



IT IS ORDERED as set forth below:

Date: August 28, 2009

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 08-85535

Anthony Lawrence Giuliani,

CHAPTER 13

Debtor.

JUDGE MASSEY

Anthony Lawrence Giuliani,

Plaintiff,

v.

ADVERSARY NO. 09-6229

Margaret M. Giuliani,

Defendant.

ORDER GRANTING MOTION TO DISMISS ADVERSARY PROCEEDING

Debtor Anthony Lawrence Giuliani brings this adversary proceeding to avoid what he contends was a transfer of real property located in New Jersey avoidable under 11 U.S.C. § 548 as fraudulent or under 11 U.S.C. § 547 as preferential. Defendant moves to dismiss for failure to

state a claim for relief pursuant to Fed. R. Civ. P. 12(b)(6) made applicable by Fed. R. Bankr. R. 7012.

As discussed below, the facts alleged in the complaint are practically non-existent, but the basic circumstances are described in Defendant's motion to dismiss. The motion shows that Plaintiff and Defendant were parties to a divorce proceeding filed by Mr. Giuliani in the Superior Court of Cobb County, Georgia under case no. 08-1-2711-49 (the "Divorce Case"). In that connection, the parties entered into a separation agreement dated March 28, 2008 pursuant to which Plaintiff agreed to transfer to Defendant real property located at 317 N. East Avenue, Vineland, New Jersey (the "Property") and real property located in Georgia. Under the March 28 agreement, Plaintiff retained a life estate in both properties. On May 12, 2008, the parties entered into an amended separation agreement, which provided that "Husband shall release his life estate" in the Property and the Georgia real property. The separation agreement, as amended, was made a part of the Final Judgment and Decree dated May 20, 2008 entered in the Divorce case. (Defendant alleges in the motion that pursuant to the amended separation agreement, Plaintiff transferred the Property to the Defendant, which is not what the initial agreement or amendment states, but it is undisputed that at some point Plaintiff gave Defendant a deed to the Property.) In September 2008, Plaintiff sued Defendant in a New Jersey state court seeking to set aside the transfer on the grounds of insufficiency of consideration and impaired mental capacity. In December 2008, Plaintiff filed the Chapter 13 case referenced in the above caption in which this adversary proceeding was filed.

In addition to asserting that the complaint fails to state a claim for relief, Defendant contends that Plaintiff lacks standing to bring this adversary proceeding. She also asserts that the Court should abstain in favor of the New Jersey litigation.

Plaintiff responded to the motion, stating that if there were a standing problem, the Trustee might join the complaint to cure that problem and that the Court has the "right" to abstain. Defendant did not dispute the facts alleged by Plaintiff.

The Court agrees with Plaintiff that the complaint fails to state a claim for relief and therefore need not reach the additional issues of whether Plaintiff has standing or whether the Court should abstain from hearing this matter.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557, 127 S. Ct. 1955, 167 L. Ed. 2d 929.

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.*, 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)

Ashcroft v. Iqbal, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009).

The complaint in this adversary proceeding alleges no facts that would, if true, satisfy any element of sections 547 and 548 of the Bankruptcy Code, other than that Plaintiff transferred the Property to Defendant within a year of filing this bankruptcy case. The allegations that the settlement agreement was unfair and unconscionable, which seems to be the gravamen of the complaint, are mere conclusions that are not elements of the claims Plaintiff attempted to state. Although the complaint alleges that the Property was worth more than Plaintiff's Georgia home, it lacks any factual allegations showing that Plaintiff was insolvent or was rendered insolvent at the time of the transfer.¹ The allegations do not permit the Court to draw the inference that Defendant is liable or indeed demonstrate even the possibility of liability under sections 547 and 548.

For this reason, Defendant's motion to dismiss is GRANTED.

END OF ORDER

¹ In his Schedules in the main bankruptcy case, Mr. Giuliani swore that on the date he filed his petition, his liabilities exceeded his assets by only \$100.26.