



WRITTEN DECISION - NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re

CLARENCE M. URBANSKI,

Debtor(s)

LESLIE T. GLADSTONE,

Plaintiff,

v.

VICKI ACRI, et al.,

Defendants.

Case No. 09-16027-A7

Adv. No. 11-90477-A7

MEMORANDUM DECISION

I.

INTRODUCTION

At the hearing held on March 29, 2012, in the above-referenced adversary proceeding, the Court took under submission paragraph two of its tentative ruling addressing the motion of Vicki Acri (“Defendant”) to dismiss the second and third claims for relief in the first amended complaint (“FAC”) filed by Leslie Gladstone (“Trustee” or “Plaintiff”). The second and third claims for relief seek to avoid

1 and recover transfers received by the Defendant pursuant to 11 U.S.C. §§ 544(b),
2 548 and 550.¹ For the reasons more fully set forth below, the Court reaffirms its
3 tentative ruling denying the motion to dismiss these claims.

4
5 **II.**
6 **FACTS**

7 The Debtor filed his chapter 7 bankruptcy petition on October 22, 2009,
8 and the Trustee was appointed. The Trustee determined that the Debtor made
9 substantial transfers to the Defendant and others within the four years preceding
10 the petition date which appeared to be avoidable transfers. Accordingly, the
11 Trustee filed her avoidance adversary proceeding on October 13, 2011
12 (“Avoidance Action”). In response to the Defendant’s motion to dismiss the
13 complaint for failure to state a claim, the Trustee filed the FAC. Thereafter, the
14 Defendant filed her present motion to dismiss.

15 The Trustee pleads most of her allegations on information and belief since
16 she has no firsthand knowledge of the facts. The pertinent allegations are as
17 follows:

18 ***GENERAL ALLEGATIONS***

- 19 • **FAC ¶ 5:** The Defendant was the live-in girlfriend/partner of Clarence
20 Urbanski, the chapter 7 debtor (“Debtor”), so she was an “insider” within
21 the meaning of § 101(31).
- 22 • **FAC ¶ 6:** Hensel Financial, Inc. is a California corporation with its
23 principal place of business in Oceanside, California (“Hensel”).
- 24 • **FAC ¶ 13:** Within the one year preceding the Debtor’s petition date, the
25 Debtor made transfers (identified in the FAC) to Defendant for services that
26

27 ¹ Hereinafter, all code and section references refer to 11 U.S.C. § 101, *et seq.* unless
28 otherwise specified.

1 Defendant allegedly rendered to Hensel Financial, Inc. (“Hensel
2 Transfers”).

3 • **FAC ¶ 14:** Additionally, during the four years preceding the petition date,
4 the Debtor made other payments (identified in the FAC) to Defendant in
5 2006, 2007, 2008 and 2009 (“Payments”) which, for tax purposes, he
6 characterized as “non-employee compensation” (collectively, the Payments
7 and the Hensel Transfers are the “Acri Transfers”).

8
9 ***FIRST CLAIM FOR RELIEF***
10 ***(Preferential Transfer – § 547)***

11 • **FAC ¶ 25:** The Hensel Transfers, the 2008 Payment, and the 2009
12 Payment were for or on account of an antecedent debt owed by the Debtor
13 to Defendant and/or Hensel before each such transfer was made in return for
14 “services” purportedly rendered by Defendant to the Debtor and/or Hensel
15 in advance of the Hensel Transfers, the 2008 Payment, and the 2009
16 Payment.

17 ***SECOND CLAIM FOR RELIEF***
18 ***(Fraudulent Transfer – § 548)***

19 • **FAC ¶ 29:** The Trustee realleges and incorporates by reference herein
20 paragraphs 1 through 28, inclusive.

21 • **FAC ¶ 31:** The Hensel Transfers, the 2008 Payment, and the 2009
22 Payment were in payment for services purportedly rendered by Defendant to
23 Hensel, not the Debtor.

24 • **FAC ¶ 33;** The services giving rise to the Hensel Transfers, the 2008
25 Payment, and the 2009 Payment were made for the benefit of Hensel, not
26 Debtor and, therefore, the Debtor received less than reasonably equivalent
27 value in exchange for the Hensel Transfers, the 2008 Payment, and the 2009
28 Payment within the meaning of § 548(a)(1)(B).

1 The Defendant recognizes that Federal Rule Civil Procedure (“Rule”) 8(d)
2 allows a plaintiff to plead alternative theories in a complaint.² However, she
3 contends that Rule 8(d) does not permit a plaintiff to plead inconsistent factual
4 statements *within the same claim for relief*. The Defendant has cited several cases
5 to support this legal proposition.³ However, none of these cases are binding upon
6 this Court. The Court is unable to reconcile these cases with the plain language of
7 Rule 8(d)(2) and (3) which permit inconsistent pleading in a single count:

8 (d) Pleading to Be Concise and Direct; Alternative Statements;
9 Inconsistency.

10 (2) Alternative Statements of a Claim A party may set out 2
11 or more statements of a claim ... alternatively or hypothetically, either
12 *in a single count* ... or in separate ones. If a party makes alternative
13 statements, the pleading is sufficient if any one of them is sufficient.

14 (3) Inconsistent Claims A party may state as many separate
15 claims ... as it has, regardless of consistency.

16 (Emphasis added).

17 Additionally, there is contrary authority recognizing that Rule 8 is drafted to
18 provide maximum flexibility in allowing a party to plead inconsistent facts and
19 theories in a complaint, and even within the same count. *See Henry v. Daytop*

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21 ///

22 ///

25 ² Federal Rule Bankruptcy Procedure 7008 provides that Rule 8 applies in every adversary
26 proceeding. Effective December 1, 2007, Rule 8(e) was renumbered Rule 8(d) without textual
change.

27 ³ *National Western Life Ins. Co. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 175 F. Supp.
28 2d 489, 492 (S.D.N.Y. 2000); *In re McCann, Inc.*, 318 B.R. 276, 290 (Bankr. S.D.N.Y. 2004).

1 *Village, Inc.*, 42 F.3d 89, 95 (2d Cir. 1994); *In re Heller Ehrman LLP*, 2011 WL
2 1539796, *6 (Bankr. N.D. Cal. April 22, 2011).⁴ Specifically, in *Heller Ehrman*,
3 the Defendant brought a motion to dismiss the Debtor’s fraudulent transfer claim
4 on the ground that, *inter alia*, plaintiff had pled inconsistent facts *within the same*
5 *count*. *Id.* at *6. The court denied the motion stating:

6
7 While Defendant seeks to dismiss or at least pin down Debtor on
8 which of these alternative theories it relies, the court is satisfied that
9 Debtor’s alternate pleading here may survive the Motion. The
10 development of the factual record will establish which theory
11 prevails, and thus what defenses are available to defendant.

12 *Id.*

13 The *Heller Erhman* analysis is appropriate here because the Trustee has no
14 first hand knowledge of the facts. The Trustee drafted the FAC to give clear
15 notice of her alternative avoidance theories based upon the limited facts that she
16 possesses. The factual inconsistency arises because the Trustee incorporated by
17 reference into her second and third claims for relief all of the earlier allegations in
18 the FAC. While the better practice is to incorporate by reference only the prior
19 paragraphs that are pertinent to a particular count, the Court declines to dismiss
20 based upon this pleading technicality. The FAC gives the Defendant has fair
21 notice of the Trustee’s alternative theories and the basic facts that support them.
22 As in *Heller Erhman*, the development of the factual record will establish which
23 theory prevails as to which transfer. The discovery may also reveal that some, or
24 all, of the transfers are not avoidable under any theory.

25 Finally, the Court does not agree that the United States Supreme Court’s
26 holdings in *Twombly* and *Iqbal* overruled the prior case law permitting a plaintiff
27 to plead alternative statements in a single count. In *Twombly* and *Iqbal*, the
28 Supreme Court addressed the minimum pleading requirements to satisfy

⁴ The Trustee attached this unpublished opinion to her opposition as Ex. “D”.

1 Rule 8(a)(2), but it did not address Rule 8(d). In discussing the function of
2 Rule 8(d), the *Wright & Miller* treatise provides:

3
4 In contrast to common law and code practice, the federal rules
5 recognized that inconsistency in pleadings does not necessarily mean
6 dishonesty, and that frequently a party, after a reasonable inquiry and
7 for proper purposes, must assert contradictory statements when he or
8 she legitimately is in doubt about the factual background of the case
9 Under Rule 8[(d)], a party may include inconsistent allegations in
10 a pleading's statement of facts.

11 5 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.*, § 1283 (3rd ed.,
12 Supp. 2011) (citing *Henry v. Daytop, Village, Inc.*, 42 F.3d 89 (2d Cir. 1994)).

13 This is a classic situation where the Trustee is legitimately in doubt of the factual
14 background of the case. As in *Heller Erhman*, the Court is satisfied that the
15 Trustee's alternative pleading should survive the motion to dismiss.
16

17 IV.

18 CONCLUSION

19 The Court reaffirms its tentative ruling to deny the Defendant's motion to
20 dismiss the second and third claims for relief. The factual inconsistency is created
21 only by virtue of the FAC's general incorporation of FAC ¶ 25 into the second and
22 third claims for relief. While the better practice is to incorporate only those prior
23 paragraphs that are pertinent to these claims, the Court declines to dismiss these
24 claims for relief based upon this pleading technicality. The Court will prepare its
25 own order.
26

27 Dated: 27 Apr '12



28 LOUISE DE CARL ADLER, JUDGE