

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
ROSS JOHN MAXWELL and	)	CASE NO. 11-30374 HCD
SAMANTHA NICOLE MAXWELL,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
	)	
MARTIN A. McCLOSKEY,	)	
	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 11-3028
	)	
ROSS JOHN MAXWELL and	)	
SAMANTHA NICOLE MAXWELL,	)	
DEFENDANTS.	)	

Appearances:

Thomas E. Panowicz, Esq., attorney for defendants, 1951 East Fox Street, South Bend, Indiana 46613; and  
Martin A. McCloskey, pro se, 301 North Nappanee Street, Elkhart, Indiana 46514.

MEMORANDUM OF DECISION

At South Bend, Indiana, on August 12, 2011.

Before the court is the Motion to Dismiss filed by the defendants Ross John Maxwell and Samantha Nicole Maxwell, chapter 7 debtors (“defendants” or “debtors”), requesting dismissal of the Complaint filed by plaintiff Martin A. McCloskey (“plaintiff”) on the ground that it fails to state a cause of action upon which relief can be granted. *See* Fed. R. Bankr. P. 7012; Fed. R. Civ. P. 12(b)(6). The plaintiff has not filed a response to the Motion to Dismiss. For the reasons that follow, the court grants the defendants’ Motion without prejudice.<sup>1</sup>

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<sup>1</sup> The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), (J), (K).

## BACKGROUND

The debtors filed their voluntary chapter 7 petition on February 17, 2011. The plaintiff was listed as a creditor on their schedules. The court set May 25, 2011, as the bar date for objections to discharge. On May 23, 2011, the plaintiff timely commenced this adversary proceeding by filing a “Complaint Objecting to Discharge of the Debtors and/or to Determine Dischargeability of Certain Debts and Motion to Retain Judicial Lien on Debtors’ Real Estate.”

In the Complaint, the plaintiff alleged that the St. Joseph County Probate Court had found that the debtors had engaged in bad faith by making intentional misrepresentations in documents filed in that court. According to the Complaint, the Probate Court awarded attorney fees to attorney McCloskey, plaintiff herein, and placed a lien on the debtors’ real estate in Elkhart, Indiana. The plaintiff alleged that he was not paid by the debtors, even though they were solvent. He charged that the debtors committed a fraud upon the bankruptcy court by filing bankruptcy to avoid paying the state court-ordered attorney fees. The plaintiff also asserted that the debtors’ actions were undertaken with intent to defraud the plaintiff, and he sought relief generally under 11 U.S.C. § 727 and § 523. Finally, he urged the court “to retain the lien on Debtor’s [*sic*] real estate.” R. 1 at 5.

The defendants timely filed a Motion to Dismiss the adversary proceeding for failure to state a claim upon which relief can be granted. The motion was accompanied by a separate supporting brief. *See* N.D. Ind. L.B.R. B-7007-1. The defendants argued that the plaintiff had failed to state a plausible basis for relief under §§ 727 or 523: He did not allege sufficient factual allegations for those claims and did not allege with particularity the circumstances underlying his allegations of fraud. Moreover, the defendants insisted that the plaintiff’s attempt to retain the lien on the defendants’ real estate was based on a misunderstanding of 11 U.S.C. § 522(f)(1) and could not stand. They sought dismissal of the Complaint with prejudice.

## DISCUSSION

Motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) are reviewed under the Supreme Court's directives established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007), and *Ashcroft v. Iqbal*, \_ U.S. \_, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). Those decisions dictate that a complaint must be dismissed if its allegations do not "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555); *see also Atkins v. City of Chicago*, 631 F.3d 823, 831-32 (7th Cir. 2011); *Reger Dev., LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir.), *cert. denied*, 130 S.Ct. 3507 (2010). In addition, when a party alleges fraud in the complaint, he "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009; *see also Reger Dev.*, 592 F.3d at 764.

The defendants' Motion to Dismiss, filed June 30, 2011, contended that the Complaint did not contain sufficient facts to state a plausible claim to relief under § 727 or under § 523. It also argued that the plaintiff did not present facts specifying the "who, what, when, where, and how" of an alleged fraudulent act. *See Reger Dev.*, 592 F.2d at 764 (quoting *Arazie v. Mullane*, 2 F.3d 1456, 1465 (7th Cir. 1993)). The plaintiff had 30 days after service of the Motion to Dismiss within which to serve and file a response. *See* N.D. Ind. L.B.R. B-7007-1(a). However, no response was filed, timely or untimely. According to the court's local rule, a party's "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." *Id.*

The court finds that the plaintiff has waived the opportunity to oppose the defendants' motion to dismiss. *See Alioto v. Town of Lisbon*, \_F.3d\_, 2011 WL 2642369 at \*5 (7th Cir. July 7, 2011) (affirming court's granting of motion to dismiss, citing longstanding case law "that a person waives an argument . . . where a litigant effectively abandons the litigation by not responding to alleged deficiencies in a motion to dismiss"). Accordingly, the court considers the defendants' motion as an uncontested motion. It construes

the nonresponse to signify that the plaintiff does not oppose the relief requested by the motion and thus grants dismissal of the plaintiff's Complaint.

