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UNITED STATES BANKRUPTCY COURT (NOT FOR PUBLICATION)
SOUTHERN DISTRICT OF NEW YORK

In Re:

RORBERT CAMERON HOWARD Chapter 7
And
JENNIFER WILLIAMS HOWARD Case No. 09-22557 (RDD)

Debtors.

S&T BANK, Adv.Proc.09-08269 (RDD)
Plaintiff, New York, New York

v.

Hearing October 28, 2009
2:35 p.m.

Howard, et al.
Defendant

MODIFIED BENCH RULING ON MOTION TO DISMISS ADVERSARY PROCEEDING
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT

APPEARANCES:

Mr. James B. Glucksman, Esq. Rattet, Pasternak and
For Defendant Gordon Oliver,
Jennifer Howard 550 Mamaroneck Avenue
Harrison, New York 10528

Mr. Keith M. Brandofino, Esq. Phillips Lytle, LLP
For Plaintiff 437 Madison Avenue
New York, New York 10022

Robert Cameron Howard
PRO SE
Defendant

Drake Smith Associates
PRO SE
Defendant

Angela Miller & Angela Z. Miller
For Plaintiff

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THE COURT: All right. Plaintiff S&T Bank has filed a complaint against Robert Cameron Howard, Drake Smith Associates, LLC, and, as is relevant to the matter before me, Jennifer Williams Howard, who's a Chapter 7 debtor in this Court. Mrs. Howard has moved to dismiss the complaint under Bankruptcy Rule 7012, which incorporates Federal Rule of Civil Procedure 12(b)(6). When considering a motion under Rule 12(b)(6), the Court must assess the legal feasibility of the complaint, not weigh the evidence that might be offered in its support. *Koppel v. 4987 Corporation*, 167 F.3d 125, 133 (2d Cir. 1999). The Court's consideration "is limited to facts stated on the face of the complaint, or the documents appended to the complaint, or incorporated in the complaint by reference, as well as to matters of which judicial notice may be taken." *Hertz Corp. v. City of New York*, 1 F.3d 121, 125 (2d Cir. 1993) cert. denied, 510 U.S. 1111 (1993). The Court accepts the complaint's factual allegations as true, and must draw reasonable inferences in favor of the plaintiff. *Tellabs Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 323 (2007). Rule 8(a) does not, moreover, require a claimant to set forth any legal theory justifying the relief sought on the facts alleged, requiring only sufficient factual reference to show that the claimant may be entitled to some form of relief.

1 Newman v. Silver, 713 F.2d 14, 15 (2d Cir. 1983). Tolle v.
2 Carroll Touch, Inc., 977 F. 2d 1129, 1134 (7th Cir. 1992).

3 However, if a complaint's allegations are clearly
4 contradicted by documents incorporated into the pleadings by
5 reference, the Court need not accept them. Labajo v. Best Buy
6 Stores, L.P., 478 F. Supp. 2d 523, 528 (S.D.N.Y. 2007).
7 Moreover, the Court is "not bound to accept as true a legal
8 conclusion couched as a factual allegation." Papasan v.
9 Allain, 478 U.S. 265, 286 (1986). Instead, the complaint must
10 state more than "labels and conclusions, and a formulaic
11 recitation of the elements of a cause of action will not do."
12 Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

13 Relatedly, while the Supreme Court has confirmed in
14 light of the notice pleading standard under Federal Rule of
15 Civil Procedure 8(a) that a complaint does not need detailed
16 factual allegations to survive a motion under Rule 12(b)(6) --
17 see Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007), its
18 "factual allegations must be enough to raise a right to relief
19 above the speculative level." Bell Atlantic v. Twombly, 550
20 U.S. at 555. The complaint must contain sufficient facts
21 accepted as true to state a claim that is "plausible on its
22 face." Id. at 570. In other words, if the claim would not
23 otherwise be plausible on its face, the plaintiff must allege
24 sufficient facts to "nudge the claim across the line from
25 conceivable to plausible." Id. Otherwise the defendant should

1 not be subject to the burdens of discovery and the worry of
2 overhanging litigation. Id.

3 Evaluating plausibility is "a context-specific task
4 that requires the Court to draw on its judicial experience and
5 common sense. But where the well pleaded facts do not permit
6 the Court to infer more than mere possibility of misconduct,
7 the claim has alleged -- but it has not shown -- that the
8 pleader is entitled to relief." *Ashcroft v. Iqbal*, 129 S. Ct.
9 1937, 1949 (2009). "When there are well pleaded factual
10 allegations, a Court should assume their veracity and then
11 determine whether they plausibly give rise to an entitlement to
12 relief." Id. at 1950. "The plausibility standard is not akin
13 to a 'probability requirement,' but it asks for more than sheer
14 possibility that a defendant has acted unlawfully." Id.

15 In sum, therefore, applying *Twombly*, the Supreme
16 Court has observed that "the pleading standard Rule 8 announces
17 did not require 'detailed factual allegations' but it demands
18 more than an unadorned 'the defendant unlawfully harmed me'
19 accusation." *Iqbal*, 129 S. Ct. at 1949 (citations omitted).
20 "Therefore in determining whether a claim should survive a
21 motion to dismiss, a court must first identify each element of
22 the cause of action." Id. at 1947. Next, the court "must
23 identify the allegations that are not entitled to 'the
24 assumption of truth' because they are legal conclusions, not
25 factual allegations." Id. at 1951. And, finally, the court

1 must assess the factual allegations in the context of the
2 elements of the claim to determine whether they "plausibly
3 suggest an entitlement to relief." Id.

4 Here, S&T Bank brings claims under 11 U.S.C. section
5 523(a)(2)(A) and 11 U.S.C. section 523(a)(6).

6 Section 523(a)(2)(A) of the Bankruptcy Code provides
7 in pertinent part that "A discharge under this title does not
8 discharge an individual debtor from any debt or money,
9 property, services, or an extension, renewal or refinancing of
10 credit to the extent obtained by false pretenses, or false
11 representation, or actual fraud, other than a statement
12 respecting the debtor's or an insider's financial condition."
13 A claim under this "fraud" exception requires that the claim
14 satisfy the heightened pleading requirements for fraud pursuant
15 to Fed. R. Civ. P. 9(b). See *In re Jacobs*, 403 B.R. 565, 574
16 (Bankr. N.D. Ill. 2009)(citations omitted), as well as *In re*
17 *Kanaley*, 241 B.R. 795, 803 (Bankr. S.D.N.Y. 1991).

18 Rule 9(b) states "In alleging fraud, a party must
19 state with particularity the circumstances constituting fraud
20 or mistake. Malice, intent, knowledge, and other conditions of
21 a person's mind may be alleged generally." While intent or
22 knowledge may be averred generally, however, the plaintiff must
23 still plead the events claimed to give rise to an inference of
24 intent or knowledge, *Devaney v. Chester* 813 F.2d 566, 568 (2d
25 Cir. 1987), which may be accomplished by pleading facts

1 consistent with certain well established "badges of fraud." In
2 re Sharp Int'l Corp., 403 F.3d 43, 56 (2d Cir. 2004). In
3 addition to providing a defendant with fair notice of the
4 claim, Rule 9(b) serves the purpose of protecting a defendant
5 from harm to his or her reputation or good will by unfounded
6 allegations of fraud, and by reducing the number of strike
7 suits. In re Actrade Financial Technologies Ltd., 337 B.R.
8 791, 801 (Bankr. S.D.N.Y. 2005).

9 Before focusing on section 523(a)(2)(A) in more
10 detail, it also should be noted that it is a primary purpose of
11 the Bankruptcy Code to relieve the honest debtor from the
12 weight of oppressive indebtedness and permit him or her to
13 start afresh, by providing the debtor a new opportunity in life
14 and a clear field for future effort unhampered by the pressure
15 and discouragement of pre-existing debt. Therefore, exceptions
16 to discharge, including under section 523(a)(2)(a), are to be
17 narrowly construed, as has been repeatedly stated by the Second
18 Circuit and courts within the Second Circuit. See In re
19 Renshaw 222 F.3d 82, 86 (2d Cir. 2000); In re Sanchez, 365 B.R.
20 414, 417 (Bankr. S.D.N.Y. 2007).

21 In In re Chase, 372 B.R. 133 (Bankr. S.D.N.Y.), the court
22 discussed the elements of false pretenses, false
23 representations and actual fraud, as they exist in section
24 523(a)(2)(A). As an initial matter, those three terms, as used
25 in that section, "embody different concepts in Congress' use of

1 the disjunctive, or evidence an intent to deny a discharge
2 under any such term." Id. at 136. The term "false pretenses"
3 is defined as "conscious, deceptive or misleading conduct,
4 calculated to obtain or deprive another of property." Id.
5 (quoting *Gentry v. Kolver*, 249 B.R. 238, 261 (Bankr. S.D.N.Y.
6 2000)). It includes an implied misrepresentation or conduct
7 intended to create a false impression. Id. The term "false
8 representation" requires that the plaintiff present proof that
9 the defendant (1) made a false or misleading statement, (2)
10 with the intent to deceive, and (3) to cause the plaintiff to
11 turn over money or property to the defendant. Id. (citing *In*
12 *re Dobrayel* 287 B.R. 3, 12 (Bankr. S.D.N.Y. 2002)). The term
13 "actual fraud" requires proof of the five fingers of fraud, or
14 five elements of fraud, which are (1) a misrepresentation, (2)
15 fraudulent intent or scienter, (3) intent to induce reliance,
16 (4) justifiable reliance, and (5) damage. See *In re Dobrayel*,
17 287 B.R. at 12. A reckless representation or silence regarding
18 a material fact may in some cases constitute the requisite
19 falsity, and in certain cases a causal link, as opposed to
20 actual reliance, may establish the creditor's injury. See *In*
21 *re Gonzalez*, 241 B.R. 67, 74 (S.D.N.Y. 1999), and *In re Lupino*,
22 221 B.R. 693, 701 (Bankr. S.D.N.Y. 1998). Although the statute
23 could conceivably be read as providing that one's debt may not
24 be subject to the discharge if one merely benefits from someone
25 else's fraud, in keeping with the Congressional purpose behind

1 section 523 that is not the approach taken by the courts. The
2 foregoing case law requires fraudulent conduct, false
3 pretenses, or false representations on the part of the
4 particular debtor in question, either directly or by
5 imputation.

6 I have reviewed the complaint here, and I see nothing
7 in the complaint that would satisfy Rule 8, let alone Rule
8 9(b), as to whether a claim has been alleged under Bankruptcy
9 Code section 523(a)(2)(A) for fraud, false pretenses or
10 misrepresentation. The complaint deals with two loans, in
11 connection with which it is alleged the debtor's husband,
12 Robert Howard, committed fraud. In each case it is alleged
13 that the loan proceeds, which were intended to be applied to
14 specific construction projects, were instead retained by "the
15 Debtors" -- that is, both Mr. Howard and Mrs. Howard, without
16 any differentiation as to how they were retained, whether they
17 were retained jointly, or by one or the other of them.

18 With respect to the first loan, which involves a
19 property on Locust Avenue, in Rye, New York, it is asserted
20 that "the Debtors," that is Mr. Howard and Mrs. Howard,
21 executed a loan agreement and mortgage, and that under the loan
22 agreement funds would be advanced periodically upon "the
23 Debtors' request" which merely summarizes a provision of the
24 loan agreement. The complaint, in the next paragraph,
25 paragraph 23, states that between January 31, 2007 and

1 September 8, 2008, Mrs. Howard's husband, Robert Howard, made
2 nine written advance requests, signed by him, as set forth in
3 paragraph 24, and that, as set forth in paragraph 28, the bank
4 subsequently learned that Robert Howard's representations, in
5 the Locust Avenue advance requests and in the Locust Avenue
6 supporting documents regarding construction work that had been
7 completed at the Locust Avenue property, were materially false,
8 and that, as set forth in paragraph 33, S&T Bank relied upon
9 such material misrepresentations made by Robert Howard and
10 disbursed the funds as requested.

11 The first factual allegation clearly pertaining
12 solely to Mrs. Howard, other than that she was the co-borrower
13 under the Locust Avenue agreement and co-owner of the Locust
14 Avenue property, is found at paragraph 60 in the first claim
15 for relief under section 523(a)(2), where the complaint states,
16 "As co-borrower under the Locust Avenue agreement and co-owner
17 of the Locust Avenue property, Jennifer Howard had actual
18 knowledge of, or should have known of, or was recklessly
19 indifferent to, the fraud perpetrated by Robert Howard." No
20 facts are alleged to support this statement other than those
21 previously noted.

22 As to the second loan, the facts are even more
23 barebones and conclusory. In the second loan, it is stated in
24 paragraph 34, upon information and belief, that "The Debtors
25 owned 50 percent of the membership interest in Drake Smith"

1 -- not specifying which of the two debtors or how, if they both
2 owned an interest, they owned it. (Drake Smith is an LLC
3 that's also named as a defendant.) And then the complaint, in
4 paragraph 35, states that, upon information and belief, Robert
5 Howard is, or at all relevant times was, the managing member of
6 Drake Smith, that Drake Smith incurred indebtedness from S&T
7 Bank, and, as stated in paragraph 38, Drake Smith executed a
8 promissory note and granted, as set forth in paragraph 39, a
9 mortgage encumbering the relevant property. And then it is
10 stated that, as set forth in the Drake Smith loan agreement,
11 Drake Smith was permitted to apply for advances under the loan
12 with respect to work actually done by the general contractor
13 and for material and equipment actually incorporated into the
14 Drake Smith property, and, as set forth in paragraph 44, Robert
15 Howard, acting on behalf of Drake Smith, made non-written
16 advance requests in respect of the property. Paragraph 45
17 states that each such request was signed by Robert Howard.
18 Paragraph 49 then states that the bank subsequently learned
19 that representations made by Robert Howard, and/or Drake Smith,
20 in the Drake Smith advance requests and Drake Smith supporting
21 documents regarding construction work that had been completed
22 at the Drake Smith property, were materially false. And
23 paragraph 54 states that S&T Bank, unaware of the material
24 misrepresentations made by Robert Howard and/or Drake Smith,
25 relied thereon in furnishing the funds.

1 The only basis for the complaint to state that Mrs.
2 Howard is liable under section 523(a)(2) in respect of all the
3 foregoing is set forth in paragraph 75, in which it is stated
4 that, as a co-owner of Drake Smith, Jennifer Howard had actual
5 knowledge of, or should have known, or was recklessly
6 indifferent to, the fraud perpetrated by Robert Howard and
7 Drake Smith -- i.e., it's asserted that, simply as a
8 shareholder of the borrower, Mrs. Howard had actual knowledge
9 of, or should have known of, or was recklessly indifferent to,
10 the corporate borrower's fraud perpetrated through its officer,
11 her husband. No other facts are alleged to support that
12 allegation.

13 Clearly no misrepresentation by Mrs. Howard has been
14 alleged here, or any intent on her part to induce reliance
15 thereon. Moreover, I find that the conclusory allegation that
16 she had knowledge or was recklessly indifferent is just that, a
17 conclusory allegation, simply reciting one of the elements of
18 the cause of action; and, under both Rule 9(b), as well as Rule
19 8, the complaint is, therefore, deficient in setting forth a
20 cause of action under section 523(a)(2) against Mrs. Howard in
21 respect of either of the two loans. It not only does not plead
22 sufficient "badges of fraud" as to her intent, it also does not
23 plead facts, as opposed to conclusions, describing her fraud,
24 as opposed to her husband's or Drake Smith Associates LLC's.
25 To be contrasted with the present complaint, are the facts pled

1 in *In re Demarest* 176 B.R. 917 (Bankr. W.D. Wash. 1995), where
2 the plaintiff clearly asserted that the defendant wife, Mrs.
3 Demerest, actively participated in the concealment of the
4 fraud, even though the fraud was committed by her husband, and
5 that such concealment resulted in a direct benefit to her. The
6 present complaint does not set forth anything like comparable
7 facts to that scenario.

8 It's also clear that if a so-called "imputation"
9 theory may be used to impute Mr. Howard's alleged frauds to
10 Mrs. Howard (a concept that is subject to conflicting case law)
11 -- but to the extent that the imputation theory would apply in
12 this Circuit -- the complaint does not state a cause of action
13 based on imputing Mr. Howard's alleged fraud to Mrs. Howard. As
14 far as the validity of the "imputation" theory in the first
15 place is concerned, see the conflicting authorities cited in
16 paragraph 523.08[3] of 4 *Collier on Bankruptcy* (15th ed. 2009)
17 at 523-52-3. The courts that have recognized the imputation of
18 one spouse's fraud or wrongdoing to the other have generally
19 concluded that it must be shown that the debtor-spouse was a
20 partner, a business partner or the business partner, of the
21 spouse who committed the fraud, "or was otherwise in a
22 principal/agent relationship." Id; see generally *In re*
23 *Tsurukawa* 258 B.R. 192, 198 (9th Cir. BAP 2001), as well as *In*
24 *re Luce*, 960 F.2d 1277, 1282-83 (5th Cir. 1992), and *In re*
25 *Allison*, 960 F.2d 481, 485-86 (5th Cir. 1992). In that latter

1 case, while recognizing the validity of the imputation therein,
2 the Fifth Circuit refused to impute a husband's fraudulent
3 conduct to a wife where there was "no evidence in the record
4 linking the wife to false or fraudulent acts or plans, and
5 where no agency relationship was established."

6 The complaint here does not plead facts setting forth
7 any such agency or other business relationship with respect to
8 the conduct of the operation of Drake Smith Associates LLC or
9 the operation of, or the making of the representations in
10 respect of, the Locust Avenue property, nor, as noted, any
11 facts, as opposed to conclusory allegations, linking Mrs.
12 Howard to the fraudulent acts of her husband, let alone facts
13 regarding her own alleged misconduct. Merely being a co-
14 borrower on the Locust Avenue property or, in an unspecified
15 way, an interest holder in Drake Smith Associates LLC does not
16 suffice. Without more, therefore, the complaint's claim under
17 section 523(a)(2) of the Bankruptcy Code should be dismissed.

18 The complaint also, on the same allegations, asserts a
19 claim under section 523(a)(6) of the Bankruptcy Code. That
20 section provides that "A discharge under Section 727 of this
21 title does not discharge an individual from any debt for
22 willful and malicious injury by the debtor to another entity,
23 or to the property of another entity." It has been held that
24 the word "willful" in this context means, "a deliberate or
25 intentional injury, not merely a deliberate or intentional act

1 that leads to injury." Ball v. A.O. Smith Corp., 451 F.3d 66,
2 69 (2d Cir. 2006). "Malicious" in this context means "wrongful
3 and without just cause or excuse," even in the absence of
4 personal hatred, spite, or ill will. Id. at 70. While it may
5 be argued that all fraud could conceivably constitute willful
6 and malicious injury, that would render section 523(a)(6)
7 superfluous, given section 523(a)(2)(A), although some courts
8 nevertheless have applied taken that approach -- see Printy v.
9 Dean Witter Reynolds, Inc., 110 F.3d 853, 859 (1st Cir. 1997).
10 (However, I've already found that the complaint has not set
11 forth a claim for fraud).

12 This Court has held, however, that there must be a
13 difference between fraud and "willful and malicious injury" as
14 used in section 523(a)(6), and that, therefore, section
15 523(a)(6) is not subsumed by section 523(a)(2). See In re
16 Lupino, 221 B.R. at 700, in which Judge Hardin stated that

17 "Actual malice may be inferred or imputed from the
18 fact that the debtor's conduct, giving rise to
19 liability, has no potential for economic gain or
20 other benefit to the debtor, from which one could
21 only conclude that the Debtor's motivation must have
22 been to inflict harm upon the creditor."

23 To the extent that that interpretation applies, i.e. that
24 section 523(a)(6) is aimed more at conduct that maliciously
25 inflicts harm, as opposed to all fraudulent conduct, the

1 forgoing facts that I've recited from the complaint are also,
2 however, clearly deficient in setting forth a section 523(a)(6)
3 claim. The claim isn't even pleaded as, in the words of Iqbal,
4 an unadorned and conclusory, "the defendant unlawfully harmed
5 me" accusation. It merely repeats the same representations and
6 conclusory statements that the defendant Mrs. Howard must have
7 known about the fraudulent misconduct of her husband and co-
8 borrower (on the Locust Avenue property) and/or the business,
9 Drake Smith Associates LLC, in which she owned some unspecified
10 interest; therefore, the complaint clearly does not set forth a
11 cause of action in respect of either of the loans under
12 Bankruptcy Code section 523(a)(6).

13 I should note that I've been addressing, as I believe
14 I must, only the complaint and the documents attached to it, or
15 referred to in it, or incorporated in it by reference. The
16 responsive papers to the motion have alleged that there are
17 additional facts -- or have alleged additional facts -- that
18 might go to show a cause of action under section 523(a)(2).
19 However, it's a basic principle that a complaint may not be
20 amended by the briefs in opposition to a motion to dismiss,
21 and, therefore, I haven't considered those factual allegations
22 as set forth in the responsive papers. See *In re Jacques*, 2009
23 WL 2915823 (Bankr. E.D.N.Y. September 4, 2009).

24 Nor am I persuaded by the plaintiff's argument that
25 the Court should overlook the complaint's deficiencies because

1 the plaintiff is largely in the dark about Mrs. Howard's
2 conduct. Not only is this argument at cross purposes with Rule
3 9(b) and the basic Rule 8 pleading requirements enunciated by
4 the Supreme Court in Twombly and Iqbal, but also it is belied
5 by the fact that the plaintiff has had ample time to take free
6 ranging discovery under Bankruptcy Rule 2004 before filing its
7 complaint.

8 So, for all those reasons, the motion is granted, and
9 the complaint's causes of action as against Mrs. Howard are
10 dismissed.

11 At oral argument counsel for the plaintiff raised the
12 possibility of seeking to amend the complaint, and I'll
13 consider such a motion if it's raised. I can tell you,
14 however, that I have substantial doubts about the efficacy of
15 an amendment, at least with regard to the Drake Smith
16 Associates LLC property. But I'll wait to see such a motion if
17 it's made.

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