

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

In re:

Case No. 3:09-bk-3381-PMG

HOWARD SHANE SHAFER,

Debtor.

Chapter 11

FIRST GUARANTY BANK AND TRUST
COMPANY OF JACKSONVILLE,

Plaintiff,

vs.

Adv. No. 3:09-ap-446-PMG

HOWARD SHANE SHAFER,

Defendant.

ORDER ON MOTION TO DISMISS COUNTERCLAIM

THIS CASE came before the Court for hearing to consider the Motion to Dismiss Counterclaim or for a More Definite Statement as to Counts II and IV filed by the Plaintiff, First Guaranty Bank and Trust Company of Jacksonville.

The Plaintiff commenced this action by filing a Complaint against the Debtor, Howard Shane Shafer, to deny the Debtor's discharge pursuant to §727(a)(4)(A) and §727(a)(4)(C) of the Bankruptcy Code.

The Debtor subsequently filed an Answer, Affirmative Defenses and Counterclaim to the Complaint. The Counterclaim contains four Counts: (1) an action for damages for violation of the Truth in Lending Act; (2) an action for violation of Florida's Deceptive and Unfair Trade Practices Act; (3) an action for damages for violation of the automatic stay; and (4) an action for damages for violation of Florida's Consumer Collection Practices Act.

In the Motion presently before the Court, the Plaintiff asks the Court to dismiss the Counterclaim in its entirety.

Background

The Debtor and his non-debtor wife, Jessica Shafer, are co-owners of an entity known as First Coast Contractors. (Main Case, Doc. 1, Schedule I).

On July 6, 2005, the Debtor and his wife entered into a Mortgage for Use with Secured Revolving Credit Agreement with the Plaintiff. (Doc. 1, Composite Exhibit A). Pursuant to the Agreement, the Plaintiff obtained a mortgage on the Debtor's property located at 2520 Marlin Court, Middleburg, Florida, in an amount not to exceed \$400,000.00.

On March 10, 2006, the Debtor and his wife entered into an additional Mortgage agreement with the Plaintiff. (Doc. 1, Composite Exhibit A). Pursuant to the agreement dated March 10, 2006, the Plaintiff obtained a mortgage on the Debtor's property located at 2520 Marlin Drive, Middleburg, Florida, in an amount not to exceed \$150,000.00.

On August 22, 2006, and March 7, 2007, the Debtor and his wife, as borrowers, and the Plaintiff, as lender, entered into Mortgage Modification Agreements related to the Mortgages dated July 6, 2005, and March 10, 2006. (Doc. 1, Composite Exhibit A).

The Debtor subsequently defaulted under the Mortgage, and in March of 2009, the Plaintiff obtained a Summary Judgment of Foreclosure against the Debtor and his wife in the Circuit Court of Clay County, Florida, in the total amount of \$592,928.98. (Doc. 1, Exhibit B).

On April 29, 2009, the Debtor filed a petition under Chapter 11 of the Bankruptcy Code. On his petition and Schedule A, the Debtor listed the property located at 2520 Marlin Court as his residence. (Main Case, Doc. 1).

On May 8, 2009, the Plaintiff filed a Motion for Relief from Stay in the Debtor's Chapter 11 case. In the Motion, the Plaintiff requested permission to proceed with its foreclosure action in state court. (Main Case, Doc. 17).

A final evidentiary hearing on the Plaintiff's Motion was scheduled for June 29, 2009.

On June 29, 2009, the same day as the final evidentiary hearing, the Debtor filed a Chapter 11 Plan of Reorganization. (Main Case, Doc. 31). In the Plan, the Debtor proposed to value his interest in the Marlin Court property at \$386,000.00, and to "pay the valuation amount as a re-amortized first mortgage, together with interest at the rate of 4.5%, in equal monthly installments over a period of 360 months."

According to the Plaintiff, the Debtor testified at the final evidentiary hearing on June 29 that he no longer resided at the Marlin Court property, that he was attempting to rent the property to fund his Chapter 11 plan, and that he had resided at separate property owned by his wife in Green Cove Springs, Florida, since March or early April of 2009. (Doc. 1, Paragraphs 16, 17). The Debtor admitted testifying as alleged by the Plaintiff, "subject to verification by the official court record." (Doc. 14).

The Plaintiff subsequently filed the Complaint that commenced this adversary proceeding. In the Complaint, the Plaintiff alleges that the Debtor's proposed Plan violates §1123(b)(5) of the Bankruptcy Code, and that the Debtor made false statements under oath at the hearing on June 29 in order to advance the Plan. (Doc. 1, Paragraph 29). Specifically, the Plaintiff alleges that the Debtor continues to reside at the Marlin Court property, contrary to his testimony at the hearing. (Doc. 1, Paragraphs 23, 27, 28). Consequently, the Plaintiff seeks the entry of a judgment denying the Debtor's discharge pursuant to §727(a)(4)(A) of the Bankruptcy Code, based on the Debtor's false oath or account, and pursuant to §727(a)(4)(C) of the Bankruptcy Code, based on the Debtor's fraudulent attempt to obtain an advantage in his Chapter 11 case.

