UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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

REPLY OF GRYPHON INVESTMENTS II, LLC IN SUPPORT OF ITS MOTION TO DISMISS COUNTS III, VI, AND VII OF PLAINTIFF'S COMPLAINT

In opposition to the Motion of Defendant Gryphon Investments II, LLC ("Gryphon II") to Dismiss Counts III, VI, and VII of the Complaint of Plaintiff Gryphon Investments III, LLC ("Gryphon III" or "Plaintiff"), Plaintiff contends that, for various reasons, its claims are "sufficiently stated." However, such is not the case, and, for the reasons set forth below, Counts III, VI, and VII of Plaintiff's Complaint must be dismissed.

I. Gryphon III's vague and limited allegations regarding fraudulent transfer do not satisfy the requirements of Fed. R. Civ. Pro. 8 or 9(b).

In its Memorandum of Law in Opposition to the Motion of Gryphon II to Dismiss (Doc #42), Plaintiff misstates the legal standard to be applied in considering a motion to dismiss as follows:

> 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. . . .

Memo. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 3.

The language, "unless it appears beyond a reasonable doubt that plaintiff can prove no set of facts in support of a claim entitling him to relief," is taken from Mr. Justice Black's opinion in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102 (1957) and has often been cited as controlling authority by the courts, including the Supreme Court. However, *Conley v. Gibson* was abrogated on that point by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560-61, 127 S.Ct. 1955, 1968 (2007) (indicating that the "no set of facts" standard is no longer to be followed).

Further, the Supreme Court has made clear that, in ruling on a motion to dismiss, the court is not to accept as true "labels and conclusions," "formulaic recitations of the elements of the cause of action" or "naked assertions devoid of further factual enhancement." As the Supreme Court has stated:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id*., at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.,* at 557, 127 S.Ct. 1955.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.,* at 570, 127 S.Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 127 S.Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.,* at 557, 127 S.Ct. 1955 (brackets omitted).

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.,* at 555, 127 S.Ct. 1955. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.,* at 556, 127 S.Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U.S.C. § 1. Recognizing that § 1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry ... and ha[d] agreed not to compete with one another." 550 U.S., at 551, 127 S.Ct. 1955 (internal quotation marks omitted). The complaint also alleged that the defendants' "parallel course of conduct ... to prevent competition" and inflate prices was indicative of the unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a "'legal conclusion'" and, as such, was not entitled to the assumption of truth. *Id.,* at 555, 127 S.Ct. 1955. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to

> proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.,* at 565–566, 127 S.Ct. 1955. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.,* at 567, 127 S.Ct. 1955. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.,* at 570, 127 S.Ct. 1955.

Ashcroft v. Iqbal, 556 U.S. 662, 677-80, 129 S.Ct. 1937, 1949-50 (2009).

In this case, as in *Twombly*, Plaintiff has relied on legal conclusions and conclusory allegations in an attempt to bootstrap its "allegations" into a well pleaded complaint for fraudulent transfer. In support of its argument that it has stated a claim against Gryphon II in Count III of the Complaint under the Missouri Uniform Fraudulent Transfer Act ("MUFTA"), Plaintiff states:

> In addition to alleging that Gryphon II conveyed the investor funds with the requisite fraudulent intent, the Complaint alleges that Gryphon II received the fraudulently transferred funds from Defendant Wehrle. Compl. ¶¶ 47-48, 52.

Memo of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 5.

The allegations set forth in Paragraphs 47-48 and in Paragraph 52 of the Complaint, on which Plaintiff relies, are as follows:

> 47. As described above, 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 Gryphon III investors.
>
> 48. Gryphon II received all funds contributed by Gryphon III investors, some of which it then fraudulently transferred to Cirqit and other individuals and entities.
>
> * * *

> 52. The Gryphon III transfers were made to or for the benefit of Wehrle and other entities, including but not limited to Wehrle, Gryphon II, and Cirqit, in furtherance of a fraudulent investment scheme.

Compl., ¶¶ 47-48, 52.

