1999 BNH 007 Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

In re:	Bk. No. 98-13487-MWV
William L. Brennan, Debtor	Chapter 7
Sally Brennan, Plaintiff	
v.	Adv. No. 98-1161-MWV
William L. Brennan, Defendant	

MEMORANDUM OPINION AND ORDER

On March 23, 1999, the Court had before it William L. Brennan's ("Defendant's") Motion to Dismiss Complaint ("motion") requesting that all five Counts of the complaint filed by Sally Brennan ("Plaintiff") be dismissed. The Court granted the motion with respect to Count IV and denied it with respect to Counts II, III and V. In addition to the Defendant's allegation that the Plaintiff's action is barred by the statute of limitations, Count I was taken under advisement, which is the subject of the Court's memorandum opinion and order today. For the reasons that follow, the Court: (1) denies the Defendant's motion to dismiss but orders the Plaintiff to re-plead Count I on or before April 20, 1999; and (2) withholds its finding on the Defendant's motion to dismiss Count I on the grounds of the state statute of limitations.

FACTS

The Plaintiff and Defendant were divorced on August 21, 1986 in Ohio. Under their Separation Agreement, adopted by the Common Pleas Court of Erie County, Ohio, the parties agreed to divide their

pension plans as follows:

> Wife's Interest in Husband's Pension:
> 25 (Years of Husband's employment during marriage) ÷ Y (number of years of Husband's employment at his retirement) X ½ = Wife's % interest in Husband's monthly pension benefit
>
> Husband's Interest in Wife's Pension:
> 17 (Years of Wife's employment during marriage) ÷ Y (number of years of Wife's employment at her retirment) X ½ = Husband's % interest in wife's monthly pension benefit

(Separation Agreement at 3, ¶ 5; Compl. at 2, ¶ 6.) On March 14, 1994, the Common Pleas Court of Erie County, Ohio, found the Defendant herein, who worked for the Ford Motor Company for twenty-nine years, "in contempt for failure to pay pension benefits due and owing to [Sally Brennan] from the date of [his] retirement on May 1, 1988 to the present." (Compl. Exh. A, Judgment Entry at 1.) The judgment ordered the Defendant to pay the full pension arrearages within ninety days, and also instructed

> Ford Motor Company or its Pension Administrator to set aside and pay to [Sally Brennan] from [William Brennan's] pension the respective percentage calculated by the methods set forth in said Decree of all pension benefits received by Plaintiff forthwith, and to further pay to [Sally Brennan] in a lump sum any and all amounts held in escrow . . . .

(Judgment entry at 1-2.)[1] The Defendant herein appealed the contempt order, claiming the Separation Agreement was ambiguous. On September 23, 1994, the Court of Appeals of Erie County issued its opinion, noting that the Defendant herein "admitted that he had violated the court's order by not informing Ford Motor Company that appellee had an interest in his pension and for failing to pay appellee any portion of the ordered benefits." (Compl. Exh. B, Decision and Judgment Entry at 2.) The Court of Appeals held that the Separation Agreement was unambiguous and affirmed the lower court's decision. (Compl. Exh. B, Decision and Judgment Entry at 6-7.)

Turning now to the complaint, Count I alleges the Defendant obtained the full amount of his pension plan, $32,662.97, from his pension plan administrator. Paragraph 8 of the complaint states that the "Defendant failed to notify his pension plan administrator of the division of the pension plan and to execute any and all papers required, as the plan participant, as required by the Court to comply with the orders of

[1] To date, neither the Defendant nor Ford Motor Company have paid the Plaintiff.

the Judgment Entry of Divorce." (Compl. at 2, ¶ 8.) It also alleges that the Defendant "fraudulently represented to the [plan administrator] that he was entitled to receive his full pension[,]" (Compl. at 2, ¶ 9), and that he "fraudulently obtained the portion of the pension plan representing Plaintiff's share from his retirement from May 1, 1988 until 1994." (Compl. at 2, ¶ 10.) Based on these three allegations,[2] the Plaintiff alleges that the Defendant's debt "represents a non-dischargeable debt for money or property obtained under false pretenses, a false representation, or actual fraud, and by the use of statements in writing that are materially false or published with intent to deceive in violation of § 523(a)(2)(A) of the United States Bankruptcy Code." (Compl. at 2, ¶ 14.)

DISCUSSION

On a motion to dismiss, which is governed by Federal Rule of Civil Procedure 12(b) and its bankruptcy analogue, Federal Rule of Bankruptcy Procedure 7012, the Court must accept as true all the well pleaded factual allegations in the Plaintiff's complaint, Albright v. Oliver, 510 U.S. 266, 268 (1994), and draw all reasonable inferences in the Plaintiff's favor, El Dia, Inc. v. Rossello, 165 F.3d 106, 108 (1st Cir. 1999); Aybar v. Crispin-Reyes, 18 F.3d 10, 13 (1st Cir. 1997). It must clearly appear from the pleadings "that the plaintiff can prove no set of facts in support of his claim which would entitle him [or her] to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

[2] The other allegations under the First Claim for Relief refer to the terms of the parties' Separation Agreement.

Count I pleads a cause of action under section 523(a)(2)(A) of the Bankruptcy Code,[3] the section which mandates that a debtor's pre-petition debts incurred fraudulently are excepted from discharge. The pleading requirements for fraud reside in Federal Rule of Civil Procedure 9(b) and Federal Rule of Bankruptcy Procedure 7009(b). These rules require that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind may be averred generally." FED. R. CIV. P. 9(b); FED. R. BANKR. P. 7009(b). The First Circuit has interpreted the particularity requirement of Rule (b) to require that fraud pleadings contain "the time, place, and content of an alleged false representation, but not the circumstances or evidence from which fraudulent intent could be inferred." Wayne Inv., Inc. v. Gulf Oil Corp., 739 F.2d 11 (1st Cir. 1984) (citing McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980)). These requirements serve a double purpose: they provide notice to defendants and protect them from unfair surprise. Despite the particularity specifications of Rule 9(b), courts must be mindful that "pleadings are liberally to be construed, and for the purpose of determining what relief a claimant has sought, complaints ought not to be read grudgingly or with a hypertechnical eye." Dopp v. HTP Corp., 947 F.2d 506, 512 (1st Cir. 1991). However, the well accepted liberal pleading rule does not neutralize the pleading requirements of fraud. Defendants alleged with fraud are entitled to sufficient notice of the facts and circumstances to form a basis for such a charge.

To prevail under Count I, the Plaintiff would have to prove by a preponderance that:

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[3] Section 523(a)(2)(A), "Exceptions to Discharge," of the Bankruptcy Code states that

> [a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> > (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
> >
> > > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

11 U.S.C.A. § 523(a)(2)(A) (West 1999).

(1) the Defendant made a representation;

(2) at the time the representation was made, the Defendant knew or should have known it was false;

(3) the Plaintiff justifiably relied on the representation; and

(4) the Plaintiff suffered damages.

Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997). Paragraphs 8 through 10 and 13 of the Plaintiff's complaint allege only a representation and damages, and the first claim for relief alleges fraud essentially against the pension plan administrator. At the hearing on March 23, 1999, counsel for the Defendant proffered the theory that the Common Pleas Court's ruling on the contempt proceeding created an agency relationship between the Defendant and the pension plan administrator; however, the Plaintiff's complaint does not aver any facts to substantiate this theory and at any rate, such imputation would have to be pled with specificity. See FED. R. CIV. P. 9(b); FED. R. BANKR. P. 7009(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). As it was, the Plaintiff's theory of imputation was raised for the first time at the March 23, 1999, hearing. This is hardly sufficient to place the Defendant on notice for fraud based on vicarious liability.

Also, the Plaintiff stated at the hearing that the two Ohio court judgments, along with the allegations in paragraphs 8, 9 and 10 of the complaint, are sufficient to form a basis for her alleged fraud Count. However, the Plaintiff's complaint contains no allegations of the existence of a principal and agency relationship between the Defendant and the pension plan administrator. The complaint also fails to allege any sort of actual or constructive knowledge to impute fraud. Finally, the complaint is bereft of any allegations regarding the Plaintiff's reliance, the time, place, circumstances, intent or motive of the Defendant. The Plaintiff's claim sounds in fraud, but the ring is dim. Fraud is a serious allegation, and Rules 9 and 7009 reflect strong public policy that defendants should not have to second-guess the bases of these charges. The complaint lacks specific facts, sources to support those facts, and a basis from which an inference of fraud, especially an imputation of fraud, may fairly be drawn. See Shearson Lehman Hutton, Inc. v. Schulman (In re Schulman), 196 B.R. 688, 693 (Bankr. S.D.N.Y. 1996) (citing Avnet, Inc. v.

American Motorists Ins. Co., 115 F.R.D. 588, 590-91 (S.D.N.Y. 1987); Decker v. Massey-Ferguson, Ltd., 681 F.2d 111, 119 (2d Cir. 1982); Beck v. Manufacturers Hanover Trust Co., 820 F.2d 46, 50 (2d Cir. 1987), cert. denied, 484 U.S. (1988)) ("Scienter can be pleaded by alleging facts showing a motive and a clear opportunity for committing fraud and these can be established by identifying circumstances indicating conscious behavior by the defendant.") (citing Devaney v. Chester, 813 F.2d 566, 568 (2d Cir. 1987)).

Thus, for these reasons, the Court hereby denies the Defendant's motion to dismiss Count I but orders the Plaintiff to re-plead Count I by April 20, 1999. The Court also withholds its finding on the Defendant's motion to dismiss Count I on the grounds that this action is barred by the statute of limitations.

This opinion and order constitutes the Court's findings of facts and conclusions of law in accordance with Federal Rule of Procedure 7052.

DATED this 31st day of March, 1999, at Manchester, New Hampshire.

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Mark W. Vaughn, Chief Judge