

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

RICHARD ALAN PIZZUTI and
SHARON LINDA PIZZUTI,

Case No. 6:10-bk-12098-ABB
Chapter 7

Debtors.

_____ /

PATRICK W. BOYLE,

Plaintiff,

Adv. Pro. No. 6:10-ap-00332-ABB

vs.

RICHARD ALAN PIZZUTI, et al.,

Defendants.

_____ /

ORDER

A status conference was held on February 27, 2012 on the Second Amended Complaint (Doc. No. 18) filed by the *pro se* Plaintiff Patrick W. Boyle and the Motion to Dismiss (Doc. No. 24) filed by the Debtors/Defendants Richard Alan Pizzuti and Sharon Linda Pizzuti (collectively, "Debtors"). Plaintiff and counsel for the Debtors appeared at the status conference.¹

Plaintiff, pursuant to the Court's directive made in open Court, filed a Response (Doc. No. 52) setting forth the causes of action he seeks to prosecute against the Debtors and the facts in support of such causes of action. The Debtors filed in response a Supplemental Motion to Dismiss and Reply (Doc. No. 54). The Debtors' Motions to

¹ Plaintiff appeared telephonically.

Dismiss (Doc. Nos. 24, 54) are due to be denied in part and granted in part for the reasons set forth herein.

Plaintiff's Second Amended Complaint

Plaintiff filed the Second Amended Complaint against the Debtors and five entities: Wellington Pierce Holdings, LLC, Wellington Pierce, Inc., WP Inspirational Advisors, Inc., Clean Dreams, LLC, and Digital Micron, Inc. (collectively, "Entities").

The Complaint contains numerous causes of action:

- (i) Plaintiff seeks a nondischargeability determination of an indebtedness of approximately \$106,700.00, plus interest, costs, and punitive damages, pursuant to 11 U.S.C. Sections 523(a)(2)(A), 523(a)(4), 523(a)(18), 523(a)(19)(A)(i), 523(a)(19)(A)(ii), and Florida statutory law relating to securities.²
- (ii) Plaintiff seeks denial of the Debtors' discharge pursuant to 11 U.S.C. Section 727(a)(4)(A).
- (iii) Plaintiff seeks dismissal of the Debtors' bankruptcy case pursuant to 11 U.S.C. Section 707(b).
- (iv) Plaintiff alleges violations by the Debtors of Fla. Stat. Section 608.426 regarding insider transactions and distributions from insolvent companies.

Plaintiff references 18 U.S.C. Sections 1341 and 1343, which are criminal statutes relating to mail and wire fraud. Any relief requested pursuant to Title 18 of the United States Code is due to be denied. Bankruptcy proceedings are civil proceedings, not criminal, and Plaintiff may not pursue criminal matters in this Court.

Motions to Dismiss

The Debtors seek dismissal of Plaintiff's Second Amended Complaint on various grounds.

² Chapter 517 of the Florida Statutes.

Jurisdiction: Plaintiff's nondischargeability Section 523(a) causes of action are based, in part, on allegations of embezzlement, conversion, and breach of contract committed by the Debtors. The Debtors, citing to Stern v. Marshall, 131 S. Ct. 2594 (2011), assert this Court lacks jurisdiction pursuant to Article III of the United States Constitution to adjudicate tort and contract law claims against non-debtor defendants. The Debtors do not assert this Court lacks jurisdiction as to the causes of action asserted by Plaintiff against the Debtors.

None of the Entities named as Defendants are debtors before this Court. Whether the Court has jurisdiction to adjudicate tort and contract law claims against the Entities is a moot issue. The relief Plaintiff is seeking pursuant to 11 U.S.C. Sections 523, 727, and 707(b) may only be granted against the individual Debtors Richard and Sharon Pizzuti—a determination of nondischargeability of a particular indebtedness, denial of the Debtors' discharge, and dismissal of their bankruptcy case. The relief sought by Plaintiff cannot be granted against any of the Entities. The Entities are due to be dismissed as party defendants in this adversary proceeding.

Standing: The Debtors assert Plaintiff lacks standing to assert a Section 523(a)(18) nondischargeability cause of action. The Debtors cite no legal authority for this assertion. The plain language of Section 523(a)(18) does not bar Plaintiff from asserting a Section 523(a)(18) cause of action. There is no case law, controlling or non-controlling, in support of the Debtors' standing assertion. The Debtors' motion to dismiss Plaintiff's Section 523(a)(18) cause of action is due to be denied.

Section 707(b): The deadline for filing a dismissal motion pursuant to Section 707(b) in this case was within sixty days after the first date set for the meeting of

creditors. FED. R. BANKR. P. 1017(e)(1). The first date set for the Debtors' Section 341 meeting was August 27, 2010 (Main Case Doc. No. 4) and sixty days from that date was October 26, 2010. Plaintiff did not seek an extension of the Section 707(b) dismissal motion deadline. Plaintiff filed his adversary proceeding complaint containing a Section 707(b) cause of action on December 30, 2010. Plaintiff did not timely file his Section 707(b) dismissal motion and such cause of action contained in his Second Amended Complaint is due to be dismissed. The Debtors' request for an award of attorney's fees pursuant to Section 707(b)(5)(A) is due to be denied.

Rule 12(b)(6): The remainder of the Debtors' dismissal motion constitutes a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), which is applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b). A complaint is subject to dismissal pursuant to Rule 12(b)(6) for failure to state a claim where "it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A Court must accept all factual allegations as true and view them in a light most favorable to the plaintiff. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984). A plaintiff is not required to set out in detail the facts upon which he bases his claim, but is only required to set out "a short and plain statement of the claim showing that the pleader is entitled to relief." Brandt v. Bassett (In re Southeast Banking Corp.), 69 F.3d 1539, 1551 (11th Cir. 1995) (*quoting* FED. R. CIV. P. 8(a)(2), which is applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7008).

Where fraud or mistake is alleged, “a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b) (applicable to bankruptcy proceedings pursuant to Federal Rule of Bankruptcy Procedure 7009).

Rule 9(b) is satisfied where the complaint sets forth:

- (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Brooks v. Blue Cross and Blue Shield of Fla., Inc., 116 F.3d 1364, 1371 (11th Cir. 1997)

(internal quotation omitted).

Plaintiff’s Complaint fulfills the pleading requirements of Federal Rules of Civil Procedure 8(a) and 9. Plaintiff pled with particularity the circumstances constituting the Debtors’ fraudulent conduct. The Complaint alerts the Debtors to the “precise misconduct with which they are charged.” Durham v. Bus. Mgmt. Assocs., 847 F.2d 1505, 1511 (11th Cir. 1988) *(citation omitted)*. It does not appear beyond doubt Plaintiff can prove no set of facts in support of his claims. Debtors, with the exception of the Section 707(b) cause of action, have presented no basis for dismissal of the Second Amended Complaint pursuant to Rule 12(b)(6). All other dismissal requests in the Motions to Dismiss are due to be denied.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtors’ Motions to Dismiss Complaint (Doc. No. 24, 54) are hereby **DENIED** as to the Plaintiff’s causes of

action pursuant to Sections 523(a) and 727(a) of the Bankruptcy Code and **GRANTED** as to the Plaintiff's Section 707(b) cause of action; and it is further

ORDERED, ADJUDGED and DECREED that Plaintiff did not timely assert a cause of action against the Debtors pursuant to 11 U.S.C. Section 707(b) and the Section 707(b) cause of action is hereby **DISMISSED**; and it is further

ORDERED, ADJUDGED and DECREED that the Debtors request for an award of attorney's fees pursuant to 11 U.S.C. Section 707(b)(5)(A) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that any relief requested by Plaintiff pursuant to Title 18 of the United States Code is hereby **DENIED**; and it is further

ORDERED, ADJUDGED and DECREED that the Defendants Wellington Pierce Holdings, LLC, Wellington Pierce, Inc., WP Inspirational Advisors, Inc., Clean Dreams, LLC, and Digital Micron, Inc. are hereby **DISMISSED** as party defendants; and it is further

ORDERED, ADJUDGED and DECREED that Plaintiff and Debtors shall, within fourteen (14) days of the entry of this Order, shall submit to the Court a list of any discovery the parties require. Upon receipt of such lists the Court shall enter a scheduling order.

Dated this 13th day of June, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge