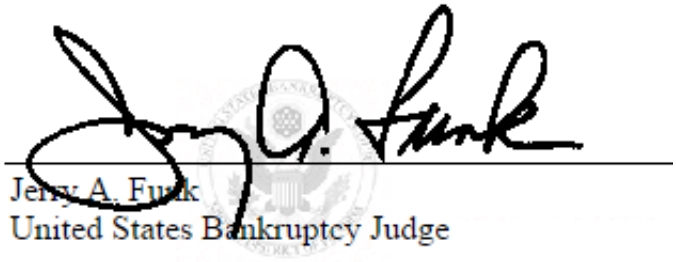
ORDERED.

Dated: February 06, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

KYUNG SEON LEE,

Debtor,
_____/

Case No. 3:14-bk-1679-JAF
Chapter 11

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2006-OPTS, ASSET-BACKED CERTIFICATES SERIES 2006-OPTS,

Plaintiff,
v.

KYUNG SEON LEE,

Defendant.
_____/

Adv. No. 3:16-ap-0098-JAF

ORDER DENYING DEFENDANT KYUNG SEON LEE'S
MOTION TO DISMISS, WITH PREJUDICE, THE AMENDED COMPLAINT

This proceeding is before the Court on: 1) Defendant KYUNG SEON LEE'S (the "Debtor") Motion to Dismiss the Amended Complaint *with* prejudice (Doc. 22); 2) Debtor's request for fees pursuant to 28 U.S.C. § 1927 (Doc. 22 at 19); and 3) Plaintiff's DEUTSCHE

BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2006-OPTS, ASSET-BACKED CERTIFICATES, SERIES 2006-OPTS ("Deutsche Bank") Response to the Motion to Dismiss the Amended Complaint (Doc. 23). For the reasons stated herein, Debtor's Motion to Dismiss and request for fees is denied without prejudice to Debtor raising the same arguments and affirmative defenses at an appropriate time.

Background

On April 9, 2014, Debtor filed a voluntary Chapter 11 petition. (Doc. 1 in 3:14-bk-1679).[1] Deutsche Bank is a creditor in the bankruptcy case. Almost a year later, on April 6, 2015, Debtor filed a proof of claim on behalf of Deutsche Bank, which the Clerk's Office designated as Claim 5-1. On April 7, 2015, the Clerk's Office served noticed of Debtor's proof of claim, on Deutsche Bank. (Doc. 51 in 3:14-bk-1679). Claim 5-1 was a secured claim in the amount of $180,823.42. (Doc. 51 in 3:14-bk-1679). On June 12, 2015, Debtor filed a proposed Chapter 11 reorganization plan, which provided for payment of Deutsche Bank's secured claim over 30 years and identified the claim as unimpaired. (Doc. 62 in 3:14-bk-1679).

On November 6, 2015, Debtor filed, and served on Deutsche Bank, an 11 U.S.C. § 1129(b) motion seeking confirmation by "cramdown" based on Deutsche Bank's non-acceptance of the proposed plan. (Doc. 94 in 3:14-bk-1679). No response to the § 1129(b) motion was filed by Deutsche Bank. A hearing was held on December 8, 2015, but no appearance was made on behalf of Deutsche Bank. On December 18, 2015, the Court granted the Debtor's § 1129(b) motion. (Doc. 142 in 3:14-bk-1679). On February 18, 2016, the Court confirmed Debtor's Chapter 11 plan of reorganization (the "Confirmation Order"). (Doc. 145 in 3:14-bk-1679). The Confirmation

[1] Case No. 3:14-bk-01679 is the underlying bankruptcy case. All citations to the record containing this case number refer to documents filed in the underlying bankruptcy case; whereas, all citations to the record without a case number refer to documents filed in the instant adversary proceeding.

Order found that Deutsche Bank was unimpaired and would receive full satisfaction of its secured claim. (Doc. 145 in 3:14-bk-1679, at 5). Then, on March 29, 2016, Deutsche Bank filed an amended proof of claim asserting a secured claim of $669,933.18, which the Clerk's Office designated as Claim 5-2.

On April 15, 2016, Deutsche Bank filed a complaint, initiating this adversary proceeding and seeking to revoke the Confirmation Order, pursuant to 11 U.S.C. § 1144. (Doc. 1). Subsequently, Deutsche Bank filed an amended complaint (the "Amended Complaint"). (Doc. 20). Specifically, the Amended Complaint alleges "[Debtor] perpetrated materially false misrepresentations in regard to the total debt owed on Plaintiff's claim when [Debtor] filed a Plan of Reorganization listing Plaintiff's claim as unimpaired, and a Proof of Claim totaling nearly $500,000.00 less than the actual total indebtedness." (Doc. 20 ¶ 18). Debtor then filed the instant motion to dismiss, pursuant to Rule 12(b)(6) and Bankruptcy Rule 7012.

Debtor's motion to dismiss contends that Deutsche Bank failed to litigate the issues of total indebtedness in the main bankruptcy case and is simply trying to get another bite at the apple. (Doc. 22). Or, put differently, that res judicata and collateral estoppel foreclose this adversary proceeding. (Doc. 22). Debtor also alleges bad faith by Deutsche Bank in bringing this proceeding and seeks fees/costs pursuant to 28 U.S.C. § 1927. (Doc. 22 ¶¶ 23-24).

Deutsche Bank filed a response, arguing that res judicata and collateral estoppel are not defenses that may be raised in a Rule 12(b)(6) motion and that the Amended Complaint meets the Rule 9(b) particularity requirements in that it contains sufficient allegations for Debtor to form a response to the Amended Complaint.

The standard for dismissal under Rule 12(b)(6)

A motion brought under Rule 12(b)(6)[2] challenges the sufficiency of the allegations in the complaint. Fed. R. Civ. P. 12(b)(6). In ruling on such a motion, the Court must accept all allegations as true and construe them in a light most favorable to the plaintiff. McCone v. Pitney Bowes, Inc., 582 F. App'x 798, 799-800 (11th Cir. 2014). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted). The complaint must "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

"[A] court may consider the factual allegations in the complaint, documents attached to the complaint as an exhibit or incorporated therein by reference, matters of which judicial notice may be taken . . . ." In re XO Commc'ns., Inc., 330 B.R. 394, 418 (Bankr. S.D.N.Y. 2005). "Thus, where the motion to dismiss is premised on a defense of res judicata—as is true in the case at hand—the court may take into account the record in the original action." Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 51 (1st Cir. 2008); see also Universal Express, Inc. v. U.S. Sec. & Exch. Comm., 177 F. App'x 52, 53 (11th Cir. 2006) (holding that a court may take judicial notice of court records). However, "[t]he prohibition against going outside of the facts alleged in the complaint protects against a party being caught by surprise when documents outside the pleadings are presented at that early stage." Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1279 (11th Cir. 1999).

[2] Federal Rule of Civil Procedure 12(b) is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7012.

Analysis

The narrow legal question raised here is whether a § 1144 claim has been sufficiently alleged by Deutsche Bank. Section 1144 of the Bankruptcy Code provides: "On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud." 11 U.S.C. § 1144; Fed. R. Bankr. 9024.

"Fraud is the only ground available for revocation of the confirmation order. The purpose of this limitation is to promote the finality of the confirmation order, which is normally res judicata and which is relied upon by the debtor and other parties in the case." In re Surfside Resort & Suites, Inc., 344 B.R. 179, 189 (Bankr. M.D. Fla. 2006). In other words, while a confirmation order "is normally res judicata," proof of actual fraud in the procurement of that order allows the Court to unbind the preclusive effect of a confirmation order. See id. Res judicata and collateral estoppel do not apply to a confirmation order in the face of actual fraud, subject to the sound discretion of the Court. Id. at 190 ("[T]he Court notes that '[r]elief under § 1144 is discretionary; the Court may, but need not, revoke the confirmation order if it finds fraud.'").

Rule 9(b)[3] requires a party alleging fraud to state with particularity the circumstances constituting fraud; though, malice, intent, and other conditions of a person's mind "may be alleged generally." Fed. R. Civ. P. 9(b). "Rule 9(b) is satisfied if 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, (3) the content of such statements and the manner

[3] Federal Rule of Civil Procedure 9(b) is made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7009.

in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.'" In re Maier, 498 B.R. 340, 345 (Bankr. M.D. Fla. 2013) (quoting Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001)).

Here, Debtor's chief argument is that res judicata and collateral estoppel foreclose Deutsche Bank's § 1144 proceeding. Attendant to this, Debtor argues the alleged misrepresentations do not demonstrate actual fraud, fraudulent intent, and reliance by the Court in the procurement of the Confirmation Order. (Doc. 22). Because these two preclusion defenses do not apply when actual fraud is found, Debtor's argument is, more accurately, a simple contention that fraud was not sufficiently alleged and/or does not exist under these circumstances.

Paragraphs 18-21 of the Amended Complaint allege specific misrepresentations, made to the Court by Debtor, in the procurement of the Confirmation Order. (Doc. 20 ¶¶ 18-21). Deutsche Bank alleges Debtor knowingly misrepresented her total indebtedness (understating it by approximately $500,000) and misrepresented the proposed plan's impairment of Deutsche Bank's secured claim when Debtor filed a proof of claim on Deutsche Bank's behalf. (Doc. 20 ¶¶ 18-19). Taking the misrepresentation and its falsity as true, fraudulent intent in procuring the Confirmation Order can be inferred even if this Court is unlikely to make such a finding in the final instance. See, e.g., In re May, 12 B.R. 618, 626-27 (N.D. Fla. 1980) ("Such intent may be proved, of course, by circumstantial evidence. Indeed, such proof is usually the only means by which the required mental element may be established."). Lastly, Deutsche Bank alleges the Court relied on these misrepresentations in rendering the Confirmation Order, which is at least "facially plausible" when taking all the allegations as true. (Doc. 20 ¶¶ 20-21); Iqbal, 556 U.S. at 678. Therefore, all requirements of Rule 9(b) have been satisfied. Maier, 498 B.R. at 345.

Debtor, however, contends that Deutsche Bank's allegation of "fraud" is nothing more than a fact-dispute that should have been raised during the underlying confirmation process. While this point is well-taken, Debtor's argument ignores two additional points: first, the question of fraud was not litigated in the underlying confirmation process and, second, actual fraud (if proven true) may unravel the preclusive finality of the Confirmation Order. Therefore, disposition of these affirmative defenses is not appropriate at this stage, under Rule 12(b).

Debtor cites In re Nyack Autopartstores Holding Co., Inc., 98 B.R. 659 (Bankr. S.D.N.Y. 1989), for the proposition that: "[c]ourts will **dismiss** a section 1144 claim that does not include facts sufficient to allege that the debtors acted with specific fraudulent intent to the procure the confirmation order." (Doc. 22 ¶ 18) (emphasis added). This Court, however, finds Nyack distinguishable because a closer reading of that opinion shows the Nyack order was based upon a Rule 56 motion for summary judgment, not a Rule 12(b) motion to dismiss. The same is true of Debtor's citation to In re Hertz, 38 B.R. 215, 216 (Bankr. S.D.N.Y. 1984), because Hertz's disposition was not based on a Rule 12(b) motion to dismiss. (Doc. 22 ¶ 19).

Likewise, Debtor's citation to In re Servico, Inc., 161 B.R. 297 (S.D. Fla. 1993), is inapposite in that the underlying order denying revocation, which was on appeal to the district court, was based on a Rule 56 motion and not a Rule 12(b) motion to dismiss. Moreover, the district court dismissed the appeal as moot because the confirmed plan had been "substantially consummated" and no effective relief could be granted. Servico, 161 B.R. at 301 ("However, after an independent review of what has been accomplished under the Plan, this court finds that the Plan has been substantially consummated.").

Debtor also relies on In re Bennington, 519 B.R. 545, 548 (Bankr. D. Utah 2014). Bennington is distinguishable because the Bennington court dismissed based on the absence of a

nexus between the alleged fraud and the procurement of the confirmation order. Bennington, 519 B.R. at 548 ("In particular, the Amended Complaint fails to show any nexus between the alleged fraud and the Debtors' procurement of the order of confirmation."). The absence of such a factual nexus is a "failure to state a claim" envisioned by Rule 12(b)(6). Here, however, a factual nexus exists because the alleged fraud pertains to the total debt owed which, in turn, relates to the impairment of Deutsche Bank's claim and the procurement of the Confirmation Order.

Deutsche Bank's Amended Complaint gives adequate information for Debtor to frame an answer. These allegations are not mere conclusory statements, but are factual assertions that set forth the particular circumstances surrounding the alleged fraud. Such factual assertions are material to the confirmation process. Therefore, the Court finds Deutsche Bank has pleaded the minimum necessary to state a § 1144 claim for revocation.

The Debtor's motion to dismiss and request for fees/costs is DENIED without prejudice to raising these affirmative defenses and bad-faith arguments in the proper manner and at the appropriate time.