

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re:

LOUIS J. PEARLMAN, et al.,

Debtors,

CASE NO.: 6:07-bk-00761-ABB

Chapter 11

Jointly Administered

_____/

SONEET R. KAPILA, as Chapter 11
TRUSTEE for TRANS CONTINENTAL
AIRLINES, INC., LOUIS J. PEARLMAN, and
TRANS CONTINENTAL RECORDS, INC.,

Plaintiff,

vs.

Adv. P. No. 6:08-ap-0073-ABB

KEYSTONE CONSULTING ASSOCIATES
OF FLORIDA, LLC,

Defendant.

_____/

**KEYSTONE CONSULTING ASSOCIATES OF FLORIDA, LLC'S
MOTION TO DISMISS COMPLAINT TO AVOID AND RECOVER
FRAUDULENT TRANSFERS, FOR TURNOVER AND FOR OTHER RELIEF**

Defendant, Keystone Consulting Associates of Florida, LLC (“Keystone” and/or “Defendant”), by its undersigned attorneys and pursuant to Bankruptcy Rule 7012, moves to dismiss the Trustee’s Complaint to Avoid and Recover Fraudulent Transfers, for Turnover and for Other Relief (the “Complaint”), and as grounds for this Motion, states:

Relief Requested

1. Keystone seeks dismissal of the Complaint based upon the bare bone assertions pled in the Complaint without factual particularity and with only a recitation of the legal elements of the various causes of action. The Complaint as pled fails to put the Defendant on notice of the grounds on which the claims rest.

Background Allegations

2. The Trustee, Soneet R. Kapila (“Trustee”), filed a seven count Complaint against Keystone alleging that the Defendant was engaged by Trans Continental Companies, Inc. (“TCC”) to provide public relations support, consulting services and other related activities as directed by TCC and that “upon information and belief, Defendant Keystone did not provide any services pursuant to the Consulting Agreement.” (Complaint, ¶ 33).

3. The Trustee further alleges that Defendant is in possession of some unidentified property of the estate and demands it to be turned over. (Complaint, ¶ 37).

Legal Basis for Requested Dismissal

4. The Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. When considering a Rule 12(b)(6) motion, the court is required to accept the allegations set forth in the complaint as true and construe them in favor of the plaintiff. *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994). However, to survive attack under Rule 12(b)(6), the complaint’s “factual allegations must be enough to raise the

right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007).

5. In *Twombly*, the Supreme Court rejected the relaxed standards set forth in *Conley v. Gibson*, 355 U.S. 42, 45-46 (1957), that permitted a “wholly conclusory” complaint to survive a motion to dismiss. *Twombly*, 127 S.Ct. at 1968-69. In dismissing the complaint in *Twombly* for failure to state a claim, the Supreme Court emphasized that the “plain statement” required by Rule 8(a)(2) must “possess enough heft to show that the pleader is entitled to relief.” *Id.* at 1966. The Court then set forth a new standard for dismissal. To survive a motion to dismiss, the Supreme Court held that a complaint’s allegations, if true, “must be enough to raise the right to relief above the speculative level.” *Id.* at 1965. This requires a complaint to include “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

6. In the instant case, the allegations are nothing more than a “formulaic recitation of the elements of a cause of action” and are insufficient to state a claim. *Id.* at 1965. The factual allegations are not sufficient to raise the right to relief above a speculative level and are insufficient to put Defendant Keystone on notice of the grounds on which the claim rests. Accordingly, the Complaint should be dismissed for failure to state a claim upon which relief may be granted.

7. Moreover, Count V of the Complaint fails to state a claim for turnover because it fails to even identify the property of the estate that Defendant allegedly has in its possession. The turnover provisions of the Bankruptcy Code apply only to tangible property and money which is due to the debtor without dispute. *In re Charter Co.*, 913

F.2d 1575, 1579 (11th Cir. 1990). In the words of the Eleventh Circuit: “Turnover proceedings are not to be used to liquidate disputed contract claims. Clearly, Congress envisioned the turnover provision of section 542 of the Code to apply to tangible property and money due to the debtor without dispute which are fully matured and payable on demand.” 913 F.2d at 1579 (citations omitted). *See also, In re Chick Smith Ford, Inc.*, 46 B.R. 515, 518 (Bankr. M.D. Fla. 1985). Here, the Complaint is totally void as to what the Trustee seeks to be turned over.

8. Counts I and III should also be dismissed because they fail to allege sufficient facts to establish actual fraud by the Defendant. Pursuant to Section 548(a)(1)(A) of the Code, a trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within two years before the date of the filing of the petition, if the debtor voluntarily or involuntarily made such transfer or incurred such obligation with the actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred.

9. The element for actual fraudulent intent requires a purposeful act intended to defraud creditors. *In re Ste. Jan-Marie, Inc.*, 151 B.R. 984, 987 (Bankr. S.D. Fla. 1993).

10. The elements of hinder, delay and defraud are three distinct elements which are viewed in the disjunctive, and a finding of any one would satisfy the requirements of the statute. *In re Mathern*, 137 B.R. 311, 326 (Bankr. D. Minn. 1992). However, the phrase must be read consistently and with the intent of the law in mind.

11. Thus, any hindrance or delay must be fraudulent, as the law seeks to avoid transfers where the debtor attempts to prejudice the legal or equitable rights of creditors. *In re Stratton*, 23 B.R. 284, 289 (S.D. 1982).

12. The Trustee fails to specifically allege that the Debtor had the actual intent to hinder, delay or defraud his creditors in connection with his dealings with Defendant. Instead, the Complaint simply makes conclusory allegations that the payments to Defendant were made with the intent to hinder, delay or defraud creditors.

13. Accordingly, the Trustee has failed to assert all of the elements necessary to allege a cause of action pursuant to 11 U.S.C. § 548(a)(1)(A) and thus Keystone request that this count be dismissed.

14. Allegations that are bald assertions, subjective characterizations or legal conclusions will not be accepted as true for purposes of motion to dismiss. *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005) (“Bald assertions will not overcome a Rule 12(b)(6) motion”). “Unwarranted deductions of fact are not admitted as true in a motion to dismiss.” *Id.* (internal citations and quotations omitted); *Oxford Asset Mgmt. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002) (“[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.”).

15. For all of the foregoing reasons, the Defendants request that this Court dismiss the Counts.

WHEREFORE, Defendant respectfully requests that Counts I through VII of the Complaint be dismissed against Defendant with leave to amend, and for such other relief to which Defendant may be entitled.

/s/ Lindsay M. Patrick
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished electronically or by U.S. Mail this 28 day of May, 2008 to Denise D. Dell-Powell, Esq. and Jill E. Kelson, Esq., Akerman Senterfitt, 420 S. Orange Avenue, Suite 1200, P.O. Box 231, Orlando, Florida, 32802 and Office of the United States Trustee, Attn: Miriam G. Suarez, 135 West Central Blvd., Suite 620, Orlando, FL 32801.

/s/ Lindsay M. Patrick
Attorney