UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Bankruptcy Caption:	In re Abraham Tofa
Bankruptcy No.:	23bk15233
Adversary Caption:	Corey Wiggins v. Abraham Tofa
Adversary No.:	24ap00044
Date of Issuance:	October 30, 2024
Judge:	Deborah L. Thorne
Appearances:	
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Corey Wiggins	*PRO SE*

Summary:

Defendant/Debtor moved to dismiss the adversary complaint. HELD: The motion to dismiss was granted with prejudice and the debtor's discharge was reinstated.

United States Bankruptcy Court, Northern District of Illinois

JUDGE	Deborah L. Thorne	**Case No.**	23-15233
DATE	October 30, 2024	**Adversary No.**	24-00044
CASE TITLE	In re Abraham N. Tofa; Corey Wiggins v. Abraham N. Tofa		
TITLE OF ORDER	Order Granting Motion to Dismiss Complaint with Prejudice and Reinstating Discharge		

STATEMENT

This matter comes before the court on Abraham N. Tofa's (Tofa) Motion to Dismiss Amended Complaint with Prejudice pursuant to Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, the motion to dismiss is granted. And because the defects in the claims cannot be cured by further amendments or repleading, the motion is granted with prejudice. Finally, Tofa's discharge in his individual bankruptcy case shall be reinstated, and the case shall be closed.

Factual Background

On November 12, 2023, Tofa filed a Chapter 7 voluntary petition in this court under Case No. 23-15233. Prior to filing the Chapter 7 petition, Corey Wiggins (Wiggins) sued Tofa in the Circuit Court of Cook County, but no judgment was entered. The filing of the Chapter 7 petition by Tofa imposed the automatic stay under 11 U.S.C. § 362 and Wiggins was stayed from proceeding further in the Circuit Court. In his individual bankruptcy case, Tofa scheduled a claim due to Wiggins in the amount of $200,000 related to the pending claim in the Circuit Court.

The Circuit Court litigation is the result of a dispute between A.B. Tofa, LLC (Tofa LLC) and Wiggins. Tofa LLC was apparently the entity from which Wiggins leased or attempted to purchase a truck. (Compl., Adv. Dkt. No. 1, Exh. A, Exh. B.) After the initiation of the state court litigation, Tofa LLC filed a Chapter 7 petition under Case No. 22-14012 on December 4, 2022, and the case was closed on August 11, 2023.

Acting *pro se,* Wiggins initiated this adversary proceeding on February 2, 2024.[1] In his original complaint, Wiggins argued that Tofa's debts ought not to be discharged, pursuant to §§ 727(a)(2), (a)(3), (a)(4) and (c). (Compl., Adv. Dkt. No. 1.) On April 4, 2024, the court vacated Tofa's discharge to allow the adversary proceeding to resolve. (Order, Bankr. Dkt. No. 33.) On May 8, 2024, Tofa filed a motion to dismiss the original complaint. (Mot. to Dismiss, Adv. Dkt. No. 17.)

On May 15, 2024, the court granted Tofa's motion to dismiss the original complaint but granted Wiggins leave to file an amended complaint. (Order, Adv. Dkt. No. 21.) Although the court encouraged Wiggins to consider hiring an attorney, Wiggins stated he was committed to continuing as a *pro se* litigant.[2] (Letter*,* Adv. Dkt. No. 19 ("While representing myself may be challenging, I believe it is the best option for me at this time to avoid further financial injury and to protect my interests to the best of my ability.")). He filed his Amended Complaint on May 22, 2024.[3] Professing confusion, Wiggins asked for, and was granted, leave to file one more amended complaint. (Order, Adv. Dkt. No. 36.)

[1] Pursuant to this Court's order on April 4, 2024, the complaint was deemed timely filed as it related back to the date Mr. Wiggins first initiated his complaint through communications with the Clerk's office. (Adv. Dkt. No. 10.)
[2] The complaint contains allegations against the attorney Wiggins had initially retained. (Am. Compl., Adv. Dkt. No. 37, ¶¶ 12-13, 17-19.)
[3] Once again, the court deemed the filing timely, although the clerk of the court docketed the filing a day after the deadline set in the order of April 4, 2024. (Adv. Dkt. No. 10.) Wiggins filed an amended version of this complaint on May 29, 2024, which included several exhibits. (Am. Compl., Adv. Dkt. No. 29.)

This latest Amended Complaint, filed on August 7, 2024, is what Tofa seeks to dismiss. (Am. Compl., Adv. Dkt. No. 37.) In the complaint, Wiggins alleges four counts objecting to Tofa's discharge or to the dischargeability of his claim. Each count corresponds to a section of the Bankruptcy Code: (Count I) alleging nondischargeability of a debt under § 523(a)(2); (Count II) alleging nondischargeability of a debt under § 523(a)(4); (Count III) objecting to discharge under § 727(a)(4); and (Count IV) requesting dismissal for bad faith filing under § 707.

Legal Standards

Under Rule 12(b)(6), a defendant may file a motion seeking dismissal of a complaint where the complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive such a motion, a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)); *Katz-Crank v. Haskett*, 843 F.3d 641, 646 (7th Cir. 2016) (quoting *Twombly*, supra). A complaint satisfies this standard when its factual allegations "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555-56; *see also Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011) ("[T]he complaint taken as a whole must establish a nonnegligible probability that the claim is valid, though it need not be so great a probability as such terms as 'preponderance of the evidence' connote."); *Swanson v. Citibank, N.A.*, 614 F.3d400, 404 (7th Cir. 2010) ("[P]laintiff must give enough details about the subject matter of the case to present a story that holds together.").

When deciding a motion to dismiss under Rule 12(b)(6), the court takes all facts alleged by the plaintiff as true and draws all reasonable inferences from those facts in the plaintiff's favor, although conclusory allegations that merely recite the elements of a claim are not entitled to this presumption of truth. *Katz-Crank*, 843 F.3d at 646 (citing *Iqbal*, 556 U.S. at 662, 663);

Virnich v. Vorwald, 664 F.3d 206, 212 (7th Cir. 2011). Thus, the question "is not whether [the pleader] might at some later stage be able to prove [facts alleged]; the question is whether [it] has adequately asserted facts (as contrasted with naked legal conclusions) to support [its] claims." *Id*. at 1129. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937 (quoting *Twombly*, 550 U.S. at 555 (2007)).

The court construes *pro se* complaints liberally, holding them to a less stringent standard than pleadings drafted by lawyers. *Cesal v. Moats,* 851 F.3d 714, 720 (7th Cir. 2017). Trial courts should also "allow ample opportunity for amending the complaint when it appears that by doing so the *pro se* litigant would be able to state a meritorious claim." *Kiebala v. Boris*, 928 F.3d 680, 684 (7th Cir. 2019) (quoting *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555 (7th Cir. 1996)). But trial courts are not "advocate[s]" and "are not charged with seeking out 'issues lurking within the confines' of the *pro se* litigant's pleadings." *Kiebala*, 928 F.3d at 684-85 (quoting *Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982)).

Discussion

The following section discusses each count of the complaint and explains why it cannot survive a motion to dismiss.

I. Counts I and II, brought under §§ 523(a)(2) and (a)(4), fail to state a claim for which relief can be granted.

Section 523 of the Bankruptcy Code provides that certain debts cannot be discharged through bankruptcy, including any debt related to money, property, or services obtained by "false pretenses, a false representation, or actual fraud" or by "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." 11 U.S.C. §§ 523(a)(2), (a)(4). Whether or

not these counts relate back to the original complaint, the facts taken as true do not give rise to grounds on which the court could grant relief.

For the count related to § 523(a)(2), Wiggins alleges that there are two grounds for finding Tofa's debt to him nondischargeable. First, he states that his allegations of Tofa's "misclassification of workers [sic] and misrepresentation in the lease purchase agreement" prove Tofa's actions meet the requirements for the statute. (Am. Compl., Adv. Dkt. No. 37, ¶ 26.) To receive an exception to discharge, "a creditor must show that (1) the debtor made a false representation or omission, (2) that the debtor (a) knew was false or made with reckless disregard for the truth and (b) was made with the intent to deceive, (3) upon which the creditor justifiably relied." *Ojeda v. Goldberg,* 599 F.3d 712, 716-17 (7th Cir. 2010) (citing *In re Scarlata,* 979 F.2d 521, 525 (7th Cir. 1992)).

Taking the allegations as true, any lease or employment agreement was between Wiggins and Tofa LLC, the business entity, not Wiggins and Abraham Tofa, the individual debtor. As Wiggins acknowledges in his response, "Both counts [I and II] address the **fraudulent conduct** that occurred in connection with Defendant's operation of A.B. Tofa LLC." (Resp., Adv. Dkt. No. 51, § 3.) Tofa LLC, and not the debtor, undertook the alleged actions. Thus, taken as true, the facts alleged do not provide support for the elements that must be pled in order to state a claim. The second ground alleged under § 523(a)(2) appears to be the statement that a debt which has not been adjudicated is nondischargeable. (Am. Compl., Adv. Dkt. 37, § 27.) Insofar as this is what Wiggins means, this is an incorrect statement of law. *See* 11 U.S.C. § 727(b); 6 Collier on Bankruptcy ¶ 727.15 (16th ed. 2024) ("Section 727(b) grants to the debtor who is discharged under section 727(a) a discharge from all debts that arose before the date of the order for relief under chapter 7, except those debts that are excepted from discharge by section 523.").

Likewise, for the count related to § 523(a)(4), Wiggins alleges only that Tofa engaged in "fraudulent business practices and violations of federal regulations." (Am. Compl., Adv. Dkt. No. 37, ¶ 28.) Taking as true all of the allegations here and in the factual background of the complaint, these facts do not establish that there was a fiduciary relationship between Wiggins and Tofa, nor that, in the alternative, Tofa engaged in embezzlement or larceny. For the former, Wiggins must plead facts that show first "the debtor acted as fiduciary to the creditor at the time the debt was created" and second that "the debt was caused by fraud or defalcation." *Estate of Cora v. Jahring (In re Jahring),* 816 F.3d 921, 925 (7th Cir. 2016). And because exceptions to discharge are construed strictly in favor of debtors, federal bankruptcy law—not contract terms or non-bankruptcy state law—determines whether there is such a relationship: "[a] fiduciary relation only qualifies under § 523(a)(4) if it 'imposes real duties in advance of the breach.'" *Kontos v. Manevska (In re Manesvka),* 875 B.R. 517, 531 (Bankr. N.D. Ill. 2018) (quoting *O'Shea v. Frain (In re Frain),* 230 F.3d 1014, 1017 (7th Cir. 2000)). Wiggins has not provided any allegations tending to show that there was a fiduciary relationship between Tofa and him, or that such a relationship could meet the higher standard imposed by federal bankruptcy law.

Neither do the allegations support the alternatives under § 523(a)(4). Embezzlement in this context is "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *In Re Weber*, 892 F.2d 534, 538 (7th Cir. 1989) (quoting *Moore v. United States*, 160 U.S. 268, 269 (1895)). Allegations that Tofa LLC engaged in fraudulent business practices or violated federal regulations, even if they are true, do not make the claim brought under Count II valid, so it must be dismissed.

II. Count III, brought under § 727(a)(4), fails to state a claim for which relief can be granted.

Section 727(a) of the Bankruptcy Code grounds for which discharge will be denied for Chapter 7 debtors, and states, in relevant part, that the court shall not grant a discharge to a debtor who

> knowingly and fraudulently, in or in connection with the case—
>
> (A) made a false oath or account;

11 U.S.C. § 727(a)(4). For a party to prevail under this section, he must establish five elements: (1) the debtor made a statement under oath, (2) the statement was false, (3) the debtor knew the statement was false, (4) the debtor intended to defraud, and (5) the statement was material to the case. *Lardas v. Grcic,* 847 F.3d 561 (7th Cir. 2017) (citing *Stamat v. Neary*, 635 F.3d 974, 978 (7th Cir. 2011)).

To support this count, Wiggins repeats an allegation he made in the main bankruptcy case that Tofa made a false oath or false claim by scheduling a debt to Wiggins in the amount of $200,000, related to the pending state court litigation. (Am. Compl., Adv. Dkt. No. 37, ¶ 31.) In an earlier order in the bankruptcy case, the court explained that scheduling a claim as required by the Code is not making a "false oath." (Order*,* Bankr. Dkt. No. 38.) Just as scheduling a claim was not grounds for dismissal pursuant to § 707, it is not grounds for an order denying Tofa's discharge pursuant to § 727. The Code requires debtors to list the creditors who may have claims against them and to estimate those claims. 11 U.S.C. § 521(a); Bankruptcy Rule 1007(a). A claim is defined as "any right to payment, whether or not reduced to judgment." 11 U.S.C. § 101.05. A lawsuit pending in the state court clearly falls within this definition.

Taking as true the allegation that the amount scheduled is inaccurate, Wiggins still fails to allege facts that support the last two elements of a § 727(a)(4)(A) action. He has not provided facts beyond mere "naked legal conclusions" that Tofa intended fraud by scheduling this claim or that the inaccuracy of the $200,000 claim was material to the case in any way.

III. Count IV, brought under § 707(a), fails to state a claim for which relief can be granted.

Section 707(a) of the Bankruptcy Code empowers the court to dismiss a case "for cause" and provides a non-exhaustive list of reasons for dismissal or conversion of a Chapter 7 case. Construing the complaint liberally, the court understands the Wiggins also alleges that Tofa's bankruptcy case should be dismissed or converted to Chapter 13 pursuant to § 707(b). Under that provision, a party in interest may move to dismiss a case if "the granting of relief would be an abuse of" Chapter 7, and the court can consider "whether the debtor filed the petition in bad faith." 11 U.S.C. § 707(b)(3)(A).

The facts that Wiggins relies on to support this count, if true, would not prove his allegations as pled under §707(a). The Bankruptcy Code provides both for the protection of the automatic stay and for scheduling a claim, and applying these provisions does not constitute "cause" for dismissal. The court addressed the facts underlying these allegations in its order entered on September 13, 2024, determining that even if the facts alleged are true, they state no claim for which the court can grant relief under § 707. (Order, Bankr. Dkt. No. 38.) The court will not revisit its holding in that order, and the count must therefore be dismissed.

The grounds stated above also do not constitute bad faith under § 707(b). Bankruptcy Rule 1017(e)(1) governs the procedures for filing an action pursuant to § 707(b), provides that it must be brought within 60 days of the first meeting of creditors, and requires a movant under §

707(b)(3) to "state with particularity the circumstances alleged to constitute abuse." The response Wiggins filed to the Motion to Dismiss introduces new legal arguments and factual allegations. (Pl. Resp., Adv. Dkt. No. 51, § 4.) Whether or not these relate back to the original complaint such that they might be considered timely, they do not state with particularity any manner in which Tofa's bankruptcy filing was in "bad faith" under § 707(b). The allegations not already discussed here, even taken as true, relate to actions taken by the corporation Tofa LLC, not by the debtor.

Conclusion

Because the complaint states no grounds on which the court can grant relief, the defendant's motion to dismiss is granted. The court has given the plaintiff ample opportunities to replead his complaint, and because the defects in the complaint cannot be cured by further amendments, the motion is granted with prejudice. Tofa's discharge shall be reinstated in Case No. 23-15233. The adversary and the main bankruptcy case should be closed.

ENTER:

Dated: October 30, 2024

Honorable Deborah L. Thorne
United States Bankruptcy Judge