**IT IS ORDERED as set forth below:**

**Date: February 20, 2008**

**James E. Massey**
**U.S. Bankruptcy Court Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| IN RE: | CASE NO. 07-73085 |
| Phuc Thi Nguyen, | CHAPTER 7 |
| Debtor. | JUDGE MASSEY |
| Wells Fargo Financial National Bank, | |
| Plaintiff, | |
| v. | ADVERSARY NO. 07-6656 |
| Phuc Thi Nguyen, | |
| Defendant. | |

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

In this adversary proceeding, the Debtor and Defendant, Phuc Thi Nguyen, seeks to dismiss the complaint to determine dischargeability of debt pursuant to 11 U.S.C. § 523(a)(6)

filed by Plaintiff, Wells Fargo Financial National Bank, for failure to state a cause of action. The Court has reviewed the pleadings and enters this Order accordingly.

The motion to dismiss "for failure to state a cause of action" would be treated as a motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, made applicable by Rule 7012 of the Federal Rules of Bankruptcy Procedure, except for the fact that Defendant had filed an answer before he filed a motion to dismiss. Rule 12(b) provides that "[a] motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed." Therefore, the Court will construe the motion to dismiss "for failure to state a cause of action" as motion for judgment on the pleadings under Rule 12(c).

> When we review a judgment on the pleadings, therefore, we accept the facts in the complaint as true and we view them in the light most favorable to the nonmoving party. *See Ortega*, 85 F.3d at 1524 (citing *Swerdloff v. Miami Nat'l Bank*, 584 F.2d 54, 57 (5th Cir.1978)). The complaint may not be dismissed " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Slagle*, 102 F.3d at 497 (*quoting Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) & citing *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811, 113 S.Ct. 2891, 2916-17, 125 L.Ed.2d 612 (1993)).

*Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998).

The substantive factual allegations, such as they are, in the complaint are contained in paragraphs 4 and 5. In paragraph 4, the Plaintiff alleges: "The Defendant has not reaffirmed the indebtedness with Plaintiff although a request for reaffirmation has been made, nor has she surrendered the collateral purchased. Upon information and belief, Defendant has conceded to her counsel that she has retained possession of said Jewelry." In paragraph 5, Plaintiff alleges that "Debtor's actions show that the Debtor had no intention to repay this Debt and that Debtor willfully and maliciously injured Creditor. 11 U.S.C. § 523(a)(6)."

Section 523(a)(6) is concerned with debts arising from intentional torts resulting in injury to the property or person of the creditor. Plaintiff has not alleged facts to support its conclusory allegation in paragraph 5 that "Debtor willfully and maliciously injured Creditor." The failure to reaffirm a debt does not cause that debt to arise from a willful and malicious injury. Plaintiff does not allege conversion of its collateral, asserting instead that Defendant still has possession of the jewelry. Why Plaintiff has not bothered to seek stay relief is not clear from the complaint. Nor is it clear what precisely the facts are that gave rise to an injury to property in which Plaintiff has an interest. Needless to say the funds that Plaintiff loaned to Defendant to acquire the jewelry cannot be the subject of a claim that Defendant injured those funds. (In all likelihood, the loan was made by check or electronic transfer; Plaintiff's interest in cash could be injured only if Defendant destroyed the cash before the loan was made, an absurd scenario that Plaintiff does not allege.)

The allegation in paragraph 5 that Defendant never intended to repay the loan does not implicate section 523(a)(6) but may be a weak attempt to state a claim under section 523(a)(2), dealing with false representations and actual fraud. Fraud allegations fall within the purview of subsection (a)(2), not subsection (a)(6) of section 523. Otherwise, there would be no need for subsection (a)(2).

Plaintiff is not required to plead its claim with as much specificity as possible. In fact, the threshold for pleadings is extremely low. All that is required at this point is that the complaint contains a "statement calculated to give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *United States v. Baxter International, Inc*., 345 F.3d 866, 881 (11th Cir. 2003) (*quoting Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Allegations of fraud

should be stated with "particularity" under Rule 9 of the Federal Rules of Civil Procedure, applicable through Rule 7009 of the Federal Rules of Bankruptcy Procedure. Defendant can file a motion under Rule 9 for more specificity as to any fraud claim.

In short, although the complaint is very poorly drafted, about as poorly drafted as one can be and still survive a motion to dismiss or a motion for judgment on the pleadings, the Court cannot say that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hawthorne*, 140 F.3d at 1370. The fact that Plaintiff did not bother to respond to the motion to dismiss may reflect an extreme lack of confidence in its ability to prove facts that would entitle it to relief.

For these reasons, Defendant's motion to dismiss the complaint for failure to state a cause of action is DENIED. The Clerk is directed to serve a copy of this Order on counsel for the parties.

***END OF ORDER***