

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**UNITED FUNDING, INC., MICHAEL
FEHRENBACHER,**

Plaintiffs,

-vs-

Case No. 6:09-cv-1839-Orl-28GJK

**JOHN BOSCHERT, JENIFER HOFFMAN,
BRYAN ZUZGA, ASSURED CAPITAL
CONSULTANTS, LLC, DAH
MANAGEMENT, INC. and DONALD
HOFFMAN, JR.,**

Defendants.

ORDER

Plaintiffs have filed a five-count Amended Complaint (Doc. 14) against all Defendants. Defendant Donald Hoffman, Jr. has filed a Motion to Dismiss (Doc. 31) pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b). The motion must be granted as to the first three counts, but denied as to Counts IV and V.

Counts I, II, and III of the Amended Complaint do not contain any allegation of conduct on the part of Donald Hoffman relevant to the stated causes of action—Conspiracy to Defraud, Unlawful Sale of Security, and Violation of Florida Unfair and Deceptive Trade Practices Act respectively. The only conduct described in the Amended Complaint attributable to Defendant Donald Hoffman is contained in Counts IV and V, both alleging violation of the Florida Uniform Fraudulent Transfer Act ("FUFTA"). It is thus clear that

Plaintiffs have failed to state a cause of action against Defendant Donald Hoffman in Counts I, II, and III and that as to those Counts he is entitled to dismissal.

The sole remaining question is whether Plaintiffs have alleged sufficient facts to state causes of action for violation of FUFTA in Counts IV and V. Generally, Rule 9(b) requires that a plaintiff alleging fraud "state with particularity the circumstances constituting the fraud." Fed. R. Civ. P. 9(b). This means that a plaintiff must set forth: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants 'obtained as a consequence of the fraud.'" Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997). Plaintiffs do not argue that they meet this heightened pleading requirement, but instead correctly argue that the standard does not apply to allegations of violations of FUFTA. See, e.g., Limbright v. Hoffmeister, No. 5:09-cv-107-KSF, 2010 WL 437160, at *5 (E.D. Ky. Feb. 1, 2010); Bond Safeguard Ins. Co. v. Ward, No. 6:09-cv-1504-Orl-31GJK, 2009 WL 479822, slip op. at *2 (M.D. Fla. Dec. 8, 2009) (citing Pearlman v. Alexis, No. 09-20865-CIV., 2009 WL 3161830 (S.D. Fla. Sept.25, 2009)); Court-Appointed Receiver for Lancer Mgmt. Group, LLC v. 169838 Canada, Inc., No. 05-60235-CIV, 2008 WL 2262063 at *2 (S.D. Fla. May 30, 2008); Special Purpose Accounts Receivable Co-op. Corp. v. Prime One Capital Co., L.L.C., No. 00-06410-CIV., 2007 WL 4482611, at *4 (S.D. Fla. Dec. 19, 2007).

In a common law fraud claim, "the defendant is alleged to have made false statements or material omissions to the plaintiff, who is in a position to plead those statements or omissions with specificity." Pearlman, 2009 WL 3161830 slip op. at *5 (quoting Steinberg v. A. Analyst Ltd., No. 04-60898, 2009 WL 806780, at *12 (S.D. Fla. Mar. 26, 2009)). Specifically, common law fraud claims usually involve a false statement or knowing misrepresentation made by a defendant or third-party who is in direct privity with the plaintiff. See Limbright, 2010 WL 437160 at *5; 169838 Canada, Inc., 2008 WL 2262063 at *2. Thus, under these types of circumstances, a plaintiff is ordinarily in a sufficient position to meet the heightened pleading requirement of Rule 9(b). In common law fraud actions, Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." Blue Cross & Blue Shield of Fla., Inc., 116 F.3d at 1370-71 (quoting Durham v. Business Mgmt. Assocs., 847 F.2d 1505, 1511 (11th Cir. 1998)) (internal quotations omitted).

Unlike a common law fraud claim, a fraudulent transfer action is ordinarily asserted by the plaintiff against a defendant or third-party who is not in privity with the plaintiff. See 169838 Canada, Inc., 2008 WL 2262063 at *2. In other words, the fraudulent transfer or conveyance may be committed by a defendant and a third-party, and the plaintiff is without any particular knowledge of the details of the transaction. See Limbright, 2010 WL 437160, at *5; 169838 Canada, Inc., 2008 WL 2262063 at *2. Because plaintiffs ordinarily possess little or no information about the alleged fraudulent transfer or conveyance other than the

fact that it occurred, it is impracticable to require a plaintiff in a FUFTA action to plead information with particularity as required by Rule 9(b). Id.

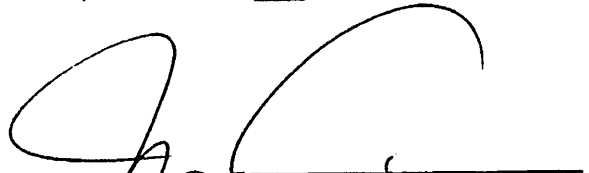
This Court agrees with other courts that have determined that 9(b) does not apply to actions brought under FUFTA and similar state statutes establishing causes of action for fraudulent transfer. See Bond Safeguard Ins. Co., 2009 WL 479822 at *2 ("Rule 9(b)'s heightened pleading requirement applies to fraud claims, not fraudulent transfer claims."); Nesco Inc. v. Cisco, No. Civ. A CV 205-142, 2005 WL 2493353, at *3 (S.D. Ga. Oct. 7, 2005) (concluding that the requirement of Rule 9(b) need not be met in an action for fraudulent conveyance); see also, e.g., Wing v. Horn, No. 2:09-cv-00342, 2009 WL 2843342, slip op. at *4 (D. Utah Aug. 28, 2009) (Rule 9 does not apply to constructive fraudulent transfer claims); Bratek v. Beyond Juice, LLC, No. Civ. A 04-4491, 2005 WL 3071750, *6 (E.D. Pa. Nov. 14, 2005) ("Rule 9(b) does not apply to allegations where the law assumes fraudulent intent."); Sharp Int'l Corp. v. State Street Bank & Trust Co., 281 B.R. 506, 518 (Bankr. E.D.N.Y. 2002) ("The weight of authority holds that a claim for constructive fraudulent conveyance is not required to be pleaded with particularity under [Rule 9(b)].").

Based on the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

1. Defendant's Motion to Dismiss Defendant Donald Hoffman, Jr. (Doc. 31) in counts I, II, and III is **GRANTED**.

2. Defendant's Motion to Dismiss Defendant Donald Hoffman, Jr. (Doc. 31) in counts IV and V is **DENIED**.

DONE and ORDERED in Chambers, Orlando, Florida this 9th day of March, 2010.



JOHN ANTOON II
United States District Judge

Copies furnished to:
Counsel of Record