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ORDERED in the Southern District of Florida on July 23, 2010.

Laurel M. Isicoff, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE: CASE NO. 07-19573-BKC-LMI

CIMAX, USA, LLC, Chapter 7

Debtor.
_________________________________/

MARCIA DUNN, Chapter 7 Trustee for Bankruptcy estate of CIMAX USA, LLC, Adv. Case No. 09-02467

Plaintiff,

v.

GIL DEZER,

Defendant.
_________________________________/

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

This matter came before the Court on March 9, 2010 on the Motion to Dismiss filed by the Defendant Gil Dezer (DE #26). The Court has considered the Motion to Dismiss, the Response filed by the Plaintiff (DE #32), as well as the arguments of counsel. Having considered the foregoing, the Complaint, the Amended Complaint, and the applicable law, for the reasons set forth below, the Motion to Dismiss is Denied in part and Granted in part.

JURISDICTION

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. §157. The jurisdiction of the bankruptcy courts is set forth in 28 U.S.C. §1334, which provides, in pertinent part, that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(b). 28 U.S.C. §157(b) provides that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title." 28 U.S.C. §157(b). This matter is a core proceeding under 28 U.S.C. §157(b)(2)(H).

BACKGROUND[1]

In March 2003, the Debtor, Cimax USA, LLC, entered into a contract with the Trump Palace Condominium (the "Palace") to install infrastructure for a "smart" system that would enable Palace residents to interface with building services through touch panels installed in each unit. The Debtor, an audio visual dealer, specialized in the design and installation of high end audio visual equipment and electronic devices. Residences at Ocean Grande, Inc. (the "Developer") was the developer of the Palace and its principal was the Defendant, Gil Dezer. Mr. Dezer owned a triplex unit at the Palace. In addition to the agreement with the Palace, the Debtor also entered into a contract with Mr. Dezer to install audio visual equipment and a security system in Mr. Dezer's apartment.

[1] These facts are set forth in the Complaint, the Amended Complaint, and in the Court docket. In reviewing a complaint, the court must accept all well-pleaded factual allegations as true. *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). However, nothing herein is intended to constitute any findings of fact by the Court.

During this timeframe, the Trustee alleges that the Developer entered into an exclusive agreement (the "Upgrade Agreement") with the Debtor, which allowed the Debtor to upgrade unit owners' smart systems and customize their audio visual and security equipment. In consideration for having the exclusive rights to sell these upgrades, the Palace would receive 30% of the net profits from these sales in each unit.[2] For the next several years until approximately October 2006, the Debtor worked on installing the infrastructure at the Palace. In addition, the Debtor sold and installed a number of upgrades to individual unit owners. In or around the October 2006 timeframe, the cost of equipment, materials, and labor began to increase unexpectedly. As a result of these increasing expenses, the Debtor was no longer able to make a profit on its upgrade sales and consequently, was placed in a position where it could no longer complete its existing projects, including the installation of the audio visual equipment in Mr. Dezer's apartment.

The Trustee contends that Mr. Dezer was aware of the Debtor's poor financial condition, yet nonetheless, told the Debtor that he would remove the Debtor from all projects operated by Mr. Dezer unless the Debtor completed the equipment installation in Mr. Dezer's apartment free of charge. Allegedly, as a result of these threats, the Debtor delivered various pieces of audio visual and security equipment to Mr. Dezer from October 2006 to July 2007.[3] Based on the Debtor's records, the total retail value of this equipment approached $400,000. At some point in February 2007, the Developer requested from the Debtor an accounting of the upgrade sales at the Palace. The Debtor complied with this request and demonstrated that no profits had been made on the upgrade sales. The accounting also revealed that many of the upgrade sales had not been completed.

[2] Mr. Dezer individually was not a party to the Upgrade Agreement.
[3] The Trustee has attached an exhibit to the Amended Complaint which purportedly lists the value of the individual items delivered to Mr. Dezer during this time period.

In September 2007, Mr. Dezer contacted the Debtor's principal, Pedro Moreiro, and allegedly told Mr. Moreiro that unless the Debtor finished the installation of the equipment in Mr. Dezer's apartment and released him from any payment obligation, Mr. Dezer would have the Debtor removed from the Palace project and other related projects. Mr. Dezer also allegedly threatened to ruin the Debtor's reputation among other area developers. In October 2007, Mr. Moreiro emailed Mr. Dezer to confirm Mr. Moreiro's understanding that Mr. Dezer would be obligated for the cost of the equipment installed in his apartment in the amount of $412,000 and that labor and programming would be at the Debtor's expense. However, Mr. Dezer would receive an advance on the equipment of up to $350,000 with the understanding that this amount would be credited against future commissions owed to the Debtor and that if those commissions were not sufficient to cover the $350,000, then Mr. Dezer would have to make up the difference himself.

The Debtor filed its Chapter 11 Petition on November 2, 2007. Marcia Dunn, the Chapter 7 Trustee (the "Trustee"), commenced this adversary action on November 30, 2009. The original four-count Complaint (DE #1) pled causes of action for the avoidance and recovery of fraudulent transfers and unjust enrichment.[4] Mr. Dezer filed a Motion to Dismiss (DE #14) on December 30, 2009. After the parties had entered into an agreed order denying the Motion to Dismiss, the Trustee filed an Amended Complaint (DE #24) on February 3, 2010 that included a new count for Avoidance and Recovery of Preferential Transfers under 11 U.S.C. §§547 and 550 as well as most of the alleged facts outlined in this background section. Mr. Dezer filed a

[4] Count I – Avoidance and Recovery of Fraudulent Transfers under 11 U.S.C. §§548 and 550.
Count II – Avoidance and Recovery of Fraudulent Transfers under 11 U.S.C. §544 and Fla. Stat. §§726.105(b) and 726.106(1).
Count III – Avoidance and Recovery of Fraudulent Transfers under 11 U.S.C. §544 and Fla. Stat. §§726.105(a).
Count IV – Unjust Enrichment.

Motion to Dismiss the Amended Complaint (DE #26) on February 12, 2010. The Trustee filed her Response (DE #32) on March 4, 2010 and the Court heard oral arguments on the Motion to Dismiss on March 9, 2010 after which the Court took the matter under advisement.

PARTIES' ARGUMENTS

The Defendant seeks dismissal of Counts I, II, III, and V of the Amended Complaint. With respect to Counts I and II, the Defendant contends that the Trustee has failed to plead a claim for constructive fraud because the Trustee has failed to identify the dates on which the alleged fraudulent transfers occurred. With respect to Count III, the Defendant contends that the Trustee has failed to plead a claim for actual fraud as required under Fla. Stat. §726.105(a).[5] The Defendant argues that the Trustee has essentially restated the legal elements for a constructive fraud claim while adding one allegation that Mr. Dezer concealed the alleged transfers from the Debtor's creditors. The Defendant contends that the Trustee has failed to explain how the alleged transfers were concealed from the creditors or note the identity of these particular creditors. Moreover, the Defendant asserts, the Trustee has failed to meet the pleading standard set forth in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), which requires plaintiffs to state a claim to relief that is plausible on its face. The Defendant further contends that the Trustee has failed to adequately explain how the Debtor was managed by Mr. Dezer or that any of the contracts entered into between the Debtor and Mr. Dezer were not in fact arm's length agreements. In

[5] The statute provides, in pertinent part:

> 1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor . . .

Fla. Stat. §726.105(1)(a).

sum, the Defendant argues that the factual allegations in the Amended Complaint fail to establish the requisite intent to defraud to support a claim under Fla. Stat. §726.105(a).[6]

Finally, with respect to Count V, the Defendant argues that the preference claim is both legally flawed and time-barred under Fed. R. Bankr. P. 7015(c)(1)(B). The Defendant contends the claim is legally flawed because it is essentially a set-off claim which should be brought under 11 U.S.C §553 and not 11 U.S.C. §547 governing preference actions. Count V is time-barred, the Defendant argues, because there was no claim for preference pled in the original complaint, and therefore, Count V does not relate back to any conduct alleged in the original complaint. The Defendant correctly points out that the basis for the preference claim, the Upgrade Agreement allegedly entered into between the Debtor and the Defendant, is not referenced anywhere in the original complaint. The Defendant contends that the Debtor had full knowledge of the facts well before filing the original complaint and could have filed its preference claim in the original complaint had it chosen to do so and cannot now interject a new theory of legal liability based on transactions or conduct not previously alleged.

