IT IS SO ORDERED.

Dated: 11:03 AM March 04 2011

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 10-54464
	)	
LESTER D. WISE	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
JAMES S. HARRELL,	)	**ADVERSARY NO. 10-5159**
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	
LESTER WISE, ET AL.	)	**MEMORANDUM OPINION RE: DEFENDANTS' MOTION TO DISMISS [DOCKET #11]**
	)	
DEFENDANT(S).	)	

On November 15, 2010, James S. Harrell, *pro se,* initiated this adversary proceeding by filing a complaint against Lester Wise and Wise Safety Solutions, LLC (collectively, "defendants"). On December 17, 2010 defendants filed a joint motion seeking to dismiss the complaint pursuant to Fed. R. Bankr. P. 7012 and Fed. R. Civ. P. 12(b)(6) (the "Motion to Dismiss").

An initial pre-trial conference was held in this matter on December 22, 2010. Appearing were James Harrell, *pro se* and counsel for defendants. Pursuant to that pre-trial conference an order was entered which, *inter alia*, set January 14, 2011 as the deadline for Mr. Harrell to file his response to the Motion to Dismiss. To date, no response has been filed.

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), 157(a) and 157(b).

In the Motion to Dismiss, defendants contend that the complaint fails to state any claim upon which relief can be granted and, therefore, should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). When considering such a motion, this Court must determine if the facts alleged in the complaint are sufficient to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must be construed in a light most favorable to the plaintiff and it need only contain sufficient factual matters to make a claim plausible, even if recovery seems very remote and unlikely. *Riverview Health Inst., LLC v. Medical Mutual of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010); *Courie v. Alcoa Wheel & Forged Products*, 577 F.3d 625, 630 (6th Cir. 2009) *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). However, this Court need not accept as true legal conclusions and unwarranted factual inferences and it need not conjure up unpleaded facts that might turn a frivolous claim into a substantial one. *See, e.g., Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

In his complaint, plaintiff indicates that he is seeking relief "under 11 U.S.C. § 523 Exceptions to Discharge" and that the relief sought "includes recovery of money and property, denial of discharge of a claimed debt, actual damages, punitive damages and treble damages arising from the scheme to defraud set forth herein, breach of contract, restrictions on future conduct, an

accounting, costs of investigation and suit, a declaratory judgment relating to the foregoing, mandatory interest and Attorney's fees." Complaint at pg. 1. After sixteen pages of alleged facts, plaintiff then sets forth two claims for relief: one for "Fraud and Fraud in the Inducement" and the other for "Racketeering."

During the initial pre-trial conference the Court raised the issue of the complaint's failure to state claims pursuant to specific subsections of § 523 of the Bankruptcy Code. Plaintiff then indicated that he was relying upon subsections (a)(2)(A) and (B) of § 523. In the Motion to Dismiss, defendants do not address the complaint in terms of whether plaintiff has stated a claim for relief under 11 U.S.C. § 523.

Section 523(a)(2)(A) of the Bankruptcy Code provides in relevant part that:

> (a) a discharge under section 727 . . . 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, . . .

In the Sixth Circuit, creditors seeking to except 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).

Section 523(a)(2)(B) excepts from discharge any debt "for money, property, services, or an extension, renewal, or refinancing of credit" to the extent that such debt was obtained by

> (B) use of a statement in writing –
>
> > (i) that is materially false;
> >
> > (ii) respecting the debtor's or an insider's financial condition;
> >
> > (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> >
> > (iv) that the debtor caused to be made or published with intent to deceive. . . .

Under this section of the Bankruptcy Code, the written statement must concern the debtor's financial condition. *Fifth Third Bank v. Collier (In re Collier),* 231 B.R. 618, 623 (Bankr. N.D.Ohio 1999). Typically, these are statements concerning an entity's overall financial health. *In re Soderlund,* 197 B.R. 742, 745 (Bankr. D.Mass.1996).

Plaintiff's complaint contains 130 paragraphs of factual allegations. Those allegations are replete with facts about four individuals (Dan Tomaszewski, David Schuler, Scott D. Garcia and Robert McVicker) and their meetings with Lester Wise. Plaintiff contends that, pursuant to those meetings, these four individuals and Mr. Wise agreed to form a new corporation that would be called Wise Environmental Technologies, Inc. (the "Corporation"). Lester Wise was to contribute certain inventory and patent and trademark rights to the Corporation and the other four individuals were to contribute capital.

Only fourteen of the 130 factual paragraphs of the complaint include a reference to plaintiff. *See* Complaint ¶¶ 90, 91, 94, 99, 100, 102, 106, 107, 109, 119, 120, 121, 123 and 129. Pursuant to a liberal reading of the facts alleged in those fourteen paragraphs, it appears that plaintiff was hired to do legal work for the Corporation. However, there is no allegation that it was Lester Wise who

contracted with plaintiff for that legal work nor is there an allegation that Mr. Wise ever incurred a debt to plaintiff.

In addition to the 130 paragraphs of factual allegations, plaintiff also attaches to his complaint two documents that he claims to have prepared: an "Agreement to Exchange Assets for Member Units" between Wise Safety Solutions LLC and the Corporation and a "Patent and Trademark Assignment" between Lester Wise and the Corporation. Also attached to the complaint are: (1) a March 27, 2009 letter from D&S Distribution Inc. ("D&S") to Scott Garcia; (2) four 2009 invoices from D&S to Wise Safety Solutions LLC; and (3) a sixty page transcript (plus several exhibits) of a deposition of Michael Marston taken in June, 2010. None of these documents demonstrate that Lester Wise contracted with plaintiff for legal work nor do they constitute an allegation that Mr. Wise incurred a debt to plaintiff.

Based upon the foregoing, the Court finds that plaintiff's complaint has failed to allege sufficient facts to support the threshold finding in a § 523 action - that debtor incurred to debt to plaintiff. Absent such allegation, the complaint has failed to state a claim on which relief can be granted under § 523 of the Bankruptcy Code

As to defendant, Wise Safety Solutions, LLC, plaintiff only makes reference to that defendant in his second claim for relief which is styled as one for "racketeering activity within the meaning of 18[]U.S.C. § § 1961 (1)(B) and 1961 (E) and 1961 (5) and 1962 (c), to wit . . . ." Defendants focused on this cause of action in their Motion to Dismiss and set forth a detailed analysis therein of why plaintiff's complaint failed to state a cause of action for racketeeing against defendants. Based upon that analysis and plaintiff's failure to respond to the Motion to Dismiss, the Court finds that the complaint has failed to state a claim on which relief can be granted under 18 U.S.C. § 1961.

Based upon the foregoing the Court finds that the complaint has not alleged sufficient facts to raise a right to relief against defendants above a merely speculative level. Accordingly, the complaint has failed to state any claim upon which relief can be granted and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). An order consistent with this Memorandum Opinion will be entered separately in this proceeding.

# # #

cc (*via* electronic mail)
JOHN OBERHOLTZER, counsel for defendants
cc (*via* regular US mail)
JAMES HARRELL, *pro se* plaintiff