

SIGNED.



Dated: June 09, 2005

Randolph J. Haines

RANDOLPH J. HAINES
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re) Chapter 7
SOUTHWEST SUPERMARKETS, LLC,) CASE NO. 2-01-14805-RJH
) through 2-01-14812
Debtor.) (Jointly Administered)

DANIEL P. COLLINS, Trustee for the)
Bankruptcy Estate of SOUTHWEST) ADVERSARY NO. 03-00945
SUPERMARKETS, L.L.C.; SOUTHWEST)
HOLDINGS, L.L.C.,)

Plaintiffs,

v.

KOHLBERG AND COMPANY, et al.,

Defendants.

MEMORANDUM DECISION RE
INDIVIDUAL DEFENDANTS'
MOTIONS TO DISMISS

In this Court's Opinion denying the Kohlberg Defendants' motion to dismiss, the Court did not make clear whether that ruling also applied to individual defendants who joined in that motion. To the extent that an individual defendant did nothing more than join in the Kohlberg motion, that Opinion applies to the individual defendant.¹ Due to the uncertainty created by the Court's lack of specificity, however, such individual defendants' answers shall be due within 10 days after notice of this decision, pursuant to Bankruptcy Rule 7012(a), or within such time as stipulated by the Plaintiff.

Motion to Dismiss Pursuant to Rule 9(b)

¹This includes defendants James D. Pack and Michael S. Geele. Defendant Kromer has answered and moved for summary judgment, which is set for hearing on August 11, 2005.

1 Certain individual defendants² have in addition moved to dismiss pursuant to
2 F.R.Civ.P. Rule 9(b), for failure to plead fraud with particularity.

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4 First, it is doubtful that Rule 9(b) applies to fraudulent transfer claims. Many
5 aspects of *scienter* are necessary elements of classic fraud, and yet there is no *scienter* element
6 to a constructive fraudulent transfer. The Arizona law cited by these Defendants are
7 constructive fraudulent transfer cases, and they merely hold that the elements of constructive
8 fraudulent transfer must be pled, without applying Rule 9(b)'s particularity standard.³

9 An actual fraudulent transfer claim hinges entirely on the transferor's intent.
10 This intent may not be fraudulent, however, as it may instead be an intent to hinder or delay
11 creditors. It may not contain any of the elements of classic fraud, because frequently there is no
12 representation, whether true or false, and no knowledge, belief or reliance by the injured
13 creditor, whether reasonable or not. Consequently, the caselaw purporting to apply Rule 9(b) to
14 actual fraudulent transfer claims merely requires only that "the requisite mental state [be pled]
15 with particularity."⁴ But, as noted, for an actual fraudulent transfer that "requisite mental state"
16 is merely that the transfer was made with actual intent to hinder, delay or defraud creditors.
17 And Rule 9(b) itself provides that "Malice, intent, knowledge, and other condition of mind of a
18 person may be averred generally."

19 Finally, "the reasons for the particularity rule are not present when the fraud
20 alleged is that of someone who is not a party to the action, and it has been held that in such a
21 case the circumstances of the fraud or mistake need not be pleaded by the plaintiff with any
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24 ²Beaith, Gaubert, Gentles, Sielaff, Vannatta, Vigil, Gioia and Williams.

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26 ³*Ferguson v. Roberts*, 64 Ariz. 357, 360, 170 P.2d 855, 857 (1946); *Union Bank v. Pfeffer*, 18
27 Ariz. App. 368, 389-90, 502 P.2d 535, 538-39 (1972). *Accord, Smith v. Arthur Anderson*, 175
28 F.Supp.2d 1180, 1201 (D.Ariz. 2001).

⁴*National Council on Compensation Insurance Inc. v. Caro & Graifman*, 259 F.Supp.2d 172,
179, citing *Atlanta Shipping Corp. v. Chemical Bank*, 818 F.2d 240, 251 (2d Cir. 1987).

1 special degree of particularity.”⁵ Here the fundamental transfers were committed by the
2 Debtors, who are not parties.

3 Here, even if Rule 9(b) applies, the factual circumstances constituting the badges
4 of fraud from which the requisite mental state may be inferred are pled with sufficient
5 particularity.

6 The motion to dismiss does not really argue that the circumstances constituting
7 the fraud lack sufficient particularity, but rather the essence of the individual Defendants’
8 argument is that the complaint fails to allege what particular role each individual Defendant is
9 alleged to have played in those circumstances. Rather than a Rule 9(b) motion, however, such
10 an argument is more properly asserted as a Rule 12(e) motion for more definite statement. The
11 standard there, however, is that the pleading is “so vague or ambiguous that a party cannot
12 reasonably be required to frame a responsive pleading.” Even without specifying the alleged
13 role of each individual Defendant, however, the Trustee’s Second Amended Complaint cannot
14 be said to suffer from that defect. The acts constituting the alleged actual fraudulent transfers
15 are identified with sufficient particularity that the individual Defendants can identify for
16 themselves what role they may have played in those acts. Because they presumably know what
17 they did while working for the corporate defendants, they can reasonably be expected to respond
18 that they had no role nor responsibility with respect to those particular transfers, if that is their
19 defense.

20 The details of each individual’s conduct can be fleshed out through discovery or
21 motions for summary judgment. Consequently the individual defendants’ motion to dismiss
22 pursuant to Rule 9(b) is denied.

23 **Motion to Dismiss for Failure to State Claim for Breach of Fiduciary Duty**

24 The individual defendants argue that the complaint fails to state a claim for
25 breach of fiduciary duty because Southwest Supermarkets is an LLC without officers or
26 directors. They suggest that titles such as “President” were illusory and implied no fiduciary

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28 ⁵5A Wright & Miller, Federal Practice and Procedure Civil 3d § 1297, at 181-82 (2004).
Accord, Smith v. Arthur Anderson, supra.

1 duties.

2 The complaint, however, adequately asserts claims for breach of fiduciary duties.
3 It alleges that the individual defendants were “mangers, officers and/or directors” of Southwest
4 Holdings and Southwest Supermarkets (Second Amended Complaint ¶¶ 15 & 18), that these
5 directors, officers and managers owed a fiduciary duty to Southwest Supermarkets and to its
6 creditors (Complaint ¶ 77), and that they breached these fiduciary duties by failing to obtain
7 repayment of the tax overpayment (Complaint ¶ 78), by allowing or causing the Pack buyout
8 (Complaint ¶ 127), by wrongfully prolonging Southwest’s existence for their own benefit and at
9 the expense of its creditors (Complaint ¶¶ 134 & 138), and by misusing the company and its
10 funds to the preference of themselves through management fees, salaries, benefits and the like
11 (Complaint ¶ 146). The individual defendants may well defend that they owed no such
12 fiduciary duties due to their positions and roles within the LLCs. That is a matter to be asserted
13 defensively, however, not a failure to state a claim for breach of fiduciary duty.

14 The individual defendants’ motion to dismiss for failure to state a claim for
15 breach of fiduciary duty is therefore denied.

16 These individual defendants shall answer within 10 days of notice of the ruling,
17 or within such additional time as Plaintiff may stipulate.

18 DATED AND SIGNED ABOVE

19 Copy of the foregoing mailed
20 this 9th day of June, 2005, to:

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~~/s/ Pat Denk~~
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