

R. Pugliese on October 2, 2012. Plaintiff Richard Mealle did not respond to the Motion to Dismiss. For the reasons set forth herein, the Court will grant the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). 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 Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

Debtor/Defendant Daniel R. Pugliese filed a voluntary petition pursuant to chapter 7 of Title 11, United States Code, on May 21, 2012. (Main Case, Doc. # 1.)¹ On September 11, 2012, Plaintiff Richard Mealle filed Complaint Objecting to Discharge of Debt ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding against Pugliese. The following facts are derived from the Complaint, which, for purposes of the Motion to Dismiss, the Court will view in the light most favorable to Mealle.

Pugliese is the sole member of R.P. Properties, LLC ("R.P. Properties").² (Compl. ¶ 7.) On April 15, 2007, R.P. Properties

¹All docket references refer to this adversary proceeding unless the Main Case is indicated.

²Both Pugliese in the Petition and Mealle in the Complaint list the subject company as "RP Properties, LLC." (See Main Case, Doc. # 1, at 1; Compl. ¶ 9.) However, the Court's search of the Ohio Secretary of State's website reveals that the entity's proper legal name is R.P. Properties, Ltd. According to the Secretary of State's website, R.P. Properties, Ltd. is an active Ohio limited

executed a Cognovit Promissory Note ("Note") in favor of Mealle in the amount of \$50,000.00, payable in quarterly installments, with ten percent (10%) interest thereon.³ (*Id.* ¶ 8.) Approximately two weeks later, R.P. Properties, through the actions of Pugliese, purchased real property located at 5857 North Ridge Road West, Ashtabula, Ohio ("Property") for \$30,000.00. (*Id.* ¶ 9.) On July 17, 2007, R.P. Properties, again through Pugliese, transferred the Property to Pugliese without consideration. (*Id.* ¶ 10.) Pugliese collects royalty payments from an oil and gas well located on the Property. (*Id.* ¶ 16.) The Property's estimated value is \$60,000.00. (*Id.* ¶ 17.)

Based on the allegedly improper transfer of the Property from R.P. Properties to Pugliese, the Complaint sets forth three causes of action. Count One asserts that the debt under the Note is nondischargeable pursuant to 11 U.S.C. § 523(a)(2) because the transfer of the Property "had the effect of removing said property from the ambit of [Mealle's] lien" when Mealle took judgment on the Note.⁴ (*Id.* ¶ 11.) Count Two alleges that the debt is nondischargeable under 11 U.S.C. § 523(a)(6) because Pugliese

liability company formed by Pugliese for the purpose of investing, managing and developing real estate for profit. The Court will assume that Pugliese and Mealle intend to reference R.P. Properties, Ltd. in this adversary proceeding.

³Although the Complaint states that a copy of the Note is attached thereto as Exhibit A (see Compl. ¶ 8), the Note is not attached.

⁴The Complaint does not specify when Mealle obtained judgment on the Note. However, Pugliese's Statement of Financial Affairs indicates that judgment was entered in the Ashtabula County Court of Common Pleas, Case No. 2009 CV 01203. (Main Case, Doc. # 10.)

willfully and maliciously transferred the Property in violation of Mealle's rights and with knowledge that the transfer would limit Mealle's ability to recover under the Note. In Count Three for piercing the corporate veil, Mealle argues that Pugliese exercised dominion and control over R.P. Properties such that he should be held personally responsible for the company's injurious actions toward Mealle. Mealle asks the Court (i) to hold Pugliese individually liable for the debt that R.P. Properties owes to Mealle under the Note; and (ii) to deny the discharge of the debt.

Pugliese moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Pugliese first argues that the time period within which to file a complaint objecting to discharge has expired. He then argues with respect to Count One that Mealle fails to allege the necessary elements of fraud. Specifically, Pugliese claims that the Complaint does not identify any misrepresentations regarding the Property or establish Mealle's justifiable reliance on such misrepresentations. With respect to Count Two, Pugliese argues that Mealle has not alleged a legal interest in the Property and thus could not have been injured by its transfer. Finally, with respect to Count Three, Pugliese contends that the determination of whether he is personally liable for R.P. Properties' debt to Mealle is properly resolved through the claims allowance process and is irrelevant to the dischargeability of the debt.