In response to the Defendant's arguments, the Trustee asserts that a constructive fraud claim does not require proof of intent to defraud and that the requirements of pleading fraud with particularity are relaxed. Moreover, the Trustee contends that it is not necessary for her to specify the particular dates on which the transfers took place, but that setting forth a range of dates is sufficient to survive a motion to dismiss. With respect to the cause of action for actual fraud, the Trustee argues that since direct evidence of actual fraud does not always exist, it is sufficient for her to prove actual fraud by alleging certain "badges of fraud," which the Court should evaluate under the "totality of the circumstances." The Trustee contends that specific facts have been alleged which establish these "badges of fraud," including the fact that the

[6] It appears that the Trustee's reference to 726.105(a) was intended to be a reference to 726.105(1)(a).

Defendant received nearly $400,000 in audio visual equipment in exchange for no consideration, that the Defendant knew the Debtor was insolvent or nearly insolvent at the time he demanded the equipment installed, and that the Defendant knew that the Debtor was not paying its debts at that time.

Finally, with respect to the preference claim under 11 U.S.C. §547, the Trustee argues that this cause of action was preserved because the first paragraph of the original complaint specified that this action was one to "avoid fraudulent and preferential transfers," even though the original complaint does not include a count for recovery of a preference. The Trustee contends that the facts underlying the preference claim are the same operative facts alleged in the original complaint and for that reason, Count V relates back under Fed. R. Civ. P. 15(c) to the original complaint. In this case, the Trustee argues, the preference claim merely adds "clarifying" facts regarding the specific date on which the Debtor agreed to forgive payment for the $400,000 of equipment transferred to the Defendant.

THE STANDARD FOR REVIEW

Federal Rule of Civil Procedure 12(b)(6), as made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012(b), provides a mechanism by which a party may seek to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). In order to survive a motion to dismiss, a plaintiff must allege more than "labels and conclusions," or simply recite the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must contain sufficient factual matter to state a claim to relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949. A claim is considered factually plausible 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.* This plausibility standard is not synonymous with a "probability requirement," but it "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

Failure to state a claim for relief is a purely legal question. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1270 n.19 (11th Cir. 2009). While the court must accept well-pled facts as true, the court is "not required to accept a plaintiff's legal conclusions." *Id.* at 1260. The courts have the authority to "fully resolve any purely legal question" on a motion to dismiss and consequently, there is no "inherent barrier to reaching the merits [of a claim] at the 12(b)(6) stage." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993).

1. Constructive Fraud Claims

In Count I, the Trustee brings an avoidance claim under 11 U.S.C. §§548 and 550. Count II is an avoidance claim under 11 U.S.C §544 and Fla. Stat. §§726.105(b) and 726.106(1).[7] In order to prevail on a claim under section 548, the Trustee must demonstrate that a transfer of an "interest of the debtor in property" was made or incurred on or within two years before the filing of the bankruptcy petition and that the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation." 11 U.S.C. §548(a)(1)(B). Moreover, the debtor must be "insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation." *Id.* 11 U.S.C. §550 provides, in pertinent part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate good faith transferee of such initial transferee.

[7] It appears that the Trustee intended to bring her claim under 726.105(1)(b) and not 726.105(b).

11 U.S.C. §550(a). The state law claims under Fla.Stat. §§ 725.105 and 726.106 are also fraudulent transfer claims with language that largely mirrors the language in 11 U.S.C. §548.[8] The Defendant claims that Counts I and II are insufficient as a matter of law under the pleading standards for constructive fraud because the Trustee has not specified the actual dates on which the allegedly fraudulent transfers took place. The Trustee argues that providing a time frame during which the transfers took place meets the constructive fraud pleading standards.

Rule 8(a) of the Federal Rules of Civil Procedure is applicable to a motion to dismiss for a constructive fraud cause of action under 11 U.S.C. §548(a)(1)(B). *See In re Enron Corp.*, 2006 WL 2400369, at *5 (Bankr. S.D.N.Y. May 11, 2006). Under Rule 8(a)(2), the plaintiff's claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Bankruptcy courts have noted that in alleging constructive fraud, "the pleading requirements are relaxed." *Giuliano v. U.S. Nursing Corp.* (*In re Lexington Healthcare Group*), 339 B.R. 570, 574 (Bankr. D. Del. 2006); *see also Grella v. Zimmerman* (*In re Art & Company*), 179 B.R. 757, 763 (Bankr. D. Mass. 1995) (noting that constructive fraud claims brought under 11 U.S.C. §548 are held to a more relaxed pleading standard than claim for fraud generally). In fact, bankruptcy courts in this district have suggested that the Rule 9(b) requirement to plead fraud with particularity may be completely inapplicable to constructive fraud claims brought under section 548. *Kapila v. Arnel* (*In re Arizen Homes, Inc.*), 2009 WL 393863, at *3 (Bankr. S.D. Fla. Jan. 22, 2009). Nonetheless, the plaintiff is required to put the defendant on notice "as to the basics of the plaintiff's complaint." *Lexington Healthcare*, 339 B.R. at 575. In the context of a fraudulent transfer claim, some of the

[8] For example, Fla. Stat. §726.105, which addresses fraudulent transfers as to present and future creditors, provides that a "transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation" with "actual intent to hinder, delay or defraud any creditor of the debtor," or "[w]ithout receiving a reasonably equivalent value in exchange for the transfer or obligation." Fla. Stat. §726.105(1).

facts which would put a defendant on notice as to the basis of the plaintiff's complaint include "identifying the transfer by date, amount, name of the transferor, and name of the transferee." *Id.* With respect to specifying the time when the allegedly fraudulent transfer occurred, the Trustee has met her pleading burden under Rule 8(a)(2), as she has specified the time frame within which the transfers were made. *See Jalbert v. Zurich American Ins. Co.* (*In re Payton Construction Corp.*), 399 B.R. 352, 365 (Bankr. D. Mass. 2009) (concluding that the Trustee met his constructive fraud pleading burden by identifying transfers that took place "on or within two years" before the filing of the bankruptcy petition).

Florida Statute Section 726.106 is essentially the same as section 548(a)(1)(B) of the Bankruptcy Code except that the state law may be used only to benefit a creditor whose claim arose before the transfer was made. *In re Toy King Distributors, Inc.*, 256 B.R. 1, 141 (Bankr. M.D. Fla. 2000).

In examining the Amended Complaint, the Court finds that the Trustee has met the pleading threshold governing constructive fraud claims under both federal and state law. The Trustee is not required to specify the exact dates on which the allegedly fraudulent transfers took place for purposes of a Motion to Dismiss. The Amended Complaint specifies that the Debtor made a "series of deliveries" of audio visual equipment to Mr. Dezer from October 2006 through July 2007. (Am. Compl. ¶14). The attached exhibit to the Amended Complaint provides a precise breakdown of the equipment delivered to Mr. Dezer during this time frame. (Am. Compl. Exh. A). These factual allegations are more than sufficient to provide Mr. Dezer with notice of the basic facts underlying the Trustee's constructive fraud claims. The facts alleged in the Amended Complaint also satisfy the other elements of a constructive fraud claim under Section 548 of the Bankruptcy Code. The Trustee sets forth the facts by which Mr. Dezer was aware of the fact that the Debtor was insolvent at the time of the transfer and that Mr. Dezer never paid for the equipment. For these reasons, the Defendant's Motion to Dismiss with respect to Counts I and II is denied.

