

**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

In re: DAVID RANDY MACGILLIVRAY  
KATHIE DENISE MACGILLIVRAY,

*Debtors*

Case No. 07-32622  
Adv. Nos. 07-3259

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HOME CITY FEDERAL SAVINGS BANK,

*Plaintiff*

Judge Humphrey  
Chapter 7

v.

DAVID RANDY MACGILLIVRAY  
KATHIE DENISE MACGILLIVRAY,

*Defendants*

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**Decision on Order Granting Motion for a  
More Definite Statement and Denying Motion to Dismiss**

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This is an adversary proceeding filed by the plaintiff, Home City Federal Savings Bank (“Home City”), seeking a determination by the court that the debtors and defendants to this proceeding, David Randy MacGillivray and Kathie Denise MacGillivray (the “MacGillivrays”), are not entitled to a discharge pursuant to 11 U.S.C. § 727. This matter is before the court on the MacGillivrays’ motion to dismiss, or in the alternative, for a more definite statement. The issues are whether this adversary proceeding should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6)<sup>1</sup> or, alternatively, whether Home City should be compelled to provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e)<sup>2</sup>. This court has jurisdiction pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

#### Procedural Background

On June 18, 2007, the MacGillivrays filed a Chapter 7 petition. On October 15, 2007, Home City filed this adversary proceeding, seeking to deny the MacGillivrays’ discharge pursuant to 11 U.S.C. § 727(a)(2)(A), (3), (4) and (5) (Doc. 1).<sup>3</sup> On November 5, 2007, the

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<sup>1</sup> Federal Rule of Civil Procedure 12(b)(6), applicable to this adversary proceeding through Bankruptcy Rule 7012, allows a defendant to move to dismiss a complaint for the “failure to state a claim upon which relief can be granted.”

<sup>2</sup> Federal Rule of Civil Procedure 12(e), applicable to this adversary proceeding through Bankruptcy Rule 7012, provides in relevant part that “[a] party may move for a more definite statement before interposing a responsive pleading.”

<sup>3</sup> 11 U.S.C. § 727 provides in pertinent part as follows:

(a) The court shall grant the debtor a discharge, unless--

...

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) ...

MacGillivrays filed an answer, which included an affirmative defense of failure to state a claim for which relief can be granted, and a counterclaim seeking a declaration that Home City has engaged in frivolous conduct by filing this adversary proceeding and seeking damages for that alleged frivolous conduct (Doc. 3). On November 5, 2007, immediately after the filing of the answer, the MacGillivrays filed a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively a motion for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e), both applicable through Bankruptcy Rule 7012 (Doc. 4). Home City filed a response to the MacGillivrays' motion on November 15, 2007 (Doc. 5). Home City filed a reply to the counterclaim on November 21, 2007 (Doc. 6).

Home City's complaint consists of eight paragraphs and a concluding standard sentence seeking all appropriate relief (Doc. 1). The first four paragraphs include basic background information, but do not provide any information concerning the allegations of Home City, beyond the fact that it is an objection to the MacGillivrays' discharge. Paragraph 5 simply cites to § 727(a)(2)(A) and quotes some of the language from that sub-section, but

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(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

11 U.S.C. § 727(a)(2)(3), (3), (4) and (5).

includes no factual information about the allegations. Paragraph 6 similarly cites § 727(a)(3) and quotes some language from that sub-section, but provides no factual information about the allegations. Paragraph 7 is only slightly more informative, providing a laundry list of allegations which might be considered a “false oath or account” under § 727(a)(4), but no factual context for any of the allegations. Paragraph 8, like paragraphs 5 and 6, quotes statutory language from § 727(a)(5), but provides no factual background.

### Legal Standards and Analysis

As noted in a recent bankruptcy court decision from this District:

Federal Rule of Civil Procedure 12(b)(6), applicable to adversary proceedings by Bankruptcy Rule 7012, states that a defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” The Sixth Circuit has stated that “[d]ismissal of a complaint for the failure to state a claim on which relief may be granted is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Thomas v. Eby*, 481 F.3d 434, 437 (6th Cir.2007) (citation omitted). To survive a defendant's motion, the plaintiff's complaint “must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.” *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6th Cir.2001) (citations and internal quotation marks omitted).

In considering a motion to dismiss, the court “must consider as true the well-pleaded allegations of the complaint and construe them in the light most favorable to the plaintiff.” *Id.* However, the court “need not accept as true legal conclusions or unwarranted factual inferences” in the complaint. *Id.* (citations omitted). The Supreme Court has recently reminded the federal courts that while a plaintiff need not provide detailed factual allegations to survive a motion to dismiss pursuant to Rule 12(b)(6), “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.” *Bell Atlantic Corp. v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (citations omitted).

*Rowland v. Walls (In re Walls)*, 375 B.R. 399, 403-04 (Bankr. S.D. Ohio 2007). The Supreme Court in *Twombly* found the complaint “did not contain sufficient facts to state a claim that

is ‘plausible on its face.’” *Weisbarth v. Geauga Park District*, 499 F.3d 538, 541 (6th Cir. 2007), quoting *Twombly*, 127 S.Ct. at 1974.<sup>4</sup> In a decision after *Twombly*, the Supreme Court stated that, under Federal Rule of Civil Procedure 8(a)(2), a complaint need not provide “specific facts”, but must at least “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 2197, 2200 (2007), quoting *Twombly*, 127 S.Ct. at 1964 (citation omitted).

As an alternative remedy to dismissal, if a claim fails to provide a defendant with sufficient notice, a defendant can move for a more definite statement. *Evans-Marshall v. Bd. of Educ. Of Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223, 228 (6th Cir. 2005), citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

The court finds the complaint is inadequate to provide the MacGillivrays with fair notice of the allegations against them. With the exception of the limited factual allegations listed in paragraph 8, which the court finds to be too vague, the complaint does not provide any information beyond conclusory legal statements. See *The State Bank and Trust Co. v. Spaeth (In re Motorwerks, Inc.)*, 371 B.R. 281, 292-93 (Bankr. S.D. Ohio 2007) (“[T]he pleader must provide more than a mere recitation of the statutory elements of the cause of action.”). Even under the relatively liberal notice pleading standard of Federal Rule of Civil Procedure 8<sup>5</sup>, the complaint is insufficient in its present form.<sup>6</sup>

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<sup>4</sup> There is apparently some uncertainty as to the scope of *Twombly* with respect to considering this “plausibility standard” outside the context of antitrust law, which was the underlying substantive law in that decision. See *Weisbarth*, 499 F.3d at 541, citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2nd Cir. 2007). The court notes the Plaintiff’s complaint is deficient in its lack of fair notice to the Defendants, regardless of the scope of *Twombly*.

<sup>5</sup> Federal Rule of Civil Procedure 8(a)(2), applicable through Bankruptcy Rule 7008, requires “a short plain statement of the claim showing that the pleader is entitled to relief[.]”

The court notes that the MacGillivrays' motion to dismiss was filed after an answer was filed, which may not be in strict compliance with the language of Rule 12(b).<sup>7</sup> Of more significance, the court is mindful of the Supreme Court's admonition that "[t]he liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim." *Swierkiewicz*, 534 U.S. at 514. Nevertheless, Home City's response to the MacGillivrays' motion concedes that a more definite statement is needed, and the court agrees an amended complaint which provides the MacGillivrays with fair notice of the allegations against them is necessary. Cf. *Motorwerks*, 371 B.R. at 292. While specific, detailed facts of each allegation are not required, some basic information is required so the MacGillivrays have fair notice of the allegations. Therefore, in the particular circumstances of this adversary proceeding, rather than dismiss it, the court will require a more definite statement pursuant to Rule 12(e).

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<sup>6</sup> Additionally, since some of the subsections included in the complaint may involve fraud, such allegations raise the heightened pleading requirement under Federal Rule of Civil Procedure 9(b), applicable through Bankruptcy Rule 7009. See generally *The State Bank and Trust Co. v. Spaeth (In re Motorwerks, Inc.)*, 371 B.R. 281, 294-95 (Bankr. S.D. Ohio 2007). The Defendants noted this issue in their answer (Doc. 3), but not in their Rule 12 motion (Doc. 4).

<sup>7</sup> Federal Rule of Civil Procedure 12(b) requires that a motion asserting one of the Rule 12(b) defenses "shall be made before pleading if a further pleading is required." Some cases have found this defect a bar to filing a motion to dismiss pursuant to Rule 12(b), but others have not. Cf. *Beebe v. Williams College*, 430 F.Supp.2d 18, 21 (D. Mass. 2006) (court allowed Rule 12(b) motion despite "technical error", where the defenses were mentioned in the answer) and *Green v. City of Bessemer, Alabama*, 202 F.Supp.2d 1272, 1273-74 (N.D. Ala. 2002) (12(b) motion filed three days after an answer is untimely). Certain cases have allowed a Rule 12(b) motion where it was filed at the same time as an answer which, in essence, is the record in this adversary proceeding. *Beary v. West Publishing Co.*, 763 F.2d 66, 68 (2nd Cir. 1985). See also *English v. Pitcher*, 23 F.3d 1086, 1090-91 (6th Cir. 1994) (noting that post-answer motions are available under separate provisions of Rule 12). The court takes no position on this question in this decision because the motion to dismiss is not warranted on its merits and the Plaintiff has conceded an amended complaint is required.

### Conclusion

The MacGillivrays' motion to dismiss the complaint is **denied** (Doc. 4). The MacGillivrays' motion for a more definite statement is **granted** (Doc. 4). Home City shall file an amended complaint not later than January 15, 2008.

It is so ordered.

c:

Home City Federal Savings Bank, 2454 N. Limestone Street, Springfield, OH 45503 (Plaintiff)

W. D. Shane Latham, 4 West Main Street, Suite 723, Springfield, OH 45502 (counsel for the Plaintiff)

David Randy MacGillivray and Kathie Denise MacGillivray, P.O. Box 100, Donnelsville, OH 45319 (Debtors/Defendants)

Scott R. Needleman, 5300 E. Main St., Suite 109, Columbus, OH 43213 (counsel for the Debtors/Defendants)

David L. Mikel, 210 West Main Street, Troy, OH 45373 (Chapter 7 Trustee)

Office of the United States Trustee, 170 North High Street, Suite 200, Columbus, Ohio 43215

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