UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GRYPHON INVESTMENTS III, LLC,	)	
	)	
Plaintiff,	)	Case No. 4:15-CV-00464
	)	
	)	
vs.	)	**JURY TRIAL DEMANDED**
	)	
JOHN S. WEHRLE, et al.,	)	
	)	
Defendants.	)	

REPLY IN SUPPORT OF JOHN S. WEHRLE'S MOTION TO DISMISS COUNTS I, III, VI AND VII OF PLAINTIFF'S COMPLAINT

In opposition to Defendant John S. Wehrle's ("Wehrle") Motion to Dismiss, Plaintiff Gryphon Investments III, LLC ("Gryphon III") contends that, for various reasons, its claims are "sufficiently stated." However, none of the reasons cited by Gryphon III rescue Counts I, III, VI and VII of its Complaint from dismissal.

I. Count I for Breach of Contract Fails Because Wehrle is Not a Party to the Operating Agreement.

Wehrle, individually, did not sign the Operating Agreement of Gryphon III ("Operating Agreement"). Rather, the "John S. Wehrle Revocable Living Trust" ("Trust") was a Class B member of Gryphon III, and Wehrle signed in his capacity as trustee of the Trust. Operating Agreement at p. 37. The Trust is party to the Operating Agreement but Wehrle, individually, is not. It is obvious that Wehrle cannot be bound by, and sued under, a contract to which he is not a party.

In attempt to salvage its breach of contract claim, Gryphon III contends that Wehrle is individually a party to the Operating Agreement by his assent to its terms through his conduct.

That conduct, according to Gryphon III, is that Wehrle served as manager, solicited contributions and directed the funds of Gryphon III. *See* Memo. in Opp. p. 5.

Nowhere does the Complaint allege that, by such purported conduct, Wehrle implicitly assented to the obligations of the Operating Agreement or otherwise agreed to be bound by its terms. Nor does the Complaint point out which rights and obligations of the Operating Agreement are granted to or binding on Wehrle individually. Instead, Gryphon III incorrectly claims, without legal support, that simply acting as Manager of a company automatically gives rise to (presumably all) the contractual rights and obligations found in the company's Operating Agreement.

As manager of Gryphon III, Wehrle had certain duties and obligations. However, the proper legal theory to assert any purported wrongdoing by Wehrle in his capacity as Manager of Gryphon III is stated in Count II of the Complaint. A claim for breach of contract does not lie where Wehrle, individually, was not a party to the contract and is not bound by its terms.

II. Gryphon III's Vague and Limited Allegations Regarding Fraudulent Transfer do Not Satisfy Federal Rule 9(b).

Gryphon III does not dispute that a cause of action for fraudulent transfer falls within the ambit of Federal Rule 9(b). Instead, it claims that it properly pleaded the "who, what, where, when and how" of the alleged fraud with the specificity required to satisfy Rule 9(b). To the contrary, Gryphon III's Memorandum in Opposition to Wehrle's Motion only further confuses its already puzzling theory on fraudulent transfer.

According to Gryphon III, the transferors were both Wehrle and Gryphon II. Memo. in Opp. p. 6, FN 3. To state a claim under Section 428.024.1(1) (actual fraud), the creditor (here, Gryphon III) must show that a debtor transferred funds with actual intent to defraud. *See Fischer v. Brancato*, 147 S.W.3d 794, 799 (Mo. Ct. App. 2004). Thus, if the purported transferors were

Wehrle and Gryphon II, they must have also been debtors of Gryphon III. The debtor and the transferor must be one in the same. There is no allegation in the Complaint that Wehrle or Gryphon II (the purported transferors) were ever debtors of Gryphon III.

Further, the Complaint only alleges that Wehrle transferred investor contributions "with actual intent to hinder, delay and defraud" Gryphon III investors. Complaint, ¶ 47. Yet, Gryphon III explains that, although not pleaded, it should be "inferred" that Gryphon II also conveyed investor funds with the requisite fraudulent intent because Wehrle controlled Gryphon II. Memo. in Opp. p. 6. Fraudulent intent must be stated with particularity under Rule 9(b) as well as under Missouri law. *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 389-90 (Mo. Ct. App. 2010). According to Gryphon III, it has met this heightened pleading standard with regard to the intent of Wehrle by stating, in conclusory fashion, that Wehrle had "actual intent." Complaint, p. 47. Yet, Gryphon III plainly fails to plead with particularity as it points to no facts supporting such intent. *See Birkenmeier,* 312 S.W.3d at 389-90 (allegations of fraud and fraudulent conveyance must be pled with particularity, and no claim is stated where the allegations only mirror the badges of fraud; more than one badge of fraud must be present). Worse, Gryphon III alleges that it has pleaded the fraudulent intent of Gryphon II (the other purported transferor) with the requisite specificity merely by inference from the fact that Wehrle was the manager of Gryphon II.

Further confusing matters, Gryphon III claims that it appropriately pleaded the "badges of fraud" because the transfers were to an insider (Wehrle, as Manager of Gryphon III). *See* Memo. in Opp. p. 7 ("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'"). However, the transfer must have been to an insider of

the debtor/transferor, not an insider of the creditor. A transfer to an insider of the creditor does not support any fraudulent intent both because the debtor would retain no advantage as a result of such transfer and the creditor would presumably benefit if its insider received the funds.

A fraudulent conveyance theory cannot be borne out under the circumstances as pleaded by Gryphon III. If, as alleged, Wehrle transferred the funds belonging to Gryphon III to himself (as an insider) he was both the transferor and transferee, never a debtor, and could not have done so to evade his obligations to any purported creditor. Indeed, according to the Complaint, the money remained in possession or control of the same exact parties notwithstanding the alleged transfers. *See* Memo. in Opp. p. 7 ("The fraudulent transfers were made to Wehrle, the manager of Gryphon III" and "Wehrle retained possession or control over the money he fraudulently transferred [to himself].")

Simply stated, it is impossible to determine who was alleged to be the debtor, creditor, transferor, transferee and which parties purportedly acted in a dual capacity. The Complaint does not satisfy Rule 9(b)'s heightened pleading standards because it does not plead a comprehensible pattern of transfers sufficient to state a claim under Missouri's Uniform Fraudulent Transfer Act. Nor does it plead facts such as the time, place and context of the fraud or the details of Wehrle's purported bad acts including the "who, what where, when and how" of the alleged fraud. *See U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 41 F.3d 552, 556 (8th Cir. 2006). For these reasons, Count II must be dismissed.

III. Gryphon III's Conversion (Count VI) and Replevin (Count VII) Claims Fail because Unidentified "Investor Funds" Contributed to Generally "Fund Working Capital" Cannot be Converted and are not Subject to an Action for Replevin.

In its Opposition, Gryphon III attempts to salvage its claims for conversion and replevin by reiterating its allegations that "Wehrle deprived Gryphon III of its right to possess investor

contributions" (Memo. in Opp. p. 10) and that the "the intended purpose of investor contributions was to fund the working capital of Gryphon III" (Memo. in Opp. p. 9). Yet, these two claims still fail to identify the *specific* property Wehrle wrongfully possessed and do not identify the *specific* purpose for which that property was designated. Accordingly, Counts VI and VII fail to state a claim and must be dismissed.

Generally, money is not the subject of an action for replevin. *A.R. By & Through C.R. v. Topper*, 834 S.W.2d 238, 239 (Mo. Ct. App. 1992). Gryphon III acknowledges that an action for replevin of money only lies when the "money is marked or designated, such that it becomes specific enough to identify it." Memo. in Opp. p. 9, citing, *A.R. By & Through C.R.*, 834 S.W.2d at 239. Yet, Gryphon III goes on to claim that it alleged Wehrle was in possession of identifiable property – namely, the "investor contributions that were supposed to have gone toward establishing the working capital of the company." Memo. in Opp. p. 10. "Investor contributions" are no more specifically identifiable than unmarked or undesignated money generally. Moreover, in paragraph 31 of its Complaint, Gryphon III alleges that the money at issue was comingled with funds of Gryphon II. The comingling of funds belies any allegation that the "investor contributions" were specifically identifiable and, therefore, those funds are not subject to an action of replevin.

Similarly, money is not subject to conversion. *L & W Engineering Co., Inc., v. Hogan*, 858 S.W.2d 847, 850 (Mo. Ct. App. 1993). The only exception is for money that has been allocated for a *specific purpose*. *Id.* In its Opposition, Gryphon III claims the "specific purpose" alleged was to "fund the working capital of Gryphon III." Memo. in Opp., p. 9. Gryphon III ignores the fact that money held for "general corporate purposes" cannot be converted. *Id.* at 851 (money held for "general corporate purposes" is not money held for a specific purpose

which may be subject to conversion). The "funding of working capital" of Gryphon III is no more specific than money held for general corporate purposes and, therefore, Count VI must be dismissed.

CONCLUSION

For the reasons set forth above, Counts I, III, VI and VII of the Complaint are insufficient to state a claim for relief and should be dismissed with prejudice in their entirety as to Wehrle.

Respectfully submitted,

CAPES, SOKOL, GOODMAN, & SARACHAN, P.C.

By: /s/ Amy L. Fehr
Sanford J. Boxerman, MO37436
Amy L. Fehr, MO60033
7701 Forsyth Blvd., 12th Floor
St. Louis, Missouri 63105
(314) 505-5470
(314) 505-5471 (fax)
boxerman@capessokol.com
fehr@capessokol.com

Attorneys for Defendant John S. Wehrle

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 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/ Amy L. Fehr