



IT IS ORDERED as set forth below:

Date: June 03, 2010

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION**

In re:	:	
	:	
DAVID L. ARNOLD,	:	BANKRUPTCY CASE NUMBER
	:	09-42804-MGD
Debtor.	:	
	:	
	:	ADVERSARY CASE NUMBER
TRAVIS RAGSDALE,	:	09-04107-MGD
	:	
Plaintiff,	:	
v.	:	CHAPTER 7
	:	
DAVID LEE ARNOLD,	:	
	:	
Defendant.	:	

ORDER DENYING MOTION TO DISMISS AND NOTICE OF HEARING

The above-styled adversary proceeding is before the Court on David Lee Arnold's ("Defendant") Motion to Dismiss Pursuant to F.R.Bank.P. 7012(b) and F.R.Civ.P. 12(b)(5) and 12(b)(6). (Docket No. 5). Travis Ragdale ("Plaintiff") has filed a Brief in Opposition to Defendant's Motion to Dismiss. (Docket No. 11). For the following reasons, Defendant's

Motion to Dismiss is DENIED.

Defendant seeks dismissal of the complaint on two grounds: insufficient service of process and failure to state a claim upon which relief can be granted. The Court will address each of these issues in turn. As to the service of process, Defendant seeks dismissal because Defendant's bankruptcy counsel was not served with the complaint. Federal Rule of Bankruptcy Procedure 7012(b)(5) permits a defendant in an adversary proceeding to assert the defense of insufficient service of process by motion. Federal Rule of Bankruptcy Procedure 7004(g) provides that whenever a debtor is served with process under Rule 7004, service shall also be made on the debtor's attorney if the debtor is represented by counsel. Plaintiff filed his complaint on October 15, 2009. On that same date, a summons was issued on Defendant and Plaintiff filed a certificate of service indicating that Plaintiff had served Defendant by first class mail. (Docket Nos. 2, 4). Defendant's Motion to Dismiss was filed on November 15, 2009. The Court notes that Defendant's counsel had actual notice of the complaint at least by November 15, 2009, when he filed the Motion to Dismiss on Defendant's behalf. In response to Defendant's Motion, Plaintiff obtained a summons on Philip Barnes of Leonard, Rickman & Holloway, P.C., who is Defendant's counsel in Defendant's underlying bankruptcy case. (Docket No. 9). Plaintiff filed a certificate of service on November 20, 2009, indicating that he had served Defendant and Defendant's counsel by first class mail on November 19, 2009. (Docket No. 10). It appears, therefore, that Defendant and Defendant's counsel have been served properly with the complaint and that this issue has been resolved.

Defendant also seeks to dismiss the complaint for failure to state a claim. Federal Rule of Bankruptcy Procedure 7012(b)(6) permits a defendant in an adversary proceeding to move for

dismissal in the event that a plaintiff fails to state a claim upon which relief can be granted.

When reviewing a complaint to determine whether a claim upon which relief can be granted has been stated, the Court must accept as true the factual allegations of the complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007); *Daewoo Motor America, Inc. v. General Motors Corp.*, 459 F.3d 1249 (11th Cir. 2006). To survive a motion to dismiss, the Plaintiff's complaint must state sufficient factual allegations to infer each element of the applicable cause of action. *In re Money*, 375 B.R. 704, 707 (Bankr. N.D. Ga. 2007).

Plaintiff's complaint is to deny the dischargeability of Defendant's indebtedness. Such complaints are governed by 11 U.S.C. § 523, generally. While Plaintiff does not specifically identify which subsections of § 523 Plaintiff believes apply to his complaint, both Plaintiff and Defendant contemplate that § 523(a)(2)(A) could be the basis for Plaintiff's complaint. To prove a complaint for dischargeability pursuant to § 523(a)(2)(A), Plaintiff must show that: (1) that Defendant has a debt to Plaintiff; (2) that the debt is "for money, property, services, or an extension, renewal, or refinancing of credit"; and (3) that the money, property, services, or credit was obtained by false pretenses, a false representation, or actual fraud. 11 U.S.C. § 523(a)(2)(A). Plaintiff has alleged that Defendant was engaged in construction as a cabinetry subcontractor and that Plaintiff contracted for Defendant's services, that Plaintiff gave Defendant \$91,250.00 for the purpose of constructing and installing cabinets, that Defendant converted those funds to his own use, that Defendant's conversion of funds is evidence of Defendant's intent to defraud Plaintiff, and that Defendant still owes Plaintiff \$91,250. Taking the complaint in the light most favorable to Plaintiff, the Court finds that Plaintiff has pled sufficient facts and that Defendant has sufficient notice of the claims asserted and the relief sought against him.

While the Court finds sufficient facts for Plaintiff's complaint to survive a motion to dismiss, Plaintiff's failure to assert which subsections of § 523 are implicated in the Complaint may unnecessarily delay this adversary proceeding. Accordingly, it is

ORDERED that Defendant's Motion to Dismiss is hereby **DENIED**.

IT IS FURTHER ORDERED and **NOTICE IS HEREBY GIVEN** that a status conference in the above-styled adversary proceeding shall be held on **JULY 7, 2010**, at **11:15 a.m.** in Courtroom 342, United States Courthouse, Federal Building, 600 East First Street, Rome, Georgia.

The Clerk shall serve a copy of this Order upon the Plaintiff, counsel for Plaintiff, Defendant, and counsel for Defendant.

END OF DOCUMENT