

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
JOHN C. THOMPSON, \*  
\*  
Debtor. \* CASE NUMBER 03-44830  
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\*  
RICHARD BUOPANE, *et al.*, \*  
\*  
Plaintiffs, \* ADVERSARY NUMBER 06-4011  
\*  
vs. \*  
\*  
JOHN C. THOMPSON, *et al.*, \*  
\*  
Defendants. \* THE HONORABLE KAY WOODS  
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ORDER DENYING MOTIONS TO DISMISS AND  
GRANTING LEAVE TO AMEND COMPLAINT  
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Before the Court are three motions to dismiss, as follows:  
(i) Motion to Dismiss for Failure to State a Claim for Relief; Motion for Judgment on the Pleadings filed by Defendants John C. Thompson, Tina Thompson and Omega Real Estate Co., LLC (collectively, the "John Thompson Defendants"); (ii) Motion of Defendant Omega Door Company, Inc. to Dismiss filed by Defendant Omega Door Company, Inc. ("Omega Door"); and (iii) Motion of Defendant R.G. Thompson to Dismiss filed by Defendant R.G. Thompson ("R.G. Thompson"). Plaintiffs Richard Buonpane and Georgeann Buonpane ("Plaintiffs") filed responses in opposition to each of the motions to dismiss. The Court held a hearing on the motions to dismiss on July 25, 2006. For the reasons set forth below, the

motions to dismiss are denied. To the extent necessary, Plaintiff is granted leave to amend the Complaint.

### **I. Factual Background**

By way of background, each of the three John Thompson Defendants and Omega Door previously filed a voluntary bankruptcy petition in this Court. These debtors were all related entities. R.G. Thompson has not filed a prior bankruptcy petition here, but he is an "insider" with respect to at least some of the other defendants, being the father of John Thompson. In addition, R.G. Thompson supplied the "new value" that permitted the plan of reorganization filed by Omega Door to be confirmed on October 12, 2005.

The Plaintiffs have a history with the John Thompson Defendants. On December 14, 1998 Richard Buonpane entered into a purchase agreement to sell all of the stock of Omega Door and its related companies to John and Tina Thompson. John and Tina Thompson signed a commercial promissory note for \$1 million dollars payable to Plaintiffs. Sky Bank acted as escrow agent in holding the stock as collateral for the promissory note. John and Tina Thompson defaulted on their obligations under the promissory note. As a consequence, on June 12, 2003, Plaintiffs obtained judgment against the Thompsons in the amount of \$750,000.00. Plaintiffs made a demand of the escrow agent to turn over the stock, which the Thompsons opposed.

On July 30, 2003, Tina Thompson filed a petition pursuant to Chapter 7 of the Bankruptcy Code, which was assigned Case No. 03-43808. She received a discharge in this case on December 1,

2003, but the case was reopened on March 19, 2004 in order to administer her interests in Omega Real Estate and Omega Properties, LLC.

On September 24, 2003, John Thompson filed a petition pursuant to Chapter 11 of the Bankruptcy Code, which was assigned Case No. 03-44830. During the course of this case, Plaintiffs were granted relief from stay to proceed with a state court action against the debtor regarding certain stock of Omega Door that was being held in escrow. On December 9, 2004, Plaintiffs filed a motion to convert or dismiss the case. Competing plans of reorganization were filed, as follows: on January 28, 2005, John Thompson filed a plan of reorganization and disclosure statement; and on February 25, 2005, Plaintiffs filed a competing plan. On April 26, 2005, the Court conducted a hearing on both disclosure statements and the parties agreed to enter into a compromise, which is now the essence of this dispute. On June 27, Debtor filed a motion to compromise, which sought approval of Settlement Agreement and Mutual Release by, between and among the John Thompson Defendants, Omega Door and Plaintiffs (the "Settlement Agreement"). On August 2, 2005, the Court held a hearing and approved the Settlement Agreement. Pursuant to the terms of the Settlement Agreement, Plaintiffs withdrew their proposed plan. On August 12, 2005, John Thompson filed an amended plan and disclosure statement. On October 7, 2005, the Court entered an Order confirming this plan.

On June 10, 2003, Omega Door filed a petition for relief pursuant to Chapter 11 of the Bankruptcy Code, which was assigned

Case No. 03-42905. On April 22, 2004, Plaintiffs filed a liquidating plan of reorganization and disclosure statement. Plaintiffs withdrew this plan on December 9, 2004. On June 30, 2004, Omega Door filed a complaint to determine the validity, priority and extent of liens, which involved the liens asserted by Plaintiffs, as well as liens asserted by others. On December 9, 2004, Plaintiffs moved to convert the case to a proceeding under Chapter 7. While the motion to convert was pending, on January 12, 2005, Omega Door filed a disclosure statement and plan of reorganization. On February 4, 2005, Plaintiffs again filed a plan of reorganization. After the Settlement Agreement was approved by the Court at the hearing on August 2, 2005, Plaintiffs withdrew their second proposed plan. On August 16, 2005, Omega Door filed an amended plan and disclosure statement, which plan was confirmed by the Court by Order dated October 12, 2005.

## **II. Standard for Dismissal**

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether a cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.<sup>1</sup>

In determining whether to grant a motion to dismiss, the court must analyze the complaint. To withstand dismissal, the complaint must provide a plain and clear statement of the claim that shows the plaintiff is entitled to relief, provide the defendant

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<sup>1</sup>The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

with notice of the claim, and the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under Fed.R.Civ.P. 12(e) for a more definite statement is the proper avenue rather than under Fed.R.Civ.P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (2003) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d. ed. 1990)).

FED. R. CIV. P. 12(b)(6), applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can not prove a set of facts to support a claim that would entitle the plaintiff to relief. *Conley*, 355 U.S. at 45-46. In determining the sufficiency of a complaint, the court must construe the complaint in the light most favorable to the plaintiff, accept the allegations set forth as true, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Med. Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge*, 282 F. Supp. 2d. at 803. However, the court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Lewis v. ABC Bus. Servs., Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998). Thus, in evaluating a 12(b)(6) motion, the court should

construe the complaint very liberally. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

### III. Terms of the Settlement Agreement

As set forth above, after a hearing on August 2, 2005, at which all defendants except R.G. Thompson were present and represented by counsel, this Court approved the Settlement Agreement by Order dated September 22, 2005. All parties represented that the Settlement Agreement was in the best interests of the bankruptcy estates of John Thompson and Omega Door. In addition, counsel for Omega Door specifically acknowledged that the proposed plan of Omega Door would have to be revised to conform to the terms of the Settlement Agreement. (See p. 17 of the Transcript of the Hearing on August 2, 2005 (hereafter cited as "8/2/2005 Tr.") (Mr. Mentzer: "I believe that the plan as proposed and the disclosure statement as it has been previously modified can, in fact, be modified with a minimum amount of work **in order to reflect those issues which have been resolved today** and would then be ready for approval.")) (Emphasis added.)

Relevant terms of the Settlement Agreement include the following:

Plaintiffs agreed to withdraw their competing plans and disclosure statements in the John Thompson and the Omega Door bankruptcy cases and also agreed to withdraw their motions to convert or dismiss these cases. (Settlement Agreement at p. 5, ¶ 1; see also 8/2/2005 Tr., pp. 9, 11, 12, 13, 14, 15, 17, 18, 20, 23.)

Plaintiffs agreed to cast their votes in favor of the plan of Omega Door and in favor of John Thompson's plan. (Settlement

Agreement at p. 5, ¶¶ 2 and 3; see also 8/2/2005 Tr., pp. 13-14.)

Plaintiffs agreed to dismiss with prejudice the pending cases in Mahoning County Court of Common Pleas and further agreed that they would not file them again. (Settlement Agreement at p. 5, ¶ 5.)

Richard Buonpane agreed to withdraw his offer to purchase the membership interest of Tina Thompson in Omega Real Estate. (Settlement Agreement at p. 6, ¶ 6.)

Omega Real Estate agreed to cause \$15,000.00 to be paid to the Plaintiffs within 10 days and to execute a note payable to Plaintiffs in the amount of \$185,000.00 with interest at the rate of 5% per annum for a term of 10 years. The note was to be secured by certain real estate located on Gibson street. (Settlement Agreement at p. 6, ¶ 7.)

The Thompsons did not personally assume any financial obligation or commitment as a result of the Settlement Agreement. (Settlement Agreement at p. 6, ¶ 8.)

Omega Real Estate agreed to enter into a 10-year lease with Omega Door. (Settlement Agreement at p. 6, ¶ 9.)

Omega Real Estate agreed that it would not file for bankruptcy protection or sell real estate without the consent of Plaintiffs. (Settlement Agreement at p. 6, ¶ 10.)

The holders of the stock of Omega Door agreed that, at the time a plan of reorganization was confirmed in the Omega Door case, they would pledge their stock as security for the promissory note of Omega Real Estate to Plaintiffs. The parties agreed that the stock

would be held in escrow. (Settlement Agreement at p. 6, ¶ 11.)

Omega Door agreed to treat Plaintiffs' bankruptcy claim in a separate disputed class, which would be treated the same as unsecured creditors. (Settlement Agreement at pp. 6-7, ¶ 12.)

John Thompson agreed to treat Plaintiffs' claim the same as a general unsecured creditor. (Settlement Agreement at p. 7, ¶ 13.)

The parties agreed that the Settlement Agreement would be binding upon and inure to the benefit of their respective heirs, executors, administrators, representatives, parents, etc. (Settlement Agreement at p. 8, ¶ 19.)

#### **IV. Motions to Dismiss**

##### **A. The John Thompson Defendants**

The John Thompson Defendants set forth three main reasons why they believe that Plaintiffs' Complaint should be dismissed. First, they rely on Paragraph 8 of the Settlement Agreement, which states that John and Tina Thompson are not personally assuming any financial obligation. These defendants contend that "[t]his clause alone renders Plaintiffs' complaint fatally defective[.]" (John Thompson Defendants' Brief in Support, unnumbered page 2.) Defendants, however, are wrong in this analysis. If, indeed, as Plaintiffs allege, John and Tina Thompson have breached the Settlement Agreement, they cannot seek to enforce a release provision in the agreement that they breached. In addition, since Plaintiffs seek specific performance of the Settlement Agreement (see Complaint at ¶ 17) as a result of the alleged breach of the agreement, it is doubtful that Paragraph 8 even comes into play.

It certainly cannot be said at this juncture that Plaintiffs will not be able to prove any set of facts that will entitle them to relief against John and Tina Thompson for which the Thompsons will be able to assert an enforceable release.

Second, the John Thompson Defendants allege that Omega Real Estate has performed all of its obligations under the Settlement Agreement. That may or may not be the case, but such allegation is a matter of fact to be proven at trial and cannot, as an argument without factual support, serve as a basis to dismiss the Complaint.

Next, the John Thompson Defendants argue that Plaintiffs have failed to allege their "complete performance" under the Settlement Agreement, which failure is "fatal." (See John Thompson Defendants' Brief in Support at p. 2.) Plaintiffs have alleged performance or waiver of all of their obligations. (See Complaint at ¶¶ 11, 14, and 16.) Whether or not Plaintiffs have sufficiently performed in order to prevail on the merits of the Complaint is not an issue to be decided in connection with a motion to dismiss. The question is whether Plaintiffs have set forth sufficient facts to support their claim. This Court finds that the allegations of performance are sufficient to survive a motion to dismiss.

#### **B. Omega Door**

Omega Door contends that Plaintiffs have no "viable breach of contract" claim against it because the "alleged acts or omissions . . . are not conditions of the Amended and Restated Plan of

Reorganization (Plan) or the Order Confirming Plan of Reorganization[.]" As set forth above, counsel for Omega Door specifically represented to the Court and other counsel that the amended plan would be revised to be consistent with all of the terms in the Settlement Agreement. To the extent any term of the Settlement Agreement is not explicit in the Plan, the parties are estopped from denying that they are not bound implicitly by those terms. Moreover, Plaintiffs have alleged that Omega Door has breached the Settlement Agreement itself, which certainly sets forth a basis for breach of contract. Omega Door also argues that it has been released from all liability as a result of Paragraph 8 of the Confirmation Order. Omega is wrong in its assertion that Plaintiffs' claims "certainly fit within the language of the Order discharging Omega Door from 'any agreement of the Debtor that has been either assumed or rejected' during the prior proceeding." (Omega Door Memorandum in Support at p. 4.) The parties entered into the Settlement Agreement subsequent to the petition date(s) and, as such, the Settlement Agreement is not an executory contract that would be encompassed within the language to which Omega Door refers. Whether the allegations asserted in the Complaint fall within the release in the Confirmation Order is a matter of fact to be developed during discovery. Based upon the fact that the Settlement Agreement was approved by Order of this Court, Plaintiffs are capable of setting forth facts that could preclude obligations in the Settlement Agreement from being released.

