

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 04-15482)
)
INTERIORS BY PRISCILLA & PERRY, INC.)
)
Debtor)
)
)
YVETTE GAFF KLEVEN, TRUSTEE)
)
Plaintiff)
)
vs.) PROC. NO. 06-1194
)
)
GARY A. FRICK, ET. AL.)
)
Defendants)

DECISION AND ORDER

At Fort Wayne, Indiana, on October 6, 2006.

The trustee initiated this adversary proceeding by filing a complaint against the recipients of a number of allegedly improper transfers made by the debtor. Two of the defendants, Gary and Rebecca Frick, responded by filing a motion to dismiss Counts I, II and IV of the trustee's complaint. This motion has been filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and argues that the plaintiff has failed to plead fraud with particularity. It is that motion and responses filed thereto which is presently before the court.

The Fricks argue that the relevant counts of the complaint fail to satisfy the pleading requirements of Rule 9 of the Federal Rules of Civil Procedure. Although the Federal Rules of Civil Procedure generally require that a party's claims need only be set forth in short and plain statement, see Fed. R. Civ. P. 8(a), fraud and mistake must be pleaded with particularity. Fed. R. Civ. P. 9(b).

This requires the plaintiff to do something more than make a conclusory allegation of fraud. The Seventh Circuit requires the plaintiff to provide a “general outline of the fraud scheme” sufficient to put the defendants on reasonable notice of their alleged role. Midwest Grinding Co., Inc. v. Spitz, 976 F.2d 1016, 1020 (7th Cir. 1992). In order to withstand a motion to dismiss, a complaint alleging fraud must include the who, what, when, where, why and how of the alleged fraudulent scheme. DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990). Viewed in this regard, the trustee’s complaint properly pleads fraud, stating facts that would show that the defendants have been unjustly enriched with sufficient particularity satisfying Rule 9.

As to Count IV, the Fricks also argue that this count should be dismissed, because the trustee has not identified a qualifying creditor in whose shoes she can stand, because the only creditor identified by the trustee did not timely file a proof of claim. Yet, as this court has previously stated, the trustee need only identify a creditor whose claim is allowable, not necessarily one whose claim is allowed. In re Crown Unlimited Machine, Inc., Case No. 03-13400, Decision dated Nov. 4, 2005, fn. 2 (emphasis original). The trustee has identified such a creditor. Thus, the Fricks’ motion fails here as well.

The motion to dismiss is, therefore, DENIED and defendants, Gary and Rebecca Frick, shall answer the plaintiff’s complaint within ten (10) days of this date.

SO ORDERED.

/s/ Robert E. Grant
Judge, United States Bankruptcy Court