IT IS ORDERED as set forth below:

Date: March 7, 2016

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
JAMES P. VANBROCKLIN, Debtor.	:	BANKRUPTCY CASE NO. 15-11761-WHD
JENNIFER DYCH, RAY CARON Plaintiffs,	:	ADVERSARY PROCEEDING NO. 15-1059-WHD
v.	:	
JAMES P. VANBROCKLIN, Defendant.	:	IN PROCEEDINGS UNDER CHAPTER 7 OF THE BANKRUPTCY CODE

O R D E R

Before the Court is the Motion to (1) Strike Affirmative Defenses or, Alternatively, Require More Definite Statement, (2) Dismiss Counterclaims or,

alternatively, Require More Definite Statement, and (3) Dismiss Objections to Claim filed by Jennifer Dych and Ray Caron (hereinafter, collectively, the "Plaintiffs") in the above-captioned adversary proceeding. This motion arises in connection with the Plaintiffs' complaint filed against James VanBrocklin (hereinafter the "Debtor") objecting to the Debtor's discharge pursuant to § 727 of the Bankruptcy Code.[1] This constitutes a core proceeding, *see* 28 U.S.C. § 157(b)(J), over which this Court has subject matter jurisdiction, *see* 28 U.S.C. §§ 157(a), 1334.

Background

A. The Plaintiffs' Complaint

The Debtor filed his voluntary chapter 7 petition on August 17, 2015. On November 16, 2015, the Plaintiffs initiated this adversary proceeding by filing a complaint objecting to the Debtor's discharge (hereinafter the "Complaint"). In the Complaint, the Plaintiffs allege that the Debtor has transferred property with the intent to hinder, delay, or defraud creditors, *see* 11 U.S.C. § 727(a)(2), has made false oaths or accounts in his Schedules and Statement of Financial Affairs, *see* 11 U.S.C. § 727(a)(4), and has failed to explain satisfactorily the loss or deficiency of

[1] 11 U.S.C. § 101 *et seq.*

property to meet his liabilities, *see* 11 U.S.C. § 727(a)(5).

According to the Plaintiffs, the Debtor and Ray Caron were officers and co-owners of two companies: Axiom Laboratories, LLC (hereinafter "Laboratories"), a nutraceutical[2] supplement manufacturing company, and Axiom Nutraceuticals, LLC (hereinafter "Nutraceuticals", collectively with Laboratories, the "Companies"), a nutraceutical supplement sales and marketing company. Near the end of 2014, Caron and the Debtor entered into a separation agreement wherein the Debtor acquired all of the interest in the Companies. The agreement also laid out their respective liabilities for the Companies' debts. After Caron and the Debtor entered into this agreement, the Debtor allegedly sold the assets of Laboratories and converted the proceeds to his own use by transferring them to USA Labs Direct, LLC, a Georgia LLC formed in April of 2015. The Plaintiffs contend that this conduct is all part of a scheme meant to defraud the Debtor's creditors.

[2] "Nutraceutical is a hybrid or contraction of *nutrition* and *pharmaceutical*." Robert E.C. Wildman & Mike Kelley, *Nutraceuticals and Functional Foods*, in HANDBOOK OF NUTRACEUTICALS AND FUNCTIONAL FOODS 1 (2d ed. 2007). The term refers to herbal products, supplements, and other foods that may provide health benefits. *Id.*

B. The Debtor's Answer and Counterclaim

The Debtor answered the Complaint on December 15, 2015. The answer contains thirty-six affirmative defenses plus a thirty-seventh defense reserving the Debtor's right to plead additional defenses as they become known. The answer also asserts a nine-count counterclaim against the Plaintiffs, alleging claims for violation of the automatic stay (Count I), injunctive relief (Count II), slander (Count III), intentional infliction of emotional distress (hereinafter "IIED") (Count IV), punitive damages (Count V), objections to the Plaintiffs' claims (Counts VI and VII), breach of contract (Count VIII), and attorney's fees (Count IX).

According to the Debtor, Caron has been actively contacting the Bank of North Georgia and the Debtor's business associates, friends, and other acquaintances spreading false information about the Debtor, including reports that the Bank of North Georgia is suing the Debtor for misappropriating assets and rumors that the Debtor is being indicted for fraud and going to jail. These allegations of mean-spirited post-petition conduct form the basis of the Debtor's claims for violation of the automatic stay,[3] slander, IIED, and breach of contract.

[3] The Debtor also alleges that Caron violated the automatic stay by filing a cross-claim against the Debtor in a state court proceeding after the filing of the

C. The Plaintiffs' Motion

On January 6, 2016, the Plaintiffs filed the instant motion (hereinafter the "Motion"), requesting that the Court strike all but four of the Debtor's affirmative defenses, dismiss his counterclaims, and dismiss his objections to the Plaintiffs' claims. In the event the Court decides against dismissal, the Plaintiffs request in the alternative that the Court require the Debtor to provide a more definite statement regarding his defenses and his counterclaims. On February 19, 2016, the Court entered a consent order that served as a withdrawal of the Motion as it pertains to the Debtor's claims for violation of the automatic stay, injunctive relief, slander, IIED, and punitive damages (Counts I through V). Following the entry of that Order, the Court has left to resolve the motion to strike affirmative defenses, the motion to dismiss the Debtor's objections to the Plaintiffs' claims, the motion to dismiss the Debtor's claim for breach of contract, and the motion to dismiss the Debtor's request for attorney's fees.

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petition.

Discussion

A. Motion to Strike Affirmative Defenses or Require More Definite Statement

As mentioned above, the Debtor's answer contains thirty-seven affirmative defenses in what can only be described as a textbook example of a shotgun pleading.[4] The Debtor's claimed defenses are failure to state a claim, failure of consideration, assumption of the risk, statute of frauds, estoppel, illegality, Plaintiffs' fraud, failure to join indispensable parties, statute of limitations, lack of personal jurisdiction, lack of subject matter jurisdiction, improper venue, contributory negligence, accord and satisfaction, duress, laches, release, waiver, payment, insufficient process, insufficient service of process, unclean hands, setoff, res judicata, forged or unauthorized signature, inducement, Plaintiffs did not make alleged payments to Debtor, Plaintiffs' conduct or the conduct of their agents, failure to plead fraud with particularity, lack of standing, undue influence, breach by Plaintiffs, Plaintiffs have sued improper party, unconscionability, failure to join parties needed for just determination, collateral estoppel, and, finally, reserving the right to plead further defenses as they become known.

[4] "A pleading that encompasses a wide range of contentions, usu. supported by vague factual allegations." *Shotgun Pleading*, BLACK'S LAW DICTIONARY (9th ed. 2009).

The Plaintiffs request that the Court either strike all of these defenses except failure to state a claim, insufficiency of process, insufficient service of process, and failure to plead fraud with particularity, or require the Debtor to provide the Plaintiffs with a more definite statement of his defenses. The Plaintiffs contend that the affirmative defenses are improperly plead and would be insufficient to defeat their objections to discharge even if they were properly plead. In response, the Debtor maintains that the defenses are plead in good faith, that there is little to be gained by striking them at this stage of the proceeding, and that he should not be required to provide a more definite statement.

1. Striking Affirmative Defenses Generally

Federal Rule of Civil Procedure 12(f) empowers a court to "strike from a pleading an insufficient defense." FED. R. CIV. P. 12(f); *see also* FED. R. BANKR. P. 7012(b) (making Federal Rule of Civil Procedure 12(b)-(i) applicable in adversary proceedings in bankruptcy). "Motions to strike are not favored by the courts." *Coca-Cola Co. v. Howard Johnson Co.*, 386 F. Supp. 330, 333 (N.D. Ga. 1974); *accord F.D.I.C. v. Stovall*, 2014 WL 8251465, at *1 (N.D. Ga. Oct. 2, 2014); *see also Brown & Williamson Tobacco Corp. v. U.S.*, 201 F.2d 819, 822 (6th Cir. 1953) ("[Striking a pleading] is a drastic remedy to be resorted to only when required for

the purposes of justice."). As a result of this disfavor, a defense's insufficiency must be clearly apparent in order for it to be stricken. *Coca-Cola Co.*, 386 F. Supp. at 333; *Bank of the Ozarks v. 400 S. Land Co., LLC*, 2012 WL 3704807, at *5 (N.D. Ga. Aug. 27, 2012) ("[Motions to strike] usually will be denied unless it is clear the pleading sought to be stricken is insufficient as a matter of law."). Nevertheless, those defenses that are "clearly insufficient…'should be stricken to eliminate the unnecessary delay and expense of litigating [them].'" *Stovall*, 2014 WL 8251465, at *1 (alteration in original) (quoting *Resolution Trust Corp. v. Youngblood*, 807 F. Supp. 765, 769 (N.D. Ga. 1992)). The Court has broad discretion in this regard. *Coca-Cola Co.*, 386 F. Supp. at 333.

2. Pleading of Affirmative Defenses Under Rule 8(c)

Since the Supreme Court released its opinions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), announcing a heightened "plausibility" pleading standard for complaints, a rift has emerged among the trial courts regarding the proper pleading standard to apply in regards to affirmative defenses. Some courts have held that affirmative defenses should be held to the same pleading standard as complaints—the defendant should have to plead sufficient facts to make his defense plausible. *See, e.g., Losada v.*

Norwegian (Bahamas) Ltd., 296 F.R.D. 688, 691 (S.D. Fla. 2013); *Gordon v. Ameriquest Mortg. Corp. (In re Fischer)*, 2011 WL 1659873, at *2 (Bankr. N.D. Ga. 2011) (Murphy, J.); *see generally Iqbal*, 556 U.S. at 662 ("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." (quoting *Twombly*, 550 U.S. at 570)). Other courts have declined to apply this heightened standard. *See, e.g.*, *Stovall*, 2014 WL 8251465, at *3; *Tomason v. Stanley*, 297 F.R.D. 541, 544-45 (S.D. Ga. 2014). This Court has not previously ruled on this issue and is unaware of any circuit court opinion on the matter.

The courts that apply the heightened standard to affirmative defenses generally do so out of considerations of fairness. *See In re Fischer*, 2011 WL 1659873, at *1. These courts reason that a defendant should be made to adhere to the same pleading standard as the plaintiff so as to provide sufficient notice. *See id.*; *see also Losada*, 296 F.R.D. at 691 ("A plaintiff should be given sufficient notice…of the defense asserted and the ground upon which it rests."). They also highlight the practical implications of this approach, i.e., applying the heightened standard will remove "boilerplate recitations or conclusory allegations" that "clutter the docket and create the need for unnecessary or extended discovery." *In re*

Fischer, 2011 WL 1659873, at *1; *see also* Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275, 298-99 (2013) ("The cases and prior scholarly articles specifically addressing post-*Twombly* affirmative defense pleading have almost uniformly entertained the premise that the Court heightened pleading standards to generally improve litigation efficiency…." (footnotes omitted)).

Courts that decline to apply the heightened standard rely upon their reading of the Federal Rules and cite the practical limitations defendants face at the beginning of a proceeding. Federal Rule of Civil Procedure 8(c) requires a party responding to a pleading to "affirmatively *state* any avoidance or affirmative defense." FED. R. CIV. P. 8(c) (emphasis added); *see also* FED. R. BANKR. P. 7008 (making Federal Rule of Civil Procedure 8 applicable in adversary proceedings in bankruptcy). In contrast, Federal Rule of Civil Procedure 8(a)(2), which was the subject of the Supreme Court's rulings in *Twombly* and *Iqbal*, requires a plaintiff to provide "a short and plain statement of the claim *showing* that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (emphasis added). Courts that do not apply the heightened standard point to this divergence between "state" and "show" to support their conclusion that Rule 8(c) "establishes a very low standard for adequately pleading

affirmative defenses." *Stovall*, 2014 WL 8251465, at *3-4. They reason that while Rule 8(a)'s "showing" requirement could be read as demanding a pleading to present a plausible claim, Rule 8(c)'s requirement that the defendant merely "state" his affirmative defenses mandates only that the defendant declare his defenses, nothing more. *See id.* These courts also note that a defendant has only twenty-one days to respond to a pleading, making it "fair and sensible" to require "a lower standard of factual specificity." *Tomason*, 297 F.R.D. at 545; *accord Stovall*, 2014 WL 8251465, at *3.

As "the text alone governs any decision" when "the language of the Rules is discernable or definite," *Tomason*, 297 F.R.D. at 545, this Court agrees with those courts that have declined to apply the heightened pleading standard to affirmative defenses. Subsections (a) and (c) of Rule 8 contain different words to express the different requirements for an offensive pleading and a defensive pleading. Applying different meaning to the different words in those subsections allows the Court to adhere to the rule of interpretation that "when Congress uses different language in similar sections, it intends different meanings." *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004) (quoting *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000)). Therefore, all Rule

8(c) requires is that a defendant state his defenses so as to give the most basic of notice. *See Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988) ("The purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it."); *Tomason*, 297 F.R.D. at 547 (denying to strike affirmative defense where defendant "identified a particular justiciability doctrine with well-known elements which Plaintiffs may investigate").

3. Insufficient Defenses

The fact that the Court adopts this "lenient" position on the pleading of affirmative defenses under Rule 8(c) does not mean that Rule 12(f) is rendered toothless. As mentioned above, the pleading of an affirmative defense must still be sufficient to put the plaintiff on notice, and the defense must have some applicability to the litigation. *See Tomason*, 297 F.R.D. at 545. Where defenses "do not provide such basic notice" or "settled law clearly forecloses an affirmative defense," the defense will be stricken. *Id.*; *see also Ayers v. Consolidated Constr. Servs. of S.W. Fla., Inc.*, 2007 WL 4181910, at *1 (M.D. Fla. Nov. 26, 2007) ("Motions to strike are disfavored, and will be denied unless the allegations have no possible relation to the controversy, may confuse the issues, or may cause prejudice to one of

the parties.") However, the Court is "reticent to strike a marginal defense as legally insufficient without allowing defendants some benefit of discovery to develop that defense." *Tomason*, 297 F.R.D. at 545.

Having analyzed the Debtor's affirmative defenses in light of the Plaintiffs' claims, the Court concludes that though they do not run afoul of 8(c), two of the defenses are clearly irrelevant and therefore insufficient. The Plaintiffs have not brought any tort claims against the Debtor, so the third (assumption of the risk) and thirteenth (contributory negligence) defenses are inapplicable.

Though some are of dubious applicability and others are more properly characterized as denials rather than affirmative defenses, the remainder of the defenses will not be stricken at this time. *See Stovall*, 2014 WL 8251465, at *2 ("[An affirmative defense stating the] plaintiff's complaint fails to state a claim upon which relief may be granted…or that defendants did not owe plaintiff a duty does not raise an affirmative defense."); *Losada*, 296 F.R.D. at 691 ("When an affirmative defense is mislabeled and more properly a denial, the Court should not strike the claim but should treat it as a specific denial."). At this stage in the litigation, the Court trusts that discovery will bring those issues that are actually contested to the fore.

4. More Definite Statement of Affirmative Defenses

Having denied the request to strike all of the defenses which the Plaintiffs have requested be stricken, the Court must now decide whether to order the Debtor to provide a more definite statement of his affirmative defenses. Federal Rule of Civil Procedure 12(e) provides that "[a] party may move for a more definite statement of a pleading *to which a responsive pleading is allowed* but which is so vague and ambiguous that the party cannot reasonably prepare a response." FED. R. CIV. P. 12(e) (emphasis added). Federal Rule of Civil Procedure 7(a), which lists the pleadings that are allowed, states that a reply to an answer is allowed only "if the court orders one." FED. R. CIV. P. 7(a)(7); *see also* FED. R. BANKR. P. 7007. In this case, the Court has not ordered a reply to the Debtor's answer, so the Plaintiffs are not in a position in which they are allowed to respond to the Debtor's defenses. Consequently, the Court will not order the Debtor to provide a more definite statement of the defenses that remain. *See Loucks v. Shorest, LLC*, 282 F.R.D. 637, 639 (M.D. Ala. 2012) ("[T]he Plaintiffs are not entitled to their requested alternative relief because a Motion for More Definite Statement is not available relief in response to an Answer, but only in response to a pleading to which a responsive pleading is allowed.").

B. Motion to Dismiss Counts VI and VII of the Debtor's Counterclaim—Objections to Claim

The sixth and seventh counts of the Debtor's counterclaim are objections to the Plaintiffs' claims: Count VI is an objection to Caron's claim; Count VII is an objection to Dych's claim. In both counts, the Debtor maintains that it is some other entity that is liable to the Plaintiffs, so the Plaintiffs have no rights to payment against the Debtor.

At the outset, the Court notes that these counts are not properly asserted as parts of the Debtor's counterclaim. First, neither Caron nor Dych has filed a proof of claim in the Debtor's main bankruptcy case. The Debtor cannot object to a proof of claim that has not been filed. *See* 11 U.S.C. § 502(a) ("A claim or interest, *proof of which is filed*…, is deemed allowed, unless a party in interest…objects." (emphasis added)). Second, even if a party could object to claims for which no proof of claim has been filed, objections to claim should be filed in the main bankruptcy case as contested matters unless they include an independent claim for relief. *See* FED. R. BANKR. P. 3007(b); *Citrus Tower Blvd. Imaging Ctr, LLC v. Key Equip. Fin., Inc. (In re Citrus Tower Blvd. Imaging Ctr., LLC)*, 524 B.R. 895, 897 (Bankr. N.D. Ga. 2014) (Diehl, J.). As these counts of the Debtor's counterclaim

do not contain any independent claim for relief, they are not "claims" that need to be asserted in this adversary proceeding. They, therefore, shall be dismissed.

Nonetheless, after reviewing the arguments in the parties' briefs on the instant motion, the Court is convinced that these "objections" have nothing to do with the claim allowance process under § 502 of the Bankruptcy Code, but are rather assaults on the Plaintiffs' statutory authority and standing to bring this adversary proceeding objecting to the Debtor's discharge.[5] Accordingly, the dismissal of the Debtor's objections to the Plaintiffs' claims will not prevent the Court from considering at the appropriate time whether the Plaintiffs are "creditors" of the Debtor.

C. Motion to Dismiss Count VIII—Debtor's Claim for Breach of Contract

In the eighth count of his counterclaim, the Debtor alleges that Caron has breached the separation agreement by slandering the Debtor after the Debtor filed

[5] The Court uses the term "statutory authority" to differentiate § 727's requirement that only a "creditor," the trustee, or the United States Trustee may object to a debtor's discharge from from the requirement that the Plaintiffs establish "standing" in the Article III sense. Article III standing requires an injury in fact, caused by the allegedly wrongful conduct, that is likely to be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (Scalia, J.) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Unlike Article III standing, statutory authority, or "prudential standing," is not a jurisdictional concept. *Bowen v. Peregrin (In re Peregrin)*, 2012 WL 5939266, at *2 (Bankr. N.D. Ill. 2012).

his petition and by failing to indemnify the Debtor against Dych's claims. Answer, Doc. No. 7, at ¶67-70. The Plaintiffs contend that the Debtor does not have authority to bring this claim for breach of contract because the separation agreement is property of the estate, and as the claim arises from the breach of that agreement, the claim for breach is property of the estate as well. In his response to the Plaintiffs' motion, the Debtor concedes that he will not be the proper party to bring the claim until the trustee abandons the cause of action, but maintains that he may plead this claim "contingent" on the trustee's abandoning of the agreement and Caron bringing his own claim for breach of contract. Defendant's Brief, Doc. No. 9, at 10-11; *see also* 11 U.S.C. §§ 323, 554; *Bowen v. Peregrin (In re Peregrin)*, 2012 WL 5939266, at *5 (Bankr. N.D. Ill. Nov. 28, 2012) ("Because [the plaintiff's] claim…has not been abandoned, [the plaintiff] lacks standing to pursue the claim.").

Federal Rule of Civil Procedure 17 demands that "[a]n action must be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a)(1); *see also* FED. R. BANKR. P. 7017 (making Rule 17 applicable to adversary proceedings in bankruptcy). Because "[a] trustee is the only proper party in interest with standing to prosecute causes of action belonging to the estate," *In re Upshur*, 317 B.R. 446, 452 (Bankr. N.D. Ga. 2004) (Bihary, J.) (citing 11 U.S.C. § 323), the Debtor's

prosecution of this breach of contract claim violates Rule 17. However, subsection (a)(3) of Rule 17 provides that a court "may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action." FED. R. CIV. P. 17(a)(3). The Eleventh Circuit has noted, though, that this provision is "applicable only when the plaintiff brought the action [in the name of the wrong party] as a result of an understandable mistake, because the determination of the correct party to bring the action is difficult." *In re Engle Cases*, 767 F.3d 1082, 1109 (11th Cir. 2014) (alteration in original) (quoting *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 208 (5th Cir. 2001)); *see also Van Sickle v. Fifth Third Bancorp*, 2012 WL 3230430, at *3 (E.D. Mich. Aug. 6, 2012); *In re Peregrin*, 2012 WL 5939266, at *5.[6]

The instant case does not suggest a situation in which identification of the proper party to bring this claim was difficult. On the contrary, it is very well established, and the Debtor does not contest, that the Trustee is the only party that

[6] Although such a limitation is not explicitly included in the rule, the Eleventh Circuit has applied it in the interest of avoiding suits that would "obstruct the…courts' ability to administer justice to litigants waiting for their cases to be heard." *In re Engle Cases*, 767 F.3d at 1113-14.

may bring claims belonging to the estate. *See Van Sickle*, 2012 WL 3230430, at *3. Consequently, "further delaying dismissal under Rule 17(a)(3) is not warranted". *See id.*; *see also In re Peregrin*, 2012 WL 5939266, at *5 ("[The defendant] should not be forced to sit in limbo indefinitely, subjected to an adversary proceeding in search of a proper plaintiff."). Therefore, this count will be dismissed.[7]

D. Motion to Dismiss Count IX—Debtor's Claim for Attorney's Fees

The final count of the Debtor's counterclaim is one for attorney's fees. The Debtor claims that the "Plaintiffs have acted in bad faith, have been stubbornly litigious[,] and have caused the Debtor unnecessary trouble and expense." Answer, Doc. No. 7, at ¶73. The Debtor cites no authority for his claim for attorney's fees, but the language in his pleading tracks that of O.C.G.A. § 13-6-11. That statute provides:

> The expenses of litigation generally shall not be allowed as a part of the damages; but where the plaintiff has specially pleaded and has made a prayer therefor and where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them.

[7] The Court would like to note that this is a dismissal without prejudice for failure to proceed in the name of the proper party. Nothing in this Order is meant to prohibit the proper party from bringing this claim at another time. *See Van Sickle*, 2012 WL 3230430, at *3.

O.C.G.A. § 13-6-11. "A claim for expenses…is not an independent cause of action." *Sandy Springs Toyota v. Classic Cadillac Atlanta Corp.*, 604 S.E.2d. 303, 306 (Ga. App. 2004). Section 13-6-11 "merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of his damages." *Dept. of Transp. V. Fru-Con Constr. Corp.*, 426 S.E.2d 905, 909 (Ga. App. 1992). Consequently, a defendant may only recover attorney's fees pursuant to the statute for the costs "allocable to the prosecution of [a] counterclaim." *Whitaker v. Houston Cnty. Hosp. Auth.*, 613 S.E.2d 664, 668-69 (Ga. App. 2005).

In the instant case, the Plaintiffs move to dismiss this count as to Dych, since the Debtor has alleged no counterclaims against Dych, and as to Caron, because the claim for attorney's fees depends upon the Debtor's success on Counts I through V. For the reasons stated below, this motion must fail as to Caron, but this motion will be granted as to Dych.

The Court notes that the Plaintiffs originally had moved to dismiss all of the counts of the Debtor's counterclaim, including the counts for violation of the automatic stay (Count I), slander (Count III), and IIED (Count IV). The Plaintiffs withdrew the Motion as to these counts pursuant to the consent order entered on

February 18, 2016. Consequently, the Debtor has alleged counterclaims against Caron that could support an award of attorney's fees.[8] On the other hand, none of the Debtor's alleged counterclaims suggests that he has any right to recover from Dych. Thus, the claim for attorney's fees will be dismissed as to Dych, as there is no foundational claim to support the demand for attorney's fees.

Conclusion

Based on the foregoing, it is hereby **ORDERED** that:

(1) The Plaintiffs' Motion to Strike Affirmative Defenses or Require More Definite Statement is **GRANTED IN PART AND DENIED IN PART**. The Debtor's third and thirteenth affirmative defenses are **STRICKEN**.

(2) The Plaintiffs' Motion to Dismiss Counts VI and VII of the Debtor's counterclaim is **GRANTED**. Counts VI and VII of the Debtor's counterclaim are **DISMISSED**.

(3) The Plaintiffs' Motion to Dismiss Count VIII of the Debtor's counterclaim is **GRANTED**. Count VIII of the Debtor's counterclaim is **DISMISSED**.

[8] At the very least, the Debtor's claim for willful violation of the automatic stay (Count I) entitles him to attorney's fees in regards to that claim. *See* 11 U.S.C. § 362(k) ("[A]n individual injured by a willful violation of a stay provided by this section shall recover actual damages, *including costs and attorneys' fees*…." (emphasis added)).

(4) The Plaintiffs' Motion to Dismiss Count IX of the Debtor's counterclaim is **GRANTED IN PART AND DENIED IN PART**. Count IX of the Debtor's counterclaim is **DISMISSED** only inasmuch as it requests an award of attorney's fees from Dych. The Plaintiffs will have **twenty-one (21) days** from the entry of this Order to respond to Count IX of the Debtor's counterclaim as it relates to Caron.

The Clerk is **DIRECTED** to serve a copy of this Order on the Debtor, the Plaintiffs, respective counsel, and Griffin E. Howell, III, the chapter 7 trustee in the Debtor's main bankruptcy case.

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