

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 09-80190-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN, Esq., as court
appointed Receiver of Creative Capital
Consortium, LLC, et al.,

Plaintiff,

v.

CAPTIN CONSTRUCTION GROUP, INC., a
Georgia corporation, HOMELAND TITLE
SERVICES, LLC, a Georgia limited liability
Company, and VALENTIN ARDELEAN,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT
HOMELAND TITLE SERVICES, LLC'S MOTION TO DISMISS**

The Plaintiff, Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC and related entities¹ (collectively, the "Receivership Entities") hereby files this response to Defendant Homeland Title Services, LLC's ("HOMELAND TITLE") Motion to Dismiss and states as follows:

INTRODUCTION

In his Amended Complaint, the Receiver alleges that Homeland Title was the recipient of \$200,000 in alleged fraudulent transfers from the Receivership Entities. Homeland Title argues at length in its Motion to Dismiss that it was a "mere conduit" with respect to the alleged

¹ Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G\$ Trade Financial, Inc. and Unity Investment Group, Inc.

fraudulent transfers, and not having exercised dominion and control over the transfers, cannot be held liable for their recovery.

While the “mere conduit” defense proposed by Homeland Title is certainly a defense which is available to them under Florida law, their fact-based arguments in support of this defense are premature, and do not provide an appropriate basis for dismissal of the Receiver’s claims. As set forth in detail below, the burden of proof is upon Homeland Title to demonstrate by a preponderance of the evidence facts sufficient to demonstrate their status as a “mere conduit” of the alleged transfers. Moreover, the equitable nature of this defense further requires that Homeland Title prove that they acted in good faith or with “clean hands” in participating in the transfers at issue.

This Court’s focus in determining Homeland Title’s Motion to Dismiss is limited to the four-corners of the Amended Complaint. In light of the Receiver’s well-pled allegations in the Amended Complaint which must be accepted as true for purposes of the Motion to Dismiss, Homeland Title cannot and does not meet its burden of proof to establish a “mere conduit” defense. Further factual considerations remain to be determined. The Motion to Dismiss should therefore be denied.

LEGAL ARGUMENT

I. The Standard Of Review

When ruling on a motion to dismiss, the Court “must accept as true all of the factual allegations in the Complaint.” Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007). Further, the factual allegations in the Complaint must be “construed in the light most favorable to the Plaintiff.” Rivell v. Private Health Care Sys., 520 F.3d 1308, 1309 (11th Cir.2008). A court’s review on a motion to dismiss is “limited to the four corners of the complaint.” Wilchombe v.

TeeVee Toons, Inc., 555 F.3d 949 (11th Cir.2009); St. George v. Pinellas County, 285 F.3d 1334, 1337 (11th Cir.2002). A court may consider only the complaint itself and any documents referred to in the complaint which are central to the claims. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir.1997).

A 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.” Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L.Ed. 2d 80 (1957); Castro v. Secretary of Homeland Sec., 472 F.3d 1334, 1336 (11th Cir. 2006); Fuller v. Johannessen (In re Johannessen), 76 F.3d 347, 349 (11th Cir. 2006). Fed. R. Civ. P. 8(a) requires only a short and plain statement demonstrating plaintiff’s entitlement to relief. “*Specific facts are not necessary*; the statement need only give the defendant *fair notice* of what the claim is and the grounds upon which it rests.” Erickson v. Pardus, 127 S.Ct. 2197, 2200, 167 L.Ed. 2d 1081 (2007) (emphasis added).

A complaint need only specify enough facts “to raise a reasonable expectation that discovery will reveal evidence” of the required elements. Rivell v. Private Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir.2008). In other words, the complaint need only identify “facts that are suggestive enough to render [the element] plausible.” Id. (quoting Watts v. Florida Int’l. Univ., 495 F.3d 1289, 1296 (11th Cir. 2007.)) This is simply “all that is required at this stage of the litigation.” Watts, 495 F.3d at 1296. “There is no requirement of probability, or of any detail - just plausibility. A complaint need only plead “enough factual matter (taken as true) to suggest” the required element. Id.

II. It Is Premature For the Court to Rule Upon the Mere Conduit Defense In the Context of a Motion To Dismiss

In its Motion to Dismiss, Homeland Title correctly recognizes that the Eleventh Circuit has adopted a “control” test to determine whether or not a defendant may be properly regarded as

an initial transferee subject to fraudulent transfer liability under the Florida Uniform Fraudulent Transfer Act, or alternatively, whether a defendant may escape liability as a “mere conduit” of the alleged fraudulent transfer. *See generally, Nordberg v. Societe Generale (In re Chase & Sanborn Corp.)*, 848 F.2d 1196 (11th Cir.1988.)

However, Homeland Title’s request for dismissal under a mere conduit theory is premature at best, and is improperly raised before the Court at this time. The mere conduit defense is an affirmative defense requiring factual proof. The burden of such proof rests upon Homeland Title as defendant. *Steinberg ex rel. Lancer Management Group LLC v. Alpha Fifth Group*, Slip Copy, 2010 WL 1332844 (S.D.Fla.2010); *See Dept. of Ins. v. Blackburn*, 633 So.2d 521, 524 (Fla. 2nd DCA 1994) (“commercial conduit” defense for intermediary transferees constitutes an affirmative defense and thus cannot justify dismissal of Receiver’s complaint with prejudice).

In essence, Homeland Title’s arguments regarding its mere conduit defense present factual issues yet to be determined in this case. The ultimate determination of such facts requires the Court to go beyond the “four corners” of the Receiver’s complaint, and as such is beyond the scope of review for a motion to dismiss. *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007).

CONCLUSION

Based on the foregoing, the Receiver respectfully requests that Homeland Title’s Motion to Dismiss be denied and that Homeland Title be required to file an answer to the Amended Complaint within ten (10) days. Alternatively, to the extent that this Court grants any part of the relief requested by Homeland Title in their Motion to Dismiss, the Receiver requests leave to amend the Amended Complaint accordingly.

Dated: May 17, 2010

Respectfully submitted,

By: s/ David P. Lemoie

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ David P. Lemoie

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SERVICE LIST

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United States District Court, Southern District of Florida

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