UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

July 24, 2017 at 10:00 a.m.

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1. 17-21035-A-7 MICHAEL/STACEY SIMONS — MOTION TO
17-2083 RK-1 — DISMISS ADVERSARY PROCEEDING
KOOSHKEBAGHI V. SIMONS ET AL — 6-23-17 [7]

Tentative Ruling: The motion will be granted in part.

The defendants, Michael and Stacey Simons, seek dismissal of the subject complaint.

The complaint alleges that the defendants purchased a 2005 Ford F350 truck in August 2015 from the plaintiff for $21,000. The defendants paid $15,000 toward the purchase price, with the agreement that the additional $6,000 would be paid within reasonable time. In September 2015, the California Department of Motor Vehicles issued a certificate of title to defendant Michael Simons, referencing the plaintiff as a lienholder. Docket 1, Ex. A.

After the defendants did not pay the additional $6,000, the plaintiff filed a state court action against the defendants in August 2016. On November 8, 2016, the state court entered a judgment against defendant Michael Simons for $6,185.

In December 2016, the plaintiff sought to enforce the judgment against Michael Simons' bank account with U.S. Bank but was unsuccessful because the account had been closed.

The defendants filed the underlying chapter 7 case on February 20, 2017. The plaintiff is listed as a creditor on Schedule E/F. The defendants' statement of financial affairs states that the plaintiff had levied $6,210 from their bank account. The statement of financial affairs also says that, in December 2016, the defendants sold the vehicle to Carmax for $8,000.

During the defendants' meeting of creditors in April 2017, the plaintiff questioned defendant Michael Simons to determine how he was able to sell the vehicle without paying the plaintiff's lien. Mr. Simons stated that the lien had been released by the California DMV prior to the sale pursuant to his request. The plaintiff requested the documents Mr. Simons presented to DMV for the release of the lien, but the defendants have not produced them.

The defendants stated that they spent the $8,000 from the sale of the vehicle on rent, utilities, and telephones. The trustee requested supporting documentation for those claims, but the defendants have not provided such documentation.

The trustee filed a report of no distribution on May 1, 2017. The plaintiff filed this adversary proceeding on May 22, the last day for filing complaints to object to discharge and except debts from discharge. The plaintiff objects to the defendants' discharge under 11 U.S.C. § 727, seeks damages in the amount

of $6,185, and seeks attorney's fees and costs.

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"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.' . . . 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. . . . 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. . . . 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."'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

The Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

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This is a partially disguised summary judgment motion because the defendants are relying on facts outside the complaint, including that they amended their statement of financial affairs after this complaint was filed, correcting the statement that the plaintiff had levied funds from their bank account. Docket 9, Michael Simons Decl. In his declaration, Mr. Simons also attempts to explain why he did not produce the documents requested by the plaintiff and the trustee at the meeting of creditors. Id.

The court is unwilling to invoke Rule 12(d) and exercise its discretion to admit matters outside the plaintiff's amended complaint. The court will not transform this motion to dismiss into one for summary judgment. The parties have conducted no formal discovery yet.

Next, the court will dismiss, without leave to amend, any claims to the extent they are seeking recovery of damages on the basis that the defendants did not pay the plaintiff the outstanding $6,000. Intentional breach of contract claims are not actionable as exceptions to discharge. See 11 U.S.C. § 523.

For example, intentional breaches of contract are not actionable under section 523(a)(2)(A), the fraud and larceny aspects of section 523(a)(4) or section 523(a)(6). Lockerby v. Sierra, 535 F.3d 1038, 1042-43 (9th Cir. 2008) (holding that intentional breach of contract does not support a section 523(a)(6) claim just because it was substantially certain that the breach would cause injury); Whited v. Galindo (In re Galindo), 467 B.R. 201, 213 (Bankr. S.D. Cal. 2012) (holding that "[a]n intentional breach of a contract alone will not trigger the 'willful and malicious injury' dischargeability exception"); Petralia v. Jercich (In re Jercich), 238 F.3d 1202, 1205 (9th Cir. 2001) and Donaldson v. Ortenzo Hayes (In re Ortenzo Hayes), 315 B.R. 579, 590 (Bankr. C.D. Cal. 2004) (holding that intentional breaches of contract require tortious conduct in order for the debt arising from the breach to be excepted from discharge); see also Rice, Heitman & Davis, S.C. v. Sasse (In re Sasse), 438 B.R. 631, 648 (Bankr. W.D. Wis. 2010) (holding that "intentional breach of contract is not fraud under § 523(a)(2), and a promise about future acts, without more, likewise does not constitute a misrepresentation").

Further, the court will dismiss, with leave to amend, any claims seeking recovery of damages on the basis of the Bankruptcy Code's enumerated exceptions to discharge. See 11 U.S.C. § 523(a). While the complaint omits any reference

to 11 U.S.C. § 523(a) but seeks recovery of the defendants' unpaid debt, there are some facts alleged in the complaint that could support a claim under section 523(a)(2) and/or (a)(6). However, the complaint is devoid of any mention of section 523.

Furthermore, the court will dismiss, with leave to amend, the plaintiff's section 727 claims. The court agrees that the complaint's reference to sections 727(4)(A) and 727(4)(D) is confusing. There are no such provisions in 11 U.S.C. § 727.

The plaintiff shall file an amended complaint no later than August 7, 2017. The timing for a response is governed by Fed. R. Civ. P. 15(a)(3), as made applicable here by Fed. R. Bankr. P. 7015.

As a final note, the plaintiff should note that the papers filed in connection with this motion were not properly scanned and/or simply lack top margins, making the top one or two lines illegible.

2. 16-22654-A-7 MARC LIM
16-2202 RJF-1
CHICK'S PRODUCE, INC. ET AL V. LIM

MOTION FOR SUBSTITUTION OF PROPER PARTY FOLLOWING DEATH OF DEBTOR/DEFENDANT
5-12-17 [31]

Tentative Ruling: The motion will be denied without prejudice.

The plaintiffs, Chick's Produce, Inc. and Del Fresh Produce, Inc. move to substitute in the place of the now deceased defendant, Marc Lim (also the named debtor in the underlying bankruptcy case) Christian Lim and Cameron Lim as real parties in interest defendants, pursuant Fed. R. Civ. P. 25, as made applicable here via Fed. R. Bankr. P. 7025.

Under Fed. R. Civ. P. 25(a)(1), "*[i]f a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed*."

Preliminarily, this motion has been filed within the 90-day deadline of Rule 25(a)(1). The notice of death as to the defendant was filed by his counsel on April 4, 2017. Case No. 16-22654, Docket 139. This motion was filed on May 12, 2017.

The court also agrees that this section 523(a) action survives the passing of the defendant, given that his is a chapter 7 bankruptcy case, where administration of the estate is not managed by the debtor and it is not dependent on his survival. The passing of a chapter 7 debtor does not extinguish the purpose of a chapter 7 discharge, which would ultimately affect the administration of the deceased debtor's remaining assets and probate estate, if any.

The motion will be denied without prejudice, however, because it is not supported by any evidence, such as a declaration or an affidavit to support the motion's factual assertions.

This violates Local Bankruptcy Rule 9014-1(d)(7), which provides that "Every motion shall be accompanied by evidence establishing its factual allegations

and demonstrating that the plaintiffs are entitled to the relief requested. Affidavits and declarations shall comply with Fed. R. Civ. P. 56(c)(4)."

Specifically, the court has no evidence about who are Christian Lim and Cameron Lim, and why they are proper parties to be substituted in the place of the defendant. Are they successors in interest to the defendant or representatives of his probate estate?

The motion merely says that, based on the fact that the two of them were served with the notice of death of the defendant, "it would appear that a legal presumption exists that they [Christian Lim and Cameron Lim] are the proper parties to be substituted in the place of [Marc] Lim." Docket 31 at 5.

The court will not assume, however, that just because they were served with the notice of death, they are proper parties for substitution. Rule 25 does not sanction such leap of legal logic. Nothing in Rule 25 prescribes that the parties served with the notice of death are presumptively proper for substitution in the stead of the deceased party. The motion is devoid also of other legal authority supporting such a premise. The plaintiffs, *i.e.*, the parties asking for substitution, still bear the ultimate burden of persuasion that the proposed parties are proper.

Nor is the court willing to decide that the notice of death complies with Rule 25. This motion does not challenge the notice of death, despite the plaintiffs' opinion that the notice was not served by proper means. The motion will be denied without prejudice.

3. 16-21585-A-11 AIAD/HODA SAMUEL — MOTION TO ABANDON
FWP-26 — 6-23-17 [820]

Final Ruling: This motion has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the creditors, the debtors, the U.S. Trustee, and any other party 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 as consent to the granting of the motion. Cf. Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See Boone v. Burk (In re Eliapo), 468 F.3d 592 (9th Cir. 2006). Therefore, the defaults of the above-mentioned parties in interest are entered and the matter will be resolved without oral argument.

The motion will be granted.

The chapter 11 trustee wishes to abandon the estate's interest in exercise equipment that has been used or was used by Muscle Systems, MVP Sports Nutrition, a tenant at the West Sacramento shopping center, which was sold in March 2017. The equipment is described in more detail in the Exhibit A attached to the motion. Docket 823. For a more detailed description of the equipment, parties in interest should review Exhibit A.

11 U.S.C. § 554(a) provides that a trustee may abandon any estate property that is burdensome or of inconsequential value or benefit to the estate, after notice and a hearing.

The debtors have not scheduled the equipment and have not provided the trustee with evidence of ownership. The trustee has no evidence of the estate owning the equipment. And, the trustee has been informed that Muscle Systems claims

ownership of the equipment.

More, even if ownership was not at issue, the trustee has been informed that the equipment is over 10 years old. After considering administrative costs and the equipment's condition, the trustee is convinced that the equipment is of inconsequential value to the estate.

Finally, the trustee is concerned that retaining interest in the equipment is burdensome to the estate, as the estate may be exposed to liability from users of the equipment.

Given the foregoing, the court concludes that the equipment is of inconsequential value and/or burdensome to the estate. The motion will be granted.

4. 16-21585-A-11 AIAD/HODA SAMUEL — STATUS CONFERENCE 3-15-16 [1]

Tentative Ruling: None.