

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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In re)	
)	
Sabastian L. Page,)	Case No. 6:18-bk-08011-KSJ
)	Chapter 7
Debtor.)	
)	
)	
Groundhog Enterprises, Inc.,)	
a Georgia corporation d/b/a Merchant Lynx)	
Services,)	
)	
Plaintiff,)	
)	
vs.)	Adversary No. 6:19-ap-00125-KSJ
)	
Sabastian L. Page,)	
)	
Defendant.)	
)	

**ORDER PARTIALLY GRANTING
AND PARTIALLY DENYING DEFENDANT’S MOTION TO DISMISS**

This adversary proceeding came before the Court to consider Defendant’s Motion to Dismiss Amended Complaint (Doc. No. 26) (“Motion”).¹ Groundhog Enterprises, Inc. (“Plaintiff”) filed this adversary proceeding against Sabastian Page (“Debtor” or “Defendant”)

¹ Plaintiff filed an Amended Memorandum of Law in Opposition to Defendant’s Motion to Dismiss (Doc. No. 28).

on April 8, 2019.² The Court dismissed this adversary proceeding without prejudice for Plaintiff's failure to state a claim upon which relief can be granted on December 13, 2019.³ Plaintiff timely filed an Amended Complaint⁴ claiming Defendant owes Plaintiff \$66,611.30 that is non-dischargeable under § 523(a)(2)(A) of the Bankruptcy Code⁵ and Defendant's discharge should be denied under § 727(a)(4) of the Bankruptcy Code. Defendant filed this renewed Motion to Dismiss claiming Defendant still does not state a claim under § 523(a)(2)(A) or § 727(a)(4). The Court finds dismissal is warranted on Plaintiff's § 727(a)(4) claim, but not on Plaintiff's § 523(a)(2)(A) claim.

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.⁶ Disposition of a motion to dismiss under Rule 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.⁷ 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."⁸ Rule 8(a)(3) requires a "demand for the relief sought."⁹ "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'

² Doc. No. 1.

³ Doc. No. 20. The Court gave Plaintiff thirty (30) days leave to file an amended complaint.

⁴ Doc. No. 24.

⁵ All references to the Bankruptcy Code refer to 11 U.S.C. § 101 *et seq.*

⁶ Fed. R. Civ. P. 12(b)(6).

⁷ *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))).

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

⁹ Fed. R. Civ. P. 8(a)(3).

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”¹⁰

For a complaint to survive a motion to dismiss, it must contain enough factual matter to “state a claim to relief that is plausible on its face.”¹¹ 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.”¹² Courts routinely allow amendments to complaints dismissed for failure to state a claim, particularly for *pro se* parties; however, when amendment is futile, dismissal with prejudice is merited.¹³

Plaintiff contracted with Defendant to provide merchant processing services for Defendant’s business, Page Elite, LLC (“Page Elite”).¹⁴ Plaintiff alleges that Defendant, through Page Elite, fraudulently charged customers for goods and services totaling \$18,229, which were never supplied. Defendant then allegedly used these monies for his personal use. Plaintiff simultaneously issued charge-backs to customers in the amount of \$18,229, which Page Elite never reimbursed to Plaintiff.¹⁵ Plaintiff filed a lawsuit against Page Elite in the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida and received a Final Default Judgment for \$66,611.30.¹⁶

¹⁰ *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).

¹¹ *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).

¹² *Id.*

¹³ *Dragash v. Fed. Nat’l Mortg. Ass’n*, No. 16-12123, 2017 WL 2859508, at *6 (11th Cir. July 5, 2017) (“Nor do we find error in the denial of leave to amend based on futility. While leave to amend ordinarily should be freely given, a district court need not grant even a *pro se* plaintiff leave to amend where amendment would be futile.”); *LaCroix v. W. Dist. of Kentucky*, 627 F. App’x 816, 819 (11th Cir. 2015), *cert. dismissed sub nom. LaCroix v. U.S. Dist. Court for W. Dist. of Kentucky*, 136 S. Ct. 996, 194 L. Ed. 2d 2 (2016) (the court “need not allow amendment where a more carefully drafted complaint could not state a claim and is, therefore, futile”).

¹⁴ See Doc. No. 24. Defendant is the managing and sole member of Page Elite.

¹⁵ *Id.* Page Elite was required to reimburse Plaintiff for charge-backs issued for disputed transactions.

¹⁶ See Final Default Judgment, Case No. 2017-CA-005461-O.

The court finds Plaintiff states a plausible claim for relief under § 523(a)(2)(A) of the Bankruptcy Code. Accepting all of the allegations as true, it is plausible that Defendant intended to defraud Plaintiff by falsely charging customers, asking Plaintiff to issue simultaneous charge-backs, but personally pocketing the money and not repaying Plaintiff. The totality of the circumstances surrounding Defendant's personal use of \$18,299 charged to customers for good and services is highly suspect.

The Court conversely concludes Plaintiff failed to state a claim for relief under § 727(a)(4) of the Bankruptcy Code. § 727(a)(4) of the Bankruptcy Code allows for denial of a debtor's discharge where the debtor "knowingly and fraudulently, *in or in connection with the case* . . . made a false oath or account . . . [or] gave, offered, received, or attempted to obtain money . . . for acting or forbearing to act."¹⁷ Plaintiff does not allege that Defendant acted fraudulently during this bankruptcy case or in connection with this bankruptcy case. Instead, Plaintiff's allegations pertain to Defendant's actions taken more than two years before filing for Chapter 7 relief on December 28, 2018.

In conclusion, Defendant's Motion is partially granted and partially denied. Plaintiff states a claim for relief under § 523(a)(2)(A) of the Bankruptcy Code, but not under § 727(a)(4) of the Bankruptcy Code. Accordingly, it is

ORDERED:

1. The Motion (Doc. No. 26) is **partially granted and partially denied**.

¹⁷ 11 U.S.C. § 727(a)(4)(emphasis added).

2. The Motion is **granted** as to Plaintiff's § 727(a)(4) claim. Any request by the Plaintiff to deny the Debtor a discharge is dismissed with prejudice.
3. The Motion is **denied** as to Plaintiff's § 523(a)(2)(A) claim.
4. The Discharge entered in the main case on April 9, 2019 (Doc. No. 10) is valid and enforceable.
5. Defendant shall file an answer to Plaintiff's § 523(a)(2)(A) claim by **May 22, 2020**.
6. A pre-trial conference is scheduled for **11:00 a.m. on July 29, 2020**, in Courtroom A on the Sixth Floor, 400 W. Washington Street, Orlando, Florida, 32801.

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Attorney, Michael P. Kelton, is directed to serve a copy of this order on all interested parties who are non-CM/ECF users and file a proof of service within three days of entry of the order.