The court also finds, by making an independent review of the Complaint, the Motion to Dismiss, and the supporting brief, that the Motion has merit and should be granted. It determines that dismissal is proper for the reasons set forth in the defendants' brief in support of the dismissal motion. In particular, it finds that the Complaint does not present a plausible story, one with "enough substance to warrant putting the defendant to the expense of discovery." *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011). The Complaint asserts claims of fraud perpetrated by the defendants in two state court proceedings and the bankruptcy court proceeding and also against the plaintiff. However, it fails to set forth with particularity its accusations of fraud and of the defendants' intent to defraud the plaintiff. Under Rule 9(b), allegations of false representation and actual fraud must be buttressed with factual content and must include the facts misrepresented and the circumstances underlying the allegations. *See, e.g., In re Boucher*, 336 B.R. 27, 36 (Bankr. D. Conn. 2005) (concluding that plaintiff failed to establish a prima facie case with bald allegations of false representations and actual fraud, without evidentiary support). To receive an exception from discharge or a denial of a debtor's discharge, the plaintiff is required to demonstrate the alleged fraudulent conduct with sufficient specificity. *See, e.g., In re Neale*, 440 B.R. 510, 523 (Bankr. W.D. Wis. 2010) (dismissing complaint under Rule 12(b)(6) for failure to satisfy the particularity requirements of Rule 9(b)). In this Complaint, the particularity requirement of Rule 9(b) is not met and the claim for relief is confusing, vague, and completely insufficient.

In addition, the plaintiff has used the Complaint as the vehicle by which to address the defendants' Motion to Avoid Lien, filed on April 26, 2011, in the debtors' main bankruptcy proceeding. Instead of filing a timely objection to that motion on or before May 26, 2011, as required in the main case, the plaintiff incorporated into the Complaint a "motion to retain judicial lien." The court finds that the plaintiff failed to file any objection to the Motion to Avoid Lien in the main case, and therefore has waived

an opportunity to do so now. *See* N.D. Ind. L.B.R. B-7007-1; *see also* N.D. Ind. L.B.R. B-2002-2(a)(5) (no hearing on motions to avoid liens on exempt property unless timely objection is filed). In addition, he has failed to present any facts or legal argument in the Complaint’s single count, entitled “Claim for Relief,” which relies generally on § 523 and § 727, to justify the retention of the lien on the debtors’ real estate. In this adversary proceeding, no relief from avoidance of the lien has been justified. *Cf. In re Boucher*, 336 B.R. at 36 n.13 (noting that, even if the court were to find the debt nondischargeable under § 523(a)(2), that decision would not adversely affect the debtors’ avoidance rights under § 522(f)). The “motion” to retain judicial lien, improperly woven into this Complaint objecting to discharge and to the dischargeability of debt, is dismissed – both for failure to state a claim upon which relief can be granted and also for failure to respond to the Motion to Dismiss, which constituted a waiver of any objection to the request for dismissal. In sum, therefore, the court dismisses the plaintiff’s Complaint in its entirety.

Nevertheless, when a complaint is subject to dismissal and no responsive pleading has been filed, a plaintiff normally is afforded the opportunity to file an amended complaint. *See In re Neale*, 440 B.R. at 523; *In re Eisaman*, 387 B.R. 219, 224 (Bankr. N.D. Ind. 2008); *see also In re Hildebrandt*, 2008 WL 5644893 at \*4 (Bankr. N.D. Ill. Dec. 18, 2008) (stating that a motion to dismiss is not a responsive pleading). Bankruptcy Rule 7015, which makes Rule 15 of the Federal Rules of Civil Procedure applicable in adversary proceedings, allows a party to amend a pleading once as a matter of course within 21 days after serving it; within 21 days after service of a responsive pleading; or within 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier. *See* Fed. R. Civ. P. 15(a)(1)(A), (B). The plaintiff did not file an amended Complaint within 21 days of the date he served the original Complaint, and thus cannot amend now as a matter of right.

Under Rule 15(a)(2), however, amendments to pleadings before trial are allowed after the 21-day period has passed, either with the opposing party’s written consent or the court’s leave. *See* Fed. R. Civ. P. 15(a)(2). The rule states that “[t]he court should freely give leave when justice so requires.” *Id.*; *see also*

*Joseph v. Elan Motorsports Techs. Racing Corp.*, 638 F.3d 555, 558 (7th Cir. 2011). However, when the court finds “undue delay, bad faith or dilatory motive on the part of the movants, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment,” the court should deny a motion to amend.

*Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962); *see also Airborne Beepers & Videos, Inc. v. AT&T Mobility LLC*, 499 F.3d 663, 666 (7th Cir. 2007). The grant or denial of an opportunity to amend is within the court’s discretion. *See id.*

In this adversary proceeding, the defendants have not filed an answer to the Complaint and the plaintiff has made no request for leave to amend the Complaint. In light of those facts, and after due consideration of the plaintiff’s Complaint, the defendants’ Motion to Dismiss and legal memorandum supporting it, and the plaintiff’s failure to respond to that Motion, therefore, the court grants the dismissal of the plaintiff’s Complaint, but without prejudice to the plaintiff’s opportunity to amend his Complaint under Rule 15(a)(2) of the Federal Rules of Civil Procedure, made applicable herein under Federal Rule of Bankruptcy Procedure 7015, and under the court’s local rule N.D. Ind. L.B.R. B-7015-1.

#### CONCLUSION

For the reasons presented above, the Complaint filed by the plaintiff Martin A. McCloskey against the defendants Ross John Maxwell and Samantha Nicole Maxwell is granted without prejudice. Any motion by the plaintiff seeking leave to amend the Complaint must be filed in this court within fourteen (14) days of the date of this Memorandum of Decision. If a timely motion to amend is not filed, the court in its discretion may grant the dismissal of the plaintiff’s Complaint with prejudice and close the adversary proceeding.

SO ORDERED.

/s/ HARRY C. DEES, JR.  
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HARRY C. DEES, JR., JUDGE  
UNITED STATES BANKRUPTCY COURT