

In the United States Bankruptcy Court
for the Northern District of Iowa

JOHN J. PEED and
DELORES A. PEED

Bankruptcy No. 92-31408XF

Debtor(s).

Chapter 7

CHARLES RICHARD GINDER
d/b/a Shamrock Trading and
Shamrock Trading Inc.

Adversary No. 92-3234XF

Plaintiff(s)

vs.

JOHN J. PEED and
DELORES A. PEED

Defendant(s)

**ORDER RE: MOTION TO DISMISS and MOTION FOR MORE DEFINITE
STATEMENT**

The matters before the court are the motion to dismiss and the motion for more definite statement filed by John J. Peed and Delores A. Peed (PEEDS) on December 4, 1992. The matters came on for hearing on January 21, 1993 in Fort Dodge, Iowa. This is a core proceeding under 28 U.S.C. § 157(b) (2) (I) and (J).

On October 30, 1992, Charles Richard Ginder d/b/a Shamrock Trading and Shamrock Trading, Inc. (GINDER) filed a complaint objecting to the Peeds' discharge and claiming certain debt as nondischargeable. The Peeds have filed a motion to dismiss the complaint under Fed. R. Bankr. P. 7012(b) which incorporates Fed. R. Civ. P. 12(b) (6) for failure to state a claim upon which relief can be granted and a motion for more definite statement. The motions recite a number of alleged deficiencies in Ginder's complaint, among them the failure to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).

Ginder states the following as the basis for relief:

Count I
* * *

3. This Plaintiff has obtained a judgment against the Debtors in the District Court, City and County of Denver, Colorado, civil Action No. 91-CV-2322. A true and correct copy of the Plaintiff's Complaint or Petition filed therein, proof of service and judgment obtained by default is attached hereto and by this reference incorporated herein. The

amount of Plaintiff's judgment has not been determined because, before a hearing on the amount of the Plaintiff's judgment could be held, the bankruptcy proceeding referred to above was filed and further proceedings in the State Court referred to above were stayed by the automatic stay in bankruptcy.

4. The debt owed the Plaintiffs (sic) is nondischargeable pursuant to 11 U.S.C. § 523(a) (2).

* * *

Count II

* * *

2. The Defendants, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under the Bankruptcy Code, have transferred, removed, destroyed, mutilated or concealed, or has (sic) permitted to be transferred, removed, destroyed, mutilated or concealed, property of the Debtors, within one year before the date of the filing of this Petition. Specifically, the Plaintiff believes that assets of Heavy Equipment Remanufacturing (sic) Corporation, Inc. (hereinafter referred to (sic) "HERC") were transferred by the Debtors in violation of 11 U.S.C. § 727(a)(2)(A) and 11 U.S.C. § 727(a)(7).

3. The Debtors have failed to disclose these transfers on the bankruptcy petition and schedules, constituting a violation of 11 U.S.C. § 727(a)(4) and 11 U.S.C. § 727(a)(7).

Attached to Ginder's complaint is a copy of a "Verified Complaint" filed in the Colorado District Court for the County of Denver, Case No. 91-CV-2322. The attached copy of the return of service indicates that the Colorado complaint was served on John Peed on April 5, 1991 in Webster City, Iowa. The Colorado action was brought by Ginder against John Peed and Heavy Equipment Remanufacturers Corp. (HERC). Delores Peed is not a party to the complaint. The complaint is in three parts, with claims for breach of contract, intentional interference with contractual obligations, and fraud. Copies of contracts between Ginder and John Peed as President of HERC are also attached to the copy of the Colorado complaint.

In testing the sufficiency of a complaint to withstand a motion for Rule 12(b) (6) dismissal, the court must accept Ginder's factual allegations as true.

A complaint must be viewed in the light most favorable to the plaintiff and should not be dismissed merely because the court doubts that a plaintiff will be able to prove all of the necessary factual allegations.... A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.

Palmer v. Tracor, Inc., 856 F.2d 1131, 1132 (8th Cir. 1988) (citations omitted). The court has a duty to examine the complaint to determine if any possible theory for relief exists. Sculler v. Rosen (In re Rosen), 132 B.R. 679, 682 (Bankr. E.D. N.Y. 1991).

Count I of Ginder's complaint does not state a claim against Delores Peed but sufficiently states a claim for relief under § 523 of the Bankruptcy Code against John Peed. The complaint alleges that debts owed as claimed in the Colorado lawsuit are nondischargeable under § 523. The parties dispute

whether the Colorado action has been reduced to judgment. However, a prior judgment is not necessary to state a claim for nondischargeable debt under § 523. The terms "debt" and "claim" are coextensive. 11 U.S.C. § 101(12); Pennsylvania Dept. of Public Welfare v. Davenport, 110 S.Ct. 2126, 2130 (1990). "Claim" is broadly defined under § 101(5) of the Bankruptcy Code to include a "right to payment, whether or not such right is reduced to judgment..."

The first claim in the Colorado lawsuit alleges breach of contract against the corporate entity HERC. Ginder's counsel acknowledged at the hearing that the first claim does not state a basis for nondischargeable debt in the Peeds' bankruptcy case. However, the second claim is for intentional interference with contractual obligations against John Peed. This portion of the complaint states a claim under § 523(a)(6) for debt arising from willful and malicious injury. See Vulcan Coals, Inc. v. Howard, 946 F.2d 1226, 1229 (6th Cir. 1991) (allegation of intentional tort of conversion sufficient to state a cause of action for nondischargeability under § 523(a)(6)).

Ginder's third claim in the Colorado complaint is an allegation of fraud. Paragraphs 37 through 45 of the complaint set forth sufficient particular facts about the circumstances, nature, and effects of the alleged false representations to state a claim for fraud. Therefore, Count I of the dischargeability complaint, incorporating by reference the Colorado complaint, also states a claim for relief under § 523(a) (2). Moreover, the allegations are sufficiently detailed to satisfy the requirement of Fed. R.Civ. P. 9(b) that fraud be pleaded with particularity.

However, by incorporating the entire Colorado complaint by reference, Ginder has made it difficult for the Peeds to answer the dischargeability complaint. Ginder should state the factual basis for nondischargeability in the body of Count I. A motion for more definite statement may be granted:

[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.

Fed. R.Civ. P. 12(e). Count I fails to identify which claims in the Colorado complaint are nondischargeable under which subsections of § 523. Ginder has left the Peeds, effectively, to make a general denial of the entire complaint.

Since Delores Peed is not a party to the Colorado complaint on which Count I is based, the Motion to Dismiss shall be granted as to Delores Peed in Count I. The Motion for More Definite Statement shall be granted as to Count I against John Peed. Ginder shall have leave to amend. Rather than simply incorporating the Colorado complaint by reference, Ginder should also state the factual basis for his nondischargeability claim in the body of his complaint.

Count II of the complaint alleges some manner of fraudulent transfer of assets belonging to HERC. A complaint alleging fraud must state the circumstances constituting fraud with particularity. Fed.R.Civ.P. 9(b); Fed.R.Bankr.P. 7009. The court in Crystal v. Foy, 562 F.Supp. 422 (S.D.N.Y. 1983), cited by Hassett v. Zimmerman (In re O.P.M. Leasing Services, Inc.), 32 B.R. 199 (Bankr. S.D.N.Y. 1983) established a three-part test for pleading fraud with particularity. The plaintiff must allege (1) specific facts, (2) sources that support the alleged specific facts, and (3) a basis from which an inference of fraud may be fairly drawn. Id. at 203. In some instances a less stringent standard may apply in pleading fraud in a bankruptcy case. Id. However, even under a more relaxed standard for pleading fraud, the complaint must "set forth the facts with sufficient particularity to apprise the defendant fairly of the charges made against him." Id.

Count II of Ginder's complaint does not satisfy the particularity requirement of Fed.R.Bankr.P. 7009. The claim merely tracks the language of § 727(a)(2)(A) of the Bankruptcy Code. The facts alleged in the Colorado action are unrelated to the claim in Count II. The only fact alleged in Count II, that the Peeds transferred assets belonging to HERC, is alleged on the basis of Ginder's belief. Even assuming this fact is true, the complaint does not state a claim under § 727(a)(2) which bars discharge for transfer of property of the debtor or the estate. Nor does it state a claim as to the fraudulent transfer of HERC's assets under § 727(a)(7).

Courts have consistently held that allegations merely tracking statutory language and allegations on information and belief not accompanied by facts on which the belief is founded are not sufficient to state a claim for fraud. See Olson v. Potter (In re Potter), 88 B.R. 843, 847 (Bankr. N.D. Ill. 1988); O.P.M. Leasing, 32 B.R. at 204; Ruyle, O'Dorisio & Kearney v. McGuff (In re McGuff), 3 B.R. 66, 70 (Bankr. S.D. Cal. 1980); Arkansas Bank v. Burrow (In re Burrow), 131 B.R. 113, 115 (Bankr. E.D. Ark. 1991). Defendants are not apprised of any facts which would put them on notice of the claims against them. Although the court has the discretion to allow the plaintiff to amend the complaint, it will not permit amendment. The deadline for objecting to discharge was October 30, 1992, the date the complaint was filed. The plaintiff did not file a motion to extend the deadline. To grant the plaintiff an opportunity to amend would be the same as permitting creditors to obtain extensions of the objection deadline, without motion, merely by filing complaints devoid of material factual allegations but which track all or parts of § 727 of the Bankruptcy Code. The Motion to Dismiss will be granted as to Count II.

ORDER

IT IS ORDERED that the Motion to Dismiss is granted as to Count II and as to defendant Delores Peed in Count I. As to John Peed, the motion to dismiss Count I is denied.

IT IS FURTHER ORDERED that the Motion for More Definite Statement is granted as to Count I. Plaintiff Ginder shall have 14 days to amend.

SO ORDERED ON THIS 17th DAY OF FEBRUARY, 1993.

William L. Edmonds
Chief Bankruptcy Judge