

FEB 26 2010

UNITED STATES BANKRUPTCY COURT  
 NORTHERN DISTRICT OF GEORGIA  
 ATLANTA DIVISION

IN RE:	:	CASE NO. 09-68240 - JB
	:	
RONALD JAMES FOSTER,	:	
	:	
Debtor.	:	
_____	:	CHAPTER 7
	:	
MARTY LOU FRANZ,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 09-09043 - JB
v.	:	
	:	
RONALD JAMES FOSTER,	:	
	:	
Defendant.	:	

ORDER

Defendant Ronald James Foster has filed a second motion to dismiss the amended *pro se* complaint filed by creditor Marty Lou Franz under Federal Rule of Bankruptcy Procedure 7012(b) and Federal Rule of Civil Procedure 12(b)(6) (Docket No. 12). The complaint as amended objects to the dischargeability of a claim under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B) and (a)(6). Plaintiff's claim is based on several loans she made to Mr. Foster during the years 1999 to 2001. After carefully considering the pleadings and the record, the Court concludes that defendant's motion to dismiss Ms. Franz's claim under § 523(a)(2)(A) must be denied, but the motion to dismiss any claims under §§ 523(a)(2)(B) and 523(a)(6) will be granted. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

On July 31, 2009, Ms. Franz filed a one page *pro se* complaint objecting to Mr. Foster's discharge of her claim. At the hearing on defendant's first motion to dismiss, the parties

appeared to agree that Ms. Franz's claim arises from money loaned to Mr. Foster that led to a consent judgment in the amount of \$10,500.00 plus interest of 12 percent (12%) issued by the Magistrate Court of Dekalb County on January 29, 2003. Ms. Franz stated she has collected payments of \$11,158.00 on the judgment, and the parties appeared to agree that, including interest, approximately \$7,860.00 of the debt remains unpaid. The Court entered an Order on October 6, 2009 dismissing any claims by Ms. Franz objecting to debtor's discharge under § 727 and any claim objecting to dischargeability of Ms. Franz's claim under §§ 523(a)(13) and 523(a)(19). The Court gave Ms. Franz time to amend her complaint to plead facts supporting an exception to discharge under §§ 523(a)(2) or (a)(6). Following the hearing, Ms. Franz filed three amendments (Docket Nos. 8, 10, and 14) (collectively the "Amended Complaint"). Mr. Foster filed a second motion to dismiss the Amended Complaint which Ms. Franz opposes.

In considering a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7012, all well-pled facts in Plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (citing *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002)). A court is not required to accept as true legal conclusions couched as factual allegations or unwarranted deductions of fact. *Ashcroft v. Iqbal*, 556 U.S. \_\_\_\_, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009); see *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). In order to survive a motion to dismiss, the factual matter in a complaint must state a claim for relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949. A complaint must contain "more

than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do". *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Factual allegations in a complaint are not required to be detailed, but the allegations must raise the right of relief above the speculative level. *Id.*

Ms. Franz's complaint and response to the motion to dismiss argue that her claim should be excepted from discharge pursuant to § 523(a)(2)(A) of the Bankruptcy Code, because Mr. Foster was not truthful with her about his intentions to repay loans she made to him. Under § 523(a)(2)(A), a debt for money or services is nondischargeable in bankruptcy to the extent it was obtained by "false pretenses, a false representation, or actual fraud . . ." 11 U.S.C. § 523(a)(2)(A). A creditor must prove by a preponderance of the evidence that: (1) the debtor made a false representation to deceive the creditor; (2) the creditor relied on the misrepresentation; (3) the reliance was justified; and (4) the creditor sustained a loss as a result of the misrepresentation. *Bropson v. Thomas (In re Thomas)*, 217 B.R. 650, 653 (Bankr. M.D.Fla. 1998). A misrepresentation includes a false representation of intent, such as a promise to act. In other words, a representation to do a particular thing is fraudulent if the representing party does not intend to perform at the time the promise is made. *Palmacci v. Umpierrez*, 121 F.3d 781, 786-787 (1<sup>st</sup> Cir. 1997) However, a breach of a promise to perform a future act is "not necessarily a misrepresentation if intervening events cause the debtor's future actions to deviate from previously expressed intentions". 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][d] (Alan N. Resnick & Henry J. Sommer eds., 16<sup>th</sup> ed. 2009).

The Amended Complaint alleges at several points that Mr. Foster orally promised Ms. Franz that if she loaned him money he would repay the loans on payday or in some instances that he would pay her double. In addition, Ms. Franz alleges that on December 21, 2000 she loaned \$1,000.00 to Mr. Foster for the express purpose of marketing a song, but that she later discovered that Mr. Foster could never have marketed the song because it had been released by another artist. She contends that Mr. Foster knew he could never market the song when he asked for the loan, and that she would not have lent him the funds had she known the truth. Ms. Franz also alleges that Mr. Foster signed a promissory note and had it notarized in her presence so that she would lend him additional money. It appears from the promissory note dated July 21, 2001 that Mr. Foster received \$500.00 when he signed the note. Ms. Franz contends that Mr. Foster made no efforts to pay her the \$500.00 until she received a state court judgment. Ms. Franz contends that Mr. Foster never intended to repay her and had she known this, she would not have loaned him any funds. Ms. Franz has alleged enough factual matter, taken as true, to create plausible grounds to exclude her claim from discharge pursuant to § 523(a)(2)(A); thus, defendant's motion to dismiss any claim under § 523(a)(2)(A) is denied.

Ms. Franz referred to § 523(a)(6) in her first adversary proceeding cover sheet, but Section 523(a)(6) is not discussed in any of her other pleadings. Section 523(a)(6) provides that an individual debtor is not discharged from a debt "for willful and malicious injury by the debtor to another entity or to the property of another entity". 11 U.S.C. § 523(a)(6). The Amended Complaint does not allege any facts that raise plausible grounds to infer that Mr. Foster's debt to

Ms. Franz falls within the exception to discharge in § 523(a)(6). Accordingly, defendant's motion to dismiss any claim under § 523(a)(6) is granted.

Finally, the Amended Complaint refers to §§ 523(a)(2)(B)(i), (iii) and (iv) and the promissory note or notes Mr. Foster gave to Ms. Franz. Plaintiff may be confused regarding the elements of a claim under § 523(a)(2)(B). To prevail on a claim under § 523(a)(2)(B), the plaintiff has the burden of proving all of the following elements by a preponderance of the evidence: a debt was obtained by a writing (1) that is materially false; (2) respecting the debtor's or an insider's financial condition; (3) on which the creditor to whom the debt is liable for such money, property, services, or credit reasonably relied; and (4) that the debtor caused to be made or published with the intent to deceive. *Equitable Bank v. Miller (In re Miller)*, 39 F.3d 301, 304 (11<sup>th</sup> Cir. 1994). The promissory note does not contain any information in writing about debtor's financial condition which is a key element of a § 523(a)(2)(B) claim. Thus, defendant's motion to dismiss plaintiff's claim under § 523(a)(2)(B) is granted.

In accordance with the above reasoning, defendant's second motion to dismiss is granted in part and denied in part. The adversary proceeding will proceed solely on the § 523(a)(2)(A) claim. Defendant shall file an answer to Ms. Franz's second amendment filed on October 29, 2009 (Docket No. 10) on or before **April 1, 2010**.

IT IS SO ORDERED, this 26<sup>th</sup> day of February, 2010.

  
\_\_\_\_\_  
JOYCE BIHARY  
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

A copy of the foregoing Order was mailed to the following:

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**Marty Lou Franz**

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**Philip Barnes**

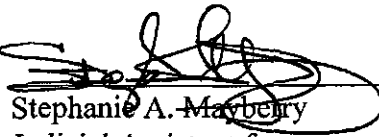
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Mailed: 02/26/2010