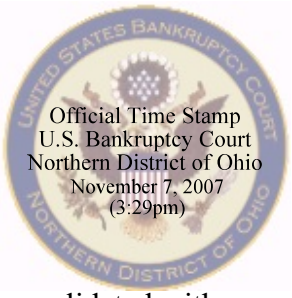
(NOT FOR COMMERCIAL PUBLICATION)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:	)	Case No. 96-12660 (consolidated with 96-12909 and jointly administered with 96-12918)
JAMES E. LUNDEEN, SR., M.D., INC., et al.,	)	
Debtors.	)	Chapter 11
	)	Judge Pat E. Morgenstern-Clarren
PARSHOTAM GUPTA, M.D., et al.,	)	Adversary Proceeding No. 07-1084
Plaintiffs,	)	
v.	)	
JAMES E. LUNDEEN, SR., M.D., et al.,	)	**MEMORANDUM OF OPINION**
Defendants.	)	(NOT FOR COMMERCIAL PUBLICATION)

The plaintiffs in this adversary proceeding[1] are creditors under a confirmed chapter 11 plan. They filed an amended complaint (the complaint) seeking relief against individual debtor James Lundeen and his non-debtor wife Cynthia Lundeen. The Lundeens move to dismiss the complaint based on lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The plaintiffs oppose the motion. (Docket 71, 91). For the reasons stated below, the Lundeens' motion to dismiss is granted as to count IV and denied as to the rest of the complaint.[2]

---

[1] The plaintiffs are Parshotam Gupta, M.D., Mahendra Patel, M.D., Darshan Mahajan, M.D., Floyd Heller, M.D., Jerold Ladin, Charles Snyder, Lindsey Heller, Estelle Lukacet, and William Midian, M.D.

[2] In the court's view, the value of this opinion is solely to decide the dispute between the parties and not as an addition to the general jurisprudence. For that reason, the opinion is not intended for commercial publication.

I. FACTS

A. Background

In 1996, James Lundeen, Sr., M.D. and two related corporate entities[3] filed chapter 11 cases.[4] The cases, which were jointly administered, also had a joint plan of reorganization. That plan was confirmed by order entered on January 25, 1999. The joint case was closed in July 2002 and reopened in 2006 on motion of certain creditors, joined by the United States trustee, based on allegations of breach of contract relating to the confirmed plan.[5] After the case was reopened, the plaintiff-creditors filed this adversary proceeding.

B. The Terms of the Confirmed Plan

The confirmed plan provides that the debtors are to fund plan payments at the rate of $10,000.00 each month for the first year, $15,000.00 each month for the second year, and $20,000.00 each month thereafter until each class has been paid in accordance with the plan. The plan divides creditors into six classes and details how the debtors' payments are to be distributed. Plaintiff Parshotam Gupta, M.D. is the class 4 secured creditor and the other plaintiffs are class 6 general unsecured creditors. The plan calls for the payments to be made by an independent disbursing agent for the first two years, with Dr. Lundeen serving as the disbursing agent for the remainder of the plan.

---

[3] The corporate entities are James Lundeen, Sr., M.D., Inc. and Lundeen Physical Therapy–Akron, Inc. and they were substantively consolidated. *See* case no. 96-12660, docket 230.

[4] The cases were assigned to the Honorable David F. Snow who retired on July 25, 2000, at which point the cases were reassigned to the undersigned.

[5] *See* memorandum and order, case No. 96-12660, docket 522, 523.

The plan also includes these provisions:

(A) a description of the means by which the plan would be executed, plan contingencies, and the individual debtor's entitlement to a salary. *See* case No. 96-12660, docket 415, Fourth Amended Joint Plan of Reorganization. Art. V, IX and XII;

(B) a provision that the land contract on the Lundeen residence will be assumed and a description of how the balloon payment on that contract is to be dealt with in the future. *Id*. at Art. VII.

(C) a default provision. *Id*. at Art. XIII; and

(D) a provision for retention of bankruptcy jurisdiction for a number of purposes, including "to determine any and all controversies and disputes arising under or in connection with the Plan and such other matters as may be provided for in the Confirmation Order[.] at Art. VI.

II. THE COMPLAINT

The gravamen of this dispute is the allegation that the debtors failed to make required payments after Dr. Lundeen assumed his role as disbursing agent and that the failure is the result of various actions taken by Dr. Lundeen and Cynthia Lundeen in violation of the plan. Dr. Lundeen denies that the plan required him to act in a manner other than he did.

The complaint requests various forms of relief against James Lundeen and Cynthia Lundeen based on these seven counts:

Count I alleges the Lundeens engaged in fraudulent conduct regarding their residence and paid off the land sale contract other than as the plan provided, as a result of which assets that should have been used to satisfy the plan claims have been diverted.

Count II alleges James Lundeen's business fraudulently paid Cynthia Lundeen rent and reimbursement for utilities and home expenses for the use of their residence, again using assets that should have been used to satisfy the plan claims.