Omega Door also asserts that the Complaint fails to state a

claim for fraud and argues that Plaintiffs have used a "shotgun approach" in making the fraud allegations. (Omega Door Memorandum in Support at p. 6.)

FED. R. CIV. P. 9(b) (incorporated by FED. R. BANKR. P. 7009) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." To plead fraud with particularity, the moving party must allege specifically times, places, contents and victims of the underlying fraud. *Vild v. Visconsi*, 956 F.2d 560, 567 (6th Cir. 1992). The moving party must also plead facts which indicate "a mental state embracing intent to deceive, manipulate or defraud." *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 362 (6th Cir. 2001) (quoting *Hochfelder v. Ernst & Ernst*, 425 U.S. 185, 193 (1976)).

Here, Plaintiffs have pled fraud with sufficient particularity to withstand dismissal. The Complaint (i) describes (and incorporates) the Settlement Agreement, (ii) describes Plaintiffs' performance under the Settlement Agreement, and (iii) describes what defendants received pursuant to Plaintiffs' performance and what defendants failed to do. The Complaint further alleges that Plaintiffs reasonably relied on representations of defendants in entering into the Settlement Agreement and that defendants intended harm to Plaintiffs or knew with substantial certainty that harm would result to Plaintiffs. These allegations are sufficient to withstand a motion to dismiss.

Furthermore, the allegations regarding fraud in the Complaint contained sufficient specificity that Omega Door was able to file an Answer.

Plaintiffs counter that they need to develop specific facts during discovery in order to comply with the specificity requirement in FED. R. CIV. P. 9(b). Plaintiffs state that they will amend their Complaint after obtaining the requisite information through discovery. Defendants should not be able to defeat a claim for fraud if and to the extent the facts to support such claim are within their control. Additionally, the proper response to lack of specificity, as required by the Federal Rules, is not a motion to dismiss, but rather a motion for a more definite statement. See FED. R. CIV. P. 12(e). As a consequence, to the extent necessary, the Court will permit Plaintiffs to amend the Complaint upon obtaining specific information concerning fraud.

Omega Door also argues that Plaintiffs have not sought return of the consideration paid by all parties in this matter, and, hence, the Complaint fails to state a claim for fraud in the inducement. Under the circumstances, this argument fails. Some of the consideration on the part of Plaintiffs consisted of dismissing pending lawsuits and withdrawing plans of reorganization - which benefitted the defendants, but which cannot be returned by the defendants. As a consequence, it would be a useless act for Plaintiffs to seek the return of such consideration. The Complaint is not fatally flawed for any lack in this regard.

**C. R.G. Thompson**

R.G. Thompson argues that he must be dismissed from this adversary proceeding because he was not a party to the Settlement Agreement. Although R.G. Thompson is correct that he was not a signatory to the Settlement Agreement, that does not mean that Plaintiffs cannot prove any set of facts to support their claim against him for breach of contract. The Settlement Agreement, by its terms, inured to the benefit of and bound the parties' heirs, executors, administrators, representatives, parents, subsidiaries, affiliates, predecessors, successors, beneficiaries and assigns. As the new owner of 100% of the shares of Omega Door, R.G. Thompson falls within the category of either "successor" or "assigns" and as the father of John Thompson, R.G. Thompson falls within the category of "parents." Accordingly, this Court cannot at this juncture say that Plaintiffs will not be able to prove a set of facts to support their claim for breach of contract against R.G. Thompson. Furthermore, although not stated as such, it appears that Plaintiffs may have intended to allege that R.G. Thompson tortiously interfered with the Settlement Agreement. (See Complaint at ¶ 15.) Plaintiffs will be permitted to amend the Complaint to so state, if that is their intent.

Additionally, although R.G. Thompson may not have been specifically mentioned by name in the Confirmation Order, he is clearly named in the Amended Plan and the Disclosure Statement as the party that was to provide "new value" so that the plan could be confirmed.

The arguments made by R.G. Thompson concerning fraud and fraud

in the inducement are similar to those made by Omega Door, and, as a consequence, this Court's response thereto is the same.

For the reasons set forth above, the Court will not dismiss Plaintiffs' Complaint. Each of the three motions to dismiss is denied. To the extent necessary, Plaintiffs may amend their Complaint.

**IT IS SO ORDERED.**

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**