

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge  
Sacramento, California

February 5, 2015 at 1:30 p.m.

---

1. [13-27293-E-7](#) CHRISTOPHER/TANA CROSBY CONTINUED MOTION TO DISMISS  
[13-2306](#) SCR-6 ADVERSARY PROCEEDING  
SANDOVAL ET AL V. CROSBY 10-30-14 [53]

**Tentative Ruling:** The Motion to Dismiss First Amended Complaint for Failure to State a Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

**Below is the court's tentative ruling.**

-----  
Local Rule 9014-1(f)(1) Motion - Hearing Required.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor's Attorney on August 28, 2014. By the court's calculation, 42 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss First Amended Complaint for Failure to State a Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). The defaults of the non-responding parties and other parties in interest are entered.

**The Motion to Dismiss First Amended Complaint for Failure to State a Claim is granted as to the First and Second Causes of Action.**

Jaime and Marie Sandoval ("Plaintiffs") filed the instant case on September 30, 2013, objecting to the discharge of debts incurred by Christopher Crosby ("Defendant-Debtor") from a construction contract between the Plaintiffs and Defendant-Debtor. Defendant-Debtor filed the instant motion

February 5, 2015 at 1:30 p.m.

- Page 1 of 15 -

to dismiss the complaint for failure to state a claim on which relief can be granted (Fed. R. Civ. P. 12(b)(6)).

The motion states with particularity (Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007) the following grounds upon which the relief is based:

- A. Plaintiffs' First Amended Complaint fails to state claims on which relief can be granted.
- B. Defendant is entitled to judgment as a matter of law.
- C. Plaintiffs have failed to adequately plead their claim under 11 U.S.C. § 523(a)(2) as they have not alleged facts which, if true, would establish that Defendant-Debtor,
  - 1. Knowingly made a false statement of material fact
  - 2. With the intention to defraud Plaintiffs and
  - 3. That Plaintiffs reasonably relied upon any statement made by Defendant-Debtor.
- D. Plaintiffs have failed to adequately plead a claim under 11 U.S.C. § 523(a)(6) as they have not alleged facts which, if accepted as true, would establish that Defendant-Debtor,
  - 1. Willfully and maliciously injured Plaintiffs.
- E. Plaintiffs' First Amended Complaint fails for the same reasons their initial Complaint failed on Defendant-Debtor's prior motion for judgment on the pleadings (Dckt. 27).

No opposition has been filed by Plaintiffs.

#### **OVERVIEW OF LITIGATION**

##### **I. Underlying State Contract and Fraud Case**

On or about June 26, 2007, Plaintiffs entered into a "Fixed Contract Amount" with Crosby Homes, Inc., a California Corporation, and Debtor for the construction of a single-family residence located at 4981 Breeze Circle, El Dorado Hills, California (the "Property"). Complaint ¶ 4.

On October 7, 2009, BMC West Corp., a subcontractor that had provided labor and/or materials for the Property, filed a Complaint to Foreclose on Mechanic's Lien in El Dorado County superior Court, No. PCL 20091195. The case named Plaintiffs and Defendant-Debtor as defendants. On February 23, 2010, the Plaintiffs filed a cross-complaint against Defendant-Debtor for breach of contract, fraud, and various violations of the California Business and Professions Code. Defendant-Debtor successfully compelled contractual arbitration of the cross-complaint. Complaint ¶ 5.

On October 2, 2009, Masters Wholesale Distributing and Manufacturing, Inc., a subcontractor that had provided labor and/or materials for the Property, filed a Complaint to Foreclose on Mechanic's Lien in El Dorado County

Superior Court, No. PCL 20091175. The case named Plaintiffs and Defendant-Debtor as defendants. On March 24, 2010, Plaintiffs filed a cross-complaint against Defendant-Debtor for breach of contract, fraud, and various violations of the California Business and Professions Code. Thereafter, the Plaintiffs and Defendant-Debtor entered into a stipulation to resolve the cross-complaints through binding arbitration. Complaint ¶ 6.

On August 31, 2011, after arbitration, Judge Person, the arbitrator, issued a Final Award in favor of the Plaintiffs and against Defendant-Debtor and Crosby Homes, Inc., jointly and severally. Complaint ¶ 10.

Judge Person awarded Plaintiffs the sum of 1,114,462, plus interest and costs of \$1,410, against Defendant-Debtor and Crosby Homes, Inc., jointly and severally for delay damages. Complaint ¶ 11.

Plaintiffs subsequently filed a Petition to Confirm Arbitration Award. On March 15, 2012, the El Dorado County Superior Court issued a judgment against Defendant-Debtor and Crosby Homes, Inc. Complaint ¶ 11. FN.1.

-----  
FN.1. Neither party, in the complaint, answer, nor any other pleading, provide the court with the judgment order from the El Dorado County Superior Court. However, because it is undisputed whether an order of judgment was ever entered, the court will consider it as fact.  
-----

**II. Arbitration Final Award**

The Arbitration Final Award, in relevant part, states:

1. "[Plaintiffs] contended that [Defendant-Debtor] knew when the contract was entered into and when he represented the construction schedule to [Plaintiffs], that the project would not be completed on time. However, the evidence admitted by [Plaintiffs] relates to events that took place after those critical times and thus do not necessarily bear on [Defendant-Debtor]'s then present state of mind." Dckt. 28, at 8:25-9:5.
2. "[Plaintiffs] also claimed that [Defendant-Debtor] misrepresented the move in ready status of the project but they did not sufficiently prove what [Defendant-Debtor] did or did not know at the time." Dckt. 28, at 9:6-9:8.
3. "Finally, [Plaintiffs] contended that either or both Respondents diverted funds from the project. [Plaintiffs] did not submit sufficient evidence to sustain their burden of proof on this contention." Dckt. 28, at 9:9-9:12.
4. "[Plaintiffs] did not prove malice in fact necessary to justify an award of punitive damages." Dckt. 28, at 9:12-9:3.

**III. Original Complaint for Declaratory Relief and Objecting to Dischargability of Debt**

On September 30, 2013, Plaintiffs filed the instant Adversary

Proceeding. Plaintiffs allege in their complaint two causes of action objecting to the discharge of debts incurred by Defendant-Debtor from the Underlying State Contract and Fraud Case. In the Complaint (Dckt. 1.), Plaintiff's allege the following causes of action:

- A. Pursuant to 11 U.S.C. §523(a)(2) the debts referred to herein are not dischargeable, as said debts were:
  - 1. incurred by false pretenses, a false representation or actual fraud.
    - a. The false pretenses and fraud of Defendant include making false representations to Plaintiffs about when construction on the house would be completed;
      - (1) whether Defendant would complete construction on the house at all;
      - (2) whether the work Defendant completed on the house would be of the quality originally promised; and
      - (3) whether Defendant would pay the subcontractors he hired for the construction.
    - b. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.
- B. Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were:
  - 1. incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs.
  - 2. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

Defendant-Debtor filed an answer on November 1, 2013, asserting thirteen separate affirmative defenses. Dckt. 8.

On July 31, 2014, Defendant-Debtor filed a Motion for Judgment on the Pleadings or, Alternatively, for Summary Judgment. Dckt. 27. The court conducted a hearing on the Motion on August 28, 2014. The court granted Defendant-Debtor's Motion for Judgment on the Pleadings as to both the first and second cause of action. Dckt. 41. Additionally, the court granted the Defendant-Debtor's Motion for Summary Judgment as to the first cause of action ( 11 U.S.C. § 523(a)(2)(A)- fraud) and denied the Motion as to the second cause of action ( 11 U.S.C. § 523(a)(6) - willful and malicious injury). Dckt. 41. In the court's order, pursuant to the stipulation between the parties, the Plaintiffs were given leave to file and serve an amended complaint on or before September 12, 2014. Dckt. 41. If this amended complaint was timely filed, Defendant-Debtor had until October 10, 2014 to file an answer or other responsive pleadings. Dckt. 41.

**IV. First Amended Complaint for Declaratory Relief and Objecting to Dischargability of Debt**

On September 12, 2014, Plaintiffs filed their First Amended Complaint. Dckt. 42. Plaintiffs allege in their amended complaint two causes of action objecting to the discharge of debts incurred by Defendant-Debtor from the Underlying State Contract and Fraud Case. In the Amended Complaint (Dckt. 42), Plaintiff's allege the following causes of action:

A. Pursuant to 11 U.S.C. §523(a)(2) the debts referred to herein are not dischargeable, as said debts were:

1. incurred by false pretenses, a false representation or actual fraud.

a. The false pretenses and fraud of Defendant include making false representations to Plaintiffs about when construction on the house would be completed;

(1) whether Defendant would complete construction on the house at all;

(2) whether the work Defendant completed on the house would be of the quality originally promised; and

(3) whether Defendant would pay the subcontractors he hired for the construction.

2. In support, the Plaintiffs state:

a. In the Summer of 2007, and before Plaintiffs hired Defendant-Debtor to construct their home, Defendant-Debtor told Plaintiffs that he could complete the home in six months or less

b. In reality, Defendant-Debtor knew that he could not complete construction of Plaintiff's home in six months or less, and he did not intend to do so. In fact, Defendant-Debtor had applied to be a featured builder in a competition known as "Street of Dreams." Pursuant to their contract, construction on Plaintiff's home was to begin on August 15, 2007. Six months from that date would have been February 15, 2008.

c. Defendant-Debtor knew that the "Street of Dreams" competition would make its selection in January 008 and he expected to be selected. In fact, Defendant-Debtor publicized his entry in the competition even before he had been selected, thus highlighting his belief that he would be selected.

d. Defendant-Debtor also knew that construction on the "Street of Dreams" project would begin in February 2008 and that significant time and effort would be necessary to prepare prior to beginning construction.

- e. As a result, Defendant-Debtor knew in the Summer of 2007 that he could not complete construction of Plaintiff's house within six months, but he made that promise anyway. Defendant-Debtor made that promise because Plaintiffs indicated that they intended to sign a contract with the contractor who could complete the work the fastest. This was because they could obtain a more favorable rate on their construction loan with a shorter time period. Defendant knew that promising to complete construction on the home within six months would enhance his chance of securing the contract with Plaintiffs and taking their money to build the home, so he did so even though he knew he did not intend to honor that promise.
- f. Between August 15, 2007 and February 15, 2007, Defendant-Debtor let the Plaintiffs' house sit idly with no construction being done at all for large blocks of time. Indeed, Plaintiffs would often drive by the home day after day for weeks and observe that no one was working on their home at all.
- g. Even after the original six months expired. Defendant-Debtor continued to promise Plaintiffs that he would complete the home quickly.
- h. Based on these representations, Plaintiffs obtained a nine-month construction loan and permitted Defendant-Debtor to make progress-based withdrawals from those funds.
- i. Additionally, Plaintiffs made arrangements for Mrs. Sandoval's father to move in their home once it was completed. Defendant-Debtor knew this was Plaintiffs' plan insofar as they explained that to him when they requested an elevator be installed from the garage to the main living floor that was large enough to accommodate a wheelchair.
- j. Plaintiffs had no reason to disbelieve Defendant-Debtor's representations and did not believe those representations. Instead, Plaintiffs' relied on his representations when agreeing to a construction loan and when arranging for the sale of the home in which they lived during the pendency of the original six-month construction period.
- k. Plaintiffs were harmed by their reliance on Defendant-Debtor misrepresentations insofar as they were forced to extend the period of time of the construction loan, at great monetary expense. Additionally, they were forced to convert the construction loan into a conventional mortgage before construction of the home was complete and before they were able to move into the

home. As a result, Plaintiffs were forced to pay two mortgages for longer than they anticipated and longer than they were financially able. Plaintiffs were unable to pay two mortgages for such an extended period of time, as a result of which their previous home was foreclosed on, eliminating the equity they had in that house and substantially damaging their credit rating.

3. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

B. Pursuant to 11 U.S.C. §523(a)(6) the debts referred to herein are not dischargeable, as said debts were:

1. incurred through wilful and malicious conduct and caused willful and malicious injury to Plaintiffs.

2. Accordingly, Defendant is prevented from obtaining a discharge from the debt owed to creditor due to the false and fraudulent conduct.

3. In support, Plaintiffs state:

a. In the summer of 2007, and before Plaintiffs hired Defendant-Debtor to construct their home, Defendant-Debtor told Plaintiffs that he could complete the home in six months or less.

b. In reality, Defendant-Debtor knew that he could not complete construction of Plaintiffs' home in six months or less, and he did not intend to do so. In fact, Defendant-Debtor had applied to be a featured builder in a competition known as "Street of Dreams." Pursuant to their contract, construction on Plaintiffs' home was to begin on August 15, 2007. Six months from that date would have been February 15, 2008.

c. Defendant-Debtor knew that the "Street of Dreams" competition would make its selection in January 008 and he expected to be selected. In fact, Defendant-Debtor publicized his entry in the competition even before he had been selected, thus highlighting his belief that he would be selected.

d. Defendant-Debtor also knew that construction on the "Street of Dreams" project would begin in February 2008 and that significant time and effort would be necessary to prepare prior to beginning construction.

e. As a result, Defendant-Debtor knew in the Summer of 2007 that he could not complete construction of Plaintiff's house within six months, but he made that promise anyway. Defendant-Debtor made that promise

because Plaintiffs indicated that they intended to sign a contract with the contractor who could complete the work the fastest. This was because they could obtain a more favorable rate on their construction loan with a shorter time period. Defendant knew that promising to complete construction on the home within six months would enhance his chance of securing the contract with Plaintiffs and taking their money to build the home, so he did so even though he knew he did not intend to honor that promise.

- f. Between August 15, 2007 and February 15, 2007, Defendant-Debtor let the Plaintiffs' house sit idly with no construction being done at all for large blocks of time. Indeed, Plaintiffs would often drive by the home day after day for weeks and observe that no one was working on their home at all.
- g. Even after the original six months expired. Defendant-Debtor continued to promise Plaintiffs that he would complete the home quickly.
- h. Based on these representations, Plaintiffs obtained a nine-month construction loan and permitted Defendant-Debtor to make progress-based withdrawals from those funds.
- i. Additionally, Plaintiffs made arrangements for Mrs. Sandoval's father to move in their home once it was completed. Defendant-Debtor knew this was Plaintiffs' plan insofar as they explained that to him when they requested an elevator be installed from the garage to the main living floor that was large enough to accommodate a wheelchair.
- j. Plaintiffs had no reason to disbelieve Defendant-Debtor's representations and did not believe those representations. Instead, Plaintiffs' relied on his representations when agreeing to a construction loan and when arranging for the sale of the home in which they lived during the pendency of the original six-month construction period.
- k. Plaintiffs were harmed by their reliance on Defendant-Debtor misrepresentations insofar as they were forced to extend the period of time of the construction loan, at great monetary expense. Additionally, they were forced to convert the construction loan into a conventional mortgage before construction of the home was complete and before they were able to move into the home. As a result, Plaintiffs were forced to pay two mortgages for longer than they anticipated and longer than they were financially able. Plaintiffs were unable to pay two mortgages for such an extended period of time, as a result of which their previous home was



foreclosed on, eliminating the equity they had in that house and substantially damaging their credit rating.

4. Accordingly, Defendant-Debtor is prevented from obtaining a discharge from the debt owed to creditor due to willfully and malicious causing these injuries to Plaintiffs.

#### **DECEMBER 11, 2014 HEARING**

At the hearing, the court continued the hearing to 1:30 p.m. on February 5, 2015. Dckt. 61.

#### **FEDERAL RULE OF CIVIL PROCEDURE RULE 12 STANDARD FOR MOTION TO DISMISS**

In considering a motion to dismiss, the court starts with the basic premise that the law favors disputes being decided on their merits. Federal Rule of Civil Procedure 8 and Federal Rule of Bankruptcy Procedure 7008 require that complaints contain a short, plain statement of the claim showing entitlement to relief and a demand for the relief requested. Fed. R. Civ. P. 8(a). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.*, citing to 5 C. WRIGHT & A. MILLER, FED. PRACTICE AND PROCEDURE § 1216, at 235-36 (3d ed. 2004) (“[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”).

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether a motion to dismiss is to be granted should be resolved in favor of the pleader. *Pond v. General Electric Co.*, 256 F.2d 824, 826-27 (9th Cir. 1958). For purposes of determining the propriety of a dismissal before trial, allegations in the complaint are taken as true and are construed in the light most favorable to the plaintiff. *McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court’s formulation of Rule 12(b)(6), a plaintiff cannot “plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-66 (2007). (“[A] plaintiff’s obligation to provide ‘grounds’ of his ‘entitle[ment]’ to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”).

In ruling on a 12(b)(6) motion to dismiss, the Court may consider “allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). The court need not accept unreasonable inferences or conclusory deductions of fact cast in the form of factual allegations. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Nor is the court required to “accept legal conclusions cast in the form of factual

allegations if those conclusions cannot be reasonably drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994).

In Adversary Proceedings Federal Rule of Civil Procedure 7(b) and Federal Rule of Bankruptcy Procedure 7007 govern law and motion practice. Rule 7(b) states:

(b) Motions and Other Papers.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought.

(2) Form. The rules governing captions and other matters of form in pleadings apply to motions and other papers.

Fed. R. Civ. P. 7(b), Fed. R. Bankr. P. 7007.

Federal Rule of Civil Procedure 8(a) requires that pleadings which include a claim for relief must contain "(1) a short and plain statement of the grounds for the court's jurisdiction... (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought." Fed. R. Civ. P. 8(a). This rule expressly applies to adversary proceedings in bankruptcy court, as well as some additional requirements which are not relevant for the instant motion. Fed. R. Bankr. P. 7008(a).

The "notice pleading requirements" of Rule 8(a) apply to any cause of action in a complaint. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003). When certain claims – like fraud – are made, the required elements in Rule 8(a) must be plead with more specificity. *Id.* at 1105; Fed. R. Civ. P. 9. To properly plead a claim in which fraud is an essential element, the complaint "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Particularity" can be satisfied by stating in the complaint "the who, what, when, where, and how" of the wrongful conduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997). The policy behind the heightened specificity is to allow defendants a better opportunity to defend themselves against specific fraud allegations, which can be harmful to a defendant's reputation if the charges are unsubstantiated. *Bly-Magee v. Cal.*, 236 F.3d 1014, 1018-1019 (9th Cir. 2001).

11 U.S.C. § 523(a)(2) - Fraud

In order to prevail on § 523(a)(2)(A) exception to discharge claim, the moving party needs to prove by a preponderance of the evidence:

(1) that the debtor made material misrepresentations;

(2) that the debtor knew the misrepresentations were false at the time they were made;

(3) that the debtor made the misrepresentations with the intention and purpose of deceiving the creditor;

(4) that the creditor justifiably relied on such misrepresentations and

(5) that the creditor sustained a loss or injury as a proximate result of the misrepresentation having been made."

*Britton v. Price (In re Britton)*, 950 F.2d 602, 604 (9th Cir. 1991); *American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi)*, 104 F.3d 1122, 1125 (9th Cir. 1997); *Citibank (South Dakota), N.A. v. Eashai (In re Eashai)*, 87 F.3d 1082, 1086 (9th Cir. 1996).

#### 11 U.S.C. § 523(a)(6) - Willful and Malicious Injury

Under § 523(a)(6), a debt will be excepted from discharge when it results from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). "A simple breach of contract is not the type of injury addressed by § 523(a)(6)" but instead it must be "[a]n intentional breach. . . accompanied by malicious and willful tortuous conduct." *In re Riso*, 978 F.2d 1151, 1154 (9th Cir. 1992) (emphasis original). In order for § 523(a)(6) to apply, "a breach of contract must be accompanied by some form of tortuous conduct that gives rise to willful and malicious injury." *In re Jercich*, 238 F.3d 1202, 1206 (9th Cir. 2001)(internal quotations omitted).

For the underlying claim to be considered tortuous conduct for § 523(a)(6), California state tort law provides that "[c]onduct amounting to a breach of contract becomes tortuous only when it also violates an independent duty arising from principles." *Id.* (citing *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4<sup>th</sup> 503, 514 (1994)). Tort recovery for the bad faith breach of a contract is permitted only when, "in addition to the breach of the covenant [of good faith and fair dealing] a defendant's conduct violates a fundamental public policy of the state." *Id.* (citing *Rattan v. United Servs. Auto. Assoc.*, 84 Cal. App. 4<sup>th</sup> 715 (2001)).

The Supreme Court has clarified that "it is insufficient under §523(a)(6) to show that the debtor acted willfully and that the injury was negligently or recklessly inflicted; instead, it must be shown not only that the debtor acted willfully, but also that the debtor inflicted the injury willfully and maliciously rather than recklessly or negligently." *Id.* (citing *Kawaauhau v. Geiger*, 238 F.3d 1202, 1207 (1998)). To prove malicious injury, the party seeking to except a debt from being discharged must show that the debtor: (1) committed a wrongful act; (2) done intentionally; (3) which necessarily causes injury; and (4) was done without just cause or excuse. *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1144-45 (9th Cir. 2002); *Littleton v. Transamerica Commercial Finance*, 942 F.2d 551, 554 (1991).

#### **DISCUSSION**

Defendant-Debtor has established on the face of the First Amended

Complaint that there are not factual allegations that "raise a right to relief above the speculative level." For Plaintiffs, even if they proved every allegation in the First Amended Complaint it would not establish a basis for the court determining the debt nondischargeable.

The cause of action under 523(a)(2) requires that the moving party to show an intentional and purposeful misrepresentation, among other elements. Here, Plaintiffs once again have only provided generalized facts to prove the elements of both causes of actions, without allegations on the issue of reliance and the damages flowing from such reliance. While the Plaintiffs have provided more factual information in support of their first cause of action, all Plaintiffs provide is a narrative of the past six years of interaction with Defendant-Debtor arising from the construction contract. It is alleged that the generally stated allegations, while more specific than the original Complaint, assert that Defendant-Debtor:

- A. Made a false representation about when construction would be completed;
- B. Whether Defendant-Debtor would complete construction at all;
- C. Whether the work by Defendant-Debtor on the house would be of the quality promised; and
- D. Whether the Defendant-Debtor would payoff the subcontractors.

First Amended Complaint, Dckt. 42.

While the Plaintiffs have provided information on what they believe were the misrepresentation, the Plaintiffs still do not allege that (1) Defendant-Debtor knew that the misrepresentations were false at the time made by him, (2) Defendant-Debtor made such statements with the intention and purpose of deceiving the Plaintiffs, (3) that the alleged misrepresentations were made by Defendant-Debtor to induce reliance by Plaintiffs, (4) Plaintiff justifiably relied on any misrepresentations, (5) that Plaintiffs incurred damages which flowed from the alleged misrepresentations.

As the Defendant-Debtor states in the accompanying Memorandum of Points and Authority, the facts alleged by the Plaintiffs, specifically the alleged verbal promise of six-month completion time line, conflicts with the contract which has the time of commencement to be August 15, 2007 and an approximate completion date of May 15, 2008 - a nine-month time line. Dckt. 55 & Dckt 42, paragraph 13. The Plaintiffs do not provide a factual basis on why or how the Plaintiffs came to rely on the alleged verbal promise of the Defendant-Debtor over the explicit time line provided for in the construction contract. The Plaintiffs do not allege any facts besides merely stating that Defendant-Debtor "told Plaintiffs that he could complete the home in six months or less" to indicate any justifiable reliance when it directly contradicts the explicit terms of the contract. While the First Amended Complaint is an improvement from the original Complaint, the Plaintiffs still fail to provide the factual basis that would support a 11 U.S.C. § 523(a)(2) claim since the Plaintiffs have failed to provide sufficient information concerning the alleged fraudulent representation and how the Plaintiffs came to rely on that alleged promise in lieu of the contractual terms. There remains the problem of bare-bone allegations and statements of "facts" that do not provide sufficient basis to

"raise a right to relief above the speculative level."

Plaintiffs fair no better in their Second Cause of Action. The Plaintiffs merely reiterate the identical "factual" basis of the first cause of action in the second cause of action. Nowhere do the Plaintiffs allege Defendant-Debtor was willful nor malicious. Plaintiffs do not allege that an Defendant-Debtor engaged in "a wrongful act done intentionally" which "necessary produces the harm" that is "without just cause or excuse." *Littleton v. Transamerica*, 942 F.2d. 554. Much like the issues with the first cause of action, the Plaintiffs fail to provide factual information that gives rise to a plausible claim. It is once again generic allegations without providing the grounds of malicious injury or the willful nature of Defendant-Debtor. Instead, it appears that the Plaintiffs assume the court to read into the First Amended Complaint those necessary elements in a mildly more detailed complaint.

Plaintiffs provide bare-bones causes of actions that simply restate the legal elements of the two causes of actions without providing any allegations on how the factual circumstances of the underlying state court contract claim support or even relate to relief sought in the instant Adversary Proceeding.

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] 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*, 550 U.S. 544, 555 (2007). See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009),

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* [*Twombly*], at 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929. 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. *Id.*, at 556, 127 S. Ct. 1955, 167 L. Ed. 2d 929. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (brackets omitted)."

As the First Amended Complaint currently stands, even taking the Plaintiffs' allegations as true, it does not provide sufficient information to find that either under 11 U.S.C. § 523(a)(2) or 11 U.S.C. § 523(a)(6) the judgment from the state court case is excepted from discharge. At best, the First Amended Complaint pleads that the Plaintiffs and Defendant-Debtor entered into a contract to build a home. The contract required that the home be built in a certain way and to be completed within a certain time period. It was not

and Plaintiffs assert that they suffered damages because the contract was not performed fully and timely by Defendant-Debtor. Such a breach of contract claim does not nondischargeable fraud, or willful and malicious injury claim make. The court will not infer and construct for Plaintiffs essential allegations which are not stated in the Complaint.

Since the December 11, 2014 hearing, no supplemental pleadings have been filed in connection with this case. The court continued the hearing to afford Plaintiffs every opportunity to respond to the Motion to Dismiss and assert any bona fide claims which they could sufficiently plead.

Therefore, the court grants Defendant-Debtor's Motion to Dismiss Plaintiffs' First Amended Complaint, on all causes of action, for Failure to State a Claim on Which Relief Can Be Granted (Fed. R. Civ. P. 12(b)(6)).

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim on Which Relief Can Be Granted (Fed. R. Civ. P. 12(b)(6)) filed by Christopher Beck Crosby ("Defendant-Debtor") for all claims asserted in the Complaint filed by Jaime Sandoval and Mary Sandoval ("Plaintiffs") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

**IT IS ORDERED** that the Motion to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim on Which Relief Can Be Granted (Fed. R. Civ. P. 12(b)(6)) is granted, and the First Amended Complaint, and all causes of Action stated therein, is dismissed.

2. [13-27293-E-7](#) CHRISTOPHER/TANA CROSBY  
[13-2306](#)  
SANDOVAL ET AL V. CROSBY

CONTINUED STATUS CONFERENCE RE:  
AMENDED COMPLAINT  
9-12-14 [[42](#)]

Plaintiff's Atty: Sean Gavin  
Defendant's Atty: Stephen C. Ruehmann

Adv. Filed: 9/30/13  
Answer: 11/1/13

Amd Cmplt Filed: 9/12/14  
Answer: none

Nature of Action:  
Dischargeability - false pretenses, false representation, actual fraud  
Dischargeability - willful and malicious injury  
Declaratory judgment

Notes:

Continued from 12/11/14 to be heard in conjunction with the motion to dismiss.