Count III alleges James Lundeen's business paid Cynthia Lundeen to allow her to make payments on a fraudulently obtained mortgage loan against the couple's residence, again using assets that should have been used to satisfy the plan claims.

Count IV alleges Cynthia Lundeen fraudulently obtained loans from World Savings Bank.

Count V alleges Dr. Lundeen's personal residence played an integral role in his reorganization plan and that he breached the terms of the plan by paying Cynthia Lundeen for use of the residence.

Count VI alleges James Lundeen breached the terms of the plan by making payments to insider Cynthia Lundeen under a purported employment arrangement.

Count VII alleges James Lundeen violated the terms of the plan after assuming the role of plan disbursing agent by making various payments to himself.

III. THE MOTION TO DISMISS

The defendants move to dismiss the complaint under bankruptcy rule 7012 on two grounds: lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See* FED. R. CIV. P. 12(b)(1) and (b)(6) (made applicable by FED. R. BANKR. P. 7012(b)).

A. Subject Matter Jurisdiction Postconfirmation

The plaintiffs have the burden of proving that the court has jurisdiction over their claims. *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2 266, 269 (6th Cir. 1990). They "must show that the complaint 'alleges a claim under federal law, and that the claim is 'substantial'.'

The plaintiff[s] will survive the motion to dismiss by showing 'any arguable basis in law' for the claims set forth in the complaint." *Mich. S. R.R. Co. v. Branch & St. Joseph Counties Rail Users Ass'n*, 287 F.3d 568, 573 (6th Cir. 2002) (quoting *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996)).

The source of bankruptcy jurisdiction is statutory and thus is the same both before and after plan confirmation. *See* 28 U.S.C. §§ 1334 and 157. Section 1334 gives district courts "original and exclusive jurisdiction of all cases under title 11," and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(a), (b). Section 157 permits a district court to refer that jurisdiction to the bankruptcy court, which the judges in this district have done. 28 U.S.C. § 157(a). For purposes of determining whether § 1334 jurisdiction exists, it is not necessary to distinguish between proceedings which "arise under", "arise in", or are "related to" to the bankruptcy case; it is only necessary to determine whether a matter is at least "related to" the bankruptcy case. *Mich. Employment Sec. Comm. v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1141 (6th Cir. 1991).

In the preconfirmation context, a matter is "related to" the underlying chapter 11 case if its outcome "'could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.'" *Lindsey v. O'Brien, Tanski, Tanzer and Young Health Care Providers of Conn. (In re Dow Corning Corp.)*, 86 F.3d 482, 489 (6th Cir. 1996) (quoting *Pacor, Inc. v. Higgins (In re Pacor, Inc.)*, 743 F.2d 984, 994 (3d Cir. 1984)). This analysis is, however, difficult to apply in the postconfirmation context. As a result, it has been modified and "the essential inquiry appears to be whether there is a close nexus to the bankruptcy plan or proceeding sufficient to uphold bankruptcy court jurisdiction over the matter." *Binder v. Price*

Waterhouse & Co., LLP (In re Resorts Int'l, Inc.), 372 F.3d 154, 166–67 (3d Cir. 2004). *See also Thickstun Bros. Equip. Co v. Encompass Servs. Corp. (In re Thickstun Bros. Equip. Co.)*, 344 B.R. 515, 521 (B.A.P. 6th Cir. 2006); *Morris v. Zelch (In re Regional Diagnostics, LLC)*, 372 B.R. 3, 22–23 (Bankr. N.D. Ohio 2007). "Matters that affect the interpretation, implementation, consummation, execution, or the administration of the confirmed plan will typically have the requisite close nexus." *In re Resorts Int'l, Inc.*, 372 F.3d at 167.

The Sixth Circuit has stated that, "[t]he bankruptcy court retains jurisdiction to ensure that the plan is followed[.]" *Linsenmeyer v. United States (In re Linsenmeyer)*, 92 Fed. App'x 101, 102 (6th Cir. 2003) (citing *Gordon Sel-Way, Inc. v. United States (In re Gordon Sel-Way, Inc.)*, 270 F.3d 280, 288–89 (6th Cir. 2001)). *See also In re Thickstun Bros. Equip. Co.*, 344 B.R. at 522 (noting that, "even the most restrictive views of post-confirmation jurisdiction acknowledge that the bankruptcy courts retain jurisdiction to interpret and enforce confirmed plans of reorganization"). The confirmed plan in this case, like many cases, included a provision stating that the bankruptcy court retains jurisdiction. That contractual provision alone cannot create jurisdiction, but if statutory jurisdiction otherwise exists, a court may give effect to the provision. *In re Thickstun Bros. Equip. Co.*, 344 B.R. at 522–23. To the extent jurisdiction exists, bankruptcy courts may issue orders necessary to implement a confirmed plan. *See* 11 U.S.C. § 1142(b) (providing that the court "may direct the debtor and any other necessary party to execute or deliver . . . any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan").

