

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
PILGRIM INTERNATIONAL, INC.,)	CASE NO. 08-33256 HCD
)	CHAPTER 7
DEBTOR.)	
)	
J. RICHARD RANSEL, TRUSTEE,)	
PLAINTIFF,)	
vs.)	PROC. NO. 10-3113
)	
GE COMMERCIAL DISTRIBUTION)	
FINANCIAL CORPORATION,)	
DEFENDANT.)	

Appearances:

J. Richard Ransel, Esq., Trustee, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana 46516;

Lisa Gilkey Schoetzow, Esq., counsel for Trustee, Thorne, Grodnik LLP, 228 West High Street, Elkhart, Indiana, 46516; and

R. William Jonas, Jr., Esq., counsel for defendant, Hammerschmidt, Amaral & Jonas, 137 North Michigan Street, South Bend, Indiana 46601.

DECISION and ORDER

At South Bend, Indiana, on July 18, 2011.

Plaintiff J. Richard Ransel (“plaintiff” or “Trustee”), the chapter 7 Trustee for the bankruptcy estate of Pilgrim International, Inc. (“debtor”), commenced this adversary proceeding against the defendant GE Commercial Distribution Financial Corporation (“defendant” or “GE CDF”) to recover preferential transfers, unpaid contract obligations, and setoffs pursuant to 11 U.S.C. § 547 and § 553(b)(1). Presently before the court are the plaintiff’s Complaint, the defendant’s Motion to Dismiss and Motion to Strike, and a request for a pretrial conference.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core (continued...)

BACKGROUND

The Complaint commencing this adversary proceeding alleged that the debtor transferred to the defendant \$170,538.02 on or after June 24, 2008, and that the defendant had contracted to pay but did not pay the debtor for recreational vehicles the debtor delivered to the defendant's dealers. It further alleged that the transfers were made to the defendant creditor on account of an antecedent debt and that they were made while the debtor was insolvent, within 90 days of the debtor's filing of its bankruptcy petition. Based upon those factual allegations, the Complaint raised three counts against the defendant:

Count I charged that the transfer to the defendant is an avoidable preference under § 547.

Count II sought judgment in favor of the Trustee for the defendant's failure to pay under the contract between the debtor and the defendant.

Count III charged that the Trustee may recover the setoffs of funds the defendant owed to the debtor under § 553(b)(1).

The defendant filed a Motion to Dismiss, asserting that the Complaint failed to plead a claim under Rule 8 of the Federal Rules of Civil Procedure, as interpreted in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In response to the Motion to Dismiss, the Trustee insisted that the Complaint's factual allegations were sufficient under Federal Rule 7008 of the Federal Rules of Bankruptcy Procedure and the cases discussing it. Appended to the Memorandum in Support of the Response were three pre-Complaint letters sent by debtor's counsel to defendant's counsel which presented factual details of unpaid invoices and alleged preferential transfers. *See* R. 14, Exs. A, B, C. The Trustee requested a denial of the motion to dismiss or the right to amend the Complaint under Federal Rule 7015(a) of the Federal Rules of Bankruptcy Procedure. He pointed out that a court should freely give leave when justice requires it and that there is no justification for denying the amendment.

The defendant then filed a Motion to Strike the Trustee's Response as untimely pursuant to Local Bankruptcy Rule 7007-1(a), because it was filed 34 days, rather than 30 days, after the defendant's Motion

¹(...continued)
proceeding pursuant to 28 U.S.C. § 157(b)(2)(F).

to Dismiss. The Trustee disagreed: His Response to the Motion to Dismiss was timely, he argued, because the filing complied with the timing set forth in the court's Order of October 25, 2010. *See* R. 7. That Order required defendant's counsel to file a formal written appearance in the case within 7 days and announced that the court would "take no further action with regard to counsel's filing and any time limits associated with it until the appearance was filed." R. 19. Defendant's counsel filed his appearance on October 29, 2010, and therefore a response to the Motion to Dismiss was expected to be filed by November 29, 2010, claimed the Trustee. The Trustee timely filed a Response on November 24, 2010, he insisted.

DISCUSSION

A. Defendant's Motion to Strike

Before turning to the merits of the defendant's Motion to Dismiss, the court considers GE CDF's Motion to Strike the Trustee's Response as untimely under this court's Local Rule B-7007-1(a), which requires a response to be filed within thirty days of the original pleading. The Trustee's Response was filed four days past the deadline. The Trustee argued that his Response was timely because the court, in effect, stopped the clock until the defendant's attorney formally filed a written appearance with the court.

The court noted that the defendant failed to file both its Corporate Ownership Statement (in violation of Federal Rule of Bankruptcy Procedure 7007.1) and its formal written appearance of counsel (in noncompliance with N.D. Ind. L.B.R. B-9010-2(a)) before filing its Motion to Dismiss. In each court Order requiring the defendant to file those documents, GE CDF was granted extra time for those submissions. After considering the untimeliness of the defendant's two submissions and the extension of time granted to it, therefore, the court believes that the defendant's crying foul concerning the plaintiff's untimely filing is an example of the pot calling the kettle black. The court finds that the defendant was not unduly prejudiced by the Response and that it had the opportunity to reply to it. It further determines that there was no undue

delay or dilatory motive shown by the plaintiff. For those reasons, the court will not strike the Trustee's Response to the Motion to Dismiss. The defendant's Motion to Strike is therefore denied.

B. *Defendant's Motion to Dismiss*

The defendant asks the court to dismiss the plaintiff's Complaint pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.² To state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."³ Fed. R. Civ. P. 8(a)(2). However, the Supreme Court no longer reviews the sufficiency of a complaint by asking whether "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the test established more than half a century ago in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957). After the Court recently criticized *Conley's* "no set of facts" language in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), in *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L.Ed.2d 1081 (2007), and in *Ashcroft v. Iqbal*, U.S., 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), courts of appeals wrestled with what "higher bar" the Supreme Court had set in its place. The Seventh Circuit succinctly stated the new test:

The Supreme Court has described the bar that a complaint must clear for purposes of Rule 12(b)(6) as follows: "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.'" [*Iqbal*, 129 S. Ct. at 1949.] A "formulaic recitation of the elements of a cause of action will not do." *Id.* Nonetheless, a plaintiff must provide "only 'enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it

² Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

³ Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 8(a) states that a pleading "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).

is plausible, rather than merely speculative, that he is entitled to relief.” *Tamayo [v. Blagojevich]*, 526 F.3d 1074, 1083 [7th Cir. 2008)]. Furthermore, plaintiffs must plead their accusations of fraud with particularity. Fed. R. Civ. P. 9(b); *Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir. 1993) (stating that particularity requires the party to specify the “who, what, when, where and how” of the alleged fraudulent act).

Reger Development, LLC v. National City Bank, 592 F.3d 759, 763-64 (7th Cir.), *cert. denied*, 130 S. Ct. 3507 (2010); *see also Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (“[T]he plaintiff must give enough details about the subject matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen.”); *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) (stating that, after *Twombly* and *Iqbal*, “a plaintiff to survive dismissal ‘must plead some facts that suggest a right to relief that is beyond the “speculative level”’) (quoting *In re marchFIRST*, 589 F.3d 901, 905 (7th Cir. 2009)). With these guidelines, the court turns to the defendant’s Motion to Dismiss the Trustee’s Complaint.

According to the defendant, the Trustee alleged only that the defendant received \$170,538.02 and owed the Trustee \$147,027.00; he set forth no other facts to demonstrate that the elements of the Complaint’s counts have been met. The defendant reviewed each count, pointing out the conclusory allegations and the scanty factual content it found. It noted that, in Count I, the Complaint failed to provide facts to support the allegations that the defendant was a creditor of the debtor, that there was an antecedent debt, and that the transfer was on account of that debt. It insisted that “the factual assertion of insolvency is merely a recitation of the element, not supported by any factual basis . . . [and] not entitled to truth.” R. 5 at 5. To support dismissal, the defendant relied upon *In re Caremerica, Inc.*, 409 B.R. 737 (Bankr. E.D.N.C. 2009). In *Caremerica*, the trustee sought to avoid preferential and fraudulent transfers made to three dozen defendants. The North Carolina bankruptcy court, reviewing the defendants’ motions to dismiss the trustee’s complaint, granted dismissal of some of the counts but also allowed the trustee to replead his claims. The defendant urged this court to espouse *Caremerica*’s heightened pleading standard.

This court finds that the *Caremerica* decision involved many defendants, complex transfers, and averments of fraud. In contrast, the Trustee's Complaint herein was filed against only one defendant, with no allegations of fraud and, at this pleading stage, no obviously complex transfers. In addition to those clearly distinguishing factors, *Caremerica* holds no precedential value for this court, since it was decided outside the Seventh Circuit. The case has been criticized because its pleading requirements "require more than the standard promulgated in *Twombly* and *Iqbal* and the liberal pleading policy underlying the civil rules." *In re TOUSA, Inc.*, 442 B.R. 852, 855-56 (Bankr. S.D. Fla. 2010). Finding itself in agreement with the Florida bankruptcy court, this court declines to follow *Caremerica*'s more rigorous pleading standard.

The court also declines to follow the case upon which the Trustee relied, *Rentas v. Miseses (In re Maxon Engineering Servs.)*, 2009 WL 3200087 (Bankr. D.P.R. 2009). In that case, the Puerto Rico bankruptcy court denied the motion to dismiss the § 547 avoidance count. It found that the complaint's allegations, although sparse, were sufficient to inform the defendant of the nature of the plaintiff's claim. *See id.* at *7. Like *Caremerica*, however, *Rentas* is a decision from a different circuit and thus not binding authority upon this court. It is also a more complex case than the one before this court, raising causes of action under §§ 544, 547, 548, 549, 550, 541, and 542, including allegations of fraud, and presenting facts quite distinguishable from the ones before this court. Guidance, for this court, must come from the Supreme Court and Seventh Circuit precedents.

The court finds that the defendant has demanded more factual detail in the Complaint than is required by *Iqbal*, *Twombly*, and the this circuit's subsequent cases. This court does not expect the degree of particularity required under Rule 9(b) when fraud is not an element to be proven. Rule 8(a) requires a short, plain statement of the claim showing that the pleader is entitled to relief, and *Twombly* and *Iqbal* require, in addition, a showing that there is a plausible basis for the claim. *See Twombly*, 550 U.S. at 547 ("[T]he Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). The Complaint's first count, brought pursuant to § 547, did indeed

paraphrase the elements of a preferential transfer, but it was not entirely the “threadbare” recital of the elements that *Iqbal* denounced. *See Iqbal*, 129 S.Ct. at 1949. Count I pled a sufficient number of factual allegations to “suggest a right to relief that is beyond the ‘speculative level,’” as *Atkins* and *In re marchFIRST* require. The court finds that the defendant was given fair notice of the Trustee’s claim and the grounds upon which it rested. It therefore determines that Count I, at the pleading stage and under the liberal standard set forth for Rule 8, has provided sufficient specificity to support a claim for relief.

Turning to the remaining counts of the Complaint, the defendant contended that Count II must be dismissed because it referenced different amounts of debt and failed to reference such specific information as (1) “acceptances to finance, invoices, GE CDF’s approval number being on said invoices, or non-revocation of acceptance as required by the contract upon which the Trustee attempts to rely,” (2) “the recreational vehicles at issue, when said recreational vehicles were delivered, and to whom they were delivered,” and (3) “when the alleged amount became due by GE CDF to the Debtor.” R. 5 at 6-7. The defendant also argued that Count III contained insufficient facts to explain an offset, mutual debt, and lack of mutuality. The defendant also questioned the Trustee’s claim that he could recover the transfers without reliance on § 550 of the Bankruptcy Code.

The court finds that Counts II and III do not state claims to relief that are plausible on the face of the Complaint. The Trustee, in his Response to the Motion to Dismiss, stated that “the Complaint states that the Defendant contracted with the Debtor to pay for recreational vehicles delivered to dealers and the Defendant has failed to pay for the recreational vehicles.” R. 14 at 5. However, Count II actually states that the plaintiff, *i.e.* the Trustee, and not the defendant, contracted with the debtor and failed to pay for the debtor’s recreational vehicles. The Trustee, in his Response, also stated that he included a copy of an agreement between the debtor and the defendant. Again, he is incorrect. The contract attached to the Complaint is a Vendor Agreement between the debtor and Deutsche Financial Services Corporation, not the defendant. Nowhere in the Complaint is the relationship between Deutsche and this defendant explained.

Nor is it clear what is due and owing to the debtor from the defendant: Count I alleged that the debtor transferred \$170,538.02 to the defendant; Count II alleged that the defendant (misabeled “plaintiff”) refused to pay \$147,027.00 for recreational vehicles delivered by the debtor; and at the conclusion of Count II the Trustee sought judgment of \$172,016.00. The court finds that, due to these confusions, Count II does not state a claim to relief that is plausible on its face.

The last count, Count III, which alleged an improper setoff, contains similar misstatements. It alleges that the plaintiff Trustee (not the defendant) retained and set off certain funds owing to the debtor. However, § 553(b)(1) requires that, “to be avoidable, a *creditor*’s offset [must] reduce any ‘insufficiency’ in accounts existing between the debtor and creditor during the 90 days before the bankruptcy is filed.” *In re Coast Grain Co.*, 2006 WL 6810917 at *8 n.14 (9th Cir. BAP Jan. 31, 2006) (emphasis added). A setoff applies only when a “*creditor* offsets a mutual debt owing to the debtor against a claim against the debtor.” *In re MicroAge Corp.*, 288 B.R. 855, 860-61 (Bankr. D. Ariz. 2003) (emphasis added). The Complaint does not make such an allegation. Moreover, the Complaint alleges that the setoffs were “not mutual because there were no mutual debits or credits.” R. 1 at 3. This allegation suggests that there was no mutual debt owing between the defendant and the debtor. The court finds that the plaintiff has not provided “enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief.” *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008) (citations omitted). The court determines, consequently, that the Trustee’s allegations in Count III were not sufficient to state a claim of a recoverable setoff pursuant to § 553(b)(1).

Accordingly, the defendant’s Motion to dismiss Count I of the Complaint is denied, and its Motion to dismiss Counts II and III is granted for failure to state a claim upon which relief can be granted.

C. Plaintiff’s Request to Amend

The Trustee requested that he be permitted to amend the Complaint. Until recently, when a motion to dismiss under Rule 12(b)(6) was filed and an answer had not been filed, a plaintiff was able to amend the complaint once as of right. See *Alioto v. Town of Lisbon*, ___ F.3d ___, 2011 WL 2642369 at *5 (7th Cir. July 7, 2011) (noting that Rule 12(b)(6) motion is not a responsive pleading, that plaintiff can amend complaint as a matter of right if no answer was filed). However, the 2009 Amendment to Rule 15(a) now provides that “the right to amend once as a matter of course terminates 21 days after service of a motion under Rule 12(b), (e), or (f).” Fed. R. Civ. P. 15(a) (2009 Amendments). Federal Rule of Bankruptcy Procedure 7015 applies Federal Rule of Civil Procedure 15 in adversary proceedings such as this one. Rule 15(a)(2) allows a party to amend its pleadings with leave of court, which should be freely given “when justice so requires.” *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962) (establishing that leave to amend may be denied for such reasons as “undue delay, bad faith or dilatory motive on the part of the movant”). The granting of leave to amend the pleadings is within the discretion of the court. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 28 L.Ed.2d 77 (1971). “This Circuit has recognized that[,] because pleadings merely serve to put the opposing side on notice, they should be freely amended as the case develops, as long as amendments do not unfairly surprise or prejudice the opposing party.” *Heath v. Isenegger*, 2011 WL 2580538 at *1 (N.D. Ind. June 28, 2011).

The defendant does not contend, and the court does not find, that there has been undue delay, bad faith or dilatory motive shown by the plaintiff. The defendant did point out that the Trustee did not file a formal motion to amend. However, the court finds no merit to that argument. Because a plaintiff could amend a complaint, as a matter of right, before a responsive brief was filed, and because the court finds no impropriety in the plaintiff’s conduct and no surprise or prejudice to the defendant, the court accepts the request proffered as an alternative response to the motion to dismiss. See *In re Bay Vista of Va., Inc.*, 2009 WL 903254 at *19 n.23 (Bankr. E.D. Va. Feb. 2, 2009) (finding that formal motion to amend was immaterial

and unnecessary before responsive brief was filed). The court finds it appropriate to grant the plaintiff another opportunity to plead sufficiently a cause of action, in light of this ruling.

Rule 15(c)(2) allows the amended pleading to relate back to the date of the original complaint if the claim arises out of the same conduct, transaction or occurrence that was set out in the original pleading. The defendant did not object to relating the pleading back, and the Trustee declared, in his request, that the amended claims would assert “amendments that arose from the transaction set out in the original Complaint.” R. 14 at 7. The court notes that the plaintiff has not sought to add a new claim or new defendants, and it has assured the court that the amended allegations would be identifiable with the original claims. It finds, therefore, that the defendant has been given “sufficient notice of what must be defended against in the amended pleading.” *Barber v. IMI Equip., LLC (In re Integrated Agri, Inc.)*, 2007 WL 605018 at *3 (Bankr. C.D. Ill. Feb. 22, 2007) (analyzing Rule 15(c)(2), granting trustee’s motion to amend). Consequently, the court grants the Trustee the right to file an amended Complaint which relates back to the date of the original pleading.

CONCLUSION

For the reasons set forth above, the court denies the Motion to Strike filed by the defendant GE Commercial Distribution Financial Corporation against the plaintiff J. Richard Ransel, Chapter 7 Trustee. The court also denies the defendant’s Motion to Dismiss in part and grants it in part. Dismissal of Count I of the Trustee’s Complaint is denied; dismissal of Counts II and III of the Trustee’s Complaint is granted, but without prejudice to the Trustee’s right to file an amended complaint that relates back to the date of the original pleading. The Amended Complaint must be filed on or before 21 days from the date of entry of this Order. Finally, the parties’ request for a pretrial conference is denied as moot.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT