UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 11
	)	
SLW PARTNERS, LP,	)	CASE NO. **11-63489** - MHM
	)	
Debtor.	)	
	)	
SLW PARTNERS, LP,	)	
	)	
Plaintiff,	)	
v.	)	**ADVERSARY PROCEEDING NO. 11-5291**
	)	
STATE BANK AND TRUST COMPANY,	)	
	)	
Defendant.	)	

ORDER ON RULE 12(b)(6) MOTION TO DISMISS

This adversary proceeding is before the Court on Defendant's motion to dismiss for failure to state a claim upon which relief may be granted. Federal Rules of Bankruptcy Procedure ("Bankr. Rule") 12(b)(6) (Fed. R. Civ. Proc. 8 and 12(b)(6), incorporated in Bankruptcy Rules 7008 and 7012). Plaintiff, the Chapter 11 Debtor SLW Partners, LP ("Debtor"), filed a complaint seeking to equitably subordinate the claims held by Defendant pursuant to 11 U.S.C. § 510(c), and seeking damages for fraudulent misrepresentation, negligent misrepresentation, bad faith and breach of contract, and attorneys' fees. Defendant argues that each count alleged by Debtor fails to meet the appropriate pleading standard of Fed.R.Civ.P. 8 or 9 and, alternatively, that the claims must fail as a matter of law. For the reasons set forth below, Defendant's motion is denied in part and granted in part.

I. STATEMENT OF FACTS

On April 24, 1992, Debtor purchased real property located at 431 Fair Street, SW, Atlanta, Georgia 30313 (the "Property"). On December 6, 2007, Debtor obtained a loan from The Buckhead Community Bank d/b/a The Cobb Community Bank ("Buckhead Bank") in the original principal amount of $355,414.00. In connection with that loan, Debtor executed a security deed (the "Security Deed") pledging the Property. On January 22, 2009, the loan was renewed, and the loan was refinanced May 14, 2009 with a January 14, 2010 maturity date (the "Maturity Date"). The terms of the Promissory Note executed in connection with the refinance called for interest-only payments for seven months and a lump sum principal and interest payment of $343,683.63 on the Maturity Date. A Modification of Security Deed was executed to reflect the new terms of the agreement.

Without advance public notice, the Georgia Department of Banking and Finance closed Buckhead Bank December 4, 2009, and the Federal Deposit Insurance Corporation ("FDIC") was appointed as receiver. Defendant is the assignee from the FDIC of certain assets of Buckhead Bank, including Debtor's loan.

Debtor claims to have contacted Defendant numerous times to request guidance as to how to proceed making interest payments and what to do when the loan reached the Maturity Date. According to Debtor's Complaint, Scott Walker, General Partner of Debtor, contacted Defendant on the Maturity Date to request a meeting to discuss the Loan and make arrangements to continue making the interest payments, but did not receive a response until February 11, 2010. The response, from John Scherer of Buckhead Bank, stated, "We'll wait on the interest due for now. The loan will be

transitioning to a[n officer of Defendant] and they will need" updated personal financial statements from Debtor's principals and Debtor's "Y/E 2009 financials, and Tax returns for 2008."

Debtor claims that Defendant never asked Debtor to make interest payments or other debt service payments until September 2010, and that Defendant would not schedule any meetings with Debtor to discuss the Loan. Debtor claims that Defendant repeatedly assured Debtor that the "process was in motion" and that discussions would be had in the near future.[1] Debtor claims that, in reliance of these assurances, Debtor did not seek funding from another lender to pay off the loan. In July, Travis Whiddon, an employee of Defendant told Debtor that a new appraisal on the Property was needed; on September 1, 2010 Mr. Whiddon again contacted Debtor:

> I have received the appraisal back on the property and it appears that we are within policy as far as our loan to value limits. In order to consider renewing, would you guys be able to bring the interest that has accrued current. As of today, interest that is due totals $16,105.94. I will also need an updated rent roll on the building and the most recent P&L and Balance Sheet you have on [Debtor].

(Complaint at Ex. E). Debtor claims that it could not pay the accrued interest because it had recently invested $45,000 to improve the Property with the intention of leasing the Property to a tenant.[2]

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[1] Debtor offers only one example of the alleged repeated assurances. On April 28, 2010, an employee of Defendant contacted Debtor, stating, "We have a process in motion. I have been in discussion with our risk partners determining what our next steps should be. After we have a couple options, I'll give you a call to discuss. Hang in there and we'll talk in the near future!" Complaint at Ex. D.

[2] In its response to Defendant's September 1, 2010 communication, Debtor told Defendant that Debtor has never had a tenant in the property. However, Debtor's Complaint states that Debtor had "secure[d] a three year lease agreement for the Property from Fame, LLC d/b/a Slice Enterprises, LLC ... on February 5, 2010." Complaint ¶ 13. It is not clear when the $45,000 was spent.

On November 1, 2010, Debtor received a demand letter from Defendant's counsel for all amounts owing under the Promissory Note, totaling $361,393.99 through October 28, 2010 and $61.70 interest per day thereafter. Debtor claims to have contacted Defendant by phone November 2, 2010 and email November 8, 2010, requesting that Defendant consider entering into a forbearance agreement to restructure the loan and give Debtor additional time to pay amounts due. Debtor claims that the parties negotiated the terms of a forbearance agreement, which Debtor signed, but was told that the agreement would have to be approved by Defendant's loan committee.[3] Under the terms of the proposed agreement, Debtor would pay Defendant $21,844.83 December 31, 2010, and would pay the remaining balance no later than March 31, 2011. Debtor claims that Defendant informed Debtor December 30, 2010 that the forbearance agreement had been rejected because of the unpaid interest, and because there was no clear plan for repayment. Debtor alleges that these stated reasons for denying the forbearance agreement were a pretext, and that Defendant knew it would not enter into a forbearance agreement before the parties began negotiating. Debtor did not tender the $21,844.83 on or before December 31, 2010.

Defendant initiated the process to foreclose on the Property in February 2011. Debtor claims that Mr. Whiddon contacted Debtor February 18, 2011:

> I have decided that I will push back the foreclosure date for more 30 [sic] days at your request provided you pay part of the expenses that we have incurred during this time, which do not include the cost to carry a non

[3] Debtor does not state when the negotiations ended, but a draft agreement appears to have been completed in early December. The Forbearance Agreement attached to Debtor's Complaint at Ex. G is dated "December __, 2010," and the Acknowledgment of Indebtedness section of the agreement lists debts "as of December 3, 2010."

> performing loan. If I receive $15,000 from you before next Friday, I will move the foreclosure date to April and run the advertisement again next month. Please understand that this is a onetime deal and will not happen again at the end of March if you have failed to find financing by then.

Complaint at Ex. H. Debtor made the $15,000 payment. Debtor claims that when Debtor asked what Defendant intended to do with the money, Defendant said it would be applied to expenses associated with the foreclosure, but Defendant did not provide Debtor with an itemization of these expenses. Defendant did not foreclose on the Property in March.

On March 29, 2011, Debtor filed a motion for a temporary restraining order in the Superior Court of Cobb County to enjoin the sale of the Property scheduled for April 5, 2011. The Cobb County Court enjoined the sale for 30 days. Debtor filed the bankruptcy petition May 2, 2011.

II. CONCLUSIONS OF LAW

Bankruptcy Rule 7008 applies Rule 8 of the Federal Rules of Civil Procedure to adversary proceedings.

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 8(a)(2). "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.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). A complaint is plausible "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.* (*citing Bell Atlantic*, 550 U.S. at 556). Plausibility does

not require probability, but does require something "more than a sheer possibility that a defendant has acted unlawfully." *Id.* (*citing Bell Atlantic*, 550 U.S. at 556).

A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly,* 550 U.S. at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Iqbal,* 556 U.S. at 678, *quoting Twombly.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555.

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b). Whereas the purpose of Fed.R.Civ.P. 9(b) is to ensure that defendants have notice of the conduct complained of in a plaintiff's claim, the Rule may be satisfied where the "complaint sufficiently describes the acts and provides defendants with sufficient information to answer the allegations." *General Cigar Co., Inc. V. CR Carriers,* Inc., 948 F. Supp. 1030, 1037 (M.D.Ala. 1996).

III. DISCUSSION

A. EQUITABLE SUBORDINATION

Debtor argues that Defendant's claims should be equitably subordinated because Defendant engaged in inequitable misconduct by stringing Debtor along with false assurances that Defendant would work with Debtor to restructure the loan. "Equitable subordination is proper where three elements are established:

(1) that the claimant has engaged in inequitable conduct;

(2) that the conduct has injured creditors or given unfair advantage to claimant; and
(3) that subordination of the claim is not inconsistent with the Bankruptcy Code."

In re N & D Properties, Inc., 799 F.2d 726, 731 (11th Cir. 1986). Because Defendant is not a fiduciary or insider of Debtor, Debtor must go beyond presenting evidence of unfair conduct and show, with particularity, that Defendant has engaged in egregious behavior, such as fraud, spoliation, or overreaching. *Id.*

Debtor has sufficiently pled injury to creditors because Debtor alleges that, as a result of relying on Defendant's alleged assurances, Debtor failed to seek other financing options, resulting in foreclosure proceedings and eventually bankruptcy. Further, Debtor claims to have spent $45,000 improving the Property; to the extent those expenditures increased the value of the Property, they increased Defendant's security at the expense of unsecured creditors. For the reasons set forth in Sections B and C below, Debtor has sufficiently pled that Defendant engaged in inequitable conduct. Finally, because 11 U.S.C. § 510(c) explicitly authorizes the court to equitably subordinate claims, equitable subordination of Defendant's claim would not be inconsistent with the Bankruptcy Code.

B. FRAUDULENT MISREPRESENTATION

Under Georgia law, five essential elements are required for fraudulent misrepresentation:

(1) the defendant made representations;
(2) knowing they were false;
(3) intentionally and for the purpose of deceiving the plaintiff;

(4) which the plaintiff reasonably relied on;

(5) with the proximate result that the plaintiff incurred damages.

Williams v. Dresser Industries, Inc., 120 F.3d 1163, 1167 (11th Cir. 1997) (citing *Bacote v. Wyckoff*, 310 S.E.2d 520 (Ga. 1984)).

Debtor has pled each element of fraudulent misrepresentation sufficient to survive Defendant's motion to dismiss. Debtor has pointed to a number of communications from Defendant, and claims to have relied upon those communications as representations that Defendant would work to restructure Debtor's loan. Debtor's general allegations as to Defendant's knowledge that the representations were false and intended to deceive Debtor are enough to sufficiently plead elements (2) and (3) under Fed.R.Civ.P. 9(b). Whereas Debtor invested in improvements on the property and did not acquire alternate financing, Debtor appears to have relied upon Defendant's representations; the reasonableness of that reliance is a question of fact. Finally, as already discussed, Debtor has pled facts sufficient for the court to infer that Debtor suffered damages as a result of its reliance when Debtor increased the value of Defendant's collateral at Debtor's expense and failed to find alternate financing to pay off Defendant, which resulted in foreclosure and bankruptcy.

C. NEGLIGENT MISREPRESENTATION

A negligent misrepresentation claim has three elements:

(1) Defendant's negligent supply of false information to foreseeable persons;
(2) such persons' reasonable reliance upon that false information; and
(3) economic injury proximately resulting from such reliance.

Sarif v. Novare Group, Inc., 703 S.E.2d 348, 352 (Ga. Ct. App. 2010). Defendant argues that negligence requires that Defendant owed Debtor a duty, breached that duty, and that breach was the proximate cause of damages. Defendant contends that, because it did not have a special relationship with Debtor, Defendant does not owe Defendant a duty, and therefore Defendant has not been negligent. However,

> [O]ne who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used.

Robert & Co. Assoc. v. Rhodes-Haverty Partnership, 300 S.E.2d 503 (Ga. 1983). Debtor claims that Defendant knew and intended that Debtor would rely upon the information as an assurance that Defendant would work to restructure Debtor's loan. As addressed in Section B above, Debtor has sufficiently pled its reasonable reliance upon the information supplied by Defendant and economic injury resulting therefrom.

D. BAD FAITH AND BREACH OF CONTRACT

In a breach of contract claim, the plaintiff has the burden of pleading and proving the existence of a valid and enforceable contract, including the "subject matter of the contract, consideration, and mutual assent by all parties to all contract terms." *Broughton v. Johnson*, 545 S.E.2d 370, 371 (Ga. Ct. App. 2001). The existence of a contract is not only essential to the breach of contract claim, but also to the claim of bad faith:

> The covenant of good faith and fair dealing is not an independent contract, nor does it provide an independent cause of action. Rather, the covenant modifies and becomes a part of the underlying contract. Thus, if there is no breach of the underlying contract, there is no cause of action for breach of the covenant of good faith and fair dealing.

Gass v. Citimortgage, Inc., 2012 WL 3201400 (N.D.Ga. 2012)(citing *Stuart Enterprises International, Inc. v. Peykan, Inc.*, 555 S.E.2d 881, 884 (Ga. Ct. App. 2001)).

To survive a motion to dismiss, Debtor must have alleged facts detailing the terms of an agreement and how those terms were breached. *Id.* It is not clear from the Complaint what agreement Debtor claims Defendant has breached. Debtor has not alleged any breach of the terms of the Promissory Note nor of the Security Deed.[4] Nor has Debtor alleged that any contract was formed through the alleged "repeated assurances" that Defendant would work with Debtor to restructure the loan.[5] By Debtor's own admission, Defendant rejected the forbearance agreement and thus no contract was formed. Finally, while Debtor could likely show that Debtor and Defendant made a binding agreement when Debtor paid Defendant

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[4] Indeed, Defendant's first communication with Debtor apparently occurred after the Promissory Note's January 14, 2010 maturity date. The modified security deed attached to Debtor's Complaint at Ex. A shows a maturity date of April 6, 2009. While Debtor seems to argue, in its response to Defendant's motion, that the bad faith occurred under the security deed, all of Defendant's communications with Debtor apparently occurred after Defendant had a right to initiate foreclosure proceedings.

[5] None of the communications between Debtor and Defendant in 2010 even vaguely resemble terms of an agreement, much less show consideration or mutual assent. Even if those communications adequately represented an agreement to restructure Debtor's loans, however, "a contract to enter a contract in the future is of no effect." *Johnson v. Oconee State Bank*, 487 S.E.2d 369 (Ga. Ct. App.1997).

$15,000 to delay foreclosure, Debtor has not alleged that Defendant breached that agreement, and Defendant did in fact delay foreclosure. Without allegations detailing what contract has been breached and how the covenant of good faith and fair dealing has been broken, Debtor's claim for bad faith and breach of contract cannot stand.

E. ATTORNEYS' FEES

Count Five of Debtor's Complaint claims that Debtor is entitled to attorneys' fees "because Defendants have acted in bad faith, been stubbornly litigious, and caused [Debtor] unnecessary trouble and expense." O.C.G.A. § 9-14-15 generally allows a court to award reasonable and necessary attorneys' fees to a party against whom another party asserts claims or defenses so bereft of merit that it could not be reasonably believed that a court would accept the asserted claim or defense, that an action or defense was brought for delay or harassment or otherwise unnecessarily expanded the proceeding.

Debtor's assertion that Defendants have "been subbornly litigious, and caused [Debtor] unnecessary trouble and expense" is not supported by any specifically alleged facts. It is not enough for a complaint to offer "naked assertion[s]" devoid of "further factual enhancement." *Iqbal,* 556 U.S. at 678, *quoting Twombly.* Therefore, Debtor's claim for attorneys' fees must be dismissed.

IV. CONCLUSION

For the reasons stated above, Debtor has adequately stated a claim upon which relief may be granted with respect to equitable subordination, fraudulent misrepresentation, and negligent misrepresentation. Debtor has failed to state a claim

upon which relief may be granted for bad faith and breach of contract and attorneys' fees. Accordingly, it is hereby

ORDERED that Defendant's motion is ***granted*** on Debtor's claim for bad faith and breach of contract, ***granted*** on Debtor's claim for attorneys' fees, and ***denied*** on Debtor's claims for equitable subordination, fraudulent misrepresentation, and negligent misrepresentation.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff, Plaintiff's attorney, Defendant, and Defendant's attorney.

IT IS SO ORDERED, this the 28th day of September, 2012 .

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE