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This matter is before the Court on the Motion to Dismiss ("Motion to Dismiss") (Doc. # 25) filed by Debtor/Defendant James E. Gray ("Debtor") on March 14, 2008. Plaintiff Estate of Shimon Zuckerman ("Plaintiff") filed Response to Defendant James E. Gray's Motion to Dismiss ("Plaintiff's Response") (Doc. # 35) on April 7, 2008. The Motion to Dismiss asserts that Plaintiff is "not the real party in interest for the underlying transaction[]" because "the loan on which the Complaint is based[] was made by an Ohio Corporation, Shimon Zuckerman, Inc." (Motion to Dismiss at 1.) For the reasons given below, the Court finds that the Motion to Dismiss is not well taken.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (District Court General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (I), (J) and (O). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

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. 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*, 355 U.S. 41, 47 (1957).

FED. R. CIV. P. 12(b)(6), which is 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).¹ The Court of Appeals for the Sixth Circuit noted:

[in *Twombly*, t]he Supreme Court has recently clarified the law with respect to what a plaintiff must plead in order to survive a Rule 12(b)(6) motion. . . . The Court stated that "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." Additionally, the Court emphasized that even though a complaint need not contain "detailed" factual allegations, its "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."

Association of Cleveland Fire Fighters v. City of Cleveland, 502 F.3d 545, 548 (6th Cir. 2007) (citations omitted) (second alteration in original). See also, *Nicholson v. Countrywide Home Loans*, No. 1:07-CV-3288, 2008 U.S. Dist. LEXIS 20714, *6 (N.D. Ohio March 17, 2008) ("Accordingly, the claims set forth in a complaint must be plausible, rather than conceivable." (citing *Twombly*, 127 S. Ct. at 1974)); *Boling v. Correctional Medical Services*, No. 07-11752, 2007 U.S. Dist.

¹In *Twombly*, 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.

LEXIS 80479, *8-9 (E.D. Mich. Oct. 31, 2007) (Noting *Twombly* "is consistent with the holdings of several prior Sixth Circuit opinions. . . . [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 a right of action.'" (citations omitted)); and *Reid v. Purkey*, No. 2:06-CV-40, 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 its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). "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 v. United States*, 282 F. Supp. 2d. 802, 803 (W.D. Tenn. 2003) (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

Assuming all of Plaintiff's well-pleaded allegations are true, the background facts relevant to this Opinion are as follows.

Debtor and third-parties Edward Zamarelli, William Zamarelli, and Charles Wern (collectively with Debtor, "Titusville Shareholders") were the only shareholders in Titusville Ford Lincoln-Mercury, Inc. ("Titusville"). (Complaint ¶ 5.) Shimon Zuckerman ("Zuckerman") was the sole shareholder in Shimon Zuckerman, Inc. ("Zuckerman, Inc.") (Plaintiff's Response at unnumbered 3.)

In early 1990, Debtor (i) "while representing [Zuckerman] in other legal matters, maliciously and fraudulently misrepresented the financial condition of Titusville in order to convince [Zuckerman] to invest additional² monies and/or assist Titusville to obtain loans or additional monies[]" (Complaint ¶ 7), and (ii) facilitated a \$100,000.00 loan from Society Bank to Zuckerman, Inc. (Complaint ¶¶ 8-9), which was personally guaranteed by Zuckerman (Plaintiff's Response at unnumbered 2). Zuckerman "only executed the aforementioned loan documents pursuant to Debtor's assurances that [the Titusville Shareholders] would execute personal guarantees in the amount of \$25,000.00 each." (Complaint ¶ 10.) Zuckerman executed the

²In addition to the 1990 \$100,000.00 loan at issue in this case, "Debtor facilitated a loan from [Zuckerman] to Titusville in the amount of at least \$60,000.00[]" in 1989. (Complaint ¶ 6.) This loan is not the subject of this Adversary Proceeding.

loan papers and transferred the \$100,000.00 to Titusville. (Complaint ¶ 11.) Debtor issued a personal guarantee of \$25,000.00, and each of the remaining Titusville Shareholders "purported to grant [Zuckerman] personal guarantees" for \$20,000.00. (Complaint ¶ 13.) "[I]t has been alleged that the Debtor fraudulently forged the executed signatures of one or more of [the Titusville Shareholders]." (Complaint ¶ 15.) When Titusville defaulted, Zuckerman "paid the balance due and owing of over \$87,000.00 to Society Bank." (Plaintiff's Response at unnumbered 2.)

On July 20, 2004, Zuckerman filed a complaint in the Trumbull County Court of Common Pleas, Case No. 2004-CV-1721, against the Titusville Shareholders ("State Court Action"). (Complaint ¶ 14.)

III. PROCEDURAL HISTORY

Debtor filed a chapter 13 voluntary petition on October 14, 2004.³ With the voluntary petition, Debtor filed Schedule F, which listed Sherman Zuckerman⁴ as the holder of an unsecured nonpriority claim of \$20,000.00. (Main Case, No. 04-45006, Doc. # 1.) Debtor amended Schedule F three times, adding creditors on November 30, 2004 (Main Case, Doc. # 11), August 24, 2005 (Main Case, Doc. # 33), and July 2, 2007 (Main Case, Doc. # 108), but Debtor did not schedule any additional debt owed to either Zuckerman or to Zuckerman, Inc. Debtor listed the State Court Action on his Statement of Financial Affairs,

³Debtor voluntarily converted the case to chapter 7 on October 24, 2006.

⁴Both parties refer to Zuckerman intermittently as "Shimon Zuckerman" and "Sherman Zuckerman," but it appears to the Court that both names indicate the same person.

filed November 8, 2004. (Main Case, Doc. # 5.)

Zuckerman filed an unsecured nonpriority claim for \$100,000.00 on December 20, 2004 ("Claim # 7"). Zuckerman attached copies of four personal guarantees to Claim # 7: one for \$25,000.00 purportedly signed by James E. Gray and three others for \$20,000.00 each, apparently signed by Bill Zamarelli, Ed Zmarelli, and Charles E. Wern, respectively.⁵ Debtor has not objected to Claim # 7.

Zuckerman initiated this Adversary Proceeding ("AP") on January 30, 2007. (AP, Doc. # 1.) On September 17, 2007, Zuckerman filed Amended Complaint to Determine Dischargeability of Debt and to Obtain Relief ("Complaint") (AP, Doc. # 17), which is the complaint currently before the Court. On March 15, 2008, Motion to Substitute Party Plaintiff was filed to substitute the Estate of Shimon Zuckerman for Zuckerman, who died November 1, 2007. (AP, Doc. # 27.)

IV. LEGAL ANALYSIS

The Motion to Dismiss requests the Adversary Proceeding be dismissed because neither Plaintiff nor any other party have standing to maintain the Complaint. Debtor argues that "the loan on which the Complaint is based[] was made by an Ohio Corporation, Shimon Zuckerman, Inc. . . . the Plaintiff's corporation, not the individual. Furthermore, the corporation has since been liquidated and dissolved and thus does not exist to substitute as a party."⁶ (Motion to

⁵Claim # 7 names "Sherman Zuckerman" as creditor, but the personal guarantees were made out to "Shimon Zuckerman."

⁶Debtor references both the Society Bank loan document and a state court judgment as evidence supporting his assertion, but neither document have been filed with this Court.

Dismiss at unnumbered 1.)

In response, Plaintiff asserts that, under Ohio Revised Code ("O.R.C.") § 1701.88, "if the proper party were Shimon Zuckerman, Inc [sic] all claims of Shimon Zuckerman, Inc. would revert to its sole shareholder, Shimon Zuckerman." (Plaintiff's Response at unnumbered 3.) Plaintiff goes on to note, "even if it [is] determined that Shimon Zuckerman Inc [sic] was the proper party, Shimon Zuckerman Inc. was not named as a creditor in the Debtor's Chapter 13 petition[.]" (*Id.* at unnumbered 4.)

The ability of an Ohio corporation to bring suit is governed by O.R.C. § 1701.88, which provides, in pertinent part:

(A) When a corporation is dissolved voluntarily, . . . the corporation shall cease to carry on business and shall do only such acts as are required to wind up its affairs

(B) Any claim existing or action or proceeding pending by or against the corporation or which would have accrued against it may be prosecuted to judgment, with right of appeal as in other cases

. . . .

(D) The directors of the corporation and their survivors or successors shall act as a board of directors in accordance with the regulations and bylaws until the affairs of the corporation are completely wound up. Subject to the orders of courts of this state having jurisdiction over the corporation, the directors shall proceed as speedily as is practicable to a complete winding up of the affairs of the corporation and, to the extent necessary or expedient to that end, shall exercise all the authority of the corporation.

O.R.C. § 1701.88 (LexisNexis 2008) (emphasis added).

As the statute implies, whether a dissolved corporation, or its successors in interest, may bring an action is a question that turns on factual issues of purpose and timing. "[O.]R.C. [§] 1701.88(D)

allows for successors in interest to a corporation to sue. [O.]R.C. [§] 1701.88(B) allows a dissolved corporation to sue. . . . Both of these statutory provisions require that the action be maintained for the sole purpose of winding up the corporation." *Kiraly v. Bonanno, Inc.*, No. 18250, 1997 Ohio App. LEXIS 4753, *4-5 (Ohio App. Oct. 29, 1997). A dissolved corporation "has no standing to pursue a claim that did not exist when the company was incorporated." *Alpha Telecommunications, Inc. v. IBM Corp.*, No. 1:06 CV 1110, 2006 U.S. Dist. LEXIS 60136, *11 (N.D. Ohio Aug. 24, 2006) (finding that a claim for breach of contract accrued when the plaintiff corporation sent the defendant an invoice for the work in question). "The determination of whether the corporation or the shareholder is the real party in interest depends upon whether . . . [inter alia,] the process of winding up the affairs of the corporation is still in progress." *Bodley-Dunn, Inc. v. Dye*, No. 76AP-895, 1977 Ohio App. LEXIS 8249, *7-8 (Ohio App. Apr. 5, 1977) (holding that this determination is a factual issue). Here, (i) the date of the claim's accrual, and (ii) the status of the winding up process for Zuckerman, Inc. at the time the claim was filed, remain to be determined.

These factual questions cannot be resolved by way of the Motion to Dismiss. However, the Court need not resolve these issues to find that the Motion to Dismiss is not well taken. Debtor's own conduct supports denial of the Motion to Dismiss. Debtor failed to (i) list Zuckerman, Inc. as a creditor on Schedule F, and/or (ii) object to Claim # 7 filed by Zuckerman. In addition, Debtor signed a personal guarantee made out to Zuckerman, not Zuckerman, Inc., and provided Zuckerman with similar additional signed guarantees in the names of the other Titusville Shareholders. In short, Debtor has himself been

inconsistent in his identification of this creditor.

Taking the allegations of the Complaint as true, Plaintiff has pled sufficient facts to state a cause of action against Debtor. The Complaint alleges that Zuckerman (i) personally guaranteed the loan to Society Bank; (ii) personally paid back more than \$87,000.00 of that loan; and (iii) executed the loan documents only upon assurances by Debtor and guarantees issued personally to Zuckerman from each of the Titusville Shareholders. As a consequence, Plaintiff has pled sufficient facts to withstand the motion to Dismiss. The Motion to Dismiss is not well taken, and will be denied

V. CONCLUSION

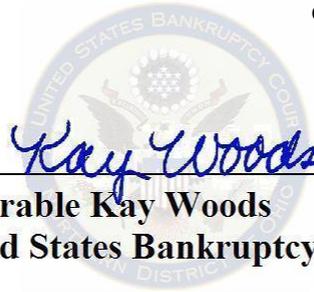
Viewing the Complaint in the light most favorable to Plaintiff, this Court does not find that Plaintiff has failed to state a claim upon which relief can be granted. Accordingly, Debtor's Motion to Dismiss will be denied. An appropriate order will follow.

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

JAMES E. GRAY,

Debtor.

ESTATE OF SHIMON ZUCKERMAN,

Plaintiff,

vs.

JAMES E. GRAY,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby denies Defendant's Motion to Dismiss.