SO ORDERED.
SIGNED this 5th day of July, 2018

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

MICHAEL G. SHUBERT

Debtor

Case No. 3:17-bk-32824-SHB
Chapter 7

ANN MOSTOLLER, TRUSTEE

Plaintiff

v.

HARRY CHRISTOPHER WAMPLER

Defendant

Adv. Proc. No. 3:18-ap-3013-SHB

MEMORANDUM AND ORDER ON MOTION TO DISMISS ADVERSARY COMPLAINT

Plaintiff filed the Complaint to Avoid Preferential Transfer and Fraudulent Conveyance ("Complaint") commencing this adversary proceeding on April 17, 2018, seeking to avoid a transfer between Debtor and Defendant. Defendant filed a Motion to Dismiss Adversary Complaint ("Motion to Dismiss") on May 16, 2018, seeking dismissal under Federal Rules of Civil Procedure 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy

Procedure 7012(b). [Docs. 5, 6.] Plaintiff timely responded in opposition to the Motion to Dismiss in accordance with E.D. Tenn. LBR 7007-1(a). [Docs. 7, 8.]

Rule 12(b)(6) of the Federal Rules of Civil Procedure requires dismissal for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).[1] "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief." Fed. R. Civ. P. 8(a) (applicable to adversary proceedings under Fed. R. Bankr. P. 7008). "To survive a motion to dismiss, 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 complaint is not required to contain "detailed factual allegations[; however,] a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 555 (internal citations and brackets omitted). "While a complaint will survive a motion to dismiss if it contains 'either direct or inferential allegations respecting all

[1] Defendant attached three exhibits in support of his Motion to Dismiss [Docs.5-1, 5-2, 5-3], and Plaintiff has objected [Doc. 8 at p. 9]. Because Defendant has not complied with this Court's local rule for summary judgment motions (E.D. Tenn. LBR. 7056-1) and because the materials filed with Defendant's motion do not meet the requirements of admissible evidence under the Federal Rules of Evidence, the Court excludes the documents and has not considered them. *See Oak St. Funding, LLC v. Blair (In re Blair)*, Adv. No. 12-1052, 2012 WL 4506913, at * 10 (Bankr. E.D. Tenn. Sept. 28, 2012 (acknowledging that "'[t]he Sixth Circuit has cautioned that conversion of Rule 12(b)(6) motions into summary judgment motions "should be exercised with great caution and attention to the parties' procedural rights."'" (quoting *Taylor v. Hillis*, No. 1:10–cv–94, 2011 WL 6341090, at *4 (W.D. Mich. Nov. 28, 2011) (quoting *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 487 (6th Cir. 2009)))). Thus, the Court does not treat the Motion to Dismiss as a motion for summary judgment. *See* Fed. R. Civ. P. 12(d).

material elements' necessary for recovery under a viable legal theory, this [C]ourt 'need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice.'" *Philadelphia Indem. Ins. Co. v. Youth Alive, Inc*., 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc*., 604 F.3d 272, 275-76 (6th Cir. 2010)).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556-57).

When deciding whether to dismiss under Rule 12(b)(6), the court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). The Court also "'consider[s] the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Solo v. United Parcel Serv. Co*., 819 F.3d 788, 794 (6th Cir. 2016) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007)).

Here, the Complaint alleges that Debtor executed a note for $600,000.00 and a deed of trust granting Defendant an interest in property located at 524 Highway 321 North and a vacant lot located on Northshore Drive, both in Lenoir City, Tennessee, on January 10, 2017, eight months before an involuntary bankruptcy petition was commenced against Debtor on September 12, 2017. [Doc. 1 at ¶¶ 2, 4, 7, 8.] The Complaint also alleges that the transfer is avoidable under

either 11 U.S.C. § 547(b) as a preferential transfer or under § 548 as a fraudulent conveyance. [*Id.* at ¶¶ 11, 12.] Although Defendant acknowledges the January 10 transfer and the involuntary bankruptcy petition filed on September 12, Defendant argues that Plaintiff has not pleaded sufficient facts to support avoiding the transfer under either §§ 547(b) or 548, that she has merely recited the statutory elements required without alleging facts. [Doc. 6.] First, Defendant argues that Plaintiff has not pleaded facts to prove insolvency under either legal theory. [Doc. 6, at pp. 3-4.] Defendant also argues that Plaintiff cannot meet the elements of a claim under § 547(b) because she cannot satisfy the requirement that Defendant be an insider given that the transfer occurred outside the 90-day preference period. [*Id*. at p. 2.] Finally, Defendant argues that Plaintiff has not pleaded facts to support a § 548 claim that there was not reasonably equivalent value. [*Id.* at p. 3.]

To successfully avoid the transfer with Defendant as a preference under § 547(b), Plaintiff must prove that (1) the transfer was made to Defendant on account of an antecedent debt while Debtor was insolvent, (2) the transfer enabled Defendant to receive more than he would have received in a routine no-asset Chapter 7 case had he not received it, (3) Defendant is a creditor or the transfer was made for the benefit of a creditor, and (4) Defendant is an insider (as that term is defined by the Bankruptcy Code) given that the transfer occurred more than ninety days before the filing of the bankruptcy petition. *See* 11 U.S.C. § 547(b). To successfully avoid the transfer as a fraudulent conveyance under § 548 as pleaded in the Complaint, Plaintiff must prove that (1) the transfer occurred within the two years preceding the bankruptcy filing, (2) Debtor received less than a reasonably equivalent value in exchange for the transfer, and (3) Debtor was insolvent or became insolvent as a result of the transfer. *See* 11 U.S.C. § 548(a)(1)(B)(i)-(ii).

The Complaint contains the following allegations: on January 10, 2017, Debtor executed a note and deed of trust in the amount of $600,000.00 in favor of Defendant, who is a creditor and was an insider of Debtor at the time of the transfer; Debtor only received $30,000.00 from Defendant when Debtor executed the note and deed of trust to encumber Debtor's real property just before the winding up of Debtor's business; prior to the winding up of Debtor's business, in which Defendant was involved, Defendant loaned a substantial amount of money to Debtor without any requiring any security interest and/or collateral; and Debtor was insolvent at the time of the transfer. [Doc. 1 at ¶¶ 4, 6-8, 10-12.]

Taking these allegations as true and considering the Complaint in a light most favorable to Plaintiff, as required by Rule 12(b)(6), the Court finds that Plaintiff has sufficiently pleaded facts that, if ultimately proved, would satisfy the elements necessary to avoid the January 10, 2017 transfer under § 547(a) or 548(a)(1)(B)(i)-(ii). For this reason, the Motion to Dismiss is DENIED.

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