

**UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE**

In re:
William L. Brennan,
Debtor

Bk. No. 98-13487-MWV
Chapter 7

Sally Brennan,
Plaintiff

v.

Adv. No. 98-1161-MWV

William L. Brennan,
Defendant

Ronald G. Kaufman, Esq.
Attorney for the Plaintiff

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Attorney for the Defendant

MEMORANDUM OPINION AND ORDER

The Court has before it William L. Brennan's ("Defendant") motion to dismiss the amended Count I of Sally Brennan's ("Plaintiff") complaint. On April 20, 1999, the Plaintiff submitted, per Court order, a Restatement of First Claim for Relief ("Restatement"), which was an attempt to more accurately plead her first count under 11 U.S.C. § 523(a)(2)(A) of the Bankruptcy Code. For the following reasons, the Court grants the Defendant's motion to dismiss.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

The pertinent legal authority on which today's decision is based may be found in this Court's previous Memorandum Opinion and Order ("Order") dated March 31, 1999, and will not be repeated in its totality. This is the second motion to dismiss Count I filed by the Defendant, which was denied without prejudice by the Order.

The Court's Order specifically pointed out the following:

. . . . [T]he first claim for relief alleges fraud essentially against the administrator. . . . [T]he Plaintiff's complaint does not aver any facts to substantiate this [agency relationship] theory and at any rate, such imputation would have to be pled with specificity. . . .

[T]he 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.

(Mem. Op. and Order at 5 [internal citations omitted].)

The Plaintiff's Restatement likewise fails to plead sufficient and specific facts to withstand the Defendant's motion to dismiss. 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."); Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (It must clearly appear from the pleadings "that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief."). Paragraph 12 of the Restatement states only that "an agency relationship exists between Ford Motor Co., the Plan Administrator, and the plan beneficiaries." (Restatement at 2, ¶ 12.) Paragraphs 14, 15 and 16 of the Restatement do not state toward whom the Plaintiff justifiably relied, although they lean toward implicating the Defendant directly with the fraud. (See Restatement at 3, ¶¶ 14, 15 and 16.) However, paragraphs 17, 19, 20 and 22 state that:

[t]he Defendant's securing of payment . . . from the fiduciary holding those funds for the benefit of the Plaintiff resulted in said fiduciary releasing the funds to the Defendant in reliance upon Defendant's representations in his application for the full benefits.

The Defendant acted without knowledge or consent of the Plaintiff in applying for and representing to the Plan Administrator that he was entitled to the full benefits.

The Plan Administrator, as a fiduciary for the Plaintiff, justifiably

relied upon the representations of the Defendant

Defendant's act of obtaining the money and property of the Plaintiff from the pension plan was obtained under false pretenses, false representations as set forth above, and by actual fraud perpetrated upon the Plaintiff and her fiduciary, i.e., the Pension Plan Administrator

(Restatement at 3, ¶¶ 17, 19, 20 and 22.) Thus, those paragraphs allege that the Defendant's fraud was perpetrated upon the Plan Administrator. To link the Plan Administrator, however, and the Plaintiff requires that the Plan Administrator be the Plaintiff's agent. Only paragraph 12 speaks to this relationship, see discussion supra; the remainder of the Restatement is silent on this integral agency relationship. (See Restatement at 1-4.) Not only are the terms "agent" and fiduciary" interchanged throughout the Restatement, but no facts elucidate the basis of the agency relationship:

The agents, however, must have been acting within the scope of their actual or apparent authority. See United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972), cert. denied, 409 U.S. 1125, 93 S. Ct. 938, 35 L. Ed. 2d 256 (1973); see also 19 C.J.S. CORPORATIONS § 738 (1990). Actual authority can be either express or implied. See Demetracopoulos v. Strafford Guidance Ctr., 130 N.H. 209, 213, 536 A.2d 189, 192 (1987). Express authority exists when the principal explicitly manifests its authorization for the agent to act. Id. Implied authority is the "reasonable incident or construction of the terms of express authority or results from acquiescence by the principal in a course of dealing by the agent." Id. at 215, 536 A.2d at 193 (quotation and ellipses omitted). Apparent authority, on the other hand, "exists where the principal so conducts [itself] as to cause a third party to reasonably believe that the agent is authorized to act." Id. (quotation omitted); see United States v. Bi-Co. Pavers, Inc., 741 F.2d 730, 737 (5th Cir. 1984).

State v. Zeta Chi Fraternity, 696 A.2d 530, 535 (N.H.), cert. denied, 118 S. Ct. 558 (1997). "Whether an agency agreement has been created is a question of fact." Carrier v. McLlarky, 693 A.2d 76, 78 (N.H. 1997) (citing 3 AM. JUR.2D AGENCY § 21 (1986)). In order to withstand a motion to dismiss, the Restatement would have to state facts illuminating the relationship between the principal, presumably the Plaintiff, and the agent, presumably the Plan Administrator: it would have to state facts regarding the Plaintiff's grant of authority for the Plan Administrator to act on her behalf, the Plan Administrator's consent to be her agent, and other conduct and/or acts to create an implied principal/agent relationship. The Restatement does not. Therefore, the Defendant's motion is granted with prejudice and Count I is hereby dismissed with prejudice.

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

DATED this 14th day of May, 1999, at Manchester, New Hampshire.

Mark W. Vaughn, Chief Judge