SO ORDERED.

SIGNED this 22nd day of February, 2021.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:	)	
	)	
University Directories, LLC	)	Case No. 14-81184
	)	
Debtor.	)	Chapter 7
	)	
	)	
Charles M. Ivey, III, Chapter 7 Trustee For the Estate of University Directories, LLC	)	
	)	
Plaintiff,	)	Adv. Pro. No. 20-9005
	)	
v.	)	
	)	
Around Campus Group, LLC, Around Campus Holdings, LLC, Verge Campus Group, LLC, James Investments, Inc., and Robert T. Alpert,	)	
	)	
Defendants.	)	

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

THIS MATTER came before the Court for hearing on October 14, 2020, after due and proper notice, upon the Defendants' Motion to Dismiss (the "Motion to Dismiss") [Docket No.

8] filed by the named defendants, Around Campus Group, LLC, Around Campus Holdings, LLC, Verge Campus Group, LLC, James Investments, Inc., and Robert T. Alpert (collectively, the "Defendants"), to dismiss this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7012 and Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Appearing before the Court were Charles M. Ivey, III, Trustee and counsel for Plaintiff, Darren A. McDonough, counsel for Plaintiff, and Brian D. Darer and Corri Hopkins, counsel for the Defendants. After considering the Motion to Dismiss, the memoranda of law in support thereof and in response thereto, the record in the main case and adversary proceeding, and the arguments of counsel, the Court finds that the Motion to Dismiss should be denied in part and granted in part for the reasons which follow.

I. FACTS

Charles M. Ivey, III, the Trustee for the Estate of University Directories, LLC (the "Trustee") initiated this adversary proceeding by filing a Complaint Seeking Damages (the "Complaint") [Docket No. 1] on March 25, 2020. The following facts are as alleged in the Complaint[1] (including the exhibits attached thereto), or are a part of the public record in either University Directories, LLC's main bankruptcy case, Case No.14-81184, or this adversary proceeding:

1. University Directories, LLC (the "Debtor") filed a Chapter 11 petition on October 24, 2014. The business of the Debtor was collegiate marketing and media, with its focus on the publishing of official student/faculty directories and planners. (Docket No. 1, ¶¶ 10, 11, 16)[2]

2. AC Acquisitions, LLC ("ACA") acting through defendant Robert T. Alpert ("Alpert"), entered into an asset purchase agreement with the Debtor for sale of its assets free and clear of any interests, liens, and encumbrances, but with the

[1] The facts alleged in the Complaint are taken as true for the purposes of the Motion to Dismiss.
[2] All references to Docket numbers or entries are for this adversary proceeding, unless specifically noted as filed in the Debtor's main bankruptcy case, 14-81184.

assumption of certain specific liabilities of the Debtor. The sale was approved by order entered April 17, 2015 and closed April 20, 2015. (Docket No. 1, ¶¶ 19, 23, 24)

3. Per the closing statement executed April 20, 2015, the consideration for the sale of the Debtor's assets was a $2,000,000.00 promissory note (the "UD Note"), and, after an accounts receivable adjustment, cash of $1,784,975.26. The UD Note was secured by a continuing security interest in the assets of ACA. (Docket No. 1, ¶¶ 25, 27; Docket No. 1, Exhibit D)

4. The UD Note provided for interest at an annual rate of 3.5%, with required quarterly payments of principal and accrued interest equal to 25% of ACA's operational cash flow for the corresponding quarter, with such payment being applied first to accrued interest and then to principal. It matured four years from date of issuance, with a balloon payment due of any unpaid balance at that time. The UD Note was secured by a Security Agreement encumbering all the tangible and intangible assets of the purchaser. In addition to the payment provisions, the UD Note (and the Security Agreement) specifically agreed to subordination of the security interest in the assets of ACA to:

> (i) a superior lien granted to any lender or creditor (a) that is not an Affiliate of the Maker unless the outstanding balance owed on the Note is less than $1,000,000.00, and (b) provides bona fide/arm's length lending or credit to the Maker and (ii) the rights of any guarantor (which guarantor may be an Affiliate of the Maker) with respect to such lending or credit, and with respect to either (i) or (ii), whether existing as of the date of this Note or later created by Maker at any time and for any reason; provided further, that such Security Interest is conditioned upon Payee executing any such subordination agreement, inter-creditor agreement, or any other such similar document in a commercially reasonable form of the document as may be requested by Maker and/or such lender/creditor from time to time to reflect the subordinated position of the Security Interest.
> (Docket No. 1, Exhibits E and F)

5. On April 21, 2015 Alpert transferred all of his membership interest in ACA to Around Campus Holdings, LLC ("ACH"), a Delaware limited liability company. Also, on that date ACA changed its name to Around Campus Group, LLC ("ACG"), also a Delaware limited liability company. Alpert was the sole member and manager of ACG and ACH. (Docket No. 1, ¶¶ 30-33)

6. The first payment under the UD note came due on September 30, 2015. ACG did not make the first payment and did not supply the quarterly financial statement to the Trustee. Even after supplying the quarterly financing statement on December 7, 2015, ACG claimed it could not make any payment, reduced or otherwise,[3]

[3] The first quarterly financial statement showed that ACG would owe $434,282.00 under the UD Note. The Trustee offered to accept a quarterly payment of $118,711.00 for the quarter ending September 30, 2015 but was told ACG could not even make the reduced payment. (Docket No. 1, ¶¶ 39-42)

under the UD Note or it would not have the funds to continue operations. An allegation was made that UD's financial condition was substantially different than what was represented prior to closing. (Docket No. 1, ¶¶ 35, 38-42)

7. The Trustee filed a motion for order in aid of consummation of sale for the purpose of modifying the UD Note on January 5, 2016.[4] Under the modification ACG would make quarterly $25,000.00 payments for the quarters ending September 30, 2015, December 31, 2015, and March 31, 2016. Additionally, ACG would make an annual payment by August 20 of each year based upon 25% of its cash flow from operations for the prior fiscal year, with all quarterly payments made during the fiscal year credited against the annual payment. An order was entered February 3, 2016 granting this motion. A copy of the unsigned modified Promissory Note was attached to the Complaint as Exhibit J.[5] However, only $100,000.00 was paid under this modified UD Note: $50,000.00 for the payments due September 30 and December 31, 2015, one payment of $25,000.00 on April 1, 2016, and $25,000.00 in November 2017. In response to the Trustee's demands for payments not made under the UD Note, ACG cited negative cash flow. (Docket No. 1, ¶¶ 43-45)

8. ACG and ACH secured two lines of credit from R Bank in January 2017 in the total amount of $1,500,000.00. ACG also obtained a loan from Independent Bank of Texas in the amount of $1,150,000.00, pledging its assets as collateral. The assets pledged were the same assets that served to secure the UD Note. In June 2017 the loan from R Bank was increased to $4,500,000.00 and the loan from Independent Bank was paid in full. No proceeds from this financing were used to repay the UD Note. In July 2017, ACG and Alpert demanded that the Trustee subordinate the UD Note and Security Agreement to the financing held by R Bank. The loan from R Bank and any modifications were described by Alpert as being arm's length transactions with a third-party lender. (Docket No. 1, ¶¶ 52, 54-57)

9. ACG filed an Emergency Motion to Clarify Sale Transaction and Determine Lien Priority (the "Emergency Motion") which was heard on August 1, 2017.[6] In Paragraph 59 of the Complaint, the Trustee characterizes the Emergency Motion as requesting approval of the subordination of the UD Note and Security Agreement to the loan from R Bank. In paragraph 6 of the Emergency Motion, R Bank is described as "not an affiliate of ACG" having provided "bona fide/arm's

[4] An order was entered on October 20, 2015 granting the Trustee's first motion for order in aid of consummation of sale which switched the fiscal year of ACG from one ending December 31 as provided in the original UD Note to one ending March 31 and also "clarifie[d] the timelines and procedures as a result of the sale transaction." (Case No. 14-81184, Docket Nos. 497, 525)

[5] The subordination paragraph set out in paragraph 4, above, from the original promissory note remained unchanged in the modified note. The original promissory note and its modifications are referred to herein as the "UD Note."

[6] *See* Emergency Motion to Clarify Sale Transaction and Determine Lien Priority, filed July 27, 2017 (Case No. 14-81184, Docket No. 634) and Transcript regarding Hearing Held on 8/1/2017, filed September 21, 2020 (Case No. 14-81184, Docket No. 932) ("August 1Transcript").

length credit" to ACG. Paragraphs 7 and 8 of the Emergency Motion state as follows:

> Pursuant to the Promissory Note, ACG requested that the Trustee execute a Subordination Agreement [to the R Bank loan], which the Trustee did but made such execution subject to Bankruptcy Court approval…The Promissory Note specifically contemplated future secured financing from third-party lenders and did not condition the subordination on Court approval. Nevertheless, ACG files this Motion to confirm the language in the Promissory Note and to effectuate the Subordination Agreement already signed by the Trustee.

10. In the Emergency Motion and at the August 1, 2017 hearing thereon, ACG did not disclose that the financing from R Bank was dependent upon the transfer of $5,000,000.00 in certificates of deposit to R Bank.[7]

11. The Complaint states that at the hearing on the Emergency Motion, ACG and Alpert also represented to the Court that the R Bank loan was not guaranteed by an insider.[8]

12. On August 8, 2017, R Bank increased its loan to ACG to $5,000,000.00. The R Bank Note was secured by two certificates of deposit of $2,500,000.00, provided to R Bank by James Investments, Inc. ("James Investments"), a Texas corporation wholly owned by Alpert. (Docket No. 1, ¶¶ 63, 65-67). There is no dispute that the $5,000,000.00 loan proceeds from R Bank were used solely by ACG for operations. (Hearing on the Motion to Dismiss, October 14, 2020).

13. In the third quarter of 2017, ACG provided the Trustee with a balance sheet indicating the value of the accounts receivable and other assets securing the UD Note was approximately $2,000,000.00. (Docket No. 1, ¶72, Exhibit P)

14. When ACG filed the Emergency Motion, the Trustee filed a Motion for Order in Aid of consummation of Sale Transaction and to Enter into Note Modification Agreement (the "Third Modification Motion") with ACG for the UD Note.[9] The Trustee agreed to the terms set forth in the Third Modification Motion, subject to court approval. The terms included: (a) reducing the principal balance to $1,000,000.00, (b) eliminating interest on the principal balance, (c) repaying the UD Note by quarterly installments of $25,000.00 with no annual payment due, (d) extending the maturity date to April 20, 2027, and (e) providing the Debtor's

[7] The Court notes that at the August 1, 2017 hearing the R Bank loan was not discussed. The discussion at the hearing centered on only the subordination of the UD Note to a security interest in accounts receivable associated with the sale of 2017-2018 school year planners; printing companies were requiring a security interest in the accounts receivable associated with the planners before they would agree to print the 2017-2018 university planners. (August 1 Transcript)

[8] The Court notes that at the August 1, 2017 hearing there was no representation by ACG and Alpert that the R Bank loan was not guaranteed by an insider. (August 1 Transcript)

[9] Case No. 14-81184, Docket No. 633, filed July 27, 2017.

estate with a warrant to acquire common stock in ACG in the amount of $500,000.00 if ACG had an initial public stock offering. The estate would receive a cash payment of $350,000.00 if the warrant was terminated due to a third-party sale of the business. (Docket No. 1, ¶ 75)

15. A hearing was held on the Third Modification Motion on August 22, 2017 and the motion was denied. The Order denying the Third Modification Motion stated that the Trustee and [ACG] failed to show that this note modification 1) was in the best interest of the creditors and the estate, 2) increased the financial return to the estate, or 3) made the UD Note a more marketable asset of the estate. (Case No. 14-81184, Docket No. 656, entered September 8, 2017, ¶ 20)

16. On April 12, 2018, James Investments purchased the R Bank Note, funding the purchase price from the two certificates of deposit it gave to R Bank as security for its loan. Eight days after James Investments became the owner of the R Bank Note, it declared ACG in default. A UCC foreclosure sale was held on May 7, 2018 and at the sale Verge Campus Group, LLC ("Verge")[10] purchased the assets of ACG for $200,000.00. The sale to Verge closed June 4, 2018. (Docket No. 1, ¶¶ 82-85, 88)

The Trustee initiated the adversary proceeding on March 25, 2020. In the Complaint, the Trustee alleges the following seven causes of action against the Defendants: (1) Recovery of Amount Due on the UD Note; (2) Successor Liability; (3) Tortious Interference with Contract; (4) Civil Conspiracy; (5) Negligent Misrepresentation; (6) Fraud; and (7) Violation of N.C. Gen. Stat. §75-1.1 Unfair and Deceptive Acts and Practices.

II. LEGAL ANALYSIS

Standard of Review

Federal Rule of Civil Procedure 12(b)(6), made applicable in this proceeding via Rule 7012 of the Federal Rules of Bankruptcy Procedure, provides that a complaint should be dismissed if "it fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

[10] Verge was formed May 18, 2018 as a Delaware limited liability company. (Docket No. 1, Exhibit K) The member of Verge is Campus Media Group, LLC. The Operating Agreement of Verge attached to the Complaint shows execution by Alpert as CEO of Campus Media Group, LLC and by Alpert as Manager of Verge. (Docket No. 1, Exhibit L) The Trustee alleges in the Complaint that Verge merged or partnered with ACG in 2016 or 2017, before it had legal existence. (Docket No. 1, ¶¶ 50-51)

To satisfy this pleading standard, the complaint must allege facts sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if the plaintiff pleads facts that allow the Court to reasonably infer that the plaintiff is entitled to his sought-after relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When considering a 12(b)(6) motion to dismiss, the Court must accept the complaint's alleged facts as true and view these facts in the light most favorable to the plaintiff. *Id.* The Court "evaluates the complaint in its entirety, as well as documents attached or incorporated into the complaint." *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011). The Court may also "consider 'relevant facts obtained from the public record,' so long as these facts are construed in the light most favorable to the plaintiff…" *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013), (citing *B.H. Papasan v. Allain*, 478 U.S. 265, 283 (1986)). "[L]egal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement" will not constitute well-pled facts necessary to withstand a motion to dismiss. *Nemet Chevrolet, Ltd. v. Consumerafffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

Discussion

In the Complaint, the Trustee asserts a broad range of state law claims stemming from the default under the UD Note and the financing ACG obtained from R Bank which had a superior security interest as compared to the UD Note.

Recovery on the UD Note (Count I)

As pled in the Complaint, ACA closed the sale of assets with the Debtor, executing the UD Note and Security Agreement in the name of ACA as partial consideration for the sale. ACA changed its name immediately thereafter to ACG. The Trustee brings the first count of the

Complaint, Recovery of Amount Due on the UD Note, against ACG for the outstanding principal balance plus accruing interest until paid.

A breach of contract action under North Carolina law involves the existence of a valid contract and breach of the terms of that contract. *Sanders v. State Pers. Comm'n*, 677 S.E.2d 182, 187-88 (N.C. Ct. App. 2009); *Poor v. Hill*, 530 S.E.2d 838, 843 (N.C. Ct. App. 2000). The UD Note and Security Agreement executed by ACA (which merged with ACG) in this case constitute valid contracts pursuant to North Carolina law. The facts pled in the Complaint support the Trustee's first cause of action that there was a breach of contract in as much as the Trustee was not paid under the Note. As such, Count I survives the Motion to Dismiss.

Successor Liability (Count II)

Under North Carolina law, as a general rule, "the purchaser of all or substantially all the assets of a corporation is not liable for the old corporation's debts." *G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc.*, 481 S.E.2d 674, 678 (N.C. App. 1997) (citing *Budd Tire Corp. v. Pierce Tire Co.*, 370 S.E.2d 267, 269 (N.C. App. 1988)). The four exceptions to this general rule against successor liability are: (1) where there is an express or implied agreement by the purchasing corporation to assume the debt or liability; (2) where the transfer amounts to a *de facto* merger of the two corporations; (3) where the transfer of assets was done for the purpose of defrauding the corporation's creditors; or (4) where the purchasing corporation is a "mere continuation" of the selling corporation in that the purchasing corporation has some of the same shareholders, directors, and officers. *Id*.

Count II, successor liability, is brought against Verge. Although the Complaint is confusing with respect to when Verge came into existence and its prior relationship with ACG before purchasing ACG's assets at the UCC foreclosure sale, the facts pled support the fourth

exception, the "mere continuation" exception, to the general rule against successor liability. The Complaint pleads (1) Alpert was the sole member and manager of ACG (Docket No. 1, ¶ 33); (2) Alpert was the sole member and manager of Verge (Docket No. 1, ¶ 47); and (3) at the 2004 examination of Alpert, he testified he loaned ACG between $60,000.00 and $100,000.00 to acquire the assets of Verge and develop its business (Docket No. 1, ¶ 49). In addition, the Complaint states that Verge purchased the assets of ACG for $200,000.00 at the UCC foreclosure sale. (Docket No. 1, ¶ 85)

The facts pled in the Complaint and as shown in Exhibit Q to the Complaint, support the "mere continuation" exception to the general rule of no successor liability for a corporation (or limited liability company) purchasing another corporation's assets. Thus, Count II, the theory of successor liability against Verge, survives the Motion to Dismiss.

Remaining Causes of Action (Counts III – VII)

The remaining causes of action pled in the Complaint include Count III - Tortious Interference with Contract; Count IV - Civil Conspiracy; Count V - Negligent Misrepresentation; Count VI - Fraud; and Count VII - Violation of N.C. Gen. Stat. §75-1.1 Unfair and Deceptive Acts and Practices. All five of the remaining causes of action are dependent on some bad act being perpetrated by the Defendants.[11] All of the facts pled in the Complaint, and taken as true, do not support the remaining causes of action, such that they must be dismissed.

[11] Tortious interference with a contract requires that the action taken by the defendant was without justification. *Cobra Capital, LLC, v. RF Nitro Commc'ns, Inc.*, 266 F.Supp.2d 432, 439 (M.D.N.C. 2003). Civil conspiracy requires an underlying unlawful act or a lawful act done in an unlawful way. *In re Fifth Third Bank, Nat. Ass'n-Village of Penland Litig.*, 719 S.E.2d 171, 181 (N.C. Ct. App. 2011). Negligent misrepresentation requires a misrepresentation. *Breeden v. Richmond Cmty. College,* 171 F.R.D. 189, 202-03 (M.D.N.C. 1997). Fraud requires a false representation or concealment of a material fact. *Charlotte Motor Speedway, LLC v. County of Cabarrus*, 748 S.E.2d 171, 178 (N.C. Ct. App. 2013). Violation of N.C. Gen. Stat. §75-1.1 requires an unfair or deceptive act or practice, or an unfair method of competition. *Spartan Leasing Inc. v. Pollard*, 400 S.E.2d 476, 481-82 (N.C. Ct. App. 1991).

The Trustee supports the remaining causes of action by detailing a "scheme" perpetrated by the Defendants that resulted in the UD Note being foreclosed out of its payments and security. The Trustee contends that:

> Had the Trustee been aware of (1) the true nature of the R Bank Note or (2) the insider guaranty or (3) the certificates of deposit having to be provided for the full principle [sic] amount of the loan, the Trustee would have vigorously resisted the subordination of the UD Note and Security Agreement because the loan from R Bank was not a bona fide/arm's length third-party financing but was instead insider financing that did not require subordination. Furthermore, had the subordination not occurred, the Trustee would have declared the UD Note in default and moved to enforce the estate's lien rights.

(Docket No. 1, ¶ 73).

The terms of the UD Note, attached to the Complaint as Exhibit E, do not support the alleged scheme that the true nature of the R Bank Note was insider financing. The UD Note subordination provision contemplates that an affiliate of the maker of the note may need to guarantee third party financing and that such financing would still be considered "bona fide arm's length." R Bank provided third party financing which was guaranteed by an affiliate of ACG, a scenario which was clearly allowed by the terms of the UD Note. The fact that James Investments put up two certificates of deposit for collateral totaling $5,000,000.00 for R Bank financing totaling $5,000,000.00 is, in its most basic, simply another guaranty by an affiliate of the maker, making the guaranty a secured guaranty, and was thus allowed by the terms of the UD Note. Further, there have been no allegations that the $5,000,000.00 was used for any purpose other than by ACG for operations.

The UD Note was properly subordinated to the bona fide/arm's length third-party financing from R Bank, and as such, the Trustee could not have "vigorously resisted the subordination." (Docket No. 1, ¶ 73). The UD Note specifically contemplated future secured third party financing and did not condition subordination of the UD Note on court approval.

Even so, the terms of the UD Note, specifically the subordination provision, came on before the Court on August 1, 2017, on ACG's Emergency Motion to Clarify Sale Transaction and Determine Lien Priority, for clarification about the subordination provision in regards to the R Bank financing and other credit to be obtained from three printing companies. While the R Bank financing was not specifically discussed at the hearing, the terms of the subordination agreement were. The parties agreed that the subordination of the UD Note was proper, and the Court entered an order on August 9, 2017, finding in part that the R Bank subordination agreement was valid and enforceable.[12]

Additionally, the Trustee's threadbare assertion that "had the subordination not occurred, the Trustee would have declared the UD Note in default and moved to enforce the estate's lien rights" is not supported by the facts. (Docket No. 1, ¶ 73). Rather, the Trustee permitted years to pass and multiple modifications of the UD Note to occur without being paid prior to the R Bank financing and never declared the UD Note in default, despite numerous opportunities to do so.[13] The Trustee admitted at the August 1, 2017 hearing on the Emergency Motion that "from the moment I took over [the UD Note] there have been issues with timely payments." (August 1 Transcript, p. 11, line 25 to p. 12, line 2). When asked by the Court why he had not called the UD Note when there had been payment issues from the very beginning, the Trustee responded "it's just simply not what I consider to be a very collectible note." (August 1Transcript, p. 14, lines 16-17). The Trustee went on to say that he was "making a business decision, working with them [ACG] would be better than calling the note." (August 1Transcript, p. 15, lines 18-19). The contention that the Trustee would have acted differently but for the alleged "scheme," which was

[12] Case No. 14-81184, Docket No. 642.

[13] The UD Note was executed on April 20, 2015. The Trustee advocated for three note modifications with ACG: the first was granted by order dated October 20, 2015, the second was granted by order dated February 3, 2016, and the Trustee's third motion to modify the UD Note was denied by the Court by order dated September 8, 2017.

not in fact a scheme, amounts to a "bare assertion devoid of further factual enhancement" and is not able to withstand a motion to dismiss. *See Nemet Chevrolet, Ltd. v. Consumerafffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009).

In conclusion, as the Defendants acted in accordance with the terms of the UD Note, the facts fail to state a claim upon which relief can be granted for Counts III through Count VII of the Complaint and Counts III through Count VII should be dismissed.

III. CONCLUSION

Accordingly, the Defendants' Motion to Dismiss the Complaint is denied as to the first and second counts of the Complaint and granted as to the third, fourth, fifth, sixth, and seventh counts.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' Motion to Dismiss the Complaint is DENIED as to the first and second counts of the Complaint and GRANTED as to the third, fourth, fifth, sixth, and seventh counts of the Complaint.

END OF DOCUMENT

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