The defendants argue that the court "should not act in 'loco parentis' over disputes and squabbles arising in the affairs of a reorganized debtor."[6] They characterize the complaint as a claim to recover fraudulent conveyances and to modify the plan, and then argue that this type of relief is not available to the plaintiffs.

If the complaint did in fact seek to recover allegedly fraudulent conveyances and to modify the confirmed plan, the Lundeens' argument would have some force. The court, however, disagrees with the defendants' characterization of the complaint. As the court reads the complaint, the plaintiffs are not attempting to obtain new rights against the Lundeens. Rather, they are trying to enforce rights which they believe they acquired under the debtors' confirmed plan. Although the plaintiffs use the term "fraudulent conveyance" in their complaint, they are not stating a claim under either bankruptcy law or state law to recover a fraudulent conveyance. Rather, read as a whole, the plaintiffs are asserting that James and Cynthia Lundeen engaged in fraudulent activities which violated the terms of the confirmed plan. It is equally clear that the plaintiffs are seeking to enforce the confirmed plan, rather than to modify it.

The Lundeens' jurisdictional argument relies on *Zahn Assocs., Inc. v. Leeds Bldg. Prods., Inc. (In re Leeds Bldg. Prods., Inc.)*, 160 B.R. 689 (Bankr. N.D. Ga. 1993). In *Leeds*, a confirmed chapter 11 plan required the debtor to enter into a trust indenture, funded by a promissory note, which would result in a distribution to creditors over a 10 year period. The indenture trustee filed suit in bankruptcy court asking for judgment on the note. The court noted that the case did not involve the execution, implementation, or interpretation of the plan, but was instead a simple, state law dispute that did not require the application of bankruptcy law. Based

[6] Motion to dismiss, docket 71 at 6.

on those facts, the court concluded that it would not exercise jurisdiction. In contrast, in the present case the plaintiffs *are* seeking to interpret and enforce the debtors' plan, with the Lundeens disputing that interpretation. This brings the case within the scope of this court's postconfirmation jurisdiction and the plan retention of that jurisdiction. Consequently, the motion to dismiss based on lack of subject matter jurisdiction is denied.

B. The Sufficiency of the Complaint

Federal Rule of Civil Procedure 12(b)(6) provides that a claim can be dismissed for "failure to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). The pleading standard required under this rule was recently clarified in *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007). Under that decision, "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[.] Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)[.]" *Id.* at 1964–65 (citations, quotation marks and footnote omitted). *See also Assoc. of Cleveland Firefighters v. City of Cleveland*, No. 06-3823, – F.3d – , 2007 WL 2768285, at *2 (6th Cir. Sept. 25, 2007).

The Lundeens argue that counts I, II, III, V, VI, and VII fail to state claims against them because they seek to recover fraudulent conveyances and the plaintiffs, as creditors, do not have the right to initiate such claims. As discussed above in the jurisdictional analysis, the court rejects this characterization of these claims. These counts claim that the Lundeens engaged in certain activities which violated the terms of the confirmed plan, thereby denying the plaintiffs payment of their claims as provided by the plan. The factual allegations, accepted as true for these purposes, provide grounds for relief in the form of plan interpretation and enforcement. *See* 11 U.S.C. § 1142(b)(2). If the plaintiffs prove their case at trial, they may or may not be

entitled to the specific relief that they seek as their remedy, but that is a separate issue. Consequently, the motion to dismiss these counts under rule 12(b)(6) is denied.

The Lundeens' motion to dismiss count IV is a different matter. This count merely alleges that Cynthia Lundeen submitted fraudulent information to World Savings Bank to obtain loans on the residence and to refinance the existing mortgage, but fails to establish any connection between that alleged conduct and any right to relief against the Lundeens. The motion to dismiss count IV for failure to state a claim is, therefore, granted.

CONCLUSION

For the reasons stated, the defendants' motion to dismiss is granted as to count IV and denied as to the remainder of the motion. A separate order will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

(NOT FOR COMMERCIAL PUBLICATION)

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 96-12660 (consolidated with 96-12909 and jointly administered with 96-12918)
JAMES E. LUNDEEN, SR., M.D., INC., et al.,	)	
Debtors.	)	Chapter 11
	)	Judge Pat E. Morgenstern-Clarren
PARSHOTAM GUPTA, M.D., et al.,	)	Adversary Proceeding No. 07-1084
Plaintiffs,	)	
v.	)	
JAMES E. LUNDEEN, SR., M.D., et al.,	)	**ORDER**
	)	(NOT FOR COMMERCIAL PUBLICATION)
Defendants.	)	

For the reasons stated in the memorandum of opinion entered this same date, the defendants' motion to dismiss is granted as to count IV only based on its failure to state a claim upon which relief can be granted. The remainder of the motion to dismiss is denied.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge