#59

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
POUGHKEEPSIE DIVISION

NOT FOR PUBLICATION

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In reply to:

MARK S. ALVARO,

Chapter 7
Case No. 02-37357

Debtor.

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STEPHEN CATANZARO,

Plaintiff,

Adv. No. 02-7212

-against-

MARK S. ALVARO,

Defendant.

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A P P E A R A N C E S:

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CECELIA G. MORRIS, UNITED STATES BANKRUPTCY JUDGE:

Plaintiff Stephen Catanzaro (the "Plaintiff") filed this adversary proceeding objecting to Debtor Mark S. Alvaro's (the "Debtor") discharge pursuant to 11 U.S.C. § 727 and seeking a determination as to the dischargeability of certain debts allegedly owed to the Plaintiff pursuant to 11 U.S.C. § 523(a). The issue of Plaintiff's standing to bring this action was first raised before this Court in the Proposed Pre-Trial Order

submitted by the parties. Upon the submissions of the parties and the hearings held on October 26, 2004, November 16, 2004, and January 4, 2005, the Court finds that Plaintiff Catanzaro lacks standing to bring this adversary proceeding and therefore dismisses it in its entirety.

JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. § 157(a) and the Standing Order of Reference signed by Acting Chief Judge Robert J. Ward dated July 10, 1984. Determinations as to the dischargeability of particular debts and objections to discharge are "core proceedings" pursuant to 28 U.S.C. § 157(c)(2)(I) and (J).

BACKGROUND FACTS

The operative facts underlying this lawsuit involve the Debtor's purchase of an income producing property from Plaintiff located in the Town of Wawayanda, Orange County, New York (the "Wawayanda Property"). Prior to the transaction between the parties, Debtor was a loan officer and in that capacity obtained mortgage financing for people, including persons referred by Plaintiff, i.e., Plaintiff's secretary. Debtor also allegedly obtained a purchaser and financing in connection with the sale of a two family home owned by Plaintiff's sister, and also obtained financing for a couple who wanted to purchase a single family home from Plaintiff. Plaintiff had referred these latter prospective purchasers to Debtor. Apparently, all three buyers later defaulted in their obligations, all three subsequently filed for bankruptcy protection, and two of the three lost their homes to foreclosure, which state of affairs Plaintiff apparently considers

significant. Any significance is equivocal, however, in that Plaintiff apparently referred at least two of the parties to Debtor, not vice versa.

Debtor frequented the Plaintiff's establishment and allegedly learned that Plaintiff was in financial difficulty. The extent of Debtor's knowledge with regard to the Plaintiff's money problems is in dispute. Plaintiff maintains that Debtor used his knowledge of Plaintiff's financial troubles to "formulate a scheme in the nature of a confidence game." Debtor states that although Plaintiff made passing remarks with regard to his businesses and his real estate holdings, he was not privy to Plaintiff's emotional state or his business and financial dealings.

Although the parties disagree as to the terms of the purchase of the Wawayanda Property, both parties agree that Plaintiff and Debtor conducted a loan transaction using the Wawayanda property as collateral. Plaintiff contends that Debtor approached him about obtaining a loan using the Wawayanda property as collateral. The Plaintiff maintains that the Debtor chose a time to approach him when he (Plaintiff) was vulnerable and in financial straits. Debtor was allegedly aware of Plaintiff's precarious financial condition through his numerous conversations with Plaintiff at the Courthouse Restaurant (the "Restaurant"). Plaintiff alleged in his complaint that Debtor represented himself as a real estate investor who owned property in Pennsylvania and locally in an attempt to induce Plaintiff to enter into the transaction. Debtor purportedly proposed a transaction in which Plaintiff and Debtor would both receive immediate cash from the use of the property as collateral. According to Plaintiff, Debtor was to use his portion of the loan proceeds to make some necessary repairs to property owned by Debtor in Walden, New York; the Walden property was to be sold shortly thereafter and Plaintiff to

be repaid from these sale proceeds immediately. After the Walden Property was sold and the Plaintiff repaid, Debtor was to re-convey the Wawayanda property to Plaintiff.

Plaintiff's business was also experiencing financial difficulties at this time. Plaintiff was the owner of the Restaurant in Middletown, New York. At all times pertinent to the transactions discussed herein, Middletown OHA Development Corporation, d/b/a Courthouse Restaurant & Lounge, was a Chapter 11 Debtor before this Court in case number 01-37589. The case was dismissed on May 16, 2002 upon the Debtor's motion. It is alleged that Plaintiff was attempting to dispose of assets – either to raise money or to put assets out of the reach of his creditors.

Plaintiff conveyed the Wawayanda Property to Debtor on May 23, 2001. Plaintiff contends that the property had a market value of $345,000 at the time of the transfer. At the closing on the loan, the Debtor delivered a mortgage on the Wawayanda Property in the amount of $293,250.00 to Conseco Credit Corp. Plaintiff received $101,084.65 at the closing, and was also given Debtor's promissory note for $120,000 (the "Note"). Allegedly, Debtor also promised to give Plaintiff a mortgage in the sum of $17,500.00. A line item for a $17,500 mortgage was set forth in the HUD-1 settlement statement, but a second mortgage was never delivered.

The $17,500 "mortgage" was allegedly to be repaid from the equity in the Walden property, and Debtor purportedly represented that he had a buyer for the Walden property prior to the consummation of the transaction. The Plaintiff states that based upon this representation, he believed or was told that the $17,500 "mortgage" would be repaid quickly, within one month. The Walden property was sold to the aforementioned buyer; nevertheless, the $17,500 was never repaid.

Plaintiff subsequently learned that Debtor had procured purchasers for the Wawayanda property for the sum of $345,000. Plaintiff demanded that Debtor assign the contract to Plaintiff but Debtor refused.

Debtor's version of the sale transaction is that Plaintiff approached Debtor to sell his property to Debtor. The parties agreed to the transaction, which would have permitted Plaintiff to continue to occupy the premises provided Plaintiff paid his portion of the expenses. When Plaintiff did not make his expense payments, the property was ultimately foreclosed upon. Debtor further denies that he represented to Plaintiff that he would use the equity in the Walden property to repay Plaintiff. Rather, it is Debtor's contention that he purchased the property from the Plaintiff, the proceeds of the loan were disbursed and Debtor gave Plaintiff a promissory note for the balance of the sum due.

At some point subsequent to these events, the exact date of which is not clear from the parties' submissions, but certainly prior to the Debtor's bankruptcy filing, Plaintiff assigned the Note to his elderly father, Michael Cantanzaro. According to the Debtor's Schedule F, the Note was reduced to Judgment in Michael Catanazaro's favor on July 7, 2002. Debtor filed this Chapter 7 bankruptcy case on October 1, 2002. The instant adversary proceeding was filed on December 29, 2002. Plaintiff filed the First Amended Complaint Objecting to Discharge and to Determine Dischargeability of Debt on August 29, 2003, ECF Docket No. 18 (the Amended Complaint).[1] In the Amended Complaint, Plaintiff states at paragraph 4 "The plaintiff Stephen Catanzaro ("Catanzaro" or "plaintiff") is a resident of Orange County, New York." Paragraphs 30 and 32 of the

[1] Debtor filed a Motion to Dismiss Adversary Proceeding, in lieu of an answer, on September 11, 2003, ECF Docket No. 19. The Court issued an oral ruling denying the Motion to Dismiss Adversary Proceeding on September 23, 2003.

Amended Complaint state, respectively: "Defendant gave to **plaintiff** a certain promissory note dated May 24, 2001 for the amount of $120,000.00" and "After May 24, 2001, defendant has not paid **plaintiff** on the $120,000 note or any further sums for plaintiff's equity in the Property." The "wherefore" paragraph of the Amended Complaint, located on page 11, but not numbered, states "WHEREFORE, the **plaintiff** prays as follows..." Nowhere in the Amended Complaint does Plaintiff mention the assignment to his father or any power of attorney held on behalf of his father. Furthermore, at the Plaintiff's January 21, 2004 deposition, counsel for Debtor questioned Plaintiff with regard to the assignment. Debtor admitted that he had assigned the Note to his father, and that no reassignment had taken place. Plaintiff also stated under oath that the only power of attorney he held on his father's behalf was medical.[2]

Trial was scheduled to commence on November 3, 2004. On September 14, 2004, a Proposed Pre-Trial Order was filed in the case, ECF Docket No. 38. In the Pre-Trial Order, the Debtor makes the following allegation in Section IV, Defendant's Contentions of Fact: "Plaintiff is not a creditor of Defendant as he assigned the debt." This statement brought the question of Plaintiff's standing to the Court's attention for the first time. Debtor did not raise the standing issue in his motion to dismiss, ECF Docket No. 19. In fact, Debtor's petition shows that a judgment on the underlying promissory note was obtained by Michael Cantazaro, who received the debt as a gift from Stephen Cantazaro, Michael's son and the plaintiff herein. The Court scheduled a further pre-trial conference to take place on October 19, 2004 to discuss the standing issue, which was adjourned until October 26, 2004. On that date, the parties were given an opportunity to

[2] See Deposition Transcript annexed as Exhibit A to Defendant Debtor's Memorandum of Law Regarding the Issue of Plaintiff's Standing, ECF Docket No. 51.

brief the issue of Plaintiff's standing and the Court scheduled an additional date to hear arguments on this issue, November 16, 2004. Plaintiff filed a Memorandum Regarding Standing, ECF Docket No. 50, on November 3, 2004. Debtor filed a Memorandum of Law regarding the issue of Plaintiff's Standing, ECF Docket No. 51, on November 8, 2004.

Plaintiff's memorandum regarding his standing to bring this action was filed in the form of an affirmation from his attorney, which stated in pertinent part that the adversary proceeding was properly commenced by Plaintiff pursuant to a power of attorney, which the Plaintiff was allegedly searching for. On November 15, 2004, at 1:28 p.m., Plaintiff's counsel filed a letter to which he attached what purported to be a Durable General Power of Attorney (the "power of attorney"). The power of attorney was executed on April 4, 2001; however, the "Affidavit that Power of Attorney is in Full Force," which is part of the form power of attorney, was not executed, nor was the power of attorney accompanied by a separate affidavit completed by Plaintiff indicating its current validity. The Memorandum was the first time that the Court was informed that this proceeding was brought under the auspice of a power of attorney. It was Plaintiff's contention therein that as attorney-in-fact for his father, he had the power to assert his father's claims in this Court, and asked that the caption should be amended to reflect Michael Catazaro's name. Plaintiff further stated that the Debtor's failure to argue standing until the joint pretrial order amounted to trial by ambush. As the Court granted Plaintiff a continuance to establish his standing to bring this action, and as issues not raised in the pleadings may be treated as if they were properly raised when they are included in a pretrial order, *see Steger v. General Electric Co.*, 318 F3d 1066, 1077 (11th

Cir. 2003), Plaintiff was granted ample opportunity to defend against Debtor's standing allegations and thus no claim of surprise can now be made. The same cannot be said for Plaintiff's eleventh hour submission of the purported power of attorney, which was not submitted to this Court until a *sua sponte* call for briefing was made with regard to Plaintiff's standing. Standing must be addressed, even if raised for the first time on appeal. *See FW/PBS, Inc., infra.* Plaintiff also argued that in paragraph 32 of the Answer, Debtor judicially admits that he had a claim. Plaintiff fails to establish that Debtor's admission amounts to conferring jurisdiction upon this Court, particularly in light of Plaintiff's particular knowledge as to the existence of the power of attorney. Debtor merely admitted that he owed money pursuant to the subject Note; it was peculiarly within Plaintiff's knowledge as to whether the Note had been reassigned to him or not – and whether the power of attorney he held gave him the right to sue on his father's behalf, particularly in light of his failure to produce the power of attorney and indeed, his affirmative denial at his deposition that any such power of attorney existed. The Court will not hold Debtor to have admitted a matter that was not known to him with a sufficient degree of particularity.

Plaintiff also maintains that Debtor has not been prejudiced, and even if the power of attorney did not extend to filing of law suits (there was deposition testimony that the power of attorney was only medical, *see infra*) the Court should focus on the underlying claim, and not on the party who filed the complaint. The Plaintiff cites to *In re Meyer*, 120 F.3d 66 (7th Cir. 1997) for this proposition. The *Meyer* case in inapposite however because a showing of understandable mistake was made in that case. Plaintiff did not even attempt to make such a showing here, as is discussed in more detail *infra*.

Debtor also filed a brief with regard to standing. The Debtor indicates that at the January 21, 2004 deposition, Plaintiff admitted that he assigned the note to his father, but that he held only a medical power of attorney on his father's behalf. The Debtor also pointed out that Plaintiff had not filed an affidavit in support of his counsel's brief. The Debtor maintains that Fed. R. Civ. P. 17, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7014, only permits substitution of a real party in interest where the improper naming of the plaintiff was an "understandable mistake" or there was difficulty naming the correct plaintiff. Debtor states that Plaintiff knew full well when this action was commenced that the claim had been assigned to his father, yet he failed to plead in his complaint that he was bringing the action on his father's behalf or that an assignment had been made. Debtor also maintains that the assignment to Plaintiff's father was done with the specific intent of evading Plaintiff's creditors.[3] As stated, Plaintiff's restaurant was involved in a bankruptcy proceeding in this Court at the time of the assignment. Thus there is at least the inference that Cantazaro does not come to this equitable court with clean hands. Debtor advances that the 60-day period for filing dischargeability proceedings has passed and that Plaintiff knew or should have known whom the proper party was to file this suit, as he himself assigned the debt to his father. Michael Cantazaro failed to bring the suit within the appropriate time period. Thus the action should be dismissed.

At the November 16, 2004 hearing, the Court precluded Plaintiff from further briefing the issue of standing, pursuant to Fed. R. Civ. P. 37(c),[4] made applicable to this

[3] In fact, Plaintiff testified at the January 4, 2005 hearing that the assignment to his father was designed to prevent business creditors from satisfying their claims from the Note.

[4] Fed. R. Civ. P. 37(c) provides "Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

adversary proceeding through Fed. R. Bankr. P. 7037, on the basis that Plaintiff failed to comply with Fed. R. Civ. P. 26(a)(1)(B),[5] made applicable to this adversary proceeding through Fed. R. Bankr. P. 7026, by concealing the existence of the power of attorney from the Court and the Debtor Defendant until the eve of the standing hearing.[6]

A further hearing on standing was held on January 4, 2005 (the "final hearing"). On that date, Stephen Catanzaro and the notary public who witnessed the execution of the power of attorney gave testimony. The Court permitted Debtor and Plaintiff a final responsive briefing period and reserved decision until this time.

DISCUSSION

Substitution pursuant to Fed. R. Civ. P. 17(a)

Fed. R. Civ. P. 17(a), made applicable to this adversary proceeding through Fed. R. Bankr. P. 7017, provides that "[e]very action shall be prosecuted in the name of the real party in interest." "[U]nder New York law, an assignor of a claim retains no right to

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(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions..." The Court found that the Plaintiff's failure to provide the Power of Attorney until the eve of the standing hearing, and indeed, after the scheduled trial date of November 3, 2004, coupled with the Plaintiff's sworn deposition testimony that he held only a medical power of attorney for his father, and the further failure to mention the assignment or Michael Catanzaro at all prior to this Court's *sua sponte* call for briefing on the issue of standing, to be misleading disclosure which warranted preclusion of further evidence by Plaintiff as to his standing.

[5] Fed. R. Civ. P. 26(a) Required Disclosures; Methods to Discover Additional Matter. (1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: (B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment...

[6] Plaintiff's counsel argued at the January 4, 2005 hearing that he had not provided an affidavit from his client prior to that date because counsel believed to do so would credit the argument made by Debtor's counsel that the power of attorney was recently fabricated. Of course, the recent fabrication defense stems from Plaintiff's misleading and possibly false testimony that he only held a medical power of attorney for his father, who held the Note upon which this action is largely predicated. In any event, counsel's argument defies logic; an affidavit executed by Plaintiff or his father would be expected to refute any such defense.

pursue that claim upon assignment and the assignee is the real party in interest with respect to that claim." *See United States Fid. & Guar. Co. v. Petroleo Brasileiro S.A.*, 2001 WL 300735 (S.D.N.Y. 2001).

Fed. R. Civ. P. 17(a) also states in pertinent part " ...No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement by, or joinder or substitution of, the real party in interest...."

The rule is designed to prevent forfeiture when determination of the proper party to sue is difficult or when an undertandable mistake has been made. *See Lans v. Gateway 2000, Inc.*, 84 F. Supp.2d 112, 119 (D.D.C. 1999); *ComBANC Holdings Corp. v. Feldman (In re Feldman)*, 224 B.R. 297, 302 (Bankr. E.D.N.Y. 1998). Debtor correctly states that Plaintiff has not made a single argument that an understandable mistake has been made in bringing this action through an improper party.

It is well settled that substitution of a real party in interest may be done only upon a showing of an honest and understandable mistake or some confusion as to who the proper party was. Courts have declined to substitute a real party in interest pursuant to Rule 17 where no showing of understandable mistake has been made. *See Metal Forming Tech. v. Marsh & McClennan Co.*, 2004 WL 2378795 at *4 (D. S.D. Ind. Oct. 15, 2004) (citing cases and refusing to substitute real party in interest where no showing of confusion or understandable mistake had been made); *Lans, supra*, at 120 (the fact that assignor forgot that he assigned patent not understandable mistake), *Automated Info. Processing, Inc. v. Genesys Solutions Group, Inc.*, 164 F.R.D. 1, 3 (E.D.N.Y. 1995)(information pertaining to real party in interest was within plaintiff's ability to

ascertain when case was filed; a party is obligated to conduct reasonable inquiry concerning truth of allegations in the pleadings; court declined to substitute real party in interest and thereby reward plaintiff for failures, oversights and misrepresentations).

As in *Automated Info. Processing, supra*, Plaintiff certainly knew that he had assigned the debt to his father when he filed this action objecting to discharge. Plaintiff represented himself as the real party in interest in his Amended Complaint yet failed to reveal the assignment or inform the Court that he was suing pursuant to a power of attorney. Additionally, Plaintiff has made no showing of understandable mistake; rather he advances that he is entitled to bring this action pursuant to a power of attorney that counsel for Plaintiff admits he had never seen prior to November 25, 2004. Significantly Michael Cantanzaro, Plaintiff's father, has not affirmed the existing validity of this power of attorney through an affidavit, and Plaintiff has provided conflicting testimony in the matter that calls his credibility into question on the issue of the power of attorney's continuing validity.

Standing is jurisdictional, and the Court lacks subject matter jurisdiction over the entire matter if the plaintiff lacks standing at the time of filing of a complaint. *See Lans, supra*, at 116-17. The Court cannot as Plaintiff suggests focus on the merit of the cause of action if the Court lacks jurisdiction over the matter. Thus, if Plaintiff cannot prove standing through competent proof, the matter must be dismissed.

The Power of Attorney

The power of attorney submitted by the Plaintiff was not accompanied by an affidavit from the Plaintiff in which Plaintiff swears that he currently has standing and authority to pursue this cause of action. The affidavit would necessarily contain a

provision that the power of attorney had not been revoked in the intervening period between its execution and the commencement of this adversary proceeding.

Fed. R. Bankr. P. 9010(c) states "Power of attorney - The authority of any agent, attorney in fact, or proxy to represent a creditor for any purpose other than the execution and filing of a proof of claim or the acceptance or rejection of a plan **shall** be evidenced by a power of attorney conforming substantially to the appropriate Official Form..."(emphasis added). The use of the word "shall" in the rule makes the production of the power of attorney mandatory; and the appropriate time to produce this document was at the time the Amended Complaint was filed. The Plaintiff had the burden to allege his standing to bring this action in the original or Amended Complaint. "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record. And it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Thus, petitioners in this case must allege facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citations omitted); *see also Board of Education v. New York State Teachers Retirement System*, 60 F.3d 106, 109 (2d Cir. 1995); *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*, 994 F.Supp. 202, 206 (S.D.N.Y. 1998) (It is the burden of the party who seeks the exercise of jurisdiction in his favor to clearly allege facts demonstrating that he is the proper party to invoke judicial resolution of the dispute.). Plaintiff herein did not make any factual allegations with

regard to his authority to bring the action pursuant to a power of attorney, *see* paragraph 4 of the Amended Complaint, *supra*, and thus has no standing.

Furthermore, if an opposing party challenges a plaintiff's standing, a plaintiff must support his allegations by competent proof. *See Wechsler, supra*, at 207 (*citing McNutt v. General Motors General Acceptance Corp.*, 298 U.S. 178 (1936)). In *Wechsler*, the Trustee submitted affidavits from "innocent directors" in support of his standing to bring a malpractice action against a law firm. The Plaintiff herein had the burden not only to allege the facts that he had standing in the brief he was directed to file, but also to come forth with competent proof of standing. The power of attorney submitted by Plaintiff as evidence of his standing was over three years old and by its own terms could have been revoked at any time during the intervening period. The Plaintiff did not submit an affidavit from a party with first hand knowledge, i.e. his father, advancing that the power of attorney had not been revoked since 2001. Instead, at the January 4, 2005 hearing, Stephen Catanzaro testified for that the power of attorney was in full force and effect. This testimony is the only evidence submitted to this Court as to the current validity of the power of attorney. As stated, however, the Plaintiff's conflicting deposition testimony on this matter makes him a less than credible witness. The notary public who witnessed execution of the document could only testify that she took Michael Catanzaro's signature; she could not testify to the power of attorney's contents at the time of signing, nor could she verify that it was currently valid.

Plaintiff **denied** that he had power of attorney, other than medical, for his father at his January 21, 2004 deposition. Taken together with Plaintiff's failure to submit an affidavit based upon his personal knowledge that contains a factual recitation of his

standing or to appropriately plead the existence of the power of attorney as the basis for his standing to file this adversary proceeding, the Court is not convinced that the power of attorney is currently valid, or was valid at the time the Amended Complaint was filed. The Court therefore finds the Plaintiff does not have standing to bring an action seeking a determination of the dischargeability of the obligation evidenced by the Note or to object to the Debtor's discharge.

Statute of Frauds

Plaintiff has alleged a claim other than that due under the Note. There is also a debt allegedly owed pursuant to a $17,500 mortgage that was never memorialized in writing, save for a line item mention in a HUD-1 settlement statement. An agreement with regard to the transfer of real property would be subject to the Statute of Frauds, New York General Obligation Law Section 5-703, and would require a writing to be enforceable. To satisfy Section 5-703, the writing must contain an expression of "consideration for the transfer...subscribed by the party to be charged. Further, the purported [writing] must identify all of the parties to the transaction, **express all of the essential terms of the contract** and include a sufficient description of the property to readily identify the same..." *See Pentony v. Saxe*, 769 N.Y.S.2d 636, 37-38 (N.Y. App. Div. 2003)(emphasis supplied). "In order for a written memorandum or note to meet the requirements imposed by the Statute of Frauds, it must...contain substantially the whole agreement, and all its material terms and conditions, so that one reading it can understand from it what the agreement is..." *Currier v. Prudential Ins. Co. of America*, 697 N.Y.S.2d 774, 775 (N.Y. App. Div. 1999). No payment terms, interest rate, or date of maturity were contained on the HUD-1 settlement statement, pursuant to Plaintiff's

admission in his Supplemental Memorandum on Standing, *see* ECF Docket No. 58. Instead, in the absence of these terms, Plaintiff asks the Court to make the inference that the terms of the non-existent mortgage are the same as those contained in the Note. Therefore all the essential terms were NOT contained in the HUD-1 settlement statement. Rather, it appears that at the time of closing on the transaction at issue, the allegedly promised mortgage had not been provided to Plaintiff or presumably even drafted for execution. Thus, the parties obviously contemplated future execution of a formal mortgage after the closing date that would contain all the material terms of the agreement. Where there is an understanding that formal document is to follow a memorandum (in this instance, the HUD-1 settlement statement) with regard to the transfer of real property and essential terms have been omitted from the memorandum **or** left to future negotiations, the memorandum is insufficient to satisfy the statute of frauds. *See Simmonds v. Marshall*, 740 N.Y.S.2d 362, 363 (N.Y. App. Div. 2002); *Rouzani v. Rapp*, 610 N.Y.S.2d 600, 601 (N.Y. App. Div. 1994); *Jaffer v. Miller*, 521 N.Y.S.2d 472, 473 (N.Y. App. Div. 1987). The case cited in support of Plaintiff's argument that essential terms such as time of payment or type of consideration can be inferred in certain circumstances is factually distinguishable from the instant case, *see 160 Chambers Street Realty Corp. v. Register of City of New York*, 641 N.Y.S.2d 351, 352 (N.Y. App. Div. 1996). In that case, the Appellate Division presumed that payment would be made upon delivery of the deed, i.e. at closing; a much more clear-cut circumstance then that which exists in this case. In this adversary proceeding, the payment on the alleged $17,500 mortgage was not to be made at the time of closing but at an undefined later date, allegedly when the Debtor's Walden property was to be sold. The Court will not by

implication import terms from the promissory note upon Plaintiff's word under these circumstances where Plaintiff's credibility is so far compromised. A party whose claim is barred by the statute of frauds does not have standing to object to discharge as the party is not a creditor of the debtor. *See Canon v. Berger (In re Berger)*, 27 B.R. 201, 205 (Bankr. D. Ore. 1982). As the alleged $17,500 line item in the HUD-1 settlement statement referring to a non-existent mortgage does not satisfy the Statute of Frauds, it cannot confer standing on Plaintiff to bring this action.

Plaintiff's Clean Hands

Additionally, the Court notes that this plaintiff does not come to equity with clean hands. Putting aside the circumstances related by Plaintiff under which he supposedly transferred the Wawayanda Property to the Debtor in apparent expectation of receiving funds, only to have the property retransferred to him, a transaction which the Court can only call "extraordinary," if not suspect, the Plaintiff also assigned the Note under conditions that suggest he was attempting to evade the creditors of his restaurant. Plaintiff admitted this in testimony given at his deposition and before this Court on January 4, 2005. In his Supplemental Memorandum of Standing, Plaintiff argues that although he assigned the Note to his father, for no consideration, he remained the beneficial owner of the Note. This is the classic fraudulent conveyance scenario, as first discussed in the seminal *Twyne's Case*, Star Chamber, 76 Eng. Rep. 809 (1601), in which the so-called badges or incidents of fraud were first set forth. *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 40-41 (1994), in which the Supreme Court stated "The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated 'covinous and fraudulent' transfers designed 'to delay, hinder or defraud

creditors and others.' 13 Eliz., ch. 5 (1570). English courts soon developed the doctrine of 'badges of fraud': proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration) would raise a rebuttable presumption of actual fraudulent intent. *See Twyne's Case*, 3 Coke Rep. 80b, 76 Eng.Rep. 809 (K.B. 1601)." Not only has Plaintiff not rebutted the presumption that the Note was fraudulently transferred to his father to delay, hinder or defraud creditors, he has reinforced it, by admitting that the transfer to his father was made to protect his assets from creditors, for little or no consideration, and that the beneficial ownership of the Note remained his. Given the suspicious circumstances alleged, the Court questions whether Plaintiff would be entitled to judgment on the merits of this claim. In any event, the allegations of fraudulent conveyance – assignment of the Note to his father while expecting to keep all benefits appurtenant thereto, with the express intent of preventing his creditors from realizing any payment from that asset – is suspiciously similar to the "scheme" which Plaintiff obviously was a co-participant in – a sham sale of the Wawayanda property to a straw man (Debtor) with the intent all along of realizing the equity in the property while maintaining ownership. Whether this alleged "scheme" would have resulted in a finding of non-dischargeability or a denial of Debtor's discharge is far from certain, given the circumstances. The Court need not decide this issue because Plaintiff does not have standing.

CONCLUSION

For the foregoing reasons, Plaintiff did not have standing to bring this adversary proceeding and it is therefore dismissed. Debtor's counsel is directed to submit an order consistent with this memorandum decision within ten (10) days.

Dated: Poughkeepsie, New York
April 5, 2005

/s/ CECELIA G. MORRIS
Cecelia G. Morris, U.S.B.J.