

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

In re

FRANK C. PEASE,
Debtor.

U.S. Bankr. Ct.
District of Connecticut
Case No. 93-53692
Chapter 7

JEFFERSON FINANCIAL SERVICES,
INC.,

Plaintiff/Counterdefendant,

v.

FRANK C. PEASE,
Defendant/Counterplaintiff.

Adv. Pro. No. 94-2126

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

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This adversary proceeding involves several claims by Jefferson Financial Services, Inc. ("JFS") requesting a determination pursuant to 11 U.S.C. § 523(a)(2)(A), (a)(2)(B), and (a)(6) of the dischargeability of various loans made to the debtor and a denial of the debtor's discharge pursuant to 11 U.S.C. § 727(a)(2), (3), (4) and (5). The debtor has also asserted various claims against JFS in an amended counterclaim, all of which purportedly arose out of the same transactions which are the subject of JFS's complaint. Presently pending before the court is the motion of JFS to dismiss the debtor's amended counterclaim for failure to state a claim upon which relief can be granted.

Upon considering an earlier Fed. R. Civ. P. 12(b)(6) motion to dismiss by JFS, the court entered an order on July 21, 1995: (1) striking the counterclaim designation of the first and second counts contained in the debtor's original counterclaim and treating them as defenses to JFS's complaint¹; (2) allowing the

¹The debtor's first count alleged that he entered into an agreement with JFS whereby certain sales contracts of the debtor would be purchased at a discount by JFS and assigned thereto with recourse. The debtor averred that one such contract with Robbin Glover was purchased by JFS, and that subsequently, she defaulted in the payment of the contract. JFS filed a collection action against Ms. Glover, and upon trial, the court ruled in her favor because JFS was unable to prove the authenticity of Ms. Glover's signature on the contract. The debtor alleged that he was not advised of the trial or otherwise subpoenaed to appear, and that if he had been, he could have testified that Ms. Glover signed the contract. As relief, and because JFS allegedly made false accusations concerning the debtor and this transaction, the debtor requested that JFS not be awarded any compensation. *Count 1* of JFS's complaint alleged that the funds which the debtor obtained from the sale of the Glover contract were obtained upon false pretenses because the signature on the contract was not that of Ms. Glover, and as a result, it is entitled to a nondischargeable
(continued...)

debtor to set forth in an amended countercomplaint the specific statutes or regulations upon which he is relying for his third count which alleged violation of "Lender Liability Laws" by JFS in refusing his attempts to compensate it for delinquent payments on various loans, and to state with greater specificity the occasions upon which payments were allegedly tendered to, but refused by JFS; (3) allowing the debtor to set forth in amended countercomplaint the specific statutes or regulations upon which he is relying for his fourth count which alleged that JFS violated "Federal Truth & Lending Laws" by never offering a notice of consumer's right to cancel; and (4) directing that the debtor's fifth count which alleged that JFS "submitted to this honorable Court a plethora of Exhibits which are deemed to be forgeries of various types" be treated as a defense to JFS's complaint, and, to the extent that the debtor intended to state a claim for damages against JFS as a result of the alleged forgeries, allowing the debtor to file an amended countercomplaint setting forth the nature of any damages

¹(...continued)
judgment in the amount of \$1,556.70. Since the debtor was merely restating his defenses to *Count 1* of JFS as a claim, the court struck the counterclaim designation and ordered that the debtor's first count be treated as a defense to JFS's complaint.

The debtor's second count alleged that prior to making the allegations in *Count 1* of its complaint, JFS attempted to collect the same debt from the debtor by filing a criminal complaint against the debtor alleging theft of property under \$1000.00. The debtor further alleged that JFS, in connection with its counsel, "conspired to commit fraud by illegally, unjustly and maliciously accusing the debtor of such criminal activity." For relief, the debtor requested that JFS "should not be entitled to further compensation" Again, this "claim" by the debtor was nothing more than a defense to the claims of JFS. Accordingly, the court struck the counterclaim designation and directed that it be treated as a defense to JFS's complaint.

incurred by the debtor.

On August 17, 1995, the debtor filed an amended countercomplaint setting forth five counts, three of which are amended counts three, four and five of the debtor's original countercomplaint. The two new counts included in the amended countercomplaint involve a claim for costs and expenses under 11 U.S.C. 523(d), and a claim alleging violation of 18 U.S.C. § 152 by JFS as the result of filing a false proof of claim in the debtor's ex-wife's chapter 13 bankruptcy proceeding. Pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012(b), JFS has moved to dismiss the debtor's amended countercomplaint for failure to state a claim upon which relief can be granted. This is a core proceeding. 28 U.S.C. 157(b)(2)(I), (J) and (O).

I.

In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff, accept as true the factual allegations in the complaint, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *See, e.g., Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993), *reh'g denied* (1993). A complaint need only give fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Id.* Although this standard is extremely liberal, the plaintiff may not simply assert legal conclusions. Rather, the complaint must

contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory. *Id.* Of course, the burden of demonstrating that a complaint does not state a claim is on the moving party. 2A MOORE'S FEDERAL PRACTICE, p. 12.07 [2-5].

II.

The court will first consider the new causes of actions which the debtor has asserted in his amended countercomplaint. JFS's motion² does not specifically address the debtor's first count which alleges that he is entitled to recover his costs and fees pursuant to 11 U.S.C. § 523(d) in the event the court finds that the request for a determination of dischargeability of consumer debt by JFS under § 523(a)(2) is not substantially justified. The court is not aware which portion of the indebtedness owed by the debtor to JFS, if any, constitutes "consumer" debt. The failure of JFS to address this issue, however, requires the court to accept the debtor's characterization of the indebtedness as consumer debt for the purpose of considering this motion. Accordingly, the court will deny JFS's motion to dismiss count one of the debtor's amended countercomplaint.

The second count of the amended countercomplaint alleges that JFS has "filed a '**PROOF OF CLAIM**' with exhibits in the Co-debtor's

²JFS failed to file a "brief setting forth the facts and law supporting the motion" as required by Local Bankr. R. 9(c). Nevertheless, the court will consider the motion on its merits on this occasion.

[ex-wife's] Chapter 13 bankruptcy which contradicts and conflicts with the representations and claims of this action in that, said Creditor has maintained in said proof of claim that, 'all secured property has been RECOVERED and SOLD and the proceeds applied to reduce debtor's balance.' The Power Planer is purported to be a part of the secured property." Because 18 U.S.C. § 152(4) makes it a crime to knowingly and fraudulently present a false proof of claim, the debtor concludes JFS has "filed a fraudulent claim in this action as a result of maintaining the truth and accuracy of the claim filed in the Co-debtor's bankruptcy action." The debtor requests that either he or his codebtor ex-wife have a judgment "in accordance with 18 U.S.C. § 152."

Although the allegations in the second count are somewhat confusing, the gist of this count is that JFS has either allegedly filed a false proof of claim in the debtor's ex-wife's case or has pursued a false claim against the debtor in this action. Some background is necessary to evaluate this assertion. In its complaint, JFS claims that the debtor sold a power planer in which JFS had a security interest with the intent to defraud JFS, that with respect to two of the loans, the debtor provided JFS with a security interest in the power planer after it had already been sold, and that the debtor concealed the transfer of the power planer by falsely testifying that it had not been sold. Because JFS did not, and probably cannot, recover the power planer from the good faith purchaser, Conasauga River Lumber Co., the debtor alleges that the proof of claim filed in the codebtor's case which

actually states that "[a]ll secured collateral has been recovered and sold with proceeds applied to reduce the Debtor's balance" is false. The debtor alternatively argues that if that proof of claim is not false, JFS is pursuing a false claim against him in this adversary proceeding by seeking a nondischargeability determination and denial of discharge based on the debtor's actions with respect to the power planer.

The court, in its memorandum opinion and order entered March 22, 1995, previously determined that the debtor was collaterally estopped by his guilty plea and conviction³ in state court from denying the allegations in *Counts 2* and *4* concerning the willful and malicious injury to JFS in selling the power planer, and granted JFS summary judgment on *Counts 2* and *4* asserting the nondischargeability of the loans for which the power planer was pledged as security. The debtor is in essence contending that JFS should not be able to take the position in this action that the power planer was security for certain indebtedness because JFS has filed a proof of claim in the debtor's ex-wife's case stating that all secured property has been recovered and sold.

Despite the debtor's obfuscatory tactics in asserting such a claim, the debtor does not have a viable cause of action against

³The debtor was charged with committing and pled guilty to the offense of "Hindering Secured Creditors," TENN. CODE ANN. § 39-14-116, in that he, on September 18, 1992, "did unlawfully, with intent to hinder enforcement of a security interest, security agreement or lien on a 24-inch Enterprise Power Planer (serial no. 70233) held by Jefferson Financial Services, remove, conceal and transfer the property of which the defendant claimed ownership" See memo. op. of March 22, 1995, at p.3.

JFS based upon these alleged grounds. Even if the court were to assume that either the proof of claim was fraudulent or that JFS is asserting a false claim herein as claimed by the debtor, there is no express or implied private right of action accruing to the debtor based upon 18 U.S.C. § 152, a criminal statute. See *Terio v. Terio (In re Terio)*, 158 B.R. 907, 911-12 (S.D.N.Y. 1993), *aff'd*, 23 F.3d 397 (2nd Cir. 1994). Moreover, the debtor has no standing to assert such an action on behalf of his ex-wife who is not even a party to this action. Accordingly, the second count of the debtor's countercomplaint will be dismissed as it fails to state a claim upon which relief can be granted.

III.

Next, the court will consider the third, fourth, and fifth counts contained in the amended countercomplaint, which were originally asserted in the debtor's initial countercomplaint. The third count states that the debtor "made an attempt to pay all arrearage to loans that were in **DEFAULT on June 30, 1993** and again on **July 16, 1993**, but the creditor refused to accept said payment when the Debtor refused to allow his wife, the co-debtor to sign a document that was prepared by Attorney Douglas R. Beier that would have incriminated her in addition to the Debtor of criminal activity." Attached to the amended countercomplaint as exhibit 15 is a copy of the document to which the debtor refers. That document appears to be a proposed order granting the defendants, Frank and Audrey Pease, a continuance of a trial of a collection

action in the Hamblen County General Sessions Court in exchange for, *inter alia*, the defendants' promise to pay monies owing on at least six accounts then in default. The order was never signed by the parties or entered by the court, apparently because the parties could not reach a mutual agreement. The third count further makes the conclusory assertion that because of JFS's refusal to accept payment from the debtor, JFS is guilty of "**BREACH OF CONTRACT and GOOD FAITH**" and tortious misrepresentation and promissory fraud which was enhanced by their [JFS's] '**BAD FAITH in ACCELERATION OF FORECLOSURE.**'"

Concerning the "breach of contract and good faith" claim by the debtor, nowhere in the debtor's third count does he allege what contract or contracts were breached, how the contract or contracts were breached considering the fact that the debtor was already involved in defending an action brought by JFS, or the nature of any damages arising from the breach. Although the debtor does imply that the security for the loans was "foreclosed upon," the debtor does not allege that JFS took some action that it was not entitled to do under its security agreements or that any sale of the collateral was not commercially reasonable. Additionally, the debtor does not aver any facts in support of the allegation that JFS breached its statutory duty of good faith under the Uniform Commercial Code as adopted by the state of Tennessee. See TENN. CODE ANN. § 47-1-203. The mere fact that after default by the debtor, JFS was unwilling to compromise the state court lawsuit is insufficient to support a claim for "bad faith." See, e.g., *Lane*

v. *John Deere Co.*, 767 S.W.2d 138 (Tenn. 1989).

Likewise, the claim of tortious misrepresentation is not supported by any allegations which establish the necessary elements of such a claim. To establish tortious misrepresentation in a commercial transaction, a plaintiff must show that he has justifiably relied upon false information which has been negligently or intentionally provided for his guidance in a business transaction. See *Jasper Aviation, Inc. v. McCollum Aviation, Inc.*, 497 S.W.2d 240, 242-43 (Tenn. 1972). Nor has the debtor alleged any facts supporting the necessary elements of promissory fraud which consists of an intentional misrepresentation with regard to a material fact which embodies a promise of future action without the present intention to carry out the promise, made with knowledge of the falsity, and which is relied upon to his detriment by the injured party. See, e.g., *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. App. 1990), *appeal denied*, (1991). Finally, the claim of "bad faith in acceleration of foreclosure" is insufficiently pled since the debtor fails to allege, *inter alia*, that either JFS did not have cause to accelerate the loans upon default or that a course of conduct in accepting irregular or late payments existed. See, e.g., *Overholt v. Merchants & Planters Bank*, 637 S.W.2d 463 (Tenn. App. 1982); *Lively v. Drake*, 629 S.W.2d 900 (Tenn. 1982). Accordingly, the debtor having been given ample opportunity to state with specificity the matters upon which this third count is based and having failed to do so, the third count of the amended countercomplaint will be dismissed.

The fourth count of the amended countercomplaint alleges that "all debts claimed to be owed by said Creditor are null and void in that,[sic] such Creditor has violated said Federal Truth & Lending Laws,[sic] pertaining to the Consumer's Rights [sic] to Cancel." The debtor cites 12 C.F.R. §§ 226.15 and 226.23 as the statutory basis for his claim. However, as JFS points out, these regulations are only applicable when "a security interest is or will be retained or acquired in a consumer's principal dwelling." See 12 C.F.R. §§ 226.15 and 226.23. The debtor does not allege that any of the numerous transactions between him and JFS which are at issue involved a security interest in the debtor's principal dwelling, and none of the exhibits to the complaint and amended countercomplaint evidence that real property was provided as security for the loans. Indeed, all of the collateral which was provided as security by the debtor appears to be personalty. Accordingly, the court will dismiss the debtor's fourth count for failure to state a claim.

Finally, the debtor alleges in his fifth count of the amended countercomplaint that exhibits B, D, F, H, and I to JFS's complaint are forgeries. Specifically, the debtor avers that exhibits B, D, F, and H were signed in blank by the debtor, the codebtor or both, and information was fraudulently filled in thereafter by JFS. The debtor claims that exhibit I is a photocopy forgery deliberately altered by JFS "to accuse the Debtor of some type of fraudulent activity and to secure certain other loan agreements that were not secured by such property." As previously ordered by the court, these allegations will be considered in defense to the claims of

JFS. The court allowed the debtor to amend the count to set forth any claim for damages which the debtor may have as a result of the alleged forgeries. The debtor has failed to do so other than in a conclusory fashion.

For example, exhibits B, D, F, and H all appear to be applications for credit, with the portions being filled in pertaining to the credit history of the debtor as obtained by JFS. These exhibits form the basis for JFS's various assertions that the debtor's liability for certain loans should be nondischargeable pursuant to § 523(a)(2)(B) because the debtor knowingly provided materially false financial statements to JFS for the purpose of deceiving it and inducing it to make the loans in question to the debtor. As stated above, the debtor's assertion that the statements were forgeries would be considered in defense to JFS's nondischargeability claims, and in the event the debtor were to prevail upon such a defense, costs may be awarded pursuant to Fed. R. Bankr. P. 7054(b). But the debtor's mere assertion that he has suffered injury due to having to defend against such claims does not constitute grounds for affirmative relief as a result of the alleged forgeries. The debtor does not allege that the loans were not made because of incorrect information and in fact does not even assert that the information filled in was incorrect.

Similarly, exhibit I is a schedule of collateral for what appears to be a renewal loan provided to the debtor. Again, despite the debtor's assertion that the alleged forgery permitted certain loans to be secured by collateral that it would otherwise

not be secured by, there is no allegation that JFS foreclosed upon collateral that it was not otherwise entitled pursuant to other loan agreements, or that JFS misapplied the proceeds from any foreclosure sale. In summary, the debtor has failed to state a cause of action based upon these alleged forgeries because he does not allege the nature of any damages incurred as a result thereof. At the most, the debtor has only demonstrated that the alleged forgeries may be considered as a defense to the claims of JFS. Accordingly, the court will dismiss the debtor's fifth count contained in the amended countercomplaint.

IV.

In summary, the court will enter an order contemporaneously herewith dismissing all but the first count contained in the debtor's amended countercomplaint.

ENTER: September 29, 1995

BY THE COURT


MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE