



IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: September 23, 2004

**ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE**

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

IN RE:)	
)	
GOLD IN GRAIN, INC.,)	Case No. 04-10202
)	Chapter 11
Debtor.)	
_____)	
)	
GOLD IN GRAIN, INC.,)	
)	
Plaintiff,)	
v.)	Adversary No. 04-5099
)	
THE JOHNSON STATE BANK d/b/a)	
THE BANK OF ULYSSES,)	
)	
Defendant.)	
_____)	

ORDER (1) DENYING MOTION TO DISMISS AND (2) GRANTING MOTION FOR MORE DEFINITE STATEMENT OF CLAIMS

Johnson State Bank, d/b/a The Bank of Ulysses' (Bank's) Motion to Dismiss for Failure to State a Claim or, in the alternative, Motion for More Definite Statement is before the Court. (*Dkt. 4*).

Plaintiff Gold-In-Grain, Inc. (Debtor) has filed a response (*Dkt. 6*). The Court has reviewed the Debtor's complaint and is ready to rule.

Debtor's complaint asserts that over a vaguely-defined period of time (1997 to 2001), Debtor's President and Secretary, Darren and Gerri Wilkey,¹ borrowed money for their own use from the Bank, securing these loans with Debtor's corporate assets and corporate guaranties signed by the Wilkeys. Over another vaguely-defined period (December, 1999 to May, 2002), the Wilkeys executed corporate mortgages and security agreements in favor of the Bank, essentially encumbering all of the Debtor's assets to secure the Wilkeys' personal obligations to the Bank. Debtor pleads that the Bank knew, or should have known, that the funds borrowed on the strength of the corporation's assets were being "misapplied" by the Wilkeys to their own use and to the disadvantage of the Debtor. Of particular relevance to the Debtor are the allegations that Charlotte Gottlob, a third director and shareholder of the Debtor, was not given notice of the meeting at which the Wilkeys were elected officers, and was not made aware of, or given an opportunity to vote on, the transactions with the Bank.

Based on these allegations,² debtor asserts three causes of action. The first, titled "Action to Avoid Liens" proceeds on the basis that the Wilkeys breached their fiduciary duties to the corporation by trafficking in corporate assets through fraud and without requisite corporate authority. Debtor asserts that the Bank knew, or should have known this, and that, by making the loans and requesting the security for the loans, it "aided, abetted and participated" in the Wilkeys' wrongdoing. The Debtor

¹ These individuals are currently debtors in a chapter 7 bankruptcy in this District. *In re Darren K. Wilkey and Gerri R. Wilkey*, Case No. 04-13538.

² Debtor has failed to separately number these allegations. *See* Fed. R. Civ. P. 10(b). Instead, Debtor makes these statements under a heading titled "History." *Dkt. 1*, p. 2.

seeks to have all of the instruments executed by the Wilkeys as part of this “scheme” voided.

The Debtor’s second cause of action is titled “Action for Turnover” and seeks a money judgment for the damage allegedly caused by the Bank’s conduct. The third cause of action is called “Action for Special Damages” and recites a claim under Fed. R. Civ. P. 9(g) as it is made applicable in bankruptcy by Fed. R. Bankr. P. 7009(g). Both the second and third causes of action are based on the same underlying facts as those alleged for Debtor’s first cause of action.

In response, the Bank moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(6) as failing to state claims upon which relief could be granted or, in the alternative, for an order requiring the Debtor to make a more definite statement of its allegations under Fed. R. Civ. P. 12(e). After carefully reviewing the complaint, the Bank’s motion and the Debtor’s response, the Court concludes that the latter-requested relief is more than justified.

In deciding a Rule 12(b)(6) motion, the Court accepts as true all well pleaded facts, as distinguished from conclusory allegations, and views them in a light most favorable to the plaintiff.³ Unfortunately, few facts per se are pleaded here. On the present record, it is difficult for the Court and likely impossible for the Bank to review and evaluate the nature of Debtor’s claims. As an example, Debtor relies on a series of unspecified acts taking place over a period of some five years in asserting that the Wilkeys not only defrauded it, but that the Bank acted in concert with the Wilkeys to achieve that end. Similarly, the Debtor fails to specifically identify any of the loan or security documents involved in the alleged transactions and the dates of those transactions. In order to state a claim for damages arising out of the concerted actions of multiple tortfeasors, whether that claim be

³ *In re Franklin Savings Corp.*, 296 B.R. 521, 525 (Bankr. D. Kan. 2002).

for civil conspiracy or for civil “aiding and abetting,” some underlying tort must be alleged.⁴ Presumably, fraud is that tort here.

However, fraud must be alleged with specificity.⁵ This means that, to the extent possible, the circumstances of the fraud, including the time, place, and content of the misrepresentation, the identity of the speaker, and the harm caused by detrimental reliance on the misrepresentation, must be described. This the Debtor failed to do. Absent a more definite statement, this Court is unable to determine what legal theory Debtor is asserting and what role or participation the Bank had in the alleged wrongdoing. Therefore, with regard to the first and second causes of action, the allegations are simply insufficient for this Court to evaluate whether a potentially meritorious cause of action has been stated.

With respect to the plaintiff’s third cause of action for “special damages” under Fed. R. Civ. P. 9(g), unless these damages are somehow different from the actual damages asserted in the second cause of action or from punitive damages, this count does not appear to state a claim upon which relief can be granted. The Court supposes the plaintiff is seeking punitive damages against the Bank.⁶ In this District, punitive damages are considered “special damages.”⁷ If the Court’s supposition is incorrect,

⁴ See *Vetter v. Morgan*, 22 Kan. App. 2d 1, 7-8, 913 P.2d 1200 (1995), *rev. denied* 257 Kan. 1096 (discussing rules for tort liability of persons acting in concert); *Meyer Land & Cattle Co. v. Lincoln County Conservation Dist.*, 29 Kan. App. 2d 746, 753, 31 P.3d 970 (2001) (civil conspiracy claim must base itself on a valid, actionable underlying tort); *York v. Intrust Bank, N.A.*, 265 Kan. 271, 292-300, 962 P.2d 405 (1998) (tort of fraud supplied the basis for civil conspiracy claim and aiding and abetting claim).

⁵ See Fed. R. Civ. P. 9(b).

⁶ However, a cause of action for punitive damages standing alone in a complaint is not sufficient. See *Branstetter v. Robbins*, 178 Kan. 8, 14, 283 P.2d 455 (1955).

⁷ See *Hilyard v. Olsen*, 1991 WL 268840 (D. Kan. Nov. 6, 1991), *citing NAL II, Ltd. v. Tonkin*, 705 F. Supp. 522, 528 (D. Kan. 1989). *Contra Nelson v. G.C. Murphy Co.*, 245 F. Supp.

the plaintiff must set out with specificity the type and nature of the “special damages” it seeks. In any event, Rule 9(g) affords special damages as a remedy for certain causes of action; it does not afford a cause of action in itself.⁸

The Bank’s motion to dismiss is denied without prejudice to refiling as to the first and second causes of action. The third cause of action for “special damages” is dismissed for failure to state a claim. The Bank’s motion for a more definite statement is granted. The Court orders the plaintiff to amend its complaint within 20 days of the date of entry of this order to replead its fraud-based allegations with specificity as required by Fed. R. Civ. P. 9(b) and to more clearly articulate the legal theories for its causes of action. If plaintiff’s demand for “special damages” is of a type other than punitive damages, the amended complaint shall detail the nature of the special damages sought and the basis for their assessment in this case.

IT IS SO ORDERED.

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846, 847 (N.D. Ala. 1965) (punitive damages are not special damages).

⁸ See *Wood v. City of Topeka, Kan., Topeka Housing Authority*, 90 F. Supp. 2d 1173, 1196 (D. Kan. 2000), *amended* 96 F. Supp. 2d 1194 (D. Kan. 2000), *affirmed* 17 Fed. Appx. 765 (Table) (10th Cir. 2001) (Damages alone do not create a cause of action; loss of consortium is not an independent cause of action)