**IT IS SO ORDERED.**

**Dated: January 06, 2011**
**01:50:33 PM**

**Kay Woods**
**United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT**
**NORTHERN DISTRICT OF OHIO**

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| IN RE: | * | |
| DENMAN TIRE, LLC, | * | CASE NUMBER 10-40855 |
| Debtor. | * | |
| * * * * * * * * * * * * * * * * | * | |
| RICHARD G. ZELLERS, TRUSTEE, | * | ADVERSARY NUMBER 10-04242 |
| Plaintiff, | * | |
| v. | * | |
| KLEHR, HARRISON, HARVEY, BRANZBURG, LLP, | * | HONORABLE KAY WOODS |
| Defendant. | * | |

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**ORDER (i) DENYING MOTION TO DISMISS, AND (ii) GRANTING TRUSTEE TWENTY-ONE DAYS TO AMEND SECOND CAUSE OF ACTION**

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This cause is before the Court on (i) Defendant's Motion to Dismiss Complaint ("Motion") and (ii) Klehr Harrison Harvey

Branzburg LLP's Memorandum of Law in Support of its Motion to Dismiss the Complaint ("Memo") (collectively, "Motion to Dismiss") (Doc. # 7) filed by Defendant Klehr Harrison Harvey Branzburg LLP on December 3, 2010. On December 13, 2010, Richard G. Zellers, Chapter 7 Trustee ("Trustee"), filed Trustee's Response to Defendant's Motion to Dismiss ("Response") (Doc. # 8). For the reasons set forth below, the Court will (i) deny the Motion to Dismiss with respect to the First Cause of Action and (ii) grant the Trustee twenty-one (21) days to amend the Second Cause of Action.[1]

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. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2010, Debtor Denman Tire, LLC filed a voluntary petition pursuant to chapter 7 of title 11 ("Petition Date"), which was denominated Case No. 10-40855. Mr. Zellers was appointed the Chapter 7 Trustee.

On November 2, 2010, the Trustee filed Complaint to Avoid Fraudulent Transfer and for Return of Property or its Value ("Complaint") (Doc. # 1), which commenced the instant adversary

[1] The First and Second Causes of Action are defined *infra* at 3.

proceeding. The Trustee states:

> On or about February 18, 2010, which is within one (1) year prior to the commencement of the case, the Debtor transferred to the Defendant property described as the sum of $75,000.00. The Debtor received no consideration in exchange for such transfer and at the time thereof was insolvent or became such as a result of such transfer.

(Compl. ¶ 5.) The Trustee alleges that the aforementioned transfer ("Transfer") is fraudulent pursuant to 11 U.S.C. § 548 and requests the Court to avoid the Transfer and enter judgment against the Defendant in the amount of $75,000.00 ("First Cause of Action"). (*Id.* at 4-5.) The Trustee also alleges that the $75,000.00 transferred to the Defendant ("Transferred Funds") is property of the estate, which the Trustee may use, sell, or lease pursuant to 11 U.S.C. § 363. (*Id.* ¶¶ 7-11.) The Trustee requests the Court to order the Defendant to surrender and deliver to the Trustee the Transferred Funds ("Second Cause of Action"). (*Id.* at 5.)

The Defendant moves to dismiss the First and Second Causes of Action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that the Complaint fails to comply with the pleading requirements in Federal Rule of Civil Procedure 8. (Mot. at 1.) The Defendant states, "The Complaint fails to plead the facts necessary to establish a plausible basis for the claims alleged by the Trustee. Rather, the Complaint contains sparse, generic allegations and legal conclusions which, under Supreme Court precedent, are insufficient to survive a motion to dismiss." (Memo at 1.)

In the Response, the Trustee asserts that the First Cause of Action states a plausible claim for relief pursuant to § 548. (Resp. at 1-2.) The Trustee contends that he diligently attempted to investigate the circumstances surrounding the Transfer, but the Defendant refused to provide the Trustee with an accounting of the Transfer or an itemization of how the Transferred Funds were used. (*Id.* at 2-3.) The Trustee also indicates that the Debtor's check register evidences the fact that the Transfer occurred. (*Id.* at 3.) With respect to the Second Cause of Action, the Trustee states that the Transferred Funds "constitute property of the estate under Section 363 recoverable by the Trustee." (*Id.* at 2.)

## II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 8(a)(2), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7008(a), requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8 (West 2010); FED. R. BANKR. P. 7008 (West 2010). The complaint does not need to contain "'detailed factual allegations,'" but it must contain more than mere "'labels and conclusions'" or "'a formulaic recitation of the elements of a cause of action.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "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 (W.D. Tenn. 2003) (citing 5A WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE § 1356 (West 1990)).

Federal Rule of Civil Procedure 12(b)(6), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires that a complaint be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2010); FED. R. BANKR. P. 7012 (West 2010). Accordingly, a complaint will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. "[T]o survive a motion to dismiss, plaintiffs must state 'plausible' grounds for relief[;] . . . the basic rule [is] that plaintiffs must plead only the basic elements of a claim, not develop all of the facts necessary to support the claim." *Hebron v. Shelby County Gov't.*, 2010 U.S. App. LEXIS 26028, *4-5 (6th Cir. 2010) (unpublished) (citing *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 556-57, 562).

When determining whether a claim alleges enough facts to state a claim upon which relief can be granted, 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); *see also Twombly*, 550 U.S. at 555. However, the court does not need to accept as true legal conclusions or unwarranted factual inferences. *Iqbal*, 129 S. Ct. at 1949-50; *Directv, Inc.*, 487 F.3d at 476.

## III. ANALYSIS

### A. First Cause of Action.

In the First Cause of Action, the Trustee requests the Court to avoid the Transfer pursuant to § 548. (Compl. at 4-5.) The Trustee does not specify which subsection of § 548 the First Cause of Action is based on, but the Trustee does not allege actual fraud pursuant to § 548(a)(1)(A). Rather, the First Cause of Action appears to allege that the Transfer was constructively fraudulent pursuant to § 548(a)(1)(B). Section 548(a)(1)(B) states, in pertinent part:

> (a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property, or any obligation incurred . . . by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
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> * * *
>
> (B)(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (ii)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation[.]

11 U.S.C. § 548 (West 2010). The Trustee can prevail on the First Cause of Action by establishing that (i) the Debtor had an interest

in the Transferred Funds, (ii) the Transfer occurred within two years before the Petition Date, (iii) the Transfer was constructively fraudulent because the Debtor received less than a reasonably equivalent value in exchange for the Transferred Funds, and (iv) the Debtor was insolvent on the date of the Transfer or became insolvent as a result of the Transfer. *See id.*; *Kovacs v. Berger (In re Berger)*, 2007 Bankr. LEXIS 2884, *6-7 (Bank. N.D. Ohio 2007).

In the Motion to Dismiss, the Defendant argues that a fraudulent transfer claim must contain "'an identification of each alleged . . . transfer by (i) date, (ii) name of debtor/transferor, (iii) name of transferee and (iv) the amount of the transfer.'" (Memo at 4 (quoting *Valley Media, Inc. v. Borders, Inc. (In re Valley Media, Inc.)*, 288 B.R. 189, 192 (Bankr. D. Del. 2003).) The Defendant asserts that "absent from the Complaint is any evidence describing the relationship between the Debtor and Defendant, the nature of the transfers, the factual scenario surrounding each transfer, or description of the alleged transfers." (*Id.* at 2.)

The Court finds that the First Cause of Action contains a plausible claim for relief pursuant to § 548(a)(1)(B) and, thus, will deny the Motion to Dismiss with respect thereto. The Trustee has pled the necessary elements of a fraudulent transfer claim by alleging that, on February 18, 2010 (within two years before the Petition Date), the Debtor transferred $75,000.00 to the Defendant without receiving any consideration and was insolvent or became

insolvent as a result of the Transfer.[2] (Compl. ¶ 5.) Thus, the Trustee has complied with "the basic rule that plaintiffs must plead only the basic elements of a claim, not develop all of the facts necessary to support the claim." *Hebron v. Shelby County Gov't.*, 2010 U.S. App. LEXIS 26028, *5 (6th Cir. 2010) (unpublished). Accepting the Trustee's allegations as true for purposes of this Motion to Dismiss, *see Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007), the Court finds that the First Cause of Action contains a plausible claim upon which relief could be granted. As a consequence, the Motion to Dismiss is hereby denied with respect to the First Cause of Action.

**B. Second Cause of Action.**

In the Second Cause of Action, the Trustee requests the Court to order the Defendant to surrender and return the Transferred Funds to the Trustee pursuant to § 363. (Compl. at 4-5.) Section 363 permits a trustee to, *inter alia*, "use, sell, or lease . . . property of the estate" and "enter into transactions, including the sale or lease of property of the estate[.]" 11 U.S.C. § 363(b)(1), (c)(1) (West 2010).

The Defendant moves to dismiss the Second Cause of Action on the basis that it "does not describe the elements of any cause of action under [§ 363]." (Memo at 6.) The Defendant maintains that

[2] Despite the Defendant's argument to the contrary, the Trustee expressly identifies (i) the date of the Transfer February 18, 2010, (ii) the transferor the Debtor, (iii) the transferee the Defendant, and (iv) the amount of the Transfer $75,000.00. (*See* Memo at 4; Compl. ¶ 5.)

the Second Cause of Action "fails to demonstrate how the Defendant exercised any control over any assets of the Debtor or how the Trustee may use, sell or lease such property." (*Id.*) In response, the Trustee summarily argues that "these funds constitute a fraudulent transfer, said sums constitute property of the estate under Section 363 recoverable by the Trustee." (Resp. at 2.)

The Court finds that the Trustee has failed to state a plausible claim for relief in the Second Cause of Action. The Trustee alleges that the Transferred Funds are "property of the Debtor's estate . . . which the Trustee may use, sell or lease pursuant to 11 U.S.C. § 363." (Compl. ¶¶ 10-11.) The Trustee then requests the Court to "order Defendant to surrender and to deliver to [the Trustee] the sum of $75,000.00 on [the Trustee]'s Second Cause of Action." (*Id.* at 5.) Although § 363 grants the Trustee certain rights with respect to property of the estate, the Trustee provides the Court with no basis in the Second Cause of Action — statutory or otherwise — to order the Defendant to surrender and return the Transferred Funds to the Trustee. Because the Second Cause of Action does not clearly express the basis for the relief requested, the Court hereby grants the Trustee twenty-one (21) days to amend the Second Cause of Action. If the Trustee fails to amend the Second Cause of Action within twenty-one (21) days after entry of this Order, the Second Cause of Action will be dismissed.

**IT IS SO ORDERED.**

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