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 12(b)(6), made applicable to the instant adversary proceeding by Federal Rule of Bankruptcy Procedure 7012(b), requires that a pleading containing a claim for relief be dismissed if it fails to "state a claim upon which relief can be granted." FED. R. CIV. P. 12 (West 2012); FED. R. BANKR. P. 7012 (West 2012). A claim will be dismissed if it fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 556). A claim does not need to contain "'detailed factual allegations,'" but it must contain more than mere "'labels and conclusions'" or "'a formulaic recitation of the elements of a cause of action.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). As a consequence, a claim "'must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory.'" *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008) (quoting *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005)).

In determining whether a claim alleges enough facts to survive a motion to dismiss, 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); see also *Twombly*, 550 U.S. at 555. Although the court "must accept all well-pleaded factual allegations in the complaint as true, [it] need not 'accept as true a legal conclusion couched as a factual allegation.'" *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555).

III. ANALYSIS

As an initial matter, Pugliese contends in the Motion to Dismiss that the Complaint objecting to discharge under 11 U.S.C. § 727 is untimely. The only reference to § 727 is in paragraph 1 of the Complaint, which states, "This is an adversary proceeding objecting to the dischargeability of the debt Defendant owes Plaintiff under sections 523 and 727 of the Bankruptcy Code" (Compl. ¶ 1 (emphasis added).) The Complaint deals solely with the dischargeability of a single debt; nowhere in the Complaint does Mealle allege that Pugliese should be denied a discharge. The Complaint does not request relief under § 727 or allege any facts to support a claim for denial of Pugliese's discharge. Pugliese is correct that the time period for asserting a cause of action to deny his discharge has expired and, thus, any attempt by Mealle to allege a cause of action under § 727 would now be untimely. Accordingly, the Court will limit its analysis to the causes of action specifically enumerated in the Complaint.

A. Dischargeability of Debt under § 523

Mealle contends in Counts One and Two of the Complaint that the debt owed him under the Note is nondischargeable pursuant to 11 U.S.C. § 523. Section 523 identifies certain types of debt that are not dischargeable, even if an individual debtor is otherwise eligible for discharge. Exceptions to discharge under § 523 are narrowly construed against the creditor and in favor of the debtor. See *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). The creditor bears the burden of proving by a preponderance of the evidence that an exception to discharge applies. See *Castle Nursing Home v. Sullivan (In re Sullivan)*, 19 F. App'x 180, 181 (6th Cir. 2001) (citing *Grogan v. Garner*, 498 U.S. 279, 291 (1991)).

1. Section 523(a)(2)

Section 523(a)(2) provides that a discharge in bankruptcy does not relieve an individual debtor of certain obligations, including those for money obtained by fraud. See *Grogan*, 498 U.S. at 280-81. Specifically, § 523(a)(2) provides:

(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 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[.]

11 U.S.C. § 523(a)(2) (West 2012). Section 523(a)(2) creates two distinct grounds upon which a debt may be held nondischargeable. See *Toyota Motor Credit Corp. v. Pittman (In re Pittman)*, Adv. No. 04-1472, 2006 Bankr. LEXIS 4139, *7 (Bankr. N.D. Ohio Apr. 20, 2006). Because the Complaint does not specify the applicable subsection of § 523(a)(2), the Court will evaluate both provisions.

a. Section 523(a)(2)(A)

Section 523(a)(2)(A) provides that a debt is not dischargeable if it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). Allegations of fraud made pursuant to § 523(a)(2)(A) must satisfy the heightened pleading requirements imposed by Federal Rule of Civil Procedure 9(b). See *Jones v. Moody (In re Moody)*, Adv. No. 12-1001, 2012 Bankr. LEXIS 2808, *1-2 (Bankr. S.D. Ohio June 4, 2012); cf. *St. Marys Cement Co. v. Leach (In re Leach)*, Adv. No. 08-6046, 2009 Bankr. LEXIS 1435 (Bankr. N.D. Ohio Mar. 26, 2009) (applying Rule 9(b) to § 523(a)(2)(B) claim). Rule 9(b), made

applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7009, provides that a plaintiff "must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b) (West 2012); FED. R. BANKR. P. 7009 (West 2012). "This rule requires a plaintiff: (1) to specify the allegedly fraudulent statements; (2) to identify the speaker; (3) to plead when and where the statements were made; and (4) to explain what made the statements fraudulent." *Republic Bank & Trust Co. v. Bear Stearns & Co.*, 683 F.3d 239, 247 (6th Cir. 2012) (citing *Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935, 942-43 (6th Cir. 2009)).

Reviewed in its entirety, the Complaint lacks the requisite factual specificity to establish a cause of action for fraud. The Complaint fails to identify any allegedly fraudulent statement or representation upon which Count One is based. The Complaint is likewise devoid of any specific facts concerning the time, place, content or maker of an allegedly fraudulent statement. The Complaint merely sets forth the conclusory - and legally insufficient - allegations that Pugliese defrauded Mealle by acquiring and transferring the Property on behalf of R.P. Properties. Construing these facts in the light most favorable to Mealle, the Complaint fails to satisfy Rule 9(b).

Count One of the Complaint fails for the additional reason that Mealle cannot establish the elements of a § 523(a)(2)(A) claim as a matter of law. To except a debt from discharge under

§ 523(a)(2)(A), a creditor must prove "(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 its 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 loss." *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (n.2 omitted).

Under § 523(a)(2)(A), "false representations and false pretenses encompass statements that falsely purport to depict current or past facts." *Done Right Builders v. Kaiser (In re Kaiser)*, Adv. No. 10-3109, 2012 Bankr. LEXIS 2999, *11 (Bankr. N.D. Ohio June 29, 2012) (internal quotations omitted).

Misrepresentations concerning future events generally are not actionable. As such, a breach of a promise to pay, without more, is insufficient to establish fraud under § 523(a)(2)(A). *See id.*; *see also Stifter v. Orsine (In re Orsine)*, 254 B.R. 184, 189 (Bankr. N.D. Ohio 2000) (explaining that the fraud contemplated by § 523(a)(2)(A) "sounds in tort and not in contract, and therefore a mere promise to be carried out in the future is not sufficient to bar the discharge of a debt, even though there is no excuse for the subsequent breach.").

The Complaint fails to allege that Pugliese materially misrepresented any of the circumstances surrounding the execution of the Note and loan to R.P. Properties. The Complaint also does not allege that Pugliese intended to deceive Mealle when the Note

was executed. At most, the Complaint establishes that R.P. Properties, through the actions of Pugliese, breached its promise to repay Mealle by defaulting under the Note. Without any additional allegations of fraudulent conduct, R.P. Properties' breach is insufficient to establish fraud under § 523(a)(2)(A). Indeed, if the debt under the Note could be held nondischargeable based simply on R.P. Properties' default, almost all debts could become nondischargeable obligations in bankruptcy because all voluntary creditors are induced, to some extent, to extend credit by a debtor's promise to pay. Such a result would render meaningless the otherwise narrow exception to discharge under § 523(a)(2)(A).

The Complaint also fails to establish Mealle's reliance on or resulting loss from Pugliese's alleged fraud. Mealle does not claim that he knew that R.P. Properties planned to acquire the Property after executing the Note. Likewise, Mealle does not contend that R.P. Properties or Pugliese conveyed or promised to convey the Property to him to secure the Note. Rather, when Mealle loaned money to R.P. Properties under the Note, neither R.P. Properties nor Pugliese owned the Property, and the debt was unsecured. Because Mealle voluntarily extended unsecured credit, he may not now look to the Property to secure his loan. Had R.P. Properties defaulted under the Note before the Property was acquired or before it was transferred to Pugliese, Mealle would be in exactly the same position in which he now finds himself, *i.e.* holding wholly

unsecured debt as a judgment creditor. Without a security interest in the Property, Pugliese's disposition and use of the Property could not have injured Mealle or impaired his ability to enforce the Note as a matter of law. As a consequence, Mealle fails to state a cause of action under § 523(a)(2)(A).

b. Section 523(a)(2)(B)

