

IT IS SO ORDERED.

Dated: September 9, 2014
09:24:52 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

WILLIAM O. FLOWERS, JR. and
KELLY M. FLOWERS,

Debtors.

* * * * *

RATHERBFARMS, LTD., et al.,

Plaintiffs,

v.

WILLIAM O. FLOWERS, JR.,

Defendant.

CASE NUMBER 14-40243

ADVERSARY NUMBER 14-4035

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION TO DISMISS COUNT III

This cause is before the Court on Motion to Dismiss Count III of Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss Count III") (Doc. 11) filed by Debtor/Defendant William O. Flowers, Jr. on August 12, 2014. Plaintiffs RATHERBFARMS, LTD., Terri A. McCoy and Bruce Haddle (collectively, "Plaintiffs") did not file a response or objection. For the reasons set forth herein, the Court will grant the Motion to Dismiss Count III.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and 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. BACKGROUND

A. Bankruptcy Case

Mr. Flowers, together with his spouse, Kelly M. Flowers,¹ filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on February 14, 2014 ("Petition Date"), which was denominated Case No. 14-40243 ("Main Case"). An Order of Discharge (Main Case, Doc. 20) was entered by this Court on June 6, 2014.

¹ Kelly Flowers is not a defendant in this adversary proceeding.

B. Adversary Proceeding

The Plaintiffs filed the Complaint (Doc. 1) on June 2, 2014 seeking a determination of non-dischargeability of debt pursuant to 11 U.S.C. § 523(a) for claims that arose during Mr. Flowers's former employment² as a zoning inspector for the Coitsville Township Zoning Office. On June 5, 2014, the Plaintiffs filed the Amended Complaint (Doc. 2).

1. Amended Complaint

Plaintiffs Terri McCoy and RATHERBFARMS, LTD ("Owners") own real property in Coitsville Township, located at 4256 McGuffey Road, Lowellville, Ohio 44436 ("Property"). (Am. Compl. ¶ 7.) In 2012, the Owners contracted with Plaintiff Bruce Haddle, a contractor, to create a pond on the Property for \$50,000.00. (*Id.* ¶ 11.) This pond was intended to be used "for an agricultural purpose to irrigate crops [the Owners] were growing and other agricultural purposes." (*Id.* ¶ 20.) As the project's contractor, Mr. Haddle hired Thomas Doyle, a sub-contractor, to begin the construction and paid him \$10,000.00. (*Id.* ¶¶ 12-13.)

Mr. Doyle worked on this project for approximately one month before Mr. Flowers issued a stop work order.³ (*Id.* ¶ 14.) The

² The Debtors' Schedule I describes Mr. Flowers as unemployed on the Petition Date. (Main Case, Doc. 1, Sch. I.) Additionally, Mr. Flowers filed a statement indicating that he did not receive any pay advices during the 60 days prior to the Petition Date. (Main Case, Doc. 5.)

³ A copy of the stop work order is attached to the Amended Complaint as Exhibit 1.

Plaintiffs allege that Mr. Flowers entered the Property without permission "driving behind a moving bulldozer in his pickup truck, bearing a firearm."⁴ (*Id.*) Mr. Flowers allegedly threatened Mr. Doyle with arrest and behaved in an "intimidating fashion." (*Id.*)

The Plaintiffs claim that an unidentified Coitsville Township Trustee approached the Plaintiffs⁵ about selling the Property, and when they declined, she "threatened zoning violations against them." (*Id.* ¶ 15.) The Plaintiffs contend that, because a zoning permit was not required to construct the pond,⁶ Mr. Flowers was acting in his official capacity to intimidate and harass the Plaintiffs into selling the Property to the nephew of the unidentified Township Trustee. The Plaintiffs allege that such intimidation occurred and the stop work order was issued as a consequence of the Plaintiffs' declination to sell the Property. (*Id.* ¶¶ 15, 18-19.)

Additionally, Mr. Flowers allegedly "gesture[ed] to Plaintiff Haddle that he was going to shoot him and [made] it known to

⁴ Schedule B - Line 8 "Firearms and sports, photographic and other hobby equipment" is checked "None" and the alleged firearm is not listed or described in any other personal property category. (Main Case, Doc. 1, Sch. B.)

⁵ Paragraphs 15, 17 and 18 of the Amended Complaint refer to the Plaintiffs collectively and do not differentiate between the Owners and their contractor.

⁶ For the proposition that a zoning permit was not required for the pond's construction, the Plaintiffs generally refer to, but do not quote, Ohio Revised Code § 519.21 and state that "no township zoning commission or board of township trustees may prohibit the use of any land for agricultural purposes of the land on which such buildings or structures are located and no zoning permit or any permit is required to construct the pond." (Am. Compl. ¶ 19.)

Plaintiff Haddle that he carried with him a firearm while on his personal time as well as while working in the capacity of zoning inspector for Coitsville Township.” (*Id.* ¶ 24.) The Amended Complaint also includes allegations of post-petition harassment of Mr. Haddle when Mr. Flowers “pointed a finger gun at him.” (*Id.* ¶ 16.)

The Plaintiffs state that they incurred damages as a result of Mr. Flowers’s conduct. After Mr. Flowers intimidated Mr. Doyle into leaving the project, (i) the Plaintiffs lost the money paid to Mr. Doyle; (ii) Mr. Haddle lost anticipated revenue from the Owners for completion of the pond; and (iii) the Property was damaged “as a result of the property sitting without having the pond completed.” (*Id.* ¶¶ 27, 43, 49.) Collectively, the Plaintiffs also assert additional unspecified damages and entitlement to attorney fees and punitive damages. (*Id.*)

The Plaintiffs state they have a pending state court action against Mr. Flowers: “[The] Plaintiffs have duly commenced suit against Defendant and the Coitsville Township Board of Trustees in the Mahoning County Common Pleas Court, which case is styled as: RATHERBFARMS, LTC, et al. v. William O. Flowers, Jr., et al., Case No. 2014 CV 432.” (*Id.* ¶ 3.) The state court action was not pending pre-petition, but was commenced on the Petition Date.⁷

⁷ The commencement date of the state court action was not disclosed in the pleadings. This Court took judicial notice of the docket report of Case No. 2014 CV 432 in the Mahoning County Court of Common Pleas, which indicated that

This adversary proceeding, which was timely commenced four months later, seeks a determination that the Plaintiffs' unliquidated, disputed claims against Mr. Flowers are non-dischargeable.⁸

The Amended Complaint outlines three causes of action:

1. In Count I, the Plaintiffs allege that the damages they suffered as a result of Mr. Flowers's "willful and malicious injury of another entity or property of another entity" are non-dischargeable, pursuant to § 523(a)(6).

2. In Count II, the Plaintiffs allege that such damages were incurred as a result of Mr. Flowers's "fraud while acting in a fiduciary capacity," due to his position as a zoning inspector, making the resulting debt non-dischargeable pursuant to § 523(a)(4).

3. In Count III, the Plaintiffs allege that Mr. Flowers's alleged misconduct took place "while acting under color of state law, deprived Plaintiffs of the rights, privileges, or immunities secured by the Fifth and Fourteenth Amendments of the United States Constitution." (Am. Compl. ¶ 48.) As a result, the Plaintiffs claim entitlement to damages pursuant to 42 U.S.C. § 1983. (*Id.* ¶ 51.)

the Plaintiffs' state court complaint was filed 15 minutes after the Debtors filed their bankruptcy petition. (Doc. 9 at 6, n. 8.)

⁸ The Plaintiffs' state court action was not disclosed in the Debtors' Statement of Financial Affairs, the related claim was not itemized in the Debtors' schedules and the Plaintiffs were not included on the Creditor Matrix.

2. Dismissal of Counts I and II

On July 7, 2014, Mr. Flowers filed Motion to Dismiss Counts I and II (Doc. 7) for failure to state a claim upon which relief can be granted. The Plaintiffs filed Memorandum in Opposition (Doc. 8) on July 21, 2014.

The Court entered Memorandum Opinion Regarding Motion to Dismiss ("Opinion") (Doc. 9) and Order Granting Motion to Dismiss Counts I and II of the Amended Complaint ("Order") (Doc. 10) on August 12, 2014. The Court held that the Plaintiffs failed to allege "sufficient facts to state a claim for tortious interference with a business relationship, because they fail[ed] to allege facts to show that (i) Mr. Flowers intentionally procured a breach of contract; and (ii) Mr. Flowers's actions in delivering the stop work order were not justified." (Op. at 14.) The Court dismissed Count I after determining that the "Plaintiffs [had] not established the elements required to find a debt non-dischargeable pursuant to § 523(a)(6)." (*Id.* at 21.) The Amended Complaint lacked sufficient allegations to show that "(i) Mr. Flowers intended to cause injury to the Plaintiffs; (ii) Mr. Flowers's actions were without justification; (iii) Mr. Flowers's actions were the cause of the Plaintiffs' damages; and (iv) each Plaintiff suffered a willful and malicious injury." (*Id.* at 21-22.) Likewise, the Court dismissed Count II for the Plaintiffs' failure to "state sufficient facts to establish a claim for non-

dischargeability under § 523(a)(4)” because they failed to support their claim with facts to show that “(i) a fiduciary relationship existed between themselves and Mr. Flowers; (ii) Mr. Flowers’s issuance of the stop work order constituted actual fraud; and (iii) the Plaintiffs were justified in relying on the stop work order.” (*Id.* at 27-28.) As a result, only Count III remains to be addressed herein.

3. Motion to Dismiss Count III

Mr. Flowers seeks dismissal of Count III of the Amended Complaint on the basis that (i) the Court previously dismissed Counts I and II when the Plaintiffs failed to establish the non-dischargeability of their claims pursuant to § 523(a)(4) or (a)(6) and determined that Mr. Flowers was acting as an agent of his employer, the Coitsville Township; (ii) Mr. Flowers has qualified immunity from personal liability for actions taken within the capacity and scope of his employment; and (iii) the Plaintiffs fail to establish a due process violation because Mr. Flowers’s issuance of the stop work order did not violate clearly established constitutional rights and a general zoning dispute does not violate the 14th Amendment when state court proceedings offer meaningful judicial review and there are state court remedies available to the Plaintiffs. The Plaintiffs did not file a response or objection to the Motion to Dismiss Count III.

II. STANDARD

Federal Rule of Civil Procedure 12(b)(6), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b), allows a defendant to move for dismissal of a complaint that fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6) (2014). The motion to dismiss will be denied if the complaint contains "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) (citation omitted). Thus, "to survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) (citation omitted).

When evaluating 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." *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896, 903 (6th Cir. 2009) (citation omitted). However, "conclusory allegations or legal conclusions masquerading as factual

allegations will not suffice.” *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, 648 F.3d 452, 457 (6th Cir. 2011) (citations omitted).

Accordingly, for purposes of determining this Motion to Dismiss, the Court accepts all facts pled in the Amended Complaint as true.

III. ANALYSIS

The Plaintiffs assert that their unliquidated, disputed claims under 42 U.S.C. § 1983 against Mr. Flowers are non-dischargeable pursuant to 11 U.S.C. § 523(a)(4) and (a)(6).⁹ 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 to prove 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)).

A. Due Process Violation

Since the Plaintiffs do not have a liquidated claim against Mr. Flowers, the first issue is whether the Plaintiffs have alleged

⁹ The Court analyzed and rejected the Plaintiffs' arguments for non-dischargability pursuant to § 523(a)(4) and (a)(6) in its Opinion and Order, which granted the Motion to Dismiss Counts I and II.

sufficient facts to state a cause of action for a due process violation, invoking damages pursuant to § 1983. Without a valid claim, the determination of non-dischargeability is unnecessary.

The Plaintiffs state that “[Mr. Flowers’s] conduct . . . , while acting under color of state law, unreasonably and arbitrarily interfered with the business interests of Plaintiff Haddle and the business and real property interests of Plaintiffs RATHERBFARMS, LTD [sic] and McCoy’s.” (Am. Compl. ¶ 47.) They allege that “[s]uch conduct of [Mr. Flowers] . . . deprived [the] Plaintiffs of rights, privileges, or immunities secured by the Fifth and Fourteenth Amendments to the United States Constitution.” (Id. ¶ 48.) As a result, the Plaintiffs assert that Mr. Flowers is liable for “all such damages under 42 U.S.C.A. § 1983.” (Id. ¶ 51.)

Section 1983 of Title 42 of the United States Code states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2014).

The threshold issue is whether a zoning dispute can constitute a constitutional right violation. To this end, "The Supreme Court has repeatedly observed that not every deprivation of property attributable to state action sinks to the depths of a [F]ourteenth [A]mendment violation." *Chongris v. Bd. of Appeals of Town of Andover*, 811 F.2d 36, 40 (1st Cir. 1987) (citations omitted). Moreover, "Where state procedures – though arguably imperfect – provide a suitable form of predeprivation hearing coupled with the availability of meaningful judicial review, the [F]ourteenth [A]mendment guarantee of procedural due process is not embarrassed." *Id.* (citing *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 829-30 (1st Cir. 1982), cert. denied, 459 U.S. 989 (1982)).

Here, in addition to the availability of adequate judicial review processes, the Plaintiffs were directed to communicate with personnel from Mahoning County and Coitsville Township to address the zoning issues regarding construction of the pond. The stop work order outlined specific avenues for the Plaintiffs to determine the legality and enforceability of the stop work order. Despite this, it appears that the Plaintiffs took no action and made no inquiries to the applicable agencies. The Plaintiffs do not explain their failure to contact the authorities identified on the stop work order to determine the necessary actions to resume construction. As a result, the Court previously held that the

Plaintiffs were not justified in relying on the stop work order.
(Op. at 28.)

The Plaintiffs have failed to allege sufficient facts to state a claim for violation of their constitutional right to due process. They have failed to allege facts to show that (i) the stop work order impeded their due process rights; (ii) issuance of the stop work order did not include a process for meaningful judicial review; and (iii) state court remedies were unavailable.

B. Qualified Immunity

Even if the Plaintiffs had a valid claim for violation of "clearly established statutory or constitutional rights of which a reasonable person would have known," they cannot proceed against Mr. Flowers in his individual capacity if he has "qualified immunity" while acting within the scope of his employment. The Plaintiffs admit that Mr. Flowers was acting within the scope of his employment (or that his actions were condoned by his employer) when he entered the Property and issued the stop work order. (Am. Compl. ¶¶ 26, 42.)

"Government officials performing discretionary functions are entitled to qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Sollitto v. Mitchell*, 23 F. App'x 527, 528 (6th Cir. 2001) (citation omitted). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court rejected the

inquiry into the actor's subjective state of mind in favor of a wholly objective standard for determining whether or not qualified immunity is applicable. The Court found that public officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. As the Supreme Court later noted in *Davis v. Scherer*, 468 U.S. 183 (1984), "Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' No other 'circumstances' are relevant to the issue of qualified immunity." *Davis*, 468 U.S. at 191 (citation omitted). Thus, the issue is whether a reasonable zoning inspector could have believed, in light of clearly established law, that the use of a stop work order was lawful under the circumstances. See *Washington v. Starke*, 855 F.2d 346, 348 (6th Cir. 1988) (applying this inquiry to a police officer's use of deadly force).

The Plaintiffs allege that Mr. Flowers had "no legal basis for serving a stop work order on [the Plaintiffs] since no zoning permit was required pursuant to Ohio Revised Code [§] 519.21." (Am. Compl. ¶ 25.) However, this is merely a legal conclusion. As previously determined by this Court:

Because the stop work order instructed the Plaintiffs to contact the Mahoning County Soil and Water Department, there may have been other statutory justification for issuance of the stop work order. Even if the stop work order was issued in error, there are no facts that Mr. Flowers was personally responsible for its issuance. Any irregularity in the issuance of the stop work order is not conclusive of any malice in its delivery by Mr. Flowers.

(Op. at 20.)

The Plaintiffs failed to offer proof to show that Mr. Flowers (i) intended to permanently terminate the construction project; (ii) intended to cause peripheral damage to the Plaintiffs in issuing the stop work order; or (iii) otherwise acted unreasonably. Significantly, there are no facts to indicate that Mr. Flowers was personally responsible for issuance of the stop work order. Given that stop work orders are generally issued within the scope of a zoning inspector's employment and generally apply to active construction projects, there are no facts alleged that establish a violation of the Plaintiffs' constitutional rights.

In addition to the Plaintiffs' failure to prove that Mr. Flowers's actions were taken without justification, they also fail to show that the stop work order and its issuance were unreasonable. "The Plaintiffs had the opportunity (i) to confirm the authenticity and legality of the zoning inspector's directive; (ii) to inquire about enforcement procedures or any appeal process; and (iii) to follow any applicable procedures to obtain any required permit." (*Id.* at 24.) The Court previously determined

that “[b]ased on the facts set forth in the Amended Complaint, Mr. Flowers’s actions in delivering the stop work order appear to be in accordance with his status as an agent of his employer, carrying out a segment of the Zoning Office’s functions.” (*Id.*)

“A plaintiff bringing an action against individual governmental officials under 42 U.S.C. § 1983 must satisfy a heightened standard of pleading when the qualified immunity defense is raised pursuant to a motion to dismiss.” *Sollitto*, 23 F. App’x at 528 (citation omitted). “That is, once a defendant claims qualified immunity, a plaintiff must plead ‘specific, non-conclusory allegations of fact that will enable the [] court to determine that those facts, if proved, will overcome the defense of qualified immunity.’” *Id.* (quoting *Veney v. Hogan*, 70 F.3d 917, 919 (6th Cir. 1995)).

The Court finds that, even when accepting all allegations pled in the Amended Complaint as true, the Plaintiffs have failed to allege sufficient facts to overcome Mr. Flowers’s qualified immunity defense, as such facts were not included in the Amended Complaint and no response to the Motion to Dismiss Count III was filed. Without establishing a valid § 1983 claim, the dischargeability determination is moot.

IV. CONCLUSION

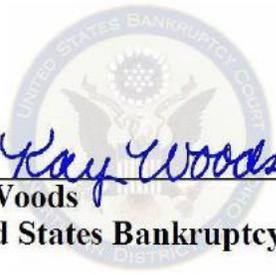
For the reasons set forth above, the Court finds that the Amended Complaint fails to state a valid claim for damages pursuant

to § 1983. The Plaintiffs' Count III fails to (i) establish the occurrence of a due process violation; and (ii) sufficiently allege facts to overcome Mr. Flowers's defense of qualified immunity. As a consequence, Count III also fails to satisfy the requirements for the non-dischargeability of the Plaintiffs' claim pursuant to § 523. Accordingly, the Court will grant the Motion to Dismiss Count III. An appropriate order will follow.

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IT IS SO ORDERED.

Dated: September 9, 2014
09:24:52 AM


Kay Woods

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United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

WILLIAM O. FLOWERS, JR. and
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HONORABLE KAY WOODS

ORDER GRANTING MOTION TO DISMISS COUNT III

This cause is before the Court on Motion to Dismiss Count III of Amended Complaint for Failure to State a Claim Upon Which Relief Can Be Granted ("Motion to Dismiss Count III") (Doc. 11) filed by Debtor/Defendant William O. Flowers, Jr. on August 12, 2014. Plaintiffs RATHERBFARMS, LTD., Terri A. McCoy and Bruce Haddle (collectively, "Plaintiffs") did not file a response or objection. Mr. Flowers seeks dismissal of Count III of the Amended Complaint (Doc. 2) on the basis that (i) the Court previously dismissed Counts I and II when the Plaintiffs failed to establish adequate grounds for the non-dischargeability of their claims pursuant to 11 U.S.C. § 523(a)(4) or (a)(6) and determined that Mr. Flowers was acting as an agent of his employer, the Coitsville Township; (ii) Mr. Flowers has qualified immunity from personal liability for actions taken within the capacity and scope of his employment; and (iii) the Plaintiffs fail to establish a due process violation because Mr. Flowers's issuance of the stop work order did not violate clearly established constitutional rights and a general zoning dispute does not violate the Fourteenth Amendment when state court proceedings offer meaningful judicial review and state court remedies are available.

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion to Dismiss Count III entered on this date, the Court hereby finds that the Plaintiffs failed to state a claim for (i) damages pursuant to 42 U.S.C. § 1983; and (ii) the non-

dischargeability of such damages pursuant to 11 U.S.C. § 523. As a consequence, the Court grants the Motion to Dismiss Count III.

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