

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:) Chapter 11
)
LIQUID HOLDINGS GROUP, INC., <i>et al.</i> ,) Case No. 16-10202 (KG)
) (Jointly Administered)
<u>Debtors.</u>)
ALFRED T. GIULIANO, in his capacity as)
Chapter 7 trustee,)
)
Plaintiff,)
)
v.) Adv. Pro. No. 17-50662 (KG)
)
BRIAN FERDINAND, BRIAN M. STORMS,)
RICHARD SCHAEFFER, KENNETH D.)
SHIFRIN, JAY H. BERNSTEIN, DARREN)
C. DAVY, DAVID R. FRANCESCANI,)
WALTER F. RAQUET, THOMAS R.)
ROSS, VICTOR R. SIMONE, JR., DENNIS)
A. SUSKIND, ALLAN B. ZAVARRO,)
SANDLER O'NEIL & PARTNERS, L.P.,)
FERDINAND HOLDINGS LLC,)
LT WORLD LIMITED, LLC,)
ROBERT KELLER, CMK HOLDINGS, LLC,)
SCHAEFFER HOLDINGS, LLC)
and SHAF HOLDINGS, LLC,)
)
<u>Defendants.</u>) Re: D.I. Nos. 125, 126, 127, 133 & 136

MEMORANDUM ORDER

WHEREAS:

A. The Court issued an Opinion (D.I. 125) and Order (D.I. 126) on June 6, 2018, on all defendants' motions to dismiss the adversary proceeding. The Court dismissed a number of claims and denied dismissal of other claims. Among its rulings, the Court

denied the motions to dismiss the Sixth Claim – Avoidance of Transfers (Pursuant to 6 Del. C. § 1304(a)(1) and 11 U.S.C. § 544), and the Eighth Claim – Recovery of Transfers. The Chapter 7 Trustee (the “Trustee”), who is the plaintiff in the adversary proceeding, brought the Sixth Claim and the Eighth Claim, *inter alia*, against the following defendants: Brian Ferdinand, LT World Limited, LLC, and Ferdinand Holdings LLC; Richard Schaeffer, Schaeffer Holdings LLC and SHAF Holdings LLC; and Robert Keller and CMK Keller Holdings LLC (collectively, the Court will refer to the foregoing defendants as the “Moving Defendants”).

B. In the Opinion, the Court neglected to address the Moving Defendants’ arguments in favor of dismissal of the Sixth Claim and Eighth Claim. As a result, the Moving Defendants have moved for reconsideration of the Court’s rulings on the Sixth Claim and the Eighth Claim in the Opinion and Order.

NOW, THEREFORE, the Court rules as follows:

1. First, the Court has the authority to reconsider at any time an earlier order. *Official Comm. Of Unsecured Creditors of Allied Sys. Hldg., Inc. v. Yucaipa Amer. Alliance Fund I, L.P. (In re Allied Sys. Hldg., Inc.)*, 524 B.R. 598, 614 (Bankr. D. Del. 2015) (the Court amended an order to correct a legal error). Second, the Court should grant a motion for reconsideration “to correct a clear error of law or fact or to prevent manifest injustice.” *Max’s Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999). Here, the Court neglected to rule on aspects of the Moving Defendants’ motions to dismiss the Sixth Claim and the Eighth Claim. In addition, the Court did in fact inadvertently

“overlook “ the Moving Defendants’ arguments in support of their motions to dismiss and will grant reconsideration to correct its error and to prevent manifest injustice.

2. In the Complaint, the Trustee alleged in his Sixth Claim that:

261. At all times material hereto, Liquid had least one creditor prior to making the Transfers.

3. Section 544(b)(1) of the Bankruptcy Code provides, in part, that:

. . . the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title.

Section 544(b)(1) requires the following allegations:

(1) a creditor, (2) holding an unsecured claim and (3) that is allowable under Section 502.

The creditor, known as the “triggering creditor” is indispensable for the Section 544 fraudulent transfer claim. In order to assert what is a state law claim for avoidance under Section 544, a plaintiff must allege that a creditor exists who has an allowable unsecured claim as of the petition date. The creditor would also have to have had standing to bring the avoidance claim had the bankruptcy petition not been filed. *See Official Comm. of Unsecured Creditors v. Chinery (In re Cybergenics Corp.)*, 226 F. 3d 237, 243 (3d. Cir. 2000) (Section 544(b) requires the existence of an unsecured creditor who has a nonbankruptcy claim).

4. The Trustee’s allegation, that there is at least one creditor, falls well short of the requirements of the Bankruptcy Code. The Trustee does not allege, as Section 544(b)(1) requires, that there is a creditor holding an allowable unsecured claim on the

petition date. Nor is there any allegation that such a creditor could have asserted a fraudulent transfer claim against the Moving Defendants if there were no bankruptcy case.

5. The Trustee argues that: (1) he made particularized allegations which address the Transfers, (2) the claims register contains the names of many creditors who held unsecured claims and the Court can take judicial notice of the claims register and (3) there is a Chapter 7 trustee who would not have been appointed if there were no unsecured creditors. The Trustee also argues that the claims encompassed within the Sixth Claim and the Eighth Claim apply to future creditors so that on the petition date in 2016, any unsecured creditor would possess standing to bring the claim.

6. The Moving Defendants replied that the Trustee failed to allege facts that would permit a plausible inference that there exists a creditor who meets the statutory requirements of Section 544(b)(1). Plausibility is the standard requirement on motions to dismiss. The complaint must allege facts “sufficient to show that the plaintiff has a plausible claim for relief.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). The complaint in this adversary proceeding does not satisfy this test. On the Trustee’s future creditor argument, as well as matters for which the Trustee argued the Court could take judicial notice, the complaint just does not contain facts which, accepted as true, would enable the Trustee to prevail.

7. Other courts have dismissed Section 544(b) fraudulent transfer claims on the basis that the complaints in those cases did not contain the necessary allegations, as the Court has found is true in this case. *See, e.g., Whittaker v. Gross Ventures, LLC (In re Bolon)*, 538 B.R. 391,404- 05 (Bankr. S.D. Ohio 2015) (dismissing claims under section 544(b) where cross-claim did not plausibly allege the existence of an unsecured creditor); *Ries v. Wintz Props., Inc. (In re Wintz Cos.)*, 230 B.R. 848, 859 (8th Cir. B.A.P. 1999) (the trustee's failure to identify a creditor resulted in finding that he lacked standing to pursue a fraudulent transfer claim). *See also, Pardo v. Avanti Corp. Health Systems, Inc. (In re APF Co.)*, 274 B.R. 634, 639 (Bankr. D. Del. 2001), in which this court dismissed a Section 544(b) claim because "the Trustee's complaint is deficient" because it did not provide the required information. Such is the case here.

8. Accordingly, the Court grants reconsideration and dismisses the Sixth Claim without prejudice. The Court also dismisses the Eighth Claim which is related to Code Section 544 and the Sixth Claim. The Trustee can move to amend the Sixth Claim and the Eighth Claim as to the Moving Defendants only. In other words, this Memorandum Order does not authorize a motion to amend beyond the Sixth Claim and the Eighth Claim or beyond the Moving Defendants. A motion to amend, if any, must be filed on or before September 19, 2018.

SO ORDERED.

Dated: September 4, 2018



KEVIN GROSS, U.S.B.J.