IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re:

GRAHAM GULF, INC. Case No. 15-3065

Debtor.

LYNN HARWELL ANDREWS,

Plaintiff,

v. Adversary Case No. 17-00082

GRAHAM HOLDING COMPANY, INC., et al.,

Defendants.

ORDER GRANTING IN PART MOTIONS TO DISMISS (DOCS. 18, 19, 20, 21, and 38) WITH LEAVE TO AMEND

This adversary proceeding is before the court on the motions to dismiss (docs. 18, 19, 20, 21, and 38) filed by the defendants pursuant to Federal Rule of Civil Procedure 12(b)(6) and 9(b), made applicable to this case by Federal Rule of Bankruptcy Procedure 7012 and 7009, with respect to the amended complaint (doc. 9) of the plaintiff/trustee Lynn Harwell Andrews. For the reasons discussed herein, the court grants the motions except with respect to certain parts of Counts 15, 16, 21, and 22 as discussed in further detail herein, but allows the trustee leave to amend the complaint under Federal Rule of Civil Procedure 15(a), made applicable by Federal Rule of Bankruptcy Procedure 7015.[1]

[1] Defendants cite Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 to argue that the court lacks subject matter jurisdiction because the amended complaint does not contain a statement that the plaintiff does/does not consent to entry of final orders or judgment by this court. Failure to include such statement does not warrant dismissal of this

Background

This is one of several actions brought by the chapter 7 trustee related to the chapter 7 bankruptcy of Graham Gulf, Inc. The facts set out below are allegations in the amended complaint and not findings of fact.

According to the amended complaint (doc. 9), Graham Gulf provided offshore support services, including operating 11 vessels. (*Id.* at ¶12). Graham Gulf purchased vessels exclusively from C&G Boat Works, Inc. and C&G did the repair work on the Graham Gulf vessels. (*Id.* at ¶13).

Defendant "Graham Holding [Company, Inc.] wholly owns both Graham Gulf and C&G[,]" as well as 97% of defendant Davenport Properties, L.L.C.. (*See id.* at ¶15). Defendant Janson Graham is the principal owner of Graham Holding, and defendants Shawn Blair and Keith Hayles were the CEO and CFO of Graham Holdings, Graham Gulf, and C&G during the relevant time period. (*See id.* at ¶¶ 16, 19, 20). Graham "served as President, Vice President, Secretary, Treasurer and/or as Director for Graham Gulf and C&G, and served as [CEO] and Director for Graham Holding" during the relevant time period. (*See id.* at ¶21). Defendant Davenport Properties "is an investment company that owns property and equipment which it leased to Graham Gulf and C&G." (*Id.* at ¶14; *see also id.* at ¶¶ 22-28).

The trustee alleges that in or about March 2014, Wells Fargo refinanced most of the debt of Graham Gulf, C&G, and Davenport (which companies the amended complaint collectively refers to as "the Enterprise") through a $33 million loan facility but that Graham Gulf (and the other entities) "were not in compliance with several of" the loan facility covenants as of

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adversary proceeding. *See, e.g.*, *In re Ward*, No. 14-32939-BJH, 2017 WL 377947, at *6 (Bankr. N.D. Tex. Jan. 26, 2017). Nonetheless, because the court is granting leave to amend, the trustee should include this statement in any amended complaint.

December 31, 2014. (*See id.* at ¶¶ 32-33). A situational analysis of Graham Gulf obtained by Graham Holding in May 2015 identified declining oil prices as the cause of Graham Gulf's revenue decline. (*See id.*). Thereafter, an independent auditors' report from about June 2015 expressed doubt about Graham Gulf's ability to continue operations and noted net losses and negative cash flows of the so-called Enterprise. (*See id.* at ¶34). Graham Gulf filed chapter 11 bankruptcy on September 18, 2015, which was later converted to a chapter 7.

Against this background, the chapter 7 trustee alleges that:

> Graham, Hayles, and Blair, individually and in concert, caused Graham Gulf to pay inflated, irregular, and above-market 'management' fees . . . to Graham Holding ostensibly to cover management salaries and bonuses among other things. Upon information and belief, Graham, Hayles, and Blair negligently and/or recklessly failed to base the amount of such fees on any objective formula or collect such fees on any schedule or with any regularity.

(*Id.* at ¶42). She also alleges that "Blair and Hayles caused [Graham Gulf] to make transfers in the form of bonuses" to themselves, and that "Graham, Blair and/or Hayles caused [Graham Gulf] to make transfers to Davenport" in the form of the rent payments, which she states were "above-market . . . ." (*See id.* at ¶¶ 73, 95).

