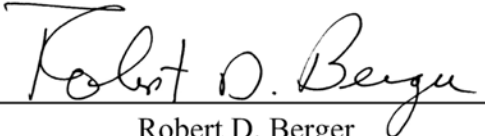




The relief described hereinbelow is SO ORDERED.

SIGNED this 25th day of April, 2014.


Robert D. Berger
United States Bankruptcy Judge

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

**In re:
RANDALL SCOTT JONES,
Debtor.**

Case No. 13-20861-11

**CLAY-PLATTE DEVELOPMENT CORPORATION,
Plaintiff,**

v.

Adv. No. 13-6082

**RANDALL SCOTT JONES, RJ EQUIPMENT
LEASING LLC, and RANDALL S. JONES, D.D.S., P.A.,
Defendants.**

**ORDER DENYING IN PART AND CONDITIONALLY GRANTING IN PART
DEFENDANTS' MOTION TO DISMISS**

This matter is before the Court on the motion to dismiss filed by Defendants Randall S. Jones ("Jones"), RJ Equipment Leasing LLC ("RJ Equipment"), and Randall S. Jones D.D.S.,

P.A. (“Jones D.D.S.”).¹ Defendants seek dismissal of the adversary complaint filed against them by Plaintiff Clay-Platte Development Corporation (“Plaintiff”). The complaint sets out two counts: one count for declaratory relief that certain collateral secures debt to the Plaintiff and one count under 11 U.S.C. § 727(a)(4)² for denial of discharge based on allegedly making false statements knowingly and fraudulently. Defendants have moved to dismiss the adversary complaint under Federal Rule of Civil Procedure 12(b)(6), arguing that Plaintiff’s allegations fail to state a claim entitling it to relief.

The Court finds that Plaintiff has alleged sufficient facts to state a claim for relief on count I of its complaint, but that count II of the complaint fails to address certain statutory requirements for nondischargeability in an individual chapter 11 case. The Court therefore denies the motion to dismiss as to count I, but grants the motion to dismiss without prejudice as to count II.

I. Background and Findings of Fact

The parties’ business relationship began in November 2009, when Defendant RJ Equipment applied for a loan with Plaintiff. The same day it applied for the loan, RJ Equipment signed a promissory note and security agreement with Plaintiff on the loan, and Defendant Jones signed a guarantee of the loan. Pursuant to these agreements, RJ Equipment gave a security

¹ Doc. 9.

² This matter is a core proceeding under 28 U.S.C. §157(b)(2)(A), (D), (G), (M), and (O). This Court has jurisdiction under 28 U.S.C. §157 and 1334. Venue is proper pursuant to 28 U.S.C. §1408 and 1409. All future statutory references are to the Bankruptcy Code (“Code”), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. §§ 101 - 1532, unless otherwise specifically noted.

interest to Plaintiff in all goods, furniture, fixtures, and equipment, whether owned then or acquired thereafter, including all products and proceeds therefrom (the “collateral”). Included in this collateral were assorted items of dental equipment. Both RJ Equipment and Jones represented to Plaintiff that the collateral belonged to RJ Equipment.

Plaintiff’s loan to RJ Equipment was for \$180,687.50. RJ Equipment agreed to repay the loan to Plaintiff with interest, at 5.5 percent, in accordance with the terms of the parties’ agreements. Plaintiff alleges it is the first priority, perfected, secured creditor on the collateral.

Jones filed an individual chapter 11 bankruptcy petition on April 9, 2013. Neither RJ Equipment nor Defendant Jones D.D.S. have filed for bankruptcy. In Schedule D of his bankruptcy petition, Jones acknowledged that the collateral for the loan discussed above belongs to RJ Equipment. Shortly after Jones’s bankruptcy petition was filed, Plaintiff filed a proof of claim for \$138,967.33 as a creditor of Jones’s chapter 11 case. Jones has filed no objection to this proof of claim.

In Jones’s proposed bankruptcy plan, he attempts to “cram down” the loan from Plaintiff to RJ Equipment. Plaintiff has objected within Jones’s bankruptcy case to those attempts.³ Jones has also claimed in his bankruptcy case that the collateral at issue never belonged to RJ Equipment, and that, alternatively, the collateral was purchased by and belongs to Jones himself. In his bankruptcy, Jones has also claimed that the collateral was never re-titled in the name of RJ

³ Recently, Jones amended his proposed chapter 11 bankruptcy plan (ECF 13-20861, 81) to provide for surrender of the dental equipment to Plaintiff, with any remaining deficiency to be allowed as an unsecured claim. Unsecured claimants are then to share in a pool of \$5,000. Several creditors have objected to this amended plan, and no chapter 11 plan has been confirmed in Jones’s chapter 11 case.

Equipment. Jones has also claimed that RJ Equipment does not file its own tax returns and that the RJ Equipment entity has always been listed on Schedule C of Jones's tax returns. Within its adversary complaint, Plaintiff alleges that Jones's statements with regard to the collateral have been knowing and fraudulent false statements and that the false statements were material because they concerned the parties' business relationship and the true ownership of the collateral.

Plaintiff filed this adversary proceeding in August 2013. Defendants' motion to dismiss has been fully briefed, and the parties are engaging in discovery.

II. Analysis

A. Standard for Motion to Dismiss and Burden of Proof

Adversary proceedings to determine the validity, extent, or priority of liens and those regarding objections to discharge are core proceedings under 28 U.S.C. § 157(b)(2)(K) and § 157(b)(2)(J) over which this Court may exercise subject matter jurisdiction.⁴

Defendants bring their motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which permits a motion for "failure to state a claim upon which relief can be granted"⁵ The requirements for a legally sufficient claim stem from Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief"⁶ To survive a motion to dismiss, a complaint must present factual allegations that, when assumed to be true, "raise a right

⁴ 28 U.S.C. § 157(b)(1) and § 1334(b).

⁵ Rule 12 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7012(b).

⁶ Rule 8 is made applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7008(a).

to relief above the speculative level.”⁷ The complaint must contain “enough facts to state a claim to relief that is plausible on its face.”⁸ “[T]he complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.”⁹

The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires more than “a sheer possibility.”¹⁰ “[M]ere ‘labels and conclusions,’ and ‘a formulaic recitation of the elements of a cause of action’ will not suffice; a plaintiff must offer specific factual allegations to support each claim.”¹¹ Finally, the Court must accept the nonmoving party’s factual allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven.¹²

B. Declaratory Relief; Security of Collateral

Count I of Plaintiff’s complaint seeks a declaratory judgment under 28 U.S.C. § 2201 and 11 U.S.C. § 506(a) that Plaintiff holds a secured claim in the collateral to the full extent of the value of the collateral and that the collateral belongs to RJ Equipment and not to Jones or Jones D.D.S. Defendants seek dismissal of count I under Rule 12(b)(6), but then argue only that both

⁷ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

⁸ *Id.* at 570.

⁹ *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

¹⁰ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹¹ *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 555).

¹² *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556).

RJ Equipment and Jones D.D.S. are property of Jones's chapter 11 bankruptcy estate and, therefore, any argument made by Plaintiff regarding the "cram down" of the collateral cannot be supported.

The Declaratory Judgment Act gives courts "the ability to declare the rights and other legal relations of interested parties" ¹³ To state a claim under the Declaratory Judgment Act, a plaintiff must "show that there is substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." ¹⁴ To succeed on such a claim, a plaintiff must "show a 'good chance' that he will be injured by the defendant's conduct in the future." ¹⁵ A plaintiff can, however, "seek declaratory relief before actual harm occurs if [he] has a reasonable apprehension of that harm occurring." ¹⁶

In count I of its complaint, Plaintiff alleges that an actual controversy exists as to the ownership of the collateral. Plaintiff's complaint details an alleged contractual relationship between the parties: the date of the alleged contract, the identities of the parties to that contract, the particulars of the parties' arrangement, and the alleged security given. Plaintiff also details the alleged obligations the parties made to each other with respect to the collateral. Plaintiff then details the controversy over the statements made by Jones in his bankruptcy. It is clear from

¹³ *United States v. Sec'y of Kansas*, Case No. 03-1170-JTM, 2003 WL 22472226, at *2 (D. Kan. Oct. 3, 2003).

¹⁴ *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974) (internal quotation marks omitted) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

¹⁵ *Al-Ibrahim v. Hadid*, Case No. CIV. A. 96-B-2429, 1997 WL 606283, at *4 (D. Colo. Apr. 10, 1997) (citing *Cox v. Phelps Dodge Corp.*, 43 F.3d 1345, 1347 (10th Cir. 1994)).

