

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IN THE MATTER OF	)	
	)	
KENNETH SHAY KLEIN and	)	CASE NO. 12-31617 HCD
CYNTHIA RUTH KLEIN,	)	CHAPTER 7
DEBTORS.	)	
	)	
WALL STREET CONSULTING, LLC,	)	
PLAINTIFF,	)	
vs.	)	PROC. NO. 12-3052
	)	
KENNETH SHAY KLEIN and	)	
CYNTHIA RUTH KLEIN,	)	
DEFENDANTS.	)	

Appearances:

Thomas M. Walz, Esq., and Thomas J. Walz, Esq., counsel for plaintiff, Hahn, Walz and Knepp, 509 West Washington Avenue, South Bend, Indiana 46614; and

Douglas R. Adelsperger, Esq., counsel for defendants, Skekloff, Adelsperger & Kleven, LLP, 927 South Harrison Street, Fort Wayne, Indiana 46802.

MEMORANDUM OF DECISION

At South Bend, Indiana, on January 16, 2013.

Before the court are the Amended Complaint in Objection to Discharge, filed by the plaintiff Wall Street Consulting, LLC (“plaintiff”); the Motion to Dismiss Amended Complaint, filed by the defendants Kenneth Shay Klein and Cynthia Ruth Klein, chapter 11 debtors<sup>1</sup> (“defendants” or “debtors”); the plaintiff’s Motion for Leave to Amend Amended Complaint; and the plaintiff’s Second Amended Complaint in Objection to Discharge. For the reasons that follow, the court grants the defendants’ Motion to Dismiss and denies the plaintiff’s Motion for Leave to Amend Amended Complaint as moot.<sup>2</sup>

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<sup>1</sup> On December 19, 2012, the bankruptcy case of Kenneth Shay Klein and Cynthia Ruth Klein was converted from chapter 11 to chapter 7. *See* R. 224, 228, 232, Case No. 12-31617.

<sup>2</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 (continued...)

A. Motion to Dismiss

When the defendants first sought dismissal of the original Complaint, the plaintiff filed a Response to the Motion to Dismiss and also moved to amend the Complaint. The defendants then filed a Motion to Dismiss the Amended Complaint. The plaintiff replied with a Motion to Amend the Amended Complaint; however, it did not respond to the second Motion to Dismiss. The court considers whether dismissal of the Amended Complaint is warranted. In weighing the sufficiency of the pleading, the court is required to “accept all well pled facts as true and draw all permissible inferences in favor of the plaintiff.” *Agnew v. National Collegiate Athletic Ass’n*, 683 F.3d 328, 334 (7th Cir. 2012) (citing case).

The defendants seek dismissal of the Amended Complaint on two grounds: the plaintiff’s failure to file a timely proof of claim and its failure to state a claim upon which relief can be granted. The court considers each argument.

(1) *Untimely Proof of Claim*

In its Motion to Dismiss, the defendants pointed out that the plaintiff failed to file a timely proof of claim pursuant to 11 U.S.C. § 1111(a), and argued that the Complaint should be dismissed as moot. The plaintiff responded that its original Complaint, filed on August 2, 2012, was an informal proof of claim that was filed timely. It further asserted that the actual proof of claim, filed ten weeks later, served as an amendment to the informal proof-of-claim Complaint and related back to the filing of the Complaint.

The plaintiff, listed on the defendants’ Schedule F as an “unliquidated” unsecured creditor, was required to file a proof of claim. *See* R. 49 (Case No. 12-31617); *see also Woodhollow Loft, Inc. v. Sisters of St. Francis Health Servs.*, 472 B.R. 494, 519 (N.D. Ind. 2010) (stating that § 1111 exempts chapter 11 creditors from the proof-of-claim requirement only if the debtor did not list their claims as disputed, contingent or unliquidated). The bar date for filing proofs of claim in this case was set at September 4, 2012. The plaintiff’s proof of claim, filed on October 15, 2012, clearly was untimely. The plaintiff did not claim

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<sup>2</sup>(...continued)  
proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

that its belated filing was due to excusable neglect. *See* Fed. R. Bankr. P. 3003(c)(3), 9006(b)(1); *see also In re National Steel Corp.*, 316 B.R. 510, 515 (Bankr. N.D. Ill. 2004). Instead, it asserted that the Complaint, timely filed, constituted an informal proof of claim.

“The informal proof-of-claim doctrine is an equitable doctrine that permits bankruptcy courts to treat a creditor’s late formal claim as an amendment to a timely informal claim.” *In re marchFIRST, Inc.*, 573 F.3d 414, 418 (7th Cir. 2009) (rejecting untimely faxed submission as an informal claim). Although some courts have construed complaints as informal proofs of claim, the courts of this circuit have opined that the doctrine “is largely a dead letter in the Seventh Circuit since [*Matter of*] *Greenig*, [152 F.3d 631 (7th Cir. 1998)]. . . [and] its remaining utility is limited to situations where a document is filed within the bar date, . . . is intended to be a proof of claim but is somehow defective or incomplete, and is then permitted to be corrected or completed after the bar date.” *In re Brooks*, 370 B.R. 194, 204 (Bankr. C.D. Ill. 2007); *cf. In re Outboard Marine Corp.*, 386 F.3d 824, 828 (7th Cir. 2004) (affirming that proof of claim was untimely; refusing to excuse late proof of claim of a sophisticated claimant, represented by counsel, who received notice of the bar date; noting that late proofs of claim may adversely impact efficient judicial administration of a case).

*Brooks* described an informal proof of claim as an attempt to assert a claim against the bankruptcy estate which fails to satisfy the claim requirements, usually because of technical errors. It pointed out that a proof of claim is filed for a particular purpose, and concluded that neither a motion for relief from stay nor an adversary complaint to determine dischargeability qualifies as an informal proof of claim. *See In re Brooks*, 370 B.R. at 205 (citing *In re Fink*, 366 B.R. 870, 876-77 (Bankr N.D. Ind. 2007)); *see also Woodhollow Loft, Inc.*, 472 B.R. at 523-24 (affirming ruling that creditor’s motion for relief from stay did not constitute an informal proof of claim).

The court finds that the plaintiff’s Complaint in Objection to Discharge, seeking a determination of nondischargeability against the defendants, does not fall within the limited scope of the informal proof

of claim doctrine. Its Amended Complaint, filed to remedy other issues, did not address or change the untimeliness of the plaintiff's proof of claim. It concludes that dismissal of the plaintiff's Amended Complaint is warranted on the ground that the proof of claim was untimely and that the Complaint cannot constitute an informal proof of claim.

(2) *Failure to State a Claim*

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)<sup>3</sup> is 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*, 556 U.S. 662, 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*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570); *see also Atkins v. City of Chicago*, 631 F.3d 823, 831-32 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1569 (2012); *Reger Dev., LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir.), *cert. denied*, 130 S. Ct. 3507 (2010). The court is required to decide whether the factual allegations plausibly suggest an entitlement to relief to a degree that "rises above the speculative level." *Munson v. Gaetz*, 673 F.3d 630, 633 (7th Cir. 2012) (quoting *Iqbal* and *Bell Atlantic*, internal quotations omitted). In addition, when a party alleges material falsity or fraud in the complaint, he "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009; *see also Reger Dev.*, 592 F.3d at 764.

The Amended Complaint requests that the debt owed by the defendants to the plaintiff be excepted from the defendants' discharge pursuant to 11 U.S.C. § 523(a)(2)(B), which provides:

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<sup>3</sup> Federal Rule of Bankruptcy Procedure 7012(b) applies Rule 12(b)-(h) of the Federal Rules of Civil Procedure 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).

A discharge . . . does not discharge an individual debtor from any debt . . . for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by . . . the use of a statement in writing –

- (I) that is materially false;
- (ii) respecting the debtor’s or an insider’s financial condition;
- (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
- (iv) that the debtor caused to be made or published with intent to deceive.

11 U.S.C. § 523(a)(2)(B). A creditor who seeks an exception to discharge under this section has the burden of proving each element by a preponderance of the evidence. *See In re Hanselman*, 454 B.R. 460, 465 (Bankr. S.D. Ind. 2011) (stating that plaintiff bears burden of proving all elements of nondischargeability); *In re Martin*, 299 B.R. 234, 239 (Bankr. C.D. Ill. 2003) (“The failure of a plaintiff to prove any one of the above elements contained in Section 523(a)(2)(B) will result in a dismissal of the dischargeability complaint.”). Exceptions to discharge are construed strictly against the complaining creditor and liberally in favor of the debtor. *See id.*

In order to prevail on a § 523(a)(2)(B) claim, the creditor must prove that: (1) the debtor made a statement in writing; (2) the statement was materially false; (3) the statement concerned the debtor’s financial condition; (4) the debtor intended to deceive the creditor; and (5) the creditor reasonably relied on that statement.

*In re Carmell*, 424 B.R. 401, 415-16 (Bankr. N.D. Ind. 2010). Moreover, when the creditor alleges a fraudulent financial statement under § 523(a)(2)(B), it is required to support its claim of material misrepresentation or fraud in the written statement with particularity, pursuant to Federal Rule of Civil Procedure 9(b). *See In re Neale*, 440 B.R. 510, 522 (Bankr. W.D. Wis. 2010) (“A complaint which fails to identify the fraudulent statements *or the reasons why they are fraudulent* does not satisfy the particularity requirements of Rule 9(b).”); *In re Carmell*, 424 B.R. at 412 (setting forth particularity requirement of Rule 9(b) under § 523(a)(2)(B)).

