

Not Intended for Publication and/or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 11-11959)	
)	
ERIC BLAINE FORD)	
ROBYN DENISE FORD)	
)	
Debtors)	
)	
)	
KERRY BURDA)	
JOHN BURDA)	
)	
Plaintiffs)	
)	
vs.)	PROC. NO. 11-1150
)	
ERIC BLAINE FORD)	
)	
Defendant)	

DECISION AND ORDER GRANTING MOTION TO DISMISS

At Fort Wayne, Indiana, on December 8, 2011.

In bankruptcy, claims for breach of contract are dischargeable debts. See, In re Whifers, 337 B.R. 326, 339 (Bankr. N.D. Ind. 2006); In re Barr, 194 B.R. 1009, 1017-18 (Bankr. N.D. Ill. 1996); In re Guy, 101 B.R. 961, 978-979 (Bankr. N.D. Ind. 1988); In re Cortese, 77 B.R. 961 (Bankr. S.D. Fla. 1987). Even an intentional breach of contract will not create a non-dischargeable debt, unless the breach is accompanied by conduct that is also tortious. In re Williams, 337 F.3d 504, 509-10 (5th Cir. 2003); Petralia v. Jerich, 238 F.3d 1202, 1205-06 (9th Cir. 2001); In re Riso, 978 F.2d 1151, 1154 (9th Cir. 1992). See also, In re Lazzara, 287 B.R. 714, 722 (Bankr. N.D. Ill. 2002) (applying §523(a)(6)). Debts for fraud and other intentional torts are, however, non-dischargeable. See, 11 U.S.C. §§ 523(a)(2), (4), (6). As a result, when an individual files bankruptcy, there is a very real

incentive for creditors to attempt to recharacterize what would otherwise be a dischargeable contract claim into some kind of non-dischargeable tort claim. That is the situation here.

The plaintiffs entered into a construction contract with Masterpiece Custom Homes, Inc. which was not performed to their satisfaction. The debtor/defendant was the corporation's president and has filed bankruptcy. The plaintiffs have filed a complaint, advancing various theories of fraud and tort, claiming that the debtor is personally liable to them in connection with the deficient construction so that the debt is non-dischargeable pursuant to §§ 523(a)(2), (a)(4), and/or (a)(6). The matter is before the court on defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiffs' complaint advances both fraud based and non-fraud based claims, each of which is subject to a different pleading standard. As for the non-fraud based claims, the general standard for a sufficient complaint requires that:

First, the complaint must describe the claim in sufficient detail to give the defendant "fair notice of what the . . . claim is and the grounds upon which it rests" . . . Second, its allegations must plausibly suggest that the plaintiff has a right to relief raising the possibility above a "speculative level"; if they do not, the plaintiff pleads itself out of court. E.E.O.C. v. Concentra Health Services, Inc., 496 F. 3d 773, 776 (7th Cir. 2007) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964)(internal citations omitted). See also, Ashcroft v. Iqbal 556 U.S. 662, 129 S.Ct. 1937, 1949-51 (2009); In re Eisaman, 387 B.R. 219, 222 (Bankr. N.D. Ind. 2008); In re Schmucker, 376 B.R. 256, 258 (Bankr. N.D. Ind. 2007).

To the extent, Plaintiffs' claims rest upon some type of fraud, there is a more rigorous pleading standard that must be satisfied. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. Rule 9(b). This requires the complaint to 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.” Bankers Trust Co. v. Old Republic Insurance Co., 959 F.2d 677, 683 (7th Cir. 1992) (quoting Sears v. Likens, 912 F.2d 889, 893 (7th Cir. 1990). See also, In re Rifkin, 142 B.R. 61, 67 (Bankr. E.D. N.Y. 1992). 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). Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987).

Plaintiff’s complaint does not allege fraud, whether under § 523(a)(2) or § 523(a)(4), with the requisite particularity. The allegations concerning the who, what, when, where, or how of any representations made to the plaintiff, or how there might be any falsity involved, are incredibly vague; there is no coherent timeline concerning the alleged misrepresentations; and no allegations as to how the plaintiffs may have relied upon any false statement. There is, as defendant contends, only “a mishmash of facts claiming misrepresentation and fraud,” Defendant’s Brief in Support of Motion to Dismiss, pg. 6. Greater specificity is necessary to support the conclusion that all this somehow constitutes fraud and not just a breach of contract.

To the extent Plaintiffs claim Defendant’s actions constitute criminal conversion, the complaint fares no better, even though the requirements for pleading this claim are less rigorous. The plaintiffs simply allege that the defendant’s actions constitute criminal conversion, without alleging any facts that would plausibly suggest that might be so. See, Kopis v. Savage, 498 N.E.2d 1266, 1270-71 (Ind. Ct. App. 1986). See also, National Association of Systems Administrators, Inc. v. Avionics Solutions, Inc., 2008 U.S. Dist. LEXIS 2568 *49 (S.D. Ind. 2008). If “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949-50 (2009), conclusory allegations alone will not.

The defendant's motion to dismiss is GRANTED. Plaintiffs shall have fourteen (14) days from this date within which time to file any amended complaint and defendant shall respond thereto within fourteen (14) days thereafter.

SO ORDERED.

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