

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

DAVID A. RUSS,

Debtor.

BKY 4-87-2332

JAMES E. RAMETTE, TRUSTEE

Plaintiff,

ADV 4-96-0288

-vs.-

RANGE MENTAL HEALTH CENTER, INC.

Defendant and Third-
Party Plaintiff,

-vs.-

RICHARD JOHN GENTILE and
GLENN A. GENTILE

Third-Party Defendants.

MEMORANDUM ORDER DENYING
THIRD-PARTY DEFENDANTS'
MOTION TO DISMISS

At Minneapolis, Minnesota, April 18, 1997.

The above-entitled matter came on for hearing before the undersigned on a motion to dismiss filed by the Third-Party Defendants. Appearances were as noted on the Court's record. The case was commenced by the Chapter 7 Trustee, James E. Ramette, to obtain the turnover to the estate of certain real property held by the Defendant, Range Mental Health Center, Inc. ("RMHC"). In its answer, RMHC seeks to join as third-party defendants Richard John Gentile and Glenna Gentile ("the Gentiles") pursuant to Federal Rules of Bankruptcy Procedure 7019 and 7020. The Gentiles, in turn, have filed a motion to dismiss the Trustee's Complaint for failing to state a claim upon which

NOTICE OF ENTRY AND FILING ORDER OR JUDGMENT	
Filed and Docket Entry made on	4/18/97
Patrick G. De Wane, Clerk, By	kk

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relief can be granted under Federal Rule of Civil Procedure 12(b)(6). After carefully considering the arguments of counsel in this case, I hold that the Trustee's Complaint adequately states a claim upon which relief can be granted and that the Gentiles' motion to dismiss should therefore be denied.

BACKGROUND

In his adversary Complaint, the Trustee alleges that, at the time the Debtor commenced this Chapter 7 bankruptcy case on July 10, 1987, the Debtor was the owner of certain real property ("the Property")¹ located in Hibbing, Minnesota, which the Debtor did not list on his bankruptcy Schedules. The Debtor received a Chapter 7 discharge on November 5, 1987, and, on July 5, 1989, the Debtor's bankruptcy case was closed. According to the Trustee's allegations, on September 12, 1989, the Debtor transferred the unscheduled Property to Jeffrey A. Hammerlind and Sandra S. Hammerlind by quitclaim deed recorded on October 12, 1989. The Trustee further alleges that, on September 29, 1989, the Hammerlinds transferred the Property to the Gentiles. On August 12, 1993, the Debtor's bankruptcy case was reopened for

¹The Property that is the subject of this dispute has the following legal description in the Office of the County Recorder for St. Louis County, Minnesota:

Lot Twelve (12), Block Twelve (12), FAIRVIEW ADDITION TO HIBBING, according to the original plat thereof on file and of record in the office of the County Recorder in and for said County and State.

the purpose of administering previously undisclosed assets of the Debtor. Finally, the Trustee alleges that, on or about January 31, 1995, the Gentiles transferred the Property to the Defendant, RMHC, pursuant to a warranty deed. Based upon these allegations, the Trustee asserts that § 542 entitles him to recover the Property from RMHC for the benefit of the estate. The Gentiles, as third-party defendants, argue that the Trustee's Complaint must be dismissed because § 542 cannot be used to avoid postpetition transfers of property of the estate. The Gentiles further argue that § 549 is unavailable to the Trustee in this case because: 1) the statute of limitations in § 549(d) has run; and 2) the Trustee has not alleged that RMHC was anything but a good faith purchaser of the Property or that a copy of the Debtor's bankruptcy petition was filed with the Office of the County Recorder for St. Louis County, Minnesota.

DISCUSSION

I. LEGAL STANDARD UNDER RULE 12(B)(6)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, as incorporated by Rule 7012 of the Federal Rules of Bankruptcy Procedure, a defendant to a complaint, counterclaim, or cross-claim may move to dismiss for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). A motion to dismiss for failure to state a claim will be granted

only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232 (1984); Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 176 (1980); Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957). Thus, the purpose of Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or the merits of the case. 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356, at 294 (2d ed. 1990).

In appraising the sufficiency of a complaint for Rule 12(b)(6) purposes, the court must take the well-pleaded allegations of the complaint as true, and construe the complaint, and all reasonable inferences arising therefrom, most favorably to the pleader. Westcott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990); Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). Nevertheless, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. See Westcott, 793 F.2d at 1488 (citing Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987)).

II. SUFFICIENCY OF TRUSTEE'S COMPLAINT

Although the Trustee has not specifically cited §§ 549 and 550 in his Complaint as grounds for recovering the Debtor's postpetition transfer, a court cannot dismiss a complaint under Rule 12(b)(6) solely because it mischaracterizes legal theories. A complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief under any possible theory. Bowers v. Hardwick, 478 U.S. 186, 201, 106 S. Ct. 2841, 2849 (1986) (Blackmun, J., dissenting); Bonner v. Circuit Court of City of St. Louis, Mo., 526 F.2d 1331, 1334 (8th Cir. 1975). Therefore, although the Trustee did not specifically rely on §§ 549 and 550 as grounds for recovering the Debtor's postpetition transfer, this Court must nevertheless consider whether or not the Trustee's Complaint adequately states a claim upon which relief can be granted under §§ 549 and 550.

Section 549(a) provides:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate --

(1) that occurs after the commencement of the case; and

(2) (A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a) (1994). Section 550, in turn, provides in part:

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property from --

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section

(a)(2) of this section from --

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the avoidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

11 U.S.C. § 550 (1994). Taken together, §§ 549 and 550 authorize the Trustee to avoid unauthorized transfers of estate property and to recover the transferred property (or the value of such property) from the initial transferee, or from any subsequent transferees who did not prove that they received the property in good faith, for value, and without knowledge of the voidability of the transfer. Ross v. Mitchell (In re Dietz), 914 F.2d 161, 164 (9th Cir. 1990); Keller v. Hoyle, Morris & Kerr (In re Blinder, Robinson & Co., Inc.), 199 B.R. 976, 983 (D. Colo. 1996).

1. Statute of Limitations

The Gentiles argue that the Trustee's Complaint fails to state a claim upon which relief can be granted under §§ 549 and 550 because the statute of limitations contained in § 549(d) has

run. According to § 549(d), "[a]n action or proceeding under this section may not be commenced after the earlier of-- (1) two years after the date of the transfer sought to be avoided; or (2) the time the case is closed or dismissed." 11 U.S.C. § 549(d) (1994). In the instant case, the Trustee filed the Complaint on September 17, 1996, seeking to avoid a transfer allegedly made by the Debtor on September 12, 1989. As the Trustee's Complaint was filed a full seven years after the date of the Debtor's alleged postpetition transfer, it is clear that, subject only to the possibility of equitable modification, the limitations period contained in § 549(d) has run.

The Trustee argues that the Debtor's concealment of the Property from the Trustee in this case tolls the statute of limitations found in § 549(d) through the doctrine of equitable tolling. The doctrine of equitable tolling is read into every federal statute of limitation. Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S. Ct. 582, 585 (1946). It provides that:

[W]here a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."

Holmberg, 327 U.S. at 397, 66 S. Ct. 585 (quoting Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1875)). Thus, in cases where fraud goes undiscovered because the defendant has taken

positive steps after the commission of the fraud to keep it concealed, the statute of limitation is tolled until there is actual discovery of the fraud. Moratzka v. Pomaville (In re Pomaville), 190 B.R. 632, 636-37 (Bankr. D. Minn. 1995) (citing Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1987)).

Alternatively, in cases where the fraud goes undiscovered even though the defendant does nothing to actively conceal it, the statute is tolled only if the plaintiff can show that due diligence was exercised in attempting to uncover the fraud. Id. (citing Schaefer v. First Nat'l Bank of Lincolnwood, 509 F.2d 1287, 1296 (7th Cir. 1975)).

It is true that the Trustee has not alleged any fraud or concealment on the part of the Defendant, RMHC, in this case. Unlike the doctrine of equitable estoppel, however, the doctrine of equitable tolling does not require any misconduct on the part of the defendant; the doctrine merely requires the plaintiff to show that he has been injured by fraud and that he has remained in ignorance of the fraud without any fault or want of diligence or care on his part. Dring v. McDonnell Douglas Corp., 58 F.3d 1323, 1328-29 (8th Cir. 1995). This principle applies even more forcefully in the context of a bankruptcy proceeding. As articulated by Judge Kressel:

A bankruptcy case presents a rather different slant on equitable tolling. In the typical situation, it is the debtor's conduct rather than the defendant's conduct which invokes equitable tolling. In some senses, this

is unfair to the defendant. On the other hand, unlike the usual civil case where a plaintiff at least has the advantage of being a party to the underlying transaction, a bankruptcy trustee must rely almost entirely on a third party (the debtor) to provide the information necessary to uncover avoidable transfers.

Pomaville, 190 B.R. at 637.

After construing the allegations found in the Trustee's Complaint, and all reasonable inferences arising therefrom, most favorably to the Trustee, the Court finds that the allegations in this case support the inference that the Debtor took positive steps to conceal the Property from the Trustee. Therefore, the Court holds that the doctrine of equitable tolling could suspend the running of the § 549(d) statute of limitations in this case, and that the Trustee's allegations are therefore sufficient to survive a motion to dismiss on the grounds that the statute of limitations in § 549(d) has run.

2. Good Faith Defense

Finally, the Gentiles argue that the Trustee's Complaint fails to state a claim upon which relief can be granted under § 549 because §§ 549(c) and 550(b) prevent the Trustee from avoiding a transfer to or recovering against a transferee who received the property for value, in good faith, and without knowledge of the Debtor's bankruptcy case. The Gentiles are correct in their assertion that a showing of good faith under §§ 549(c) or 550(b) may constitute an affirmative defense to the Trustee's avoidance and recovery action. See, e.g., In re Hill,

156 B.R. 998, 1008 (Bankr. N.D. Ill. 1993). Their argument fails to carry the day, however, as it does not account for the procedural posture of this case. To survive a motion to dismiss, the general rule is that a plaintiff must allege only those facts necessary to support a prima facie case; a plaintiff is not required to allege the nonexistence of affirmative defenses requiring factual review. See Weaver v. Clarke, 45 F.3d 1253, 1255 (8th Cir. 1995); Landstrom v. Ill. Dep't of Children and Family Serv., 892 F.2d 670, 675 n.8 (7th Cir. 1990); Ouiller v. Barclays American/Credit, Inc., 727 F.2d 1067, 1069 (11th Cir. 1984), aff'd on reh'g, 764 F.2d 1400 (11th Cir. 1985), cert. denied, 476 U.S. 1124, 106 S. Ct. 1992 (1986); Richards v. Mileski, 662 F.2d 65, 73 (D.C. Cir. 1981). See also 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.34[4][b], at 12-73 to 74 (3d ed. 1997). Therefore, although RMHC's good faith purchaser defense may prove to be meritorious when the facts of this case come to light, it does not constitute grounds for dismissal under Rule 12(b)(6).

In conclusion, the Court holds that the Trustee's Complaint adequately states a claim upon which relief can be granted under §§ 549 and 550. In light of this holding, the Court does not need to, and does not, decide the issue of whether the Trustee's Complaint adequately states a claim under § 542.

ORDER

Based on all the foregoing, the Court holds that the Trustee's Complaint has adequately stated a claim upon which relief can be granted. ACCORDINGLY, IT IS HEREBY ORDERED THAT the Third-Party Defendants' Motion to Dismiss is DENIED.



Nancy C. Breher
United States Bankruptcy Judge