



IT IS ORDERED as set forth below:

Date: December 22, 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. 09-80672

Lynn L Carroll,

CHAPTER 7

Debtor.

JUDGE MASSEY

Jaynie McNeely and Drew McNeely,

Plaintiffs,

v.

ADVERSARY NO. 09-6657

Lynn L Carroll,

Defendant.

ORDER DENYING MOTION TO DISMISS AND GRANTING MOTION TO AMEND

Pursuant to Fed. R. Civ. P. 12(b)(6), made applicable by Fed. R. Bankr. P. 7012, Lynn L. Carroll, the Debtor and Defendant in this adversary proceeding, moves to dismiss the complaint filed by creditors Jaynie and Drew McNeely, alleging that it consists mainly of conclusory

allegations and that in sum the complaint fails to state a claim upon which relief can be granted. Defendant also raises objections to the form of Plaintiffs' complaint. Plaintiffs oppose the motion and seek leave to amend the complaint.

On August 6, 2009, Debtor filed a petition constituting an order for relief under Chapter 7 of the Bankruptcy Code, as well as schedules listing Plaintiffs as creditors. On November 9, 2009, Plaintiffs commenced this adversary proceeding by filing a complaint under section 727 objecting to Defendant's discharge. Defendant responded with the motion to dismiss, filed on November 16, 2009. On November 30, 2009, Plaintiffs filed a motion for leave to amend the complaint. Defendant filed an answer to the complaint on December 8, 2009.

Under Fed. R. Civ. P. Rule 8, made applicable by Fed. R. Bankr. P. 7008, a pleading asserting a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In order 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. 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." *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007) (citations and internal quotation marks omitted). Two working principles underlie the determination of the sufficiency of a complaint. First, although courts on a motion to dismiss must assume all factual assertions in the complaint are true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*, at 1949. Second, "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged" it fails to

state a plausible claim for relief and must be denied. *Id.*, at 1950. The Eleventh Circuit, as it must, follows the standard set in *Twombly*. See *Watts v. Florida Intern. University*, 495 F.3d 1289, 1295-96 (11th Cir. 2007). Further, Civil Rule 8(d)(1), applicable here, makes it clear that "[e]ach allegation must be simple, concise, and direct[;] [n]o technical form is required," and Civil Rule 8(e), also applicable here, provides that "[p]leadings must be construed so as to do justice."

Plaintiffs' complaint, designated a "Complaint to Object to Discharge Under 11 U.S.C. 727" in the caption, alleges that Defendant "made a number of misrepresentations and omissions in her bankruptcy schedules" regarding the value of her interest certain items of real and personal property, her right to receive child support payments, and certain transfers of property made prior to the filing of the petition. (Complaint, 9-20). Far from being conclusory, the allegations are fairly detailed and provide an abundant factual context, including allegations regarding Defendant's training and professional experience as a "practicing attorney" who represents lenders (Complaint, 8, 14), is "well educated in real estate matters" (Complaint 9), is the "co-trustee" of her mother's trust (Complaint, 14), and "the administratrix of her father's estate" (Complaint 17). These allegations, if proven, would permit an inference that Defendant, an experienced attorney, "knowingly made false and fraudulent statements under oath, both in her bankruptcy filings and at the 341 hearing, thus requiring a denial of discharge in this case." (Complaint, 21). It is also possible, of course, that even if the alleged omissions and misstatements are proved, Defendant can explain her conduct to show that whatever errors, if any, she made were inadvertent. But that possibility does not negate the plausibility of the complaint on its face.

Although the caption situates the legal basis of the complaint in 11 U.S.C. § 727 without specifying the subsection or subsections under which Plaintiffs intend to travel, the nature of the action is clear: the complaint seeks to state a claim for relief under § 727(a)(4)(A), which forbids the award of discharge where "the debtor knowingly and fraudulently, in or in connection with the case . . . made a false oath or account" and under § 727(a)(5), which forbids the award of discharge where "the debtor has failed to explain . . . any loss of assets or deficiency of assets" Moreover, "[i]f a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

Defendant asserts that the complaint contains other defects in addition to failing to state a claim for relief. Some of her contentions are petty and simply untrue, such as that the complaint does not contain numbered paragraphs, which it obviously does and which Defendant conceded, and that Bankruptcy Rule 7010 requires that the parties be referred to as "Plaintiffs" and "Defendant" throughout the body of the complaint, which it does not. Others are minor defects in the structure of the complaint that are not a valid basis for dismissing it under Bankruptcy Rule 7012 or otherwise. For example, there is no question that the Court has subject matter jurisdiction in this adversary proceeding, even though the complaint failed to allege that conclusion of law.

Finally, the Court notes that Plaintiffs have promptly sought to amend their complaint to specify § 727(a)(4) and (a)(5) as grounds for the complaint. Defendant has not responded to the motion to amend but did file an answer to the complaint. Prior to the filing of the answer, the motion to amend was not required, but because the amended complaint was an exhibit to the

motion to amend and not separately filed, the motion to amend is not moot. Civil Rule 15, made applicable by Fed .R. Bankr. P. 7015, gives a court considerable latitude to “freely” allow amendment to a pleading where justice so requires. The amendment proposed by Plaintiff seeks primarily to correct certain of the technical defects identified by Defendant, none of which hindered Defendant in filing her answer. Defendant has not shown and could not show any prejudice as a result of granting the motion to amend.

For the reasons stated herein, the motion to dismiss is DENIED and the motion to amend the complaint is GRANTED. Defendant shall have 25 days from entry of this Order to serve and file an answer to the amended complaint.

END OF ORDER