The allegations, set forth in Paragraph 47 of the Complaint, that "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 Gryphon III investors*" are mere legal conclusions, and, as such, in the words of Twombly, "[are] not entitled to the assumption of truth."

Similarly, the allegation in Paragraph 48 of the Complaint that Gryphon II "*then fraudulently transferred* [some of the funds] to Cirqit and other individuals and entities is a mere legal conclusion, and as such, "is not entitled to the assumption of truth."

Nor do the introductory words of Paragraph 47, referring to Wehrle's conduct "[as] described above," save Count III for the reasons that many of the "averments" set forth in the preceding paragraphs merely set forth legal conclusions or are actually contradicted by the exhibits attached to the Complaint upon which Plaintiff relies in making them.

For example, even where Plaintiff has attempted to plead facts based on documents attached to his Complaint, the documents themselves frequently do not support the averments made by Plaintiff. By way of example, Plaintiff states in its Complaint:

> 23. The Gryphon III Subscription Agreement [attached to the Complaint as Exhibit 2] expressly stated that Wehrle (as Manager) would use capital contributions to fund the capital of Gryphon III and no other entity.
>
> 24. The Gryphon III Summary of the Terms of the Investment [attached to the Complaint as Exhibit 3] expressly stated that Wehrle (as Manager) would use capital contributions "to fund working capital and other expenditures of [Gryphon III]" and no other entity.

Compl., ¶¶ 23-24.

Yet, nowhere in the Gryphon III Subscription Agreement (attached to the Complaint as Exhibit 2) does it state that there is a prohibition on the use of the funds. Similarly, the Gryphon III Summary of the Terms of the Investment (attached to the Complaint as Exhibit 3) expressly warned all investors that its terms did not constitute a definitive offer and were not to be relied on, and, therefore, to the extent it stated "for discussion purposes" that the capital contributions would be used "to fund working capital," it was not to be relied on. The Gryphon III Summary of the Terms of the Investment specifically states in italic print at the top of its first page:

> *The following term sheet is not a definitive offer and provides indicative terms intended for discussion purposes only. The final terms and conditions of the proposed financing transactions described herein will be based solely upon the Limited Liability Company Operating Agreement of Gryphon Investments III, LLC, dated March 1, 2008, and other transaction documents.*

Summary of the Terms of the Investment (attached to the Complaint as Exhibit 3), p. 1 (italics in original).

Thus, that document could not reasonably be relied on by anyone for the averments set forth in Paragraph 24 of Plaintiff's Complaint.

Gryphon III does not dispute that a cause of action for fraudulent transfer falls within the ambit of Fed. R. Civ. Pro. 9(b). Instead, it claims that it has properly pleaded the "who, what, where, when and how" of the alleged fraud with the specificity required to satisfy Rule 9(b). *See* Memo. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), pp. 4-7.

However, Plaintiff's Memorandum in Opposition to Gryphon II's Motion only further confuses Gryphon III's already puzzling theory on fraudulent transfer.

According to Gryphon III, the transfers were both to Wehrle and Gryphon II. Memo. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 5 fn 2.

However, to state a claim under Section 428.024.1(1) (actual fraud), the creditor (herein 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 and 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 and that Gryphon II then fraudulently transferred some of the funds to Cirqit and others. Complaint, ¶¶ 47-48. Plaintiff would have this court infer Gryphon II's intent from its mere conclusory allegations.

However, under both federal and state law, Gryphon II's alleged fraudulent intent may not be pleaded as a mere conclusory allegation. *Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 389 (Mo. Ct. App. 2010) ("Allegations of fraud and fraudulent conveyance must be pled with particularity").

As the court in *Birkenmeier* stated:

> In this case, Birkenmeier's petition was not pled with particularity. In his second amended petition, Birkenmeier merely set forth allegations that mirrored the badges of fraud. For example, he alleged, "[t]he rights to the Product were transferred to Defendant Perio Protect with inadequate consideration" and "[t]he transaction is different from the usual method of transacting business for Keller Biomedical." He also alleged, "The transfer was made in anticipation of suit or claims by Plaintiffs." Birkenmeier failed to set forth any facts in support of these allegations. Therefore, his allegations were not sufficient to state a cause of action under MUFTA and the trial court properly dismissed this count. The first point of the cross appeal is denied.

Birkenmeier, 312 S.W.3d at 390.

According to Gryphon III, it has met the heightened pleading standard with regard to the intent of Gryphon II by stating, in conclusory fashion, that "Gryphon II received all funds

contributed by Gryphon III investors, some of which it then *fraudulently* transferred to Cirqit and other individuals and entities." Complaint, ¶ 48 (emphasis added). Yet, in so pleading, Gryphon III has merely pleaded conclusory statements regarding intent without reference to their factual context, which the Supreme Court condemned as inadequate in *Ashcroft v. Iqbal*, 556 U.S. 662, 686, 129 S.Ct. 1937, 1954 (2009), as more fully set forth below. *See* also *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 requite specificity merely by inference from the fact that Wehrle was the manager of Gryphon II.

However, the Federal Rules of Civil Procedure do not require courts to credit a complaint's conclusory statements regarding intent without reference to its factual context. As the Supreme Court has explained:

> Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 172a–173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

Ashcroft v. Iqbal, 556 U.S. 662, 686, 129 S.Ct. 1937, 1954 (2009).

Further confusing matters, Gryphon III claims that it appropriately pleaded the "badges of fraud" because the transfers:

> were made to Wehrle, the manager of Gryphon III and Gryphon II. . . . Second, the Complaint states that Gryphon II retained possession or control over the money the entity fraudulently transferred, or factor two under statute. *Id*. at ¶ 32, 47, 48, 52. 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, 32.

See Memo. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 6.

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.

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 MUFTA. Nor does it plead facts such as the time, place and context of the fraud or the details of Gryphon II'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). In addition, Plaintiff has merely pleaded conclusory statements regarding intent without reference to their factual context, which the Supreme Court has condemned. For these reasons, Count III must be dismissed.

II. Gryphon III's claim for conversion (Count VI) and its claim for replevin (Count VII) fail to state claims for which relief can be granted because unidentified "investor funds" contributed to "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 "the Complaint clearly alleges, in detail, how Wehrle and

Gryphon II, fraudulently diverted investor funds that were contributed with the specific purpose of funding the working capital of Gryphon III." Memo. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 8.

Yet, Counts VI and VII of the Complaint fail to identify the *specific* property Gryphon II is alleged to have wrongfully possessed and also fails to identify the *specific* purpose for which the property is alleged to have been designated. Accordingly, Counts VI and VII fail to state a claim upon which relief can be granted 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 where "money is marked or designated, such that it becomes specific enough to identify it." Memo. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 9, citing *A.R. By & Through C.R. v. Topper*, 834 S.W.2d at 239.

"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" are specifically identifiable and, therefore, those funds are not subject to an action for 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. of Plaintiff in Opp. to Motion to Dismiss (Doc #42), p. 8.

Gryphon III ignores the fact that money held for "general corporate purposes" cannot be converted. *L&W Engineering Co., Inc.,* 858 S.W.2d at 851 (Money held for "general corporate purposes" is not money held for a specific purpose which may be the subject of conversion). The "funding of working capital" of Gryphon III is no more specific than money held for general corporate purposes and, therefore, Counts VI and VI must be dismissed.

CONCLUSION

For the reasons set forth above, Counts III, VI, and VII of the Complaint fail to state a claim upon which relief can be granted and should be dismissed with prejudice in their entirety as to Gryphon II.

Respectfully submitted,

/s/ S. Francis Baldwin

S. FRANCIS BALDWIN #28005MO
9909 Clayton Rd., Suite 226
St. Louis, Missouri 63124
Tel. No.: (314) 569-5857
Fax No.: (314) 569-9081
e-mail: frankb@fbaldwinlaw.com

Attorney for Defendant
Gryphon Investments II, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 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/ S. Francis Baldwin