

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
STEPHEN L. YOUNG and)	CASE NO. 07-32071 HCD
DEBRA A. YOUNG,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
JEROME (JERRY) OSBORN, BRAD)	
PIERSON and MARK A. COOPER,)	
PLAINTIFFS,)	
vs.)	PROC. NO. 07-3136
)	
DEBRA A. YOUNG and)	
UNITED STATES TRUSTEE,)	
DEFENDANTS.)	

Appearances:

Jerome (Jerry) Osborn, *pro se* plaintiff, 4325 South Main Street, South Bend, Indiana 46614;

Brad Pierson, *pro se* plaintiff, 14117 Dragoon Trail, Mishawaka, Indiana 46544;

Mark Cooper, *pro se* plaintiff, 1136 Byron Drive, South Bend, Indiana 46614;

Debra Voltz-Miller, Esq., counsel for defendant Debra A. Young, 1951 East Fox, South Bend, Indiana 46613;

United States Trustee, defendant, 1 Michiana Square Building, Room 555, 100 East Wayne Street, South Bend, Indiana 46601; and

Jacqueline S. Homann, Chapter 7 Trustee, putative defendant, 600 Key Bank Building, 202 South Michigan Street, P.O. Box 4577, South Bend, Indiana 46634-4577.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 26, 2008.

Before the court are two motions in this adversary proceeding. The first is a Motion to Dismiss Pursuant to Rule 12(b)(6), filed by Debra Young, debtor and defendant herein (“defendant”). It asks for dismissal of the Complaint filed against her and the United States Trustee (“second defendant”) by three plaintiffs, Jerome (Jerry) Osborn, Brad Pierson, and Mark A. Cooper (“plaintiffs”), representing themselves (“*pro se*”). The second

is a Motion to Substitute Defendant filed by the plaintiffs, seeking to remove the United States Trustee and to substitute the Chapter 7 Trustee, Jacqueline S. Homann, as the second defendant in the Complaint. For the reasons that follow, the court grants the Motion to Dismiss and denies the Motion to Substitute Defendant.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

In the related bankruptcy, Debra A. Young and Stephen L. Young filed their voluntary chapter 7 petition on August 14, 2007. On Schedule A, the debtors listed 20 rental properties. On their Statement of Intention, they declared their intent to surrender 18 of the rental properties and reaffirmed the mortgage of their residential real estate. Two rental properties in South Bend, Indiana – at 54427 Quince Road and at 741 27th Street – were not included in that Statement. Plaintiff Osborn was listed on Schedule F and on the debtors' matrix as an unsecured creditor holding a promissory note in the amount of \$23,000.00.¹ Plaintiffs Pierson and Cooper

¹ Exhibit 2, attached to the Complaint, is the promissory note executed on July 22, 2006, by Debra Young and Osborn. *See* R. 1, Ex. 2 (“Promissory Note”). In it, Debra Young promised to pay Osborn \$23,000 on or before July 19, 2007. On June 30, 2007, Osborn executed two documents entitled “Partial Assignment of Proceeds,” written on the back of the Promissory Note, assigning a portion of the Note to plaintiff Cooper, *see id.*, Ex. 3 (“Cooper Assignment”), and another portion to plaintiff Pierson. *See id.*, Ex. 4 (“Pierson Assignment”).

were not named as creditors in the Youngs' bankruptcy case. On November 19, 2007, the debtors received a discharge. On January 2, 2008, the plaintiffs filed proofs of claim as unsecured creditors in the Youngs' bankruptcy: Osborn's claim was in the amount of \$30,000.00; Cooper's claim was \$16.84; and Pierson's was \$24,000.00. *See* Claims 8, 9, and 10, Case No. 07-32071.

