SO ORDERED.
SIGNED this 11th day of March, 2021

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

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

In re

JAMES A. BEGLEY
aka TONY BEGLEY

Debtor

Case No. 3:20-bk-30342-SHB
Chapter 7

RICH STEEL

Plaintiff/Counter-Defendant

v.

JAMES A. BEGLEY

Defendant/Counter-Plaintiff

Adv. Proc. No. 3:20-ap-3017-SHB

MEMORANDUM AND ORDER

On May 8, 2020, Plaintiff filed the Complaint to Determine Nondischargeability of Debt ("Complaint") commencing this adversary proceeding, which asks the Court to enter a judgment against Defendant and determine that, pursuant to 11 U.S.C. § 523(a)(2)(A), the judgment is nondischargeable. [Doc. 1.] Defendant, *pro se*, filed an Answer on July 31, 2020 [Doc. 13], asserting a counterclaim against Plaintiff for lost profits. Plaintiff/Counter-Defendant filed a

Motion for Dismissal of counterclaim on August 21, 2020, as amended on August 21, 2020 (collectively, "Motion to Dismiss"), together with a brief as required by E.D. Tenn. LBR 7007-1, averring that the counterclaim should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). [Docs. 16-18.] On October 22, 2020,[1] Defendant/Counter-Plaintiff filed a document entitled "Response to the Amended Motion of Rich Steel for Dismissal of Counterclaim" ("Response") that does not address the Motion to Dismiss; instead, it stated, "I, James A. Begley, object and ask the court for a hearing on my behalf to be allowed to defend my counterclaim. I pray that the court will grant me this hearing to be able to defend my counterclaim in person." [Doc. 22.]

Because Defendant/Counter-Plaintiff's Response did not comply with the requirements of E.D. Tenn. LBR 7007-1(a), which directs, in material part, that "any objection to the relief sought in the motion . . . must be supported by a brief setting forth the facts and the law in opposition to the motion," the Court entered an Order on October 28, 2020, directing Defendant/Counter-Plaintiff to file a brief "setting forth the facts and law in opposition" to the Motion to Dismiss and continuing the scheduling conference [Doc. 23]. On November 20, 2020, Defendant/Counter-Plaintiff filed a brief as directed [Doc. 25].

On December 10, 2020, the Court held a scheduling conference at which Defendant/Counter-Plaintiff informed the Court about health problems he was experiencing and asked for time to hire counsel, as a result of which the Court entered an Order on December 23, 2020, continuing the scheduling conference and providing that, if Defendant/Counter-Plaintiff retained counsel (with a January 11, 2021 deadline for such counsel to file a notice of appearance), such counsel would be permitted to file a motion to amend the Response to the

[1] Defendant/Counter-Plaintiff sought and obtained additional time to respond to the Motion to Dismiss. [Docs. 19, 20.]

Motion to Dismiss [Doc. 29] by January 18, 2021. On January 6, 2021, Defendant/Counter-Plaintiff filed a Motion for Additional Time [Doc. 31], stating that Defendant/Counter-Plaintiff "ha[d] not been able to secure counsel" and asking for additional time to retain counsel. The Court granted the Motion for Additional Time by Order entered on January 8, 2021, resetting the scheduling conference, extending the deadline to February 1 for any retained counsel to file a notice of appearance, and extending the deadline to February 15 for retained counsel to move to amend the Response. [Doc. 32 at ¶¶ 2-4.] The January 8 Order also provided that if Defendant/Counter-Plaintiff, acting *pro se*, desired to further amend the Response, his deadline to do so was February 8, 2021. [*Id.* at ¶ 4.] Finally, the January 8 Order also stated that "[i]n the event Defendant/Cross-Plaintiff does not retain counsel and continues to represent himself *pro se*, a failure to comply with the Local Rules of this Court may result in *sua sponte* denial of future relief sought by Defendant/Counter-Plaintiff without further notice or hearing." [*Id.* at ¶ 6.]

Defendant/Counter-Plaintiff did not retain counsel; instead, he filed a "Motion to Amend Defendant/Counter-Plaintiff's Response [Docs. 22, 25] to Plaintiff/Counter-Defendant's Amended Motion for Dismissal of Counterclaim [Doc. 17]" ("Motion to Amend") on February 5, 2021, stating "I, James A. Begley, Defendant/Counter-Plaintiff, object to E.D. Tenn. LBR 7007-1 and ask the court for a hearing on my behalf to be allowed to defend my counterclaim against Rich Steel, Plaintiff/Counter-Defendant. I pray this court grants my proposed order for setting a hearing date." [Doc. 34.] This document, however, was submitted via facsimile notwithstanding that it was not an emergency filing (as authorized by General Order No. 2020-07 "Interim Bankruptcy Procedures for Parties Not Represented by an Attorney") and was not accompanied by a brief as required by LBR 7007-1(a). Additionally, Defendant/Counter-Plaintiff did not sign the Motion to Amend as required by Rule 9011(a) of the Federal Rules of

Bankruptcy Procedure and E.D. Tenn. LBR 9011-4; did not, "[w]ithin 7 days after . . . faxing a document . . . , deposit the original document with a hand-written signature into the United States Mail, postage prepaid, addressed to the clerk of court at the appropriate divisional office[,]" as required by General Order 2020-07; and did not include a certificate of service for the Motion to Amend as required by E.D. Tenn. LBR 9013-1. Because Defendant/Counter-Plaintiff did not comply with the foregoing rules, the Motion to Amend will be denied, and the Court will decide the Motion to Dismiss based on the documents of record in this adversary proceeding.[2]

I. Rule 12(b)(6) Standard

Federal Rule of Civil Procedure 12(b)(6)[3] requires dismissal for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint need not contain "detailed factual allegations[; however,] a plaintiff's obligation to provide the grounds of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level[.]" *Twombly*, 550 U.S. at 545.

> [Although] a complaint will survive a motion to dismiss if it contains "either direct or inferential allegations respecting all material elements" necessary for recovery under a viable legal theory, [the] court "need not accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice."

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[2] Defendant/Counter-Plaintiff has requested a hearing on his counterclaim, which he is authorized to do under E.D. Tenn. LBR 7007-1(a); however, the Court is not required to grant such a request when doing so would not change the outcome based on the law involved.

[3] Rule 12 is applicable in adversary proceedings under Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

Philadelphia Indem. Ins. Co. v. Youth Alive, Inc., 732 F.3d 645, 649 (6th Cir. 2013) (quoting *Terry v. Tyson Farms, Inc*., 604 F.3d 272, 275-76 (6th Cir. 2010)).

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556-57).

When deciding whether to dismiss under Rule 12(b)(6), the court "construe[s] the complaint in the light most favorable to the plaintiff, accept[s] its allegations as true, and draw[s] all reasonable inferences in favor of the plaintiff." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). The Court also "'consider[s] the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.'" *Solo v. United Parcel Serv. Co*., 819 F.3d 788, 794 (6th Cir. 2016) (alteration in original) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd*., 551 U.S. 308, 322 (2007)).

II. Analysis

In support of his counterclaim, Defendant/Counter-Plaintiff averred in narrative form that he and Plaintiff/Counter-Defendant originally did business in 1993; that in January 2018, they entered into an agreement that they would buy, retore, and sell vehicles, but because of legal problems associated with Plaintiff/Counter-Defendant's girlfriend at a car show in April 2019, they lost a $10,000.00 profit and potential profits on inventory they could have purchased; that Defendant/Counter-Plaintiff was hospitalized in August and November and unable to make any trade deals; and that he was entitled to a judgment against Plaintiff/Counter-Defendant in the amount of $96,000.00 (representing 120 hours per month from January through August at

$100.00/hour), attorneys' fees, and costs. [Doc. 13.] Specifically, with respect to his "cause of action," Defendant/Counter-Plaintiff alleged the following:

> Rich was told [in 1993] my hourly rate was $100 an hour. Another industry standard that has went up tremendously since 1993 . . . .
>
> . . . .
>
> I had told Rich Steel many times that I had a lot of money and time into this business arrangement and my time is money. I figured out an average of 120 hours per month (at $100 per hour) that I put in from January-August on this project. This is a conservative estimate. 8 months x 120 hrs = 960 hrs x $100 per hr = $96,000.

[Doc. 13 at p. 5.] Defendant/Counter-Plaintiff, however, provided no legal authority in his Answer on which he based his counterclaim.

In the brief in support of his Motion to Dismiss, Plaintiff/Counter-Defendant argued that the counterclaim fails to state a claim because Defendant/Counter-Plaintiff admitted in his Answer the existence of written agreements memorializing the investment project between the parties for the purchase, restoration, and sale of vehicles, but because none of the agreements reflect that Plaintiff-Counter-Defendant agreed to payment of or that Defendant/Counter-Plaintiff was entitled to $100.00 per hour for his time spent restoring vehicles under the arrangement, the essential elements of a contract under Tennessee law were not satisfied. [Doc. 18 at pp. 3-4.]

An enforceable contract can be written or oral; however, a party seeking to enforce an oral contract "must prove mutual assent to the terms of the agreement . . . and must also demonstrate that the terms of the contract are sufficiently definite to be enforceable." *Castelli v. Lien*, 910 S.W.2d 420, 426-27 (Tenn. Ct. App. 1995) (citations omitted).

> It is well established in this jurisdiction that a contract can be expressed, implied, written, or oral, but an enforceable contract must, among other elements, result from a meeting of the minds and must be sufficiently definite to be enforced. *Johnson v. Cent. Nat'l Ins. Co. of Omaha, Neb.,* 356 S.W.2d 277, 281 (Tenn. 1962); *Price v. Mercury Supply Co., Inc.,* 682 S.W.2d 924 (Tenn. Ct. App. 1984). The contemplated mutual assent and meeting of the minds cannot be accomplished by the unilateral action of one party, nor can it be accomplished by an ambiguous course of dealing between the two parties from which differing

> inferences regarding continuation or modification of the original contract might reasonably be drawn. *Batson v. Pleasant View Util. Dist.,* 592 S.W.2d 578, 582 (Tenn. Ct. App. 1979); *Balderacchi v. Ruth,* 256 S.W.2d 390 (Tenn. Ct. App. 1953). In addition, a mere expression of intent or a general willingness to do something does not amount to an "offer." *Talley v. Curtis*, 129 S.W.2d 1099 (Tenn. Ct. App. 1939).

Jamestowne on Signal, Inc. v. First Fed. Sav. & Loan Ass'n, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990).

Indisputably, none of the writings between the parties attached to the Complaint, on which the investment arrangement was based, include any provision that Defendant/Counter-Plaintiff was to be paid an hourly rate of $100.00. In fact, the record is devoid of any evidence that payment of an hourly rate was discussed between the parties or that payment of an hourly rate was within the parties' course of dealing. Because all contracts – whether oral or implied – must be sufficiently definite and cannot be accomplished through the unilateral actions of only one party, Defendant/Counter-Plaintiff's averment that "my time is money" was insufficient to form any sort of implied contract with Plaintiff/Counter-Defendant. As such, even taking the counterclaim in a light most favorable to Defendant/Counter-Plaintiff, he has failed to provide any proof of or to assert a claim on which relief can be granted.

III. ORDER

For the foregoing reasons, the Court directs the following:

1. The "Motion to Amend Defendant/Counter-Plaintiff's Response [Docs. 22, 25] to Plaintiff/Counter-Defendant's Amended Motion for Dismissal of Counterclaim [Doc. 17]" filed on February 5, 2021 [Doc. 34], is DENIED.

2. Taking the allegations of the counterclaim as true and considering it in the light most favorable to Defendant/Counter-Plaintiff, as required by Rule 12(b)(6), the Amended Motion of Rich Steel for Dismissal of Counterclaim filed by Plaintiff/Counter-Defendant on August 21, 2020 [Doc. 17], is GRANTED.

3. The counterclaim filed by Defendant/Counter-Plaintiff on July 31, 2020 [Doc. 13], is DISMISSED.

4. As directed in the Order entered January 8, 2021 [Doc. 32], the scheduling conference for this adversary proceeding will be held on March 25, 2021, at 1:30 p.m. in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee (or telephonically if required by notice posted on the Court's website at http://www.tneb.uscourts.gov/covid-19-notices).

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