The Counterclaim and Motion to Dismiss

The Debtor filed a four-Count Counterclaim against the Plaintiff, and the Plaintiff has filed a Motion to Dismiss the Counterclaim in its entirety.

1. Count I of the Counterclaim is an action for damages for violation of the federal Truth in Lending Act. Generally, the Debtor acknowledges that it entered a series of Mortgage agreements with the Plaintiff, but asserts that the Plaintiff did not make the disclosures required by the Act prior to concluding the transactions. (Doc. 14, Paragraphs 16, 17). Consequently, the Debtor seeks an award of damages pursuant to 15 U.S.C. §1640.

The Plaintiff contends that Count I should be dismissed, because it is barred by the one-year statute of limitations set forth in 15 U.S.C. §1640(4)(e). The Plaintiff recognizes that an exception to the limitations period exists for certain actions that are brought as defenses to collection suits, but asserts

that the exception does not apply in cases where the underlying action is an action to deny the Debtor's discharge.

2. Count II of the Counterclaim is an action for a declaration that the Plaintiff's conduct constitutes a deceptive and unfair trade practice within the meaning of §501.203 of the Florida Statutes. Specifically, the Debtor asserts that the Plaintiff failed to make material disclosures in connection with the Mortgage, and granted credit to him when there was no reasonable expectation for repayment, among other unfair practices. (Doc. 14, Paragraphs 40-43).

The Plaintiff contends that Count II of the Counterclaim should be dismissed because Florida's Deceptive and Unfair Trade Practices Act does not apply to entities regulated by the Office of Financial Regulation. Since it is regulated by the Office, the Plaintiff contends that Count II fails to state an actionable claim against it under the Act.

3. Count III of the Counterclaim is an action for damages for violation of the automatic stay. Specifically, the Debtor asserts that the Plaintiff violated the stay by performing a "site check" of his residence while the Chapter 11 case was pending in an attempt to obtain control over the property.

The Plaintiff contends that Count III of the Counterclaim should be dismissed because the purpose of the "site check" was only to test the truthfulness of the Debtor's testimony, and not to exercise control over his property.

4. Count IV of the Counterclaim is an action for damages for violation of Florida's Consumer Collection Practices Act. The Debtor alleges that the Plaintiff disclosed information regarding the Debtor's reputation to a private investigator in violation of the Act.

The Plaintiff contends that Count IV should be dismissed because the Debtor did not identify the information that was allegedly disclosed, and because the Plaintiff had a legitimate business need to communicate with the private investigator.

Discussion

Although the Plaintiff in this case does not specifically recite Rule 12(b)(6) as the basis for its Motion to Dismiss, it appears that the Plaintiff essentially asserts that the Counterclaim should be dismissed because it fails to state a claim upon which relief can be granted.

Generally, a motion to dismiss a counterclaim is evaluated under the same standard as a motion to dismiss a complaint. New Jersey Steel Corporation v. Bank of New York, 1997 WL 716911, at 1 (S.D.N.Y.).

In evaluating a motion to dismiss under Rule 12(b)(6), the Court must accept the claimant's factual allegations as true and construe them in the light most favorable to the claimant. In re Bill Heard Enterprises, Inc., 406 B.R. 98, 102 (Bankr. N.D. Ala. 2009).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009)(quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "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, 129 S.Ct. at 1949(citing Bell Atlantic Corp. v. Twombly, 550 U.S. at 556). In other words, the relevant question for purposes of a motion to dismiss under Rule 12(b)(6) is "whether, assuming the factual allegations are

true, the plaintiff has stated a ground for relief that is plausible." Ashcroft v. Iqbal, 129 S.Ct. at 1959(quoted in In re Bill Heard Enterprises, Inc., 406 B.R. at 102).

In applying the Twombly standard to the Counterclaim in this case, the Court finds that the Plaintiff's Motion to Dismiss should be denied. With respect to Count I, for example, the Court cannot determine from the record whether a claim based on the Truth in Lending Act should be barred as a matter of law by the statute of limitations set forth in 15 U.S.C. 1640, if it is brought in response to an action to deny a debtor's discharge. (See Doc. 24, pp. 2-6). Additionally, with respect to Count II, the Court cannot determine from the record whether Florida's Deceptive and Unfair Trade Practices Act applies to the Plaintiff in its capacity as a mortgage lender to the Debtor. (See Doc. 24, pp. 6-9). Finally, with respect to Counts III and IV, the Plaintiff has primarily raised only factual disputes that should be developed through discovery or further proceedings.

In summary, assuming that all of the factual allegations in the Counterclaim are true, the Court finds that the Debtor has stated grounds for relief that are plausible under the standard set forth in Twombly. The Plaintiff's Motion to Dismiss should be denied, without prejudice to the Plaintiff's right to renew its challenge to the Counterclaim at any time in this proceeding.

Accordingly:

IT IS ORDERED that the Motion to Dismiss Counterclaim or for a More Definite Statement as to Counts II and IV filed by the Plaintiff, First Guaranty Bank and Trust Company of Jacksonville, is denied, without prejudice.

DATED this 9 day of March, 2010.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
Chief Bankruptcy Judge