

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

In re:

RC Sooner Holdings, LLC, et al.<sup>1</sup>

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

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

Plaintiffs, in their Memorandum of Law in Opposition to the Motion to Dismiss filed by Defendant, Sperry Van Ness / William T. Strange Associates, Inc. (hereinafter, "Sperry"), seek to avoid dismissal of their claims against Sperry by misstating the averments of their Amended Complaint as alleged against Sperry, and by misapplying the relevant statutory and case law. Accordingly, Sperry respectfully submits this brief reply.

**A. PLAINTIFFS' STATEMENT OF FACTS IS NOT CONSISTENT WITH THE ALLEGATIONS OF THEIR COMPLAINT**

At p. 3 of their response brief, Plaintiffs purport to offer their "Statement of Facts." Presumably, Plaintiffs, by way of this statement, would simply restate facts alleged in their Amended Complaint in order to demonstrate that they have sufficiently pled facts in support of their claims against Sperry, as facts not pled in a Complaint, unless of public record, are not to be

<sup>1</sup> 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.

considered in ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). *Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir. 2004). In their response brief, however, Plaintiffs have asserted facts that are not set forth in their Amended Complaint.

At p. 4 of their response brief, Plaintiffs suggest that ¶¶ 31 – 33, 43, & 44 of their Amended Complaint allege that "Sperry knowingly provided false documentation and exchanged communications that included intentional misrepresentations about the financial status of the Apartment LLC's and the accompanying Mortgages." Notwithstanding that this statement is simply not true, the referenced paragraphs do not allege that Sperry knowingly provided any false documentation or exchanged any communications that included any intentional misrepresentations to Plaintiffs. Similarly, Plaintiffs suggest that ¶¶ 35 – 40 & 44 allege that "[t]he Agreements the parties executed at Closing contained materially false warranties and representations." In fact, Plaintiffs have not alleged in their Amended Complaint that Sperry, the broker for the underlying transaction, ever executed any Agreements that contained any materially false warranties or representations, nor can such be truthfully alleged. Plaintiffs further suggest ¶¶ 40, 43, 45, 45, 50, 53 – 55, 63, 64, 67, & 69 allege that Sperry knew the representations regarding the loan defaults were false. In fact, of these thirteen paragraphs, none allege that Sperry knew the representations were false. Finally, as related to Plaintiffs' claim that the Selling Defendants, not Sperry, wrongfully executed forbearance agreements with Fannie Mae on behalf of the transferred Apartment LLCs, Plaintiffs suggest that ¶¶ 45 – 48 allege that "Sperry failed to notify and actively concealed the transaction from Fannie Mae to further conceal the fact that the loans were in default prior to closing." None of these paragraphs, however, even reference the conduct or omissions of Sperry.

Plaintiffs, in order to avoid dismissal, must demonstrate that they have sufficiently alleged that Sperry made a misrepresentation to them, however, they are not permitted to first allege as much in their brief in opposition to Sperry's Motion to Dismiss. Plaintiffs' Amended Complaint

"may not be amended by the briefs in opposition to a motion to dismiss. . . ." *Pennsylvania ex rel. Zimmerman v. Pepsico, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988).

**B. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR FRAUD AGAINST SPERRY**

Plaintiffs, at p. 7 of their response brief, suggest that they have alleged each element of their fraud claim "with particularity and precision." One could put a large square peg in a small round hole with more precision than that used by Plaintiffs in drafting their Amended Complaint.

As to the alleged misrepresentation, Plaintiffs argue that their Amended Complaint, at ¶¶ 31 – 33, 43, 44, 48, & 53, "alleges that the marketing information communicated to the Plaintiffs stating that none of the Loans, Mortgages, Apartments or Apartment LLCs were in default was false." Plaintiffs' Amended Complaint, however, is devoid of any allegations suggesting that Sperry ever provided any marketing information to Plaintiffs. Moreover, Plaintiffs' Amended Complaint fails to reference any marketing information whatsoever. Plaintiffs also suggests that they have, with precision, alleged that that Sperry made a false representation to them at ¶¶ 34, 35, 38, 43, 44, & 53, which purportedly provide that the "Representations and Warranties contained in the Limited Liability Purchase Agreements were false and identif[y] the exact documents and representations alleged to be false." In fact, as acknowledged by Plaintiffs in their Amended Complaint at ¶ 38, the representations and warranties were made by the "Selling Defendants." Sperry made no representations or warranties, nor has such been alleged by Plaintiffs in their Amended Complaint.

Plaintiffs, in their response brief at pp. 7 and 8, go on to identify other allegations in their Amended Complaint which purportedly provide that misrepresentations were made to them; however, they acknowledge that those misrepresentations were alleged to have been made by the Selling Defendants and not Sperry. In sum, as to Plaintiffs' fraud claim against Sperry, Plaintiffs' Amended Complaint does not "set forth the time, place and contents of the [alleged] false representation, the identity of the party making the [alleged] false statements and the consequences

thereof," as required under Rule 9(b). *Tal v. Hogan*, 453 F.3d 1244, 1263 (10th Cir. Okla. 2006). Accordingly, Plaintiffs' fraud claim is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(6). *Miller v. McCown De Leeuw & Co.* (In re Brown Sch.), 368 B.R. 394, 403 (Bankr. D. Del. 2007).

At p. 8 of their response brief, Plaintiffs attempt to justify their failure to allege fraud with particularity by suggesting that the Defendants acted collectively. Plaintiffs' response brief is unclear as to whether they are suggesting that the numerous Selling Defendants acted collectively in this regard, or whether they are suggesting that Sperry acted collectively with the Selling Defendants.<sup>2</sup> To the extent Plaintiffs are suggesting that they need not plead fraud with particularity as to Sperry because they are contending Sperry acted collectively with the Selling Defendants, Plaintiffs' position is without merit. Significantly, Plaintiffs' Complaint specifically distinguishes its allegations as to the Selling Defendants from its allegations as to Sperry. Moreover, Plaintiffs cite no case law or other authority in support of their contention that fraud need not be pled with particularity where there are independent fraud claims asserted against different defendants, as asserted in Count I of Plaintiffs' Amended Complaint. Accordingly, the pleadings requirements as set forth in Rule 9(b) and *Tal* are applicable.

**C. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR CONSPIRACY TO COMMIT FRAUD AGAINST SPERRY**

Plaintiffs, at p. 10 of their response brief, argue that they need not allege their conspiracy to commit fraud claim with particularity. However, a plaintiff asserting a claim of conspiracy to commit fraud is required to comply with Fed. R. Civ. P. 9(b), by pleading that fraud with particularity. Claims of conspiracy to commit fraud must nonetheless "specify the who, what, when, where, and how of any conspiracy. General or conclusory allegations of conspiracy are insufficient." *United States ex rel. Lacy v. New Horizons, Inc.*, 2008 U.S. Dist. LEXIS 73814, 21-22 (W.D. Okla. Sept. 25, 2008), *aff'd* 348 Fed. Appx. 421, 424 (10th Cir. Okla. 2009). "[C]ourts

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<sup>2</sup> Plaintiffs do cite ¶ 19, of their Complaint in support of their argument that the defendants collectively made fraudulent representations. That paragraph, however, only addresses the conduct of the Selling Defendants, not Sperry.

have concluded that "the requirements of the [Rule 9(b)] apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud." *General Latex & Chem. Corp. v. BASF Corp.*, 1999 U.S. Dist. LEXIS 22904, 11-12 (D. Del. July 14, 1999).

In support of their contention that they need not plead their conspiracy to commit fraud claim with particularity, Plaintiffs cite *China Resources Products (U.S.A.) Ltd. v. Fayda Int'l, Inc.*, 788 F. Supp. 815, 819 – 20 (D. Del. 1992), *Eames v. Nationwide Mut. Ins. Co.* 412 F. Supp. 2d 431, 438, 39 (D. Del. 2006), and *Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1400 (D. Del. 1984). The first two cases cited by Plaintiffs are off point and inapplicable. The Court's holding in *Kalmanovitz*, actually supports Sperry's position.

*China Resources Products* did not involve a common law claim of conspiracy to commit fraud, but rather involved a Delaware statutory claim of fraudulent conveyance under 6 Del. C. § 1301, et seq. The District Court held that "because the plaintiff need not prove actual or constructive fraud under the provisions [of the Act], Rule 9(b) does not apply to pleadings made pursuant to those provisions." *China Resource Prods. v. Fayda Int'l*, 788 F. Supp. 815, 819 (D. Del. 1992). Contrary to Plaintiffs' argument, the Court in *Eames* did not hold that Rule 9(b) does not apply to claims for conspiracy to commit fraud. In *Eames*, the Court dismissed the plaintiffs' conspiracy claim because they failed to allege an underlying wrong. The Court did, however, state in a footnote that "[t]o the extent a higher pleading standard were required for the civil conspiracy count, the particularized pleading that is [] required for the underlying fraud claim should suffice." *Eames v. Nationwide Mut. Ins. Co.*, 412 F. Supp. 2d 431, 439 (D. Del. 2006).

In *Kalmanovitz*, the District Court stated as follows:

Fraud, conspiracy and collusion must be charged by allegations of fact; and general allegations of fraud, fraudulent intent, and conspiracy or collusion, without a statement of supporting facts, are conclusions of law and are insufficient. The plaintiffs must plead with particularity the 'circumstances' of the alleged wrongdoing in order to place the defendants on notice of the precise misconduct with which they are charged. Only allegations of conspiracy which

are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient.

*Kalmanovitz v. G. Heileman Brewing Co.*, 595 F. Supp. 1385, 1400-1401 (D. Del. 1984) (internal citations omitted).

As previously demonstrated, Plaintiffs have not met that heightened pleading standard in their fraud claim as to Sperry. By extension, they have not met that standard as to their conspiracy to commit fraud claim as asserted against Sperry.

Even if Rule 9(b) did not apply to Plaintiffs' claims for conspiracy to commit fraud claim, Plaintiffs' allegations fail to satisfy the more liberal pleading requirements of Fed. R. Civ. P. 8(a). At p. 11 of its response brief, Plaintiffs argue that they have sufficiently stated a claim for conspiracy by alleging that "Sperry is the agent and representative of the Remys," and that "the Selling Defendants, the Remys and Sperry collectively engaged in fraudulent conduct." These allegations, however, constitute conclusions of law, not facts. In order to state a claim for conspiracy to commit fraud, a plaintiff must allege that a combination of two or more persons committed an unlawful act, or committed a lawful act by unlawful means. *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). Plaintiffs do not allege that Sperry combined with anyone 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. Since Plaintiffs have not alleged a viable claim for civil conspiracy under either a heightened or liberal pleading standard, this claim is also subject to dismissal.

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

Plaintiffs at p. 13 of their response brief, suggest that Sperry does not contend that Plaintiffs have failed to properly plead a claim for fraudulent transfer. On the contrary, Sperry has, in detail, set forth arguments in their instant motion demonstrating that Plaintiffs have not properly pled a claim for fraudulent transfer, and further, have failed to comply with the heightened pleadings requirements of Fed. R. Civ. P. 9(b), as related to their fraudulent transfer claim. As set forth on p. 12 of their Memorandum of Law, Plaintiffs merely recite the elements of the statute for this claim without alleging any corresponding facts. Accordingly, Plaintiffs' fraudulent transfer claim should be dismissed.

Notwithstanding Plaintiffs failure to sufficiently state a claim for fraudulent transfer, presumably, they 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 from the Selling Defendants were worth less than they paid. Sperry's receipt of its commissions, however, even if received under the circumstances alleged in Plaintiffs' complaint, are not recoverable under §548 because Sperry was not the initial transferee, and further because Sperry was a subsequent transferee that was merely paid the value of the brokerage services it provided to its clients. Under such circumstances, Plaintiffs cannot assert any recovery against Sperry. 11 U.S.C. § 550(b).

Plaintiffs argue that even though Sperry was paid its brokerage fees by the Selling Defendants, and not Plaintiffs, because Sperry was paid at the time of the closing, it must be deemed an initial transferee.<sup>3</sup> They, however, cite no statute or case law in support of this argument. Moreover, they fail to address the holding of *Balaber –Strauss v. Lawrence*, 264 B.R.

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<sup>3</sup> Actually, Plaintiffs have not alleged that Sperry received its commissions at the time of closing. At p. 79, they merely allege that they transferred amounts to and for the benefit of one or more of the Defendants.

In fact, Sperry has not been fully compensated for the services it provided to the Selling Defendants.



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**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.'s Reply Brief in Support of its Motion to Dismiss was served on all parties via ECF or regular mail on the below date.

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

Date: 6/2/2010

BY: /s/ Gary Kaplan  
Gary Kaplan