoidance of the transfer on account of which recovery under this section is sought[.]” 11 U.S.C. § 550(f)(1). The defendants acknowledge that the trustee filed the proceeding against them within that one year limit.

Section 550(a) permits recovery “to the extent a transfer is avoided under section 544[.]” 11 U.S.C. § 550(a). The defendants’ argument focuses on the fact that the trustee avoided the transfers as to the initial transferee DCI, while he is now seeking to recover from the defendants as subsequent transferees. They argue that this action is time-barred because the trustee does not have an avoidance judgment that can serve as the basis for seeking recovery against *them*, and it is now too late under § 546(a) to assert such an avoidance claim. The trustee, on the other hand, argues that the claim is timely because the avoidance judgment provides the requisite basis for seeking recovery from the defendants.

This same issue was addressed in *Sec. Investor Protection Corp. v. Bernard L. Madoff Inv. Sec. LLC*, 501 B.R. 26 (S.D. N.Y. 2013). There the district court concluded that “a subsequent-transferee defendant is entitled to bring a statute of limitations defense to avoidance only if the Trustee failed to bring any avoidance action with respect to the initial transfer (against

either the initial or subsequent transferee) within section 546(a)'s two-year limitations period.”

Id. at 35. In reaching that conclusion, the court noted that:

This result makes sense within the structure of the Bankruptcy Code's avoidance and recovery provisions. Effectively, what the defendants are arguing is that section 550(a)'s limitation on recovery “to the extent a transfer is avoided” obliges the Trustee to bring an avoidance claim in every recovery action against a subsequent transferee. A corollary of that proposition is that such avoidance claims must be timely brought within section 546(a)'s limitations period for avoidance actions. Such a requirement would import the section 546(a) statute of limitations into all recovery proceedings, thereby conflating the separate concepts of avoidance and recovery, and rendering section 550(f) a nullity. *See* 11 U.S.C. § 550(f). Indeed, the very terms of section 550(f), which bases the beginning of the running of the statute of limitations for recovery actions on the date of avoidance, suggests that Congress did not intend that actions seeking recovery would also require simultaneous avoidance against that defendant. Thus, the Court rejects the defendants' interpretation, as it would require the Trustee to bring duplicative avoidance actions within section 546(a)'s statute of limitations period against subsequent transferees where he has brought such an action against the initial transferee.

Additionally, the court pointed out that:

the section 550(f) statute of limitations reflects the difficulties that may be faced by a trustee in tracking down the various subsequent transfers that may occur after a debtor parts with his money. In a complex case like this one, it is unreasonable that the Trustee, who is a stranger to any non-debtor transactions, would be expected to bring all recovery proceedings against subsequent transferees within section 546(a)'s two-year period.

Id. at 35-36 (footnotes omitted).⁴

⁴ A trustee may, however, opt to bring an avoidance action against a subsequent transferee, rather than the initial transferee. *See Bash v. Textron Fin. Corp.*, No. 5:12-cv-987, – B.R. –, 2015 WL 224968 at *7 (N.D. Ohio Jan. 15, 2015) (adopting the reasoning of *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689 (11th Cir. 2005)).


This is sound reasoning and the court adopts it here. The trustee's recovery claim is not time-barred because the trustee filed a timely avoidance action against DCI as the initial transferee and then filed this claim to recover against the defendants as subsequent transferees within the time limit for recovery set by § 550(f).⁵

The defendants' remaining arguments are based on due process requirements, issue and claim preclusion, and the trustee's failure to include them as necessary parties to the avoidance litigation. These arguments are not appropriately addressed through a Civil Rule 12(b)(6) motion because they are directed to an issue of proof rather than the sufficiency of the amended complaint. The defendants also focus on whether the trustee may use the avoidance judgment to prove his case in this proceeding. As the trustee accurately notes, his amended complaint does not rely on the avoidance judgment and includes sufficient factual allegations to establish that the previously avoided transfers to DCI were actual and constructively fraudulent transfers. Consequently, dismissal based on these issues is not warranted.

CONCLUSION

The defendants' motion to dismiss is denied.

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge

⁵ The cases cited by the defendants were considered and do not warrant a different conclusion.