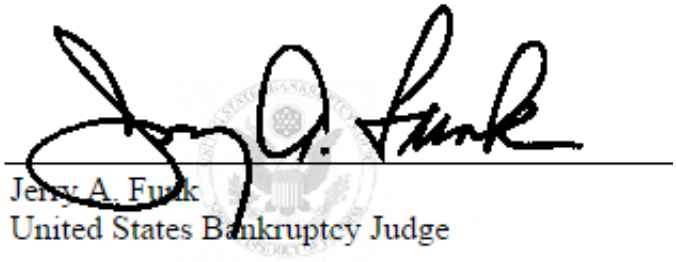
ORDERED.

Dated: June 05, 2017



Jerry A. Funk
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

MICHAEL W. LANIER,

Debtor,
_____/

Case No. 3:16-bk-3307-JAF
Chapter 11

FEDERAL TRADE COMMISSION,

Plaintiff,
v.

MICHAEL W. LANIER,

Defendant.
_____/

Adv. No. 3:17-ap-0035-JAF

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This proceeding is before the Court on Defendant MICHAEL W. LANIER'S (the "Debtor's") Corrected Motion to Dismiss the Complaint (Doc. 10) and Plaintiff FEDERAL TRADE COMMISSION'S Memorandum in Opposition to the Motion to Dismiss (Doc. 6). For the reasons stated herein, Debtor's Motion to Dismiss is denied.

Background

On August 30, 2016 (the "Petition Date"), Debtor filed a voluntary Chapter 13 petition. (Doc. 1, in Case No. 3:16-bk-3307). On February 22, 2017, the Chapter 13 case was converted to a Chapter 11 case. (Doc. 99 in 3:16-bk-3307). The Federal Trade Commission (the "Commission") filed a proof claim in the amount of $13.5 million as to a judgment debt resulting from litigation in the United States District Court for the Middle District of Florida (the "District Court"), in case number 3:14-CV-0786 (the "FTC Action"). (Claim 10-1). The District Court entered an interlocutory order granting summary judgment in favor of the Commission, on July 7, 2016. (Doc. 1 at 67-144) (Ex. C.). The final judgment in the FTC Action was rendered on August 12, 2016, eighteen (18) days prior to the Petition Date. (Doc. 1 at 35-64) (Ex. B.).

Allegations of the Complaint

The Complaint seeks to except from discharge, pursuant to 11 U.S.C. § 523(a)(2)(A), the judgment awarded to the Commission in the FTC Action. (Doc. 1). Count I is the primary count alleging nondischargeability, while Count II includes an argument for issue preclusion based on the FTC Action. The Commission alleges the following facts, which the Court accepts as true.

Debtor was owner, officer, manager, or representative of six corporate entities, all of which were codefendants in the FTC Action. Debtor and the corporate entities (the "Common Enterprise") acted as a common enterprise through common ownership/management, as well by commingling funds and sharing marketing materials. Debtor directed, controlled, had authority to control, or participated in deceptive or fraudulent acts/practices through the Common Enterprise.

More specifically, from January 2011 to July 2014, Debtor and the Common Enterprise marketed mortgage assistance relief services to individual consumers by telephone, U.S. Mail, and websites. (Doc. 1 ¶ 9). Debtor and the Common Enterprise promised consumers "they would

receive legal representation from foreclosure defense attorneys, who would negotiate with [the consumers'] lenders to save their homes from foreclosure or make their mortgage payments substantially more affordable," in return for upfront and/or monthly fees. (Doc. 1 ¶ 11). Debtor and the Common Enterprise also promised "forensic loan audits" that would be used to "win concessions from lenders." (Doc. 1 ¶ 12). However, "[i]n numerous instances, [Debtor] and his co-defendants failed to obtain any relief for their customers." (Doc. 1 ¶ 13). The Complaint also describes the "sales pitch" made to the consumers. (Doc. 1 ¶¶ 14-21). In essence, Debtor and the Common Enterprise failed to follow through on their promises. (Doc. 1 ¶¶ 22-25).

In July 2016, the Commission obtained summary judgment in the FTC Action.[1] (Doc. 1 at 67). In footnote 31 of the interlocutory order, the District Court stated as follows:

> [Debtor] Lanier maintains that "[a]s an attorney, I could not, and did not, guarantee any specific outcome for any client, as reflected in the signed retainer agreements between us." While, for purposes of resolving the FTC Motion, **the Court accepts [for purposes of summary judgment] Lanier's sworn assertion that he, himself, did not make any guarantees to consumers,** this does not rebut the aforementioned evidence showing that other individuals, specifically those working for the staffing or referral companies, made guarantees about Lanier's services. . . . To the extent some consumers attribute statements to Lanier himself, which he denies, the Court has not considered those statements.

(Doc. 1 at 97 n.31) (emphasis added).

The District Court further determined "the email records make clear, [Debtor and his cohorts] managed these entities together . . . as a singular operation with multiple component parts." (Doc. 1 at 116). On the primary cause of action, the District Court determined "members of the [C]ommon [E]nterprise made numerous misrepresentations to consumers." (Doc. 1 at 117). In August 2016, the District Court rendered its final judgment, awarding the Commission roughly

[1] The District Court's orders are attached to operative Complaint and were incorporated by reference.

$13.5 million and holding Debtor jointly and severally liable with his non-settling codefendants for the full amount. (Doc. 1 at 46).

Dismissal under Rule 12(b)(6)

A motion brought under Rule 12(b)(6), made applicable by Bankruptcy Rule 7012, 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, [or] 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).

Analysis

Section 523(a)(2)(A) of the Bankruptcy Code provides: "A discharge . . . does not discharge an individual debtor from any debt . . . for money . . . 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) (2016). That is, "[s]ection 523(a)(2)(A) sets forth three separate grounds for non-dischargeability: false pretenses, a false representation, and actual fraud." In re Lloyd, 549 B.R. 282, 291 (Bankr. M.D. Fla. 2016). The

Supreme Court recognized that courts have "has historically construed the terms in § 523(a)(2)(A) to contain the 'elements that the common law has defined them to include.'" Husky Int'l Elecs., Inc. v. Ritz, 136 S. Ct. 1581, 1586 (2016); Lloyd, 549 B.R. at 291 ("Courts have generally interpreted § 523(a)(2)(A) to require the traditional elements of common law fraud.").

It is important to distinguish false pretenses and false representations. "The concept of false pretenses is especially broad. It includes any intentional fraud or deceit practiced by whatever method in whatever manner." Lloyd, 549 B.R. at 291. "False pretenses may be implied from conduct or may consist of concealment or non-disclosure where there is a duty to speak, and may consist of any acts, work, symbol, or token calculated and intended to deceive." Id. "It is a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or a false and misleading understanding of a transaction, by which a creditor is wrongfully induced by a debtor to transfer property or extend credit to the debtor." Id. "Silence or concealment as to a material fact can constitute false pretenses." Id.

In other words, for purposes of § 523(a)(2)(A), "false pretenses" often involve implied misrepresentations (or omissions) whereas "false representations" often involve express misrepresentations. Finally, "[t]he term 'actual fraud' in § 523(a)(2)(A) encompasses forms of fraud, like fraudulent conveyance schemes, that can be effected without a false representation."[2] Husky, 136 S. Ct. at 1586. However, "[a]lthough 'fraud' connotes deception or trickery generally, the term is difficult to define more precisely." Id.

In light of the above case law, a creditor must prove: 1) the debtor made an express or implied misrepresentation with deceptive intent or engaged in a plan/scheme with fraudulent

[2] See also Black's Law Dictionary (10th ed. 2014) (defining "promissory fraud" as "A promise to perform made when the promisor had no intention of performing the promise.—Also termed *common-law fraud*.").

intent, 2) the creditor relied on the misrepresentations or fraudulent conduct at issue, 3) the creditor's reliance was justified under the circumstances, and 4) the creditor sustained a loss as a result of the misrepresentation or fraudulent conduct. In his motion, Debtor raises numerous arguments, sans organization. Each of the essential arguments is addressed, below.

A. Standing.

Debtor contends the case law applying § 523(a)(2)(A) uniformly refers to deceiving the creditor, yet the Commission (i.e., the creditor in this instance) was not directly deceived even when taking the allegations as true. The Court agrees the case law typically involves creditors who are directly deceived. See, e.g., In Re Denise Roberts-Dude, 597 F. App'x at 617 ("made a false representation with the intention of deceiving the creditor"). The Court construes this argument as on one of standing to bring this § 523 nondischargeability claim. The Commission has standing to bring a claim of nondischargeability even though the Commission was not an individual consumer allegedly deceived/defrauded by Debtor. In re Black, 95 B.R. 819, 821 (Bankr. M.D. Fla. 1989); In re Bilzerian, 1995 WL 934184, at *2 (M.D. Fla. May 15, 1995). Further, this argument ignores the plain language of § 523.

Here, the Commission has a "claim" against Debtor because the Commission has a "right to payment" in the form of a judgment debt. 11 U.S.C. § 101(5) (2107). The Commission is a "creditor" because the claim "arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A) (2017). Further, since the right to payment has been reduced to judgment, there is "liability on [the] claim" and the claim is, therefore, a "debt" under 11 U.S.C. § 101(12), when taking all allegations as true.

Section 523(c) provides that "any debt" "for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud" "shall be discharged . . . unless, on request of *the*

creditor to whom such debt is owed, . . . the court determines such debt [is] to be excepted from discharge under paragraph (2) . . . of subsection (a) of this section." 11 U.S.C. §§ 523(c)(1), 523(a)(2)(A) (2017) (italics added).

The plain language of § 523 does not require the creditor to be the party that was misled. Instead, the planning language of § 523(c) establishes that the creditor to whom such debt is owed has standing to bring a nondischargeability claim. The Commission is the creditor to whom such debt is owed. Absent a latent or patent ambiguity, this Court is without authority to add meaning that is not present in the plain language of the statutes. See Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938, 1949 (2016) ("[O]ur constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'") (construing 11 U.S.C. § 101(52)). There is no ambiguity, here. The Court, therefore, concludes the Commission has pled sufficient facts to establish standing under § 523.

B. Debtor's fraudulent intent or intent to deceive.

Debtor contends the Commission failed to allege he personally intended to deceive any individual consumer. Additionally, he contends that, in the FTC Action, the question of whether he personally deceived consumers was not litigated, and points to footnote 31 of the interlocutory order granting summary judgment.

The plaintiff in a nondischargeability action under § 523(a)(2)(A) must prove, inter alia, the debtor obtained the money by using "false pretenses, a false representation, or actual fraud," which, in turn, requires proof of some deceptive or fraudulent intent. In re Lloyd, 549 B.R. 282, 292 (Bankr. M.D. Fla. 2016) ("The preliminary determination the Court must make as to both the false representation and the false pretenses claims is whether Defendant intended to deceive Plaintiffs."); Husky, 136 S. Ct. at 1586 ("Thus, anything that counts as 'fraud' and is done with

wrongful intent is 'actual fraud' [under § 523(a)(2)(A)]."). Rule 9(b), made applicable by Bankruptcy Rule 7009, provides that intent (and other scienter elements) "may be alleged generally." Fed. R. Civ. P. 9(b).

Here, paragraph 33 of the Complaint alleges Debtor "and his co-defendants in the [FTC Action] represented, directly or indirectly, expressly or by implication, that in return for payment of an advance fee, he and his co-defendants would obtain mortgage loan modifications for consumers, which would make their payments substantially more affordable, or would help them avoid foreclosure." (Doc. 1 ¶ 33). Further, "[Debtor] and his co-defendants typically did not obtain mortgage loan modifications for consumers that made their payments substantially more affordable, or help them avoid foreclosure." (Doc. 1 ¶ 34). Finally, "[Debtor's] and his co-defendants' representations described in ¶ 33 [of the Complaint] were material and false or misleading, and constituted deceptive practices." (Doc. 1 ¶ 35). While Debtor is correct that the Commission did not specifically allege intent to deceive, such intent can be plausibly inferred from the express allegations of the Complaint and, therefore, deceptive and/or fraudulent intent (i.e., the scienter element) has been pled generally. Iqbal, 556 U.S. at 678.

Debtor also correctly points out that footnote 31 of the District Court's interlocutory order granting summary judgment states the District Court did not find that Debtor, in proper person, deceived consumers. (Doc. 1 at 97 n.31). However, this argument goes to the merits of the Commission's issue-preclusion argument (collateral estoppel) and/or claim-preclusion argument (res judicata) alluded to in the Complaint. The merits of these arguments are not appropriately addressed at the pleadings stage. Issue and claim preclusion are not independent causes of action. Rather, these doctrines are legal arguments that, in essence, provide a shortcut to establish the proof necessary to prevail on a given cause of action.

C. Pleading with particularity.

Finally, Debtor contends the Commission failed to plead facts with sufficient particularity required by Rule 9(b). 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) [the] same, (3) the content of such statements and the manner 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, the Complaint, in paragraphs 9 through 25, details specific facts demonstrating that: 1) Debtor and the Common Enterprise made statements to consumers that the consumers would receive modifications to their mortgages, a reduced interest rate, a reduced monthly payment, a reduction in principal balance owed, and/or other concessions from the mortgage lender; 2) the statements were made to the consumers after the consumers responded to various forms of telephone, postal, internet, and other advertising, during the period from January 2011 to July 2004; 3) the "sales pitch" statements impliedly, expressly, or fraudulently misled consumers by promising results that would never be achieved; and 4) Debtor actually obtained upfront and monthly payments from the consumers. (Doc. 1 ¶¶ 9-25). Under the circumstances, these allegations of fraud meet the particularity requirements of Rule 9(b).

While the District Court did not determine that Debtor personally deceived/misled any consumer, neither the District Court's interlocutory order nor final judgment conclusively refute the Commission's allegations. Further, the District Court's orders support the notion that Debtor acted with fraudulent intent as a part of a scheme.

Accordingly, based on the foregoing analysis, it hereby ORDERED that Debtor's motion to dismiss is DENIED. Debtor shall answer the Commission's Complaint within twenty-one (21) days of entry of this Order.