United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

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Bankruptcy Caption:	In re Kimberly N Boyd
Bankruptcy Number:	23 B 4595
Adversary Caption:	Pro Swagger Promotions, Inc. v. Kimberly N Boyd
Adversary Number:	23 A 169
Date of Issuance:	July 26, 2024
Judge:	David D. Cleary

Appearance of Counsel:

Attorney for Pro Swagger Promotions, Inc.:
Michael J Gunderson
The Gunderson Law Firm
2155 W. Roscoe Street
Chicago, IL 60618

Debtor appearing *Pro Se*:
Kimberly N Boyd

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	
	)	Case No. 23 B 4595
KIMBERLY N. BOYD,	)	
	)	
Debtor.	)	Chapter 13
_____	)	
	)	
PRO SWAGGER PROMOTIONS, INC.,	)	
	)	Adv. No. 23 A 169
Plaintiff,	)	
	)	
v.	)	
	)	Judge David D. Cleary
KIMBERLY N. BOYD,	)	
	)	
Defendant.	)	

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Plaintiff Pro Swagger Promotions, Inc. ("PSP" or "Plaintiff") filed a two count complaint ("Complaint") against Defendant Kimberly N. Boyd ("Boyd" or "Defendant"), seeking a finding that Defendant's debt to it is nondischargeable under 11 U.S.C. §§ 523(a)(2)(A) and (a)(4). Defendant, who is not represented by counsel in this adversary proceeding, filed a motion to dismiss ("Motion to Dismiss") the Complaint. The court entered a briefing schedule, and the parties timely filed a response in opposition to the Motion to Dismiss ("Response") and a reply in support ("Reply"). The court then took the Motion to Dismiss under advisement.

Having reviewed the Complaint and the papers submitted, the court will grant the Motion to Dismiss as to Count I and deny the remainder of the Motion to Dismiss.

I. JURISDICTION

The court has subject matter jurisdiction under 28 U.S.C. § 1334(b) and the district court's Internal Operating Procedure 15(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). Venue is proper under 28 U.S.C. § 1409(a).

II. BACKGROUND

In resolving a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court considers well-pleaded facts and the reasonable inferences drawn from them in the light most favorable to the plaintiff. *See Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. 2010). Every allegation that is well-pleaded by a plaintiff is taken as true in ruling on the motion. *See Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289-90 (7th Cir. 2016).

"On a Rule 12(b)(5) motion, the court likewise assumes the truth of the complaint's well-pleaded allegations and draws reasonable inferences in the non-movant's favor. But the court can also consider affidavits and other documentary evidence." *Schiller DuCanto & Fleck, LLP v. Potter* (*In re Potter*), 616 B.R. 745, 748 (Bankr. N.D. Ill. 2020) (citation omitted).

While Defendant was working as Plaintiff's employee, she used Plaintiff's professional software and vendor contacts to order merchandise under Plaintiff's name. (Complaint, ¶¶ 7, 17.) Defendant later converted this merchandise and resold it through her own corporate entity. (*Id.*, ¶ 18.) She billed the goods to Plaintiff and kept all proceeds from the sales. (*Id.*, ¶¶ 13, 19.)

In December 2021, Plaintiff filed a complaint against Defendant in state court, based on these allegations. (*Id.*, Ex. A.) The parties reached a settlement. (*Id.*, ¶ 8, Ex. B.) Plaintiff attached copies of the state court complaint and the settlement agreement to the Complaint. (*Id.*, Exs. A and B.)

Defendant filed for relief under chapter 13 of the Bankruptcy Code on April 6, 2023. (Case No. 23 B 4595, EOD 1.) Plaintiff filed this adversary proceeding on June 22, 2023, and a summons issued the same day. (Adv. No. 23 A 169, EOD 1, 2.) The court held status hearings on the following dates: July 31, 2023; August 28, 2023; October 2, 2023; and November 20, 2023. (*Id.*, EOD 5-7.) Plaintiff did not appear at three of those four status hearings. When the court issued a rule to show cause on November 20, 2023, Plaintiff's counsel appeared at that show cause hearing on January 8, 2024. (*Id.*, EOD 9, 11.)

Plaintiff requested and the court issued an alias summons on January 11, 2024. (*Id.*, EOD 13, 14.) Plaintiff filed the return of service the same day. (*Id.*, EOD 15.)

III. LEGAL DISCUSSION

A. Contentions of the Parties

1. Dismissal for insufficient service of process

In her Motion to Dismiss, Defendant first argues that the complaint was not timely served. Although she does not refer to it, Fed. R. Civ. P. 12(b)(5) provides the grounds for dismissal when there has been insufficient service of process.

In response, Plaintiff contends that notice of the filing of this adversary proceeding was sent, electronically, to Defendant's counsel in her bankruptcy case. Plaintiff also asserts that it sent a copy of the complaint and summons to Defendant by mail on June 23, 2023.[1] Plaintiff points out that ten days after it mailed the complaint and summons, Defendant filed a notice of address change in her bankruptcy case. This presented "a challenge to effectuate service." (Response, ¶ 21.)

[1] Plaintiff stated in paragraph 4 of its Response that the copy was sent on June 23, 2024. The court assumes that this was a typographical error, as Plaintiff filed the Response prior to that date.

In reply, Defendant reiterates that Plaintiff has presented no proof that the original summons was served on either herself or her attorney. She also included discussion in the Reply about what the U.S. Post Office would have done with mail addressed to her.

2. Dismissal for failure to state a claim

Defendant's second argument is that the Complaint fails to state a claim under either §§ 523(a)(2)(A) or (a)(4). She asserts that Plaintiff acted improperly in obtaining the state court settlement agreement, and therefore cannot maintain a claim under § 523(a)(2). Defendant continues this line of reasoning in regard to the § 523(a)(4) count, asserting that parties to an arbitration must provide complete and accurate information, and that a failure to do so could be characterized as a failure to uphold a fiduciary duty.

In response, Plaintiff points out that it is relying on the "circumstances under which Plaintiff filed the State Court action, all of which, Plaintiff alleges, provide relief under Section 523." (Response, ¶ 31.)

In the Reply, Defendant repeats her "focus[] on the Plaintiff's conduct during both this and the arbitration proceedings." (Reply, ¶ 34.)

B. The court will deny the request to dismiss for insufficient service of process

1. Standard for a motion to dismiss for insufficient service of process

After filing an adversary proceeding, plaintiffs must serve the summons and the complaint upon defendants. Fed. R. Civ. P. 4(m), made applicable in adversary proceedings by Fed. R. Bankr. P. 7004, provides that plaintiffs must accomplish that service within 90 days of filing. Service is made upon a debtor/defendant "by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing." Fed. R. Bankr. P. 7004(b)(9). If an attorney is representing

the defendant in the main bankruptcy case, service must also be made upon the debtor's attorney. Fed. R. Bankr. P. 7004(g).[2]

As the Seventh Circuit wrote:

> A defendant may enforce the service of process requirements through a pretrial motion to dismiss. Fed. R. Civ. P. 12(b)(5). The plaintiff bears the burden to demonstrate that the district court has jurisdiction over each defendant through effective service. If, on its own or on the defendant's motion, the district court finds that the plaintiff has not met that burden and lacks good cause for not perfecting service, the district court must either dismiss the suit or specify a time within which the plaintiff must serve the defendant. Fed. R. Civ. P. 4(m). As the text of the rule indicates, the decision of whether to dismiss or extend the period for service is inherently discretionary[.]

Cardenas v. City of Chicago, 646 F.3d 1001, 1005 (7th Cir. 2011) (citations omitted).

