FILED

2008 Sep 17 AM 09:45

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

OLD LADDER LITIGATION CO., LLC,	*	**ADVERSARY NUMBER 08-04106**
Plaintiff,	*	
vs.	*	
THE R.L. BEST COMPANY,	*	
	*	**HONORABLE KAY WOODS**
Defendant.	*	

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MEMORANDUM OPINION REGARDING MOTION TO DISMISS COUNT THREE
Not Intended for National Publication

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The following Memorandum Opinion is not intended for national publication and carries limited precedential value. The availability of this Opinion by any source other than www.ohnbuscourts.gov is not the result of direct submission by this Court. The Opinion is available through electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Before the Court is Motion of Defendant to Dismiss Plaintiff's Count Three Invoking 11 U.S.C. §549 [sic] Pursuant to F. R. of Bankruptcy [sic] 7012 and F. R. CP. [sic] 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted, and For Failure to Comply With the Applicable Statute of Limitations ("Motion to Dismiss") (Doc. # 7) filed by Defendant The R.L. Best Company ("R.L. Best") on July 11, 2008. Plaintiff Old Ladder Litigation Co., LLC ("Old Ladder") did not respond to the Motion to Dismiss.

Old Ladder commenced this Adversary Proceeding on June 12, 2008, by filing Complaint of Old Ladder Litigation Co., LLC, as Litigation Designee On Behalf of the Liquidation Trust Appointed in the Cases of Old Ladder Co. (DE), Inc. (f/k/a Werner Holding Co. (DE), Inc., *et al*.) To Avoid and Recover Transfers Pursuant to 11 U.S.C. §§ 547 and 550 ("Complaint") (Doc. # 1). The Complaint contains four Counts, including Count Three (Recovery of Post Petition Transactions Pursuant to 11 U.S.C. § 549) ("Count Three"). The Motion to Dismiss seeks dismissal of only Count Three and does not otherwise address the remainder of the Complaint.

For the reasons stated below, the Court finds the Motion to Dismiss well taken and therefore **GRANTS** the Motion to Dismiss. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

This Adversary Proceeding is related to a Chapter 11 case (Case No. 06-10578) *In re: Old Ladder Co. (DE), Inc. (F/K/A) Werner Holding Co. et. al.*, filed in the Bankruptcy Court for the District of Delaware ("Delaware Court") on June 12, 2006, ("Petition Date")[1] by Old Ladder Co. (DE), Inc. ("Debtor"). On October 25, 2007, the Delaware Court entered Order Confirming Committee's Revised Second Amended Liquidating Plan Pursuant to Chapter 11 of the United States Bankruptcy Code, As Modified ("Plan"). The Plan provided for all of Debtor's causes of actions to be retained by a Liquidation Trust and pursued by Old Ladder. Thereafter, Old Ladder filed the Complaint.

Old Ladder alleges in the Complaint that, at some point before the commencement of the case, Debtor transferred $5,462.50 to R.L. Best. Attached to the Complaint is Exhibit A, which indicates a payment of $5,462.50 on invoice number 22350 to "Best RL Co." payment no. 703182, with a "Clear Date" of "4/5/2006."

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A),

[1]The Petition Date is the same date as the "commencement of the case," as set forth in 11 U.S.C. § 549.

(I), and (O).

II. STANDARD FOR REVIEW

A. FED. R. CIV. P. 12(b)(6)

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. A cognizable claim for relief must contain (i) a short and plain statement of the claim that shows the plaintiff is entitled to relief, (ii) give the defendant fair notice of the claim, and (iii) state the grounds upon which the claim rests. *See* FED. R. CIV. P. 8(a); *Conley v. Gibson,* 355 U.S. 41, 47 (1957). If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.[2]

FED. R. CIV. P. 12(b)(6), which is applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).[3] Referring to *Twombly*, the Court of Appeals for the Sixth Circuit noted:

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[2]The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams,* 490 U.S. 319, 326-27 (1989).

[3]In *Twombly*, the Supreme Court held that the following language from *Conley* had earned its retirement: "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." *Conley*, 355 U.S. at 45-46. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct. at 1969.

> The Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. The Court stated that "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." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual 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."

Association of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (alteration in original).

In determining whether a cognizable claim has been pled, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). However, the Court does not have to accept as true legal conclusions or unwarranted factual inferences. *Id.* The Court may also consider any exhibits attached to the Complaint so long as they are referred to in the Complaint and are central to the claims contained therein. *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008).

B. 11 U.S.C. § 549(a)

11 U.S.C. § 549(a) allows the Trustee to avoid certain transfers made after the commencement of the case. Specifically,

§ 549(a) provides:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--
>
> (1)that occurs after the commencement of the case; and
>
> (2)(A)that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

Therefore, in order to successfully avoid a transfer under § 549(a), three requirements must be met: (i) the transfer must involve property of the estate, (ii) the transfer must have occurred after the commencement of the case, and (iii) the transfer must not have been authorized by the Bankruptcy Code or the Bankruptcy Court. *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques, Inc.)*, 930 F.2d 458, 465 (6th Cir. 1991).

For purposes of § 549(a), a check is transferred the day the check is honored by or clears the bank. *Guinn v. Oakwood Props., Inc. (In re: Oakwood Markets, Inc.)*, 203 F.3d 406, 409 (6th Cir. 2000). This rule encourages prompt submission of checks to banks and provides an exact date for courts to base rulings upon in the event of litigation. *Id.*

III. ANALYSIS

The Motion to Dismiss asserts two grounds for dismissal: (i) 11 U.S.C. § 549(a) does not apply to the transfer because the check was transferred before the commencement of the case and (ii)

even if § 549(a) does apply, the avoidance action is time barred by the statute of limitations in § 549(d).

In Count Three, Old Ladder quotes § 549(a) and then states, "To the extent that any pre-petition transfers cleared and/or were received after the date of petition, those Transfers constitute avoidable transfers pursuant to section 549(a) of the Bankruptcy Code." (Compl. ¶¶ 31-32). Old Ladder fails to affirmatively allege that Debtor made a transfer to R.L. Best after the commencement of the case.

Moreover, by re-alleging all of the preceding paragraphs of the Complaint, Count Three reincorporates the allegation that the transfer to R.L. Best took place <u>before</u> the commencement of the case. Count One of the Complaint states, "<u>On or within ninety (90) days before the Petition Date</u> . . . [Debtor], or an affiliate, transferred and/or caused to be transferred, to or for the benefit of [R.L. Best], one or more payments of monies and/or transfers of goods in a total amount of no less than $5,462.50." (Compl. ¶ 17 (emphasis added).) In Count Two, Old Ladder alleges that the transfer occurred <u>within two years</u> of the Petition Date as specifically described in Exhibit A of the Complaint. (Compl. ¶¶ 25-26 (emphasis added).) Exhibit A shows the "Clear Date" of the check to R.L. Best as "4/5/2006," which is prior to the Petition Date. (Compl. Ex. A.)

Thus, even when the Court construes the Complaint in the

light most favorable to Old Ladder, accepts its allegations as true, and draws all reasonable inferences in its favor, Old Ladder fails to state a cognizable claim that shows it is entitled to relief under § 549(a). The Complaint does not allege that the transfer to R.L. Best was after the commencement of the case, but rather that the check cleared prior to the commencement of the case.

Because the Court finds that Old Ladder has failed to state a cognizable claim under § 549(a), the Court need not address R.L. Best's second argument.

IV. CONCLUSION

The Court finds that Old Ladder has not alleged sufficient facts in the Complaint to state a claim against R.L. Best under 11 U.S.C. § 549(a). The Motion to Dismiss Count Three is well taken and is therefore **GRANTED**. An appropriate order will follow.

# # #

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2008 Sep 17 AM 09:51

CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.

Kay Woods

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

OLD LADDER LITIGATION CO., LLC,	*	**ADVERSARY NUMBER 08-04106**
Plaintiff,	*	
vs.	*	
THE R.L. BEST COMPANY,	*	
	*	**HONORABLE KAY WOODS**
Defendant.	*	

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ORDER GRANTING MOTION TO DISMISS COUNT THREE

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For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby grants Defendant The R.L. Best Company's Motion of Defendant to Dismiss Plaintiff's Count Three Invoking 11 U.S.C. §549 [sic] Pursuant to F. R. of Bankruptcy [sic] 7012 and F. R. CP. [sic] 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted, and For Failure to Comply With the Applicable Statute of Limitations. Accordingly, Count Three of the Complaint is hereby dismissed.

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