UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

June 28, 2018, at 11:00 a.m.

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1. **15-28908-E-13** **WILLIAM/SARAH MCGARVEY** **MOTION TO DISMISS ADVERSARY PROCEEDING**
18-2053 **DKM-1** **5-29-18 [8]**

MCGARVEY V. USAA SAVINGS BANK

Tentative Ruling: 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.

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

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Plaintiff-Debtor's Attorney on May 29, 2018. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss Adversary Proceeding has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1) and Federal Rule of Bankruptcy Procedure 4004(a). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Dismiss Adversary Proceeding is granted.

USAA Savings Bank ("Defendant") moves for the court to dismiss all claims against it in Sarah McGarvey's ("Plaintiff-Debtor") Complaint according to Federal Rule of Civil Procedure 12(b)(6).

REVIEW OF COMPLAINT

As the court reads the Complaint, Plaintiff-Debtor alleges:

A. Defendant was sent actual notice of the automatic stay in Plaintiff-Debtor's Chapter 13 bankruptcy case, filed on November 16, 2015. ¶ 9–10; Dckt. 1.

B. Post-filing, Defendant continued to report on Plaintiff-Debtor's credit report that her account was in collections with a past-due balance owed. ¶ 11.

C. Defendant filed two separate claims in Plaintiff-Debtor's Chapter 13 bankruptcy case on January 26, 2016. ¶ 15.

D. Defendant, by failing to update its reporting on Plaintiff-Debtor's credit report, acted with intent and Plaint-Debtor believes the collections notation and past-due balance related to Defendant's claims will only be removed by paying the Defendant. ¶ 20–21.

E. Defendant is "simultaneously attempting to receive payment from" the Plaintiff-Debtor as well as under the Chapter 13 plan. ¶ 22.

F. Plaintiff-Debtor argues that Defendant's knowledge of the automatic stay, coupled with the alleged intentional failure to remove the collections notation on the Plaintiff-Debtor's credit report, constituted a willful violation of the automatic stay under 11 U.S.C. § 362.

APPLICABLE LAW

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 a complaint have 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 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 that would entitle him to the relief. *Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976). Any doubt with respect to whether to grant a motion to dismiss should be resolved in favor of the pleader. *Pond v. Gen. Elec. 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 Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 731 (1961).

Under the Supreme Court's formulation of Federal Rule of Civil Procedure 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*, 556 U.S. 662, 687 (2009). Instead, a complaint must set forth enough factual matter to establish plausible grounds for the relief sought. *See Bell Atl. Corp.*

v. Twombly, 550 U.S. 544, 556 (2007) ("[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 a cause of action's elements will not do.").

In ruling on a motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6), 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 reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754–55 (9th Cir. 1994) (citations omitted).

A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: either a lack of a cognizable legal theory, or insufficient facts under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

REVIEW OF MOTION

The Motion responds to the Complaint's claims with the following grounds:

A. Defendant alleges that Plaintiff-Debtor's Adversary Complaint failed to plead sufficient facts that support the claim that Defendant willfully and intentionally violated the automatic stay.

B. Defendant alleges that Plaintiff-Debtor's Adversary Complaint simply pleads legal conclusions based on the language of 11 U.S.C. § 362(k).

C. Defendant asserts that the Ninth Circuit Bankruptcy Appellate Panel decision, *In re Keller*, is controlling and that credit reporting is not a *per se* violation of the automatic stay.

D. Defendant argues that Plaintiff-Debtor fails to plead sufficient facts that would demonstrated Defendant violated the automatic stay through harassment or coercion.

PLAINTIFF-DEBTOR'S OPPOSITION

Plaintiff-Debtor filed an Opposition on June 14, 2018. Dckt. 12. Plaintiff-Debtor states that a First Amended Complaint has been drafted to address issues raised in Defendant's Motion to Dismiss, which Plaintiff-Debtor expects to file and serve in advance of the hearing date.

DEFENDANT'S REPLY

Defendant filed a Reply on June 21, 2018. Dckt. 14. Defendant argues that Plaintiff-Debtor has failed to file and serve a timely amended complaint pursuant to Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 15(a). Defendant also argues that Plaintiff-Debtor's so-called opposition is not actually opposing any of the grounds for dismissal raised by Defendant.

DISCUSSION

The court has reviewed the Complaint itself and now adds to the analysis and counter-analysis of the Parties as to what is stated in the Complaint.

Reading these allegations, Plaintiff-Debtor's assertions are broad and non-specific, especially concerning the issue of intent. Plaintiff-Debtor alleges that Defendant's "intent is that Plaintiff will make a payment" despite the active bankruptcy proceedings, but she fails to offer any knowledge of factual matter that would establish whether Defendant's actions and intent were aimed at coercing or otherwise influencing Plaintff-Debtor, or whether Defendant merely acted with intent not to change the credit report. ¶ 20; Dckt. 1. If Plaintiff-Debtor has factual grounds for establishing the intent of Defendant, those grounds have not been presented adequately in the complaint as drafted.

Plaintiff-Debtor alleges that Defendant's actions were a "willful" violation of 11 U.S.C. § 362(a)(6), citing the Ninth Circuit definition, concluding that Defendant had "prior actual knowledge" and its conduct was "unreasonable," but does not provide any facts to support the unreasonableness element of the claim. ¶ 26; Dckt. 1. Plaintiff-Debtor cannot plead the basic elements of a cause of action and then conclude that Defendant's action was willful—that appears to be a circular argument and an attempt to plead what is merely a general allegation. As set forth by *Iqbal*, the law requires that a general and conclusory complaint, without a set of facts to support the claim, cannot not survive a motion to dismiss. 556 U.S. 662, 687 (2009).

Defendant has argued that the mere act of credit reporting by a creditor, even post-petition, is not a *per se* violation of 11 U.S.C. § 362(a)(6). *In re Keller*, 568 B.R. 118, 122 (B.A.P. 9th Cir. 2017) (holding that post-petition credit reporting of overdue or delinquent payments, *without more*, does not violate the automatic stay as a matter of law). Plaintiff-Debtor argues that Defendant's willful reporting to credit agencies is a violation of the automatic stay, but she does not provide any explanation of what *more* there is to consider in the instant matter.

Plaintiff-Debtor has argued, rather ambiguously, that Defendant acted with the intent "that Plaintiff will make a payment." ¶ 26; Dckt 1. The *In re Keller* court provides that to violate 11 U.S.C. § 362(a)(6), there must be a showing that the credit reporting was done with the "purpose of coercing" the debtor. 568 B.R. at 123. Plaintiff-Debtor has only made vague inferences to an intent by Defendant to influence her into making a payment—but there is no mention of the coercion element required by the *In re Keller* court. *Id*. In the instant case, this court relies on the persuasive law detailed above and reiterates that unreasonable inferences or mere conclusions of fact recast as factual allegations are insufficient pleadings.

As drafted, the Complaint does not meet the Supreme Court standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Plaintiff-Debtor's argument is lacking in supporting facts. The Complaint also fails on the grounds that the elements of "willful" and "unreasonable" cited by Plaintiff-Debtor are mere conclusions, not legal analysis. The Complaint also appears to argue—due to an absence of supporting factual grounds that would argue otherwise—that the credit reporting is a *per se* violation of § 362(a)(6), which is incorrect. Finally, Plaintiff-Debtor fails to provide anything beyond an inference that Defendant acted with an intent to coerce.

While all of this discussion would be moot if Plaintiff-Debtor had filed an amended complaint as she claimed that she would, no such amended complaint has been filed.

The Motion to Dismiss Adversary Proceeding is warranted because Plaintiff-Debtor has not pleaded sufficient facts to establish plausible grounds for the Complaint. The Motion is granted, and the Complaint is dismissed. Plaintiff-Debtor shall file an Amended Complaint by July 6, 2018.

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.
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> The Motion to Dismiss Adversary Proceeding filed by USAA Savings Bank ("Defendant") 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 is granted, and the Complaint is dismissed without prejudice. Sarah McGarvey ("Plaintiff-Debtor") shall file an amended complaint by **July 6, 2018.**