UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 06-50243
	)	
John Reece,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
T II, LLC, Assignee of Gordon Food Services,	)	ADVERSARY NO. 06-5113
	)	
	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),	)	
	)	
vs.	)	
	)	
John Reece,	)	**Order re Motion to Dismiss**
	)	
DEFENDANT(S).	)	

This matter is before the Court on the motion of John Reece ("Reece") to dismiss the Plaintiff, T II, LLC's Complaint (defined below) for failure to state a claim upon which relief may be granted.

Jurisdiction

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

Standard of Review

When considering a motion to dismiss, a court must construe the challenged complaint in the light most favorable to the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue that must be decided is not whether plaintiff will ultimately prevail but whether plaintiff is entitled to offer evidence to support the claims stated in his complaint. *Id.* Thus, a motion to dismiss for failure to state a claim will not be granted unless it appears *beyond doubt* that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* (emphasis added).

Reece argues in his motion to dismiss that the Complaint fails to plead fraud with requisite particularity required by Fed. R. Civ. P. 9(b) as incorporated by Fed. R. Bankr. P. 7009. Fed. R. Civ. P. 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." To satisfy Rule 9(b), "a plaintiff must at a minimum allege the time, place and contents of the misrepresentation(s) upon which he relied." *Bender v. Southland Corp*., 749 F.2d 1025, 1216 (6th Cir. 1984).

> Rule 9(b) does not require the pleading of detailed evidentiary matter." *In re Lionel Corporation*, 41 B.R. at 805. It remains for "[t]he party seeking an exception from discharge in bankruptcy under § 523(a)(2) [who] has the

> burden of proof on the issue by clear and convincing evidence," *Knoxville Teachers Credit Union v. Parkey*, 3 Bankr.L.Rep. (CCH) ¶ 71,126 at 88,972 (6th Cir.1986); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1165 (6th Cir.1985), to prove the case at trial, not at the pleading stage.

In re Schwartzman, 63 B.R. 348, 356 (Bankr. S.D.Ohio1986).

Allegations in the Complaint

On March 1, 2006, Reece filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.

On May 1, 2006, T II, LLC ("Plaintiff") filed a complaint initiating the above-captioned adversary proceeding. In pertinent part, the allegations in the initial complaint are as follows:

3. That the Plaintiff is the holder of an unsecured claim against Defendant[1] arising from dishonored negotiable instruments in the form of electronic transfers.
4. T II, LLC is the owner of this account by virtue of assignment from the original creditor Gordon Food Service, Inc.
5. That the defendant failed to discharge his liability on said negotiable instruments within ten (10) days after receipt of dishonor.
6. That Defendant failed to discharge his liability on said instruments within thirty (30) days after service of notice pursuant to O.R.C. §2307.61(A)(2)(a).
7. That Defendant authorized Electronic transfers on or about August 11, 2005; August 12, 2005; August 18, 2005; August 19, 2005: August 24, 2005; August 25, 2005; February 1, 2005 and February 8, 2005, the sum of which total's $63,474.57 plus interest, in exchange for goods and merchandise GFS delivered to Defendant doing business as Powerhouse Restaurant Group, Inc., Powerhouse 380, Inc., New Philadelphia 402, Inc., Wadsworth 775, Inc., Akron 548, Inc., Powerhouse 268, Inc., and Canton 195 Inc.
8. Defendant has received a benefit from such services, and allowing this bill to unpaid will result in Defendant, being unjustly enriched to Plaintiff's detriment.
9. That Defendant obtained the goods and services under false pretenses, false

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[1] The initial complaint refers to "Defendant" and to "Defendant John Reece." The term "Defendant" is not defined in the initial complaint.

representations or actual fraud, and for that reason the indebtedness is non-dischargeable in bankruptcy pursuant to 11 U.S.C. Section 523(a)(2)(A).

On June 2, 2006, Reece filed a Motion to Dismiss the Adversary Proceeding [docket #8]. In response Plaintiff filed a Motion for Leave to File an Amended Complaint [docket #9] and an Amended Complaint [docket #10] (the "Complaint"). Plaintiff also filed a brief in opposition to Reece's Motion to Dismiss. [docket #11]. On June 20, 2006, Reece filed a reply. [docket #14].

The allegations in the Complaint are as follows:

3. The Plaintiff is the holder of an unsecured claim against Defendant[2] arising from dishonored negotiable instruments in the form of electronic transfers.
4. T II, LLC is the owner of this account by virtue of assignment from the original creditor, Gordon Food Service, Inc. (hereinafter "GFS").
5. At all times relevant, Defendant, John Reece, was the President of six (6) Ohio Corporations: Powerhouse Restaurant Group, Inc., Powerhouse 380, Inc., New Philadelphia 402, Inc., Wadsworth 775, Inc., Akron 548, Inc., Powerhouse 268, Inc., and Canton 195 Inc.
6. On March 28, 2005, Defendant John Reece executed personal guarantees in favor of GFS, on behalf of the six (6) corporations set forth above.
7. Defendant authorized Electronic Fund Transfers (hereinafter "EFT's") on or about August 11, 2005; August 12, 2005; August 18, 2005; August 19, 2005: August 24, 2005; August 25, 2005; February 1, 2005 and February 8, 2005, the sum of which total's $63,474.57 plus interest, in exchange for goods and merchandise GFS delivered to Defendant doing business as Powerhouse Restaurant Group, Inc., Powerhouse 380, Inc., New Philadelphia 402, Inc., Wadsworth 775, Inc., Akron 548, Inc., Powerhouse 268, Inc., and Canton 195 Inc.
8. Defendant failed to discharge his liability on said negotiable instruments within ten (10) days after receipt of dishonor.
9. Defendant failed to discharge his liability on said instruments within thirty

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[2] The Complaint also refers to "Defendant," but fails to define the term. It is not clear from the face of the Complaint whether Plaintiff intends both terms to refer to the same actor. At a pre-trial conference in this adversary proceeding on July 12, 2006, plaintiff's counsel stated that both terms refer to the named defendant, John Reece.

(30) days after service of notice pursuant to O.R.C. § 2307.61(A)(2)(a).

10. Pursuant to O.R.C. § 2913.11(B), the six (6) corporations as set forth above are presumed to have known that the EFT authorizations would be dishonored.
11. Pursuant to O.R.C. § 2913.11(A), Defendant John Reece caused the authorization of the aforementioned EFT's, and knew or should have known at the time of the authorization that the EFT's would be dishonored for insufficient funds.
12. GFS relied on the authorizations of Defendant by providing goods and services to Defendant, with the expectation that it would be paid for the goods and services that it provided.
13. Thus, Defendant intended to, and did, obtain the goods and services under false pretenses, false representations or actual fraud, and for that reason the indebtedness is non-dischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(2)(A).
14. Defendant has received a benefit from such services, and allowing this bill to unpaid *(sic)* will result in Defendant, being unjustly enriched to Plaintiff's detriment.

Discussion

The Plaintiff argues that Reece owes Plaintiff a debt that is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), which provides in relevant part that:

> (a) A discharge under section 727, . . . of this section does not discharge an individual debtor from any debt –
>
> (2) for money, property, services, or an extension, renewal or refinancing of credit, to the extent obtained by –
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

In the Sixth Circuit, creditors seeking to exempt a debt from discharge under § 523(a)(2)(A) must prove that:

> [1] the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to is truth;
> [2] the debtor intended to deceive the creditor;
> [3] the creditor justifiably relied on the false representation; and
> [4] its reliance was the proximate cause of the loss.

Field v Mans, 516 U.S. 59, 116 S.Ct. 437, 439 (1995); *Longo v. McClaren (In re McLaren*),

3 F.3d 958, 961 (6th Cir. 1993); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

> A purchase of goods on credit by a debtor who does not intend to pay for them is a false representation. A creditor alleging fraud bears the burden of proving that the debtor knew full well that any professed intention to repay was false or was known by the debtor not to be well grounded, and that the debtor nevertheless deliberately obtained goods knowing they were beyond his or her ability to pay. The debtor's insolvency or inability to pay does not by itself provide a sufficient basis for inferring the debtor's intent. A debtor's honest belief that a debt would be repaid in the future, even if in hindsight found to have been very unrealistic, negates any fraudulent intent.

Collier on Bankruptcy-15th Edition Rev. P 523.08[1][d]. The Complaint identifies the dates of the electronic transfers and the total amount of dishonored transfers. Plaintiff has alleged that Reece knew or should have known that there would not be sufficient funds to cover the Electronic Funds Transfers made in February and August 2005 and authorized by Reece. Complaint ¶ 11. In addition, citing the presumption of fraud that arises under Ohio Revised Code § 2913.11, Plaintiff alleges that Reece authorized the EFT intending to defraud Plaintiff. Complaint ¶ 13. Plaintiff states that GFS, its assignor, relied on the misrepresentation and was damaged as a result. Complaint ¶12 and 14.

The Plaintiff has alleged, albeit in a minimal fashion, each of the elements necessary to state a claim for relief under §523(a)(2)(A). The purpose of Rule 9(b) is to provide defendants with fair notice of the substance of a plaintiff's claim in order that a defendant may adequately prepare a responsive pleading. *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir.1988). There is sufficient information in the Complaint to provide "fair notice" to the Defendant, John Reece. Rule 9(b) does not require more. Although Plaintiff may have difficulty proving each of its allegations, ultimately, the question

before the Court is not whether Plaintiff will prevail, but rather the question is whether Plaintiff should be entitled to present evidence in support of his claim. In this context, the Court does not find Reece's motion well taken.

Conclusion

Based on the above findings of fact and conclusions of law, the Court finds that the Defendant-debtor's motion to dismiss is not well taken and will be denied. A further pre-trial conference will be held in this matter on July 19, 2006 at 3:30 p.m.

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