NOT INTENDED FOR PUBLICATION 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	)	
	)	
	)	
TERRY TAYLOR	)	
KATHLEEN TAYLOR	)	
	)	
Plaintiffs	)	
	)	
vs.	)	PROC. NO. 11-1151
	)	
ERIC BLAINE FORD	)	
ROBYN DENISE FORD	)	
	)	
Defendants	)	

DECISION AND ORDER ON PLAINTIFFS' MOTION FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

At Fort Wayne, Indiana, on March 12, 2012.

When the court granted the defendants' motion to dismiss the plaintiffs' second amended complaint, it gave the plaintiffs fourteen (14) days to file a motion for leave to file a third amended complaint. They did so and the defendants have opposed the motion arguing that the amended complaint the plaintiffs want to file fails to remedy the deficiencies in the second amended complaint, so that permitting the amendment would be futile. The matter is before the court on the plaintiffs' motion for leave to file a third amended complaint and the defendants' response thereto.

Amendments to pleadings are governed by Rule 15 of the Federal Rules of Civil Procedure, which is made applicable to adversary proceedings by Bankruptcy Rule 7015. The rule provides that

a party may only amend its complaint once as a matter of course, within a specified time period, which the plaintiffs did when they filed their amended complaint.[1] After this time, however, a party may only amend its pleadings upon the written consent of the adverse party or with leave of court. Fed. R. Civ. P. Rule 15(a)(2). Although the court has discretion to determine whether leave is granted, Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S. Ct. 795 (1971); Hi-Lite Products Co. v. American Home Products Corp., 11 F.3d 1402, 1411 (7th Cir. 1993); Campbell v. Ingersoll Mill. Mach. Co., 893 F.2d 925 (7th Cir. 1990), the rule indicates that this discretion should generally be exercised liberally – "[l]eave [to amend] shall be freely given where justice so requires." Fed. R. Civ. P. Rule 15(a)(2). Nonetheless, leave to amend is not appropriate when there is "undue delay, bad faith, dilatory motive on the part of the movant, 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 amendment." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962); Feldman v. American Memorial Life Ins. Co., 196 F.3d 783, 793 (7th Cir.1999); Perrian v. O'Grady, 958 F.2d 192, 194 (7th Cir. 1992). As to the latter point – futility – "[t]he opportunity to amend a complaint is futile if the complaint, as amended, would fail to state a claim upon which relief could be granted." General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1085 (7th Cir.1997) (internal quotations omitted); Moore v. State of Indiana, 999 F.2d 1125, 1128 (7th Cir. 1993); Bower v. Jones, 978 F.2d 1004, 1008 (7th Cir. 1992); Perkins v. Silverstein, 939 F.2d 463, 472 (7th Cir. 1991).

The defendants argue that the plaintiffs have still failed to allege fraud with the required

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[1]On the same day they filed an amended complaint, they also filed a second amended complaint.

particularity and so to allow them to again amend their complaint would be futile. Although, the plaintiffs have not directly responded this argument,[2] based upon the arguments advanced in their initial brief, and given the standard the court is to apply to motions for leave to file amended complaints, the third amended complaint is not completely futile,[3] and so the motion will be granted, in part.

Plaintiffs claim the defendants' obligations to them are non-dischargeable due to fraud. The essence of their claim is that the defendants contracted to build a home for the plaintiffs and failed to do so. They claim that, at various times throughout the project, the defendants misrepresented the progress of construction, and so what would otherwise be a dischargeable debt for a breach of contract becomes a non-dischargeable debt for fraud.

Fraud must be pleaded with particularity. Fed R. Civ. P. Rule 9(b). To do so requires a plaintiff to make relatively specific allegations concerning the misrepresentations it claims constitute fraud. The complaint must identify the facts misrepresented, when and where those misrepresentations were made, by whom, and how they were communicated to the plaintiff. See, Bankers Trust Co. v. Old Republic Insurance Co., 959 F.2d 677, 683 (7th Cir. 1992). See also, In re Rifkin, 142 B.R. 61, 67 (Bankr. E.D. N.Y. 1992). In doing so, it must not only identify the fraudulent statements but also the reasons why the are false. Skycom Corp. v. Telstar Corp., 813 F.2d 810, 818 (7th Cir. 1987). Furthermore, not every misstatement will support a claim of fraud.

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[2]Plaintiffs did not file a reply to the defendants' brief opposing their motion.

[3]The third amended complaint is not a model of pleading clarity, whether for fraud or any other type of claim. Instead, it seems to be based upon the proposition that if counsel can throw enough facts together, perhaps something will stick. Such an approach does nothing to assist the court in understanding the claims counsel is attempting to advance.

The misrepresentations complained of must involve present or existing facts – not predictions of future events – In re Markley, 446 B.R. 484, 489 (Bankr. D. Kan. 2011); In re Bullock, 317 B.R. 885, 889 (Bankr. M.D. Ala. 2004), see also, Next Century Communications Corp. v. Ellis, 318 F.3d 1023, 1027 (11th Cir. 2003)(Georgia law), Lycan v. Walters, 904 F. Supp. 884, 897 (D. S.D. Ind. 1995)(Indiana law), and those facts must be material ones. In re Scarpello, 272 B.R. 691, 700 (Bankr. N.D. Ill. 2002) ("An intentional falsehood relied on under § 523(a)(2)(A) must concern a material fact"). Plaintiffs claim both debtors made fraudulent representations to them and the court must separately evaluate the sufficiency of their allegations as to each defendant.

As for the claim against Robyn Ford, there are no allegations that she made misrepresentations of existing facts to the plaintiffs[4] or that any misrepresentations she may have made involved material facts. Rather, the statements attributable to her involve future events or relatively trivial things, such as instructing the plaintiffs to meet with a sales person at Lee Supply, providing the plaintiffs' with sample books, getting cabinet and flooring samples, sending an e-mail regarding flooring, sending an e-mail regarding sink dimensions, stating that she had lighting books for the plaintiffs to review, receiving appliance quotes, ordering plumbing items, promising to send plumbing pictures, and promising to send an e-mail with information about vanities. Plaintiffs' Third Amended Complaint, ¶¶ 17, 18, 19, 20, 24, 25, 26, 27, 32, 35, 36. Furthermore, although the plaintiffs allege that the statements such as those related to Mrs. Ford's obtaining appliance quotes and changing cabinet prices were fraudulent and that the plaintiffs relied on them by continuing to

[4]The only existing fact the complaint alleges Robyn Ford to have made is that she falsely represented to Lee Flooring that the plaintiffs had put the project on hold. Yet, this representation was not made to the plaintiffs, but to a third party, and is not something upon which the plaintiffs relied in their dealings with the debtors.

make payments, there is no allegation that those statements were actually false or why they were so. As to the remainder of the statements made by Mrs. Ford, there are no sufficient allegations that they were false or that the plaintiffs did anything any reliance on them. As such, the plaintiffs' third amended complaint fails to state a claim for relief against Robyn Ford and, as to her, the motion for leave to amend will be denied.

As for the claim against Eric Ford, the majority of the allegations in the third amended complaint do not allege fraud with the requisite particularity. Most of them involve predictions of future events (representing in August of 2009 that construction would be completed in the spring of 2010) or the proposed complaint fails to allege why supposed misrepresentations are false. There are, however, a few statements that he allegedly made where fraud has been alleged with the requisite particularity. The third amended complaint alleges that Mr. Ford told the plaintiffs that doors had been ordered, would arrive, and would be installed in October 2009. Plaintiffs' Third Amended Complaint, ¶ 22. Those statements are alleged to have been false because the plaintiffs later learned that doors had never been ordered, and in reliance upon them the plaintiffs claim they continued to make payments to Mr. Ford. Plaintiffs' Third Amended Complaint, ¶ 23. Similarly, the plaintiffs also allege that Mr. Ford represented that fireplaces and stone had been ordered, the mason would begin laying the stone in a few weeks, and the fireplaces would arrive the following week. As with the representations concerning doors, these statements are alleged to be false because plaintiffs later learned that neither doors nor fireplaces had ever been ordered. Plaintiffs' Third Amended Complaint, ¶¶ 28, 29, 30. Finally, in December 2009, Mr. Ford represented to the plaintiffs that garage doors and the front door would be installed on specified dates and yet neither of them had ever been ordered. Plaintiffs' Third Amended Complaint, ¶41. In reliance upon these

false statements plaintiffs allege they continued to make payments to the defendants. Plaintiffs' Third Amended Complaint, ¶44. The allegations in these potions of the plaintiffs' third amended complaint plead fraud with the requisite particularity and, given the liberality associated with granting leave to amend, the court cannot say that allowing plaintiffs to amend their complaint as to Eric Ford would be futile.

Plaintiffs' motion for leave to file an amended complaint is, therefore, GRANTED, in part, and DENIED, in part.

1. As to Robyn Ford, the motion for leave to file an amended complaint is DENIED.

2. As to Eric Ford, the motion for leave to file an amended complaint is GRANTED, and, as to him, the plaintiffs shall file and serve an amended complaint within fourteen (14) days of this date, which the defendant shall answer within fourteen (14) days thereafter.

SO ORDERED.

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