On November 13, 2007, the three plaintiffs filed a Complaint to Determine Dischargeability of Debt and Objection to Debtor's Discharge. *See* R. 1. In recognition of the *pro se* plaintiffs' status, the court describes the pleading in detail and holds it to a less exacting standard than one prepared by counsel. *See Greer v. Board of Education of City of Chicago, Ill.*, 267 F.3d 723, 727 (7th Cir. 2001) (stating that a court liberally construes the pleadings of individuals who proceed *pro se*). The Complaint contained numerous broad allegations as background and one count of nondischargeability. It alleged that the defendant² was a real estate agent with Trinity Century 21 Real Estate Company, Inc., who "took an active part in the fraudulent activities entered into by Trinity and those other persons and entities acting together and in concert with Trinity with respect to alleged real estate sales and transfers, financial counseling and mortgage lending fraud." *Id.* at ¶ 12. Those fraudulent activities included "alleged fraudulent real estate, fraud counseling and lending and mortgage activities" and "residential properties that mainly were in a 'distressed' condition or otherwise valued in a low amount."³ *Id.* ¶¶ 13, 14. The "Factual Background" of the Complaint presented this specific allegation of the defendant's fraudulent activity:

Defendant in the instant action counseled Plaintiff Osborn in fraudulent methods to convert and shelter assets from his alleged creditors by Quit Claim Deed, filed, on the 13th day of July, 2006, with the St. Joseph County Recorder, for a parcel of real estate property commonly known as 741 26th Street, South Bend, Indiana 46615 (see Exhibit '1a') to and for Defendant's personal enjoyment

² Throughout the Complaint, the plaintiffs refer to "the defendant," even though there are two defendants charged in the pleading. It appears that "the defendant" is Debra Young. The second defendant, the United States Trustee, is expressly named only in the prayer of the Complaint.

³ Those fraudulent activities, according to the Complaint, were described in a state court case (which the plaintiffs failed to append to the Complaint as Exhibit 1) and in another adversary proceeding (which was dismissed with prejudice by stipulation of all seven plaintiffs). This evidence is therefore not before the court.

and potential profit and/or others acting in concert with Defendant. Defendant admitted this fraudulent activity in open court at the 1st Meeting of Creditors.

Id. ¶ 15. It also alleged that the defendant worked in concert with Title Express, Inc., to prepare the Quit Claim Deed.⁴ Finally, after describing Osborn, aged 74, as elderly, with only a 6th grade education, and mentally challenged because of a head injury he suffered in June 2002, it alleged that the defendant took advantage of him as one who is protected under the Older Americans Act, 42 U.S.C.A. § 3001. *See id.* ¶¶ 17, 33.

The Complaint's "Fraudulent and Unlawful Conduct" background section alleged that the defendant acted in concert with others when she "made false representations and/or omissions and otherwise engaged in conduct for the purpose of undertaking the fraudulent purchase for sale of the residence in question and to misappropriate funds from such transaction to her and others working in concert from this transaction to her own use, enjoyment and benefit." *Id.* ¶ 27. It further alleged that (a) the defendant (along with others) knew that her representations were false; (b) the plaintiffs reasonably relied on the misrepresentations; and (c) the plaintiffs suffered damages. *Id.* ¶ 27-¶ 30. This prefatory section of the Complaint listed, without explication, state law claims of property conversion, criminal deception, and criminal conversion against the defendant and those acting in concert with her, in violation of Indiana Code 35-43-5-3(a)(2) and (3) and Indiana Code 35-43-4-3. *Id.* ¶¶ 31-32. It also alleged a violation of the Older Americans Act and added (again with no comment) the citation of Indiana's Bureau of Aging Services, Indiana Code 12-10-1 to -5.

The sole count of the Complaint charged that the defendant's "debt to plaintiffs is not dischargeable pursuant U.S.C.A. et. seq; U.S.C.A. § 523(a)" for the following reason:

Defendant and other[s] working in concert with her in their individual capacity by fraud and criminal conduct. Misappropriated the aforesaid real property with intent to deprive plaintiff of its enjoyment and usage of Plaintiff Osborn by engaging in act of false pretense, false representation, false credit

⁴ The Quit-Claim Deed by which the plaintiff Osborn transferred property to defendant Young on July 13, 2006, was attached to the Complaint. *See* R. 1, Ex. 2 ("Quit-Claim Deed" or "Deed"). Only the legal description of the property was recorded on the Deed; however, the plaintiffs' Complaint stated that the property was "commonly known as 741 26th Street" in South Bend, Indiana. R. 1 ¶ 15. Osborn received \$10.00 "and other valuable consideration" for the property. The Quit-Claim Deed was notarized and the transfer recorded in the St. Joseph County Recorder's Office on that date. *See id.*

counseling and actual fraud. Defendant and others working in concert with her engaged in conduct involving wilful and malicious injury to plaintiffs.

Id. ¶ 35- ¶ 36. The court takes notice that, although the title of the Complaint included an “Objection to Debtor’s Discharge,” no count in that pleading raised a charge under § 727 of the Bankruptcy Code, and there are no allegations objecting to the debtor’s discharge. The court therefore construes the Complaint as one brought solely under 11 U.S.C. § 523(a). In addition, it notes that only in the final prayer for relief was the second defendant, the United States Trustee, named:

That the U.S. Trustee be order[ed] by Declaratory Judgment not to sell Plaintiffs’ Real Estate for the benefit of Creditors in this instant bankruptcy and Plaintiff allowed to replevin said real estate.

Id. ¶ 36(c). The prayer of the Complaint requested an order that the defendant’s debt to the plaintiffs be non-dischargeable, that the Trustee not sell the property, and that costs be assessed to the defendant. The Complaint also sought joinder to and certification of a class action pending in state court. It described the class as “a nationwide class of all ‘victims of Trinity Century 21 and Title Express, Inc.’ which is defined as consumers of defendants’ real estate, mortgage, title and closing service (and the instant claim of fraudulent Credit Counseling and conversion to defraud creditors).” *Id.* at ¶ 20.

The defendant Young, by counsel, filed an Answer to the Complaint on February 13, 2008. *See* R. 18. She admitted that she had been a real estate agent working for Trinity Century 21, but denied or was without information concerning the other allegations. She denied all allegations of fraudulent conduct. As one of her affirmative defenses, the defendant asserted that the complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). She also filed a Motion to Dismiss on that ground. *See* R. 15, 16 (Motion, Memorandum of Law). In it, she asserted the following reasons for dismissal: (a) insufficient factual allegations to support a claim of nondischargeability; (b) failure to meet the notice pleading requirements of Federal Rule of Civil Procedure 8 or the fraud particularity requirements of Federal Rule 9; (c) the plaintiffs’ lack of standing to bring this case by relying on a St. Joseph Superior Court case and an adversary proceeding to which they were not

parties; (d) lack of jurisdiction to determine issues under the Older Americans Act; and (e) failure to meet the requirements for class certification.

The plaintiffs did not respond to the Motion to Dismiss by the thirty-day deadline of March 13, 2008. *See* N.D. Ind. L.B.R. B-7007-1(a). On March 8, 2008, the plaintiffs had filed a “Motion for Expansion of Time to File All Plaintiff’s [*sic*] Reply and Objection to Motion to Dismiss And Other Defendant’s Filings.” *See* R. 19. The court denied the Motion on the ground that no reason was given to justify the extension. *See* R. 20; *see also* N.D. Ind. L.B.R. B-7007-1(a) (“Extensions of time shall only be upon order of the court, for good cause shown.”). Without asking the court to reconsider the denial of a time extension, the plaintiffs filed a belated Objection to Motion to Dismiss and an Amended Table of Exhibits on March 25, 2008. *See* R. 22, 23.

The court could dismiss this adversary proceeding based solely upon a lack of timely response to the motion to dismiss. *See* N.D. Ind. L.B.R. B-7007-1(a) (“The failure to respond or reply within the time required will be deemed a waiver of the opportunity to do so and may subject the motion to a ruling without further submissions.”). Because the plaintiffs are proceeding *pro se*, however, it considers the Complaint and the Motion to Dismiss it on their merits.

Discussion

The question before the court is whether the plaintiffs’ Complaint must be dismissed as a matter of law pursuant to Rule 7012(b) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.⁵ In order to state a claim for relief, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶ Fed. R. Civ. P. 8(a)(2). Until recently, courts relied on the Supreme Court’s analysis of Rule 8(a) in

⁵ Federal Rule of Bankruptcy Procedure 7012(b) states that Rule 12 (b)-(h) of the Federal Rules of Civil Procedure are applicable in adversary proceedings. Rule 12(b)(6) is the affirmative defense that the complaint must be dismissed for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6).

⁶ Federal Rule of Bankruptcy Procedure 7008 states that Rule 8 of the Federal Rules of Civil Procedure applies (continued...)

Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957), and in particular on its mandate that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Id.* at 45-46; 78 S. Ct. at 102. However, the Court last year criticized the “no set of facts” language in *Conley* and set forth what it considered a more plausible test for satisfying Rule 8(a)(2):

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Bell Atlantic Corp. v. Twombly, _ U.S. _, 127 S. Ct. 1955, 1964-65, 167 L.Ed.2d 929 (2007) (citations omitted) (effectively overruling *Conley v. Gibson*). According to the Court, “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” *Id.* at 1965 n.3.

The Seventh Circuit Court of Appeals explained that, “[i]n *Bell Atlantic*, the Supreme Court retooled federal pleading standards, retiring the oft-quoted *Conley* formulation.” *Killingsworth v. H.S.B.C. Bank of Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007) (citing *Conley*, 355 U.S. at 45-46, and *Bell Atlantic*, 127 S. Ct. at 1969).

In *Airborne Beepers [& Video, Inc. v. A.T. & T Mobility, LLC*, 499 F.3d 663 (7th Cir. 2007)], we read [*Bell Atlantic Corp. v. Twombly* together with the Supreme Court’s decision two weeks later in *Ericson v. Pardus*, _ U.S. _, 127 S. Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007), and observed that “we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8.” *Airborne Beepers*, 499 F.3d at 667.

Id., 507 F.3d at 619. Following the Supreme Court and the Seventh Circuit, therefore, this court accepts as true the factual allegations contained in a complaint and will dismiss the complaint only if it fails to set forth enough

⁶(...continued)

in adversary proceedings. Rule 8(a) states that a pleading “shall contain (1) a short and plain statement of the grounds upon which the court’s jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.” Fed. R. Civ. P. 8(a).

facts to state a claim for relief that is “plausible on its face.” *St John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Twombly*), *cert. denied*, 2008 WL 593773 (2008).

In this case, to survive dismissal the Complaint must satisfy both Rules 8 and 9(b) of the Federal Rules of Civil Procedure. The plaintiffs’ claim for relief is based upon allegations of fraudulent activity: mortgage lending fraud, fraud counseling, and fraudulent methods of sheltering assets, to name some of the charges. “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). This rule of civil procedure is made applicable in adversary proceedings by Rule 7009 of the Federal Rules of Bankruptcy Procedure.

In order to withstand a motion to dismiss, a complaint alleging fraud must, at a minimum, state “the identity of the person making the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff.” A complaint which fails to identify the fraudulent statements or the reasons why they are fraudulent does not satisfy the particularity requirement of Rule 9(b). That requirement applies equally to all claims which are based upon an underlying fraud, including all three aspects of 11 U.S.C. § 523(a)(2)(A) (false pretenses, false representations, and actual fraud), and complaints under § 523(a)(4) concerning fraud in a fiduciary capacity.

S & L Enters. I, LLC, v. Eisaman (In re Eisaman), ___ B.R. ___, 2008 WL 1945534 at *2 (Bankr. N.D. Ind.) (citations omitted). Particularity, under Rule 9(b), “means the who, what, when, where, and how” of the circumstances at issue. *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.), *cert. denied*, 498 U.S. 941 (1990).

With the fundamental principles of pleading under Rules 8 and 9(b) set forth, the court now turns to the Complaint before it, recognizing that the *pro se* plaintiffs’ pleadings are held to less strict standards than those filed by attorneys for their clients. *See Greer v. Board of Education of City of Chicago, Ill.*, 267 F.3d 723, 727 (7th Cir. 2001). *Greer* reminds courts that “[t]he essence of liberal construction is to give a *pro se* plaintiff a break when, although he stumbles on a technicality, his pleading is otherwise understandable.” *Id.* (quoting *Hudson v. McHugh*, 148 F.3d 859, 864 (7th Cir. 1998)). Nevertheless, “[p]laintiffs’ voluntary *pro se* status does not give them any privilege to engage in sloppy litigation, or any extra entitlement to amend the complaint.” *Denlinger v. Brennan*, 87 F.3d 214, 217 (7th Cir. 1996).

In this case, the court finds that even the most generous reading of this nondischargeability Complaint cannot save it from dismissal. To prevail on a claim of nondischargeability, the plaintiffs have the burden of proof by a preponderance of the evidence. *See Grogan v. Gardner*, 498 U.S. 279, 285, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991). By generically citing only § 523(a), which excepts from discharge many different categories of debts (including domestic support obligations, educational loans, certain tax debts, and several kinds of liabilities based on fraud), the plaintiffs gave “only a passing reference to the Bankruptcy Code” without indicating which subsection provided the basis for excepting their debt from discharge. *McCready v. eBay, Inc.*, 453 F.3d 882, 890 (7th Cir. 2006) (concluding that McCready’s passing reference to the Code failed to provide notice of his claim).

If the plaintiffs intended to argue, for example, that the debt owed to them by the defendant was one “for fraud or defalcation while acting in a fiduciary capacity” under § 523(a)(4), the plaintiffs did not state in their Complaint that there was a fiduciary relationship between them and the defendant. *See In re Frain*, 230 F.3d 1014, 1017 (7th Cir. 2000). If they meant that the debt was obtained by a materially false statement written about the defendant’s financial condition with the intent to deceive the plaintiffs, as required under § 523(a)(2)(B), they did not produce such a document. *See Fischer Inv. Capital, Inc. v. Cohen (In re Cohen)*, 507 F.3d 610, 613 (7th Cir. 2007). If they intended to claim that the debt was obtained by “false pretenses, a false representation, or actual fraud” under § 523(a)(2)(A), the plaintiffs were required to establish that (1) the defendant obtained the plaintiffs’ property or money through representations that the defendant either knew to be false or made with such reckless disregard for the truth as to constitute willful misrepresentation; (2) the defendant acted with an intent to deceive the plaintiffs; and (3) the plaintiffs justifiably relied on the defendant’s false representations to their detriment. *See, e.g., Mayer v. Spanel Int’l, Ltd. (In re Mayer)*, 51 F.3d 670, 673 (7th Cir.), *cert. denied*, 516 U.S. 1008 (1995); *see also Field v. Mans*, 516 U.S. 59, 74-75, 116 S. Ct. 437, 446, 133 L.Ed.2d 351 (1995) (creditor’s reliance need only be justifiable). The plaintiffs’ Complaint, however, presented only cursory allegations of

misrepresentations, detrimental reliance, and damages, unsupported by any explanation. It used the term “intent” once, in Count 1, alleging the defendant’s “intent to deprive plaintiff” Osborn of enjoyment of his property.

