

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:)	Bankr. No. 11-10177
)	Chapter 7
MARCUS EDWARD JUNDT)	
SSN/ITIN xxx-xx-8331)	
)	
Debtor.)	
)	
FORREST C. ALLRED, TRUSTEE)	Adv. No. 13-1006
)	
Plaintiff)	
-vs-)	DECISION RE: TRUSTEE-PLAINTIFF'S
)	MOTION TO AMEND COMPLAINT
MARY ANN GUZY)	
)	
Defendant.)	

The matter before the Court is Trustee-Plaintiff Forrest C. Allred's Motion to Amend Complaint. As discussed below, Trustee-Plaintiff's motion will be denied.

I.

By his motion (doc. 95), Trustee-Plaintiff seeks the Court's leave to amend his Amended Adversary Complaint for Turnover of Estate Property and for Breach of Contract ("first amended complaint") (doc. 20). Trustee-Plaintiff wishes to add two counts to his first amended complaint: one entitled "Fraudulent Transfer (Actual Fraud)" and another entitled "Fraudulent Transfer (Constructive Fraud)" (doc. 95-1). Both are premised on the same \$300,000 transfer that Trustee-Plaintiff described as a loan in his first amended complaint. Defendant Mary Ann Guzy objects (doc. 103).

II.

Subject to certain time constraints, a party may amend its pleading once as a

matter of course. Fed.R.Civ.P. 15(a)(1).¹ In filing his first amended complaint, Trustee-Plaintiff has already availed himself of this provision. Consequently, he may only further amend his complaint with Defendant's written consent—which the Court presumes he has been unable to obtain—or the Court's leave. Fed.R.Civ.P. 15(a)(2). Such leave should be freely given "when justice so requires." *Id.*

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962).

In her objection, Defendant argues allowing Trustee-Plaintiff to further amend his complaint would be futile. An amendment would be futile if "the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure."² *Cornelia I. Crowell GST Trust v. Possis Medical, Inc.*, 519 F.3d 778, 782 (8th Cir. 2008). To withstand a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.*

¹Federal Rule of Civil Procedure 15 applies in adversary proceedings. Fed.R.Bankr.P. 7015.

²Federal Rule of Civil Procedure 12(b) applies in adversary proceedings. Fed.R.Bankr.P. 7012(b).

Corp. v. Twombly, 550 U.S. 544, 570 (2007). The plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

III.

Trustee-Plaintiff's proposed second amended complaint does not pass muster, for several reasons. First, in ¶ 4 of his proposed second amended complaint, Trustee-Plaintiff appears to reference 11 U.S.C. § 548 as the statutory basis for the two new causes of action.³ Pursuant to § 548, a trustee may avoid certain transfers. However, any such transfer must have taken place within two years of the date on which the debtor's petition was filed. 11 U.S.C. § 548(a)(1). In this case, according to Trustee-Plaintiff's proposed second amended complaint, the transfer complained of allegedly took place in December 2004,⁴ or more than six and a half years before August 26, 2011, the date on which Debtor Marcus Edward Jundt's petition for relief under chapter 7 was filed. To the extent Trustee-Plaintiff truly wishes to proceed under § 548, the two new causes of action are thus time-barred.

Second, Trustee-Plaintiff requests in his motion "that [he] be allowed to amend [his] Complaint to add claims in the alternative for fraudulent transfer under Minnesota

³In ¶ 4 of his first amended complaint, Trustee-Plaintiff referenced 11 U.S.C. §§ 541 and 542 as the statutory bases for his complaint. In ¶ 4 of his proposed second amended complaint, Trustee-Plaintiff added 11 U.S.C. § 548 as a statutory basis for his complaint.

⁴In his motion to amend, Trustee-Plaintiff first indicates this transfer took place in December 2003 but then later indicates it took place in December 2004.

law regarding the transfer of funds from Debtor to the Defendant," thereby implicating 11 U.S.C. § 544(b), not 11 U.S.C. § 548(a). However, even if, contrary to the express language of Trustee-Plaintiff's proposed second amended complaint, the two new claims are considered to be premised on § 544(b), the proposed amendment would be no less futile. Pursuant to § 544, "[a] 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 [11 U.S.C. §] 502 . . . or that is not allowable only under [11 U.S.C. §] 502(e)[.]" 11 U.S.C. § 544(b)(1). "To exercise her § 544(b)(1) avoidance power, the trustee must show that the transfer is voidable under state law by at least one unsecured creditor of the bankruptcy estate with an allowable claim." *Williams v. Marlar (In re Marlar)*, 267 F.3d 749, 753 (8th Cir. 2001). Unlike the creditors described in 11 U.S.C. § 544(a)(1), (2), and (3), the creditor described in § 544(b) may not be a hypothetical creditor: "[T]he Trustee must first show that there is an *actual* unsecured creditor holding an allowable unsecured claim . . . who, under [state] law, could avoid the transfers in question." *Bies v. Wintz Properties, Inc. (In re Wintz Cos.)*, 230 B.R. 848, 859 (B.A.P. 8th Cir. 1999) (internal quotation marks and citation omitted) (emphasis added). The Court may not assume such a creditor exists. *In re Petters Co., Inc.*, 495 B.R. 887, 899-900 (Bankr. D. Minn. 2013).

In this case, the only reference to the requisite "predicate creditor" is found in ¶ 32 (Count Three) of Trustee-Plaintiff's proposed second amended complaint, in

which Trustee-Plaintiff alleges "the transfer of \$300,000 was a gift transferred to the Defendant with actual intent to hinder, delay, or defraud the creditor of the debtor."⁵ Trustee-Plaintiff does not identify "the creditor." At most, Trustee-Plaintiff may be said to have alleged, albeit implicitly, the existence of such a creditor. However, that does not suffice:

[T]he Trustee's generalized statement that "there was and is at least one or more creditors" within the contemplation of § 544(b), does not meet muster under Rule 8(a), in the wake of *Twombly* and *Iqbal*. It is not enough to merely state that there "was or is" *some* creditor out there, who could have sued a particular defendant on the relevant date to set aside a transfer of money to it from one of the Debtors.

Id. at 899. Trustee-Plaintiff's proposed second amended complaint thus fails to demonstrate Trustee-Plaintiff has standing to pursue the two new claims.

Third, a claim brought under the Minnesota Uniform Fraudulent Transfer Act, MINN. STAT. §§ 513.41 to .51, inclusive, to avoid a transfer based on constructive fraud—such as that set forth in Count Four of Trustee-Plaintiff's proposed second amended complaint—must be brought within six years of the date of the transfer. *Finn v. Alliance Bank*, 838 N.W.2d 585, 591-96 (Minn. App. 2013). As noted above, in this case, according to Trustee-Plaintiff's proposed second amended complaint, the transfer complained of allegedly took place in December 2004, or eight and a half years before June 7, 2013, the date on which Trustee-Plaintiff filed his adversary

⁵This lone reference is "restate[d] and reallege[d]" in ¶ 35 (Count Four) of Trustee-Plaintiff's proposed second amended complaint.

complaint against Defendant. Count Four of Trustee-Plaintiff's proposed second amended complaint is thus time-barred.

Fourth, a claim brought under the Minnesota Uniform Fraudulent Transfer Act to avoid a transfer based on actual fraud—such as that set forth in Count Three of Trustee-Plaintiff's proposed second amended complaint—may be brought within six years of the date of the aggrieved party's discovery of the fraud. *Id.* For the purposes of a complaint under § 544(b), the "aggrieved party" entitled to this "discovery allowance" is the predicate creditor from which the trustee derives his standing, not the trustee. *Petters*, 495 B.R. at 902. If the predicate creditor was either unaware of the fraud on the date on which the debtor's petition was filed or only became aware of the fraud within six years of the date on which the debtor's petition was filed, the trustee may avail himself of the discovery allowance to extend the statute of limitations, subject to the limitations on his avoiding powers provided by 11 U.S.C. § 546(a). *Id.* at 903. However,

[t]o the extent that the Trustee seeks to have the statute of limitations of Minn. Stat. § 541.05, Subd. 1(6) eased by the application of the discovery allowance, he must plead that his predicate creditor did not know of or discover the fraud . . . at any time until within the six years before the date on which the bankruptcy petition was filed. . . . He must also plead the specific facts that prevented the predicate creditor from obtaining such knowledge and from discovering the fraud.

Id. at 904.

In this case, Trustee-Plaintiff's proposed second amended complaint does none of these things. It does not identify a predicate creditor. It does not include an allegation that any such predicate creditor did not know of or discover Debtor's alleged fraud within six years of the date on which Debtor filed his chapter 7 petition. It does not include specific facts to demonstrate any such predicate creditor was prevented from obtaining such knowledge and from discovering Debtor's alleged fraud. As matters now stand, therefore, Count Three of Trustee-Plaintiff's proposed second amended complaint is also time-barred.⁶

IV.

For the foregoing reasons, the Court concludes allowing Trustee-Plaintiff to further amend his complaint in the manner requested would be futile. Consequently, Trustee-Plaintiff's Motion to Amend Complaint will be denied.

Dated: February 27, 2014.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Charles L. Nail, Jr.", is positioned above the printed name.

Charles L. Nail, Jr.
Bankruptcy Judge

⁶In his motion, Trustee-Plaintiff notes the *Finn* case is currently on appeal to the Minnesota Supreme Court and suggests "it is impossible to know what the statute of limitations for constructive fraud under [the Minnesota Uniform Fraudulent Transfer Act] will ultimately be." The Court agrees. However, even if the Minnesota Supreme Court were to reverse the Minnesota Court of Appeals and extend the discovery allowance to a claim brought under the Minnesota Uniform Fraudulent Transfer Act to avoid a transfer based on constructive fraud, Count Four of Trustee-Plaintiff's proposed second amended complaint would still be time-barred for the same reason Count Three is time-barred.

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Debtor.)	
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FORREST C. ALLRED, TRUSTEE)	Adv. No. 13-1006
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Plaintiff)	
-vs-)	ORDER DENYING
)	TRUSTEE-PLAINTIFF'S
MARY ANN GUZY)	MOTION TO AMEND COMPLAINT
)	
Defendant.)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED Trustee-Plaintiff Forrest C. Allred's Motion to Amend Complaint (doc. 95) is denied.

So ordered: February 27, 2014.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota