

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION**

R. WAYNE KLEIN, the Court Appointed
Receiver of U.S. Ventures LC, Winsome
Investment Trust, and the assets of Robert J.
Andres and Robert L. Holloway,

Plaintiff,

v.

LEWIS S. SCOGIN, and COVENANT
FAMILY TRUST

Defendants.

REPORT & RECOMMENDATION

Case No. 2:12-cv-00121

United States District Court Judge Clark
Waddoups

Magistrate Judge Dustin Pead

On May 30, 2012, Defendant Lewis Scogin (Scogin) filed a pro se Motion To Dismiss on his behalf and on behalf of Defendant Covenant Family Trust (the Family Trust).¹ Defendants seek dismissal of Court Appointed Receiver Wayne Klein's (Receiver) claims for relief.² The Receiver's response to the Defendants' Motion To Dismiss is two-fold. First, the Receiver filed a Motion To Strike the request for dismissal as to the Family Trust.³ Second, the Receiver filed an opposition to the Motion To Dismiss.⁴

As an initial matter, local rule DUCivR 83-1.3 states that "[n]o corporation, association, partnership or other artificial entity may appear pro se but must be represented by an attorney

¹Docket Number 7.

²*Id.*

³Docket Number 9.

⁴Docket Number 10.

who is admitted to practice in this Court.”⁵ Thus, as a business entity, the Family Trust may only act through a licensed attorney.⁶ The Family Trust’s Motion To Dismiss, was filed by Scogin, an individual who is not admitted to practice law before this court and who has not entered an appearance as a licensed attorney.⁷ Accordingly, because the Family Trust is a business entity, Scogin may not file pleadings on its behalf and the Motion To Strike the Family Trust’s Motion To Dismiss should be granted. The Family Trust is required to obtain legal representation and may not appear pro se.⁸

Scogin’s Motion To Dismiss⁹ seeks dismissal of the Receiver’s first cause of action for “Avoidance and Recovery of Fraudulent Transfers” and second cause of action for “Constructive Trust and Other Provisional Remedies.”¹⁰ Scogin claims that the Receiver fails to state viable claims because the transfer of funds was a “legitimate investment” and the defendants are “innocent victims” who “have not been unjustly enriched.”¹¹

When evaluating the propriety of a dismissal for failure to state a claim, “all well-pleaded

⁵See DUCivR83-1.3 (c).

⁶See *Harrison v. Wahatoyas, LLC*, 253 F.3d 552, 556 (10th Cir. 2001) (“[A] corporation or other business entity can only appear in court through an attorney and not through a non-attorney corporate officer appearing pro se.”); *Alpha Land Company v. Little*, 238 F.R.D. 497 (E.D. Cal. 2006) (“[A] trust can only be represented by an attorney in federal court.”).

⁷See DUCivR 83-1.3(a).

⁸See DUCivR 83-1.3 (c).

⁹Because the Court has stricken the Motion To Dismiss as to the Family Trust, it shall only refer to Scogin in its analysis of the Motion To Dismiss.

¹⁰Docket Number 2.

¹¹Docket Number 7. “Defendants’ Motion To Dismiss For Failure To State A Claim” pgs. 2-3.

factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party.”¹² Dismissal is only appropriate when viewing the facts as true, plaintiff does not pose any “plausible” right to relief.¹³

To state a claim for fraudulent transfer, a party must allege that a transfer was made with an “actual intent to hinder, delay or defraud any creditor of the debtor.”¹⁴ Further, under Utah’s Fraudulent Transfer Act (UFTA), a “debtor’s actual intent to hinder, delay, or defraud is conclusively established by proving that the debtor operated as a Ponzi scheme.”¹⁵ Here, the Receiver explains the nature of the US Ventures and Winsome Ponzi schemes,¹⁶ gives details of payments made for the benefit of Scogin¹⁷ and alleges that the payments were made with an actual intent to hinder, delay or defraud investors.¹⁸ Accordingly, the complaint states a plausible claim for fraudulent transfer against Scogin.

To state a claim for constructive fraudulent transfer, a plaintiff must allege that a transfer was made “without receiving a reasonably equivalent value in exchange for the transfer or obligation,” and that the transferor “was insolvent at the time or became insolvent as a result of

¹²See *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997); *Ridge at Red Hawk L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

¹³See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247-48 (10th Cir. 2008).

¹⁴See Utah Code Ann. § 25-6-5(1)(a).

¹⁵*SEC v. Madison Real Estate Group, LLC*, 647 F. Supp. 2d 1271, 1279 (D. Utah 2009) (quotation omitted).

¹⁶See Complaint ¶¶ 13-48.

¹⁷See Complaint ¶¶ 49-52.

¹⁸See Complaint ¶ 56.

the transfer or obligation.”¹⁹ The Receiver alleges that the transfers were made for the benefit of Scogin²⁰ and that US Ventures and Winsome did not receive reasonably equivalent value in exchange for the payments made.²¹ Additionally, the Receiver claims that US Ventures and Winsome were insolvent at the time they made the payments.²² Accordingly, the Receiver states a plausible claim for constructive fraudulent transfer.

Finally, the Receiver states a proper claim for constructive trust even though Scogin disputes the amounts received. A constructive trust is an equitable remedy available to the court when there is a “(1) wrongful act, (2) unjust enrichment, and (3) specific property that can be traced to the wrongful behavior.”²³ Here, the Receiver alleges wrongful acts by Winsome and US Ventures by defrauding investors for the unjust enrichment of defendants.²⁴ Furthermore, the Receiver traces the specific property at issue in the form of wrongful payments to Scogin.²⁵

For the reasons stated herein, the court concludes that the complaint is well plead and states plausible claims against defendant for actual and constructive transfers and constructive trust. Accordingly it is hereby recommended:

The Receiver’s Motion To Strike as to Defendant Covenant Family Trust be GRANTED.

Defendant Lewis Scogin’s Motion To Dismiss be DENIED.

¹⁹Utah Code Ann. § 25-6-6.

²⁰See Complaint ¶¶ 49-52.

²¹See Complaint ¶ 56.

²² *Id.*

²³*Wilcox v. Anchor Wate, Co.*, 2007 UT 39, ¶ 34, 164 P.3d 353.

²⁴See Complaint ¶¶ 60-61.

²⁵See Complaint ¶¶ 6, 49-51.

Copies of the foregoing report and recommendation are being mailed to all parties who are hereby notified of their right to object. Any objection must be filed within 14 days after being served with a copy.²⁶ Failure to object may constitute a waiver of objections upon subsequent review.

DATED this 10th day of October, 2012.



Dustin Pead
U.S. Federal Magistrate Judge

²⁶ See Fed. R. Civ. P. 72(b)(2).

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF UTAH, CENTRAL DIVISION

R. WAYNE KLEIN,

Plaintiff,

vs.

LEWIS S. SCOGIN and COVENANT
FAMILY TRUST,

Defendants.

**ORDER ADOPTING REPORT AND
RECOMMENDATIONS**

Case No. 2:12-cv-121 CW-DBP

District Judge Clark Waddoups

Magistrate Judge Dustin B. Pead

Plaintiff R. Wayne Klein was appointed as a receiver of U.S. Ventures, LC, Winsome Investment Trust, and the assets of Robert J. Andres and Robert L. Holloway (collectively the "Receivership Defendants"). In his capacity as receiver, he has filed suit against a number of individuals and entities to recoup money that had been paid out by the Receivership Defendants under a Ponzi scheme. One of those suits is against defendants Lewis S. Scogin and Covenant Family Trust. Mr. Klein asserts the defendants received about \$1.1 million from the Receivership Defendants. Accordingly, he asserts claims for fraudulent transfer and constructive trust. Mr. Scogin, as a *pro se* litigant, filed a motion to dismiss the complaint for failure to state a claim. Mr. Klein filed a motion to strike the responsive pleading as to Covenant Family Trust because Mr. Scogin cannot appear as a *pro se* litigant on behalf of Covenant Family Trust.

Initially, this case was assigned to United States District Court Judge Clark Waddoups, who then referred it to United States Magistrate Dustin B. Pead under 28 U.S.C. § 636(b)(1)(B). Judge Pead issued a Report and Recommendation on October 10, 2012, which recommends that the motion

to strike be granted and the motion to dismiss be denied. On November 1, 2012, Mr. Scogin filed an Objection to the Report and Recommendation. In his motion and the Objection, Mr. Scogin sets forth the factual background of his involvement with the underlying investment programs at issue. Mr. Scogin asserts that at the time he invested in the programs, he had a good faith belief that the programs were legitimate. He also asserts that he and his family and friends gave value for the money they received from the program because collectively they had invested \$10 million in it and received back about one tenth of this amount.

A “good faith belief” constitutes an affirmative defense to a fraudulent transfer and “receiving equivalent value” constitutes an affirmative defenses to a constructive trust. If Mr. Scogin is able to prove these defenses by showing how much was invested in comparison to how much was received and why his investments were in good faith, then Mr. Klein’s claims may ultimately fail.

Procedurally, however, affirmative defenses are not considered at this stage of the litigation. Instead, when reviewing a motion to dismiss, the court only looks at the allegations in the complaint, and at no other information. Then, based on those allegations alone, the court determines whether they sufficiently state a claim for relief. Judge Pead found that Mr. Klein has alleged sufficient facts to state the two claims for relief. The court concurs in this finding. Accordingly, the court hereby APPROVES AND ADOPTS the Report and Recommendation.¹

By approving and adopting the report, this means that Mr. Klein may proceed to prove his claims against Mr. Scogin and Mr. Scogin may proceed to prove his affirmative defenses to those claims.

¹ Docket No. 14.

SO ORDERED this 13th day of November, 2012.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Clark Waddoups", is written over a horizontal line.

Clark Waddoups
United States District Judge