The Supreme Court, in *Twombly*, stated that “a formulaic recitation of the elements of a cause of action” does not provide sufficient grounds for entitlement to relief. *Bell Atlantic Corp. v. Twombly*, _ U.S. at ___, 127 S. Ct. at 1964-65. The court finds that this Complaint did not provide even a complete formulaic recitation of the elements of the cause of action: There is no allegation of an intent to defraud, for example. Moreover, the Complaint alleged that the defendant “engag[ed] in act[s] of false pretense, false representation, false credit counseling and actual fraud,” but it offered no description at all of those acts or representations. Nor does it point to a statement in any document that reflects an underlying fraud. In fact, the factual detail presented by the plaintiffs is so poorly worded and sketchy that it fails to notify the defendant of the specific actions she allegedly made against the plaintiffs. The court determines, therefore, that the Complaint does not provide sufficient notice to the defendant of the claim against her and thus does not satisfy Civil Procedure Rule 8. *See McCready*, 453 F.3d at 890 (“Although we construe complaints by pro se litigants liberally, *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L.Ed.2d 652 (1972), we must do so while keeping in mind the purpose of the federal pleading system is to provide notice of all claims, *see* Fed. R. Civ. P.8.”).

Because fraud was alleged, as well, the plaintiffs were required under Rule 9(b) to set forth more specific details than Rule 8 requires, details of what the defendant did, when, where, and to whom. *See In re Doctors Hosp. of Hyde Park, Inc.*, 308 B.R. 311, 322 (Bankr. N.D. Ill. 2004) (“Fraud is a serious charge, easy to allege and hard to prove.”). The single count of the Complaint asserts an undefined fraud claim, and the Complaint’s allegations do not set forth the necessary details of the defendant’s actions. It does not even make clear who is charged with fraud. It alleged that “the defendant” made misrepresentations, without clarifying whether the defendant was Young or the Trustee. *See Speights v. State*, 2000 WL 263700 (N.D. Ill. 2000) (unpub’d) (finding complaint deficient because it failed to identify which defendants were responsible for the definite harms enumerated). Nor does it pinpoint what was fraudulent. The Complaint described the Quit-Claim

Deed but did not allege fraud concerning that Deed or its execution and recording. The court, having examined the Deed, does not find anything reflective of fraud on its face. The court further takes note that the identification of the property being transferred is ambiguous: The Complaint describes property at “741 26th Street” but the debtors’ schedules list property at “741 27th Street,” and the Deed itself presents only the legal description. Without clear facts concerning which defendant and which property are involved, the Complaint lacks the most basic necessary information. The Complaint also does not identify any fraudulent statement or fraudulent conduct by the defendant; it merely labels the transfer of property from plaintiff Osborn to the defendant as a fraudulent activity.⁷ See, e.g., *Cross v. Simons*, 729 F. Supp. 588, 594 (N.D. Ill. 1989) (stating general rule that, to satisfy Rule 9(b), complaint must “inform each defendant of the specific fraudulent acts” constituting the claim against that particular defendant) (citations omitted).

Without sufficient explanation of the acts constituting fraud, stated with particularity, this Complaint does not satisfy the requirements of Rule 9(b). See *In re Rockefeller Ctr. Props., Inc. Sec. Litig. v. Rockefeller*, 311 F.3d 198, 217 (3d Cir. 2002) (stating that Rule 9(b) “requires at a minimum” that plaintiffs support fraud complaints with the “who, what, when, where and how” of the events at issue). The court concludes that the Complaint must be dismissed pursuant to Rule 12(b)(6) because it failed to give sufficient notice of the plaintiffs’ claim to the defendant and failed to plead fraud with sufficient particularity and clarity, pursuant to Federal Rules of Civil Procedure 8 and 9(b).

In addition, the court must dismiss the Complaint against the second defendant individually. Even though “a Complaint may group individual defendants to a certain degree for the purpose of stating a claim for relief when each defendant is explicitly connected to the underlying allegations supporting that claim,” it fails when the allegations linking the defendants to the claims against them are insufficient. *In re Verestar, Inc.*, 343

⁷ In the view of this court, the Complaint’s allegation that the defendant “counseled plaintiff Osborn in fraudulent methods to convert and shelter assets from his alleged creditors” suggests that plaintiff Osborn, by following Young’s counsel and by transferring the property to Young, was complicit in some fraudulent plan to hide his assets from creditors. See R. 1, ¶ 15.

B.R. 444, 481 (Bankr. S.D.N.Y. 2006). The plaintiffs in this case failed to state any claim at all against the United States Trustee: There were no allegations of her personal involvement, of any act by her toward the plaintiffs, or of any wrongdoing on her part. *See, e.g., Indemnified Capital Investments, S.A. v. R..J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1407 n.2 (7th Cir. 1993); *Potter v. Clark*, 497 F.2d 1206, 1207 (7th Cir. 1974). The Complaint therefore is dismissed as to the second defendant.

The court further finds that it lacks jurisdiction over any claim by the plaintiffs under the Older Americans Act, 42 U.S.C. § § 3001-3058ee. That Act gives the federal government the power to distribute funds to the states each year, and the states in turn provide funds for services to “older individuals,” defined under the Act as individuals 60 years of age or older. *See* 42 U.S.C. § 3002(38); *City of Chicago v. Lindley*, 66 F.3d 819, 820-21 (7th Cir. 1995). Governmental agencies on aging have standing to raise claims under the Act. *See id.* at 824 n.6. However, no private right of action, express or implied, is available under the Act. *See Community & Econ. Dev Ass'n of Cook County, Inc v. Suburban Cook County Area Agency on Aging*, 770 F.2d 662, 668 (7th Cir. 1985); *Osborn v. American Ass'n of Retired Persons*, 660 F.2d 740, 745-46 (9th Cir. 1981) (finding no implied private right of action by individuals). Whatever claim plaintiff Osborn believes he may have under the Older Americans Act, it is not a claim that arises under or is related to any proceeding under the Bankruptcy Code, and it is not within this court's jurisdiction. *Cf. In re Mandalay Shores Co-op. Housing Ass'n, Inc.*, 17 B.R. 33, 35 (Bankr. Fla. 1981).

It is also the finding of the court that the plaintiffs' mere citation to statutes is insufficient to state a claim for relief under those statutes. *See, e.g., Walker v. Michael W. Colton Trust*, 47 F. Supp. 2d 858, 864 (E.D. Mich. 1999) (stating that citations, without more, are insufficient to satisfy pleading requirements under Rule 8.); *cf. United States v. Williams*, 429 F.3d 767, 775 (8th Cir. 2005) (stating that a citation to a statute, without more, does not cure the omission of an essential element of the charge in an indictment). Therefore none of the citations to state statutes or to the Older Americans Act pleads a claim in the Complaint.

The plaintiffs' attempt at class certification fares no better. The plaintiffs define the class as "a nationwide class of all 'victims of Trinity Century 21 and Title Express, Inc.' which is further defined as consumers of defendants' real estate, mortgage, title and closing service (and the instant claim of fraudulent Credit Counseling and conversion to defraud creditors)." R. 1 ¶ 20. They ask the court to certify the class or to join the "state class action" that was stayed by Deborah Young's bankruptcy filing.

This court may certify representatives of a class of plaintiffs "if the putative class satisfies all four requirements of Federal Rule of Civil Procedure 23(a) – numerosity, commonality, typicality, and adequacy of representation – and any one of the conditions of Rule 23(b)."⁸ *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 2952 (2007). Bankruptcy Rule 7023, which applies Rule 23 of the Federal Rules of Civil Procedure in adversary proceedings, allows class action lawsuits in bankruptcy cases. Although in the past some courts refused to allow class actions for nondischargeability claims under § 523(a), *see Sweet v. Hanson (In re Hanson)*, 104 B.R. 261, 262-63 (Bankr. N.D. Cal. 1989); *In re Woodmore Corp.*, 4 B.R. 186, 190-92 (Bankr. D. Colo. 1980), most courts now recognize that dischargeability proceedings are adversary actions that may be prosecuted as class actions under Bankruptcy Rule 7023. *See, e.g., Turner v. Talbert (In re Talbert)*, 347 B.R. 804, 807 (Bankr. E.D. La. 2005). The plaintiffs have the burden of satisfying all the elements of Rule 23(a). *See Oshana*, 472 F.3d at 513; *In re Talbert*, 347 B.R. at 808.

For these plaintiffs, the adequate representation requirement of Rule 23(a)(4) is dispositive. A plaintiff who is not an attorney and who is proceeding *pro se* cannot be a class representative who fairly and adequately protects the interests of the class under Rule 23(a)(4). *See Fymbo v. State Farm Fire & Cas. Co.*, 213

⁸ The statutory requirements are as follows:

- (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

F.3d 1320, 1321 (10th Cir. 2000) (“A litigant may bring his own claims to federal court without counsel, but not the claims of others.”) (citations omitted); *see also Rutledge v. Lane*, 215 F.3d 1330 (unpub’d) (7th Cir. 2000) (concluding that pro se plaintiff does not fulfill the Rule 23(a)(4) requirement). Although the court finds other requirements of Rule 23(a) unfulfilled as well, it denies the plaintiffs’ class action request based upon their inability to satisfy this criterion of fair representation of the class.

It is clear to the court, too, that the plaintiffs’ definition of a class cannot apply in this adversary proceeding against the defendants Young and the U.S. Trustee. The United States Trustee does not have a real estate, mortgage, title and closing service. There are no consumers of the Trustee’s services. In addition, neither Trinity Century 21 nor Title Express, Inc., is a defendant in this proceeding. It appears that only “consumers” who could show a valid claim against the defendant Young, based upon her alleged undefined fraudulent activity in providing real estate, mortgage, title or closing services, could qualify as members of the plaintiffs’ putative class. Since the plaintiffs in this adversary proceeding have failed to state a claim against defendant Young, this court refuses to consider further a class certification. *See Oshana*, 472 F.3d at 512-13 (affirming district court’s determination that proposed class was not sufficiently definite to warrant certification).

One last matter must be considered. The plaintiffs filed a Motion to Substitute defendants, seeking to substitute the Chapter 7 Trustee for the U.S. Trustee as the second defendant in the Complaint. They gave no reason for the request and submitted no affidavit accompanying the Motion. Earlier in this Memorandum of Decision, the court determined that the Complaint must be dismissed against the U.S. Trustee on the ground that the pleading presented no allegations of the Trustee’s wrongdoing and failed to state any claim whatsoever against the Trustee. Indeed, she was named for the first time in the prayer for relief. The plaintiffs have presented no justification for removing the U.S. Trustee and for substituting the Chapter 7 Trustee in this case, and have made no showing of excusable neglect for having filed the action initially against the U.S. Trustee, rather than the Chapter 7 Trustee. The court, in its discretion, therefore denies the Motion for Substitution. *See Russell v. City of Milwaukee*, 338 F.3d 662, 667 (7th Cir. 2003) (affirming refusal to substitute parties).

In summary, the court determined that the plaintiffs' Complaint, with its blanket vague allegations of fraud, failed to state a claim upon which relief can be granted. It pointed out the Complaint's many shortcomings: The Complaint failed to identify which defendant was charged with particular fraudulent conduct, which property allegedly was fraudulently transferred, what acts and representations were alleged to be fraudulent, and under which dischargeability exception of § 523(a) the Complaint was brought. The court also dismissed the Complaint against the second defendant, the U.S. Trustee, and denied the plaintiffs' Motion to Substitute the chapter 7 Trustee for the U.S. Trustee. The court's dismissal encompassed all nonbankruptcy citations in the Complaint because they were merely listed as citations, without more. Finally, the court denied the plaintiffs' request for class certification.

Rules 8 and 9(b) of the Federal Rules of Civil Procedure justify dismissal of the Complaint pursuant to Rule 12(b)(6). The court grants the Motion to Dismiss filed by defendant Debra A. Young and denies the Motion to Substitute Defendant filed by the plaintiffs.

Conclusion

For the reasons stated above, the court grants the Motion to Dismiss Pursuant to Rule 12(b)(6) filed by defendant Debra A. Young. The plaintiffs' Complaint to Determine Dischargeability of Debt is dismissed. The court also denies the plaintiffs' Motion to Substitute Defendant.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT