

THIS OPINION IS NOT INTENDED  
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re: ) Case No. 04-11736  
)  
MARILYN ANN YUHASZ, ) Chapter 13  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
\_\_\_\_\_)  
)  
MARILYN ANN YUHASZ, ) Adversary Proceeding No. 04-1167  
)  
Plaintiff, )  
)  
v. )  
)  
JEAN M. BESS, et al., ) **MEMORANDUM OF OPINION**  
)  
Defendants. )

The defendant moves to dismiss the plaintiff-debtor's second amended complaint under federal rule of civil procedure 12(b)(6) on the ground that it fails to state a claim upon which relief can be granted. (Docket 51). The plaintiff opposes that request. (Docket 52).

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(H).

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**DISCUSSION**

**The Debtor's Claims**

The debtor's second amended complaint<sup>1</sup> states that "the within action is brought pursuant to 11 U.S.C. §§ 544(b), 522(h), 548, 549 and 550 [and] Ohio's Uniform Fraudulent Transfer Act . . . ," and it includes three counts. The first two counts request relief against defendant Jean Bess, the debtor's daughter. Count I alleges that the debtor involuntarily and without consideration transferred her home to Ms. Bess and asserts that this was a fraudulent transfer within the meaning of bankruptcy code § 544(b)(1) and Ohio's Uniform Fraudulent Transfer Act. Count II alleges that the debtor's social security check was deposited into a joint account which she had with Ms. Bess and that Ms. Bess removed the money and refused to return it to the debtor. This is asserted to be a fraudulent transfer within the meaning of bankruptcy code § 548. Count III of the complaint asks that parties with an interest in the transferred real property be required to assert their interest or be forever barred from doing so.

**The Motion to Dismiss**

Federal rule of civil procedure 12(b)(6) addresses the sufficiency of a plaintiff's claim for relief. *See* FED. R. CIV. P. 12(b)(6) (providing for a motion to dismiss a claim for "failure to state a claim upon which relief can be granted") (applicable in adversary proceedings under FED. R. BANKR. P. 7012). In considering a motion made under this rule, "[t]he court must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and

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<sup>1</sup> The debtor filed a second amended complaint with leave of court. (Docket 40, 41, 45). This is the pleading which the defendant's motion addresses.

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determine whether the plaintiff can prove a set of facts in support of [her] claims that would entitle [her] to relief.” *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 360 (6th Cir. 2001). “In order for dismissal to be proper, it must appear beyond doubt that the plaintiff would not be able to recover under any set of facts that could be presented consistent with the allegations of the complaint.” *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 346 (6th Cir. 2000). To survive a rule 12(b)(6) motion, “[A] complaint . . . must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory’.” *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir. 1998) (quoting *Sogevalor v. Penn Cent. Corp.*, 771 F. Supp. 890, 893 (S.D. Ohio 1991) (alteration in original)).

Ms. Bess first moves to dismiss on the basis that the debtor has failed to state a claim under bankruptcy code § 522(h). That section permits a debtor to exercise the trustee’s avoiding powers to the extent the debtor could have exempted the property under § 522(g)(1) if the trustee had avoided the transfer. Section 522(h) provides that:

(h) The debtor may avoid a transfer of property of the debtor . . . to the extent that the debtor could have exempted such property under subsection (g)(1) of this section if the trustee had avoided such transfer, if—

(1) such transfer is avoidable by the trustee under section 544, 545, 547, 548, 549, or 724(a) of this title or recoverable by the trustee under section 553 of this title; and

(2) the trustee does not attempt to avoid such transfer.

11 U.S.C.A. § 522 (h). And § 522(g)(1), in turn, provides that:

(g) Notwithstanding sections 550 and 551 of this title, the debtor may exempt under subsection (b) of this section property that the trustee recovers under section 510(c)(2), 542, 543, 550, 551, or 553

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of this title, to the extent that the debtor could have exempted such property under subsection (b) of this section if such property had not been transferred, if-

(1)(A) such transfer was not a voluntary transfer of such property by the debtor; and

(B) the debtor did not conceal such property[.]

11 U.S.C.A. § 522(g)(1). Read together, the two sections allow a debtor to avoid a transfer of property under §§ 544 and 548 (or any of the trustee's avoidance powers) if these conditions are met: (1) the trustee does not attempt to avoid the transfer; (2) the debtor did not conceal the property; (3) the debtor did not voluntarily transfer the property; and (4) the debtor could have exempted the property. *See Trentman v. Meritech Mortgage Servs. (In re Trentman)*, 278 B.R. 133, 135 (Bankr. N.D. Ohio 2002).

The debtor's response to the motion to dismiss states that she intended to assert a claim for avoidance under § 522(h). A review of the complaint, however, indicates that she did not do so. Although the complaint refers to § 522(h), it does not state a claim under that section because it fails to include either direct or inferential allegations that: (1) the trustee does not seek to avoid the transfers; or (2) the debtor could have exempted the property at issue. The debtor has, therefore, failed to state a claim under § 522(h).

The debtor's complaint specifically requests avoidance of transfers to Ms. Bess under §§ 544 and 548. Ms. Bess also requests dismissal based on the debtor's lack of standing to bring an avoidance action.<sup>2</sup> There is, however, a split in the case authority regarding a chapter 13 debtor's ability to bring an avoidance action outside the context of § 522(h). *See, for example,*

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<sup>2</sup> Ms. Bess's brief asserts that the debtor lacks standing to bring a § 548 action. Presumably, this argument was also intended to address the debtor's § 544 claim.

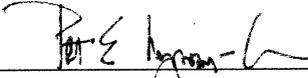
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*Houston v. Eiler (In re Cohen)*, 305 B.R. 886 (B.A.P. 9th Cir. 2004) (upholding a chapter 13 debtor's right to exercise the avoidance powers) and *In re Lott*, 196 B.R. 768, 776-77 (Bankr. W.D. Mich. 1996) (holding that a chapter 13 debtor does not have standing to exercise the avoidance powers). Additionally, decisions on this issue can hinge on whether avoidance is being sought for the benefit of creditors. *See, for example, Straight v. First Interstate Bank of Commerce (In re Straight)*, 200 B.R. 923, 928 (Bankr. D. Wyo. 1996) (holding that chapter 13 debtors could pursue avoidance actions so long as any recovery benefitted their unsecured creditors). The debtor's complaint clearly states a claim for avoidance under § 544 and § 548. As there is no controlling precedent on this issue and the decision on this issue may be fact sensitive, the court declines to address the issue of the debtor's standing in the context of this 12(b)(6) motion.

**CONCLUSION**

For the reasons stated, Ms. Bess's motion to dismiss the complaint for failure to state a claim is denied. A separate order will be entered reflecting this decision.

Date: 8 Dec 2014

  
\_\_\_\_\_  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Mary Ann Rabin, Esq.  
Jeremy Browner, Esq.

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MARILYN ANN YUHASZ, ) Adversary Proceeding No. 04-1167  
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Plaintiff, )  
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v. )  
)  
JEAN M. BESS, et al., ) **ORDER**  
)  
Defendants. )

For the reasons stated in the memorandum of opinion entered this same date,

IT IS, THEREFORE, ORDERED that the defendant's motion to dismiss for failure to state a claim is denied. (Docket 51).

Date: 8 June 2004

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Mary Ann Rabin, Esq.  
Jeremy Browner, Esq.