Under § 523(a)(2)(B), a debt may not be discharged if the debtor made a false statement in writing respecting the debtor or an insider's financial condition. 11 U.S.C. § 523(a)(2)(B) (West 2012). The plaintiff must prove that the debt was obtained by use of a statement "(1) in writing; (2) that is materially false; (3) respecting the debtor's or an insider's financial condition; (4) on which the creditor to whom the debtor is liable for money, property, services, or credit reasonably relied; [and] (5) that the debtor caused to be made or published with intent to deceive." *Giant Eagle, Inc. v. Monus (In re Monus)*, 294 B.R. 707, 713 (Bankr. N.D. Ohio 2003), *aff'd*, 167 F. App'x 494 (6th Cir. 2006).

The Complaint fails to establish at least one essential element of a cause of action under § 523(a)(2)(B). Section 523(a)(2)(B), by its very terms, requires the existence of a writing to state a claim for nondischargeability. See *Prim Capital Corp. v. May (In re May)*, Adv. No. 05-1098, 2006 Bankr. LEXIS 4196, *10 (Bankr. N.D. Ohio Aug. 14, 2006) ("A writing is the *sine qua non* of section 523(a)(2)(B) nondischargeability.") The Complaint contains no allegations that Pugliese provided Mealle with any written statement

in connection with the loan and Note, let alone a written statement that satisfies the remaining elements of § 523(a)(2)(B). Absent allegations of a written statement, the Complaint fails to establish a claim under § 523(a)(2)(B). Accordingly, Count One will be dismissed.

2. Section 523(a)(6)

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6) (West 2012). To satisfy the requirement in § 523(a)(6) that the injury be willful, the plaintiff must show that the debtor either (i) intended or desired harm; or (ii) believed that injury was substantially likely to result from his conduct. See *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 465 n.10 (6th Cir. 1999). The malice requirement is satisfied by proof that the debtor acted "in conscious disregard of [his] duties or without just cause or excuse." See *Monsanto Co. v. Trantham (In re Trantham)*, 304 B.R. 298, 308 (B.A.P. 6th Cir. 2004) (internal citations omitted).

To establish a willful and malicious injury for purposes of § 523(a)(6), the plaintiff must typically allege that the debtor committed an intentional tort. *Musilli v. Droomers (In re Musilli)*, 379 F. App'x 494, 498 (6th Cir. 2010) (setting forth a non-exclusive list of intentional torts giving rise to nondischargeability under § 523(a)(6)). Only deliberate injuries - and not mere deliberate acts - rise to the level of willful and malicious injury for

purposes of § 523(a)(6). See *Kennedy v. Mustaine (In re Kennedy)*, 249 F.3d 576, 581 (6th Cir. 2001) (citing *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998)). As under § 523(a)(2), breach of contract is insufficient to deny a discharge under § 523(a)(6). See *Schafer v. Rapp (In re Rapp)*, 375 B.R. 421, 436 (Bankr. S.D. Ohio 2007) (citing *Salem Bend Condo. Ass'n v. Bullock-Williams (In re Bullock-Williams)*, 220 B.R. 345, 347 (B.A.P. 6th Cir. 1998)).

Mealle cannot establish a willful and malicious injury to support a claim for nondischargeability under § 523(a)(6). First, the Complaint sets forth no facts to establish that Mealle sustained an injury to his legal rights. For a debt to be nondischargeable under § 523(a)(6), the injury must invade the creditor's legal rights, not merely his economic interests or expectancies. See *Steier v. Best (In re Best)*, 109 F. App'x 1, 6 (6th Cir. 2004) (citations omitted). The Complaint does not allege that the Property at any time secured the Note or that Mealle had a lien against it. At most, Mealle asserts that, once he obtained a judgment on the Note, he would be able to assert a lien on property held by R.P. Properties and the transfer of the Property to Pugliese "remov[ed] said property from the ambit of Plaintiff's lien when he took Judgment on the said Cognovit Note." (Compl. ¶ 11.) Without title or claim to the Property, Mealle has no legal interest that stands to be hindered by Pugliese's disposition and use of the Property. While Pugliese's actions may have caused Mealle to lose an opportunity to collect on his judgment, they do not constitute

an invasion of Mealle's legal rights sufficient to state a claim for nondischargeability.

Moreover, even accepting the premise that R.P. Properties transferred the Property to Pugliese to limit Mealle's recovery under the Note, as alleged in the Complaint, such actions are insufficient to satisfy § 523(a)(6). Efforts to thwart the collection of judgment debt do not render the debt nondischargeable pursuant to § 523(a)(6) because such actions do not give rise to the debt. See *In re Best*, 109 F. App'x at 6; see also *Nat'l Auto Fin. Co. v. Smith (In re Smith)*, 249 B.R. 748 (Bankr. S.D. Ohio 2000). Mealle's injury occurred when R.P. Properties breached the terms of the Note, as evidenced by the judgment lien against it. Even if Pugliese's conduct hindered Mealle's subsequent efforts to collect the debt, such conduct does not cause the debt to become nondischargeable.

Finally, the Complaint does not contain any facts to suggest that Pugliese deliberately injured Mealle. The Complaint does not allege that Pugliese or R.P. Properties intended to injure Mealle by (i) refusing to convey the Property to Mealle; or (ii) defaulting under the Note. The Complaint likewise does not allege that Pugliese knew or should have known that his acquisition of the Property would hinder Mealle's rights under the Note in any way. As a consequence, any injury of which Mealle complains results solely from R.P. Properties' breach of the Note, which does not support a finding of nondischargeability under § 523(a)(6).

Accordingly, Mealle's § 523(a)(6) claim fails, and Count Two will be dismissed.

B. Piercing the Corporate Veil

Based on the foregoing disposition of Counts One and Two of the Complaint, the Court need not decide whether to pierce the corporate veil to hold Pugliese personally liable for R.P. Properties' debt to Mealle. Even accepting the allegations in the Complaint as true and assuming that R.P. Properties acted solely through Pugliese, the Court has determined that such debt is not excepted from discharge under § 523. As such, if Mealle wishes to pursue a claim against Pugliese in his individual capacity, he may do so through the claims allowance process in the Main Case. Accordingly, the Complaint fails to state a claim for piercing the corporate veil, and Count Three will be dismissed.⁵

IV. CONCLUSION

For the reasons set forth above, the Court finds that the Complaint fails to state a claim for the nondischargeability of a debt under 11 U.S.C. § 523(a)(2) or (6). Accepting the allegations in the Complaint as true, Mealle establishes no basis for objecting to Pugliese's discharge or to the discharge of the debt under the Note. The Complaint fails to allege fraud with sufficient

⁵The Court notes that a plaintiff seeking to pierce the corporate veil by alleging fraud must also satisfy Federal Rule of Civil Procedure 9(b). See *Se. Tex. Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666, 672 (6th Cir. 2006) ("When a cause of action seeks to pierce the corporate veil on the basis of fraud, it is subject to FED. R. CIV. P. 9(b).") (citation omitted). As previously discussed, the Complaint fails to plead the elements of fraud with the factual specificity required by Rule 9(b). Count Three of the Complaint thus will be dismissed for the additional reason that Mealle cannot establish fraud.

particularity to satisfy the requirement of Federal Rule of Civil Procedure 9(b). The Complaint also fails to establish several of the elements of § 523(a)(2) and (6) as a matter of law. Based on the failure of Mealle's § 523(a) claims, the Court need not address his claim to pierce the corporate veil of R.P. Properties.

As a consequence, the Court will grant the Motion to Dismiss. An appropriate order will follow.

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R. Pugliese on October 2, 2012. Plaintiff Richard Mealle did not respond to the Motion to Dismiss.

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

1. Finds that the Complaint fails to state a claim for denial of Pugliese's discharge pursuant to 11 U.S.C. § 727;
2. Finds that Count One lacks the requisite factual specificity to state a claim for fraud;
3. Finds that Count One fails to state a claim pursuant to 11 U.S.C. § 523(a)(2);
4. Dismisses Count One;
5. Finds that Count Two fails to state a claim pursuant to 11 U.S.C. § 523(a)(6);
6. Dismisses Count Two; and
7. Grants the Motion to Dismiss.

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