



The relief described hereinbelow is SO ORDERED.

Signed February 17, 2011.

A handwritten signature in black ink that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

GARY D. JUSTIS,

Debtor.

**Case No. 10-21178
Chapter 7**

**NEBRASKA FURNITURE MART,
Plaintiff,**

v.

Adv. No. 10-6117

GARY D. JUSTIS,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Defendant/Debtor Gary Justis moves to dismiss a complaint objecting to discharge of a \$23,000 debt under 11 U.S.C. §523(a)(2)(A).¹ Plaintiff Nebraska Furniture Mart alleges Debtor incurred credit charges for merchandise used for his business on his personal charge account,

¹ Doc. No. 10.

thereby misrepresenting the nature of his purchases and defeating NFM's security interest in the collateral.

Background

Debtor filed for bankruptcy on April 14, 2010. On the petition date, Debtor held a personal revolving credit account with NFM with a balance owing of \$22, 956.54. NFM alleges Debtor purchased on his personal credit account merchandise which was actually used, installed or sold for his business, LAM Development, LLC. LAM Development had its own commercial account with NFM. NFM filed UCC financing statements as needed to protect its security interest in collateral sold on credit to LAM Development. NFM alleges that pursuant to the Revolving Charge Agreement, Debtor represented items purchased on the personal account were for his personal, family, and household purposes. NFM alleges Debtor obtained merchandise by false pretenses by charging merchandise for his business on his personal account and thereby defeating NFM's ability to perfect its lien against subsequent purchasers of the merchandise.

Discussion

In considering a motion to dismiss, the court accepts all well-pleaded factual allegations, as opposed to conclusory legal allegations, as true and construes them in the light most favorable to the plaintiff.² A complaint must contain sufficient factual allegations to state a plausible claim to relief.³ A claim is plausible when plaintiff pleads sufficient facts to allow the court to reasonably infer the defendant is liable for the alleged misconduct. Still, the complaint need not contain detailed factual allegations; the allegations must be enough to raise a right to relief above

² *Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991).

³ *Ashcroft v. Iqbal*, – U.S. –, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

the speculative level. The issue is not whether the plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims.⁴ In determining whether facts are sufficiently pled, the court may consider exhibits attached to the complaint.⁵ “[A]n exhibit to a pleading is a part of the pleading for all purposes.”⁶

In order to state a claim under §523(a)(2)(A), the plaintiff must allege the defendant made a false representation or a material omission with an intent to deceive, and the plaintiff justifiably relied upon it to his detriment.⁷ Complaints for nondischargeability for fraud under §523(a)(2) also have heightened pleading requirements under Fed R. Bankr. P. 7009. Alleging fraud with Rule 9’s required particularity means (1) identifying who made the misrepresentation; (2) stating the time, place and content of the misrepresentation; and (3) describing how the misrepresentation was communicated and its consequences.⁸ Rule 7009 requires simple, concise, and direct averments which are construed so as to do substantial justice.⁹ The result should allow the defendant fair and reasonable notice of plaintiff’s claims and the factual grounds upon which the claims are based.¹⁰

Plaintiff’s complaint sufficiently sets forth allegations asserting a §523(a)(2) objection to dischargeability. The complaint alleges Debtor represented items purchased on his personal charge account would be for his personal use. The complaint alleges Debtor charged business items to the personal account, knowing such purchases violated his revolving charge agreement.

⁴ *Id.*

⁵ *Thompson v. Illinois Dep’t of Prof’l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002).

⁶ Fed. R. Bankr. P. 7010.

⁷ *Field v. Mans*, 516 U.S. 59 (1995).

⁸ *Koch v. Koch Industries, Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000).

⁹ *In re Panem*, 352 B.R. 269, 281 (Bankr. D. Colo. 2006).

¹⁰ *Id.*

The complaint alleges NFM lost its interest in the merchandise because of Debtor's representations. NFM has alleged sufficient facts to survive dismissal.

Conclusion

IT IS ORDERED Defendant's Motion to Dismiss is DENIED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS