IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JASON L. NOHR, Receiver for MSC Holdings USA, LLC, MSC Holdings, Inc., and MSC GA Holdings, LLC,	:	**CIVIL ACTION NO. 1:14-CV-02761-SCJ**
Plaintiff,	:	
v.	:	
CORRINA JANG, et al.,	:	
Defendants.	:	

ORDER

This matter appears before the Court on Defendant Julie Starcher's Motion to Dismiss (Doc. No. [161]), Defendant Robert Rohm's Motion to Dismiss (Doc. No. [202]), and Defendants' James and Patricia Sheffield's Motion to Dismiss (Doc. No. [204]). For the following reasons, these motions are **DENIED**.

I. BACKGROUND AND LEGAL STANDARD

Plaintiff, the appointed Receiver for MSC Holdings USA, LLC, MSC Holdings, Inc., and MSC GA Holdings, LLC ("Receivership entities"), filed the complaint in this action on August 26, 2014. Doc. No. [1]. Plaintiff alleges that Defendant is liable under O.C.G.A. § 18-2-74, the Georgia Uniform Fraudulent Transfers Act ("GUFTA"), and for unjust enrichment. Id. at p. 70–73. Specifically,

the complaint states Defendant Starcher received $24,907 in "false profit" payments from the Receivership defendants, Billy McClintock and Dianne Alexander; Defendant Rohm received $31,088 in "false profit" payments and $172,078 in "referral fees" as payment for expanding the Ponzi scheme by securing additional funds from new investors; and Defendants James and Patricia Sheffield received $82,906 in "false profit" payments and $197,853 in "referral fees." Id. at p. 39–41, ¶¶ 187-98; p. 69, ¶¶ 407-11. Plaintiff claims that equity requires Defendants to return these profits so that Plaintiff can make an equitable distribution to all investors. Id. Defendant Starcher filed a motion to dismiss on February 2, 2015 (Doc. No. [161]), Defendant Rohm filed a motion to dismiss on February 23, 2015 (Doc. No. [202]), and Defendants James and Patricia Sheffield filed their motion to dismiss on February 23, 2015 (Doc. No. [204]).

A complaint may be dismissed if the facts as pleaded do not state a claim for relief that is plausible on its face. Ashcroft v. Iqbal, 556 U.S. 662, 679-80 (2009) (explaining "only a complaint that states a plausible claim for relief survives a motion to dismiss"); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561-62, 570 (2007) (retiring the prior Conley v. Gibson, 355 U.S. 41, 45-46 (1957), standard, which provided that in reviewing the sufficiency of a complaint, the complaint should

not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In Iqbal, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 556 U.S. at 678.

In Twombly, the Supreme Court emphasized that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555. Factual allegations in a complaint need not be detailed but "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. (internal citations and emphasis omitted).

II. DISCUSSION

Defendants' motions to dismiss contain the same arguments, and the Court will address these contentions in turn.[1]

---

[1] Defendant Starcher makes one additional argument, claiming "Plaintiff sued the wrong person" because it was actually Starcher's father, Defendant Sheffield, who made the alleged $50,000 investment and received the alleged "false profits." Doc. No. [161], p. 1-2. Defendant Starcher provides no evidence or support for her bald claim, and this is a factual question inappropriate for determination in a motion to dismiss. This motion is not for summary judgment, and Defendant Starcher has not requested the Court to convert this into a motion for summary judgment. As such, the motion to

A. Fraudulent Transfers

Defendants argue that Plaintiff "fails to allege sufficient facts to show plausible grounds to state a fraudulent transfer claim." Doc. No. [161], p. 4.[2] Plaintiff alleges Defendants violated GUFTA under both the actual fraud and constructive fraud provisions, which provide:

> A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

---

dismiss is denied as to the issue of whether Defendant Starcher is a proper defendant.

[2] Because the arguments are the same, the Court will cite to the briefs related to Defendant Starcher's motion to dismiss unless otherwise noted.

O.C.G.A. § 18-2-74(a). Plaintiff alleges actual fraud occurred because "[t]ransfers to the Defendants by the Receivership entities and Receivership Defendants were made in furtherance of the Ponzi scheme, not for value, and with the intent to hinder, delay, and defraud creditors, pursuant to O.C.G.A. § 18-2-74(a)(1)." Doc. No. [1], p. 70, ¶ 418. Plaintiff claims constructive fraud occurred because "[t]he MSC Holdings entities made payments to Defendants when they were insolvent. By making these payments, the MSC Holdings entities either intended to incur, or reasonably should have known that it would incur, debts beyond its ability to pay the debts as they became due, in violation of O.C.G.A. § 18-2-74(a)(2)." Id. at p. 71, ¶ 421. In support of these allegations, Plaintiff pleads sufficient facts to survive a motion to dismiss. For example, Plaintiff alleges:

> The Receivership Defendants, individually and doing business as the MSC Holdings entities, were operating a type of Ponzi scheme known as a "prime bank fraud" from 2002 to the present using the Receivership entities. McClintock and Alexander controlled the MSC Holdings entities solely for the illegitimate and fraudulent purpose and enterprise of operating a Ponzi-type scheme. The Receivership Defendants raised over $15 million from over 200 investors in more than 20 states, including Georgia, by telling investors that their money would be placed with a clandestine overseas entity that McClintock and Alexander referred to only as "the Trust." McClintock and Alexander misrepresented that the Trust would

> generate a return of at least 38 percent. The Receivership entities involved in the Ponzi scheme conducted no legitimate business or enterprise. Instead, the Receivership Defendants merely used investor funds to make "interest" and "referral fee" payments in order to continue and expand the scheme. The Receivership Defendants com[m]ingled investor deposits into bank accounts from which "referral fee" and "interest" payments were made. The MSC Holdings entities were insolvent from their inception and at the times it made "referral fee" and "false profit" payments to the Defendants.

Id. at p. 22–23, ¶¶ 78-83. Plaintiff further alleges:

> While the majority of investors lost most or all of the amounts they "invested" in the Receivership Defendants' Ponzi scheme, certain Defendants received "interest" payments in excess of the principal amount they "invested." The fictitious or "false profit" payments some investors received in excess of the principal amount they "invested" represent nothing more than inequitable and fraudulent transfer of money paid by other investors to a select few. Payments of "referral fees" and "false profits" to Defendants were made pursuant to a Ponzi scheme, after the Receivership entities incurred obligations to creditors, and while the MSC Holdings entities were insolvent. These payments of "referral fees" and "false profits" were made to further the Receivership Defendants' fraudulent Ponzi scheme and injured the Receivership entities by dissipating its assets.

Id. at 24-25, ¶¶ 90–92. By pleading these particular facts, Plaintiff makes out a plausible claim for relief and certainly puts Defendants on notice of the claims against them.

Defendants also argue that Plaintiff "fails to plead sufficient facts regarding the 'Ponzi Scheme Presumption'" and that "in order to survive this motion to dismiss, Plaintiff was required to allege sufficient facts under the heightened pleading standard set forth in Rule 9(b), Fed.R.Civ.P. showing plausible grounds for actual fraud to exist in the alleged transfer to" Defendants. Doc. No. [161], p. 5–8. The Court disagrees.

1. Ponzi Scheme Presumption

The "Ponzi Scheme Presumption" is succinctly stated, "With respect to Ponzi schemes, transfers made in furtherance of the scheme are presumed to have been made with the intent to defraud for purposes of recovering the payments." Perkins v. Haines, 661 F.3d 623, 626 (11th Cir. 2011). Plaintiff states in his complaint that

> Based upon the Receivership Defendants' admissions, and the facts establishing the Receivership Defendants' operation of a fraudulent and insolvent Ponzi scheme in the SEC action, the well-established "Ponzi Scheme Presumption" applies and proof of actual fraud [is]

> presumed to exist in the fraudulent transfer and recovery actions filed in the Receivership Court.

Doc. No. [1], p. 23–24, ¶ 86. Defendants argue that "Plaintiff's sole basis for invoking the Ponzi Scheme Presumption is (1) supposed 'admissions' made by McClintock and Alexander in the SEC action (not this action), and (2) other 'facts' pleaded in the SEC action (not this action). However, the Receivership Defendants made no such admission." Doc. No. [161], p. 5-6 (citation omitted).[3]

To survive Defendants' motions to dismiss, Plaintiff need not provide proof of any kind. Plaintiff need only plead sufficient facts to state a claim for relief that is plausible on its face. See Iqbal, 556 U.S. at 679–80. Again, Plaintiff adequately pleads his claims. Whether Plaintiff may use the "Ponzi Scheme Presumption" as proof of actual fraud is irrelevant for the purposes of this motion because this is not a motion for summary judgment.

2. *Rule 9(b)'s Heightened Pleading Standard*

Defendants argue that Plaintiff failed to allege sufficient facts under the heightened pleading standard set forth in Federal Rule of Civil Procedure 9(b) (Doc. No. [161], p. 8), which states, "In alleging fraud or mistake, a party must

---

[3] Defendants are referring to the related case of SEC v. McClintock, 1:12-cv-04028-SCJ (N.D. Ga 2012).

state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the 'precise misconduct with which they are charged' and protecting defendants 'against spurious charges of immoral and fraudulent behavior.'" Kipperman v. Onex Corp., No. 1:05-CV-1242-JOF, 2007 WL 2872463, at *6 (N.D. Ga. Sept. 26, 2007) (quoting Durham v. Bus. Mgmt. Assocs., 847 F.2d 1505, 1511 (11th Cir. 1998)). The rule "is intended to put defendants on notice as to the conduct complained of so that they have sufficient information to formulate a defense." Id. at *7 (quoting United States ex rel. Stinson v. Blue Cross Blue Shield of Ga., Inc., 755 F. Supp. 1040, 1053 (S.D. Ga. 1990)).

Courts are split on whether Rule 9(b) applies to claims under GUFTA. One court held that under GUFTA, Rule 9(b) applies to intentional fraud claims but not to constructive fraud claims. See Kipperman, 2007 WL 2872463, at *6. However, another court held that Rule 9(b) applies to neither. See Nesco, Inc. v. Cisco, No. Civ. A. CV205-142, 2005 WL 2493353, at *3 (S.D. Ga. Oct. 7, 2005). The court in Nesco stated, "[a] statutory action of fraudulent transfer is

distinguishable from a common law fraud claim." Id. at *2. In comparing the elements, the Nesco court stated that "it is readily apparent that common law fraud and the statutory action of fraudulent transfer bear very little relation to each other. In particular, the element of false representation, which must be present in a common law fraud, is not found in the statute." Id. at *3.

This Court need not determine whether Rule 9(b) applies to intentional fraud claims because Plaintiff meets the heightened pleading standard. "Allegations of date, time or place satisfy the Rule 9(b) requirement that the circumstances of the alleged fraud must be pleaded with particularity, but alternative means are also available to satisfy the rule." Kipperman, 2007 WL 2872463, at *6 (quoting Durham, 847 F.2d at 1511) (internal quotations omitted). To make the requirement more precise, the court in Kipperman looked to General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1079 (7th Cir. 1997), a Seventh Circuit case involving the Illinois Uniform Fraudulent Transfer Act. Id. The court agreed with the Seventh Circuit that Federal Rule of Civil Procedure 84, Form 13

> provides a good indication of what one must plead in a fraudulent conveyance claim under the Uniform Fraudulent Transfer Act to satisfy the purposes of 9(b). Form 13 merely requires (1) an allegation of

> jurisdiction, (2) a statement of the date and the conditions of the indebtedness involved (often with the document itself attached), (3) the amount owed, (4) a statement that the defendant conveyed real and personal property of a given description to another for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness described prior, and [(5)] a demand for judgment.

Id.[4] Here, Plaintiff sufficiently pleads jurisdiction, provides numerous facts regarding the Ponzi scheme, alleges that Defendants received "referral fees" and "false profits" in furtherance of the Receivership defendants' Ponzi scheme and injured the Receivership entities by dissipating their assets, specifies the amount owed, and demands judgment. Doc. No. [1], p. 3, 22-25, 28-70. Plaintiff also attached a 43-page document detailing the date and amount of each investment Defendants made to the Receivership entities, the date and amount Defendants received in interest or principal payments, and the date and amount Defendants received in payments for referral fees. See Doc. No. [1-1]. Thus, Plaintiff has met the Kipperman standard for Rule 9(b).

Furthermore, Plaintiff sufficiently pleads the intent element.

---

[4] Under the current version of the Federal Rules, Form 13 is now Form 21 and outlines a complaint on a claim to recover debt and to set aside a fraudulent conveyance. See Fed. R. Civ. P. Form 21.

> In determining actual intent under paragraph (1) of subsection (a) of this Code section, consideration may be given, among other factors, to whether:
> (1) The transfer or obligation was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer or obligation was disclosed or concealed;
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all the debtor's assets;
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

O.C.G.A. § 18-2-74(b).[5] The Court "may infer the requisite intent based upon a confluence of these factors. Thus, circumstantial evidence is utilized to prove actual fraudulent intent. As long as the parties plead one or more of the badges

---

[5] "'Debtor'" means a person who is liable on a claim." O.C.G.A. § 18-2-71(6) (2012).

of fraud above, they have pled the intent element with the requisite degree of particularity." Kipperman, 2007 WL 2872463, at *9 (citation omitted). Plaintiff's factual pleadings fall under at least one badge of fraud. For example, as it relates to badge of fraud number eight, Plaintiff alleges that Defendants wrongfully received payments in excess of the principal amount they "invested." Doc. No. [1], p. 26, ¶ 98. Plaintiff states the fictitious or "false profit" payments – transfers to Defendants from the Receivership defendants for amounts above the principal – represent nothing more than inequitable and fraudulent transfer of money paid by other investors to a select few. Id. at p. 24, ¶ 90; p. 26, ¶ 99. Plaintiff continues, "The 'referral fee' payments to the Defendants were not for anything of equivalent value, were made with the actual intent of defrauding creditors, and represent nothing more than the redirected funds obtained by the Receivership Defendants from new participants in their Ponzi scheme." Id. at p. 27, ¶ 102.

Because Plaintiff meets even the heightened Rule 9(b) pleading standard for fraud, Defendants' motions to dismiss have no merit.

B. Unjust Enrichment

Defendants argue that Plaintiff's unjust enrichment claim "fails to allege sufficient facts to show plausible grounds to state a claim." Doc. No. [161], p. 8. The essential elements of a claim for unjust enrichment "are that (1) a benefit has been conferred, (2) compensation has not been given for receipt of the benefit, and (3) the failure to so compensate would be unjust." Clark v. Aaron's, Inc., 914 F. Supp. 2d 1301, 1309 (N.D. Ga. 2012). The Court already determined that Plaintiff pleads sufficient facts to state a fraudulent transfer claim. The Court likewise finds that Plaintiff pleads sufficient facts to satisfy the necessary elements of a claim for unjust enrichment. Plaintiff clearly alleges Defendants received wrongful payments, in one form or another, that they were not entitled to and did not provide anything of equivalent value for these payments.

Defendants also argue that "Plaintiff's allegations incorrectly treat the unjust enrichment and fraudulent transfer claims as duplicative. Such a duplicative claim should be dismissed where, as here, it relies on the same allegations and implausible inferences as in the fraudulent transfer claim." Doc. No. [161], p. 9. Under Federal Rule of Civil Procedure 8, a party may plead in the alternative regardless of consistency. Fed. R. Civ. P. 8(d), (e). Plaintiff may, in the end, be barred from recovering under both counts, but it is too early at this stage to dismiss Plaintiff's claim for unjust enrichment. See WESI, LLC v. Compass

Envtl., Inc., 509 F. Supp. 2d 1353, 1362-63 (N.D. Ga. 2007); Manhattan Constr. Co. v. McArthur Electric, Inc., No. 1:06-cv-1512-WSD, 2007 WL 295535, at *8-10 (N.D. Ga. Jan. 30, 2007). This is simply not a case, as Defendants suggest, where Georgia courts would normally dismiss duplicative claims that "rely on the same allegations and implausible inferences as" other claims. Hays v. Page Perry, LLC, 26 F. Supp. 3d 1311, 1320 (N.D. Ga. 2014).

CONCLUSION

For the foregoing reasons, Defendant Starcher's Motion to Dismiss (Doc. No. [161]), Defendant Rohm's Motion to Dismiss (Doc. No. [202]), and Defendants' James and Patricia Sheffield's Motion to Dismiss (Doc. No. [204]) are **DENIED**.

IT IS SO ORDERED, this 28th day of September, 2015.

Steve C. Jones

HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE