

**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.)	

**MOTION OF GRYPHON INVESTMENTS II, LLC
TO DISMISS COUNTS III, VI AND VII**

Defendant Gryphon Investments II, LLC, by and through its attorney, respectfully moves this Court:

1. Pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, for an order dismissing Counts III (fraudulent transfer), VI (conversion), and VII (replevin) of the Complaint filed against it herein by Plaintiff, on the grounds that each of those Counts fails to state a claim upon which relief can be granted.

2. Defendant Gryphon Investments II, LLC files contemporaneously herewith its memorandum of law in support of this motion, which is incorporated herein.

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 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

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JOHN S. WEHRLE, et al.,)	
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**MEMORANDUM IN SUPPORT OF MOTION OF GRYPHON
INVESTMENTS II, LLC TO DISMISS COUNTS III, VI,
AND VII OF PLAINTIFF'S COMPLAINT¹**

On March 13, 2015, Gryphon Investments III, LLC (“Gryphon III”) filed its Complaint herein (“Complaint”) (Doc. #1) against Defendants John S. Wehrle (“Wehrle”), Gryphon Investments II, LLC (“Gryphon II”) and Cirqit.com, Inc. (“Cirqit”) (collectively “Defendants”). The Complaint alleges that investor contributions to Gryphon III were improperly comingled with funds of Gryphon II and transferred to the various Defendants.

In its Complaint, Gryphon III has attempted to set forth eight (8) causes of action arising out of the same general set of facts.

Counts I and II are against Wehrle only. They are, respectively for breach of contract and breach of fiduciary duty.

The other counts are against all the Defendants. They are for fraudulent transfer (Count III); unjust enrichment (Count IV); money had and received (Count V); conversion (Count VI); replevin (Count VII), and for accounting (Count VIII).

¹ This Memorandum is modeled on, and, in pertinent respects, is substantially similar to, the Memorandum of John S. Wehrle in Support of his Motion to Dismiss (Doc. # 22), previously filed with the Court. However, there are some material differences between this Memorandum and Doc. #22.

For the reasons stated below, Counts III, VI, and VII fail to state a claim upon which relief can be granted against Gryphon II and should be dismissed.

ARGUMENT

I. Gryphon III Has Not, and Cannot, Satisfy the Federal Pleading Standards With Respect to Counts III, VI, and VII.

Under Rule 8(a)(2), Fed.R.Civ.P., a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). “[T]he 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 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Id.* (quoting *Twombly*, 550 U.S. at 570).

“A claim has special 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.* A complaint does not “suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

Here, Gryphon III’s counts for fraudulent transfer, conversion, and replevin all fail because Gryphon III cannot establish certain key aspects of those claims for relief.

A. Count III of the Complaint fails to state a claim for fraudulent transfer under Missouri law and does not meet the heightened pleading standards of Federal Rule 9(b).

1. Gryphon III has failed to sufficiently plead a claim for fraudulent transfer under Missouri law.

Claims for fraudulent transfer are governed by Missouri’s Uniform Fraudulent Transfer Act, Section 428.005, RSMo, et seq. (“MUFTA”).

MUFTA imposes varying requirements based upon the class of creditor attempting to bring the claim. Section 428.024, RSMo, covers creditors whose claims were in existence at the time the transfer was made (present creditors), as well as creditors whose claims arose thereafter (future creditors). Section 428.029, RSMo, covers only creditors whose claims were in existence at the time of the transfer in question.

Section 428.024.1(2) relates to transactions where the debtor did not receive reasonably equivalent value in exchange for the transfer and the debtor was insolvent or nearly insolvent. The Complaint does not allege insolvency and, therefore, does not state a claim under subsection (2) of Section 428.024.1.

Nor does the Complaint state a claim under Section 428.029.1, which also requires an allegation of insolvency. Accordingly, the only provision of MUFTA possibly implicated by the Complaint is Section 428.024.1(1) – actual fraud.

Among the essential elements of a claim for fraudulent transfer under Section 428.024.1(1) are: (1) a debtor’s conveyance or assignment of goods or chattels, (2) with the intent to hinder, delay or defraud creditors. *Fischer v. Brancato*, 147 S.W.3d 794, 799 (Mo. Ct. App. 2004). In Count III, Gryphon III alleges a morass of facts in the vain hope that a cognizable claim for fraudulent transfer will emerge. Gryphon III, for example, pleads that *Wehrle* transferred investor contributions “to himself and other entities, including. . . Gryphon II. . . with actual intent to hinder, delay and defraud Gryphon III investors.” Complaint, ¶ 47; *see* also ¶ 51. Plaintiff then contradicts herself in the Complaint by averring that *Gryphon II*, and not *Wehrle*, initially received those same funds and that Gryphon II transferred them to Cirqit and other unnamed and unspecified individuals and entities. Complaint ¶¶ 47-50. It is not pleaded

that Gryphon II (one of the purported transferors) conveyed or assigned the investor funds with the requisite intent.

Similarly, Gryphon III alleges that *Wehrle* “improperly and fraudulently transferred Gryphon III investor contributions to himself and other entities” (Complaint ¶ 47), and that “every transfer by Wehrle was based upon fraudulent documents and financial transactions” (Complaint ¶ 51) and that “Wehrle concealed his fraud from investors” (Complaint ¶ 53).

Gryphon III further confuses matters by alleging that, in addition to being the purported “transferors,” Wehrle and Gryphon II were subsequent “transferees” in that they received the investor contributions. Complaint ¶¶ 47, 52. Additionally, the Complaint seems to allege that the initial transfers from investors to Gryphon II were improper because “Gryphon III did not receive fair value in exchange for the transfers.” Complaint ¶ 49. However, according to the Complaint, Gryphon III was never in possession of any money and, does not seem to be a purported transferor or transferee. From the face of the Complaint, it is impossible to determine which parties were transferors, transferees or both.

In addition, the allegation related to Wehrle’s “actual intent to hinder, delay or defraud” is a bare conclusory allegation with no effort to set forth any facts supporting such intent. Because intent is difficult to prove, MUFTA enumerates eleven non-exclusive factors, or “badges of fraud,” to be considered by a court in determining whether there was fraudulent intent on the part of the debtor.² The Complaint does not specifically allege *any* of these badges of

² These eleven factors are 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;

fraud and, accordingly, must be dismissed. *See Birkenmeier v. Keller Biomedical, LLC*, 312 S.W.3d 380, 389-90 (Mo. Ct. App. 2010) (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). No such allegations are made against Gryphon II.

2. Gryphon III has failed to satisfy the heightened pleading requirement of Federal Rule 9(b).

In the unlikely event that Count III is deemed to contain the elements necessary to plead a claim for fraudulent transfer, it falls short of the requirement of Federal Rule of Civil Procedure 9(b) that *fraud be pleaded with particularity*. Because the crux of Gryphon III's fraudulent transfer claim is actual fraud, that count must meet the heightened pleading standard of Rule 9(b). *C. Coyle Packaging, LLC v. GRM Packaging, Inc.*, No. 4:10 CV 462 HEA, 2012 WL

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- (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.

§ 428.024.2, RSMo.

1684535, at *6 (E.D. Mo. May 15, 2012) (claim alleging transfers made with actual intent to hinder, delay and defraud Plaintiff dismissed for failure to satisfy Rule 9(b)); *DLJ Mortgage Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 331 (E.D.N.Y. 2009) (to adequately plead a state law fraudulent transfer claim involving “actual intent to hinder, delay, or defraud,” plaintiff must plead its claim with the particularity required by Rule 9(b)).

A complaint containing general allegations that does not state with particularity the circumstances constituting fraud does not meet the Rule 9(b) requirement. *U.S. ex rel. Joshi v. St. Luke’s Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (False Claims Act case dismissed for failure to satisfy Rule 9(b)). In *Joshi*, the Court explained:

Under Rule 9(b), “the circumstances constituting fraud ... shall be stated with particularity.” Rule 9(b)’s “particularity requirement demands a higher degree of notice than that required for other claims,” and “is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations.” To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place and context of the defendant’s false representations, as well as the details of the defendant’s fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result. Put another way, the complaint must identify the “who, what, where, when and how of the alleged fraud.”

Joshi, 441 F.3d at 556 (internal citations omitted).

In order to state a claim under Rule 9(b), Gryphon III is therefore required to state the time, place and context of the fraudulent conduct alleged, as well as the identity of the particular person committing the wrongful acts. The Complaint plainly fails to meet the Rule 9(b) requirement.

As set forth above, Gryphon III fails to plead *with particularity* what specific improper acts *Gryphon II* engaged in; who on its behalf engaged in those acts; when those acts occurred; where those acts occurred; how it was involved in the supposed fraud; and what it obtained as the result of the supposed fraud. More generally, from the face of the Complaint, it is impossible

to determine which parties were purportedly creditors, debtors, transferors, or transferees, and, therefore, which parties are responsible for the wrongful conduct alleged.

“Rule 9(b) ‘does not allow a complaint to ... lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant.’” *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (internal citation omitted) (confirming dismissal where plaintiffs lumped several defendants together in their “shotgun pleading” that alleged “everyone did everything”); *see also Jepson v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994) (dismissal upheld for failure to satisfy 9(b) requirement; “[w]hen the complaint accuses multiple defendants of participating in the scheme to defraud, the plaintiffs must take care to identify which of them was responsible for the individual acts of fraud”).

The Complaint does not appropriately identify the “who” – *i.e.* the parties accused of transferring funds with fraudulent intent, the parties who received those monies, and the parties in the role of “debtor” and “creditor” as set forth under MUFTA. Moreover, the property purportedly transferred, or the “what” of the claim for fraudulent transfer, is not adequately identified but is only referred to as “investor funds,” in unnamed amounts, belonging to unidentified “investors” of Gryphon III. Similarly, no specific information is provided regarding where the monies *were transferred, the dates on which the transfers occurred, or how the purported fraud was carried out by Gryphon II.*

In paragraph 50, Gryphon III asserts that “to the extent that Defendants are not initial transferees of Gryphon III contributions, they are subsequent transferees, and upon information and belief, they cannot satisfy their burden that they took Gryphon III assets for value and in good faith or are the entities or individuals for whose benefit such Gryphon III contributions were made.” Complaint ¶ 50.

Rule 9(b) generally does not permit allegations based on “information and belief.” *Woodruff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV88–L–314, 1990 WL 124996, at *4 (D. Neb. Jan. 22, 1990). The rule is sometimes relaxed for matters peculiarly within the adverse party’s knowledge, in which case the allegations must then be accompanied by a statement of the facts upon which the belief is founded. *Id.* Here, there is no assertion that any such matters are peculiarly within the adverse party’s knowledge, and the underlying allegations, in any event, fail to satisfy Rule 9(b).

Overall, as demonstrated above, the Complaint fails to satisfy Rule 9(b) in alleging claims based on fraudulent intent against Gryphon II. Because the Complaint fails to sufficiently allege a claim for fraudulent transfer with sufficient particularity under Rule 9(b), Count III should be dismissed.

B. Gryphon III’s conversion claim in Count VI fails to state a claim upon which relief can be granted because the “investor funds” described in the Complaint cannot be converted.

The property allegedly converted, as described in the Complaint, is certain “investor funds” belonging to Gryphon III.

The Supreme Court of Missouri has defined conversion as “the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner’s rights.” *Emerick v. Mut. Ben. Life Ins. Co.*, 756 S.W.2d 513, 523 (Mo. 1988). Generally, “personal property” for purposes of conversion does not include money. *L & W Engineering Co., Inc., v. Hogan*, 858 S.W.2d 847, 850 (Mo. Ct. App. 1993). An exception exists for money that has been given for a specific purpose and where the defendant diverts that money for a different and unauthorized purpose. *Id.*

Missouri courts have allowed claims for the conversion of money given to an attorney for expenses related to the plaintiff's suit, *Dillard v. Payne*, 615 S.W.2d 53 (Mo. 1981), and money paid by a homeowner into escrow for taxes and insurance, *Boyd v. Wimes*, 664 S.W.2d 696 (Mo. Ct. App. 1981). However, money that is held for "general corporate purposes" is not provided for a specific purpose and cannot be converted. See *L & W Engineering Co., Inc.*, 858 S.W.2d at 851.

In the present case, Plaintiff describes the money referenced in its Complaint as contributions for the "working capital and other expenditures" of Gryphon III. Complaint ¶ 24. Gryphon III sets forth no specific purpose for which it earmarked that money. Accordingly, under Missouri law, the money described in the Complaint cannot be converted, and Count VI must be dismissed for failure to state a claim upon which relief can be granted.

C. Count VII for replevin does not state a claim upon which relief can be granted because the money at issue is not specifically identifiable.

Similarly, "[m]oney is not the subject of an action of replevin." *A.R. By & Through C.R. v. Topper*, 834 S.W.2d 238, 239 (Mo. Ct. App. 1992). Under the narrow exception to this rule, a claim for replevin is allowed only where the money is "marked, or designated in some manner, so as to become specific as regards the power of identification, such as being in a bag, or package." *Id.*

Gryphon III's allegations that certain unidentified "investor funds" were wrongfully possessed by Gryphon II do not state a claim for replevin. Replevin claims under Missouri law are limited to instances involving the wrongful retention of *specific* property. Section 533.010, RSMo.

Here, there are no allegations against Gryphon II that it is currently in possession of *any specifically identifiable* property belonging to Gryphon III. Rather, Gryphon III merely alleges

that the money at issue was comingled with other monies in a general account. Complaint ¶ 31. Therefore, the money was not adequately marked or designated so as to become the subject of an action for replevin. For this reason, Count VII should 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 against Gryphon II and should be dismissed with prejudice in their entirety as to it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ S. Francis Baldwin
