

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
KARA RENEE GREEN,)	Case No. 00-13138-7
)	
Debtor.)	
_____)	
)	
MARY E. MAY, TRUSTEE,)	
)	
Plaintiff,)	
)	
vs.)	Adv. No. 02-5214
)	
AMERICREDIT FINANCIAL SERVICES, INC.,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

This matter is before the court on Defendant Americredit Financial Services, Inc.’s (hereinafter referred to as “Defendant”) Motion to Dismiss (Doc. 7). The parties have fully briefed the issues contained in this motion. The court has reviewed the arguments presented by the parties and the relevant law concerning this motion and is now prepared to rule.

I. STATEMENT OF FACTS

According to the allegations contained in the Trustee’s Complaint to Recover Fraudulent Conveyance (Doc. 1), the Debtor’s parents purchased a 1995 Dodge Neon in August 1996.¹ The

¹The Defendant claims in its Answer that both the Debtor and her parents purchased the Neon, as opposed to only the parents purchasing the vehicle. However, because this motion was filed pursuant to Bankruptcy Rule 7012(b) for failure to state a claim upon which relief can be granted, the

purchase of the Neon was financed by the Defendant, and only the Debtor's parents signed the loan documents. The Debtor filed her Chapter 7 Bankruptcy Petition on August 15, 2000. Within the one-year period prior to the date the Debtor filed for bankruptcy, the Debtor paid the Defendant a total of \$2,928.68 on the loan her parents secured for the purchase of the Neon.

The Trustee claims that because the Debtor was under no legal obligation to make the payments on the Neon, those payments constitute a fraudulent conveyance pursuant to 11 U.S.C. § 548, subject to recovery by the Trustee pursuant to 11 U.S.C. § 550. The Defendant has moved to dismiss the Complaint pursuant to Bankruptcy Rule 7012(b), claiming that the Trustee failed to allege the necessary elements of a fraudulent conveyance under 11 U.S.C. § 548.

II. STANDARD FOR A MOTION TO DISMISS PURSUANT TO RULE 7012(b)

Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b) into all adversary proceedings. To prevail on a Rule 12(b)(6) motion to dismiss for failure to state a claim, the movant must demonstrate beyond a doubt that there is no set of facts in support of plaintiff's theory of recovery that would entitle plaintiff to relief. *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kansas*, 927 F.2d 1111, 1115 (10th Cir. 1991). All well-pleaded allegations will be accepted as true and will be construed in the light most favorable to the plaintiff. *In re American Freight System, Inc.*, 179 B.R. at 956.

III. ANALYSIS

allegations contained in the Complaint will be deemed true and construed in the light most favorable to the Trustee for purposes of this motion. *See In re American Freight System, Inc.*, 179 B.R. 952, 956 (Bankr. Kan. 1995).

The Trustee contends that the transfers of money to the Defendant within one year of the filing of the Debtor's bankruptcy constitute fraudulent transfers pursuant to 11 U.S.C. § 548(a). In order to prevail on this claim, the Trustee must allege and prove actual fraud under § 548(a)(1)(A), or constructive fraud under § 548(a)(1)(B). In Paragraph 1 of the Response of Successor Trustee J. Michael Morris, to Motion of Defendant Americredit Financial Services, Inc. to Dismiss (Doc. 16), the trustee "disclaims any action under the 'actual fraudulent intent' provisions of § 548(a)(1)(A)."² Therefore, the Court will only address the Defendant's Motion to Dismiss as it relates to the claims being brought under the constructive fraud provisions of § 548(a)(1)(B).

In order to show that a transfer is fraudulent under § 548(a)(1)(B), the Trustee must prove the following: (1) a transfer of an interest of the debtor in property occurred, (2) the transfer occurred within one year of the bankruptcy filing, (3) the debtor received less than equivalent value in exchange for the transfer, and (4) the debtor was insolvent on the date of the transfer. *See Newman v. Midway Southern Baptist Church*, 183 B.R. 239, 246 (Bankr. D. Kan. 1995) (applying former § 548(a)(2) which is identical to current § 548(a)(1)(B)). The Defendant bases its Motion to Dismiss on two issues. First, the Defendant claims the Trustee has failed to allege in the Complaint the necessary elements of a claim under § 548(a)(1)(B). Second, the Defendant contends the Trustee cannot prevail on the claim because the Debtor received equivalent value in exchange for the transfers, to wit: the use of the car.

The Court agrees with the Defendant and finds that the Complaint in this case fails to specifically allege the elements required to prove a claim under § 548(a)(1)(B). At no point in the Complaint does the

²The response was filed by J. Michael Morris, who is the successor trustee to Mary E. May, who initiated this adversary proceeding by filing the original Complaint.

Trustee allege that the debtor received less than equivalent value in exchange for the transfer, or that the debtor was insolvent on the date of the transfer – both of which are elements of the claim – other than a reference to Debtor not having a legal obligation to repay the note. The successor Trustee himself admits “the Complaint could have been more artfully drafted” by the prior trustee and asks that the Court grant him leave to amend the Complaint as set forth in Paragraph 1 of his response.³

Bankruptcy Rule 7015 incorporates Federal Rule of Civil Procedure 15, which states that leave to amend pleadings should be freely given when justice so requires. Fed. R. Bankr. P. 7015(a). The decision whether to grant leave to amend lies within the sound discretion of the trial court. *Long v. United States*, 972 F.2d 1174, 1183 (10th Cir. 1992). The court finds that the errors on the part of the original Trustee in drafting the Complaint were not prejudicial to the Defendant. The Defendant’s Motion to Dismiss clearly demonstrates that it was aware of what transactions were involved in this action and the theories that the Trustee was intending to pursue to recover these transfers. Under these circumstances, the Court finds that justice requires the Court to grant the Trustee’s request to amend the Complaint. The Trustee shall have until March 5, 2003 to file an Amended Complaint in this action consistent with the request made in Paragraph 1 of the Trustee’s response to the Motion to Dismiss.

The Defendant’s second basis for seeking dismissal of this action is that the Trustee will ultimately be unable to show that the Debtor did not receive equivalent value for the transfers. As pointed out by the Trustee, when reviewing a motion to dismiss, the issue is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence in support of the claim. *Scheuer v. Rhodes*, 416 U.S. 232,

³The proposed amendment would alter at least Paragraph 8 of the Complaint to include the elements of a claim under § 548(a)(1)(B), which are missing from the original Complaint.

236 (1974), *overruled on other grounds*, *Davis v. Scherer*, 468 U.S. 183 (1984). The Court must accept as true, for purposes of this motion, the Trustee's allegation that the debtor received less than reasonably equivalent value in exchange for the transfers. *See Glannon v. Garrett and Associates, Inc.*, 261 B.R. 259, 263 (D. Kan. 2001) (holding that "[i]n considering a Rule 12(b)(6) motion, the court must assume as true all well-pleaded facts, as distinguished from conclusory allegations, and must draw all reasonable inferences in favor of the nonmovant"). With the approved amendment to the Complaint in this case (as set forth above), the Amended Complaint will, according to the trustee, contain all of the factual allegations necessary to prevail on a claim under § 548(a)(1)(B). The Defendant's attempt to dismiss the action based on an alleged lack of evidence is, therefore, premature. The Motion to Dismiss must thus be denied on this ground.

III. CONCLUSION

The Court finds that the Motion to Dismiss filed by Defendant should be, and hereby is, denied – except to the extent it deals with any claims by the Trustee concerning actual fraud brought pursuant to § 548(a)(1)(A). The Trustee has stated that he does not intend to pursue a claim under § 548(a)(1)(A), thus leaving only a claim under § 548(a)(1)(B) at issue in this case. In its current form, the Complaint fails to allege the necessary facts sufficient to state a claim of fraudulent transfer under § 548(a)(1)(B). Rather than dismiss the action, however, the Court will grant the Trustee leave to file an Amended Complaint as requested in the Trustee's response to the Motion to Dismiss. The issue of whether the Debtor received equivalent value for the monetary transfers to the Defendant is an issue of fact that cannot be decided on a Motion to Dismiss brought pursuant to Rule 7012(b). The Trustee has been granted leave to file an Amended Complaint that, according to the Trustee, will contain all of the allegations necessary to state a

claim under § 548(a)(1)(B). The issue of whether the Trustee can offer sufficient evidence to prove those allegations must be decided at a later date.

IT IS, THEREFORE, BY THIS COURT ORDERED that the Defendant Americredit Financial Services, Inc.'s Motion to Dismiss (Doc. 7) is hereby granted as it relates to any claim brought pursuant to 11 U.S.C. § 548(a)(1)(A), but is otherwise denied.

IT IS FURTHER ORDERED that the Trustee shall have until March 5, 2003, to file an Amended Complaint consistent with the request contained in Paragraph 1 of the Response of Successor Trustee, J. Michael Morris, to Motion of Defendant Americredit Financial Services, Inc. To Dismiss (Doc. 16).

IT IS SO ORDERED this _____ day of February, 2003.

Janice Miller Karlin
United States Bankruptcy Judge