

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:)	Chapter 7
)	
Ulys Randall Riner,)	Case No. 04-71540mgd
)	
Debtor)	Judge Diehl
)	
)	
Tamara Miles Ogier as Chapter)	
7 Trustee for the Estate of Express)	Adversary Proceeding
Factors, Inc.)	
Plaintiff,)	No. 04-6562
)	
vs.)	
)	
Ulys Randall Riner,)	
)	
Defendant)	

ORDER DENYING DEFENDANT'S
MOTION TO DISMISS

On October 18, 2004, Tamara Miles Ogier, as Chapter 7 Trustee for the Estate of Express Factors, Inc. ("Trustee") filed a Complaint in the above matter seeking a determination of non-dischargeability and of liability for certain alleged debts allegedly owed by Defendant Ulys Randall Rimer ("Defendant"), the former President, Director and sole shareholder of Express Factors, Inc.¹ The cover sheet describes the cause of action as "Objection to Discharge Pursuant to 11 U.S.C. §§ 523(a)(4) and (a)(19) and for Determination of Liability." The Complaint itself

¹The Trustee had previously commenced an adversary proceeding against Defendant (AP No. 03-6389) in connection with the Chapter 7 case of Express Factors, Inc. (Case No. 02-66992)(Hereinafter "Express") but that action was stayed by the filing of Defendant's bankruptcy case. The Trustee then filed the Complaint herein. The underlying claims in the two actions appear to be substantially the same.

contains a series of factual allegations relating to Defendant's status with Express and his actions and then has two counts. Count I - 11 U.S.C. § 523(a)(4) alleges that Defendant was a fiduciary of Express and its creditors and seeks both damages and a determination that those damages are non-dischargeable under the cited subsection. The damages are generally described as fraudulent transfers, conversion, securities violations, wire and mail fraud and Georgia RICO violations. The complaint also alleges damages as a result of deepening insolvency and punitive damages and attorneys fees. Count II - 11 U.S.C. § 523(a)(19) seeks a determination that damages arising from the sale by Defendant of unregistered securities are non-dischargeable

Defendant has filed a Motion to Dismiss the Complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.² With respect to Count I, Defendant argues that he is not a "fiduciary" within the meaning of 11 U.S.C. § 523(a)(4). With respect to Count II, Defendant argues that the non-dischargeability provisions of § 523(a)(19) were added to the Bankruptcy Code after his Chapter 7 case was filed and is therefore not applicable to his case. The Trustee concedes this latter argument and states that she withdraws Count II.

The function of a Rule 12(b) motion to dismiss is test the legal sufficiency of the claim for relief. Such motion should only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Jackson v. Hospital Corp. of America Mideast, Ltd.*, 800 F. 2d 1577, 1579 (11th Cir. 1986). The burden of proof that the Complaint fails to state a claim is

²Applicable in this adversary proceeding pursuant to Rule 7012 of the Rules of Bankruptcy Procedure.

on the moving party. *Johnsrud v. Carter*, 620 F. 2d 29, 33 (3d Cir. 1980). In deciding such a motion, the Court should construe the complaint in the light most favorable to the plaintiff, and its allegations taken as true. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969), *reh'g denied*, 396 U.S. 869 (1969). The real issue before the Court is “not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.” *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974).

Defendant would have the Court read the Complaint narrowly to state that the only basis for a determination of non-dischargeability under § 523(a)(4) is “fraud or defalcation while acting in a fiduciary capacity” and that the only basis for finding that Defendant was a fiduciary was his status as a corporate officer. However, Plaintiff’s Complaint, construed in the most favorable way to Plaintiff goes much further than that narrow theory.

First, Defendant does not even address the claims for a determination of liability without regard to the dischargeability issues. While the Complaint does not contain detail with respect to many of these items of damages, the allegations are sufficient for notice pleadings. Thus, it does not appear that Defendant contests that a claim has been stated with respect to Defendant’s liability for certain sums on fraudulent conveyance and preference theories.

Second, with respect to the dischargeability issues, Plaintiff’s prayer for relief references Section 523(a)(4) in general and thus could be interpreted in the light most favorable to Plaintiff as encompassing any relief available under that section. Indeed, a motion to dismiss should be granted only if the court cannot grant any relief from the facts plead. It need not appear that the plaintiff can obtain the exact relief requested in the complaint. *Bowers v. Hardwick*, 478 U.S. 186, 201-02, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (Blackmun, J., dissenting); See *Brooks v.*


Blue Cross & Blue Shield of Fla., Inc., 116 F. 3d 1364, 1369 (11th Cir. 1997). While the numbered paragraphs do appear to limit themselves to the “fraud or defalcation while acting in a fiduciary capacity” section of 523(a)(4), the Court will permit the Plaintiff to amend her complaint in this respect.³

The Court need not reach at this juncture the narrow legal issue raised by Defendant’s motion: whether a fiduciary duty imposed by state law rises to the level of fiduciary capacity as used in 11 U.S.C. § 523(a)(4). Until the parties have conducted discovery and provided evidence to the court it is premature to determine whether or not the Defendant was acting in a fiduciary capacity in this case.

It is therefore ORDERED that Plaintiff shall have thirty days from the entry of this Order in which to file a Motion to Amend the Complaint and it is further

ORDERED that Defendant’s Motion to Dismiss is DENIED.

This 2nd day of February, 2005.



Mary Grace Diehl
United States Bankruptcy Judge

³Plaintiff’s Response to Defendant’s Motion indicates that an amendment will be forthcoming. However, as of the date of this Order, no motion to amend appears on the docket.