

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 09-13240)
)
GLENN G. CONKLING)
PEGGY S. CONKLING)
)
Debtors)
)
)
GRABILL PAINTING & DRYWALL, INC.)
)
Plaintiff)
)
vs.) PROC. NO. 09-1183
)
GLENN G. CONKLING, JR.)
PEGGY S. CONKLING)
)
Defendants)

DECISION AND ORDER DENYING MOTION TO DISMISS

At Fort Wayne, Indiana, on August 25, 2010

The complaint initiating this adversary proceeding alleges that the debtors' obligation to the plaintiff is non-dischargeable under § 523(a)(2)(A) and/or § 523(a)(6) of the United States Bankruptcy Code. Defendants responded with a motion to dismiss, arguing the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. Rule 12(b)(6). The matter is before the court to consider the issues raised by that motion and plaintiff's response thereto.

The operative facts in the complaint say only that, prior to the petition, the plaintiff sued the defendants in state court for "fraud in the inducement, constructive fraud, and conversion" and recovered a judgment against them, which has not been paid. It then continues with the conclusion that the judgment represents a debt for obtaining property under false pretenses or a willful and

malicious injury and so is non-dischargeable under § 523(a)(2)(A) or § 523(a)(6). Such conclusory allegations do not even begin to satisfy the requirements of Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct. 1955 (2007) and Ashcroft v. Iqbal, ___ U.S. ___, 129 S.Ct. 1937, 1949-50 (2009) (“Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”), or, to the extent it asserts a claim of fraud, Rule 9(b) of the Federal Rules of Civil Procedure. See, In re Brown, 399 B.R. 44, 46 (Bankr. N.D. Ind. 2008); In re Eisaman, 387 B.R. 219, 222-23 (Bankr. N.D. Ind. 2008); In re Schmucker, 376 B.R. 256, 257-58 (Bankr. N.D. Ind. 2007); In re Chochos, 325 B.R. 780, 783 (Bankr. N.D. Ind. 2005). The plaintiff argues, however, that it attached a copy of the state court complaint and judgment to the complaint initiating in this case and the allegations and information they contain cure the deficiencies in the present pleading. In doing so, it apparently relies on Rule 10(c) of the Federal Rules of Civil Procedure which, in relevant part, states: “A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.” Fed. R. Civ. P. Rule 10(c).

Although the Seventh Circuit has observed that Rule 10(c) is not “a license to plead their cases by exhibit,” Perkins v. Silverstein, 939 F.2d 463, 467 (7th Cir. 1991), it has inadvertently enabled plaintiffs to do so by broadly interpreting the rule’s reference to “a written instrument” attached to the complaint. See, Northern Indiana Gun & Outdoor v. City of Chicago, 163 F.3d 449, 452-53 (7th Cir. 1998). Rather than limiting the concept to documents such as contracts, deeds, bills of exchange, promissory notes and similar writings which form the foundation of the claim sued upon, see e.g., Rose v. Bartle, 871 F.2d 331, 339 n.3 (3rd Cir. 1989); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1115 (D. W.D. N.Y. 1996); DeMarco v. Depotech Corp., 149 F. Supp. 2d 1212, 1220-22 (D. S.D. Cal.2001); In re Empeyan BioSciences, Inc. Securities Litigation,

219 F.R.D. 408 (D. N.D. Ohio 2003), it will allow any document attached to a complaint to be considered in ruling on a motion to dismiss.¹ As a result, it has approved the review of such things as affidavits, letters, newspaper articles, cartoons, other things in connection with a motion to dismiss, see, Schnell v. City of Chicago, 407 F.2d 1084, 1085 (7th Cir. 1969); Northern Indiana Gun, 163 F.3d 449; Perkins, 939 F.2d 463, even as it simultaneously recognizes that these things are not the type of documents contemplated by the rule. Perkins, 939 F.2d at 467 n. 2. A more rigorous approach to what constitutes a written instrument would have spared it the difficulty of deciding how to resolve conflicts between allegations in the complaint and statements in documents attached to it when those documents are not the basis of plaintiff's claims, Northern Indiana Gun, 163 F.3d at 454-57, or a painstaking review of miscellaneous exhibits to see if they contained anything that might remedy the otherwise insufficient complaint to which they were attached. Perkins, 939 F.2d 467-68. (They did not, but unless one acknowledges the possibility that they might, there would be no reason to review them). While the Court's decisions in Twombly and Iqbal suggest that the circuit may want to reconsider its broad approach to Rule 10(c), until it does this court must follow it. See, Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22 (1989).

The state court pleading attached to the complaint in this proceeding contains the necessary

¹It is interesting to contrast the circuit's approach to documents attached to a plaintiff's complaint with its approach to documents submitted to it in connection with a motion to dismiss. Such documents will not be considered unless they are referred to in the complaint and central to the plaintiff's claim. See, Rosenbaum v. Travelbyus.com, Ltd., 199 F.3d 657, 661 (7th Cir. 2002); Venture Associates Corp. v. Zenith Data Systems Corp., 987 F.2d 429, 431 (7th Cir. 1993); McCready v. eBay, Inc., 453 F.3d 882, 891 (7th Cir. 2006); Levenstein v. Salafsky, 164 F.3d 435, 437 (7th Cir. 1998). A similar approach to documents attached to a complaint would not only be more consistent but also might be more faithful to the language of Rule 10(c).

facts which are absent from the latter document and alleges fraud with the required particularity. Had those same allegations been placed in the body of the complaint filed in this court it would be sufficient. Since the attachments to that complaint are part of the pleading for all purposes, they cure the deficiencies in what is an otherwise insufficient complaint.

Defendants' motion to dismiss is DENIED and they shall answer Plaintiff's complaint within fourteen (14) days of this date.

SO ORDERED.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court