



IT IS ORDERED as set forth below:

Date: March 2, 2016

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

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

In re:	:	BANKRUPTCY CASE NO:
	:	
WILLIAM JEFFREY SAYE and	:	
KIMBERLY LYNNE SAYE,	:	15-51671-MGD
	:	
Debtors.	:	CHAPTER 7
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DARREN W. PENN,	:	
	:	
Plaintiff,	:	
	:	
v.	:	ADVERSARY PROCEEDING NO:
	:	
WILLIAM JEFFREY SAYE and	:	15-5389
KIMBERLY LYNNE SAYE,	:	
	:	
Defendants.	:	
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ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS

Before the Court is the Motion of Debtor-Defendants' William Jeffrey Saye and Kimberly Lynne Saye to Dismiss Plaintiff Darren W. Penn's Complaint (Doc. 4) ("Motion to

Dismiss”). Plaintiff commenced this adversary proceeding on October 5, 2015 by filing a complaint seeking the following relief: denial of Debtors’ discharges under 11 U.S.C. §§ 727(a)(2)(A) (concealed property of the debtor) and 727(a)(4)(A) (false oath), and exception to discharge of the debt owed to Plaintiff under §§ 523(a)(2)(A) (actual fraud) and 523(a)(6) (willful and malicious injury).

Defendants filed the Motion to Dismiss on November 4, 2015 on the grounds that Plaintiff’s Complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6) and that Plaintiff failed to plead with specificity claims of fraud under Federal Rule of Civil Procedure 9(b). On November 16, 2015, Plaintiff filed a Response to the Motion to Dismiss. Plaintiff’s Response to the Motion to Dismiss does not object to the dismissal without prejudice of all Counts as they relate only to Mrs. Saye individually provided that such dismissal does not affect the claims against Mr. Saye.

This adversary proceeding, brought under Bankruptcy Code Sections 523 and 727, is a core proceeding arising under Title 11 in which the Court has authority to enter a final order. 28 U.S.C. § 157(b)(2)(I), (J). The Court has jurisdiction under 28 U.S.C. §§ 157(a) and 1334(b) by general reference, LR 83.7A, NDGa, and venue is proper under 28 U.S.C. § 1409(a).

I. Background

This adversary proceeding arises from a contract dispute between Plaintiff and Defendant William Saye. In July 2014, Plaintiff and Mr. Saye entered into a contract where Mr. Saye agreed to design and install a security and entertainment system in Plaintiff’s residence. (Doc. 1 ¶ 7).

The original contract price was \$91,500.00 and was subsequently modified to a total of \$125,500.00. (Doc. 1 ¶ 7). Plaintiff paid Mr. Saye an initial payment of \$10,000.00. (Doc. 1 ¶ 10). Approximately one month later, Plaintiff wired \$40,000.00 to Mr. Saye so that he could order equipment. (Doc. 1 ¶ 12). In September 2014, Plaintiff wired \$50,000.00 to Mr. Saye. (Doc. 1 ¶ 15). By September 3, 2014, Plaintiff had paid Mr. Saye a total of \$100,000.00. (Doc. 1 ¶ 16).

According to the original timeline, the project was to be completed around October 3, 2014. (Doc. 1 ¶ 14). Around October 11, 2014, Plaintiff sent multiple text messages to Mr. Saye complaining about the lack of progress on the project. (Doc. 1 ¶ 17). Throughout October and November, Plaintiff requested updated timelines and explanations for delays in the project. (Doc. 1 ¶ 18). During the months of October, November, and December, Plaintiff claims that Mr. Saye sent workers to his residence with no equipment and no way of working on the project. (Doc. 1 ¶ 20).

Due to the lack of progress on the project, Plaintiff terminated Mr. Saye's services on December 23, 2014 by email. (Doc. 1 ¶ 23). Plaintiff hired another company to complete the project. (Doc. 1 ¶ 24). Plaintiff paid the replacement vendor \$140,000.00 due to the fact that the new company had to remove and replace some of the work done by Mr. Saye. (Doc. 1 ¶ 24). Although Plaintiff made numerous requests for a refund, Mr. Saye has not refunded any of the \$100,000.00 paid by Plaintiff. (Doc. 1 ¶ 27). Plaintiff claims that Mr. Saye used those funds for his own personal use and did not purchase the equipment for the project. (Doc. 1 ¶ 19). Plaintiff claims that Mr. Saye owes Plaintiff \$108,000.00 for work not completed and increased costs of the project due to the poor quality of Mr. Saye's work. (Doc. 1 ¶ 28).

On January 28, 2015, Mr. Saye and his wife Kimberly Saye filed a Chapter 13 bankruptcy case. They converted their case to one under Chapter 7 on July 1, 2015. Plaintiff claims that they did not list him as a creditor in their Chapter 13 petition. (Doc. 1 ¶ 5). Plaintiff also claims on information and belief that Mr. Saye received an inheritance of more than \$1,400,000.00 in early 2012 and has not accounted for the whereabouts of that inheritance throughout the bankruptcy proceedings. (Doc. 1 ¶¶ 33, 34).

II. Legal Standards

A complaint should be dismissed under Rule 12(b)(6) only where it appears that the facts alleged fail to state a “plausible claim for relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); Fed. R. Civ. P. 12(b)(6). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). In ruling on a motion to dismiss, the court must accept factual allegations as true and construe them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. at 678. However, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

“A claim has facial plausibility 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.* at 678. The rule “does not impose a probability requirement at the pleading stage,” but instead “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of” the necessary element. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). A complaint may survive a motion to dismiss for failure to state a claim, however, even if it is “improbable” that a plaintiff would be able to prove those facts; even if the possibility of

recovery is extremely “remote and unlikely.” *Id.* “Specific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555 (internal quotations omitted)). “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. at 679 (citation omitted).

When a plaintiff alleges fraud, the “plaintiff must comply with Rule 9(b) of the Federal Rules of Civil Procedure.” *In re Presley*, 490 B.R. 633, 638 (Bankr. N.D. Ga. 2013); Fed. R. Civ. P. 9(b). Rule 9(b) requires the plaintiff to “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). This requirement serves the purposes of “alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior.” *West Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 F. App’x 81, 86 (11th Cir. 2008) (internal quotation marks omitted); *In re Presley*, 490 B.R. at 638. In order to satisfy the requirement of Rule 9(b), the Eleventh Circuit “generally require[s] that a complaint identify (1) the precise statements, documents or misrepresentations made; (2) the time and place of and persons responsible for the statement; (3) the content and manner in which the statements misled the plaintiff; and (4) what the Defendants gain[ed] by the alleged fraud.” *West Coast Roofing and Waterproofing, Inc.*, 287 F. App’x at 86; *In re Smith*, 489 B.R. 875, 890 (Bankr. M.D. Ga. 2013). Moreover, “Rule 9(b) requires more than conclusory allegations that certain statements were fraudulent; it requires that a complaint plead facts giving rise to an inference of fraud.” *West Coast Roofing & Waterproofing, Inc.*, 287 F. App’x at 86.

III. Discussion

The Court turns first to the denial of discharge claims under Section 727, and then discusses exceptions to dischargeability under Section 523.

A. Denial of Discharge of Debt under 11 U.S.C. § 727(a)(2)(A)

Under § 727(a)(2)(A), a debtor may be denied a discharge “where property of the debtor is transferred by the debtor or with the debtor’s permission within one year of the filing of the bankruptcy petition, and the transfer was made with the intent to hinder, delay, or defraud a creditor.” *In re Jennings*, 533 F.3d 1333, 1339 (11th Cir. 2008); 11 U.S.C. § 727(a)(2)(A). Under this section, “a creditor must establish (1) that the act complained of was done within one year prior to the date the petition was filed, (2) with actual intent to hinder, delay, or defraud a creditor, (3) that the act was that of the debtor, and (4) that the act consisted [of] transferring, removing, destroying, or concealing any of the debtors property.” *In re Jennings*, 533 F.3d at 1339.

Here, Plaintiff’s Complaint fails to provide facts regarding the one year element. Plaintiff’s Complaint alleges that “[o]n information and belief, Mr. Saye testified at the 341 Meeting that he received a cash inheritance of more than \$1,400,000.00 in early 2012.” (Doc. 1 ¶ 33). It also alleges that “[o]n information and belief, as of the date of this filing, Defendants have not accounted for the location, loss, or expenditure of the Inheritance.” Plaintiff fails to provide any facts that would allow the Court to infer that Defendants acted improperly within one year before filing their petition or post-petition. Accepting all of Plaintiff’s factual allegations as true, Plaintiff fails to state a claim under which relief can be granted.

Federal Rule of Civil Procedure 15 provides that the court should grant leave to amend “when justice so requires.” Fed. R. Civ. P. 15. In the Eleventh Circuit, “if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, leave to amend should be freely given.” *Dysart v. BankTrust*, 516 F. App’x 861, 865 (11th Cir. 2013) (citations, alterations, and internal quotation marks omitted). The Eleventh Circuit also recognizes that “a district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile.” *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir.2004); *Dysart*, 516 F. App’x at 865. Here, the facts alleged in Plaintiff’s Complaint may be a proper subject of relief, and granting leave to amend would not be futile. Therefore, the Court will grant Plaintiff leave to amend Count I, subject to Federal Rule of Civil Procedure 15(c)(1)(B).

B. Denial of Discharge of Debt under 11 U.S.C. § 727(a)(4)(A)

Under § 727(a)(4)(A), a debtor may be denied a discharge if the debtor “knowingly and fraudulently . . . made a false oath or account.” 11 U.S.C. 727(a)(4)(A). Under this section, the plaintiff must show “that the false oath or account was made knowingly and fraudulently about a material matter.” *In re Matus*, 303 B.R. 660, 676 (Bankr. N.D. Ga. 2004); *Swicegood v. Ginn*, 924 F.2d 230, 232 (11th Cir. 1991). “Deliberate omissions from schedules or the statement of financial affairs may constitute false oaths or accounts.” *In re Seligman*, 478 B.R. 497, 504 (Bankr. N.D. Ga. 2012). “A false oath or account is ‘knowingly’ false if the debtor knew the information omitted from the schedules should have been included but, for whatever reason, was not.” *In re Letlow*, 385 B.R. 782, 795-96 (Bankr. N.D. Ga. 2007). A false oath is material “if it bears a relationship to the bankrupt’s business transactions or estate, or concerns the discovery of

assets, business dealings, or the existence and disposition of his property.” *In re Chalik*, 748 F.2d 616, 618 (11th Cir. 1984); *In re Seligman*, 478 B.R. at 504. The purpose of the disclosure requirements is “to allow the trustee or creditors to investigate the debtor’s affairs and recover any assets without a costly investigation. So, if the omission would not assist or impede the trustee or creditors in this endeavor, it is not material.” *In re Reynolds*, No. 11-87131-BEM, 2015 WL 6520157, at *5 (Bankr. N.D. Ga. Sept. 18, 2015).

Because § 727(a)(4)(A) alleges fraud, “a plaintiff must plead the fraud with particularity, in accordance with Fed. R. Civ. P. 9(b).” *In re Riddle*, No. 14-53381-BEM, 2015 WL 1038473, at *3 (Bankr. N.D. Ga. Mar. 2, 2015). *See also In re Smith*, 489 B.R. 875, 896 (Bankr. M.D. Ga. 2013) (noting that “[s]ome courts hold that the particularity required for § 727(a)(4)(A) claims is less than that for other types of fraud claims,” which “makes sense because the debtor requires fewer details to meaningfully respond”).

Here, Plaintiff’s Complaint alleges that Defendants did not include Plaintiff in their bankruptcy schedules and “Defendants either knowingly or otherwise omitted Plaintiff and the debt owed to him from the Schedules of Creditors.” (Doc. 1 ¶ 5). The Complaint also alleges that Plaintiff requested numerous refunds from Mr. Saye. (Doc. 1 ¶ 27). Accepting these facts as true, the Court could reasonably infer from these facts that the Defendants’ failure to schedule the Plaintiff as a creditor was done knowingly and that the omission of a creditor could be deemed material. *See Reynolds*, 2015 WL 6520157, at *5 (considering “whether [a] Defendant’s omission of [a creditor] from her schedules and SOFA was a misrepresentation made with fraudulent intent”). Plaintiff’s Complaint is sufficient under the heightened pleading standard and provides sufficient facts to overcome Defendants’ Motion.

C. Alter Ego Issue

A preliminary issue in any dischargeability case is whether the debtor is actually liable for any debt owed the creditor. Plaintiff's Complaint asserts that his contract was with Mr. Saye personally or in the alternative, that Mr. Saye is personally liable based on an alter ego theory.

Under Georgia law, "it is well established that '[a]n officer of a corporation who takes part in the commission of a tort by the corporation is personally liable therefore, [and] an officer of a corporation who takes no part in the commission of a tort committed by the corporation is not personally liable unless he specifically directed the particular act to be done or participated or cooperated therein.'" *Cherry v. Ward*, 420 S.E.2d 763, 765 (Ga. App. 1992) (quoting *Smith v. Hawks*, 355 S.E.2d 669 (Ga. App. 1987)). When sued in his personal capacity, "an officer or agent of a corporation may not escape personal liability for his tortious misconduct damaging . . . third parties by hiding behind the corporate veil even in those situations where the corporation might also be a proper party to the action." *Moore v. Barge*, 436 S.E.2d 746, 749 (Ga. App. 1993). Although ordinarily officers and agents of a corporation are not personally liable for the torts of the corporation, "corporation directors, officers and managers can be individually liable to third parties for participating in or assenting to torts committed by them or their corporation. This liability arises from the tortious conduct of the individual and does not rely on piercing the corporate veil." *In re Dixon*, 525 B.R. 827, 841 (Bankr. N.D. Ga. 2015) (citing *Ford Motor Credit Co. v. Owens*, 807 F.2d 1556, 1559 (11th Cir. 1987)).

Plaintiff alleges in his Complaint that he entered into a contract with Mr. Saye (Doc. 1 ¶ 7) and that payments were wired to Mr. Saye (Doc. 1 ¶¶ 12, 15). Plaintiff alleges that Mr. Saye

did not use Plaintiff's money to purchase equipment and instead used the funds for personal use (Doc 1. ¶ 19). Plaintiff further alleges that "Mr. Saye falsely represented to Plaintiff that he would use the \$100,000.00 payment to purchase and install the specified security system and multimedia entertainment system for Plaintiff, when, in fact, he had no intention of doing so." (Doc. 1 ¶ 29). Plaintiff claims that Mr. Saye sent workers to Plaintiff's residence without equipment and instructed the workers to "make it look like they were working." (Doc. 1 ¶ 20). Accepting these factual allegations as true, Plaintiff alleges sufficient facts to show that Mr. Saye is personally liable because he "specifically directed the particular act to be done." *Cherry v. Ward*, 204 Ga. App. at 834, 420 S.E.2d at 765.

D. Exception to Discharge of Debt under 11 U.S.C. § 523(a)(2)(A)

Section 523(a)(2)(A) excepts from discharge "any debt for money . . . to the extent obtained by false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). The requisite elements of a § 523(a)(2)(A) claim are the traditional elements of common law fraud: "(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." *SEC v. Bilzerian (In re Bilzerian)*, 153 F.3d 1278, 1281 (11th Cir. 1998); *In re Johannessen*, 76 F.3d 347, 350 (11th Cir. 1996); *Grogan v. Garner*, 498 U.S. 279, 287 (1991). Because § 523(a)(2)(A) alleges fraud, the "plaintiff must comply with Rule 9(b) of the Federal Rules of Civil Procedure." *In re Presley*, 490 B.R. 633, 638 (Bankr. N.D. Ga. 2013).

Here, Plaintiff's Complaint provides the following details of his transaction with Mr. Saye: Plaintiff entered into a contract with Mr. Saye for the installation of a security and entertainment system; Mr. Saye instructed Plaintiff to wire \$100,000.00 to order equipment and

begin the project; Plaintiff wired \$100,000.00 to Mr. Saye; Mr. Saye did not do the work to which he had agreed under the contract; Mr. Saye sent workers to the work site with no equipment; Mr. Saye used Plaintiff's money for personal use instead of buying the equipment; Plaintiff had to hire another company to complete the project and paid approximately \$140,000.00; and Mr. Saye never refunded any portion of the Plaintiff's \$100,000.00 despite Plaintiff's numerous requests for a refund. (Doc. 1 ¶ 7–27). Plaintiff's Complaint provides sufficient facts to satisfy the elements of a claim under § 523(a)(2)(A). These facts allow the Court to infer: (1) Mr. Saye made a false representation to deceive Plaintiff when he instructed Plaintiff to wire money to order equipment and then used the money for personal purposes; (2) Plaintiff relied on that representation when he wired the money to Mr. Saye; (3) Plaintiff's reliance was justified because Plaintiff and Mr. Saye had entered into a contract; and (4) Plaintiff sustained a loss due to Mr. Saye's false representation because Defendant did not refund any portion of Plaintiff's \$100,000.00 for work not completed, and Plaintiff had to pay another company to complete the project. Plaintiff's Complaint is sufficient under the heightened pleading standard and provides sufficient facts to overcome Defendants' Motion.

E. Exception to Discharge of Debt under 11 U.S.C. § 523(a)(6)

Section 523(a)(6) excepts from discharge an individual's debts incurred by "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). Under this section, proof of "willfulness requires a showing of an intentional or deliberate act." *In re Jennings*, 670 F.3d 1329, 1334 (11th Cir. 2012) (internal quotation marks omitted). A showing of mere recklessness does not establish willfulness. *Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998); *Lee v. Ikner (In re Ikner)*, 883 F.2d 986, 989 (11th Cir. 1989) (citing

Chrysler Credit Corp. v. Rebhan, 842 F.2d 1257, 1262-63 (11th Cir. 1988)); *In re Carroll*, 505 B.R. 74, 79 (Bankr. N.D. Ga. 2014). A willful injury occurs when the debtor “commits an intentional act the purpose of which is to cause injury or which is substantially certain to cause injury.” *In re Jennings*, 670 F.3d at 1334 (11th Cir. 2012); see *Kawaauhau*, 523 U.S. at 57. “Malicious” acts under this section are “wrongful and without just cause or excessive even in the absence of personal hatred, spite, or ill will.” *Matter of Holt*, 173 B.R. 806, 812 (Bankr. M.D. Ga. 1994). Malice can be implied from the nature of the act. *In re Walker*, 48 F.3d 1161, 1164 (11th Cir. 1995). “To establish malice, ‘a showing of specific intent to harm another is not necessary.’” *In re Jennings*, 670 F.3d at 1334 (quoting *In re Ikner*, 883 F.2d at 991).

Here, Plaintiff’s Complaint alleges that Mr. Saye instructed Plaintiff to wire \$100,000.00 in payments so that he could begin ordering equipment. (Doc. 1 ¶ 11–16). Plaintiff’s Complaint alleges that Mr. Saye used the funds for personal purposes, never purchased the equipment, and did not use the funds for labor for the project. (Doc. 1 ¶ 19). Plaintiff further alleges that Mr. Saye sent workers to Plaintiff’s residence from October to December with instructions to “appear to be working.” (Doc. 1 ¶ 20–21). The Court could reasonably infer from these facts that Defendant acted deliberately and intended to cause the alleged injury to Plaintiff. Plaintiff’s Complaint provides sufficient facts to overcome Defendants’ Motion.

IV. Conclusion

For the foregoing reasons, the Court concludes that Count I of Plaintiff’s Complaint does not plead sufficient facts to state a claim under § 727(a)(2)(A). Because Plaintiff fails to allege facts to support Counts I–IV against Defendant Kimberly Saye and does not oppose dismissal as

to Mrs. Saye so long as the dismissal is without prejudice to his claims against Mr. Saye, the Court will grant the Motion to Dismiss as to Mrs. Saye subject to those terms. Accordingly, it is

ORDERED that Defendants William and Kimberly Saye's Motion to Dismiss Plaintiff's Complaint is **GRANTED IN PART** as to Count I and as to all Counts against Defendant Kimberly Saye, and **DENIED IN PART** as to all other Counts. Plaintiff may file an Amended Complaint, subject to Fed. R. Civ. P. 15(c)(1)(B), within 14 days after the date of entry of this Order.

It is **FURTHER ORDERED** that the Complaint is **DISMISSED** as to Defendant Kimberly Saye, and the Clerk is directed to drop Mrs. Saye as a party pursuant to Fed. R. Civ. P. 21. Such dismissal does not prejudice Plaintiff's claims against Defendant William Saye.

The Clerk is directed to serve a copy of this Order on Plaintiff, Defendants, and Defendants' Counsel.

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