



IT IS ORDERED as set forth below:

Date: April 11, 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.	:	

WELLS FARGO BANK, N.A.,	:	ADVERSARY PROCEEDING
	:	NO. 13-5450

Plaintiff,

v.

DAVID FARMERY,

Defendant.

**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND GRANTING
PLAINTIFF LEAVE TO AMEND COMPLAINT**

This adversary proceeding is before the Court on David Farmery's ("Defendant") Motion

to Dismiss for failure to state a claim. (Docket No. 5). 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 Complaint alleges sufficient facts to state a claim, or, alternatively, requesting leave of Court to amend the Complaint. (Docket No. 12).

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 Complaint does not specify which theory under § 523(a)(2)(A) the Plaintiff bases its nondischargeability claim.

A. False Pretenses or False Representation

The facts alleged by the Plaintiff are insufficient to make out a false pretenses or false representation claim under § 523(a)(2)(A). Based upon the facts alleged, the Court can draw no reasonable inference that Defendant has made any misrepresentation, material omission or implied representation with an intent to deceive Plaintiff. The facts, as pled, demonstrate that the Defendant executed a Personal Loan Agreement with Plaintiff and then relatively soon thereafter sought relief under Chapter 7.

The Complaint also lacks sufficient facts to infer Plaintiff's reliance on any

misrepresentation by Defendant. A § 523(a)(2)(A) claim only requires justifiable reliance, *Field v. Mans*, 516 U.S. 59, 59 (1995), yet there is an absence of any fact supporting even this low threshold. The Complaint states that the “Plaintiff reasonably relied on Defendant’s false pretenses, false representation or actual fraud,” yet this statement is no more than a conclusory statement reciting an element of a § 523(a)(2)(A) claim. Under *Iqbal* and *Twombly*, this type of conclusory statement is “not entitled to the assumption of truth.” *Iqbal*, 566 U.S. at 664.

B. Actual Fraud

Under a theory of actual fraud, the Complaint also fails to state a claim. As stated above, the facts are insufficient to infer the existence of any misrepresentation by the Defendant. The Complaint also fails to allege facts to infer Defendant’s design, artifice, or intent to deceive the Plaintiff. Defendant’s lack of personal income, execution of a Personal Loan Agreement, and petition for relief under Chapter 7 alone are insufficient to support any plausible inference that the Defendant intended to deceive the Plaintiff when incurring the debt.

The Complaint includes statements that Defendant “knew they [sic] did not have the ability to repay the indebtedness” and that “he did not intend to repay the indebtedness,” yet again, the Court does not take such conclusory statements as true. *Iqbal* 556, U.S. at 663-64. Without facts in support of such conclusions, Defendant’s subjective intent not to repay cannot be inferred. Although the Plaintiff’s Response to Defendant’s Motion includes additional facts pertaining to the relationship between the parties, only facts in the Complaint can be considered in determining a motion to dismiss. *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1347 (11th Cir.1999) (citing *Milburn v. United States*, 734 F.2d 762, 765 (11th Cir.1984) (noting that “when considering a motion to dismiss for failure to state a claim, we may look only to the facts alleged in the complaint and not beyond.”)).

As the Complaint fails to allege sufficient facts to make out a § 523(a)(2)(A) claim under the basic pleading standards prescribed under *Twombly* and *Iqbal*, let alone the heightened pleading standard under Rule 9(b), the Defendant's Motion to Dismiss is granted. The proper remedy, however, is to also give leave for Plaintiff to amend the Complaint. *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir.1991). Accordingly, it is

ORDERED that Defendant's Motion to Dismiss is **GRANTED**.

It is **FURTHER ORDERED** that Plaintiff is granted leave to file and serve an amended complaint within twenty-one days of this Order.

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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