The trustee seeks to avoid under bankruptcy and Alabama state law the payment of the management fees from Graham Gulf to Graham Holding; the payment of the bonuses to Blair and/or Hayles; and the payment of the rents to Davenport. She also seeks to avoid under bankruptcy law alleged preferential transfers of property from Graham Gulf to Graham Holding and from Graham Gulf to Davenport. Further, she asserts state law claims for breach of fiduciary duty against Graham, Blair, and Hayles; breach of contract against Hayles and Graham based on purported employment agreements; and unjust enrichment against all defendants based on alleged fraudulent transfers.

Legal Discussion

On a Rule 12(b)(6) motion, the court accepts as true the well-pleaded factual allegations of the complaint and draws all reasonable inferences in the plaintiff's favor. *Smith v. United States*, 873 F.3d 1348, 1351 (11th Cir. 2017). To withstand Rule 12(b)(6) scrutiny, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face[, so as to] nudge[] [her] claims across the line from conceivable to plausible . . . ." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "This necessarily requires that a plaintiff include factual allegations for each essential element of . . . her claim." *See GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1254 (11th Cir. 2012). These minimum pleading standards "require[] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *See Twombly*, 550 U.S. at 555. "Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *See id.* "Legal conclusions without adequate factual support are entitled to no assumption of truth." *Mamani v. Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011).

For fraud allegations, a plaintiff must "state with particularity the circumstances constituting fraud . . . ." *See* Fed. R. Civ. P. 9(b).[2] "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Id.*

The defendants argue several grounds for dismissal, each of which the court discusses below to the extent it affected the court's decision. However, in applying the correct motion to

[2] There is a split of authority whether this heightened pleading standard applies to allegations of constructive fraud. The court need not decide this issue because, as discussed below, the constructive fraud allegations are not well-pled even under the lower standard.

dismiss standard, the court has not considered any argument asking the court to consider matters beyond the pleadings. *See, e.g.*, *Kennedy v. Tallant*, 710 F.2d 711, 718 n.6 (11th Cir. 1983).

I. Lumping defendants together and pleading around affirmative defenses

Federal Rule of Civil Procedure 20, made applicable by Federal Rule of Bankruptcy Procedure 20, allows the trustee to join multiple defendants in this case if "any right to relief is asserted against them jointly, severally, *or in the alternative* with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences[,] and any question of law or fact common to all defendants will arise in the action." (emphasis added). Thus, the trustee's use of "and/or" in pleading claims against more than one defendant is not a ground for dismissal of her claims, although, as discussed below, the court finds that dismissal is appropriate on other grounds and that the trustee should amend her complaint accordingly.

Similarly, the trustee is not required to plead around affirmative defenses such as the ordinary course of business defendant and business judgment rule. *See, e.g.*, *Jones v. Bock*, 549 U.S. 199, 216-17 (2007); *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (a plaintiff is "not required to negate an affirmative defense in" her complaint) (citation and quotation marks omitted); 35A C.J.S. *Federal Civil Procedure* § 304. The court also denies the defendants' requests to dismiss claims based on the applicable statute of limitations where the court is unable to determine from the face of the amended complaint whether the claims are time-barred.

II. Bankruptcy Code § 547: Counts 21 and 22

For a transfer to be avoided as preferential under § 547, it must have been made "(A) on or within 90 days before the date of the filing of the petition; or (B) between ninety days and one year before the date of the filing of the petition, if such creditor as the time of such transfer was

an insider . . . ." The trustee alleges that the petition date was September 18, 2015. Her claim in Count 21 based on a transfer dated September 12, 2014 is time-barred on the face of the amended complaint.

The trustee's § 547 claims also require facts to support that Graham Gulf was insolvent as of a particular date. The claims based on transfers on or within 90 days are sufficient to state a claim. *See* 11 U.S.C. § 547(f) ("For purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition."). But the court finds that the factual allegations related to Graham Gulf's purported insolvency between ninety days and one year before the date of the filing of the petition do not nudge that issue across the line from conceivable to plausible and will dismiss these claims. *See, e.g.*, *Tow v. Bulmahn*, 565 B.R. 361, 367 (E.D. La. 2017), *aff'd, Matter of ATP Oil & Gas Corp.*, No. 17-30077, 2017 WL 4876310, at *6 (5th Cir. Oct. 27, 2017). However, the court is not persuaded that documents in the record establish solvency as a matter of law such that the trustee can never sufficiently plead this element, and thus the dismissal will be with leave to amend.

III. Bankruptcy Code § 548(a)(1)(B): Counts 2, 7, 11

The trustee has pled constructive fraud under Code § 548(a)(1)(B), which requires her to show that Graham Gulf received less than reasonably equivalent value for a transfer to a defendant. The trustee recites this element, but the amended complaint "is devoid of factual allegations that might lend shape and substance to this formulaic recitation of an element." *See SE Prop. Holdings, LLC v. Braswell*, No. 13-0267-WS-N, 2013 WL 4498700, at *4-5 (S.D. Ala. Aug. 21, 2013) (analyzing a similar element under the Alabama Uniform Fraudulent Transfer Act). "There are no well-pleaded facts plausibly suggesting that" Graham Gulf did not receive reasonably equivalent value on account of the transfers. *See id.* "All we have is the [trustee]'s

conclusory say-so, which is not entitled to the assumption of truth under *Iqbal/ Twombly*." *See id.*

While the trustee argues that "the fluctuating and/or irregular nature of the amounts ostensibly paid as Management Fees, Bonuses, and Rental payments evidence a lack of reasonably equivalent value being exchanged[,]" (Trustee opp., doc. 44, at p.19), the allegations do not plausibly suggest that the trustee has a right to relief that rises above a speculative level. *See, e.g.*, *In re Merrillville Surgery Ctr., LLC*, No. 2:12-CV-253-TLS, 2013 WL 3338418, at *5-6 (N.D. Ind. July 2, 2013). The trustee has not alleged what the market rent would have been at the time the payments were made, *see, e.g.*, *id.*, and includes only conclusory allegations of payment of "inflated" and/or "exorbitant" management fees and bonuses with "no factual material to support this assertion of value." *See, e.g.*, *Tow v. Bulmahn*, No. 15-3141, 2016 WL 1722246, at *27 (E.D. La. Apr. 29, 2016), *aff'd*, *Matter of ATP Oil & Gas*, 2017 WL 4876310, at *6. "Allegedly poor executive performance, without more, does not state a claim for fraudulent transfer." *Tow v. Bulmahn*, 565 B.R. at 366.

Additionally, to the extent the trustee is relying on allegations of insolvency for these counts, *see* § 548(a)(1)(B)(ii)(I), those allegations are insufficient for the same reasons discussed above regarding those allegations. Finally, if she is relying on § 548(a)(1)(B)(ii)(II) or (III), she must do more than merely recite those elements.

IV. Bankruptcy Code § 548(a)(1)(A): Counts 1, 6, 10

The trustee has also pled actual fraud under Code § 548(a)(1)(A). Count One is based on "transfers in the form of 'management fees' and other transfers . . . to Graham Holding that later were paid in exorbitant, above-market salaries and discretionary bonuses for management or for the personal benefit of management and/or family members of management." (*See* Am. Compl.,

doc. 9, ¶45). Count 6 is based on year-end bonuses of $25,000 paid to Blair and Hayles, (*see id.* at ¶73), and Count 10 is based on "transfers to Davenport, an insider, in the form of above-market rent . . . ." (*See id.* at ¶95). Again, though, there is no factual content supporting these claims and, thus, nothing from which this court could infer that a defendant is liable for the misconduct alleged. While the trustee recites certain "badges" of fraud, including lack of reasonably equivalent value and insolvency, as discussed above the factual allegations supporting those contentions are insufficient.

V. Bankruptcy Code § 544: Counts 3, 4, 5, 8, 9, 12, 13, 14

The defendants argue that the trustee must plead the existence of a triggering creditor for her § 544 claims. A triggering creditor is "(1) an unsecured creditor, (2) who holds an allowable unsecured claim under section 502 [of the Bankruptcy Code], and (3) who could avoid the transfers at issue under applicable (i.e., state) law." *See MC Asset Recovery, LLC v. S. Co.*, No. 1:06-CV-0417B, 2006 WL 5112612, at *3 (N.D. Ga. Dec. 11, 2006).

While in the past a trustee may not have had to identify a triggering creditor, *Twombly/Iqbal* jurisprudence now makes it "necessary to include specific allegations to support this element of the claim." *See, e.g.*, *In re Rollaguard Sec., LLC*, 570 B.R. 859, 881 n.11 (Bankr. S.D. Fla. 2017); *see also id.* at 881-82. The trustee "must name a specific creditor or creditors[,]" which she has not done.[3] *See id.* at 881 n.11; *see also id.* at 881 ("The Trustee must identify by name at least one creditor with an allowable unsecured claim that could have sought avoidance of the transfer in question under [state] law."). "It is not sufficient to merely draw the [c]ourt's attention to the schedules of liabilities filed in a case, particularly if this is done only in

[3] The existence of one or more triggering creditors may be especially significant since Wells Fargo's deficiency claim (based on a 2014 loan) constitutes most of the debtor's unsecured debt.

connection with a motion to dismiss[,]" as here. *See id.* at 881 n.11. Further, there "must be a specific triggering creditor identified for each alleged transfer[, although i]t is possible that the same creditor or creditors may serve this purpose for a number of transfers." *See id.* at 881 n.12. The § 544 claims will be dismissed for this reason. *See, e.g.*, *id.* at 881-82.

Finally, to the extent that trustee's § 544 claims are based on allegations of actual or constructive fraud, those allegations are insufficient for the reasons identified above.

VI. Bankruptcy Code § 550: Count 15

To succeed on her § 550 claim, the trustee must state a claim for relief under §§ 544, 547, or 548 (or other sections of the Code not pled here). *See* 11 U.S.C. § 550(a)(1); *see also, e.g.*, *In re Callas*, 557 B.R. 647, 653 (Bankr. N.D. Ill. 2016) ("'Section 550(a) stands as a recovery statute only and not as a primary avoidance basis for an action, as it will survive only when coupled with the transfer avoidance sections of the Code.'") (citation, ellipses, and brackets omitted). The court will dismiss the § 550 claim except to that extent that that claim is based on any § 547 claim that the court is not dismissing as outlined above. *See, e.g.*, *MC Asset Recovery*, 2006 WL 5112612, at *4 (if the plaintiff could not avoid property under § 544, it "would likewise be unable to recover it" under § 550(a)).

VII. State law breach of fiduciary duty: Counts 16 and 17

The elements of the trustee's state law breach of fiduciary duty claims are: "(1) the existence of a fiduciary duty between the parties; (2) the breach of that duty; and (3) damages suffered as a result of the breach." *See Regions Bank v. Lowrey*, 101 So. 3d 210, 219 (Ala. 2012). The trustee alleges that "Graham breached his fiduciary duties to Graham Gulf by causing [Graham Gulf] to make the Transfers and pay the Above-Market Rents described" in the amended complaint. (*See* Am. Compl., doc. 9, ¶128). These allegations are deficient for the

same reasons outlined above regarding the trustee's mere conclusory allegations with respect to value. The trustee's allegations against Blair and Hayles relate to the payment of "excessive management fees, Bonuses, and Above-Market Rents[,]" (*see id.* at ¶¶ 137-38) and are likewise insufficient. *See, e.g.*, *Matter of ATP Oil & Gas*, 2017 WL 4876310, at *4 (discussing similar fiduciary duty claims under Texas law). However, while offering no opinion on the ultimate viability of any claim, the court finds that the trustee's allegations of additional breaches by Graham in Count 16 (¶¶ 129-30) are sufficient to state a claim and denies the motions to dismiss as to those claims.

VIII. State law breach of contract: Counts 18 and 19

The trustee has not pled that either Hayles or Graham had a contract with the debtor Graham Gulf, and dismissal of her state law breach of contract claims against these defendants is warranted on this ground. *See, e.g.*, *In re Richardson*, 538 B.R. 594, 606 (Bankr. M.D. Ala. 2015). The trustee may be relying on a third-party beneficiary or some other theory, but she has not pled facts to support any such theory. In dismissing the breach of contract claims, the court has not considered arguments – particularly those by Hayles – that exceed the allegations of the amended complaint.

IX. State law unjust enrichment: Count 20

This state law claim is presumably based on the trustee's allegations, including those about receipt of less than reasonably equivalent value, which the court has already held are insufficient. Therefore, the court will dismiss this claim. *See, e.g.*, *Mantiply v. Mantiply*, 951 So. 2d 638, 655 (Ala. 2006) ("In the absence of mistake or misreliance by the donor or wrongful conduct by the recipient, the recipient may have been enriched, but he is not deemed to have been *unjustly* enriched.") (citation and quotation marks omitted) (emphasis in original).

Conclusion

To the extent the court has not specifically addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. For the reasons discussed above, the court grants in part the motions (docs. 18, 19, 20, 21, and 38) to dismiss.

However, under Federal Rule of Civil Procedure 15(a), the court "should freely give leave [to amend a complaint] when justice so requires." Factors to consider include "undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of amendment." *See Perez v. Wells Fargo N.A.*, 774 F.3d 1329, 1340 (11th Cir. 2014) (citation, quotation marks, ellipses, and brackets omitted). Having considered these factors, the court grants the trustee leave to amend her complaint within fourteen days of the date of this order. The court further orders defendants to file a responsive pleading to any amended complaint within fourteen days of its filing.[4]

Dated: February 14, 2018

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE

[4] The court cautions defendants that any further motions to dismiss should not argue matters beyond the pleadings and reminds all parties that the December 2018 trial setting is firm.