

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

In re:

BEN H. WILLINGHAM, JR.,

Case No.: 3:11-bk-1002-JAF

Debtor.

ABDULLAH M. AL-RAYES;
ENTERPRISE PROPERTIES, INC.;
RANGER INVESTMENTS, INC.;
RANGER-KENMAR, INC.;
ESSEX INVESTMENTS, INC.; and
ESSEX-TRIANGLE, INC.,

Adv. Pro. No. 3:11-ap-269-JAF

Creditors/Plaintiffs,

v.

BEN H. WILLINGHAM, JR.,

Debtor/Defendant.

**ORDER GRANTING IN PART MOTION TO DISMISS COMPLAINT AND GRANTING
IN PART PLAINTIFFS' MOTION TO STRIKE**

This proceeding came before the Court on Debtor/Defendant Ben H. Willingham, Jr.'s ("Defendant") Motion to Dismiss Complaint Objecting to Dischargeability of Debt and Discharge of Debtor (Doc. 5, Motion to Dismiss; *see also* Doc. 1, Complaint). Plaintiffs filed a response in opposition to the Motion to Dismiss (Doc. 8). Subsequently, Defendant filed a Reply brief to Plaintiff's response in opposition (Doc. 10), which Plaintiff moves to strike as untimely filed (Doc. 11, Motion to Strike).

For the reasons set forth herein, Defendant's Motion to Dismiss (Doc. 5) will be granted in part and the Motion to Strike (Doc. 11) will be granted in part.

Background

On February 17, 2011, Defendant filed a voluntary Chapter 7 Petition (the “Petition”) under 11 U.S.C § 301, thereby commencing Case No. 3:11-bk-1002-JAF. Prior to filing the Petition, on March 15, 2007, the United States District Court for the Middle District of Florida, in Case No. 3:06-cv-362-J-34JRK, entered a Consent Judgment in favor of Plaintiffs and against Defendant in the amount of \$25,707,605.00 (Doc. 1, Ex. A) (the “District Court Litigation”). In the District Court Litigation, Plaintiffs alleged claims against Defendant and others for, *inter alia*, fraud pursuant to federal and state Racketeer Influenced and Corrupt Organizations (“RICO”) statutes. The Consent Judgment explicitly states that it was entered “without concession on the part of Ben H. Willingham, Jr. to the merits of the claims” asserted against him (Doc. 1, Ex. A).

Plaintiffs filed the instant Adversary Proceeding objecting to discharge and/or to except from discharge Defendant’s Consent Judgment debt, *supra*, under section 523 of the Bankruptcy Code¹ (Doc. 1 at 1-5). Plaintiffs also object generally, under section 727 of the Bankruptcy Code, to any discharge (Doc. 1 at 1-5).

In the Complaint (Doc. 1), Plaintiffs maintain that, subsequent to the filing of the Chapter 7 Petition, they discovered the Schedules and Statement of Financial Affairs filed by Defendant in the underlying bankruptcy case were not accurate. More particularly, Plaintiffs allege Defendant’s Schedules failed to list various assets including, but not limited to: an antique watch; an equity membership interest in a golf country club; and golf clubs (Doc. 1 at 3; *see also* Doc. 7, Case No. 3:11-bk-1002-JAF).²

¹ Unless otherwise indicated, reference to the Bankruptcy Code herein shall mean Title 11 of the United States Code.

² Defendant amended his Schedules to reflect these items subsequent to the filing of the Complaint (*see* Doc. 30, Case No. 3:11-bk-1002-JAF).

In addition, Plaintiffs state Defendant failed to disclose certain creditors who have obtained unsatisfied judgments against him (Doc. 1 at 3). Plaintiffs also claim Defendant has received over sixty (60) wire transfers, purportedly from an off-shore bank account in Switzerland held by his wife (which Plaintiffs maintain is nevertheless controlled by Defendant) (Doc. 1 at 3-4). Plaintiffs further claim that, at various times, said Swiss bank account was funded with ill-gotten gains derived from the alleged underlying fraudulent scheme perpetrated by Defendant (Doc. 1 at 3-4). Plaintiffs maintain such funds have been transferred in an effort to hinder, delay, or defraud Defendant's creditors (Doc. 1 at 3-4). Moreover, Plaintiffs assert that Defendant's Statement of Affairs failed to disclose the identity of Defendant's accountant, who is alleged to be in possession of the only existing financial records of Defendant (as Defendant apparently testified to shredding all of his copies of such records) (Doc. 1 at 4).

In response to the Complaint, Defendant filed the instant Motion to Dismiss (Doc. 5), arguing the Complaint is due to be dismissed on grounds of *res judicata* and collateral estoppel, and because it "fails to plead fraud with sufficient specificity or with plausibility" (Doc. 5 at 2-3).

Motion to Dismiss Standard

A motion to dismiss pursuant to Rule 12(b) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. When evaluating whether a plaintiff has stated a claim, a court must determine whether the complaint satisfies Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." To survive a Rule 12(b) motion, the complaint must contain enough factual matter (taken as true) to "raise [the] right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[N]aked

assertions devoid of further factual enhancement” will not satisfy Rule 8(a)(2)’s requirement of a short plain statement of the claim showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted). A “formulaic recitation of the elements of a cause of action will not do.” *Id.* Thus, a plaintiff must plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged.” *Twombly*, 550 U.S. at 555.

Further, on a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, courts must view the complaint in the light most favorable to the plaintiff. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir. 2003). A complaint may not be dismissed under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief.” *Lopez v. First Union Nat’l Bank*, 129 F.3d 1186, 1189 (11th Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). On a motion to dismiss, courts are to limit their considerations to the pleadings and exhibits attached thereto. *GSW v. Long County, Ga.*, 999 F.2d 1508, 1510 (11th Cir. 1993).

Discussion

I. Motion to Strike

In the Motion to Strike (Doc. 11), Plaintiffs request the Court to strike Defendant’s Reply brief to their response in opposition to the Motion to Dismiss (Doc. 10) as untimely filed. This Court’s Procedures Order (Doc. 3) provides that the deadline for movants to file and serve any reply memorandum or brief is no later than seven (7) days from the date of service of the opposing legal memorandum.

Here, Plaintiffs’ response in opposition to the Motion to Dismiss (Doc. 8) was served on June 14, 2011. Consequently, the deadline for Defendant to file and serve any reply

memorandum or brief was June 21, 2011 (*see* Doc. 3). Defendant's Reply brief (Doc. 10) was served on July 12, 2011. As such, the document was filed nearly one month after Plaintiffs' response in opposition was filed; thus, it is clearly untimely.

Pursuant to Rule 7012(f) of the Federal Rules of Bankruptcy Procedure, the Court may strike from the record any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. In accordance therewith, Plaintiffs urge the Court to strike Defendant's Reply brief (Doc. 11). In the Reply brief, however, Defendant withdraws his *res judicata* and collateral estoppel arguments made in support of the Motion to Dismiss (Doc. 10 at 1). Accordingly, the Court will accept those portions of the Reply brief which withdraw Defendant's *res judicata* and collateral estoppel arguments, and will grant Plaintiffs' motion as to the remainder of the document. Thus, the Motion to Strike (Doc. 11) is granted in part.

II. Motion to Dismiss

A. Count I

Count I of Plaintiffs' Complaint seeks a determination of non-dischargeability of the Consent Judgment debt of \$25,707,605.00 pursuant to section 523(a)(2)(A) of the Bankruptcy Code (Doc. 1 at 1-5). Section 523(a)(2)(A) provides that a discharge will not be granted for any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A).

With respect to Count I, the Court finds it is due to be dismissed, without prejudice, as a shotgun pleading.

To illustrate, Rule 9(b), made applicable by Rule 7009 of the Federal Rules of Bankruptcy Procedure, requires a party alleging fraud to "state with particularity the

circumstances constituting fraud. . . .” Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009. Malice, intent, knowledge, and other conditions of a person’s subjective intent, however, “may be alleged generally.” Fed. R. Civ. P. 9(b). Nevertheless, to state a claim under section 523(a)(2)(A), a plaintiff must allege facts that plausibly support: (1) the debtor made a false representation with the purpose and intention of deceiving the creditor; (2) the creditor relied on the debtor’s representation; (3) the creditor’s reliance was justifiable; and (4) the creditor was damaged as a result of the false statement(s). *Citizens First Nat’l Bank v. Hunter (In re Hunter)*, 229 B.R. 851, 858 (Bankr. M.D. Fla. 1999).

In support of their claims in this regard, Plaintiffs state: “[a]s set forth in Plaintiffs’ First Amended Complaint in the District Court Litigation, the acts intentionally undertaken by the Debtor/Defendant to defraud Plaintiffs . . . all constitute fraud within the meaning of section 523(a)(2)” (Doc. 1 at 4). Attached as an exhibit to the Complaint is the First Amended Complaint in the District Court Litigation (Doc. 1, Ex. B). This document is sixty (60) pages in length, contains 313 individually numbered paragraphs, and asserts twenty-two (22) separate counts against eighteen (18) individually named defendants, including Ben H. Willingham, Jr., and ten (10) John Doe defendants (Doc. 1, Ex. B). For the factual basis in support of Count I, Plaintiffs incorporate by reference the entire complaint from the District Court Litigation. This manner of pleading is condemned by the courts because “it becomes impossible to determine the factual basis of each claim.” *Corbitt v. Home Depot U.S.A.*, 573 F.3d 1233 (11th Cir. 2009).

As was so aptly put by the court in *Chaires v. N. Fla. Nat. Bank*:

each succeeding count [of the complaint] incorporated by reference not only the paragraphs contained in the complaint’s preliminary allegations but also *all* of the paragraphs contained in each of the preceding counts. Such is improper. By the time the beleaguered reader gets to the fifth count, he [or she] is having to cope with presumably five causes of action asserted in one count. This practice is an

unnecessary hindrance to trial courts' efforts to determine the facial validity of the various causes being asserted and serves only to confuse and delay.

432 So.2d 183, 185 (Fla. Dist. Ct. App. 1983) (*emphasis in original*).

Based on the foregoing, Count I of the complaint will be dismissed without prejudice with leave to file an amended complaint. In any amended complaint, Plaintiffs must support their fraud-based claims with facts specifically alleged against Defendant.

B. Count II

With respect to Count II of the Complaint, Section 727 of the Bankruptcy Code provides in pertinent part:

The court shall grant the debtor a discharge, unless—

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

11 U.S.C. § 727(a).

As an initial matter, the Court would note that, in support of Count II, Plaintiffs again incorporate by reference Plaintiffs' First Amended Complaint in the District Court Litigation (Doc. 1 at 4, ¶¶ 6, 15). As noted above, to the extent Plaintiffs incorporate the complaint from the District Court Litigation into the instant Complaint, such is improper, and will not be considered by the Court. Furthermore, Plaintiffs' incorporation by reference of the First Amended Complaint in the District Court Litigation is stricken from Count II.³

Plaintiffs, however, additionally allege facts within the Complaint which, if accepted as true, state a plausible claim for relief under section 727 (*see* Doc. 1 at 3-4). More particularly, Plaintiffs maintain that, subsequent to the filing of the Chapter 7 Petition, they discovered the Schedules and Statement of Financial Affairs filed by Defendant in the underlying bankruptcy case were not accurate (Doc. 3-4). In this regard, Plaintiffs allege Defendant: (1) failed to list various assets; (2) failed to disclose certain creditors who have obtained unsatisfied judgments against him; and (3) failed to disclose the identity of Defendant's accountant, who is allegedly in possession of the only existing financial records of Defendant (Doc. 1 at 3-4). Such allegations sufficiently state a claim pursuant to section 727(a)(2)(B) and (a)(4)(A).

³ Should Plaintiffs file an amended complaint, they are permitted to assert any additional facts they believe support Count II.

Plaintiffs also assert Defendant has received over sixty (60) wire transfers, purportedly from an off-shore bank account in Switzerland controlled by Defendant, that were made in an effort to hinder, delay, or defraud Defendant's creditors (Doc. 1 at 3-4). Such allegations are sufficient to state a plausible claim under section 727(a)(2)(B) and (a)(5). Plaintiffs further assert that Defendant has shredded all of his copies of financial records, and that he failed to disclose the name of his accountant who holds the only surviving records (Doc. 1 at 4). These facts are sufficient to state a claim under section 727(a)(3).

According to the Eleventh Circuit Court of Appeals, a debtor's knowing and fraudulent omission of assets or information necessary to determine his financial condition is sufficient to bar a discharge under section 727. *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir. 1984). "All assets are to be listed even if some assets are believed to be 'valueless at the time.'" *Id.*

The recalcitrant debtor may not escape a section 727(a)(4)(A) denial of discharge by simply asserting that the admittedly omitted or falsely stated information concerned a worthless business relationship or holding. Such a defense is specious. It is immaterial whether he intends to injure his creditors when he makes a false statement. Creditors are entitled to judge for themselves what will benefit, and what will prejudice them.

Id. (internal citations and quotations omitted).

As Plaintiffs have asserted facts that support a plausible claim under section 727 of the Bankruptcy Code, Defendant's Motion to Dismiss Count II of the Complaint is denied.

Conclusion

Based on the foregoing, the Court finds the incorporation by reference of the First Amended Complaint in the District Court Litigation is wholly inappropriate and contravenes the rules of pleading. Thus, Count I of the Complaint is dismissed without prejudice with leave to file an amended complaint. Count II of the Complaint, however, alleges enough factual matter,

if accepted as true, to state a cause of action pursuant to section 727 of the Bankruptcy Code.

Therefore, Count II will not be dismissed; however, those portions of Count II which incorporate by reference the First Amended Complaint in the District Court Litigation are stricken from Count II. Defendant's Reply brief (Doc. 10) will be stricken as untimely, except those portions of the Reply brief which abandon Defendant's *res judicata* and collateral estoppel arguments will be accepted.

Accordingly, it is **ORDERED**:

1. Debtor/Defendant Ben H. Willingham, Jr.'s Motion to Dismiss Complaint Objecting to Dischargeability of Debt and Discharge of Debtor (Doc. 5) is granted in part as provided herein. Plaintiffs shall have until **October 14, 2011** within which to file an amended complaint.
2. Plaintiffs' motion to strike Defendant's Reply brief to Plaintiff's response in opposition to the Motion to Dismiss (Doc. 11) is granted in part as provided herein.

DATED this 28th day of September, 2011 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge

Copies to:

Kenneth B. Jacobs, Counsel for Plaintiffs, and
Mike E. Jorgensen, Counsel for Defendant