UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GRYPHON INVESTMENTS III, LLC, by and through its RECEIVER, CLAIRE M. SCHENK,	)	
Plaintiff,	)	
v.	)	Case No. 4:15-CV-00464
JOHN S. WEHRLE, GRYPHON INVESTMENTS II, LLC, and CIRQIT.COM, INC.	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO JOHN S. WEHRLE'S MOTION TO DISMISS COUNTS I, III, VI, AND VII AND MOTION TO STRIKE PARAGRAPH 35 OF PLAINTIFF'S COMPLAINT

The Complaint filed by Plaintiff Gryphon Investments III, LLC ("Gryphon III") plainly satisfies the notice pleading standards imposed by the Federal Rules of Civil Procedure and sufficiently states a claim under Counts I, III, VI, and VII. Defendant John S. Wehrle's ("Wehrle") Motion to Dismiss is without merit and should be denied.

INTRODUCTION

On March 13, 2015, Gryphon Investments III, LLC ("Gryphon III"), by and through its Receiver Claire M. Schenk, filed its Complaint to recover more than $3.4 million in investor funds intended for and belonging to Gryphon III. Neither the Court nor Defendants need look beyond that Complaint to obtain fair notice as to what the claim is and the grounds upon which it rests. Indeed, the 76-paragraph Complaint sets out in detail exactly how Gryphon III investment funds were fraudulently diverted to Wehrle, Gryphon Investments II, LLC ("Gryphon II"), and Cirqit.com, Inc. ("Cirqit").

In March of 2008, Wehrle organized Gryphon III as a Missouri limited liability company. Compl. ¶ 13. Wehrle's trust, the John S. Wehrle Revocable Trust, appointed him to serve as manager of the company. *Id.* at ¶ 15; Ex. 1 of Compl., Operating Agreement. The appointment was documented in the Gryphon III Operating Agreement ("Operating Agreement") and required Wehrle individually to comply with extensively detailed duties and obligations set out over more than five (5) pages in the Agreement. Ex. 1 of Compl. Among them were the duties to not comingle company property and to act with the same care as would a corporate officer in similar circumstances and in the best interests of the company. Ex. 1 of Compl.; Compl. ¶¶ 16-17, 25. During this same time, Wehrle also controlled other very similarly named "Gryphon" entities including Gryphon Holdings "II" and "II B" and Gryphon Investments II, LLC ("Gryphon II"). Compl. ¶ 4.

As manager of Gryphon III, Wehrle raised funds, solicited capital contributions, and communicated with investors, among other responsibilities entrusted to him by the Operating Agreement. Compl. ¶ 18. Wehrle, and others at his direction, directed that investors in Gryphon III make their investment contributions by signing the Gryphon III Subscription Agreement ("Subscription Agreement") and by placing their funds into what purported to be a Gryphon III bank account. Compl. ¶¶ 19, 27; Ex. 2 of Compl., Subscription Agreement. But, and as the Complaint details, the investors received their directions from Wehrle in explicit—but false—Wire Transfer Instructions that provided a bank account number that actually belonged to a deceptively similarly named entity, Gryphon II, not Gryphon III. *Id.* at ¶¶ 28-30; Ex. 4 of Compl. Wire Transfer Instructions.

From March through September of 2008 investors contributed more than $3.4 million to what was actually Gryphon II, not Gryphon III, under the false representation that their monies

would fund the working of capital of Gryphon III. Compl. ¶¶ 31-33; Ex. 4 of Compl. Not a single penny of the $3.4 million intended to fund Gryphon III was ever utilized by the company. *Id.* at ¶ 33. Instead, Wehrle improperly diverted those monies to himself, Gryphon II, and Cirqit, a company that Wehrle also controls as Chairman of its Board of Directors. *Id.* at ¶¶ 7, 31-33. It matters not to what use these funds were ultimately put, or for whose benefit these funds were ultimately spent; Gryphon III never had access to them, and never had the benefit of their use. And that is what the Complaint in this case sets out in detail and that is what this lawsuit is about.

The Receiver of Gryphon III now seeks to recover the monies that Wehrle, Gryphon II, and Cirqit improperly and fraudulently obtained. Defendant Wehrle has moved to dismiss Counts I, III, VI, and VII of the Complaint for failure to state a claim under Rule 12(b)(6) and has also moved to strike paragraph 35 of the Complaint. Because Counts I, III, VI, and VII comply with federal notice pleading standards, Defendant Wehrle's Motion to Dismiss must be denied.

ARGUMENT

I. Legal Standard.

A motion to dismiss under Rule 12(b)(6) shall not be granted "unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief." *Young v. City of St. Charles, Mo.,* 244 F.3d 623, 627 (8th Cir. 2001). When considering a motion to dismiss, the court must take the complaint's material allegations as true and must liberally construe the complaint in the light most favorable to the plaintiff.[1] *Little Gem Life*

[1] In considering a motion to dismiss, a court also examines documents attached to or incorporated within a complaint. *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459-60 (8th Cir. 2010). Gryphon III's Complaint incorporated

Sciences, LLC v. Orphan Medical, Inc., 537 F.3d 913, 917 (8th Cir. 2008). "[T]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 926 (8th Cir. 1993) (internal quotation omitted).

"Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007) (internal quotation omitted). A complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (internal quotation omitted). Because Counts I, III, VI, and VII of Gryphon III's Complaint unquestionably provide a short and plain statement of the claims entitling Gryphon III to relief, Defendant Wehrle's Motion to Dismiss must be denied.

II. Gryphon III's Claims are Sufficiently Stated.

A. Count I sufficiently states a claim for breach of contract because Wehrle is a party to the Gryphon III Operating Agreement.

Wehrle does not dispute the sufficiency of the allegations of Gryphon III's breach of contract claim. Rather, Wehrle's challenge rests entirely on the erroneous assertion that because he signed the Operating Agreement on behalf of his trust, but purports that he did not sign it individually, he is not a party and cannot be liable under the Agreement. To the contrary, Missouri law holds that "[a] signature is not required in order to show mutuality or assent to the terms of a writing. Assent can be shown in other ways, such as by the parties' conduct." *Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 134 (Mo. App. E.D. 2005); *accord Tobin v.*

---

the Operating Agreement, the Subscription Agreement, the Summary of the Terms of the Investment, and the Wire Transfer Instructions, all of which must be considered in ruling on Defendant Wehrle's Motion to Dismiss.

Jerry, 243 S.W.3d 437, 441 (Mo. App. E.D. 2007); *Thomas v. O'Brien,* 791 S.W.2d 4, 6 (Mo. App. S.D. 1990). Gryphon III pled facts showing that Wehrle mutually assented to the Operating Agreement through conduct, including: acting as a manager, soliciting contributions for Gryphon III, and directing Gryphon III funds. *See* Compl. ¶¶ 18, 19, 26, 27, 39. Thus, whether Wehrle signed the Operating Agreement in his individual capacity is inconsequential to the sufficiency of Gryphon III's breach of contract claim.

Wehrle's contention that he is not legally bound by the Operating Agreement is similarly flawed. Under the Operating Agreement, a manager's obligations and duties arise when he or she is expressly appointed by a member of Gryphon III, not by the manager's signature. *See* Ex. 1 of Compl., at p. 14. Here, the John S. Wehrle Revocable Trust, as a member of Gryphon III, expressly appointed Wehrle to serve as a manager.[2] Thus, Wehrle's contention that he is not legally bound by the Operating Agreement is, at the very least, specious, and at best, an issue more properly decided at an advanced stage of litigation.

B. Count III sufficiently states a claim for fraudulent transfers under FRCP 9(b).

Gryphon III's claim for fraudulent transfers provides a short and plain statement of the claim, including fraudulent intent. "The essential elements of a fraudulent transfer include the conveyance or assignment of goods or chattels with the intent to hinder, delay, or defraud creditors." *Gill Const., Inc. v. 18th & Vine Auth.*, No. 05-0608-CV-W-SOW, 2006 WL 2711614, at *5 (W.D. Mo. Sept. 21, 2006). Paragraph 47 specifically states: "Wehrle improperly and fraudulently transferred Gryphon III investor contributions to himself and other entities, including but not limited to Gryphon II and Cirqit, with actual intent to hinder, delay, or defraud

[2] Tellingly, Wehrle takes no issue with Gryphon III's breach of fiduciary duty claim, the core of which centers on Wehrle's capacity as manager of the Gryphon III.

Gryphon III investors." Paragraph 48 also states "Gryphon II received all funds contributed by Gryphon III investors, some of which it then fraudulently transferred to Cirqit and other individuals and entities." Accordingly, Count III sufficiently states a claim for fraudulent transfers.[3]

Wehrle argues that this Count should be dismissed because it is not pleaded that Gryphon II conveyed or assigned the investor funds with any fraudulent intent. The Complaint, however, specifically states that Wehrle served as the founder and managing partner of Gryphon II. Compl. ¶¶ 4-5. This Court is required to take the pleaded facts and "draw all reasonable inference[s] that the defendant is liable for the misconduct alleged." *Ashcroft,* 556 U.S. at 678. Because the Complaint alleged that Wehrle controlled Gryphon II and that Wehrle transferred the investor funds with fraudulent intent, it can be reasonably inferred that Gryphon II, as Wehrle, conveyed the investor funds with the requisite fraudulent intent and is liable for the misconduct alleged.

Wehrle's contention that this Count fails to specifically allege fraudulent intent with *any* "badge of fraud" is also demonstrably false. § 428.024.2 RSMo. identifies eleven factors, any of which can establish "actual intent" under the fraudulent transfers statute, commonly referred to as "badges of fraud."[4] *Fischer v. Brancato,* 147 S.W.3d 794, 798-99 (Mo. App. E.D. 2004). The

[3] Wehrle argues that it is "impossible to determine which parties are the transferors, transferees, or both. To the contrary, the Complaint specifically states that Wehrle transferred the Gryphon III investor contributions to the Gryphon II bank account. Compl. ¶ 47. This allegation makes it clear that Wehrle, the transferor, diverted the funds to Gryphon II, the transferee. The Complaint further states that Gryphon II received those funds in its bank account and then transferred those funds to Cirqit and other individuals and entities. *Id.* at ¶ 48. This allegation makes it clear that upon receipt of the Gryphon III investor funds, Gryphon II, now the transferor, transferred the funds to Cirqit, the transferee. From the face of the Complaint, it is abundantly clear who the transferors and transferees are.

[4] § 428.024.2 RSMo. provides: "[i]n determining actual intent under subdivision (1) of subsection 1 of this 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;…"

Complaint specifically pleads three of those factors. First, the Complaint states that the fraudulent transfers were made to Wehrle, the manager of Gryphon III. Construing the Complaint liberally, it is clear that as the manager of Gryphon III, Wehrle was an "insider." Compl., ¶¶ 15, 16, 47. Second, the Complaint states that Wehrle retained possession or control over the money he fraudulently transferred, or factor two under statute. *Id.* at ¶ 32, 39, 44, 47. Third, the Complaint alleges that the Wire Transfer Instructions fraudulently directed investors to place their money into a bank account for Gryphon III when, in fact, the money went into a bank account belonging to Gryphon II. *Id.* at ¶ 27-30.

Wehrle also asks this Court to dismiss Gryphon III's fraudulent transfers claim because of its failure to plead it with the requisite specificity under Rule 9(b). Wehrle wholly ignores the "Factual Background" section of the Complaint, which provides 22 separate paragraphs detailing Wehrle's conduct, in addition to the allegations contained within the Count itself.[5]

Rule 9(b) requires the "circumstances constituting fraud," including "such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Abels v. Farmers Commodities Corp.*, 259 F.3d 910, 920 (8th Cir. 2001). The Eighth Circuit has held that Rule 8 and Rule 9 must be read together, "in harmony with the principles of notice pleading." *Id.* "The special nature of fraud does not necessitate anything other than notice of the claim; it simply requires a higher degree of notice, enabling the defendant to respond specifically." *Id.*

[5] Wehrle notes that FRCP 9(b) does not permit allegations based on "information and belief," as paragraph 50 states. Paragraph 50, however, does not fail the particularity standard because the elements of a fraudulent transfer claim, as discussed *infra* section (B), are sufficiently plead. Whether or not the Defendants can satisfy their burden that they took Gryphon III assets for value and in good faith is not an essential element of a fraudulent transfer claim, and therefore it does not matter that the allegation is based on "information and belief."

Here, Wehrle asserts that the Complaint does not identify the "who," or the parties accused of transferring the funds with fraudulent intent, the parties who received those monies, and the parties in the role of the debtor and creditor. Wehrle, however, cannot ignore the plain allegations setting forth the "who" in the Complaint. Specifically, paragraphs 27-33, 39, 44, 47 of the Complaint identify that Wehrle fraudulently transferred Gryphon III investor contributions to himself, Gryphon II, and Cirqit. Paragraph 47 identifies that Gryphon II and Cirqit received the fraudulently transferred monies, while paragraphs 27-28 provide facts showing that the creditors were the Gryphon III investors and Gryphon III itself, and Wehrle, Gryphon II, and Cirqit were the debtors. Compl., ¶¶ 31-33. Accordingly, Count III of the Complaint sufficiently pleads the higher degree of notice required for fraudulent transfers.

C. Count VI sufficiently states a claim for conversion.

Count VI is also not subject to dismissal. Under Missouri law, a conversion is "the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights." *Pollock v. Berlin-Wheeler, Inc.*, 112 S.W.3d 73, 77 (Mo. App. W.D. 2003). Money is not ordinarily the subject of conversion. *In re Estate of Boatright,* 88 S.W.3d 500, 506 (Mo. App. S.D. 2002). An exception, however, exists for "funds placed in the custody of another for a specific purpose and their diversion for other than such specified purpose subjects the holder to liability in conversion." *Dillard v. Payne*, 615 S.W.2d 53, 55 (Mo. 1981) (reversing trial court's dismissal of plaintiff's conversion claim because plaintiff adequately alleged his attorney and assistant converted the plaintiff's retainer for their own use); *Lappe & Associates Inc. v. Palmen*, 811 S.W.2d 468 (Mo. App. E.D. 1991) (reversing the trial court's finding that a claim for conversion did not exist when a stock broker diverted check intended for investment in corporate stock).

Wehrle contends that Count VI should be dismissed because the specific purpose for which the investor funds were designated was not properly pled. However, the Complaint clearly alleges, in detail, how Wehrle fraudulently diverted investor funds that were contributed with the specific purpose of funding the working capital of Gryphon III. *Id.* at ¶¶ 26-33. The Complaint even incorporates the agreement between Gryphon III and all investors, explicitly stating that the intended purpose of investor contributions was to fund the working capital of Gryphon III. Ex. 2 of Compl. Thus, Count VI sufficiently gives Wehrle notice of the facts of conversion, including the specific purpose for which the investor funds were contributed, and the grounds upon which the claim rests.

D. Count VII sufficiently states a claim for replevin.

Similarly, Count VII is not subject to dismissal because Gryphon III pled sufficient facts apprising Wehrle of its replevin claim. "Replevin is a possessory action to obtain property that is in the defendant's possession." *Herron v. Barnard,* 390 S.W.3d 901, 908 (Mo. App. W.D. 2013). Replevin and conversion are identical in that both require proof of the same three elements: "(1) plaintiff owned the property or was entitled to possess it (2) the defendant took possession of the property with intent to exercise some control over it and (3) the defendant deprived the plaintiff of the right to possession." *Id.* at 909. Wehrle correctly notes that Missouri law allows a claim for replevin when money is marked or designated, such that it becomes specific enough to identify it. *A.R. By & Through C.R. v. Topper*, 834 S.W.2d 238, 239 (Mo. App. E.D. 1992); *Hamilton v. Clark*, 25 Mo.App. 428, 433 (1887). Wehrle, however, incorrectly states that Gryphon III did not allege Wehrle to be in possession of identifiable property belonging to Gryphon III.

In its Complaint Gryphon III alleged, in detail, how Wehrle came into the possession of more than $3.4 million in property specifically belonging to Gryphon III, or the Gryphon III investor contributions that were supposed to have gone toward establishing the working capital of the company. Compl. ¶¶ 26-33, 39, 44, 47, 51-52, 54, 56, 68-71. Gryphon III was not required to allege each specific investor and the exact amount Wehrle improperly diverted from that investment's intended use. *See U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 503 (6th Cir. 2008) ("[A] complaint need not provide an exhaustive roadmap of a plaintiff's claims"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (the pleading of a claim "simply calls for enough fact to raise a reasonable expectation that discovery will reveal [evidence of the claim]").

The Complaint alleges the elements and facts supporting Gryphon III's replevin claim—*i.e.*, that Wehrle deprived Gryphon III of its right to possess its investor contributions that Wehrle unlawfully diverted. Compl. ¶¶ 68-71. Accordingly, when construed liberally in the light most favorable to Gryphon III, it cannot be said that Count VII does not state a claim for replevin.

III. Gryphon III does not object to Wehrle's Motion to Strike Paragraph 35 of the Complaint.

Gryphon III does not object to Wehrle's Motion to Strike paragraph 35 of the Complaint. To the extent the Court deems it necessary, Gryphon III is prepared to file an Amended Complaint that does not include paragraph 35.

CONCLUSION

For the foregoing reasons, Gryphon III's claims are properly plead. This Court should deny Defendant Wehrle's Motion to Dismiss.

Respectfully submitted,

THOMPSON COBURN LLP

By /s/ Stephen B. Higgins
Stephen B. Higgins, #25728MO
Brian A. Lamping, #61054MO
Kristen E. Sanocki, #67375MO
One US Bank Plaza
St. Louis, Missouri 63101
Phone: 314-552-6000
Fax: 314-552-7000
shiggins@thompsoncoburn.com
blamping@thompsoncoburn.com
ksanocki@thompsoncoburn.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Stephen B. Higgins