UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

November 13, 2018 at 10:00 a.m.

---

1. 15-29136-A-12 P&M SAMRA LAND — MOTION TO
PRC-1 INVESTMENTS L.L.C. — DISMISS OR TO CONVERT CASE
9-24-18 [616]

Final Ruling: The motion for conversion will be denied. The hearing on the motion to dismiss will be continued to December 10, 2018 at 10:00 a.m.

Secured creditors The Socotra Fund, L.L.C., Gary E. Roller Profit Sharing Plan, and Roller Family Living Trust seek dismissal or conversion of the case to chapter 7.

11 U.S.C. § 1208(c) provides that "*on request of a party in interest, and after notice and a hearing, the court may dismiss a case under this chapter for cause, including . . . (6) material default by the debtor with respect to a term of a confirmed plan.*"

The request for conversion to chapter 7 will be denied. Conversion to chapter 7 is permitted only when a chapter 12 debtor has committed fraud in connection with the case. The motion alleges no fraud.

As to the request for dismissal, the movants contend that the debtor has defaulted under the terms of its plan. The debtor paid the plan payment due May 25, 2018 on August 1, 2018 and the debtor has not made the monthly payments due June 25, 2018 and thereafter.

The debtor does not dispute this default but contends that it seeks to sell the real property securing the claims of the movants and Ag. The debtor filed on November 4, 2018 a second modified plan along with a motion to confirm the modified plan. Dockets 635 & 639. The second modified plan provides for the sale of the debtor's real property. The hearing on the motion is set for December 10, 2018 at 10:00 a.m.

The debtor will be given the opportunity to obtain confirmation of this second modified plan. As such, the court will continue the hearing on the dismissal motion to December 10.

2. 12-34040-A-13 JASON FERNANDEZ — MOTION TO
18-2113 PLC-1 — APPROVE COMPENSATION OF
FERNANDEZ V. AMERICAN FIRST CREDIT UNION — PLAINTIFF'S ATTORNEY
8-27-18 [10]

Tentative Ruling: The motion will be granted in part and denied in part.

The plaintiff, Jason Fernandez, the debtor in the underlying chapter 13 case, prevailed in this action against the defendant American First Credit Union. As

the prevailing party he seeks $5,360 in attorney's fees and $241,90 in expenses, a total of $5,690.90.

The requested compensation represents work by two attorneys who represented the plaintiff. $1,230 in fees represents work performed by attorney Mo Mokarram, who charged an hourly rate of $300. Mr. Makarram represented the plaintiff in the chapter 13 bankruptcy case and made an attempt to obtain reconveyance of the deed of trust from the defendant, prior to the filing of this adversary proceeding.

The remainder of the compensation, $4,130 in fees and $241.90 in expenses (for a total of $4,371.90), represents work by Peter Cianchetta, the attorney who prepared the adversary proceeding complaint and filed this action.

The compensation is based on an attorney's fee provision in the note and deed of trust between the parties and California's fee reciprocity statute, Cal. Civ. Code § 1717(a). The sought compensation covers the period from May 23, 2018 through August 27, 2018 (when this motion was filed). In performing its services, the plaintiff's attorneys charged hourly rates of $300 and $350.

The defendant while not disputing the plaintiff's entitlement to compensation, disputes the reasonableness of the requested compensation.

Cal. Civ. Code § 1717 provides that:

"*(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.*"

As mentioned above, the defendant does not dispute the plaintiff's entitlement to compensation under the agreements between the parties and under section 1717. The only issue here is the reasonableness of the requested compensation.

First, the court rejects the defendant's explanation for initially not wanting to reconvey the deed because it was not aware that this court did not require "an order avoiding the lien" before the reconveyance. This court ordered the defendant's junior encumbrance on the plaintiff's residence stripped off on September 26, 2012. Case No. 12-34040, Docket 28. The ruling granting the motion to value expressly states that "*The respondent's deed of trust will remain of record until the plan is completed. This is required by 11 U.S.C. § 1325(a)(5)(B)(I). Once the plan is completed, if the respondent will not reconvey its deed of trust, the court will entertain an adversary proceeding. See also 11 U.S.C. § 1325(a)(5)(B)(I).*" Case No. 12-34040, Docket 27 at 2.

In other words, the defendant was on notice that completion of the plan would lead to the requirement of reconveyance. See Case No. 12-34040, Docket 19 (proof of service indicating that the motion to value was served on the defendant); see also Case No. 12-34040, Docket 23 (late-filed opposition to the valuation motion, indicating that the defendant knew of the motion and eventual granting of the motion). Nothing justifies the defendant's failure to reconvey the deed when it first discovered that the plaintiff had completed his chapter 13 plan.

Second, as the defendant has not challenged the fees of Mr. Makarram, and the

court does not find them unreasonable or unnecessary, given the defendant's refusal to reconvey the deed and the need for new counsel to prosecute the adversary proceeding, Mr. Makarram's fees will be allowed. Such fees constituted 2.9 hours of Mr. Makarram attempting to obtain the reconveyance and 1.2 hours of facilitating the transfer of the representation to Mr. Cianchetta.

Third, the court is unconvinced that all of Mr. Cianchetta's fees are all reasonable.

The court will not allow Mr. Cianchetta to bill for clerical time. Billing for clerical time is impermissible because it is overhead expenses. See Sousa v. Miguel (In re U.S. Trustee), 32 F.3d 1370, 1374 (9th Cir. 1994).

The court will disallow in its entirety the July 10, 2018 0.5-hour time entry for Mr. Cianchetta's service of the "[c]omplaint and associated documents."

Further, the court will disallow 0.6 hours from the July 10, 2018 1.0-hour time entry for Mr. Cianchetta's "[r]esearch [of] proper service address and service party." There was clearly no need for a search of the "proper . . . service party" here. This has never been an issue in this dispute. Searching the proper service address also did not require one hour. The defendant is a credit union and its address can be easily obtained from the Internet at various sites.

The court will also disallow 0.5 hours from the July 10, 2018 1.0-hour time entry for Mr. Cianchetta's "[r]eview Sacramento County Recorder for reconveyance." The court finds excessive, and Mr. Cianchetta has said nothing to justify, a one-hour search for whether the defendant recorded a reconveyance of the deed.

The court will additionally disallow 1.2 hours from the July 10, 2018 4.0-hour time entry for Mr. Cianchetta's "[p]repar[ing] motion to reopen, Adversary Proceeding," which presumably includes preparation of the adversary proceeding complaint. The motion to reopen is barely one-half page long. Case No. 12-34040, Docket 46. While the complaint is nine pages long (with the last two pages seeking recovery of attorney's fees), it appears to be a standard complaint Mr. Cianchetta has filed in other chapter 13 bankruptcy cases in the past. Docket 1. As such, the court will award a total of 2.8 hours of compensation for these services.

The court will not disallow any fees for the two 0.5-hour entries (August 13 and August 23) of Mr. Cianchetta for his receiving, reviewing, and sending emails. The opposition mischaracterizes the work involving those entries as merely "[e]-mails." It was more than just Mr. Cianchetta sending emails. The August 13 entry involved receiving/reviewing emails and responding. The August 23 entry involved receiving/reviewing email, filing a stipulation for entry of judgment, and preparing email to the plaintiff.

The defendant has not challenged other time entries by Mr. Cianchetta. See Docket 26 at 9-10.

The above total 2.8 hours or $980 (2.8 hours x $350 / hour). Therefore, Mr. Cianchetta's fees will be allowed in the amount of $3,150 ($4,130 - $980). The expenses will be allowed as requested. The motion will be granted in part and denied in part.

3. 17-22851-A-7 ABDUL/TAHMINA RAUF — MOTION TO COMPEL O.S.T. 11-5-18 [96]
BHS-5

Tentative Ruling: The motion will be granted.

The trustee seeks to compel the debtors to provide access to their residence in Sacramento, California, in order to permit the trustee to prepare the property for sale and show the property to prospective buyers. The trustee asks that the debtors not be present when the home is shown to prospective buyers. The proposed advance notice to the debtors, prior to a visit, is 24 hours.

11 U.S.C. § 541(a)(1) provides that property of the estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 542(a) requires parties holding property of the estate to turn over "and account for, such property or the value of such property."

Neither the debtors nor their attorney has been responsive to contacts by the trustee about the estate's sale of the property.

There is equity in the property that could be potentially realized for the benefit of the estate. The court will allow the estate to market the property for sale.

Accordingly, given the debtors' failure to respond to the trustee's requests to show the property to prospective buyers, the court will enter an order compelling the debtors to provide access to the trustee and any of his professionals, in order for him to prepare the property for sale and market it. The court will also compel the debtors to leave the property prior to any showings conducted by the trustee or his professionals provided they are given 24 hours notice.

This is the trustee's first step to administer the property. In the event the debtors fail to abide by the court's order and cooperate in the sale of the property, the trustee may seek further relief from the court in order to discharge his obligations to the estate and the creditors. Further relief could entail compelling the debtors to vacate the property.

The motion will be granted.

4. 18-23182-A-7 ENRIQUE OLMOS — MOTION TO DISMISS ADVERSARY PROCEEDING 10-2-18 [16]
18-2139 AJP-1
BERMUDEZ V. OLMOS, JR.

Tentative Ruling: The motion will be granted.

The defendant, Enrique Olmos, who is the debtor in the underlying chapter 7 case, seeks dismissal under Fed. R. Civ. P. 12(b)(6) of the amended complaint filed August 31, 2018 by the plaintiff Omar Bermudez.

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).

"*Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint. See Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1141 n.5 (9th Cir. 2003).*"

Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006); see also Stoner v. Santa

Clara County Office of Educ., 502 F.3d 1116, 1120 n.2 (9th Cir. 2007).

"*In reviewing the dismissal of a complaint, we inquire whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949–50, 173 L. Ed. 2d 868 (2009). The heightened pleading standard of Rule 9(b) governs FCA claims. Bly–Magee v. California, 236 F.3d 1014, 1018 (9th Cir. 2001). Rule 9(b) provides that '[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.' Fed.R.Civ.P. 9(b). To satisfy Rule 9(b), a pleading must identify 'the who, what, when, where, and how of the misconduct charged,' as well as 'what is false or misleading about [the purportedly fraudulent] statement, and why it is false.' Ebeid ex rel. United States v. Lungwitz, 616 F.3d 993, 998 (9th Cir. 2010) (internal quotation marks and citations omitted).*"

Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055-56 (9th Cir. 2011).

The plaintiff's August 31 amended complaint is grossly deficient in pleading actionable nondischargeability claims against the defendant.

The complaint appears to seek the nondischargeability of the debt owed by the defendant to the plaintiff. According to the complaint, in December 2016, the defendant entered into an unspecified contract with the plaintiff, who runs a car dealership Eagle Auto Sales, involving the purchase and financing of a 2003 Toyota RAV4 vehicle.

The complaint contends that the defendant fraudulently filed for bankruptcy because he did not comply with the plaintiff's request to become current on the loan secured by the vehicle or to return the vehicle. The complaint also alleges that the defendant hid the vehicle by abandoning it in Fairfield, California, preventing the plaintiff from recovering it.

The plaintiff sued the defendant in small claims court. The trial in that court took place on May 18, 2018. A judgment in the small claims court for $7,303 was entered against the defendant on or about June 15, 2018. The defendant filed the underlying chapter 7 case on May 21, 2018.

The vehicle was impounded by the City of Fairfield on June 25, 2018.

First, the complaint fails to identify the nondischargeability provision under which the plaintiff is prosecuting this action. There is no reference to any of the provision of 11 U.S.C. § 523.

Second, to the extent the complaint complains that the debt should not be discharged because the defendant stopped paying on his contract with the plaintiff, the complaint will be dismissed without leave to amend. Merely stopping to make payments on a loan is not fraud for purposes of 11 U.S.C. § 523(a)(2) or (a)(4) and it is not actionable under 11 U.S.C. § 523(a)(6).

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").

Third, to the extent the complaint alleges fraud, it will be dismissed because fraud is not alleged with specificity. 11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff justifiably relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")). These elements are virtually identical to the elements of common law or actual fraud. Younie, 211 B.R. at 374; Advanta Nat'l Bank v. Kong (In re Kong), 239 B.R. 815, 820 (B.A.P. 9th Cir. 1999).

The complaint says nothing precise about fraud. For example, it says nothing about what representations the defendant made, to whom he made them (to the plaintiff or his manager), when he made the representations, what was false about the representations, what indicates that the defendant knew the representations to be false when he made them, how and when the plaintiff relied on the representations, etc.

Fourth, the allegations about the defendant having hidden the vehicle do not amount to fraud. And, while there may be a claim under section 523(a)(6), the complaint gives virtually no facts about the circumstances of the alleged concealment of the vehicle. The "vehicle hiding" allegations do not state a section 523(a)(6) claim upon which relief can be granted.

Fifth, the reference to the small claims action and resulting judgment against the defendant are not helpful either. The complaint says nothing about the claims asserted in the small claims action. It says nothing about what was alleged and on which claims the court entered the judgment.

Also, the judgment was entered post-petition, during the pendency of the underlying bankruptcy case. The judgment establishes only that the plaintiff violated the automatic stay. See 11 U.S.C. § 362(a). The automatic stay was in effect in June 2018, when the plaintiff obtained the small claims court judgment against the defendant.

Therefore, the August 31 complaint does not state a claim upon which relief can be granted. The court will dismiss the August 31 amended complaint, with leave for the plaintiff to amend the complaint and make one last attempt to plead actionable nondischargeability causes of action.

The plaintiff's new allegations in the opposition to this motion, and documents attached to the opposition, are not part of the complaint and the court will not consider them. The court is limited to considering the complaint. The motion will be granted.

The plaintiff shall have 14 days from November 13 to file a second amended complaint. A responsive pleading from the defendant on that complaint shall be due 14 days from when the complaint is filed.

5. 18-23182-A-7 ENRIQUE OLMOS — CONTINUED STATUS CONFERENCE
18-2139 — 8-31-18 [12]
BERMUDEZ V. OLMOS, JR.

Tentative Ruling: None.