

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
JAMES LEE PERRY and	)	CASE NO. 05-30097 HCD
PATSY LOU PERRY,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
THE DAVID W. BARR, II REVOCABLE	)	
LIVING TRUST, et al.,	)	
PLAINTIFFS,	)	
vs.	)	PROC. NO. 05-3026
	)	
JAMES LEE PERRY and	)	
PATSY LOU PERRY,	)	
DEFENDANTS.	)	

Appearances:

John Thrasher, Esq., counsel for plaintiff, 6409 Woods Edge South Drive, Indianapolis, Indiana 46250; and  
Debra Voltz-Miller, Esq., counsel for defendant, 1951 East Fox Street, South Bend, Indiana 46613.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 28, 2006.

Before the court are the Plaintiffs' Amended Complaint to Avoid Discharge, filed on April 14, 2006, by the David W. Barr, II Revocable Living Trust, David W. Barr, Trustee, et al., and the Defendant's [*sic*] Motion to Dismiss filed on April 24, 2006, by the defendants James Lee Perry and Patsy Lou Perry, chapter 7 debtors. After considering the parties' submissions in this adversary proceeding, the court denies the motion to dismiss.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding

within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

### Background

The plaintiffs are inter vivos trusts scheduled as unsecured priority claimants in the debtors' bankruptcy. In their Amended Complaint<sup>1</sup> they state that they are seeking "to avoid discharge of debts arising from actual fraud and willful and malicious damage to property." R. 31 at 1. Their complaint is a "shotgun pleading," however, with two counts (labeled "claims") that contain multiple claims in each. *See id.*

The plaintiffs begin with a description of two assets owned by the defendants before they filed bankruptcy – stocks and real estate. On June 30, 1993, the defendants purchased from the plaintiffs shares of stock in two closely held Indiana corporations. They signed two Stock Purchase Agreements and promissory notes to satisfy payment under the agreements. The stock has been held in escrow ever since. The second asset of the defendants was 13 parcels of realty located in Winamac, Indiana, with a total assessed valuation of \$526,100. On August 22, 2003, while owning those properties, the defendants created DBC, Inc. The plaintiffs alleged that the defendants conveyed some or all of the real property either to DBC, as insiders of DBC, or to members of their family as gifts.

On January 12, 2005, the defendants filed a voluntary chapter 7 bankruptcy petition. Schedule B listed assets of less than \$3,000. The defendants did not list either the stocks or the two stock purchase agreements as assets. The plaintiffs alleged that the defendants either lied on their schedules (committing perjury

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<sup>1</sup> The court notes that the plaintiffs filed their original Complaint to Avoid Discharge on April 14, 2005; Plaintiffs' First Amended Complaint to Avoid Discharge on November 26, 2005; and Plaintiffs' Amended Complaint to Avoid Discharge on April 14, 2006. The last complaint should have been titled Plaintiffs' Second Amended Complaint to Avoid Discharge.

by signing them) or transferred title to their realty for little or no value prior to filing. According to the plaintiffs, “[t]his is a hallmark of fraudulent conveyance under Indiana statute.” R. 31 at 3, ¶ 17. The plaintiffs also hypothesized that the defendants, after transferring their assets to DBC or to family members, had too few assets to conduct their businesses (laundry and dry cleaning) and to continue making their installment payments under the stock purchase agreements. *See id.* at 4, ¶ 19.

In the first count, the plaintiffs presented multiple allegations:

- (a) The defendants’ transfers were fraudulent under Indiana Code 32-18-2-14, -15.
- (b) The defendants committed fraud under Indiana Code 35-43-5-4(8).
- (c) The defendants committed larceny under § 523(a)(4).
- (d) The defendants’ conduct requires treble damages under Indiana Code 34-24-3-1.
- (e) The promissory note debt is not dischargeable under § 523(a)(3) “because it was neither listed nor scheduled in time to permit timely filing of a proof of claim.”<sup>2</sup>

*Id.* at 4. The plaintiffs claimed damages of at least \$76,000 caused by the defendants’ default on the notes.

The second count grew out of the testimony of the defendant James Perry at the 341 meeting of creditors held on April 21, 2005. He stated under oath that, at the end of 2003, DBC, Inc., sold its assets to a company called JCC, Inc., which was owned by the defendants’ son and daughter-in-law. The plaintiffs again presented many allegations in this count:

- (1) The sale of the businesses’ principal assets was prohibited under the 1993 stock purchase agreements without the consent and participation of the trustees of the plaintiffs.
- (2) The sale of those assets also was prohibited under Indiana Code 23-1-41-2, unless certain listed formalities were observed. The defendants did not comply with those statutory requirements in conducting the sale.
- (3) The debt created by the defendants’ breach of contract and violation of the Indiana statute is not dischargeable under § 523(a)(3) because it was neither listed nor scheduled in time to permit timely filing of a proof of claim.

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<sup>2</sup> The record in the debtors’ bankruptcy reflects that the bar date for filing proofs of claim was July 21, 2005. The plaintiffs’ claim in the amount of \$30,760 was timely filed on May 18, 2005, and, upon objection by the Trustee, was allowed as an unsecured nonpriority claim. *See* R. 47, Order of June 28, 2005.

(4) The sale of those assets constituted willful and malicious damage to DBC's property and diminished the defendants' ability to repay their debt to the plaintiffs. The debt is not dischargeable under § 523(a)(6).

*Id.* at 5-6. They asked in their prayer that the plaintiffs' debts to the defendants, scheduled and unscheduled, be held non-dischargeable, and that the plaintiffs be awarded \$76,000 plus treble damages, fees and costs.

On April 24, 2006, the defendants filed a Motion to Dismiss and a memorandum in support. *See* R. 33, 34. The defendants argued that the complaint's allegations of fraud and mishandling of corporate assets did not provide specific information regarding the defendants' fraudulent conduct by the defendants. The complaint therefore failed to satisfy Federal Rule of Civil Procedure 9(b), which requires that fraud be stated with particularity. The defendants also contended that the complaint contained sweeping legal conclusions, much speculation and few factual allegations. In addition, they asserted that, pursuant to 11 U.S.C. § 550, only the Trustee is allowed to pursue a fraudulent conveyance cause of action. *See* R. 33 at 2, R. 34 at 3. In their view, the plaintiffs, as creditors, lacked standing to bring a cause of action for fraudulent conveyance unless the trustee has abandoned the claim. They insisted, therefore, that the complaint fails to state a claim upon which relief may be granted.

#### Discussion

The Federal Rules of Civil Procedure require that a complaint set out ““a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L.Ed.2d 80 (1957) (quoting Fed. R. Civ. P. 8(a)(2)); *see also Mosely v. Board of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006). In this case, the defendants ask the court to dismiss the plaintiffs’ Amended Complaint for its failure to state a claim. Federal Rule of Civil Procedure 12(b)(6), which is made applicable in adversary proceedings under Federal Rule of Bankruptcy Procedure 7012, provides the defense of dismissal on the ground that the pleading failed to state a claim upon which relief can be granted. In *Conley*, the Supreme Court set forth the rule of law under Rule 12(b)(6):

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

*Conley*, 355 U.S. at 45-46; 78 S. Ct. at 102; *see also Cody v. Harris*, 409 F.3d 853, 857 (7th Cir. 2005). The Seventh Circuit Court of Appeals has pointed out that plaintiffs must plead “‘claims’ (which is to say, grievances)” but need not plead the legal theories or factual specifics of their case. *Simpson v. Nickel*, 450 F.3d 303, 305-06 (7th Cir. 2006) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L.Ed.2d 1 (2002)). In fact, their complaint “should only be dismissed if there is no set of facts, even hypothesized, that could entitle a plaintiff to relief.” *Massey v. Merrill Lynch & Co., Inc.*, \_\_\_ F.3d \_\_\_, 2006 WL 2620902 at \*3 (7th Cir. Sept. 14, 2006) (citing *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901-02 (7th Cir.2004)).

When a complaint alleges fraud, however, “[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). The rule also states that “[m]alice, intent, knowledge, or other condition of mind of a person may be averred generally.” “The circumstances of fraud or mistake include ‘the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.’” *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1078 (7th Cir. 1997) (citations omitted); *see also Midwest Commerce Banking Co. v. Elkhart City Centre*, 4 F.3d 521, 523 (7th Cir. 1993) (concluding that Rule 9(b) required only that the plaintiff “set forth the date and content of the statements or omissions that it claimed to be fraudulent”). Rules 8(a) and 9(b) do not conflict with one another: “[I]t is possible to write a short statement narrating the claim – which is to say, the basic grievance – even if Rule 9(b) requires supplemental particulars.” *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir.), *cert. denied*, 540 U.S. 968 (2003).

Courts must be careful to confine the heightened pleading requirements of Rule 9(b) only to allegations of fraud or mistake. They are not applicable, for example, to municipal liability under § 1983, *see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160,

112 L.E.2d 517 (1993), or to employment discrimination claims, *see Swierkiewicz*, 534 U.S. at 513, 122 S.Ct. at 998, or to “the truth of a prisoner’s prior statements,” *see Simpson*, 450 F.3d at 305-06, and therefore a complaint may not be dismissed for failure to plead that allegation with particularity.

Rule 9(b) can most effectively be confined to its proper domain when we remember that its purpose is to ensure that the party accused of fraud . . . is given adequate notice of the specific activity that the plaintiff claims constituted the fraud so that the accused party may file an effective responsive pleading.

*Lachmund v. ADM Investor Services, Inc.*, 191 F.3d 777, 783 (7th Cir. 1999). The court therefore first reviews the complaint generally to see if it gives fair notice of the plaintiffs’ claims or grievances and does not dismiss it unless “there is no set of facts, even hypothesized, that could entitle a plaintiff to relief.” *Massey*, \_\_\_ F.3d at \_\_\_, 2006 WL 2620902 at \*3. Then, with the allegations of fraud, the court requires a more detailed explanation of the alleged fraudulent activity of the defendants. It now evaluates whether the plaintiffs in this case have pled the circumstances of fraud with sufficient particularity to satisfy Rule 9(b) and its bankruptcy counterpart Federal Rule of Bankruptcy Procedure 7009, which applies Rule 9(b) in adversarial bankruptcy proceedings.

The court first finds that the plaintiffs have laid out alternative hypothetical sets of facts that could entitle them to relief. Each alternative allegation leads the plaintiffs to conclude that the defendants committed bankruptcy fraud, criminal fraud or civil fraud under the Indiana Fraudulent Transfer Act. The plaintiffs presented the following circumstances underlying their allegations of fraud: (1) The defendants and plaintiffs executed stock purchase agreements and promissory notes on June 30, 1993, and the defendants later defaulted on the notes; (2) the defendants owned 13 parcels of realty, worth \$526,100, as of August 22, 2003; (3) the defendants created DBC, Inc., on August 22, 2003; (4) at the end of 2003, the companies which had issued the stock bought under the 1993 agreements sold their assets to a company called JCC, Inc, which is owned by the defendants’ son and daughter-in-law, and (5) when the defendants filed their bankruptcy petition on January 12, 2005, they listed assets of less than \$3,000 and did not include among those assets the two stock purchase agreements or stock in DBC, Inc. The plaintiffs believed that either the defendants lied on their schedules or they

fraudulently transferred the parcels of realty and stock into DBC or to family members for less than equivalent value. They suggested, as well, that the defendants could not continue both their businesses and their installment payments under the stock purchase agreements once they had transferred their real property, and as a result they became insolvent. They asserted that their claim arose before the fraudulent transfers occurred and asked the court to enter judgment for the amounts owed under the note (plus interest, attorneys' fees, costs, expenses, and treble damages), and to declare the debts owed to the plaintiffs nondischargeable.

The court finds that the plaintiffs have presented sufficient detail of the circumstances surrounding the defendants' alleged fraudulent transfers of stock and realty and the resulting insolvency. *See General Elec. Capital Corp.*, 128 F.3d at 1080 (finding that the complaint's details concerning the transfer that rendered the debtor insolvent and precluded it from meeting its deficiency obligation to the plaintiff were sufficient to deny dismissal under Rule 9(b)). Although fraud was averred only generally, the underlying facts described the loss of known assets of the defendants prior to the bankruptcy.<sup>3</sup> The facts are sufficiently set forth to provide the defendants with fair notice of the allegations and to allow them to respond meaningfully to the Amended Complaint. The court finds that the Amended Complaint meets the requirements of Rule 8(a) and 9(b) by presenting a short and plain statement of the claims for relief and, in addition, providing enough facts and circumstances to warrant the allegation that fraud occurred. *See, e.g., Wolstein v. Docteroff (In re Docteroff)*, 133

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<sup>3</sup> Another matter in the defendants' bankruptcy case, Case No. 05-30097, is relevant to the plaintiffs' allegations in this adversary proceeding. An Application To Compromise was filed by Rebecca Hoyt Fischer, Chapter 7 Trustee, on January 26, 2006. *See* R. 75. In it, she listed facts identical or similar to those presented by the plaintiffs in their Amended Complaint. She stated that the debtors had incorporated DBC, Inc. in August 2003, and were its sole shareholders. In October 2003, they quitclaimed parcels of real estate to DBC, Inc. worth approximately \$500,000.00, and subject to mortgages of approximately \$300,000.00. On January 1, 2004, the debtors gifted the stock in DBC, Inc. to family members on the ground that the transfer was for estate planning purposes. The Trustee also stated that the current shareholders of DBC, Inc. offered \$20,000.00 to settle the Trustee's potential cause of action for fraudulent transfer. Because the Trustee believed that it was in the best interests of the creditors and estate that the Trustee be allowed to accept the offer, she filed her Application to Compromise. On April 17, 2006, following a hearing on the matter, the court overruled the Objection to the Application filed by the David W. Barr, II Revocable Living Trust et al., and granted the Application to Compromise the claims. *See* R. 84. In light of the Trustee's action and the court's ruling in the main case, the parties are advised to reconsider their claims of fraudulent conveyance and of the plaintiffs' standing.

F.3d 210, 217 (3d Cir. 1997) (finding that the complaint put the defendant on sufficient notice to respond, noting that the allegations were sufficient to allow him to file an answer); *Master-Halco, Inc. v. Picard (In re Picard)*, 339 B.R. 542, 553-55 (Bankr. D. Conn. 2006) (denying dismissal of complaint, finding allegations contained sufficient facts and circumstances to state claims for fraud).

The defendants argued that the court need not accept legal conclusions or unwarranted factual inferences as true, and they relied upon *Lachmund v. ADM Investor Services*, 26 F. Supp.2d 1107 (D. Ind. 1998), to support their argument. The district court did indeed present that general legal premise when setting forth its analysis of the complaint before it. It is instructive, however, to see that the court found that the complaint before it satisfied the requirements of Rules 8(a) and 9(b). It found that, under the liberal pleading requirements of the federal rules, it was plausible that some sets of facts consistent with the plaintiff's allegations would reflect the plaintiff's theory. "While the evidence may not ultimately bear out the amended complaint's allegations that the two companies were operating as a single entity with respect to Lachmund's grain contracts, it is premature to dismiss Lachmund's claim of common-law fraud against A/C on Rule 9(b) or Rule 12(b)(6) grounds." *Lachmund v. ADM Investor Services, Inc.*, 26 F. Supp. 2d 1107, 1114 (N.D. Ind. 1998), *aff'd*, 191 F.3d 777 (7th Cir. 1999). This court agrees with the district court's careful reasoning and finds that it is premature, in this case, to dismiss the plaintiffs' claims. It determines that the plaintiffs' allegations were set out clearly enough to give the defendants adequate notice of the alleged fraudulent activity so that they could file an effective responsive pleading. Accordingly, the court denies the Defendants' Motion to Dismiss.

#### Conclusion

For the reasons presented above, the court denies the Defendants' Motion to Dismiss filed by the defendants James Lee Perry and Patsy Lou Perry. Further proceedings with respect to the Plaintiffs' Amended Complaint filed by the David W. Barr, II Revocable Living Trust, et al., will be set by separate order.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
HARRY C. DEES, JR., CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT