IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: VEG LIQUIDATION, INC. f/k/a ALLENS, INC. and ALL VEG, LLC, Debtors — **No. 5:13-bk-73597, Jointly Administered, Ch. 7**

R. RAY FULMER II, chapter 7 trustee — **Plaintiff**

v. — **5:16-ap-7017**

FIFTH THIRD EQUIPMENT FINANCE CO. et al. — **Defendants**

ORDER GRANTING IN PART AND DENYING IN PART PARTICIPATING DEFENDANTS' MOTION TO DISMISS

Before the Court is the *Motion to Dismiss Plaintiff's Corrected and Substituted First-Amended Complaint and Memorandum in Support Thereof* filed by the "Participating Defendants" on July 1, 2016; the *Plaintiff's Opposition to Participating Defendants' Motion to Dismiss* filed by the trustee on July 29, 2016; and the *Participating Defendants' Reply in Support of Motion to Dismiss Plaintiff's Corrected and Substituted First-Amended Complaint* filed on August 19, 2016. The motion and responses relate to the trustee's first amended complaint and comply with the Court's *Order Granting Motion For an Order Staging Procedures* entered on June 2, 2016. In that order, the Court ordered Participating Defendants to file any motions to dismiss the trustee's claims for relief under Federal Rule of Civil Procedure 60, Federal Rule of Bankruptcy Procedure 9024, and 11 U.S.C. § 363(n), including, but not requiring, the inclusion of any Rule 12(b) defenses.

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (H), and (O).

For the reasons stated below, the Court grants the defendants' motion to dismiss as it relates to the trustee's allegations of fraud on the court under Federal Rule of Civil Procedure 60(d)(3), which is made applicable by Federal Rule of Bankruptcy Procedure 9024, and collusion under § 363(n) and denies without prejudice the defendants' motion to dismiss to the extent it relates to all other counts alleged by the trustee.[1]

I. Standard for dismissal

Federal Rule of Bankruptcy Procedure 7008 incorporates Federal Rule of Civil Procedure 8. Fed. R. Bankr. P. 7008. Under Rule 8, a complaint 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). To meet this standard and survive a motion to dismiss under Rule 12(b), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard referenced by the Supreme Court "requires a plaintiff to show at the pleading stage that success on the merits is more than a 'sheer possibility.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). To survive a motion to dismiss, a complaint must state a plausible claim for relief. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. When the facts that are pled "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

[1] The defendants' also raise the finality of the § 363 sale and allege that the trustee's action is an improper attack on the final sale order. The Court will hold in abeyance any argument made in the defendants' motion regarding the collateral estoppel effect of the § 363 sale order without prejudice to the defendants presenting further argument as the case progresses.

II. Background

The debtor filed its voluntary chapter 11 bankruptcy petition on October 28, 2013. On February 12, 2014, the Court entered its sale order that approved the debtor/debtor-in-possession [DIP]'s sale of substantially all of its assets to Sager Creek. On June 6, 2015, the debtor converted its case to a case under chapter 7 and a chapter 7 trustee was appointed. The trustee filed his initial complaint in this adversary proceeding on February 26, 2016, more than two years after the conclusion of the sale, and his first-amended complaint on April 28, 2016. It is the amended complaint that is currently before the Court.[2] What is clear from the trustee's complaint is that the trustee does not like the results of the sale of the debtor's assets that was conducted by the debtor/DIP two years earlier and believes that the assets were worth more than the amount received by the estate. Without directly challenging the debtor's/DIP's business judgment, the trustee brings before the Court the same actions that the debtor/DIP could have brought had the case not converted to a case under chapter 7. *See Armstrong v. Norwest Bank, Minneapolis, N.A.*, 964 F.2d 797, 801 (8th Cir. 1992) ("it is axiomatic that the Trustee is bound by the acts of the debtor-in-possession . . . .").[3]

III. Fraud on the court

The Court will first address the trustee's allegations of fraud on the court in this proceeding. The sale order that is the subject of the trustee's complaint was entered on February 12, 2014, and the trustee's initial complaint was filed on February 26, 2016, more than two years later. Federal Rule of Civil Procedure 60(c) requires that a motion

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[2] When the Court references the complaint in the remainder of its order, it is referring to the amended complaint.

[3] The trustee's complaint does not allege any wrongdoing on the part of the debtor/DIP in relation to the sale. Likewise, the complaint does not allege that the debtor/DIP was aware of or participated in the named defendants' alleged fraud on the court.

for relief from final judgment be filed within a year of the entry of the judgment if the grounds for relief are fraud. However, according to subsection (d), Rule 60 "does not limit a court's power to . . . set aside a judgment for fraud on the court." Fed. R. Civ. P. 60(d).

The trustee pleads, or at least mentions, fraud on the court either specifically or as a "sub-category" or attachment to five of his fourteen claims.[4] Fraud on the court has a high standard of proof and "'can be characterized as a scheme to interfere with the judicial machinery performing the task of impartial adjudication, as by preventing the opposing party from fairly presenting his case or defense. A finding of fraud on the court is justified only by the most egregious misconduct *directed to the court itself*, such as bribery of a judge or jury or fabrication of evidence by counsel, and must be supported by clear, unequivocal and convincing evidence.'" *Landscape Prop., Inc. v. Vogel*, 46 F.3d 1416, 1422 (8th Cir. 1995) (quoting *Pfizer, Inc. v. Int'l Rectifier Corp.* (*In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*), 538 F.2d 180, 195 (8th Cir. 1976)) (emphasis added); *see also Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978). Fraud on the court is an extremely serious matter that is "justified only in the most egregious misconduct directed to the court itself." *Woodcock v. U.S. Dept. of Educ*. (*In re Woodcock*), 326 B.R. 441, 448 (B.A.P. 8th Cir. 2005). "'Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court.'" *Rozier*, 573 F.2d at 1338 (quoting *U.S. v. Int'l Tel. & Tel. Corp.*, 349 F.

[4] Under Count 2, Fraudulent Transfer, the trustee states that "Defendants' conduct and lack of candor constitutes a fraud on the Court." Count 3 is titled "Conspiracy to Commit Fraud on the Court." Count 4 is titled "Aiding and Abetting Conversion and Fraud on the Court." Count 13 is titled "Equity Equitable Subordination and Claim Bar Due to Fraud on the Court." Under Count 14, Equity Declaratory Relief, the trustee states that "[t]he concealment by the Defendants constitutes a fraud on the Court . . . ."

Supp. 22, 29 (D. Conn. 1972), *aff'd without opinion*, 410 U.S. 919 (1973) (citations omitted)).

According to the trustee, exhibits that should have been introduced at the hearing to approve the sale were not introduced, information concerning adjustments to the purchase price was not disclosed to the Court, funding agreements between one of the qualified bidders and its suppliers were not disclosed to the Court, and the fact that the undisclosed suppliers were also members of the unsecured creditors' committee was not disclosed to the Court. In ¶ 80, the trustee states that "[t]he absence of the material and candid disclosures by the Defendants not only reduced the value received by the estate of the assets sold, but likewise constituted a fraud on the Court under applicable bankruptcy and Arkansas state law." Additionally, in the trustee's second claim–Fraudulent Transfer–at ¶ 120, the trustee states specifically that "Defendants' conduct and lack of candor constitutes a fraud on the Court." Despite these allegations of fraud on the court, the Court cannot glean from the trustee's statement of alleged facts exactly what egregious misconduct was directed *to the Court itself* by the defendants.

Specifically, the Court is not able to identify or locate in the trustee's complaint any allegation that indicates any attempt to defile the Court itself or that an officer of the Court fabricated evidence or made an affirmative misrepresentation to the Court.[5] There is no allegation that the alleged fraudulent activities were directed to the Court. Even if the Court accepts as true all of the trustee's allegations of fact, which it must, the Court cannot find that the trustee's allegations meet the plausibility standard set forth in *Iqbal*. The trustee has failed to show "at the pleading stage that success on the

[5] In fact, the trustee has not named a single attorney or other officer of the Court as a defendant in his complaint as the perpetrator of any of the acts that allegedly constitute fraud on the court.

merits is more than a 'sheer possibility'" *Braden*, 588 F.3d at 594 (citing *Iqbal*, 556 U.S. at 678). Because the trustee has failed to state sufficient facts to support an allegation of fraud on the court, the Court grants the defendants' motion to dismiss with regard to any allegation made by the trustee relating specifically to fraud on the court under Federal Rule of Civil Procedure 60(d). According to the Eighth Circuit,

> apart from its pejorative character, the claim of fraud on the court adds nothing analytically to the basic claim under § 363(n). For in virtually every case in which a trustee files suit under that provision to challenge the sale of a bankrupt estate's property, the trustee will have been unaware of the alleged agreement to control the price of the property when he sought and obtained the bankruptcy court's approval of the sale. *It is § 363(n), and not any alleged fraud on the court, which determines whether the sale was improper.*

Vogel, 46 F.3d at 14 (emphasis added).

IV. 11 U.S.C. § 363(n)

The trustee has also alleged collusion under § 363(n), the remedy for which is either avoiding the § 363 sale or recovering the amount by which the value of the property exceeds the sale price. 11 U.S.C. § 363(n). The trustee states in ¶ 102 of his complaint (but not in his prayer for relief) that the "Defendants collectively owe the estate $74 million in un-rebutted avoidance actions," among other damages. To state a claim under § 363(n), the trustee must plead that (1) there was an agreement, (2) between potential bidders, (3) that controlled the price at bidding. *See, e.g., Birdsell v. Fort McDowell Sand and Gravel* (*In re Sanner*), 218 B.R. 941, 944 (Bankr. D. Ariz. 1998); *Ramsay v. Vogel*, 970 F.2d 471, 474 (8th Cir. 1992) (trustee may avoid sale under § 363(n) if price was controlled by an agreement among potential bidders).

The Court can identify three specific agreements alleged in the trustee's voluminous complaint that may be relevant. The first is an allegation in ¶ 43 that "Defendant Ball executed an undisclosed agreement with the Second Lien Holders [Sager Creek] . . . ."

The second is an allegation in ¶ 56 that "Defendant Ball executed an undisclosed agreement . . . ." The third is an allegation in ¶ 61 that "Sager Creek admitted on the record to reaching a side-agreement with Defendant Ryder." On its face, the complaint supports the first element of § 363(n).

The second element requires that the agreement be between potential bidders. Sager Creek was a qualified bidder at the auction of the debtor's property and the Court finds that it meets the requirement of being a potential bidder. In ¶ 57, the trustee also characterizes Defendant Ball and the Committee Defendants, of which Ryder and Ball are members, as potential bidders that did not submit qualifying bids.[6] However, simply stating that Ball and Ryder were potential bidders states a legal conclusion, not necessarily a fact. Even though the Court must take the trustee's factual allegations as true when ruling on a motion to dismiss, it does not have to accept the trustee's legal conclusions. *Twombly*, 550 U.S. at 555 (court is not bound to accept as true a legal conclusion couched as a factual allegation); *Braden*, 588 F.3d at 594 (same).

The trustee would like the Court to find that the term "potential bidders" refers to any entity that has the ability to offer a bid without regard to the remoteness of that possibility. Although the Court believes the term is expansive, the Eighth Circuit has established parameters under which to determine the scope. The Eighth Circuit defines "potential bidders" as "all persons who are contemplating making an offer to purchase property of a bankrupt estate that the trustee seeks to sell, whether such sale be private or at public auction." *Vogel*, 46 F.3d at 1419. The Court cannot identify any allegation in either the trustee's fifty-page complaint or the attachments to the complaint that indicate that Ball or any other member of the unsecured creditors' committee

[6] The Committee Defendants are identified in the trustee's complaint as Ball Metal Food Container Corp.; Crown Cork & Seal USA, Inc.; Fifth Third Equipment Finance Company; International Paper Company; Ryder Integrated Logistics, Inc.; Syngenta Seeds, Inc.; Teneo Securities, LLC; and URS Real Estate LP.

contemplated making a bid, intended to qualify under the bidding procedures, gave any indication to the debtor/DIP of its intent to bid, or even had any communication with the debtor/DIP about the bidding procedure such that the Court could conclude that Ball or the committee were potential bidders.[7] Accordingly, there is no basis for the Court to find that Ball or the unsecured creditor committee were potential bidders under § 363(n) as that term is defined by the Eighth Circuit. Further, the trustee failed to identify any other "potential bidders" between whom an agreement was made to control the price at bidding. Without a single fact that allows the Court even to "infer more than the mere possibility of misconduct," the Court must find that the trustee is not entitled to the relief requested under § 363(n) and dismisses any allegation made by the trustee relating specifically to that section of the bankruptcy code.

V. § 363(m)

The trustee also raises § 363(m) in his response to the defendants' motion to dismiss.[8] However, no party, including Seneca, the stalking-horse bidder, appealed the sale order.[9] For § 363(m) to be implicated, one of the parties must have appealed the sale order and the appellate court must have reversed or modified the order. Without an order reversing or modifying a § 363 sale order on appeal, § 363(m) can provide no

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[7] The allegation by the trustee that Ball was somehow a "bidder" because it was to some degree in control of Sager Creek (based on the agreements between Ball and Sager Creek) does not conform to the definition of a potential bidder by the Eighth Circuit.

[8] The Court is not aware of any mention of § 363(m) in the trustee's complaint. However, because the trustee refers to § 363(m) at page 21 in Part V. (C) of his *Plaintiff's Opposition to Participating Defendants' Motion to Dismiss,* the Court will address the subsection in this order.

[9] According to ¶ 64 of the trustee's complaint, Seneca dropped out of the auction because of the additional bidding requirement that was added at the auction. The Court can find nothing in the complaint or incorporated documents that supports this claim.

relief to the trustee. *See Holsinger v. Hanrahan* (*In re Miell*), 439 B.R. 704, 708 (B.A.P. 8th Cir. 2010). To the extent the trustee intends (or intended) to proceed under § 363(m), the Court finds as a matter of law that § 363(m) is not applicable in this proceeding.

VI. Conclusion

For the reasons stated above, the Court grants the defendants' motion to dismiss as it relates to the trustee's allegations of fraud on the court under Federal Rule of Civil Procedure 60(d) and collusion under § 363(n) but denies the defendants' motion to dismiss as it relates to all other counts alleged by the trustee.[10] In accord with the Court's Order Staging Procedures, the defendants shall have thirty days from the entry of this order to file an answer to the trustee's complaint and/or any additional Rule 12(b) defenses that were not raised initially.

IT IS SO ORDERED.

Ben Barry
United States Bankruptcy Judge
Dated: 09/29/2016

cc: all interested parties

[10] As recognized by the Eighth Circuit, "'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that a recovery is very remote and unlikely.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Twombly*, 550 U.S. at 556).