¹⁶ *United States v. Colo. Supreme Court*, 87 F.3d 1161, 1166 (10th Cir. 1996).

these facts that the parties dispute the ownership of, and security in, the alleged collateral, creating a substantial controversy that is immediate and real. As a result, the parties have adverse legal interests. Plaintiff's complaint also sets out how Plaintiff is injured by the alleged behavior of Defendants, asserting that Jones seeks to value the collateral in his bankruptcy far lower than Plaintiff contends the collateral should be valued and seeking an order from this Court concerning the secured status and value of that collateral.

Defendants' motion does not address the facts as plead, but instead seeks to debate the true ownership of the collateral, the ownership of RJ Equipment and Jones, D.D.S, and the contours of Jones's bankruptcy estate property. For example, Defendants' motion debates the ownership of the shares of RJ Equipment and Jones, D.D.S, and also argues that "RJ Equipment has never had a meaningful separate existence."¹⁷ Defendants' response then alleges additional facts regarding the formation of RJ Equipment, the tax status of RJ Equipment, the leadership of that entity, and the facts surrounding Jones's divorce.¹⁸ Whatever the facts may ultimately prove to be, the veracity of the facts supporting Plaintiff's claim are not currently before this Court. On a Rule 12(b)(6) motion to dismiss, the Court *must* assume the facts in the complaint are true, then assess whether those facts are sufficient to support a claim. Here, Plaintiff has plead sufficient facts to support its claim under the Declaratory Judgment Act. Defendants' motion to dismiss does not address the elements of Plaintiff's claim, but instead argues the facts, which is

¹⁷ Doc. 9, 4 ¶ 8.

¹⁸ *Id.* ¶ 9.

inappropriate at the motion to dismiss stage.¹⁹ The Court determines only that Plaintiff's complaint sufficiently states a claim for relief on count I. As a result, Defendants' motion to dismiss count I of Plaintiff's complaint must be denied.

C. Denial of Discharge Under § 727(a)(4)

Count II of Plaintiff's complaint seeks to deny a discharge to Jones under 11 U.S.C. § 727(a)(4), which denies a discharge to a debtor who "knowingly and fraudulently, in or in connection with the case--(A) made a false oath or account; [or] (B) presented or used a false claim[.]" Defendants seek dismissal of count II by denying that Jones concealed anything or that he made any statement with fraudulent intent. Plaintiff responds by going through the elements required under § 727(a)(4), alleging it has plead sufficient facts on each element.

To state a claim under § 727(a)(4), Plaintiff bears the burden of showing, by a preponderance of the evidence, that Jones "knowingly and fraudulently" made an oath or false claim and that the oath or false claim "relates to a material fact."²⁰ There are, therefore, two prongs to the § 727(a)(4) inquiry: a knowingly and fraudulently made oath or false statement and materiality.

The first prong requires that the oath or false claim be knowingly and fraudulently made: "A debtor will not be denied discharge if a false statement is due to mere mistake or inadvertence."²¹ However, "reckless indifference to the truth has consistently been treated as the

¹⁹ See *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556) (stating that a complaint's factual matter must be "accepted as true" when analyzing a motion to dismiss).

²⁰ *Gullickson v. Brown (In re Brown)*, 108 F.3d 1290, 1294–95 (10th Cir. 1997).

²¹ *Id.* at 1294.

functional equivalent of fraud for purposes of § 727(a)(4)(A).”²² Because a debtor is ordinarily the only person able to directly state his intent, “fraudulent intent may be deduced from the facts and circumstances of a case.”²³ Cases in the Tenth Circuit have found that a knowingly and fraudulently made “omission of assets from a Statement of Affairs or schedule may constitute a false oath under section 727(a)(4)(A).”²⁴

The second prong of the § 727(a)(4) claim deals with materiality. “A statement or omission is material under § 727(a)(4) if it bears a relationship to the debtors’ business transactions, or if it concerns the discovery of assets, business dealings, or the existence or disposition of the debtor’s [sic] property.”²⁵ Under this definition, the existence and disposition of property has been considered a material fact.²⁶

Plaintiff’s complaint alleges sufficient facts to support a § 727(a)(4) claim. Plaintiff alleges false statements from Jones and/or RJ Equipment regarding the ownership of the collateral. Specifically, Plaintiff alleges that Jones knowingly and fraudulently made false statements either at the time the loan agreements between the parties were signed or at the time

²² *U.S. Trustee v. Garland (In re Garland)*, 417 B.R. 805, 815 (B.A.P.10th Cir. 2009) (internal quotation marks omitted) (quoting *Cadle v. King (In re King)*, 272 B.R. 281, 302 (Bankr. N.D. Okla. 2002)).

²³ *Job v. Calder (In re Calder)*, 907 F.2d 953, 955-56 (10th Cir. 1990). Courts in the Tenth Circuit analyze “badges of fraud” to identify fraudulent intent. See *In re Garland*, 417 B.R. at 815 (listing “badges of fraud”).

²⁴ *In re Calder*, 907 F.2d at 955.

²⁵ *Freelife Int’l, LLC v. Butler (In re Butler)*, Case Nos. UT-06-077, 04-27637-JAB, 04P-3012-JAB, 2007 WL 866660, at *8 (B.A.P. 10th Cir. 2007).

²⁶ *In re Calder*, 907 F.2d at 955.

Jones signed his sworn bankruptcy petition schedules. Plaintiff alleges that Jones knew these statements were false and that Jones purposefully made the false statements concerning a material matter. Plaintiff alleges that the false statements were material because they concerned the discovery of assets, the parties' business dealings, and the existence or disposition of the collateral at issue. Plaintiff alleges it is harmed by Jones's false statements due to Jones's efforts to cram down the loan from Plaintiff to RJ Equipment by changing the value of the debt based on the value of the collateral securing the loan.

Plaintiff's complaint therefore alleges all elements necessary to state a claim for relief under § 727(a)(4). As discussed above, Defendants contend that the facts do not support Plaintiff's claims, arguing that there was no concealment or fraudulent intent by Jones. As also discussed above, this is not an appropriate argument in a motion to dismiss based on failure to state a claim.²⁷ The parties' factual disputes must be fleshed out through discovery, and the Court will address them at the appropriate time. Here, it is sufficient that Plaintiff has given Defendants fair notice of the facts underlying its § 727(a)(4) allegation.²⁸

Although not raised by Defendants, this Court recognizes that Plaintiff's complaint's request for an order denying Jones a discharge is incomplete. Jones's bankruptcy case is an individual chapter 11 case under the Bankruptcy Code. Section 1141(d)(3) therefore requires

²⁷ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)) (stating that a complaint's factual matter must be "accepted as true" when analyzing a motion to dismiss).

²⁸ See *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (requiring that a complaint give a defendant "fair notice" of the claim and the grounds for that claim).

more before the § 727(a) bars to discharge apply. Specifically, § 1141(d)(3) states that “confirmation of a plan does not discharge a debtor if” three elements are met:

- (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
- (B) the debtor does not engage in business after consummation of the plan; and
- (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

The Tenth Circuit B.A.P. has concluded that “[a]ll three elements of § 1141(d)(3) must be established before a Chapter 11 debtor’s discharge may be denied. A Chapter 11 discharge cannot be denied solely on the ground that the debtor would have been denied a discharge under Chapter 7.”²⁹

Plaintiff’s complaint seeks to deny Jones a discharge solely under § 727(a)(4), without any reference to the additional elements required for denial of discharge under § 1141(d)(3). As a result, as currently stated, count II of Plaintiff’s complaint fails to plead all of the necessary statutory requirements for denial of discharge.

Defendants’ motion to dismiss should be granted for Plaintiff’s failure to state a claim for relief because count II of the complaint fails to address the required statutory elements for denial of discharge in an individual chapter 11 case. The Court therefore grants without prejudice Defendants’ motion to dismiss as to count II.³⁰

²⁹ *Torrington Livestock Cattle Co. v. Berg (In re Berg)*, 423 B.R. 671, 677 (B.A.P. 10th Cir. 2010) (citations omitted).

³⁰ Apparently recognizing this infirmity, the Plaintiff filed a motion to dismiss count II of its complaint on April 4, 2014 (Doc. 38). Plaintiff’s motion to dismiss is denied as moot.

III. Conclusion

For the reasons set forth above, the Court denies Defendants' motion to dismiss count I of Plaintiff's complaint. Plaintiff has alleged sufficient facts to support count I of its complaint and has put Defendants on notice of the case made against them. The Court, however, grants Defendants' motion to dismiss as to count II of Plaintiff's complaint.

It is, therefore, by the Court ordered that Defendants' motion to dismiss is denied in part and granted in part.

IT IS SO ORDERED.

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