

IT IS SO ORDERED.



Dated: November 28, 2007
01:43:04 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

LISA D. LARD,
Debtor.

CASE NUMBER 07-40865

TERRENCE P. WILLIAMS,
Plaintiff,

ADVERSARY NUMBER 07-4105

vs.

LISA D. LARD,
Defendant.

THE HONORABLE KAY WOODS

MEMORANDUM OPINION
REGARDING DEFENDANT'S MOTION TO DISMISS
(NOT INTENDED FOR NATIONAL PUBLICATION)

The following opinion is not intended for national publication and carries limited precedential value. The availability of this opinion by any source other than www.ohnb.uscourts.gov is not the result of direct submission by this Court. The opinion is

available for electronic citation at www.ohnb.uscourts.gov pursuant to the E-Government Act of 2002 (Pub. L. No. 107-347).

Defendant/Debtor Lisa Lard ("Debtor") filed a chapter 7 voluntary petition on April 18, 2007. In her petition ("Petition") (Main Case # 07-40865, Doc. # 1), she listed Plaintiff Terrence P. Williams ("Plaintiff") as a creditor holding an unsecured nonpriority claim of \$5,640.00 for money loaned as down payment on a house. (Schedule F). Subject to resolution of this Adversary Proceeding, Debtor received her discharge on August 27, 2007 (Main Case, Doc. # 23).

Plaintiff did not file a claim in the Debtor's bankruptcy case, but commenced this adversary proceeding on August 6, 2007, by filing, *pro se*, Form 104, the Adversary Proceeding Cover Sheet ("Complaint Cover Sheet"), together with an untitled document notifying the Court of Plaintiff's "Objection to Exemption and Discharge of the Debtor" ("Complaint"). (Doc. # 1 at 3).¹ On the Complaint Cover Sheet, Plaintiff (i) requested \$5,000 in relief and (ii) stated the cause of action is based on §§ 542 and 547 of the Bankruptcy Code.

¹Because the First Meeting of Creditors was originally scheduled for June 5, 2007, the last date to object to discharge was August 6, 2007. (Main Case, Doc. # 4). The Complaint Cover Sheet, which Plaintiff filed on August 6, 2007, states that the cause of action is "objection to exemption and Discharge of debt." The Complaint, a typed letter-document also filed on August 6, 2007, purports to "notify the U.S. Bankruptcy Court of the Objection to Exemption[.]" In the margin there is an arrow and the hand-printed words "And Discharge." The Court finds that there is an inconsistency between the Cover Sheet and the Complaint concerning whether Plaintiff intended to object to Debtor receiving a discharge or whether Plaintiff intended that the debt owed to him be found to be non-dischargeable. The limited facts in the Complaint relate only to the debt owed to Plaintiff. There is no indication whatsoever that Plaintiff intended to object to Debtor's general discharge.

Plaintiff filed Objection to Exemption and Discharge of Debt ("Amended Complaint") (Doc. # 10) on September 24, 2007. Debtor filed Motion to Dismiss Plaintiffs [sic] Amended Complaint (Objection to Exemption and Discharge of Debt) (Doc. # 13) on September 28, 2007.

Plaintiff filed a second Objection to Exemption and Discharge of Debt ("Second Amended Complaint") (Doc. # 15) on October 1, 2007, requesting that the \$5,000 debt owed to Plaintiff be found non-dischargeable. Plaintiff alleges that Debtor incurred this debt in connection with the purchase of a certain piece of real property² ("Property"). (Doc. # 15, ¶¶ 6-10).

This matter is before the Court upon Debtor's Motion to Dismiss Second Amended Complaint (Objection to Exemption and Discharge of Debt) ("Motion to Dismiss") (Doc. # 16) filed by Debtor on October 8, 2007. Debtor argues that the Second Amended Complaint fails to state a claim upon which relief can be granted. As set forth below, this Court finds that the Second Amended Complaint fails to state a claim upon which relief can be granted. Pursuant to FED. R. BANKR. P. 7012(b), which incorporates FED. R. CIV. P. 12(b)(6), the Second Amended Complaint must be dismissed.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

²Located at 2685 Flagg Road, Orwell, Ohio 44076.

I. Standard for Review

A party may bring a motion to dismiss for failure to state a claim pursuant to FED. R. CIV. P. 12(b)(6) to test whether a cognizable claim has been pled in the complaint. If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.³ To withstand dismissal, the complaint must (i) provide a short and plain statement of the claim that shows the plaintiff is entitled to relief, (ii) give the defendant fair notice of the claim, and (iii) state the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*,⁴ 355 U.S. 41, 47 (1957).

FED. R. CIV. P. 12(b)(6), applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); see also *Boling v. Correctional Medical Services*, 2007 U.S. Dist. LEXIS 80479, *8-9 (E.D. Mich. Oct. 31, 2007) (Noting *Twombly* "is consistent with the holdings of several prior Sixth Circuit opinions. . . . [holding that a complaint] 'must contain either direct or inferential allegations regarding all the material elements' . . . [and be more than] 'a statement of facts that merely creates a suspicion that the pleader might have

³The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

⁴In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007), the Supreme Court held that the following language from *Conley* had earned its retirement: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. "The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct. at 1969.

a right of action.'" (internal citations omitted)); and *Reid v. Purkey*, 2007 U.S. Dist. LEXIS 42761, *4-5 (E.D. Tenn. June 11, 2007) ("While a complain [sic] need not contain detailed factual allegations, a pleader has a duty to supply, at a minimum, the necessary facts and grounds which will support his right to relief." (citing *Twombly*, 127 S. Ct. at 1964-65)).

In determining the sufficiency of a complaint, the court must construe the complaint in the light most favorable to the plaintiff, accept the allegations set forth as true, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Medical Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (W.D. Tenn. 2003).

"The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under Fed. R. Civ. P. 12(e) for a more definite statement is the proper avenue rather than under Fed. R. Civ. P. 12(b)(6)." *Aldridge*, 282 F. Supp. 2d. at 803 (citing 5A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 1356 (1990)).

However, "the [c]ourt is not required to accept 'sweeping unwarranted averments of fact,'" *Official Comm. of Unsecured Creditors v. Austin Fin. Servs., Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D.N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Power & Tel. Supply Co., Inc. v. Suntrust Banks, Inc.*, 447 F.3d 923, 930 (6th Cir. 2006) ("The court

need not accept legal conclusions or unwarranted factual inferences as true.”).

II. Facts

Plaintiff’s Second Amended Complaint alleges the following: On or about May 28, 2003, Plaintiff bought the Property for \$93,000.00, at the request of Debtor and her husband (“Lards”). (Doc. # 15, ¶¶ 7-8). The Lards agreed to rent the Property from Plaintiff for \$1,000.00 per month and to purchase it from Plaintiff for \$93,000.00. (Doc. # 15, ¶ 8). On December 30, 2003, when the Lards were unable to obtain adequate financing, Plaintiff sold them the Property for \$87,209.19 with the understanding that the Lards would pay Plaintiff the difference between \$93,000.00 and the actual purchase price of \$87,209.19, together with unpaid back rent. (Doc. # 15, ¶ 10). The Lards never paid Plaintiff these monies.⁵ (Doc. # 15, ¶ 11).

Debtor filed the Motion to Dismiss on October 8, 2007. Debtor argues that the Second Amended Complaint “fails to state a claim . . . for which relief can be granted.” (Doc. # 16 at 3).

Plaintiff filed Pre-Objection to Defendants [sic] Motion to Dismiss Plaintiffs [sic] Amended [sic] Complaint (“Pre-Objection”) (Doc. # 17) on October 9, 2007, which asks the Court to provide “continued procedural notification of any non complying matter referencing this case[.]” (Doc. # 17, ¶ 7).

Defendant filed Response to Pre-Objection to Defendants [sic] Motion to Dismiss Plaintiff’s Amended Complaint (Doc. # 18) on

⁵According to Plaintiff, the Lards tendered either two or three checks, which were returned for insufficient funds. (Doc. # 15, ¶ 11).

October 19, 2007, stating "[D]efendant is confused as to the nature and effect" of the Pre-Objection, but "[D]efendant renews her motion to dismiss[.]" (Doc. # 18 at 1).

III. Dischargeability Analysis

Section 523(a) provides several exceptions to the general rule that pre-petition debts are dischargeable under the Bankruptcy Code. Creditors bear the burden of proving by a preponderance of the evidence that a debt is excepted from discharge. See *Meyers v. Internal Revenue Service (In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999) (citing *Grogan v. Garner*, 498 U.S. 279, 290-91 (1991)). Exceptions to discharge are narrowly construed. See *id.* (citing *Grogan*, 498 U.S. at 286-87). See also, *Steier v. Best (In re Best)*, 109 Fed. Appx. 1, 4 (6th Cir. 2004) ("Exceptions to discharge are strictly construed against creditors.").

Sections 523(a)(2)(A) and 523(a)(2)(B) of the Bankruptcy Code implement the "long standing principle of bankruptcy jurisprudence that only those debts honestly incurred are afforded the benefits of a bankruptcy discharge." *Bernard Lumber Co. v. Patrick (In re Patrick)*, 265 B.R. 913, 916 (Bankr. N.D. Ohio 2001). Section 523(a)(2) provides in pertinent part:

(a) A discharge under section 727 . . . of this title 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;

(B) use of a statement in writing--

- (i) that is materially false;
- (ii) respecting the debtor's . . . financial condition;
- (iii) on which the creditor . . . reasonably relied; and
- (iv) that the debtor caused to be made or published with intent to deceive. . . ."

11 U.S.C. § 523 (West 2007).

To satisfy § 523(a)(2)(A), Plaintiff must prove that: (i) Debtor obtained something of value through material misrepresentations that Debtor knew were false or that Debtor made with gross recklessness; (ii) Debtor intended to deceive Plaintiff; (iii) Plaintiff justifiably relied on Debtor's false representations; and (iv) Plaintiff's reliance was the proximate cause of his losses. *Rembert v. AT&T Universal Card Servs., Inc.* (*In re Rembert*), 141 F.3d 277, 280-81 (6th Cir. 1998).

"A determination of nondischargeability under § 523(a)(2)(B) requires proof that the Plaintiff reasonably relied upon false financial documents concerning the Defendants or an insider provided to the Plaintiff by the Defendants who intended to deceive the Plaintiff." *Gilbert v. Brown (In re Brown)*, 352 B.R. 841, 847 (Bankr. E.D. Tenn. 2006).

Subsections (a)(2)(A) and (a)(2)(B) are mutually exclusive.

A debt based upon an oral misrepresentation of financial condition is not actionable and will be dischargeable. Conversely, a debt obtained through fraudulent written statements about a debtor's financial condition will be nondischargeable. As a result of this construction, whether a debt under this section is dischargeable or nondischargeable depends on whether the fraudulent misrepresentation (i) is oral or in writing

and (ii) whether the statement concerns the debtor's financial condition.

Prim Capital Corp. v. May (In re May), 2007 Bankr. LEXIS 2335, *15 (B.A.P. 6th Cir. Jul. 19, 2007).

Finally, where fraud is alleged, the concept of notice pleading is heightened by a requirement of specificity. FED. R. CIV. P. 9(b), made applicable to adversary proceedings pursuant to FED. R. BANKR. P. 7009(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." FED. R. CIV. P. 9(b) (West 2007).

To satisfy FED. R. CIV. P. 9(b), plaintiffs "must, at a minimum allege the time, place and content of the misrepresentations; the defendant's fraudulent intent; the fraudulent scheme; and the injury resulting from the fraud." *Power & Tel. Supply Co., Inc. v. SunTrust Banks, Inc.*, 447 F.3d 923, 931 (6th Cir. 2006). Plaintiffs "must state with particularity the specific circumstances giving rise to the complaint." *In re Schwartzman*, 63 B.R. 348, 355 (Bankr. S.D. Ohio 1986) (citing *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d. 389, 394 (6th Cir. 1975)).

IV. Analysis

Plaintiff checked boxes on the Complaint Cover Sheet stating that his Complaint was based on § 542 (turnover of property) and § 547 (preferences) of the Bankruptcy Code. However, §§ 542 and 547 actions belong to the chapter 7 trustee; they may not be used by individual creditors to collect pre-petition debt. *Society Bank v. Sinder (In re Sinder)*, 102 B.R. 978, 982 (Bankr. S.D. Ohio 1989)

("The Bankruptcy Code by clear and specific language vests the power to bring actions pursuant to [§§ 542 and 547] in the bankruptcy trustee. . . . Courts have unwaveringly honored these Code provisions and foreclosed attempts by other parties to share, or appropriate to themselves, these statutorily conferred powers of a bankruptcy trustee."). See also *Access Lending Corp. v. Scott* (*In re Scott*), 2006 Bankr. LEXIS 44, *13 (Bankr. N.D. Ill. Jan. 18, 2006) ("[A] creditor has no standing to seek turnover under section 542.") and *Met-Al, Inc. v. Gabor* (*In re Metal Brokers Int., Inc.*), 225 B.R. 920 (Bankr. E.D. Wis. 1998) (Holding that an individual creditor has no standing to bring a preference action under § 547 of the Bankruptcy Code.).

The Second Amended Complaint expressly requests that the \$5,000.00 debt be declared "non-dischargeable" and that Plaintiff be awarded this amount plus the costs of bringing this action. (Doc. # 15, unnumbered ¶ 13). Section 523 contains an enumerated list of debt categories that are nondischargeable. Plaintiff fails to indicate a specific ground for nondischargeability in any of his pleadings. Given the nature of the debt, it would appear that the only possible applicable category would be § 523(a)(2).⁶

Section 523(a)(2), as detailed above, prevents the discharge of debt incurred through fraudulent means. In the present case,

⁶The \$5,000 clearly does not fall within any of the other § 523 categories: (1) tax, (3) debt to an unnamed creditor, (4) result of fiduciary misconduct, (5) domestic support obligation, (6) injury to person or property, (7) governmental fine, (8) student loan, (9) personal injury committed while debtor was intoxicated, (10) non-discharged debt from a former bankruptcy case, (11) incurred while acting as fiduciary for a depository institution, (12) bank debt owed a Federal agency, (13) ordered restitution for a criminal act, (14) tax or fine, (15) domestic support obligation, (16) condominium fee, (17) court filing fee imposed on prisoner, (18) pension plan debt, (19) violation of Federal securities law.

Plaintiff has alleged no fraud, nor does he plead any facts that would imply fraud. On the contrary, Plaintiff apparently knew that Debtor's "lender would not loan [Debtor and her husband] the money necessary to purchase the home for the \$93,000.00" from Plaintiff before he sold them the Property for \$87,409.19. (Doc. # 15, ¶ 9-10). It was the Debtor's financial difficulties, in fact, that created the need for the parties' loan agreement.⁷ Plaintiff also knew at the time of the sale that Debtor and her husband were behind on the rent. *Id.* Plaintiff does not allege that Debtor misled him in any way or misrepresented her financial situation, either orally or in writing. He does not indicate that he was confused or tricked by Debtor. His complaint is simply that Debtor promised, yet failed, to pay him the difference between the \$93,000.00 and the purchase price, as well as back rent.

Despite any promises to do so, Debtor's failure to pay her debt to Plaintiff is, at most, a breach of contract. Breach of contract is not sufficient to support nondischargeability under § 523(a)(2). "[F]or purposes of a purported misrepresentation under 11 U.S.C. § 523(a)(2)(A), courts ordinarily distinguish a knowing misstatement of a prior fact, which ordinarily falls within § 523(a)(2)(A), and a promise of future performance that is subsequently not performed, which ordinarily does not." *Bohannon v. Horton (In re Horton)*, 372 B.R. 349, 357 (Bankr. W.D. Ky. 2007). See also 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][d] (Alan R. Resnick &

⁷It appears that Plaintiff's actions were motivated, at least in part, by charitable intent. He alleges that he purchased the Property "at the request of [the Lards] to maintain this parcel as part of the family farm" (Doc. # 15, ¶ 7) and refers to his actions as "gestures of good will toward providing a home for the [Debtor]" (Doc. # 17, ¶ 7).

Henry J. Sommer eds., 15th ed. 2007) ("The failure to perform a mere promise is not sufficient to make a debt nondischargeable, even if there is no excuse for the subsequent breach.").

Finally, Plaintiff filed the Pre-Objection. Like Debtor, the Court is puzzled about the nature and purpose of this pleading. The Pre-Objection could be construed as a request for the Court to provide instruction and an opportunity for Plaintiff to further amend his Complaint. Plaintiff asks to be notified by the Court of any "improprieties relative to the laws related to the matters within" (Doc. # 17, ¶ 4). Plaintiff further notes that "[w]ithin these proceedings the Court sends out preprinted forms with the appropriate boxes checked to advise [the parties] on any necessities relative to pertinent issues."⁸ *Id.* However, the deficiencies in the Second Amended Complaint are not ones of form, but of substance, which cannot be cured by merely rewording the complaint. "In the context of amendments to complaints, . . . when amendment is futile, leave should be denied. . . . 'Futility means that the complaint, as amended, would fail to state a claim upon which relief could be granted.'" *Shaw v. MRO Software, Inc.*, 2006 U.S. Dist. LEXIS 69550, *4 (E.D. Mich. Sep. 27, 2006) (quoting *Glassman v. Computervision Corp.*, 90 F.3d 617, 623 (1st Cir. 1996)). The standard for futility is whether a proposed amended complaint would withstand a motion to dismiss under FED. R. CIV. P. 12(b)(6). *Boling*, 2007 U.S. Dist. LEXIS 80479 at *5.

⁸It seems likely that Plaintiff is referring to the Notice of Filing Deficiency (Doc. # 12) entered by the Court on September 24, 2007, which notified Plaintiff that he had incorrectly identified the parties in the Amended Complaint. The Court also issued an Order (Doc. # 8) on September 12, 2007, directing Plaintiff to amend the Complaint to comply with FED. R. BANKR. P. 7008(a).

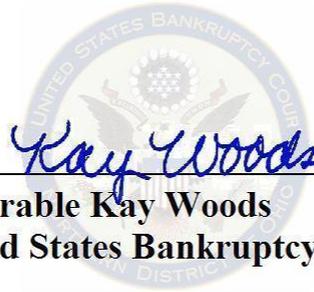
V. Conclusion

Viewing the Second Amended Complaint in the light most favorable to Plaintiff, Plaintiff has failed (i) to allege grounds for non-dischargeability of a debt as required by Section 523 of the Bankruptcy Code, or (ii) to state any other applicable section of the Bankruptcy Code as a basis for relief. Plaintiff's Second Amended Complaint fails to state a claim upon which relief can be granted. To the extent that Plaintiff's Pre-Objection is a motion for leave to amend the complaint, it is denied. Accordingly, Debtor's Motion to Dismiss is hereby granted.

An appropriate order will follow.

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IT IS SO ORDERED.



Dated: November 28, 2007
01:43:04 PM

Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

LISA D. LARD,
Debtor.

CASE NUMBER 07-40865

TERRENCE P. WILLIAMS,
Plaintiff,

ADVERSARY NUMBER 07-4105

vs.

LISA D. LARD,
Defendant.

THE HONORABLE KAY WOODS

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND
DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

For the reasons set forth in this Court's Memorandum Opinion entered this date, Plaintiff's Objection to Exemption and Discharge of Debt (Doc. # 15) fails to state a claim upon which relief can be granted. To the extent that Plaintiff's Pre-Objection to Defendants [sic] Motion to Dismiss Plaintiffs [sic]

Ammended [sic] Complaint (Doc. # 17) is a motion for leave to amend the Complaint, it is denied. Accordingly, Debtor's Motion to Dismiss Second Amended Complaint (Doc. # 16) is hereby granted.

IT IS SO ORDERED.

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