2. Plaintiff did not serve Defendant within 90 days of filing

Plaintiff asserts that it mailed a copy of the Complaint and summons to Defendant on June 23, 2023, and that a copy was sent electronically to Defendant's counsel in her bankruptcy case. These assertions are inadequate to satisfy Plaintiff's burden of demonstrating that this court has jurisdiction over the Defendant through effective service. Rule 7004(b)(9) does not require proof that Defendant *actually received* the Complaint and summons, but it does require proof that process was *mailed*. *See Bak v. Vincze* (*In re Vincze*), 230 F.3d 297, 299 (7th Cir. 2000). An assertion in a response to a motion to dismiss is not proof. The Federal Rules of Civil Procedure require that proof be made to the court by the server's affidavit. Fed. R. Civ. P. 4(l). Plaintiff clearly knows this – it filed proof of service of the *alias* summons.

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[2] In its Response, Plaintiff states that notice of filing of the Complaint was sent electronically to Defendant's bankruptcy counsel. *See* Response, ¶¶ 3, 6. This did not accomplish service. The Administrative Procedures for the Case Management/Electronic Case Filing System provide at section II.B.2 that registration "constitutes waiver of the right to receive notice of hearings and service of documents by personal service or first class mail, except that electronic service is not sufficient service of (1) a complaint and summons in an adversary proceeding under Fed. R. Bankr. P. 7004[.]" *See Nigolian v. Grove*, No. 8:21-00408-DOC, 2021 WL 3435006, at *3 (C.D. Cal. July 26, 2021), *aff'd sub nom. Matter of Grove*, No. 21-55843, 2022 WL 779897 (9th Cir. Mar. 14, 2022) ("[R]egistering for CM/ECF does not constitute consent to electronic service of a summons and complaint."). Plaintiff subsequently served Defendant's bankruptcy counsel on January 11, 2024.

3. The court will order service to be made within a specified time

Having found that Plaintiff failed to prove that Defendant was served within 90 days after the Complaint was filed, the court must either "dismiss the action without prejudice against that defendant or order that service be made within a specified time." Fed. R. Civ. P. 4(m). The Seventh Circuit, quoting with approval the Advisory Committee's Note to Rule 4(m), recognizes that a permissive extension of time for service may be appropriate "if the applicable statute of limitations would bar the refiled action[.]" *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 341 (7th Cir. 1996) (quotation omitted).

Since the time for filing a complaint under 11 U.S.C. §§ 523(a)(2)(A) and (a)(4) passed on July 3, 2023, the court takes that factor into consideration. Moreover, while service was not properly effected, Defendant did have actual notice of the Complaint. She acknowledged in her Reply that "[t]he attorney for my Chapter 13 case notified me that a complaint was filed in June, but noted that I had to wait for the complaint to be served to me …. [T]here was nothing for me to do until they served me." Reply, ¶ 7. Finally, the court recognizes that Plaintiff has already effected service on both Defendant and her bankruptcy attorney by later serving the alias summons and filing the server's affidavit on January 11, 2024. *See* Adv. No. 23 A 169, EOD 15. For all of these reasons, rather than dismissing the Complaint, the court will "order that service be made within a specified time." The motion to dismiss for insufficient service of process will be denied.[3]

[3] Although the court is denying the request to dismiss for insufficient service of process, this should not be construed as an acceptance of Plaintiff's arguments that Defendant's "own actions and representations about her address are enough to present a challenge to effectuate service" or that "Defendant should not be able to argue that Plaintiff should adhere to strict deadlines for effectuating service when her own actions would make any type of service impractical." (Response, ¶ 21.)

Defendant filed a change of address ten days after Plaintiff filed its complaint. Service by mail at her original address could easily have been made within that time period. For a debtor/defendant to file a single change of

C. The court will grant the motion to dismiss for failure to state a claim in Count I

1. Standard for a motion to dismiss for failure to state a claim

To defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6), made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7012, a complaint must describe the claim in enough detail to give notice to the defendant. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In addition, the complaint must be "plausible on its face." *Id.* at 570. "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint need only offer "a short and plain statement of the claim showing that the pleader is entitled to relief[,]" Fed. R. Civ. P. 8(a)(2), unless the subject matter of that pleading implicates a heightened standard, *see* Fed. R. Civ. P. 9. The circumstances supporting an action sounding in fraud must be articulated with particularity under Rule 9.