The Amended Complaint acknowledged each element of § 523(a)(2)(B). It asserted that the defendants made “materially false written statements and /or representations about their financial condition to Plaintiff, specifically James Schnorf, and upon which Plaintiff and James Schnorf reasonably relied.” R.

12, ¶ 14. It further alleged that the Statement of Financial Condition and related documents represented that the information was “true and accurate as of the date of the 31st day of December, 2008, as well as on the date on which it was sent and/or published to Plaintiff,” which was October 20, 2009. *Id.* Because the plaintiff reasonably relied on the materially false statements, it claimed, the plaintiff provided the defendants money and an extension of credit. *See id.* ¶ 16. The Amended Complaint also charged that the defendants intended to deceive the plaintiff into believing that their financial condition was strong and fiscally sound. *See id.* ¶ 18. However, it alleged, the defendants’ materially false statements “painted a substantially untrue picture of the financial condition of the Defendants.” *Id.* ¶ 17.

In comparison to the financial information provided within Defendants’ Bankruptcy Schedules, Defendants’ purported financial condition as evidenced by the written information contained within the Financial Information Packet submitted to Plaintiff was severely inflated, and untrue.

*Id.* ¶ 15.

The court examined the Financial Information Packet, attached to the Amended Complaint as Exhibit 6. It was an 11-page exhibit, with a facsimile transmittal cover sheet indicating that the document was sent from “The Klein Group, LLC” to Jim Schnorf. Entitled “Statement of Financial Condition” (“Statement”), it listed the assets, liabilities, and net worth of Kenneth S. and Cynthia R. Klein as of December 31, 2008. It included projected cash receipts and disbursements, a summary of business schedules, a subsidiary schedule (listing pension and profit sharing plans, automobiles, personal property, life insurance, oil and gas interests, real estate, other notes payable, and other investment real estate and non-rental), and a statement of revenues and expenses, which included the defendants’ income and operating expenses as of December 31, 2008. However, the Statement was submitted without the debtors’ signatures or affidavits of the authenticity, truth, or accuracy of the Statement, and it therefore was not established that the written Statement actually was theirs. Nevertheless, the defendants did not challenge the Statement, and the court is willing to accept that the facsimile cover sheet sufficiently indicated that the written document was presented to the plaintiff by the defendants as a representation of their financial condition as of

December 31, 2008. The court thus finds that it meets the statutory requirements of a statement in writing representing the debtors' financial condition.

However, the Amended Complaint does not point out any substantial untruths in the Statement to demonstrate that it is materially false. The only allegation of its falsity is that, when compared to the debtors' bankruptcy schedules (which were submitted to the court on May 2, 2012, three and one-half years after the date of the Statement of Financial Condition), it "was severely inflated and untrue." R. 12, ¶ 15. The plaintiff presented no evidence of a specific material misrepresentation in the lengthy financial document – no undisclosed omissions or contingent liabilities, for example, *see In re Martin*, 299 B.R. at 240, or unmentioned mortgages, *see In re Harasymiw*, 895 F.2d 1170, 1174 (7th Cir. 1990), or false valuations or overstated income. Without some indication that the defendants gave the plaintiff materially false information or otherwise misrepresented their financial condition in those documents, the court must find that the plaintiff has failed to meet its burden of demonstrating that the financial statement was materially false. *See In re Neale*, 440 B.R. at 523 ("On its face, the complaint fails to provide any information about one of the crucial elements of a claim under § 523(a)(2)(B): that the proffered financial statement was 'materially' false."); *In re Park*, 314 B.R. 378, 384 (Bankr. N.D. Ill. 2004) (dismissing § 523(a)(2)(B) count which "nowhere discloses just what aspect of the financial statements . . . was in fact 'false,' a critical omission.").

Nor has the plaintiff demonstrated that it actually and reasonably relied upon the defendants' representations as to their financial condition. It did not show that it followed its standard practices in evaluating the defendants' creditworthiness. *See In re Hanselman*, 454 B.R. at 465. Nor did it point to "a 'red flag' that would have alerted an ordinarily prudent lender to the possibility that the information [was] inaccurate." *Id.* The court concludes that the plaintiff failed to satisfy its burden of proving reasonable reliance under § 523(a)(2)(B).

Finally, the Amended Complaint alleged, without any supporting facts, that the defendants submitted the documents with intent to deceive the plaintiff and to induce it to provide the loan. It could have proven the intent through direct or inferred evidence. *See In re Sheridan*, 57 F.3d 627, 633 (7th Cir. 1995). Instead, it proffered a conclusory allegation with no evidence of conduct reflecting deceptive or fraudulent intent. *See In re Neale*, 440 B.R. at 522-23 (dismissing complaint which alleged that the debtor's financial statement was "untrue" without demonstrating "how the financial statement was fraudulent"); *In re Young*, 428 B.R. 804, 820 (Bankr. N.D. Ind. 2010) (concluding that "the specific circumstances of submission of 'statements' under § 523(a)(2)(B)" were not pled with sufficient specificity under Rule 9(b)).

The court determines that the Amended Complaint, on its face, fails to provide any evidence of the material falsity of the proffered financial Statement, the defendants' intent to deceive, or the plaintiff's reliance. *See In re Neale*, 440 B.R. at 523 (finding that the debtor did not offer enough of the "what" or the "how" in regard to the debtor's alleged fraud and no reason why the financial statement or other representations were fraudulent); *see also Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 818 (7th Cir. 1987) (finding that the complaint, which failed to identify a fraudulent statement by the defendants or to specify why a statement was fraudulent, should be dismissed). The Amended Complaint's allegations thus do not contain sufficient facts to state a claim to relief that is plausible on its face. Consequently, dismissal of the Amended Complaint is warranted for failure to state a cause of action and, as the court concluded in the previous section of the Memorandum of Decision, for failure to file a timely proof of claim.

#### B. Leave to Amend the Amended Complaint

The plaintiff first amended the original Complaint as a matter of right pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), which applies in adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7015. *See* R. 13. It now seeks to amend the Amended Complaint, in order to correct

the plaintiff's legal name and a date and to attach documents referenced in the Complaint but not included as exhibits. *See* R. 16. It has appended the Second Amended Complaint to its Motion to Amend.

However, the plaintiff did not challenge or respond to the defendants' Motion to Dismiss the Amended Complaint. The court has determined that the plaintiff cannot prevail under § 523(a)(2)(B) and that the Amended Complaint must be dismissed for failure to state a claim and for failure to file a timely proof of claim. It now concludes that the plaintiff's request for further amendment is futile. "[A] court may refuse to [grant leave to file an amended complaint] where amendment would be futile, such as where a proposed amended complaint could not survive a motion to dismiss." *Gilman v. Amos*, 445 Fed. Appx. 860, 864 (7th Cir. 2011) (dismissing time-barred claim); *see also General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1085 (7th Cir. 1997) ("The opportunity to amend a complaint is futile if 'the complaint, as amended, would fail to state a claim upon which relief could be granted.'") (quoting cases).

The court finds that, in this case, amendment is futile. The changes incorporated into the Second Amended Complaint are typographical and oversight corrections rather than changes of substance. The Second Amended Complaint, like its predecessor, does not provide evidence of three of the five elements of nondischargeability under § 523(a)(2)(B) – the material falsity of the proffered written statement, the defendants' intent to deceive, and the plaintiff's reasonable reliance. Moreover, like the two pleadings that preceded it, it does not "state with particularity the circumstances constituting fraud or mistake," as required by Federal Rule of Civil Procedure 9(b). The Second Amended Complaint contains the same deficiencies found in the two earlier versions of the plaintiff's pleading and contributes no additional allegations or legal argument to redeem the Amended Complaint. The court determines, therefore, that allowance of this amendment would be futile, and it denies the plaintiff leave to amend its Complaint for the third time. *See Sudduth v. Donnelly*, 367 Fed. Appx. 703, 706 (7th Cir. 2010) (affirming denial of motion to amend on ground that movant "never explained what he would add that could entitle him to relief, so there would have been no point in letting him amend").

In light of the plaintiff's inability to plead the § 523(a)(2)(B) claim sufficiently or to plead its case with particularity under Rule 9(b), in spite of its opportunity to amend the Complaint, the court concludes that dismissal of the case with prejudice is appropriate. *See In re Neale*, 440 B.R. at 523 (dismissing with prejudice after plaintiff repeatedly failed to craft a proper complaint); *In re Young*, 428 B.R. at 826 (referring to Seventh Circuit precedent, establishing the rule that, when "a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the . . . court dismisses the action with prejudice."). Accordingly, the adversary complaint is dismissed with prejudice.

#### CONCLUSION

For the reasons stated in this Memorandum of Decision, the court grants the Motion to Dismiss Amended Complaint filed by the defendants Kenneth Shay Klein and Cynthia Ruth Klein. The court denies the Motion for Leave to Amend Amended Complaint in Objection to Discharge filed by the plaintiff Wall Street Consulting, LLC. This adversary proceeding is dismissed with prejudice.

SO ORDERED.

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