



IT IS ORDERED as set forth below:

Date: June 30, 2014

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

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

In re:	:	Case No. 13-71735
	:	
DAVID FARMERY	:	Chapter 7
and AMANDA TYRE FARMERY,	:	
	:	Judge Diehl
Debtors.	:	
<hr/>		
WELLS FARGO BANK, N.A.,	:	ADVERSARY PROCEEDING
	:	NO. 13-5450
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID FARMERY,	:	
	:	
Defendant.	:	

ORDER DENYING DEFENDANT’S MOTION TO DISMISS AMENDED COMPLAINT

This adversary proceeding is before the Court on David Farmery’s (“Defendant”) Motion to Dismiss Amended Complaint for failure to state a claim. (Docket No. 19). Wells Fargo Bank, N.A.

(“Plaintiff”) seeks a determination that the debt owing to Plaintiff is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Plaintiff filed a Response to Defendant’s Motion to Dismiss, arguing that the Amended Complaint alleges sufficient facts to state a claim (Docket No. 20).

The Court has jurisdiction over this matter; this is a core proceeding; and venue is proper. 28 U.S.C. §§ 157(b)(2), 1334 & 1408.

I. Motion to Dismiss Standard

Rules 8, 9 and 12 of the Federal Rules of Civil Procedure are made applicable to the Bankruptcy Court by Rules 7008, 7009 and 7012 of the Federal Rules of Bankruptcy Procedure. Rule 12(b)(6) permits a defendant to move for dismissal when a plaintiff fails to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). To survive a Motion to Dismiss under Rule 12(b)(6), the complaint must “contain sufficient factual matter . . . to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 566 U.S. 662, 129 S.Ct. 1937, 1949 (2009)(citing *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)). A claim has facial plausibility when the factual content in the claim allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* While the court must accept all factual allegations in the complaint as true, *id.* at 1949, the pleading must contain more than “threadbare recitals of a cause of action’s elements[.]” *Id.* at 1940. Complaints alleging fraud must also comply with the heightened pleading standard imposed by Rule 9 of the Federal Rules of Civil Procedure. *United States v. Baxter Intern. Inc.*, 345 F.3d 866, 883 (11th Cir. 2003).

II. Exception to Discharge under Section 523(a)(2)(A)

The Complaint asserts that the debt owed to Plaintiff is nondischargeable under § 523(a)(2)(A). Section 523(a)(2)(A) excludes from discharge “any debt – for money, property. . .or an extension . . . of credit, to the extent it is obtained by – false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition[.]” 11 U.S.C. § 523(a)(2)(A).

Courts apply the traditional elements of common law fraud to assess a § 523(a)(2)(A) claim. *Field v. Mans*, 516 U.S. 59, 70 n. 9 (1995); *In re Bilzerian*, 153 F.3d 1278, 1281 (11th Cir. 1998). Thus, to except a debt from discharge under § 523(a)(2)(A), a creditor must prove: 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 plaintiff sustained a loss as a result of the misrepresentation. *In re Bilzerian*, 153 F.3d at 1281; *Old Republic Nat'l Title Ins. Co. v. Presley (In re Presley)*, 490 B.R. 633, 638-39 (Bankr. N.D. Ga. 2013); *Bank of North Georgia v. McDowell (In re McDowell)*, 497 B.R. 363, 372 (Bankr. N.D. Ga. 2013).

To establish the first element of a claim for fraud under § 523(a)(2)(A), “a creditor must prove that the debtor made a ‘false representation’ other than an oral statement regarding the debtor’s financial condition, with the intent to deceive the creditor.” *Duncan v. Bucciarelli (In re Buccarrelli)*, 429 B.R. 372, 375 (Bankr. N.D. Ga. 2010). A debtor’s false representation may consist of silence, concealment, or intentional non-disclosure of a material fact as well as affirmative representations of material fact. *Id.* at 372. An implied misrepresentation intended to create and foster a false impression may also satisfy this element as fraud perpetrated through “false pretense.” *In re Butler*, 277 B.R. 843, 849 (Bankr. M.D. Ga. 2002). False pretense also contemplates misrepresentation that is intentional or made with reckless indifference to the truth. *In re Presley*, 490 B.R. at 639 (citations omitted). However, a debtor’s representation of intent to perform an act in the future will generally not form the basis of a false representation that is actionable under § 523(a)(2)(A). *Bucciarelli*, 429 B.R. at 372.

In addition to claims for false representation or false pretense, § 523(a)(2)(A) also includes debts incurred through actual fraud. 11 U.S.C. § 523(a)(2)(A). A claim for actual fraud can be broader than a claim for false representation. *In re Alam*, 314 B.R. 834, 840 (Bankr. N.D. Ga. 2004). Actual fraud “consists of any deceit, artifice, trick or design involving direct and active operation of the mind, used to

circumvent or cheat another; something said, done or omitted with the design of perpetrating what is known to be a cheat or deception.” *Id.* (citations omitted). A debtor’s inability to repay a debt is insufficient to support an inference of the Defendant’s intent not to repay. 4 COLLIER ON BANKRUPTCY ¶523.08[1][e] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

III. Discussion

The Amended Complaint alleges sufficient facts to make out a facially plausible legal theory under § 523(a)(2)(A). Unlike the original Complaint, the Amended Complaint alleges facts that allow the Court to make a reasonable inference that Debtor’s plausibly misrepresented his financial situation through omissions or concealment. The legal question presented here is limited to whether there is a facially plausible claim. The merits of such claim are not before the Court at this time. *E.g., Republican Party v. Martin*, 980 F.2d 943, 952 (4th Cir.1992). The Amended Complaint provides facts beyond mere conclusory statements and with sufficient particularity to put Defendant on notice as to the acts or omissions that Plaintiff bases its nondischargeability claim. *See West Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 Fed.Appx. 81, 86 (11th Cir.2008). Accordingly, it is

ORDERED that Defendant’s Motion to Dismiss is **DENIED**.

The Clerk is directed to serve a copy of this Order on Plaintiff, Defendant, their respective counsel, and the Chapter 7 Trustee.

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