

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: TUESDAY
DATE: OCTOBER 16, 2018
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

Each matter on this calendar will have one of three possible designations: No Ruling, Tentative Ruling, or Final Ruling. These instructions apply to those designations.

No Ruling: All parties will need to appear at the hearing unless otherwise ordered.

Tentative Ruling: If a matter has been designated as a tentative ruling it will be called. The court may continue the hearing on the matter, set a briefing schedule or enter other orders appropriate for efficient and proper resolution of the matter. The original moving or objecting party shall give notice of the continued hearing date and the deadlines. The minutes of the hearing will be the court's findings and conclusions.

Final Ruling: Unless otherwise ordered, there will be no hearing on these matters. The final disposition of the matter is set forth in the ruling and it will appear in the minutes. The final ruling may or may not finally adjudicate the matter. If it is finally adjudicated, the minutes constitute the court's findings and conclusions.

Orders: Unless the court specifies in the tentative or final ruling that it will issue an order, the prevailing party shall lodge an order within 14 days of the final hearing on the matter.

1. [18-11471](#)-A-7 **IN RE: ARTURO/MARIA DE LOS ANGELES MACIAS**
[18-1036](#)

CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT
8-10-2018 [[14](#)]

CLARK V. MACIAS
BRAD CLARK/ATTY. FOR PL.

Tentative Ruling

The status conference is continued to December 12, 2018, at 10:00 a.m. In the event that defendant Arturo Machuca Macias files a motion to dismiss the Second Amended Complaint, if filed, and sets the hearing date on that motion after December 12, 2018, the court is likely to continue the status conference to the date of the hearing on the motion. The parties are encouraged to check the court's pre-hearing dispositions on the website after 2:00 p.m. on December 11, 2018, to avoid an unnecessary appearance.

2. [18-11471](#)-A-7 **IN RE: ARTURO/MARIA DE LOS ANGELES MACIAS**
[18-1036](#) [GT-1](#)

MOTION TO DISMISS ADVERSARY PROCEEDING/NOTICE OF REMOVAL
9-12-2018 [[28](#)]

CLARK V. MACIAS
GRISelda TORRES/ATTY. FOR MV.

Tentative Ruling

Motion: Dismiss Adversary Proceeding Complaint (Rule 12(b)(6))
Notice: Written opposition filed
Disposition: Granted in part with leave to amend, denied in part
Order: Civil minute order

Defendant Arturo Machuca Macias ("Macias") moves to dismiss the Brad Clark ("Clark") First Amended Complaint, August 10, 2018, ECF # 14, under Rule 12(b)(6). Clark opposes the motion.

FACTS

As pled, Clark owns a residence at 2547 N. Archie, Fresno, California. Defendant Macias does business as "Macias Roofing." Macias performs his work with the assistance of his two sons, Nestor A. Macias and "Aaron Macias." He advertises that he is a licensed roofing contractor. The only written representation of licensure appears to be page 2 of Exhibit 2 to the First Amended Complaint. He advertises that he does "general roofing," "repairs and installation" and "all types of roofing." His business cards state that the work is "100% water proof."

In 2010, Clark hired Macias to re-roof his house. As a part of the bid process, on or about July 13, 2010, and/or October 27, 2010,

Macias submitted an estimate to Clark for \$9,300. First Amended Complaint, Exhibit 2, August 10, 2018, ECF # 14. That exhibit states "Lic#908505" and below it the name "Jose Flores." Macias performed the work but (at least according to Clark) did so in a less than workmanlike manner. Clark did not discover that defect in March 2017, apparently when the roof leaked.

When Clark contacted Macias, Macias initially denied responsibility, then agreed to repair the problem and, finally and again, denied responsibility.

Clark sued Macias in Small Claims Court and was awarded a judgment for \$10,075. Macias then petitioned the court, requesting a court-ordered \$25 per month payment plan based on his lack of assets and low-income status. And the Fresno County Superior Court approved that payment plan.

Macias has since filed chapter 7 bankruptcy and Clark's adversary proceeding followed. The adversary proceeding pleads causes of action under 11 U.S.C. §§ 523(a)(2)(A),(a)(6), 727(a)(3),(4). Clark argues the applicability for § 523(a)(2),(a)(6), because his representations of being a licensed contractor are false and because the contractor's license Macias used belonged to "Jose Flores," who neither knew that Macias was using his contractor's license number, nor authorized Macias to work under it. Clark argues that Macias's representations regarding income and expenses used to secure a court-order payment plan by the Fresno County Superior Court are false and a basis to deny discharge under § 727(a)(3),(4).

RULE 12(b)(6)

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 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." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80

F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); accord *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

DISCUSSION

First Count: 11 U.S.C. § 523(a)(2)(A)

Defendant Macias argues that the First Amended Complaint fails to plead the fraud with particularity, as required by Federal Rule of Civil Procedure 9(b).

Since this is a claim alleging fraud, Rule 9(b) applies. *See, e.g., Chase Bank, U.S.A., N.A. v. Vanarthos (In re Vanarthos)*, 445 B.R. 257, 264 (Bankr. S.D.N.Y. 2011). This rule's heightened pleading standard requires a plaintiff to "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b), incorporated by Fed. R. Bankr. P. 7009. This standard means that "the complaint must set forth what is false or misleading about a statement, and why it is false." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (quoting *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999)) (internal quotation marks omitted). The facts constituting fraud must be pleaded specifically enough to give a defendant sufficient "notice of the particular misconduct" so that defendant may defend against the charge. *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir. 2003). A plaintiff must include the "who, what, when, where, and how" of the fraud. *Id.*

Here, the key aspects of the First Amended Complaint are paragraph 50 and Exhibit 2 (the bid). Neither satisfies the strictures of Rule 9(b). Read together, they suggest but a single misrepresentation of licensure arising solely and exclusively out of the words "Lic#908505" and below it the name "Jose Flores" on Exhibit 2 to the First Amended Complaint.

There are two problems here. The first is the court is not entirely clear as to whether the representations on page 2 of Exhibit B to the First Amended Complaint are the only instances of misrepresentations of licensure of which Clark complains.

The second is that even if page 2 of Exhibit B to the First Amended Complaint is the only misrepresentation of which Clark complains, that document fails Rule 9(b) particularity. It does specify the "when" (October 27, 2010), "what" ("Lic#908505" and "Jose Flores"), and "how" (submitted by written estimate). But it does not specify "where" the representation was made and, most importantly, whether the representation was made by Macias, or one of his sons, Nestor or Aaron. And the court notes that the signature on p. 2 of Exhibit B of the First Amended Complaint is illegible. The surname appears to be "Macias." The court is unable to ascertain the signatory's given name. The difference between a representation made by Macias himself and a representation made by one of his sons changes the standard by which § 523(a)(2)(A) will be adjudicated. Compare *Ghomeshi v. Sabban (In re Sabban)*, 600 F.3d 1219, 1222 (9th Cir. 2010)(five elements), with *Sachan v. Huh (In re Huh)*, 506 B.R. 257 (9th Cir. BAP 2014) (imputed fraud requires that the defendant knew or had reason to know of his agent's fraud). For these reasons, the motion will be granted with leave to amend.

Second Count: 11 U.S.C. § 523(a)(6)

Defendant Macias argues that the First Amended Complaint does not state a cause of action for willful and malicious injury, 11 U.S.C. § 523(a)(6), and has failed to plead facts from which the court can independently conclude that Macias's actions meet the intent elements.

Section 523(a)(6) excepts from discharge a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." The "malicious" injury requirement is separate from the "willful" injury requirement. *Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 706 (9th Cir. 2008).

A "malicious" injury involves "(1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse." *Petralia v. Jercich (In re Jercich)*, 238 F.3d 1202, 1209 (9th Cir. 2001) (quoting *In re Bammer*, 131 F.3d 788, 791 (9th Cir. 1997)).

A "willful" injury is a "deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998) (emphases in original). This willful injury requirement is satisfied "only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." *Carrillo v. Su (In re Su)*, 290 F.3d 1140, 1142, 1144-45 (9th Cir. 2002). By contrast, "debts arising from recklessly or negligently inflicted injuries do not fall within the compass of § 523(a)(6)." *Geiger*, 523 U.S. at 64.

Thus, the standard is a subjective one, where the debtor must have "either a *subjective intent* to harm, or a *subjective belief [or actual knowledge]* that harm is substantially certain." *Su*, 290 F.3d at 1444 (emphases added). In determining whether the debtor has actual knowledge, the court can infer that the debtor is usually

"charged with the knowledge of the natural consequences of his actions." *Ormsby v. First Am. Title Co. (In re Ormsby)*, 591 F.3d 1199, 1206 (9th Cir. 2010). "In addition to what a debtor may admit to knowing, the bankruptcy court may consider circumstantial evidence that tends to establish what the debtor must have actually known when taking the injury-producing action." *Su*, 290 F.3d at 1146 n.6.

Here, the First Amended Complaint falls short of the mark. It does not show subjective intent to injure, nor does it show that harm was substantially certain to occur. Many unlicensed builders do have the requisite skill set to perform the work undertaken and frequently perform repairs within the standards of the building industry. That they may not do so lawfully does not mean that harm is intended or certain to occur. The plaintiff appears to concede this point. "Defendant's conduct was voluntary, intentional, willful and reckless because he **knew or should have known** that his lack of a roofer's contractor's license and qualifications as required by California's laws would result in him causing harm to the plaintiff." First Amended Complaint ¶ 54, August 10, 2018, ECF # 14 (emphasis added). Neither the defendant's actual knowledge, nor that he should have known, rises to the level required described by *Su*.

For these reasons, the motion will be granted with leave to amend.

Third Count: 11 U.S.C. § 727(a)(3)

Defendant Macias argues that the First Amended Complaint does not state a cause of action for denial of discharge based on a false oath under Rule 727(a)(3) because he understated his monthly income, monthly rental expense and extent of his assets to the Fresno County Superior Court in requesting a court-mandated repayment plan of just \$25 per month.

As one source noted:

Failure to maintain adequate books and records: **A Chapter 7 discharge may be denied if the debtor has concealed, destroyed, mutilated, falsified or failed to keep books and records relevant to the debtor's financial condition or business transactions ... unless the act or failure was "justified under all of the circumstances of the case."** [11 USC § 727(a)(3)]

The **purpose** of § 727(a)(3) is to ensure that the trustee and creditors are provided with **sufficient information to trace the debtor's financial history from a reasonable period in the past to the present.** [*In re Cox* (9th Cir. 1990) 904 F2d 1399, 1401; *In re Caneva* (9th Cir. 2008) 550 F3d 755, 761]

. . .

Records relevant to debtor's financial condition or business transactions: The statute is directed at records

and documents "from which the debtor's financial condition or business transactions might be ascertained." [11 USC § 727(a)(3)] **A discharge is denied when the concealment, destruction, failure to maintain, etc. (unless justified under the circumstances) has made it impossible to ascertain the debtor's financial condition and/or material business transactions.** [See *In re Cox* (9th Cir. 1994) 41 F3d 1294, 1296]

March, Ahart and Shapiro, *California Practice Guide: Bankruptcy, Discharge and Dischargeability*, Chapter 7 Discharge (Rutter Group 2017).

Here, the pleading is extraordinarily conclusory. After incorporating the first 55 paragraphs of the First Amended Complaint, the third count merely states, "The Debtor, in his operation of his business, 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." First Amended Complaint § 58, August 10, 2018, ECF #14. Such a pleading falls short of the factual plausibility standards described in *Iqbal* and *Twombly*.

