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IT IS SO ORDERED.



Jeffery P. Hopkins
Jeffery P. Hopkins
United States Bankruptcy Judge

Dated: June 04, 2012

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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|------------------------|---|----------------------------|
| In Re | : | |
| | : | |
| JOSEPH R. MOODY | : | Case No. 11-16287 |
| KATHY M. MOODY | : | Chapter 13 |
| | : | Judge Hopkins |
| Debtors | : | |
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| JAMES JONES | : | Adversary Case No. 12-1001 |
| | : | |
| Plaintiff | : | |
| | : | |
| vs. | : | |
| | : | |
| JOSEPH MOODY | : | |
| | : | |
| Defendant | : | |
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MEMORANDUM OF DECISION ON
ORDER PARTIALLY GRANTING MOTION TO DISMISS

This is a dischargeability action under 11 U.S.C. § 523(a)(2)(A), (a)(4) and/or (a)(6). Presently before the Court is a Fed. R. Civ. P. 12(b)(6) motion to dismiss ("Motion")(Doc. 8).

ISSUES

The Motion raises two issues. First, does the complaint plead fraud under § 523(a)(2)(A) with the particularity required by Fed. R. Civ. P. 9(b)? Second, does the complaint state plausible claims under § 523(a)(4) and (6)?

RULE 9(b) STANDARD

When fraud is alleged, Rule 9(b) requires the complaint to "state with particularity the circumstances constituting fraud[.]" To comply, the complaint must allege the time, place, and content of the alleged misrepresentation or omission. *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 467 (6th Cir. 2011). The Rule is designed to permit a meaningful response, narrow discovery, protect defendants' reputations, and prevent "fishing expeditions." *Id.* at 466.

§ 523(a)(2)(A) ALLEGATIONS

The complaint makes the following allegations of fraud.

James Jones owned an apartment building that was damaged by fire. To repair the building, Mr. Jones hired Joseph Moody as a general contractor. Mr. Moody represented, expressly and impliedly, that the repairs would be made in a workmanlike manner in accordance with industry standards. In reliance, Mr. Jones entered into an oral contract to repair the apartment building. The parties formed the contract sometime in December of 2009.

Mr. Moody performed substandard work. He impeded the work of subcontractors and failed to pay them. After receiving \$90,000 from Mr. Jones, Mr. Moody abandoned the project in April of 2010.

FRAUD NOT PLEADED WITH PARTICULARITY

To facilitate a meaningful response and narrow discovery, the complaint must provide further detail.

When were the "workmanlike" representations made? The contract was formed in December of 2009. Yet, the complaint does not say when Mr. Moody made the representations. If they also occurred in December of 2009, on what day?

Where were the representations made? By his response to the Motion, Mr. Jones suggests they were made at the property. The complaint does not say so.

The representations were express and implied. How did Mr. Moody imply that the repairs would be workmanlike?

How did Mr. Moody get paid? The complaint references draw requests and joint checks. Was there a downpayment at the time of contract formation? Did Mr. Moody make any misrepresentations to induce subsequent payments? If so, what were they, where did they occur, and when did they occur?

Mr. Jones will be granted leave to amend his complaint to provide more particulars.

RULE 12(B)(6) STANDARD

A claim is subject to dismissal under Rule 12(b)(6) if it is not plausible. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A claim is plausible if the complaint contains well-pleaded factual allegations that support a reasonable inference of liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Conclusory statements and mere recitals of elements are insufficient. *Id.*

§ 523(A)(4) CLAIM

According to Mr. Jones, the debt is nondischargeable under § 523(a)(4) because Mr. Moody committed embezzlement.¹ "A creditor proves embezzlement by showing that he entrusted his property to the debtor, the debtor appropriated the property for a use other than that for which it was entrusted, and the circumstances indicate fraud." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1173 (6th Cir. 1996); *Cash America Fin. Servs., Inc. v. Fox (In re Fox)*, 370 B.R. 104, 116 (B.A.P. 6th Cir. 2007).

The complaint alleges that Mr. Jones "entrusted the repair money to Joseph Moody" who "misappropriated the repair money and used it for his own personal expenditures." See Doc. 1 at ¶ 23-24. Mr. Moody contends that these allegations are conclusory, threadbare recitals of the elements of the claim. The Court agrees.

How did Mr. Jones entrust the repair money to Mr. Moody? Did Mr. Jones retain an ownership interest in the funds paid to Mr. Moody? Payment by draw request and joint check, as currently alleged, suggests that Mr. Moody may have obtained exclusive ownership of the funds upon receipt. If so, Mr. Jones would not be able to state an

¹ Section 523(a)(4) excepts from discharge debts "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." By his response to the Motion, Mr. Jones limited his § 523(a)(4) argument to embezzlement.

embezzlement claim. See *Bank of Kentucky v. Ruhe (In re Ruhe)*, Adv. No. 04-1142, 2005 WL 4030037, *1 (Bankr. S.D. Ohio June 21, 2005)(Hopkins, J.)("For purposes of § 523(a)(4), one cannot embezzle one's own property.").

Therefore, Mr. Jones will be granted leave to state a well-pleaded claim for embezzlement.

§ 523(A)(6) CLAIM

Determining plausibility under rule 12(b)(6) is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. When weighing plausibility, the complaint is construed in favor of the plaintiff, all well-pleaded allegations are accepted as true, and all reasonable inferences are drawn in favor of the plaintiff. *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008).

A claim under § 523(a)(6) is established by proof of a willful and malicious injury. *In re Markowitz*, 190 F.3d 455, 463 (6th Cir. 1999). To be a willful injury, the actor must intend to cause the injury or believe that the injury is substantially certain to result from his or her action. *Id.* at 464. To be a malicious injury, there must be a "conscious disregard of one's duties" or an act "without just cause or excuse." *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir. 1986).

Construing the complaint and drawing all inferences in favor of Mr. Jones, the Court finds the § 523(a)(6) claim to be plausible. Plausible does not necessarily mean that liability is probable. *Iqbal*, 556 U.S. at 678. It simply means that the complaint, construed in favor of the plaintiff, establishes more than a mere possibility of liability. *Id.*

CONCLUSION

For the foregoing reasons, the Motion will be **GRANTED** concerning the claims under § 523(a)(2)(A) and (4). The Motion will be **DENIED** concerning the claim under § 523(a)(6). An order to this effect will be entered separately.

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