2. Actual Fraud Claim

Count III is a claim for avoidance and recovery of fraudulent transfers pursuant to 11 U.S.C. §544[9] and Fla. Stat. §726.105(a). Under section 726.105 of the Florida Statutes,

> (1) [a] transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
> (a) [w]ith actual intent to hinder, delay, or defraud any creditor of the debtor.

Fla. Stat. §105(1)(a). In order to establish a fraudulent conveyance under Florida law, the creditor (or trustee) must demonstrate that there was (1) a creditor to be defrauded; (2) a debtor intending fraud; and (3) conveyance of property that could have been applicable to payment of the debt due. *Shear v. Seminara* (*In re PSI Indus.*), 306 B.R. 377, 387 (Bankr. S.D. Fla. 2003). It is the second requirement, the showing of fraudulent intent, which is at issue here.

Rule 9(b) of the Federal Rules of Civil Procedure is made applicable to adversary proceedings through Bankruptcy Rule 7009(b). *Olson v. Potter* (*In re Potter*), 88 B.R. 843, 847 (Bankr. N.D. Ill. 1988). A complaint that simply restates the technical elements of fraud will not satisfy the requirements of Rule 9(b). *Id.* However, courts will generally relax the specificity requirements for pleading actual fraud where the plaintiff is a trustee in bankruptcy. *Profilet v. Cambridge Financial Corp.*, 231 B.R. 373, 379 (S.D. Fla. 1999). Moreover, courts have recognized that it is often difficult to provide direct evidence of an "actual intent to hinder, delay, or defraud" creditors. *Dionne v. Keating* (I*n re XYZ Options, Inc.*), 154 F.3d 1262, 1271 (11th

[9] 11 U.S.C. §544 permits the Trustee to avoid certain fraudulent transfers under applicable state law. *In re American Way Service Corp.*, 229 B.R. 496, 529 (Bankr. S.D. Fla. 1999).

Cir. 1998). As a result, courts may infer fraudulent conduct based on circumstantial evidence. *Id.* In examining the circumstantial evidence, courts will look to see if certain "badges of fraud" exist which support a finding of actual fraud. *Id.* These badges of fraud include:

(1) The transfer was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer was disclosed or concealed;

(4) Before the transfer was made 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;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made;

(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.

Id.

Just as courts will consider the presence of these badges of fraud when evaluating the validity of a fraudulent transfer claim brought under the Bankruptcy Code, courts will also check for the existence of badges of fraud when evaluating claims brought under Florida's version of the Uniform Fraudulent Transfer Act. *PSI Indus.*, 306 B.R. at 387 (noting that courts may rely on badges of fraud to infer fraudulent intent). In examining badges of fraud, courts observe that while a "single badge of fraud may create a suspicion but not the requisite fraud to set aside a conveyance, several considered together may afford a basis to infer fraud." *In re Young*, 235 B.R. 666, 669 (Bankr. M.D. Fla. 1999).

The Trustee contends that there are several factors present in this case which demonstrate that the Debtor made these transfers with the intent to delay, hinder, and defraud creditors. For example, the Trustee alleges that (a) the transfers were concealed from creditors such as unit owners who purchased upgrades in the Palace and other projects, (b) the Debtor received no value in consideration for the transfers, (c) the Debtor was insolvent or became insolvent shortly after the transfers were made, and (d) the transfers occurred shortly before or shortly after a substantial debt was incurred. (Am. Compl. ¶33).

While the Court is fully aware that the Trustee may not be in the best position to set forth detailed factual allegations supporting the actual intent element of its claim, the Trustee must still meet the pleading requirements of Rule 9(b). Here, the Trustee is merely parroting the "badges of fraud" as if they were underlying facts as opposed to legal conclusions. This is precisely the type of conclusory pleading that the Supreme Court in *Iqbal* disallowed. In *Iqbal*, the Supreme Court concluded that while "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." 129 S. Ct. at 1950. Here, the Trustee has failed to describe how the transfers were concealed from creditors, who purchased the upgrades, and from which creditors these transfers were concealed. Without these types of supporting facts, the Defendant cannot possibly be apprised of the nature of the claim being brought against him and cannot adequately defend against this claim absent further factual support.

Perhaps on an even more fundamental level, however, the Amended Complaint fails to connect the Debtor's alleged intent to defraud with the Defendant's actions. From the face of the Amended Complaint, it appears that the Trustee is attempting to impute Mr. Dezer's alleged intent to defraud to the Debtor. In support of this position, the Trustee cites *Freehling v. Nielson* (*In re F&C Services, Inc.*), 44 B.R. 863, 872 (Bankr. S.D. Fla. 1984), for the proposition that when the transferee "is in a position to dominate or control the Debtor's disposition of his property, the transferee's intent to hinder, delay or defraud creditors may be imputed to the Debtor." *Id.* The *F&C Services* case, however, is completely distinguishable from this one. In *F&C Services*, the bankruptcy court expressly found that the transferee in that case was the alter ego of the debtor and that the transferee was "created and used solely to continue the business activities of the Debtor." *Id.* In contrast, the Trustee has not pled any facts that would suggest Mr. Dezer was the alter ego of the Debtor. The Trustee asserts that Mr. Dezer was "in a position to dominate or control the debtor's disposition of his property," yet offers no facts to support this conclusory allegation. If anything, the facts pled in the Amended Complaint merely establish that Mr. Dezer was a party to an agreement with the Debtor using economic leverage to obtain advantage. While that conduct, if proven, may be actionable, it does not support a claim that Mr. Dezer dominated or controlled the Debtor.

Iqbal directs this Court to allow a complaint to survive a motion to dismiss only if it "states a plausible claim for relief." 129 S. Ct. at 1950. In determining whether a claim is plausible, the Court must "draw on its judicial experience and common sense" and review the claim in the context of the case as a whole. *Id.* In applying the Court's common sense, this Court must grant the Defendant's Motion to Dismiss Count III.

3. Preference Claim

As previously noted, the Defendant argues that the Preference Claim (Count V) should be dismissed for two reasons: (1) the Trustee's claim under 11 U.S.C. §547 is actually a setoff claim under 11 U.S.C. §553; and (2) the Trustee's claim is time-barred because it does not relate back to the facts alleged in the original complaint under Fed. R. Bankr. Pr. 7015(c)(1)(B). Because the second argument is dispositive of this issue, the Court need not address the Defendant's setoff argument.

Fed. R. Bankr. P. 7015 expressly makes Fed. R. Civ. P. 15 applicable to adversary proceedings. *Mendelsohn v. National Westminster Bank, U.S.A.* (*In re Frank Santora Equipment Corp.*), 256 B.R. 354, 367 (Bankr. E.D.N.Y. 2000). Fed. R. Civ. P. 15(c)(1)(B) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when: (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Courts have held that the "critical issue in Rule 15(c) determinations is whether the original complaint gave notice to the defendant of the claim now being asserted." *Moore v. Baker*, 989 F.2d 1129, 1131 (11th Cir. 1993). Moreover, when "new or distinct conduct, transactions, or occurrences are alleged as grounds for recovery, there is no relation back, and recovery under the amended complaint is barred by limitations if it was untimely filed." *Id.* (internal citation omitted). When the plaintiff's new claim requires "unique facts from those required to prove his initial claim," such a claim will not relate back to the original pleading. *See Merker v. Miami-Dade County Fla.*, 485 F. Supp. 2d 1349, 1355 (S.D. Fla. 2007) (holding that plaintiff could not amend complaint with new claim under the Americans with Disabilities Act because new facts would have to be alleged in order to prove claim even though there would be some overlap in the background facts of the case). It is inappropriate for the plaintiff to attempt to "interject a new theory of liability based upon facts and conduct that was not previously alleged." *Hajtman v. NCL (Bahamas) Ltd.*, 2008 WL 1803630, at *2 (April 21, 2008 S.D. Fla. 2008).

In her Response, the Trustee cites to *Santora* to support her position that amended claims will relate back to the original complaint if the claims asserted in the amended complaint arise from the same "conduct, transaction or occurrence" alleged in the original pleading. While this is a correct statement of law, the *Santora* case is factually distinguishable from this case. In *Santora*, the Trustee commenced an adversary proceeding against National Westminster Bank, USA ("NatWest") seeking to avoid alleged preferential payments under 11 U.S.C. §§547 and 550. The complaint was subsequently amended twice and the second amended complaint, filed over four years after the original complaint, added claims under 11 U.S.C. §§544, 550(a), and New York Debtor and Creditor Law ("DCL") §§273, 273-a, 274, and 275 seeking to recover certain fraudulent conveyances made to NatWest. In holding that the second amended pleading related back to the original pleading, the *Santora* court noted that the "transactions sued upon between the Trustee and NatWest are one and the same under either 11 U.S.C. §547 (preferences) and 11 U.S.C. §§544(b)(1) and 550 and DCL §§273 et seq. (fraudulent conveyances)." *Santora*, 256 B.R. at 367. Additionally, the *Santora* court concluded that NatWest was "in the same position to defend whether it be a preference claim or a fraudulent transfer claim." *Id.*

This case is quite different from *Santora*. Unlike *Santora*, the preference claim in the Amended Complaint arises from an alleged agreement entered into between the Developer and the Debtor that is not mentioned anywhere in the original complaint. This agreement, known as the Upgrade Agreement, forms the basis of the preference claim. Count V specifically alleges that "[i]f the Court finds that commissions were owed by the Debtor under the Upgrade Agreement to either Dezer or the Developer, then in repayment of and in consideration for the commission obligation, in October 2007, the Debtor released Dezer from the payment obligation for the Equipment." Am. Compl. ¶ 50. The Trustee goes on to assert that this release of the payment obligation constitutes a transfer of the Debtor's property to or for the benefit of a creditor for an antecedent debt within 90 days of the Petition Date. The original complaint does not mention the existence of the Upgrade Agreement or any release of any payment obligation. The original complaint merely alleges that Mr. Dezer got equipment he didn't pay for. Furthermore, the resolution of the other four claims in the Amended Complaint in no way depends on any of the facts alleged to form the basis of the preference claim.

The Trustee attempts to rescue this claim by arguing that she added the facts surrounding the formation of the Update Agreement merely to "clarify" the facts already pled in the original complaint. The Court declines to accept this strained explanation as the facts surrounding the formation of the Update Agreement, such as the dates when the agreement was entered into and the percentage of profits the Palace would receive on upgrade sales, are completely independent of the facts alleged in the original complaint. Finally, the Trustee points out that while she did not plead a preference claim, she did mention in paragraph one of the original complaint that this action was an action to "avoid fraudulent and preferential transfers pursuant to 11 USC § 544, 547 and 548 and Florida Statute § 726.101 et seq." The Court concludes that this one sentence reference to "preferential transfers" does not reasonably give notice to the Defendant of a preference claim or the facts asserted about the Update Agreement and consequently Count V must be dismissed.

CONCLUSION

Having reviewed the parties' pleadings, considered the parties' oral argument, and the record, the Court concludes that the Trustee has satisfied the pleading threshold for pleading a claim based on constructive fraud. However, with respect to pleading a claim for actual fraud, the Trustee falls short. Finally, the Court disagrees with the Trustee's contention that her preference claim relates back to the original complaint under Rule 15. The Defendant does not challenge the Trustee's claim for Unjust Enrichment in this Motion to Dismiss. Therefore, it is accordingly ORDERED:

(1) The Motion to Dismiss is DENIED with respect to Counts I and II.

(2) The Motion to Dismiss is GRANTED with respect to Counts III and V.

(3) Defendant shall have twenty-one (21) days from the date of this Order to file an Answer.

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Copies furnished to:
Jonathan S. Feldman, Esq.
Ian J. Kukoff, Esq.