For these reasons, the motion will be granted with leave to amend.

Fourth Count: 11 U.S.C. § 727(a)(4)

Defendant Macias argues that the First Amended Complaint does not state a cause of action for denial of discharge based on a false oath under Rule 727(a)(4) because he (1) understated his 2017 income in the Statement of Financial Affairs (\$13,500 claimed); (2) understated his 2016 income in the Statement of Financial Affairs (\$3,000 claimed); and (3) represented that Macias Roofing operated from January 1, 2003, through December 31, 2015, when it actually ceased operations December 14, 2017. First Amended Complaint ¶¶ 62-64.

An objection to discharge under § 727(a)(4)(A) requires the plaintiff to prove that (1) the debtor made a false oath (or account) in connection with his own bankruptcy case; (2) the oath related to a material fact; (3) the oath was made knowingly; and (4) the oath was made fraudulently. *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1197 (9th Cir. 2010). **As to the first element, "[a] false statement or an omission in the debtor's bankruptcy schedules or statement of financial affairs can constitute a false oath." *Id.* As to the second element, a fact is material "if it bears a relationship to the debtor's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of the debtor's property." *Id.* at 1198 (emphasis added).**

If true, these representations may constitute a false oath justifying denial of discharge. If the debtor continued business operations until December 2017, a period of some four months before Macias's chapter 7 filing, it would bear a sufficient nexus to the

estate and its assets, e.g., receivable owed or tools and equipment, to support, at least for pleading purposes, denial of discharge under s 747(a)(4).

For these reasons, the motion will be denied.

VIOLATION OF LOCAL RULES

Each of the parties have violated portions of the local rules.

Plaintiff Clark

Local Bankruptcy Rules require numbering and legibility.

Legible Text. **All petitions, pleadings, motions, briefs and other papers submitted for filing shall be** typewritten, printed, computer generated, or prepared by some other **clearly legible** process, with printing on only one side of each page. Unless prior approval of the Court is granted, interlineations shall not be allowed.

LBR 9004-2(a)(3)(emphasis added).

Exhibits.

- 1) Separate Exhibit Document(s). Exhibits shall be filed as a separate document from the document to which it relates and identify the document to which it relates (such as "Exhibits to Declaration of Tom Swift in Support of Motion For Relief From Stay"). A separate exhibit document may be filed with the exhibits which relate to another document, or all of the exhibits may be filed in one document, which shall be identified as "Exhibits to [Motion/Application/Opposition/...]."
- 2) Exhibit Index. **Each exhibit document filed shall have an index at the start of the document that lists and identifies by exhibit number/letter each exhibit individually and shall state the page number at which it is found within the exhibit document.**
- 3) Numbering of Pages. **The exhibit document pages, including the index page, and any separator, cover, or divider sheets, shall be consecutively numbered and shall state the exhibit number/letter on the first page of each exhibit.**
- 4) Exhibit Page Size. Exhibits larger than 8 ½ inches by 11 inches shall be reduced in size prior to filing. Duplexed exhibits shall be copied and filed with text printed on one side of each page only.

LBR 9004-2(d).

Clark's exhibits attached to the First Amended Complaint are not numbered and are not supported by an index. Many of the pages of Exhibit 5 to the First Amended Complaint are illegible. This court is unable to consider documents that it cannot read.

Defendant Macias

Defendant Macias has two species of violations. The first is that Local Bankruptcy Rules require that each motion be assigned a unique docket control number and docket control numbers not be reused.

(c)Docket Control Number.

1) In motions filed in the bankruptcy case, a Docket Control Number (designated as DC No.) shall be included by all parties immediately below the case number on all pleadings and other documents, including proofs of service, filed in support of or opposition to motions.

. . .

3) **The Docket Control Number shall consist of** not more than three letters, which may be the initials of the attorney for the moving party (e.g., first, middle, and last name) or the first three initials of the law firm for the moving party, and **the number that is one number higher than the number of motions previously filed by said attorney or law firm in connection with that specific bankruptcy case.**

Example: The first Docket Control Number assigned to attorney John D. Doe would be DC No. JDD-1, the second DC No. JDD-2, the third DC No. JDD-3, and so on. This sequence would be repeated for each specific bankruptcy case and adversary proceeding in which said attorney or law firm filed motions.

LBR 9014-1(c)(1),(3) (emphasis added).

Defendant Macias' motion is denominated "GT-1." Clark has previously used that docket control number. See Motion to Dismiss, July 20, 2018, ECF # 7. This is a violation of LBR 9014-1(c).

The second is that Macias has utilized the disfavored practice of "mothorities" (aggregating the motion and the memorandum of points and authorities into but a single document). Local Rules require that the motion must specify the relief sought and the grounds without argument.

Motion or Other Request for Relief. The application, **motion**, contested matter, or other request for relief **shall set forth the relief or order sought and shall state with particularity the factual and legal grounds**

therefor. Legal grounds for the relief sought means citation to the statute, rule, case, or common law doctrine that forms the basis of the moving party's request but does not include a discussion of those authorities or argument for their applicability.

LBR 9014-1(d)(3)(A)(emphasis added).

The memorandum of points and authorities is the appropriate venue for argument.

Memorandum of Points and Authorities. If filed, the memorandum of points and authorities shall be a succinct and reasoned explanation of the moving party's entitlement to relief. Memorandum of points and authorities in excess of 10 pages shall include a table of contents and table of authorities.

LBR 9014-1(d)(3)(C).

Unless the combined motion and motions and authorities are under 6 pages in length, those documents may not be combined into a single document.

Separate Documents. Except as provided herein, each of the documents described in subpart (d)(1) hereof shall be filed as a separate document. **A motion or other request for relief and a memorandum of points and authorities thereto may be filed together as a single document when not exceeding six (6) pages in length, including the caption page.**

LBR 9014-1(d)(4)(emphasis added)

Each party is cautioned to comply with applicable local rules. Depending on the nature of the violation, future failures may result in summary denial of the relief requested and/or an Order to Show Cause for sanctions.

CIVIL MINUTE ORDER

The court shall issue a civil minute order that conforms substantially to the following form:

Findings of fact and conclusions of law are stated in the civil minutes for the hearing.

Arturo Machuca Macias's Rule 12(b)(6) motion to dismiss has been presented to the court. Having considered the complaint, the motion, the memorandum of points and authorities, and the opposition,

IT IS ORDERED that the motion to dismiss is granted as to the first, second and third counts and denied as to the fourth count of the First Amended Complaint, August 10, 2018, ECF # 14.

Second Amended Complaint filed

IT IS FURTHER ORDERED that the plaintiff may file and serve an amended complaint no later than November 7, 2018.

IT IS FURTHER ORDERED that no later November 28, 2018, the defendant Arturo Machuca Macias shall file and serve a responsive pleading or motion. The parties shall not enlarge time for the filing of a responsive pleading or motion without order of this court. Such an enlargement may be sought by ex parte application, supported by stipulation or other admissible evidence.

IT IS FURTHER ORDERED that if defendant files a motion under Rule 12(b) or otherwise, rather than an answer, the motion shall be set for hearing consistent with LBR 9014-1(f)(1) and set for hearing on the first regular hearing date available that is consistent with LBR 9014-1(f)(1).

IT IS FURTHER ORDERED that if defendant fails to file in a timely manner responsive pleading or motion, the plaintiff shall seek entry of the defendant's default.

Second Amended Complaint not filed

IT IS FURTHER ORDERED that if plaintiff Brad Clark elects not to file an amended complaint, not later than November 28, 2018, defendant Arturo Machuca Macias shall file an answer to the First Amended Complaint.

IT IS FURTHER ORDERED that if defendant fails to file timely a responsive pleading or motion, the plaintiff shall seek entry of the defendant's default.