

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

In re	)	
	)	
HOPE P. BLUMEYER,	)	Adv. No. 99-4202-293
	)	
Debtor,	)	
	)	
A.W. McPHERSON, Liquidator	)	Case No. 98-48804-293
BEL-AIRE INSURANCE CO.,	)	
	)	
Plaintiffs,	)	<b>CHAPTER 7 PROCEEDING</b>
	)	
vs.	)	Debtor's Motion to Dismiss
	)	(Motion No. 4)
HOPE P. BLUMEYER,	)	
	)	
Defendant.	)	

**MEMORANDUM OPINION**

This case is before the Court on Debtor's motion to dismiss (Motion No. 4). Debtor argues that the Court should dismiss the adversary complaint because the Plaintiffs failed to plead the alleged fraudulent activity with sufficient particularity as required by Fed. R. Civ. P. 9(b), made applicable to this adversary proceeding by Bankr. R. 7009. The Court disagrees and will deny Debtor's motion.

## **JURISDICTION AND VENUE**

This Court has jurisdiction over the parties and subject matter of this proceeding under 28 U.S.C. §§1334, 151, and 157 and Local Rule 9.01 (B) of the United States District Court for the Eastern District of Missouri. This is a core proceeding under 28 U.S.C. §157(b)(2)(I), which the Court may hear and determine. Venue is proper in this District under 28 U.S.C. §1409(a).

## **FINDINGS OF FACT**

The Court will accept all of the allegations in Plaintiffs' complaint as true on Debtor's motion to dismiss. McSherry v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.), 81 F.3d 739, 740 (8th Cir. 1996). Accepting all of Plaintiffs' allegations as true, the Court makes the following findings of fact.

Debtor and her husband owned all the outstanding stock of several insurance companies (the "Insurance Companies"). Bel-Aire was the entity that actually issued insurance policies. The other related companies either provided operational or managerial support to Bel-Aire. (the "Related Companies").

The Circuit Court of Cole County (the "State Court") appointed a temporary receiver to oversee the Insurance Companies' operations on October 3, 1990. The State Court continued the receivership and ordered the liquidation of the Companies' assets in an order dated July 15, 1993. The State Court appointed

plaintiff A.W. McPherson as the receiver for the Insurance Companies.

Prior to the State Court's appointment of McPherson as receiver, Debtor and her husband participated in a scheme whereby they misappropriated the premiums paid by Bel-Aire's policyholders. Paragraph 8 of the complaint alleges the Debtor and her husband caused the Bel-Aire policyholders' premiums to be paid directly to the Related Companies and then used the premiums for their personal use.

Paragraph 10 of the complaint further elaborates on how Debtor participated in the scheme. Paragraph 10 of the complaint avers that Debtor opened an account at the Bank of Florida on October 18, 1992. (the "Florida Account"). Debtor made four deposits into the Florida Account totaling \$58,453.00 shortly after opening the account. Paragraph 10 recites that premiums funneled through two of the Related Entities was the source of the \$58,453.00. Paragraph 10 additionally alleges that Debtor wrote checks out of the Florida Account totaling over \$30,000.00 for the benefit of herself and her family members.

Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code and the Court converted the proceeding to a case under Chapter 7. McPherson, as the State Court appointed receiver of Bel-Aire, and Bel-Aire itself filed this instant adversary complaint alleging Debtor's obligation to Bel-Aire arising out of the alleged fraudulent scheme is excepted from discharge under 11 U.S.C. §§523(a)(2)

or 523(a)(6).

Debtor filed the instant motion to dismiss arguing that Plaintiffs failed to plead the circumstances constituting Debtor's fraud with respect to Bel-Aire with sufficient particularity as required by Fed. R. Civ. P. 9(b). The Court, after reviewing the Plaintiffs' complaint, finds that the complaint sets forth the alleged facts that constitute Debtor's fraudulent behavior. The Court, therefore, will deny Debtor's motion.

### **CONCLUSIONS OF LAW**

Any complaint asserting that a particular debt is excepted from discharge under the fraud exception of §523(a)(2) is subject to the heightened pleading requirement of Rule 9(b). Durns v. Dawson (In re Dawson), 264 B.R. 13, 16 (Bankr. N.D. Iowa 2001). Rule 9(b) requires the pleader to state "the circumstances constituting fraud....with particularity". The circumstances constituting fraud include the time, place, and content of the alleged fraud as well as the identity of the persons involved in perpetrating the fraud and an averment of what was either given up or obtained because of the fraud. Comm. Properties Investment, Inc. v. Quality Inns Int'l., Inc., 61 F.3d 639, 644 (8th Cir. 1995).

Debtor advances three arguments as to why the instant complaint fails to satisfy the heightened pleading requirement of Rule 9(b). First, Debtor contends

that Paragraph 8 of Plaintiffs' complaint only states generally that Debtor and her husband engaged in a scheme whereby they misappropriated the Bel-Aire premiums for their own personal use. Debtor argues, therefore, that Paragraph 8 fails to specifically state the circumstances of this fraudulent scheme.

While it maybe true that Paragraph 8 of the complaint fails to aver specific factual allegations, Paragraph 10 of the complaint clearly contains sufficient detail to meet the heightened pleading requirement of Rule 9(b). Paragraph 10 avers that Debtor participated in the scheme by: (1) opening the Florida Account; (2) making four deposits into the Florida Account totaling \$58,453.00 ; (3) funneling the \$58,453.00 from two of the Related Entities; and (4) using the funds she deposited into the Florida Account for her and her family's personal use.

Paragraph 10 of the Complaint, therefore states the time, place and the content of the alleged fraud as well as the identity of the person committing the fraud and what Debtor obtained by participating in the fraudulent scheme. Accordingly, Paragraph 10 of the complaint sufficiently states the circumstances surrounding the alleged fraud with particularity as required by Rule 9(b).

Debtor's second argument is that the averments in Paragraph 10 are insufficient under Rule 9(b) because the Plaintiffs based the allegation that Debtor's actions were fraudulent to Bel-Aire on information and belief. An

allegation based on information and belief is sufficient under Rule 9(b) if the pleader states the alleged facts upon which it bases that information and belief.

United States ex. rel. Karvelos v. Melrose-Wakefiled Hosp., 360 F.3d 220, 226 (1st Cir.) cert. denied 543 U.S. 820 (2004).

Here, as described above, the Plaintiffs specifically allege that Debtor funneled the \$58,453.00 that she deposited into the Florida Account from two of the Related Companies. The complaint also avers that the \$58,453.00 were premiums paid by Bel-Aire's policy holders and rightfully belonged to Bel-Aire, not the Related Companies. Thus, the complaint clearly states the alleged facts upon which the Plaintiffs based their belief that Debtor's actions were fraudulent with respect to Bel-Aire. The complaint, therefore, is not deficient simply because the Plaintiffs based their allegation that Debtor committed a fraud on Bel-Aire on information and belief.

Debtor finally argues that the Plaintiffs' complaint fails to plead the circumstances constituting the fraud sufficiently because the complaint only states that she wrote checks "exceeding \$30,000.00" from the Florida Account. Debtor maintains that because the complaint fails to contain a specific dollar amount, it fails to sufficiently allege the circumstances constituting the fraud.

A creditor asserting that a particular debt is excepted from discharge under

§523(a)(2) need only identify the specific transactions at issue to meet the particularity requirement of Rule 9(b). Huntington Nat'l Bank v. Schwartzman (In re Schwartzman), 63 B.R. 348, 357 (Bankr. N.D. Ohio 1986). Here, the Plaintiffs identified Debtor's four deposits into the Florida Account and the corresponding checks she wrote from that account as the transactions that constituted the fraud. The Plaintiffs, therefore, have satisfied the particularity requirement of Rule 9(b) by identifying the transactions at issue that give rise to their fraud claim.

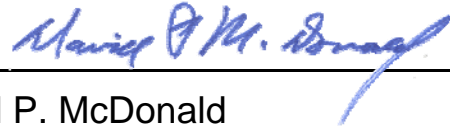
### **CONCLUSION**

The Plaintiffs' complaint specifically alleges the time, place, and contents of Debtor's alleged fraud as well as identifies who participated in the alleged fraudulent scheme and what Debtor gained. Further, although the Plaintiffs base their contention that Debtor perpetrated a fraud upon Bel-Aire on information and belief, they state the specific factual allegations that support that belief. The Plaintiffs also identify the specific transactions at issue which give rise to their fraud claim. The Plaintiffs' complaint, therefore, sufficiently alleges the circumstances constituting the fraud with particularity as required by Rule 9(b). The Court will therefore deny Debtor's motion to dismiss.

An Order consistent with this Memorandum Opinion will be entered this date.

DATED: October 10, 2006

St. Louis, Missouri



---

David P. McDonald  
United States Bankruptcy Judge

Copy mailed to:

A. Thomas DeWoskin  
Danna McKitrick, PC  
150 N. Meramec, 4th Fl.  
St. Louis, MO 63105

David M. Dare  
Herren, Dare & Streett  
1051 N. Harrison Ave.  
St. Louis, MO 63122

Hope P. Blumeyer  
15445 Mill Run Court  
Chesterfield, MO 63017

Peter Lumaghi  
Office of U.S. Trustee  
111 S. 10th St., Ste. 6353  
St. Louis, MO 63102

David A. Sosne  
Summers, Compton, Wells & Hamburg, P.C.  
8909 Ladue Rd.  
St. Louis, MO 63124