Defendant's arguments do not mention this standard for a motion to dismiss for failure to state a claim. Defendant attacks Plaintiff's conduct during the state court proceedings, rather than addressing whether the allegations in the complaint state a claim.

In determining whether the allegations of the Complaint state a claim, the court will not consider Plaintiff's conduct in the state court proceedings. Indeed, in resolving a motion to dismiss for failure to state a claim, the court should consider only the four corners of the Complaint and the exhibits attached to it. To do otherwise would be to implicate Fed. R. Civ. P. 12(d), which provides that "[i]f, on a motion under Rule 12(b)(6) … matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."

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address does not raise any concerns for this court regarding the equity of requiring a plaintiff to comply with the Federal Rules of Civil Procedure.

Instead, the court will review the elements of 11 U.S.C. §§ 523(a)(2)(A) and (a)(4) and determine whether the Complaint plausibly alleges a claim under either or both of these statutes.

2. The elements of a claim for relief under 11 U.S.C. § 523(a)(2)(A) have not been pleaded in the Complaint

In Count I, Plaintiff seeks relief under 11 U.S.C. § 523(a)(2)(A):

> (a) A discharge under section 727, 1141, 1192, 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[.]

For its claim for relief under § 523(a)(2)(A) based on false pretenses or a false representation to survive a motion to dismiss, Plaintiff must plausibly allege: (1) Defendant made a false representation or omission; (2) she knew that representation was false or she made it with reckless disregard for the truth; (3) she made the statement with the intent to deceive Plaintiff; and (4) Plaintiff justifiably relied on the representation. *See Ojeda v. Goldberg*, 599 F.3d 712, 716-17 (7th Cir. 2010); *Handler v. Moore* (*In re Moore*), 620 B.R. 617, 627 (Bankr. N.D. Ill. 2020).

The Complaint contains no allegations that would support a claim for relief under this section. There are no allegations that Defendant made false representations or omissions. Neither are there are any allegations that Defendant made statements or omissions with the intent to deceive Plaintiff. Finally, there are no allegations that Plaintiff justifiably relied on any such false representations or omissions.

The Complaint does not specify whether Plaintiff is alleging false pretenses, a false representation, or actual fraud. The court is mindful that actual fraud encompasses "any deceit,

artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another[.]" *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000) (quotation omitted). However, even if the court could construe the allegations in the Complaint as describing some type of fraud – and the court is instructed to view the allegations of a complaint in the light most favorable to Plaintiff when deciding a motion to dismiss – this Complaint fails to meet the standard required of a fraud count by Fed. R. Civ. P. 9. When alleging fraud, "a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Plaintiff has not met this standard in the Complaint. *See United States ex rel. Sibley v. Univ. of Chicago Med. Ctr.*, 44 F.4th 646, 655 (7th Cir. 2022) ("Though the exact details that must be included in a pleading vary based on the facts of a given case, plaintiffs must inject precision and some measure of substantiation into their allegations of fraud.") (quotation omitted).

For all of the reasons stated above, the court will grant the motion to dismiss for failure to state a claim in Count I. The motion will be granted without prejudice, should Plaintiff wish to amend the Complaint.

D. The court will deny the motion to dismiss for failure to state a claim in Count II

1. Standard for a motion to dismiss for failure to state a claim

As stated above in section III.C, to defeat the motion to dismiss the Complaint must describe the claim in enough detail to give notice to the defendant, it must be plausible on its face, and it must provide a short and plain statement of the claim. And again, as mentioned above, Plaintiff's conduct during the state court proceedings is irrelevant to the court's decision today.

2. The elements of a claim for relief under 11 U.S.C. § 523(a)(4) have been pleaded in the Complaint

In Count II, Plaintiff seeks relief under 11 U.S.C. § 523(a)(4):

> (a) A discharge under section 727, 1141, 1192, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-- …
>
> > (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

The Seventh Circuit tells us that embezzlement is "fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Matter of Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quotation omitted), *abrogated on other grounds by Grogan v. Garner*, 498 U.S. 279 (1991). To plead a claim for relief under § 523(a)(4) based on embezzlement, a creditor must plausibly allege that: "(1) the debtor appropriated funds or property for his or her own benefit; and (2) the debtor did so with fraudulent intent or deceit." *FNA Group, Inc. v. Arvanitis* (*In re Arvanitis*), Adv. No. 14-514, 2015 WL 5202990, at *17 (Bankr. N.D. Ill. Sept. 1, 2015).

"Larceny is proven for § 523(a)(4) purposes if the debtor has wrongfully and with fraudulent intent taken property from its owner." *Matter of Rose*, 934 F.2d 901, 903 (7th Cir. 1991).

The Complaint contains the following relevant allegations:

> The Defendant had, while working in her capacity as an employee of the Plaintiff, ordered merchandise under the name of the Plaintiff, merchandise that she later converted and resold under her own corporate entity. Defendant caused this merchandise to be billed to her employer. Defendant retained all proceeds from the sale of the merchandise….
>
> Defendant purchased merchandise using Plaintiff's funds, while acting as an employee and agent of Plaintiff. Defendant diverted this merchandise from her employer to her own personal corporation and resold it under her personal corporation.

> Defendant retained all proceeds from the sale of the merchandise purchased while acting as an agent of the Plaintiff, with funds belonging to the Plaintiff….
>
> Defendant, while acting as an employee of Plaintiff, used Plaintiff's professional software and vendor contacts to purchase various merchandise commonly resold as part of Plaintiff's business.
>
> Defendant converted this merchandise and resold it under her own company.
>
> Defendant caused Plaintiff's business to be billed for the merchandise she ordered and resold under her own corporation.
>
> Defendant never paid Plaintiff for the merchandise ordered from and billed to Plaintiff's company.
>
> Defendant retained all profits realized from selling the merchandise she ordered through Plaintiff's company.

Complaint, ¶¶ 7, 12-13, 17-21.

Taken together, these allegations "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft*, 556 U.S. at 678. By alleging that Defendant ordered merchandise in Plaintiff's name and then retained the profits for herself, Plaintiff satisfied the requirement of pleading that Defendant appropriated funds or property for her own benefit. Although the Complaint does not use the word "intent," the court can reasonably infer from the allegations that Defendant "converted" and "diverted" merchandise that she was acting with fraudulent intent. And although fraudulent intent is a required element, it need not be pleaded with particularity. *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

Finding that the Complaint has plausibly alleged a claim for relief under § 523(a)(4) is not the same as finding that Defendant's debt to Plaintiff is nondischargeable as embezzlement or larceny. Defendant will have the opportunity to take discovery, to adduce testimony from witnesses, to seek admission of exhibits or otherwise present evidence to the court if she decides to contest the allegations in the Complaint. For now, however, Plaintiff has met its burden of

plausibly alleging a claim for relief under § 523(a)(4). The Motion to Dismiss will be denied as to Count II.

IV. CONCLUSION

For all of the reasons stated above, **IT IS ORDERED THAT**

1. The Motion to Dismiss for insufficient service of process is **DENIED**;
2. The specified time within which service of the Complaint and summons shall be made is extended retroactively to January 11, 2024;
3. The Motion to Dismiss Count I is **GRANTED** and Count I is dismissed without prejudice;
4. The Motion to Dismiss Count II is **DENIED**; and
5. This adversary proceeding is set for status on August 12, 2024 at 2:00 p.m. At that time, the parties shall be prepared to advise the court whether Plaintiff intends to request time to file an amended complaint and, if not, suggest an appropriate deadline for Defendant to answer or otherwise plead.

ENTERED:

Date: July 26, 2024

DAVID D. CLEARY
United States Bankruptcy Judge