IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	: Chapter 7
	:
Moll Group, LLC	: Bankruptcy No. 02-38198
Debtors	:
Lawrence J. Lichtenstein, Trustee	: Adv. No. 04-1113
	:
Plaintiff	:
V.	:
	:
First National Bank of Chester County (VISA) and ICBA Bancard & TCM BANK	:
	:
Defendants	:
Lawrence J. Lichtenstein, Trustee	: Adv. No. 04-1115
	:
Plaintiff	:
V.	:
	:
First National Bank of Chester County	:
	:
Defendant	:

OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE

Introduction

The Trustee has filed two complaints to avoid what are alleged to be either preferential or fraudulent transfers. The first complaint was filed against the Bank and two credit card companies; the second was filed against the Bank alone. Motions were filed in both proceedings to dismiss Counts I and II, for a more definite statement, and to strike certain allegations. The Trustee opposes both motions. A hearing was held on

May 31, 2005, after which the matter was taken under advisement. For the reasons set forth below, the motion will be granted in part and denied in part.[1]

The Respective Complaints
and the Motions to Dismiss

In *both* Complaints, counts I and II allege avoidance claims under federal bankruptcy and state fraudulent conveyance law. The Complaint against the Bank and the credit card companies (04-113) alleges that certain payments made by the Debtor for credit card charges are fraudulent. The Complaint filed solely against the Bank (04-115) alleges that certain loan and lease payments are avoidable for the same reasons.[2]

As to both sets of fraudulent transfer claims, the motion to dismiss raises an affirmative defense.[3] So although the Defendants motions are styled as motions to dismiss, they go beyond the pleadings to offer proofs that the fraudulent transfer claims must fail. The Defendants rely here on the following provision of F.R.C.P. 12(b) which is made applicable by Bankruptcy Rule 7012(b):

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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[1]These proceedings seek to recover preferential and fraudulent transfers and are, therefore, within this Court's core jurisdiction. *See* 11 U.S.C. § 157(b)(2)(F), (H).

[2]For ease of reference, the first complaint will be referred to as the Credit Card Complaint and the second as the Loan/Lease Complaint.

[3]The Bank filed the motion to dismiss the Loan/Lease Complaint while the Bank along with the credit card companies moved to dismiss the Credit Card Complaint.

F.R.C.P. 12(b). For his part, the Trustee has not challenged the admission of the evidence attached to the two motions. Therefore, the motions will be treated as seeking summary judgment.

Standard for Summary Judgment

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.").[4] Pursuant to Rule 56, summary judgment should be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). For purposes of Rule 56, a fact is material if it might affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The moving party has the burden of demonstrating that no genuine issue of fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

The court's role in deciding a motion for summary judgment is not to weigh evidence, but rather to determine whether the evidence presented points to a disagreement that must be decided at trial, or whether the undisputed facts are so one sided that one party must prevail as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249, 252, 106 S.Ct. at 2511-12. In making this determination, the court must consider all of the evidence presented, drawing all reasonable inferences therefrom in the light most favorable to the nonmoving party, and against the movant.

[4] Fed.R.Civ.P. 56 is applicable to the instant proceeding pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.")

See United States v. Premises Known as 717 South Woodward Street, 2 F.3d 529, 533 (3rd Cir.1993); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir.1990), *cert. denied*, 499 U.S. 921, 111 S.Ct. 1313, 113 L.Ed.2d 246 (1991); *Gould, Inc. v. A & M Battery and Tire Service*, 950 F.Supp. 653, 656 (M.D.Pa.1997).

To successfully oppose entry of summary judgment, the nonmoving party may not simply rest on its pleadings, but must designate specific factual averments through the use of affidavits or other permissible evidentiary material that demonstrate a triable factual dispute. *Celotex Corp. v. Catrett*, 477 U.S. at 324, 106 S.Ct. at 2553; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 250, 106 S.Ct. at 2511. Such evidence must be sufficient to support a jury's factual determination in favor of the nonmoving party. *Id.* Evidence that merely raises some metaphysical doubt regarding the validity of a material fact is insufficient to satisfy the nonmoving party's burden. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). If the nonmoving party fails to adduce sufficient evidence in connection with an essential element of the case for which it bears the burden of proof at trial, the moving party is entitled to entry of summary judgment in its favor as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. at 322-23, 106 S.Ct. at 2552-53.

The Affirmative Defenses

As to Counts I and II of both Complaints, the following defenses are raised:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in

> exchange for such transfer or obligation.

11 U.S.C. § 548(c). The same provision is found in the Pennsylvania Uniform Fraudulent Transfer Act (PUFTA):

> (d) Rights of good faith transferee or obligee.--Notwithstanding voidability of a transfer or an obligation under this chapter, a good faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:
>
> (1) a lien on or a right to retain any interest in the asset transferred;
> (2) enforcement of any obligation incurred; or
> (3) a reduction in the amount of the liability on the judgment.

12 P.S. § 5108(d); *see also id.*, Committee Comment (4)(explaining that § 5108(d) is an adaption of § 548(c)). The two defenses thus require proof of two elements: first, innocence on the part of the transferee, and second, an exchange of value. Raised successfully, these defenses defeat both actual and constructive fraud claims. *See* 5 *Collier on Bankruptcy*, ¶ 548.07[2][a] (Matthew Bender 15th ed. revised 2003) ("To the extent that a transfer is avoidable under section 548, so long as the transferee's 'only liability to the trustee is under this section, and he takes for value and in good faith,' subsection (c) protects the transfer.") As with any affirmative defense, the Defendants bear the burden of proof. *See, e.g., In re Foxmeyer Corp*., 286 B.R. 546, 572 (Bankr.D.Del.2002).

The Good Faith Requirement

The Bankruptcy Code does not define a "good faith transferee."[5] *In re Kemmer*,

[5]For that matter, neither is there is a definition of "good faith" anywhere in the Bankruptcy Code. Likewise, the legislative history related to section 548(c) never defines, and scarcely addresses, good faith. *See* S Rep. No. 989, 95th Cong., 2d Sess. 89-90 (1978); HR

265 B.R. 224, 236 (Bankr.E.D.Ca.2001). *Collier* has observed that because the question of good faith arises in varied circumstances, the term defies an easy or precise definition. *See* 5 *Collier*, ¶ 548.07[2][a]; *In re Roco Corp*., 701 F.2d 978, 984 (1st Cir.1983) (noting that "good faith" is not susceptible of precise definition). Accordingly, courts generally evaluate good faith defenses on a case-by-case basis. *In re Model Imperial, Inc.*, 250 B.R. 776, 797 (Bankr.S.D.Fla.2000). This requires the court examine what the transferee objectively "knew or should have known," such that a transferee does not act in good faith when it has sufficient knowledge to place it on inquiry notice of the voidability of the transfer. *In re Sherman*, 67 F.3d 1348, 1355 (8th Cir.1995); *see also In re M & L Business Machine Co.*, 84 F.3d 1330, 1335-36 (10th Cir.1996) (stating that "the presence of any circumstance placing the transferee on inquiry as to the financial condition of the transferor may be a contributing factor in depriving the former of any claim to good faith unless investigation actually disclosed no reason to suspect financial embarrassment"); *In re Agricultural Research & Tech. Group,* 916 F.2d 528, 535-36 (9th Cir.1990) (stating that courts look to what the transferee objectively knew or should have known in questions of good faith, rather than examining what the transferee actually knew from a subjective standpoint).

The Exchange of Value Requirement

This Court has previously held that in determining “value” for purposes of this affirmative defense, the standard used for determining “reasonably equivalent” value will suffice. *In re Burry*, 309 B.R. 130, 136 (Bankr.E.D.Pa.2004). And this applies when

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Rep. No. 595, 95th Cong., 1st Sess. 375 (1977), U.S.Code Cong, & Admin.News 1978, 5787, 5875-76, 5963, 6331.

determining value under the PUFTA as well. *Id.* at 137. Such a determination is factual in nature. *In re Halpert Company, Inc*., 254 B.R. 104, 115 (Bankr.N.J.1999). As we stated in *Burry*:

> While neither the Code nor the PUFTA define "reasonably equivalent value," the Third Circuit Court has provided a thorough analysis of that term. *See In re R.M.L., Inc*., 92 F.3d 139 (3d Cir.1996). The inquiry is two-fold: first, the court must determine whether the debtor received any value at all in exchange for the transfer. The inquiry in the first step of the analysis is whether the debtor obtained "*any benefit ... whether* direct or *indirect,* without regard to the cost of ... services, the contractual and arm's length nature of the relationship, and the good faith of the transferee." *Id.* at 150. According to the Third Circuit Court, this determination involves whether the debtor received any "realizable commercial value" as a result of the transaction. *Id.* at 149, *citing Mellon Bank, N.A. v. Metro Communications, Inc*., 945 F.2d 635, 647 (3d Cir.1991), cert. denied, 503 U.S. 937, 112 S.Ct. 1476, 117 L.Ed.2d 620 (1992). Second, if it is determined that "value" was in fact conferred on the debtor as a result of the transaction, the court must then determine whether that value was reasonably equivalent to the cash transferred by the debtor. In making this assessment, the court may apply a "totality of the circumstances" test. *Id*. at 153. That entails the consideration of a variety of factors, such as the fair market value of the item or service received compared to the price paid, the arms-length nature of the transaction, and the good faith of the transferee. *Id.* at 148.

Summary Judgment will be Granted
as to the Loan/Lease Complaint

The Court takes up first the Bank's challenge to the Loan/Lease Complaint as that is more easily disposed of. Beginning with the question of the Bank's good faith, the Court observes that it relies on the Affidavit of Richard Kaufman, an officer of the Bank. Mr. Kaufman explains that 28 of the 30 payments sought to be avoided were installment payments on a secured loan which the Bank had made to the Debtor. That

testimony is uncontroverted. The Bank, then, would have no reason to suspect that anything was amiss about such payments.

As to the remaining two payments, Mr. Kauffman explains that they paid the rent which the Debtor owed an entity known as Real Moll, Inc. The Bank had made a loan to Real Moll, which the Debtor had guaranteed. The rent checks were endorsed over to the Bank to reduce what Real Moll owed the Bank. *See* Motion to Dismiss Loan/Lease Complaint, Affidavit, ¶ 7. The Trustee's response does not dispute this arrangement. His objection is that paragraph 7 of Kaufman's affidavit is "vague." Trans. 26. The Court disagrees finding the explanation to be clear and straightforward. Accordingly, the Bank's good faith with regard to the loan and lease payments has been established.

The same circumstances which support the good faith finding reflect that the Debtor received value in exchange for those payment. Payments on a loan necessarily indicate that the value had already been received in the form of the loan principal. *See In re Toy King Distributors, Inc.*, 256 B.R. 1, 134 (Bankr.M.D.Fla.2000) (holding that debtor's payment of loan principal on loan to it constitutes reasonably equivalent value) Likewise, the rental payments were made in exchange for the use of the leasehold. Contrary to the assertion of gratuitous or inequitable transfers, these payments were made in exchange for quantifiable, equivalent value. For that reason, the Bank's request for summary judgment on the Loan/Lease Complaint will be granted.

Summary Judgment will be Denied
as to the Credit Card Complaint

As to counts I and II of the Credit Card Complaint, the Defendants rely on Mr. Kaufman to establish their affirmative defense. On the issue of good faith, Mr. Kaufman

certified that "the Bank issued one or more Visa cards to debtor and upon information and belief the remaining defendants issued and/or administered these Visa cards; that the Defendants do not receive any information regard the specific goods and or services charged by customers to their Visa cards; and that Defendants do not monitor the specific purchases of Visa customers; and did not monitor the purchases made with debtor's cards." *See* Motion to Dismiss Credit Card Complaint, Affidavit, ¶¶ 2-4. The Trustee offers no evidence which would refute those assertions. Accordingly, nothing in this record indicates a lack of innocence on the part of the Bank and credit card companies when receiving these payments.

Did the Defendants Give Value
In Exchange for the Payments
on the Credit Card Bills?

The Court turns to the question of whether the Defendants gave value in exchange for the credit card payments. Again, Mr. Kaufman's affidavit states that "each of the Transfers ... was in satisfaction or partial satisfaction of a previously incurred or antecedent debt, owed by debtor to defendants, being payment for purchases made using the Visa cards; that each … was applied to and reduced debtor's obligation under the Visa/credit agreement with defendants on a dollar-for-dollar basis; that all … were used or were applied to indebtedness of debtor to defendants; and that none … were applied to indebtedness of someone else." Affidavit, ¶¶ 5-8. The sum and substance of the Defendants' value argument here is that the Debtor received the indirect benefit of a reduction in liability for all charges on the Visa accounts.

The Trustee offers no evidence of his own as to value but he challenges the probative value of what is offered by the Defendants. In essence, he argues that the

Defendant's emphasis on its liability on the accounts is misplaced. What matters, the Trustee explains, is whether the charges which the Debtor paid were related to the Debtor's business. To the extent that the Debtor paid a charge "that benefitted [employees] personally and not the Debtor, those [charges] are subject to avoidance." Trans. 18. Put another way, the Debtor did not receive value in exchange for paying the personal expenses of its employees and officers. And according to the Trustee, the Kaufman Affidavit never speaks to the nature of the charges on the Visa accounts. All that is averred is that payments were made on Visa accounts opened in the Debtor's name or for which the Debtor was liable. Trans. 31-32.

The Court finds the question of whether the Debtor received reasonably equivalent value in exchange for paying the credit card charges to be unsettled. The probative reach of the Kaufman Affidavit is that the Debtor paid the credit card bills on accounts for which it, and no one else, was liable. This evidence must be judged against the two-part test for "value" set forth by the Third Circuit in *R.M.L., supra.* Paying down its liability for the Visa accounts would have a positive effect on the Debtor's balance sheet and, therefore, would constitute "realizable commercial value" indirectly received. Moreover, § 548 of the Bankruptcy Code defines "value" as "satisfaction … of a present or antecedent debt of the debtor." 11 U.S.C. § 548(d)(2)(A). But is that reduction reasonably equivalent to what was paid out, which is required by the second prong of the *R.M.L.* test? The better indication of that would be the very goods and services charged on the Visa accounts. With that information, the Court could determine equivalence. But nothing in the record indicates what was being charged on these accounts. *See In re Duke & Bendedict, Inc*., 265 B.R. 524, 530

(Bankr.S.D.N.Y.2001) (stating that an assessment of reasonable equivalence requires comparison of what was given with what was received; also referred to as the measurement test); *see also In re Guerrera*, 225 B.R. 32, 36 (Bankr.D.Conn.1998) (explaining that in assessing reasonably equivalent value, the court must keep the equitable purposes of the statute firmly in mind, recognizing that any significant disparity between the value received and the obligation assumed will have significantly harmed innocent creditors). The Court, then, cannot determine if the Debtor received reasonably equivalent value in exchange for the payments on the Visa accounts. For that reason, summary judgment will not be granted as to Counts I and II of the Credit Card Complaint.

The Motion for More Definite Statement

If the Defendants cannot obtain a dismissal of the fraudulent transfer claims, then they would at least like the Trustee to be required to plead with more specificity. Rule 12 provides, in pertinent part:

> **Motion for More Definite Statement**. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

F.R.C.P. 12(e), incorporated by B.R. 7012(b). "A motion for a more definite statement under Federal Rule of Civil Procedure 12(e) is generally disfavored and will be granted

only if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." *Frazier v. Southeastern Pennsylvania Transportation Authority*, 868 F.Supp. 757, 763 (E.D.Pa.1994)

The Defendants maintain that paragraph 21 of the Complaint lacks the requisite degree of specificity. *See* Motion to Dismiss Credit Card Complaint, ¶ 17. That allegation reads as follows:

> Based on the trustee's review of the books and records of the debtor, *some* of the Transfers were made in payment of accounts for which the debtor was not obligated or were made in payment of accounts for which the debtor was not obligated or were made in payment of accounts for which the purchase of goods and services were made for the personal benefit of employees or members of the debtor or third persons for which the debtor received no benefit or value

Complaint, ¶ 21 (emphasis added). The Defendants consider this allegation vague and overly broad. *See* Motion, ¶ 18. In order to make a proper response, they need to know on which account the illegitimate charges were made, who made such charges and how the Defendants are supposed to have knowledge of that, and the books and records which would indicate which accounts were the responsibility of the Debtor. *See* Motion, ¶¶ 18,19. The Trustee disagrees and points out that his fraudulent transfer claim contains the requisite degree of precision. Response, ¶¶ 18-19. He directs the Court's attention to *In re Harry Levin, Inc.*, 175 B.R. 560 (Bankr.E.D.Pa. 1994). Trans. 22. Like this case, *Harry Levin* involved a Rule 12(e) challenge to a bankruptcy trustee's fraudulent transfer complaint. The trustee in *Harry Levin* sued the debtor's president for having "manipulate[d], use[d] and enjoy[ed] Levin's assets for his personal

benefit," having "charged various personal expenses to Levin's" and having received an "excessive" salary from Levin's." *Id*. at 564. That is as specific as the trustee would get. In finding that those allegations were sufficient for Rule 12(e) purposes, Judge Fox would expound upon the balance to be struck between Rule 8's general notice pleading requirement and Rule 9's heightened specificity requirement for fraud claims. And an additional factor influencing this analysis is the trustee's initial lack of familiarity with the information that would support the fraud claims:

> A Rule 12(e) motion for a more definite statement is appropriate only "if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." As explained by a leading commentator:
> With the exception of allegations of fraud and mistake, there is no requirement in the rules that pleading be particular. As amended in 1946, the Rule is plainly designed to strike at unintelligibility rather than want of detail. If a pleading meets the requirements of Rule 8 and fairly notifies the opposing party of the nature of the claim, a motion for a more definite statement will not be granted.
> J. Moore, 2A *Moore's Federal Practice*, ¶ 12.18[1], at 12-161 to 12-163 (2d ed. 1994) (footnotes omitted); *accord, e.g., Schaedler v. Reading Eagle Publication, Inc*., 370 F.2d 795, 798 (3d Cir.1967) ("[a Rule 12(e) motion] is directed to the rare case where because of the vagueness or ambiguity of the pleading the answering party will not be able to frame a responsive pleading").
>
> Rule 8(a) directs that a complaint simply contain "a short and plain statement of the claim showing that the pleader is entitled to relief ... and a demand for judgment for the relief" sought. Given this pleading standard, along with the ability of a defendant to obtain detailed information about an asserted cause of action through discovery, as a general principle a motion for a more definite statement "is not favored. In particular, a motion for a more definite statement should not be granted to require evidentiary detail that is properly sought through discovery...." J. Moore, 2A *Moore's Federal Practice*, ¶ 12.18[1], at 12-171 (2d ed. 1994); *accord, e.g., In*

re Noroton Heights Enterprises Corp., 96 B.R. 11, 15 (Bankr.D.Conn.1989); *In re American Intern. Airways, Inc*., 66 B.R. 642, 645 (Bankr.E.D.Pa.1986).

While Rule 12(e) motions are usually denied, they are appropriate "when the pleading is wholly uninformative as to the basis of the claim...." J. Moore, 2A *Moore's Federal Practice*, ¶ 12.18[1], at 12-173. Indeed,

> [d]epending upon the type of action, and the available defenses, certain information may be deemed necessary for forming a response. Thus, transaction dates have sometimes been required on the ground that without them the defendant cannot tell whether to plead the statute of limitations, though it has also been held that the defendant should simply plead the statute and then discover the dates through the normal discovery procedures.

Id., at 12-173 to 12-174 (footnotes omitted); *see In re Lee Way Holding Co.*, 105 B.R. 404, 417 (Bankr.S.D.Ohio 1989).

Fed.R.Bankr.P. 7009, made applicable to all adversary proceedings, simply incorporates Fed.R.Civ.P. 9. Rule 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge or other condition of mind of a person may be averred generally.

Thus, claims of fraud require a greater particularity of pleading than do other types of claims raised in federal courts.

However, the factual detail that need be alleged in a fraud count is also tempered by the overall themes of simplicity and conciseness permeating the modern federal pleading system. In construing Fed.R.Civ.P. 9(b), one treatise on federal practice explained:

> In order to satisfy Rule (9)(b), allegations of fraud must give the opposing party reasonable notice of the claim, and contain sufficient information to allow that party to respond.

J. Moore, 2A *Moore's Federal Practice*, ¶ 9.03[1] at 9-23 (2d ed. 1994) (footnote omitted). The Third Circuit Court of Appeals expanded upon this general requirement:

> Fed.R.Civ.P. 9(b) requires plaintiffs to plead the circumstances of the alleged fraud with particularity to ensure that defendants are placed on notice of the 'precise misconduct with which they are charged, and to safeguard

defendants against spurious charges' of fraud.... The first sentence of Rule 9(b) requires the identification of the elements of the fraud claim.... Nonetheless, focusing exclusively on the particularity requirement is 'too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'
Craftmatic Securities Litigation v. Kraftsow, 890 F.2d 628, 645 (3d Cir.1989) (quoting, respectively, *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir.1984), cert. denied, 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985) and Wright & Miller, 5 *Federal Practice and Procedure,* § 1298, at 407 (1969)) (citation omitted).

Indeed, in *Seville*, the Court of Appeals noted further that "allegations of 'date, place or time' fulfills these [particularity] functions, but nothing in the rule requires them. Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." 742 F.2d at 791. In an earlier decision, it explained:
In applying the first sentence of Rule 9(b) courts must be sensitive to the fact that its application, prior to discovery, may permit sophisticated defrauders to successfully conceal the details of their fraud. Moreover, in applying the rule, focusing exclusively on its 'particularity' language 'is too narrow an approach and fails to take account of the general simplicity and flexibility contemplated by the rules.'
Christidis v. First Pennsylvania Mortg. Trust, 717 F.2d 96, 99-100 (3d Cir.1983), quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1298, at 407 (1969).

This "flexibility" of approach to the particularity requirement has been viewed as especially applicable to fraud claims raised by a statutory bankruptcy trustee.

When a trustee in bankruptcy pleads a claim of fraud, cases have held the Rule 9(b) requirement of particularity is relaxed. A persuasive reason to permit this relaxation is the trustee's inevitable lack of knowledge concerning acts of fraud previously committed against the debtor, a third party.

L. King, 9 *Collier on Bankruptcy*, ¶ 7009.05, at 7009-5 (15th ed. 1994) (footnotes omitted); *accord, e.g., Wieboldt Stores, Inc. v. Schottenstein*, 94 B.R. 488, 498 (N.D.Ill.1988); *In re American Spring Bed Mfg. Co.*, 153 B.R. 365, 374

(Bankr.D.Mass.1993); *In re Hunt,* 136 B.R. 437, 452 (Bankr.N.D.Tex.1991).

175 B.R. at 566-568. The Court has quoted Judge Fox's analysis *Harry Levin* at length because the same factors are extant here. The Credit Card Complaint pleads a fraud claim that is, at places, lacking detail. And the Defendants argue that they cannot frame a proper response without more information. The Trustee's explanation for that lack of detail is that the Debtor's records in his possession are incomplete, but that these questions will be answered in discovery. Trans. 20-21.

The Court is constrained to agree with the Defendants that the Complaint is unnecessarily vague in one respect. At issue here are 19 payments which the Trustee seeks to recover as fraudulent. Yet he concedes that he does not know if all 19 are avoidable. Trans. 18. He explains that he does not have a complete set of the Visa accounts statements for the year prior to bankruptcy; however, from the information he does have, he concludes that some of the charges paid for by the Debtor on those Visa accounts were not business related. Trans. 18-19. That begs the question of why those charges have not been identified. Merely because a trustee is afforded latitude when pleading fraud claims does not mean that the specificity requirement of Rule 9 may be ignored when a trustee has some pertinent information. And this is what the Defendants would like to know: which fraudulent charges were paid on which Visa account, who made each particular charge, and where is that reflected in the Debtor's books and records. *See* Motion, ¶ 19. From the information presently in his possession, the Trustee will be required to replead these counts to specify which charges he considers to be "personal," to which Visa accounts they were made, and the

name of the person who made the charge. To that limited extent, the Motion for a More Definite Statement is granted.

The Motion to Strike

The last objection is made as to both complaints. It involves the Trustee's assertion that he is reserving the right to amend the Complaints at a future date to include subsequently discovered avoidable transfers. *See* Credit Card Complaint, ¶¶10, 15; *see also* Loan/Lease Complaint, ¶¶ 15, 19. Because this is nothing more than an improper attempt to circumvent applicable statutes of limitation, the Defendants say, these allegations should be stricken. *See* Motion to Dismiss Credit Card Complaint, ¶¶ 22-29.; Motion to Dismiss Loan/Lease Complaint, ¶¶ 26-33. The Trustee opposes striking that matter and explains that any attempt to add newly discovered transfers to his claim will be made pursuant to Rule 15. Response, ¶ 29; Trans. 21. Is this the type of allegation which ought to be stricken?

Rule 12 provides, in pertinent part:

> **Motion to Strike**. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

F.R.C.P. 12(f). "While courts possess considerable discretion in weighing Rule 12(f) motions, such motions are not favored and will generally be denied unless the material bears no possible relation to the matter at issue and may result in prejudice to the moving party." *Blum v. Council Rock School District*, 2003 WL 1873617 *3 (E.D. Pa.)

(*quoting Miller v. Group Voyagers, Inc*., 912 F.Supp. 164, 168 (E.D.Pa.1996); *see also* Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1380.

In this case, the possibility that the Trustee may come upon other avoidable transfers has no relation to those payments already pleaded in the Complaints. Be that as it may, the Defendants cannot say that they are prejudiced by what is declared in the objectionable paragraphs. "Prejudice" is defined as some harm, damages or deprivation of a right. *See In re O'Brien Energy, Inc*., 188 F.3d 116, 126 (3d Cir.1998). Merely pleading an intention to add additional transfers does not mean that the Trustee may do so. Any assertion that rights are being reserved is spurious. The Trustee would require leave before he can amend. As he concedes, any amendment of the Complaint depends on whether he can meet the strictures of Rule 15. *See* Trustee's Brief, 10-11. So there is no indication of any prejudice here. The language in the complaint announcing an intention to amend has no legal effect and will be ignored as opposed to stricken. *See Lyon Financial Services, Inc. v. Woodlake Imaging, LLC*, 2005 WL 331695 *9 (E.D.Pa.) (explaining that courts should not tamper with the pleadings unless there is a strong reason for doing so)

Summary

Counts I and II of the Loan/Lease Complaint will be dismissed. The same counts in the Credit Card Complaint survive dismissal. The Motion for a More Definite Statement will be granted as to the Credit Card Complaint only and will require the Trustee to specify from the information presently in his possession which charges were fraudulently paid. The same motion is moot as to the Loan/Lease Complaint. Finally, the Motion to Strike will be denied as to both Complaints.

An appropriate order follows.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: June 15, 2005

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	: Chapter 7
Moll Group, LLC Debtors	: Bankruptcy No. 02-38198
Lawrence J. Lichtenstein, Trustee Plaintiff v. First National Bank of Chester County (VISA) and ICBA Bancard & TCM BANK Defendants	: Adv. No. 04-1113
Lawrence J. Lichtenstein, Trustee Plaintiff v. First National Bank of Chester County Defendant	: Adv. No. 04-1115

ORDER

AND NOW upon consideration of the Defendants' Motions to Dismiss, For More Definite Statement and to Strike under Bankruptcy Rule 7012, the Responses of the Trustee, after hearing held on May 31, 2005, and for the reasons stated in the foregoing Opinion, it is

ORDERED that the Motion to Dismiss Counts I and II of Adversary No. 04-1115 is granted but that the Motion to Dismiss Counts I and II of Adversary No. 04-1113 is denied; and it is

FURTHER ORDERED that the Motion for a More Definite Statement is denied as moot as to Adversary No. 04-1115. The motion is granted as to Adversary No. 04-1113 and the Trustee will be required, within 20 days of the date of entry of this order, to replead that complaint to specify from the information presently in his possession which credit card charges are fraudulent and to which each account each applies, who made each such charge, and the date of such charge; and it is

FURTHER ORDERED that the Motion to Strike is denied as moot as to Adversary No. 04-1115 and is otherwise denied as to Adversary No. 04-1113.

By the Court:

Stephen Raslavich
United States Bankruptcy Judge

Dated: June 15, 2005

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