

**IN THE
UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE**

10-50723-BLS

RC SOONER HOLDINGS, LLC, et al.

Plaintiffs

v.

SPERRY VAN NESS / WILLIAM T. STRANGE ASSOCIATES, INC., et al.

Defendants

**BRIEF IN SUPPORT OF MOTION TO DISMISS
OF DEFENDANT SPERRY VAN NESS / WILLIAM T. STRANGE ASSOCIATES, INC.**

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:

RC Sooner Holdings, LLC, et al.¹

In Re: RC SOONER HOLDINGS, LLC, et al.

Plaintiffs

v.

REMYCO, INC., et al.

Defendants

Chapter 11

Case No. 10-10528 (BLS)
(Jointly Administered)

ADV. PRO. NO. 10:50723

**BRIEF IN SUPPORT OF MOTION TO DISMISS OF DEFENDANT
SPERRY VAN NESS / WILLIAM T. STRANGE ASSOCIATES, INC.**

**PRELIMINARY STATEMENT PURSUANT TO
USCS BANKRUPTCY R. 7012(b)**

Defendant Sperry Van Ness / William T. Strange Associates, Inc., maintains that this adversary proceeding is non-core. It does not consent to entry of final orders or judgment by the bankruptcy judge. It reserves the right to seek withdraw of the reference of this case if the instant motion is not granted.

¹ The Debtors are RC Sooner Holdings, LLC; RC Brixton Square Owner, LLC; RC Cedar Crest Owner, LLC; RC Fulton Plaza Owner, LLC; RC Magnolia Owner, LLC; RC Pomeroy Park Owner, LLC; RC Salida Owner, LLC; RC Savannah South Owner, LLC; RC Southern Hills Owner, LLC; Brixton Square Apartments, LLC; CC Apartments, LLC; Fulton Plaza Apartments, LLC; Magnolia Manor Apartments, LLC; Pomeroy Park Apartments, LLC; Salida Apartments, LLC; Savannah South Apartments, LLC; and Southern Hills Villa Apartments, LLC.

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I. NATURE AND STAGE OF PROCEEDINGS

The Debtors each filed voluntary petitions for protection under Chapter 11 of the Bankruptcy Code on February 22, 2010. The cases are being jointly administered. The Debtors are continuing to operate as debtors-in-possession. Two days later, on February 24, 2010, the Debtors filed a Complaint commencing this Adversary Proceeding. On March 13, 2010, the Debtors filed an Amended Complaint. Defendant Sperry Van Ness / William T. Strange Associates, LLC, now file this Motion to Dismiss in response to the Amended Complaint.

II. SUMMARY OF ARGUMENT

Plaintiffs, RC Sooner Holdings, LLC (hereinafter, "Sooner Holdings") and Old South Apartments, LLC (hereinafter collectively "Plaintiffs"), filed their Amended Complaint in this adversary proceeding on March 17, 2010. Therein, Plaintiffs allege that Defendant Sperry Van Ness / William T. Strange Associates, Inc. (hereinafter "Sperry"), is liable to them for fraudulent misrepresentation (Count II), Civil Conspiracy (Count III), and Fraudulent Transfer pursuant to 11 U.S.C. §§ 548 and 550 (Count V). Plaintiffs, however, have failed to state any claim against Sperry for which relief can be granted; thus, it claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Plaintiffs claims for fraudulent misrepresentation and fraudulent transfer pursuant to 11 U.S.C. §§ 548 and 550, are subject to dismissal because Plaintiffs have failed to allege these claims with sufficient specificity as required by Fed. R. Civ. P. 9(b). As to the fraudulent misrepresentation claim, Plaintiffs have failed to set forth the time, place or specific contents of the allegedly false representation. Furthermore, they have failed to identify the individual who is alleged to have made the false statements on behalf of Sperry. Plaintiffs have failed to identify any facts which could give rise to its fraudulent transfer claim against Sperry. Instead, Plaintiffs merely recite the elements it is required to prove in order to prevail on this claim.

Additionally, Plaintiffs' fraudulent misrepresentation claim as to Sperry is subject to dismissal because Plaintiffs have not alleged any facts which could demonstrate that Sperry knew that the statement it allegedly made to Plaintiffs was false, or that Sperry could not have reasonably believed that the statement was true.

Plaintiffs' fraudulent transfer claim is also subject to dismissal because they have not alleged facts which, if proven true, could demonstrate that Sperry partook in a fraudulent transfer as defined by §§ 548 and 540.

Finally, Plaintiffs' civil conspiracy claim as to Sperry must be dismissed because Plaintiffs have not alleged facts that could demonstrate that Sperry committed an underlying unlawful act, or committed a lawful act by unlawful means, as is required in order to state a claim for civil conspiracy.

III. FACTS AS ALLEGED BY PLAINTIFFS²

In early October of 2009, Daniel Gordon, on behalf of RC Sooner Holdings, and real estate broker Defendant Sperry Van Ness/William T. Strange Associates, Inc (“Sperry”), on behalf of its clients, Home Realty Ventures, Inc., Bradford Creek Properties, LLC, Landrun Design and Development Co., Inc., and Bluechip Holdings, LP (“Selling Defendants”) began negotiations for the purchase of the membership interests in eight separate special purpose entities, each of which owned an Apartment LLC, which in turn owned various multi-family residential apartment complexes in and around Tulsa, Oklahoma (the “Apartment LLCs”). Each apartment complex was in turn encumbered by a mortgage. *Id.* (¶¶ 11, 31, 35). Negotiations between Sperry and Gordon continued through October of 2009, and the parties agreed that RC Sooner Holdings would form a group of entities (referred to in the Amended Complaint as RC LLCs), and through those entities, acquire the membership interests in the various Apartment LLCs. *Id.* at ¶ 32. The RC LLCs (and

² Facts as alleged in Plaintiffs' Amended Complaint admitted as true for the purposes of the instant Motion to Dismiss only. Movants reserve the right to contest any of the facts alleged by Plaintiff at, or prior to, trial. A true and correct copy of Plaintiffs' Amended Complaint is attached hereto as Exhibit "A."

non-Debtor Purchaser Old South Apartments, LLC) agreed to purchase 100% of the membership interests of the Apartment LLCs for a total aggregate cash payout of \$1,196,000.000. The agreement was memorialized in five separate written agreements, each of which was titled “Limited Liability Company (sic) Purchase Agreement” (the “Purchase Agreements”). Though the Purchase Agreements recite both an effective date and a closing date of October 29, 2009, the Amended Complaint acknowledges that the closing did not actually occur until the following month. *Id.* at ¶37.

Plaintiffs allege that while they were negotiating the sale of the purchase of the Apartments and the Apartment LLCs, unbeknownst to them, mortgages were in default, and had been in default since approximately September 2, 2009, and remained in default as of the Closing. (Amend. Comp. at ¶43). Plaintiffs further allege that "During the time since the default, however, Selling Defendants and specifically TJ Remy, Sherry Remy, and [Sperry], represented and later in the Representations and Warranties given at Closing (excluding [Sperry]) reaffirmed , that none of the Loans, Mortgages, Apartments or Apartments LLCs were in default." (Amend Comp. at ¶ 44).

IV. ARGUMENT

A. LEGAL STANDARD FOR RULE 12(b)(6) MOTION AND FOR FAILURE TO COMPLY WITH RULE 9(b)

Federal Rule of Civil Procedure 12(b)(6) applies to adversary proceedings in the Bankruptcy Court. USCS Bankruptcy R 7012(b). A Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a pleading. *Carter v. City of Phila.*, 1998 W.L. 208847, 2 (E.D. Pa. Apr. 20, 1998). In considering a motion to dismiss pursuant to Rule 12(b)(6), the court must accept all well-pleaded facts in the complaint as true and may consider matters of public record. *Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir. 2004). To survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint is properly dismissed when it clearly

appears that a plaintiff has alleged "no set of facts, which, if proved, would entitle him or her to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). *Jones v. Pennsylvania Minority Bus. Dev. Auth.*, 1998 U.S. Dist. LEXIS 5795, Civil Action No. 97-4486 (E.D. Pa. Apr. 22, 1998) (a complaint may be dismissed when the facts alleged and the reasonable inferences there from are legally insufficient to support the relief sought). While all well-pleaded facts, as distinguished from conclusory allegations, should be taken as true, "a court need not credit a complaint's bald assertions or 'legal conclusions' when deciding a motion to dismiss". *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3d Cir. 1997). It is not "proper to assume that the [plaintiff] can prove facts that [she has] not alleged." *Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983) (footnote omitted). The Court is "not required to accept legal conclusions either alleged or inferred from the pleaded facts." *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). Furthermore, the Court is not bound "to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allian*, 478 U.S. 2675, 2686 (1986).

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Fed. R. Civ. P. 9(b). "Thus, a complaint alleging fraud must set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. Okla. 2006). A claim for fraud which has not been pled with sufficient specificity as required by Rule 9(b) is subject to dismissal for failure to state a claim. *Miller v. McCown De Leeuw & Co.* (In re Brown Sch.), 368 B.R. 394, 403 (Bankr. D. Del. 2007) (bankruptcy court dismissed trustee's fraud claim where he failed to comply with the requirements of Rule 9(b)).

B. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR FRAUDULENT MISREPRESENTATION

Under Oklahoma law, in order to state a claim for fraudulent misrepresentation, a Plaintiff must allege "(1) a representation; (2) that is false; (3) that is material; (4) the speaker's knowledge of its falsity or ignorance of the truth; (5) the speaker's intent it be acted on; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's right to rely on it; and (9) injury." *Stinson v. Maynard*, 2008 U.S. Dist. LEXIS 76556 (W.D. Okla. Sept. 30, 2008). "An essential element of actionable fraud is scienter or knowledge of its falsity or negligence in making it without a reasonable ground for believing it to be true." *Dawson v. Tindell*, 1987 OK 10 (Okla. 1987).

In the instant matter, Plaintiffs have failed to sufficiently allege facts, which if proven, give rise to a viable cause of action for fraud against Sperry. At ¶ 44, Plaintiffs allege that "[d]uring the time since that default [] Selling Defendants and specifically TJ Remy, Sherry Remy, and [Sperry], represented and later in the Representations and Warranties given at Closing (excluding SVN) reaffirmed , that none of the Loans, Mortgages, Apartments or Apartments LLCs were in default." At ¶ 53, Plaintiffs similarly allege that "[t]he selling Defendants, the Remys and [Sperry] made misrepresentations of material fact to [Plaintiffs] prior to and during execution of the Agreements with the intent to induce [Plaintiffs to execute the Agreements." These are the only two allegations in Plaintiffs' Amended Complaint which attempt to identify any conduct on the party of Sperry as related to Plaintiffs' fraud claim. Plaintiffs have not distinguished its allegations as to Sperry from its allegations as to the other defendants to this matter; thus, Plaintiffs have not pled their fraud claim with sufficient specificity. Paragraph 44, merely alleges that sometime between the default, and the sale of the apartments Sperry misrepresented that none of the loans, mortgages, apartments, or apartments LLCs were in default. Likewise, ¶ 53 does not set forth the time, place or contents of any false statement allegedly made by Sperry. Neither paragraph indicates whether the alleged misrepresentation was oral or written, nor does either paragraph identify any individual who is

alleged to have made the false statement on behalf of Sperry, a corporation, which can only speak through its representatives.

In sum, Plaintiff's Amended Complaint does not "set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof," as required under Rule 9(b). *Tal*, 453 F.3d at 1263. Accordingly, Plaintiffs' fraud claim is subject to dismissal pursuant to Rule 12(b)(6). *Miller*, 368 B.R. at 403.

Significantly, Plaintiffs allege that the Remys misrepresented that the mortgages were not in default, and that the Remys' agent, Sperry, made the same statement to them. Under Oklahoma law, one cannot be held liable for fraudulent misrepresentation unless he knew of its falsity, or did not have reasonable grounds for believing that it was true. Since the same statement is alleged to have been made by the Remy's, it could not have been unreasonable for Sperry to believe that it was true, as the Remys were in the best position to have knowledge as to whether their mortgages were in default. Research does not reveal any Oklahoma law which specifically addresses this issue; however, the Supreme Court of Kansas held that, "[i]f an agent makes false representations on behalf of his principal honestly believing them to be true, the mental element of fraud is lacking and he is not guilty of fraud and not liable for such, although his principal may have known that such representations were false." *Mahler v. Keenan Real Estate*, 255 Kan. 593, 603 (Kan. 1994).

Here, Plaintiffs have not alleged any facts suggesting that Sperry knew that the mortgages were in default; nor have they alleged any facts which would suggest that it was unreasonable for Sperry to believe that the mortgages were not in default. Instead, Plaintiff's merely allege the legal conclusion that Sperry made the statements "in reckless disregard for the truth." Amend. Comp. at ¶ 56. Accordingly, Plaintiffs claim of fraud must be dismissed.

C. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR CIVIL CONSPIRACY

At Count III of their Complaint, Plaintiffs assert a civil conspiracy claim against Sperry. Count III, however, is devoid of any factual allegations relating to this claim. They merely allege the legal conclusion that "[t]he Selling Defendants, the Remys and SVN, one or more, pursued an independently unlawful purpose in selling the Apartment LLCs to the RC LLCs by means of fraud, misrepresentation or racketeering." (Amend. Comp. at ¶ 64). Plaintiffs, however, have failed to state a claim for civil conspiracy against Sperry.

"A civil conspiracy consists of a combination of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. Civil conspiracy itself does not create liability. To be liable the conspirators must pursue an independently unlawful purpose or use an independently unlawful means. A conspiracy between two or more persons to injure another is not enough; an underlying unlawful act is necessary to prevail on a civil conspiracy claim." *Roberson v. PaineWebber, Inc.*, 2000 OK CIV APP 17, 21 (Okla. Civ. App. 1999), citing *Brock v. Thompson*, 948 P.2d 279, 294 (Okla. 1997).

As set forth above, Plaintiffs have failed to state a viable claim for fraud against Sperry; thus, their civil conspiracy claim does not allege that Sperry combined with others to commit an underlying unlawful act, or lawful act by unlawful means. Moreover, Plaintiffs have failed to allege that two or more persons, including Sperry, conspired to do anything. In fact, as related to this claim, Plaintiffs, at ¶ 64 of their Amended complaint, specifically allege that one or more of the defendants pursued an independently unlawful purpose. In order to state a viable claim for civil conspiracy, however, Plaintiffs must allege a combination of two or more persons. Since Plaintiffs have not alleged a viable claim for civil conspiracy, this claim is also subject to dismissal.

D. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR FRAUDULENT TRANSFER

At Count V of their Amended Complaint, Plaintiffs assert a claim of fraudulent transfer against all defendants pursuant to 11 U.S.C. §§ 548, 550. In sum, Plaintiffs allege that in transferring cash and assuming the sellers' mortgage debt obligations, they "received less than a reasonably equivalent value in exchange." Amend. Comp. at ¶81. Plaintiffs, however, do not allege that Sperry did not receive a "reasonably equivalent value" in exchange for its brokerage services. In fact, as related to this claim, Plaintiffs do not address the value conferred upon Sperry whatsoever. They merely recite the elements of the statute for this claim without alleging any corresponding facts.

"It is well settled law that Rule 9(b) applies to section 548 claims. *OHC Liquidation Trust v. Nucor Corp.*, 325 B.R. 696, 698 (Bankr. D. Del. 2005). Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b); *see also United States v. Dow Chem. Co.*, 343 F.3d 325, 328 (5th Cir. 2003); *In re Circle Y*, 354 B.R. 349, 356 (Bankr. D. Del. 2006)("To plead fraud, the Trustee cannot merely recite the statutory elements."). The purpose of Rule 9(b) is to "place the defendants on notice of the precise misconduct with which they are charged." *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984); *ASARCO LLC v. Ams. Mining Corp.*, 382 B.R. 49, 2007 U.S. Dist. LEXIS 85832 (D. Tex. 2007); *In re APF Co.*, 308 B.R. 183, 188 (Bankr. D. Del. 2004) (describing the standard as higher and more strict than notice pleading). A claim for fraud which has not been pled with sufficient specificity as required by Rule 9(b) is subject to dismissal for failure to state a claim. *Miller*, 368 B.R. at 403. Since Plaintiffs have failed to allege this claim with any specificity as to Sperry, it is likewise subject to dismissal.

Although not alleged in their Complaint, presumably, Plaintiffs contend that the commissions that Sperry received from the sellers as compensation for the brokerage services it

provided constitute an inequitable transfer because, according to them, the businesses they acquired were worth less than they paid the sellers. Sperry's receipt of such commissions, however, even if received under the circumstances alleged in Plaintiffs' complaint, are not recoverable under §548.

Title 11 U.S.C. § 548 provides in relevant part:

(a) 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 one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily. . .

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and,

(B)(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"

Bfp v. Resolution Trust Corp., 511 U.S. 531, 535 (U.S. 1994)

A trustee may not recover from one other than the initial transferee if the property was taken by the subsequent transferee for value, in good faith, and without knowledge of the avoidability of the transfer. 11 U.S.C. § 550(b).

Even if the businesses received by Plaintiffs were of an inequitable value, Sperry cannot be held liable because it was not the initial transferee, as it was paid by its client, the sellers at the time of the closing. Plaintiffs do not, and cannot, allege that they paid Sperry any compensation directly. The total amount they paid was the purchase price for the Apartments and the Apartment LLCs. Furthermore, Plaintiffs do not allege that Sperry had any knowledge of the avoidability of the transfer at the time it brokered the transaction. Since Sperry was not the initial transferee, it is entitled to retain its commissions.

Even if Sperry were deemed to have been an initial transferee, it would nonetheless be entitled to retain its commissions because they constitute a fair value for the services it provided. In order to determine "if a fair economic exchange has occurred in a case of suspected fraudulent

transfer, the bankruptcy court must analyze all the circumstances surrounding the transfer." 5 Collier on Bankruptcy p. 548.05. Assuming for the sake of argument that Sperry is deemed to have received value directly from Plaintiffs, Sperry cannot be held liable as long as Plaintiffs received a fair value in exchange for such services. The value received by Plaintiffs from Sperry is not the businesses that are the subject of the transaction, but the brokerage services provided by Sperry. Where the Plaintiffs "received value in exchange for the commissions paid to the Brokers for performing, in good faith, a facially lawful and customary service for which they were retained [t]he focus of the Court's inquiry is the value of the goods and services provided rather than the impact that the goods and services had on the bankrupt enterprise. . . ." *Balaber –Strauss v. Lawrence*, 264 B.R. 303, 308 (S.D.N.Y. 2001).

In *Balaber Strauss*, the trustee, plaintiff, stood in the shoes of several debtor entities which were operated as a Ponzi scheme by the debtors' principal. The trustee filed suit against brokers who were hired by the principal to originate mortgages and solicit investors in one or more of the entities. The key issue before the court on the trustee's fraudulent transfer claims that were brought by the trustee in the bankruptcy court, was whether reasonably equivalent value was given and received in the transactions between the debtors and the brokers. The district court affirmed the bankruptcy court's finding that, where the brokers were alleged to have merely performed brokerage services for commissions that were not excessive, and where there was no allegation that such services were performed by the brokers with knowledge of their clients' wrongdoing, the debtors received equitable value in exchange for the commissions paid to the brokers. *Id.*

Here, Plaintiffs do not allege that Sperry did not perform the services for which it was retained; nor do they allege that Sperry had knowledge of any wrongful conduct on the part of the sellers. Accordingly, Sperry cannot be held liable for fraudulent transfer.

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FOR THE DISTRICT OF DELAWARE

In Re: RC SOONER HOLDINGS, LLC, et al.

Plaintiffs

v.

REMYCO.,INC., et al.

Defendants

ADV. PRO. NO. 10:50723

CERTIFICATE OF SERVICE

I Gary Kaplan do hereby certify that a true and correct copy of Defendant, Sperry Van Ness/William T. Strange Associates, Inc. Motion to Dismiss with Memorandum of Law was served on all parties via ECF or regular mail on the below date.

**MARSHALL, DENNEHEY, WARNER,
COLEMAN AND GOGGIN**

Date: 4/23/2010

BY: /s/ Gary Kaplan
Gary Kaplan

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