

ORDERED.

Dated: July 25, 2017



 Karen S. Jennemann
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
 MIDDLE DISTRICT OF FLORIDA
 ORLANDO DIVISION
www.flmb.uscourts.gov

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| In re |) | |
| |) | |
| MARK ANDREW MACQUARRIE, |) | Case No. 6:14-bk-13112-KSJ |
| |) | Chapter 7 |
| Debtors. |) | |
| _____ |) | |
| |) | |
| MARK ANDREW MACQUARRIE, |) | |
| |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Adversary No. 6:16-ap-00114-KSJ |
| |) | |
| JPMORGAN CHASE BANK, N.A., et. al, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

ORDER GRANTING MOTION TO DISMISS

This adversary proceeding was considered on the Defendant’s Motion to Dismiss Adversary Proceeding and the Debtor’s Response.¹ The Court will grant the Motion with prejudice as to Count II but allow the Debtor leave to amend his complaint as to Count I.

Rule 12(b)(6) provides that before an answer is filed a defendant may seek dismissal of a complaint if the complaint fails to state a claim.² Disposition of a motion to dismiss under Rule

¹ Doc. Nos. 8, 14.

12(b)(6) focuses only upon the allegations in the complaint and whether those allegations state a claim for relief. In reviewing a motion to dismiss, courts must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff.³ Under Rule 8(a)(2), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁴ Rule 8(a)(3) requires a “demand for the relief sought.”⁵ “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”⁶ For a complaint to survive a motion to dismiss, it must contain sufficient factual matter to “state a claim to relief that is plausible on its face.”⁷ Facial plausibility is present “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”⁸

Debtor filed this adversary complaint (“Complaint”) alleging violations of his Discharge issued in 2006 and later violations in connection with a second Discharge issued in 2015.⁹ These allegations stem from Defendant’s collection activities directed to the Debtor’s home and related to his home mortgage.

² Fed. R. Civ. P. 12(b)(6).

³ *Brophy v. Jiangbo Pharm., Inc.*, 781 F.3d 1296, 1301 (11th Cir. 2015) (quoting *Piedmont Office Realty Trust, Inc. v. XL Specialty Ins. Co.*, 769 F.3d 1291, 1293 (11th Cir. 2014) (quoting *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003))).

⁴ Rule (8)(a) is made applicable in adversary proceedings by virtue of Bankruptcy Rule 7008(a).

⁵ Fed. R. Civ. P. 8(a)(3).

⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal citations omitted).

⁷ *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citing *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).

⁸ *Id.*

⁹ The 2015 Discharge was entered on June 16, 2015. Case No. 6:14-bk-13112-KSJ, Doc. No. 33. The 2006 Discharge was entered on February 7, 2006. Case No. 6:05-bk-12671-KSJ, Doc. No. 15.

Debtor filed two bankruptcy cases—one in 2006 and one in 2014.¹⁰ In the earlier bankruptcy case filed in 2006, the Debtor entered into a reaffirmation agreement with Chase Home Finance LLC.¹¹ The reaffirmation agreement provided that the Debtor would continue to be personally liable for payment of the home mortgage even after the first Discharge issued in 2006.¹² Creditors, such as JPMorgan Chase, who hold reaffirmed debt may disregard the discharge and freely continue to collect outstanding debt because the Debtor remains personally liable. Because the Debtor reaffirmed the debt in his previous bankruptcy case, Debtor fails to state a cognizable claim for violation of the discharge.¹³ Chase was permitted to pursue collection against the Debtor, at least until another bankruptcy case was filed. Count II of the Complaint is dismissed with prejudice.

Debtor then filed his second bankruptcy case on December 1, 2014, and a Discharge issued on June 16, 2015.¹⁴ At that point, Chase arguably could have violated the second Discharge if they continued collection activities. The Court, however, could not find sufficient factual content in the Complaint that would allow it to draw the reasonable inference that the defendant is liable for any violation of the second Discharge issued in 2015. The single reference in the Complaint is that the Debtor received written demand letters for payment related to the home mortgage. But those letters were sent before the Discharge was entered and during the time that the Debtor's case was dismissed.¹⁵ In the Debtor's Response to the Motion to Dismiss, the Debtor alleges that he still receives these written demand letters "to this very day."¹⁶ If that is the case, the Debtor can allege those facts more clearly in an amended complaint. The Court finds it

¹⁰ Case No. 6:14-bk-13112-KSJ, Doc. No. 1, filed December 1, 2014. Case No. 6:05-bk-12761-KSJ, Doc. No. 1, filed October 6, 2005.

¹¹ Case No. 6:05-bk-12671-KSJ, Doc. No. 9.

¹² Case No. 6:05-bk-12671-KSJ, Doc. No. 9, ¶ 5.

¹³ *In re Ward*, 320 B.R. 760, 761–62 (Bankr. M.D. Fla. 2005) (discharge injunction protects a "debtor from *in personam* liability on a pre-petition debt **that has not been reaffirmed**") (emphasis supplied).

¹⁴ Case No. 6:14-bk-13112-KSJ, Doc. Nos. 1, 33.

¹⁵ Doc. No. 1, ¶ 22.

¹⁶ Doc. No. 14, ¶ 3.

appropriate to allow the Debtor the opportunity to allege specific violations of the 2015 Discharge. Count I is dismissed without prejudice.

Accordingly, it is

ORDERED:

1. The Motion to Dismiss Adversary Proceeding is **GRANTED**.
2. Count II is dismissed with prejudice.
3. Count I is dismissed without prejudice.
4. Debtor, Mark Andrew MacQuarrie, may file an amended complaint on or before **August 18, 2017**, listing specific violations occurring after the Discharge of June 16, 2015.
3. Defendant shall respond to the amended complaint, by **September 15, 2017**.
4. A pretrial conference is scheduled **at 2:45 p.m. on September 19, 2017**, in Courtroom A, 400 West Washington Street, Orlando, FL, 32801.

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Attorney, Andrew Zaron, is directed to serve a copy of this order on all interested parties and file a proof of service within three days of entry of the order.