

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-35800

LARRY GENE CUPP
PEGGY JO CUPP

Debtors

LONE STAR EPOXIES

Plaintiff

v.

Adv. Proc. No. 05-3014

PEGGY J. CUPP

Defendant

**MEMORANDUM ON MOTION
FOR MORE DEFINITE STATEMENT**

APPEARANCES: JAMES M. MOORE, ESQ.
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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court upon the Complaint to Determine Dischargeability of Debt (Complaint) filed by the Plaintiff on February 3, 2005, asking the court to determine that a judgment entered against the Defendant/Debtor on November 1, 2004, by the Circuit Court for Blount County, Tennessee, in the amount of \$58,421.55 is nondischargeable. On February 22, 2005, the Defendant filed a Motion for More Definite Statement (Motion), requesting that the Plaintiff be required to amend the Complaint to include the jurisdictional statement required by Federal Rule of Bankruptcy Procedure 7008(a), to identify upon which subsection of § 523(a)(2) (West 2004) the Complaint is based, and to state with particularity the facts upon which it bases its claim of fraud or misrepresentation, as required by Federal Rule of Civil Procedure 9(b) and Rule 7009 of the Federal Rules of Bankruptcy Procedure.

The Plaintiff did not file a response to the Motion within twenty days, as required by E.D. Tenn. LBR 7007-1, which states that the failure to file a response “shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion.” E.D. Tenn. LBR 7007-1. As such, the court presumes the Plaintiff does not oppose the Motion and will rule accordingly, without a hearing.

I

“In the case of a truly unclear complaint, the defendant can move for a more definite statement of the claim under Rule 12(e).” *Baxter v. Rose*, 305 F.3d 486, 490 (6th Cir. 2002). By virtue of Rule 12(e), if a pleading is so vague or ambiguous that the party required to respond cannot reasonably do so, that party may file a motion for a more definite statement which advises the court of the pleading’s deficiencies

and details the information needed so that the party may adequately respond. *See* FED. R. CIV. P. 12(e) (applicable in adversary proceedings pursuant to FED. R. BANKR. P. 7012(b)).

The Plaintiff requests a determination of nondischargeability under § 523(a)(2), which allows for the nondischargeability of debts incurred through fraudulent means, predicated upon either material misrepresentations under subsection (A) or false financial documents, under subsection (B). *See* 11 U.S.C.A. § 523(a)(2). To satisfy § 523(a)(2)(A), the Plaintiff must prove that the Defendant obtained value through material misrepresentations that she knew were false or she made with gross recklessness, that the Defendant intended to deceive the Plaintiff, that the Plaintiff justifiably relied on the Defendant's false representations, and that the Plaintiff's reliance was the proximate cause of his losses. *See Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 760 (Bankr. E.D. Tenn. 2003) (citing *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280 (6th Cir. 1998)). A determination of nondischargeability under § 523(a)(2)(B) requires proof that the Plaintiff reasonably relied upon false financial documents concerning the Defendant or an insider, provided to the Plaintiff by the Defendant, who intended to deceive the Plaintiff. *Copeland*, 291 B.R. at 780 (quoting 4 COLLIER ON BANKRUPTCY ¶ 523.08[2] (Lawrence P. King ed., 15th ed. rev. 2002)). These subsections, by their definitions, are mutually exclusive. 11 U.S.C.A. § 523(a)(2); *Copeland*, 291 B.R. at 759.

The Defendant seeks a more definite statement primarily because the Complaint alleges fraud by the Defendant, but it contains no specific allegations regarding the Defendant's actual actions, nor does it have attached a copy of the November 1, 2004 Judgment obtained or any other documentation. Instead, the Complaint merely references the Judgment in the amount of \$58,421.55 entered against the Defendant

in the Circuit Court for Blount County, Tennessee, and avers that the Judgment is based upon the Defendant's false pretenses, use of a false financial statement, and presentment of false financial documents upon which the Plaintiff relied to its detriment.

Federal Rule of Civil Procedure 9(b) requires that “[i]n all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” FED. R. CIV. P. 9(b) (applicable to adversary proceedings by virtue of FED. R. BANKR. P. 7009). “[T]he threshold test is whether the complaint places the defendant on ‘sufficient notice of the misrepresentation,’ allowing the defendant[] to ‘answer, addressing in an informed way plaintiffs [sic] claim of fraud.’” *In re LTV Steel Co., Inc.*, 288 B.R. 775, 780 (Bankr. N.D. Ohio 2002) (quoting *Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993)) (citation omitted); *see also Pardo v. Gonzaba (In re APF Co.)*, 308 B.R. 183, 188 (Bankr. D. Del. 2004). In other words, in order “to satisfy Federal Rule 9(b), ‘the pleader must state the time, place and content of the false representation, the fact misrepresented, and what was obtained or given as a consequence of the fraud.’” *Hartley v. Elder-Beerman Stores Corp. (In re Elder-Beerman Stores Corp.)*, 222 B.R. 309, 312 (Bankr. S.D. Ohio 1998) (quoting *Bell v. Bell*, 132 F.3d 32, 1997 WL 764483, at *5 (6th Cir. Dec. 3, 1997)); *see also Manheim Auto. Fin. Servs., Inc. v. Park (In re Park)*, 314 B.R. 378, 383 (Bankr. N.D. Ill. 2004). Moreover, “Rule 9(b)’s particularity requirement does not mute the general principles set out in Rule 8[, calling for “simple, concise, and direct” averments]; rather, the two rules must be read in harmony.” *Michaels Bldg. Co. v. Ameritrust Co., N.A.*, 848 F.2d 674, 679 (6th Cir. 1988). Therefore,

to comply with Rule 8, these elements of fraud need only be pled “with a short and plain statement.” *Elder-Beerman Stores Corp.*, 222 B.R. at 312.

Here, with respect to allegations of fraud, the Complaint is inadequate and ambiguous. It makes only generalized statements that the Defendant’s actions fit within the statutory elements required for nondischargeability under either subsection (A) or (B) of § 523(a)(2). It does not contain “the time, place, and content” of the Defendant’s alleged actions, nor does it provide this information through the attachment of the Judgment. In fact, other than referencing the Judgment and restating the elements of § 523(a)(2)’s subsections, the Plaintiff has not offered any facts to sufficiently provide the Defendant with “fair notice of the substance of [the] plaintiff’s claim in order that the defendant may prepare a responsive pleading[.]” as required by Rule 7009. *Michaels Bldg. Co.*, 848 F.2d at 679 (finding that the complaint met the particularity requirements of Rule 9(b) by specifying the parties to the alleged fraud, the alleged content of the fraudulent representations, how the representations were misleading or false, the time and place the representations were made, the defendants’ fraudulent intent, the plaintiff’s reliance on the representations, the injury incurred as a result of the fraud, and by attaching the fraudulent loan documents to the complaint). Accordingly, the Defendant’s Motion shall be granted, and the Plaintiff shall file a more definite statement in compliance with the requirements of Federal Rule of Civil Procedure 9(b).

The Plaintiff’s failure to include the jurisdictional statement required by Rule 7008(a) of the Federal Rules of Bankruptcy Procedure is not fatal, even though it renders the Complaint procedurally defective. *See Kirk v. Hendon (In re Heinsohn)*, 231 B.R. 48, 52-53 (Bankr. E.D. Tenn. 1999) (collecting cases). The Plaintiff’s failure to designate under which subsection of § 523(a)(2) it is proceeding is likewise not

fatal, since it may argue both subsections if the facts so dictate, despite their being mutually exclusive. Nevertheless, since the Plaintiff is required to amend the Complaint as set forth above, it shall also be required to cure these procedural defects.

An order consistent with this Memorandum will be entered.

FILED: March 18, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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ORDER

For the reasons set forth in the Memorandum on Motion for More Definite Statement filed this date, the court directs the following:

1. The Motion for More Definite Statement filed by the Defendant on February 22, 2005, is GRANTED.
2. The Plaintiff shall, within ten (10) days, file an amended complaint to include the jurisdictional statements required by Rule 7008(a) of the Federal Rules of Bankruptcy Procedure and to include a more definite statement consistent with the requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

SO ORDERED.

ENTER: March 18, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE