

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **10-05650-hb**

Adversary Proceeding Number: **10-80136-hb**

ORDER DENYING MOTION TO DISMISS

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
02/09/2011**



Entered: 02/10/2011

A handwritten signature in cursive script, appearing to read "John L. Currie".

US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re,

Kenneth Joseph Pujdak and Jo Ellen Sands
Pujdak,

Debtor(s).

Janet Voss,

Plaintiff(s),

v.

Kenneth Joseph Pujdak
Jo Ellen Sands Pujdak,

Defendant(s).

C/A No. 10-05650-HB

Adv. Pro. No. 10-80136-HB

Chapter 7

**ORDER DENYING MOTION TO
DISMISS**

THIS MATTER comes before the Court on the Motion to Dismiss (“Motion”)¹, filed by Kenneth Joseph Pujdak and Jo Ellen Sands Pujdak (“Defendants”). Defendants seek relief from the Court under Fed. R. Civ. P. 12(b)(6).² A response in opposition to Defendants’ Motion was filed by Janet Voss (“Plaintiff”). The Court has jurisdiction over

¹ Although the Defendants filed individual Motions to Dismiss, the Motions are identical and state that both Defendants pray that the above-captioned adversary proceeding be dismissed.

² Defendants do not state that the Motion to Dismiss is pursuant to Rule 12(b)(6). In fact, Defendants do not state any grounds under Rule 12 for their Motion to Dismiss. Nonetheless, it is clear from the face of the Motion and Plaintiff’s Brief that Defendants seek dismissal pursuant to Rule 12(b)(6) for failure to state a claim. For instance, in their Motion, Defendants assert that:

Because there is no state Court judgment or remaining rights under state law for recovery under the SC Uniform Securities Act and under state law Fraud and/or Constructive Fraud, plaintiff is barred from asserting in this court fraud under 11 U.S.C. § 523(a)(2)(A) and securities laws violations under 11 U.S.C. § 523(a)(19).

(Doc. # 13 & 14 at ¶ 7). Therefore, it is appropriate to deem the Motion as a motion to dismiss pursuant to Rule 12(b)(6). *See* 5 Wright & Miller, Federal Practice & Procedure § 1192 (“Many district judges tend to focus on whether any party has been prejudiced by the movant’s lack of particularity and whether the court can comprehend the basis of the motion and deal with it fairly; as a result, courts generally avoid engaging in an overly technical evaluation of the papers on which the motion is predicated and grant or deny the requested relief on the basis of the underlying merits of the petition.”).

the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I).

Plaintiff initiated a state court action in the Court of Common Pleas for Greenville County, South Carolina against Defendants and their businesses. *Voss v. Pujdak, et. al*, C/A No. 07-CP-23-0180, slip op. (2007). Defendants answered, but thereafter the court found that they failed to comply with discovery orders and struck Defendants' Answer and found them in default. The court referred the matter to the Master in Equity for a determination of damages. Thereafter, a judgment was entered in favor of the Plaintiff against Defendants and their businesses on March 31, 2008. The state court, entering judgment, specifically held that:

The Court finds that . . . Defendants caused [Plaintiff] damage in the amount of \$41,541.96 . . . and \$1,288.72 . . .

. . .

Defendants, being in default, are liable for violation of the SC Securities Act, SC Code 35-1-509; common law negligence, fraud and constructive fraud, quantum meruit, and SC Unfair Trade Practices Act. Accordingly, under these theories of liability, this Court finds Plaintiff is damaged under each theory and Defendants are liable in the actual amount of \$42,830.68.

However, in terms of recovery, Plaintiff can only recover under one theory of damages. Plaintiff elects recovery under SCUTPA.

Under the SCUTPA claim, specifically SC Code 39-5-140, Plaintiff is entitled to a trebling of damages, and costs and attorney fees. Damages are awarded in the amount of \$128,492.04. By separate affidavit, counsel for Plaintiff has submitted fees and costs in the amount of \$7,132.50.

Id. at 2-4. Defendants filed for relief under chapter 7 on August 8, 2010, and thereafter Plaintiff initiated this adversary proceeding. Copies of the state court complaint and the state court's order are attached to Plaintiff's Complaint and all allegations and findings thereof were incorporated by reference into the Complaint. In this action Plaintiff claims the

debts owed to her are excepted from discharge³ pursuant to 11 U.S.C. §§ 523(a)(2)(A) and (a)(19).⁴

Section 523(a)(2)(A) prohibits the discharge of debt obligations “obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.” § 523(a)(2)(A). Under § 523(a)(19), debts for violation of state or federal securities laws are excepted from discharge.

Section 523(a)(19) was added to § 523 by the Sarbanes-Oxley Act, passed on July 30, 2002. The provision includes debts that are covered by a judgment, order, consent decree or settlement agreement, whether before or after the date of the petition, and is broadly worded to cover damages, fines, penalties, restitution awards, attorneys fees, and any other payment owed by the debtor.

Ginsberg & Martin on Bankruptcy § 11.06.

Defendants were found to be in debt to Plaintiff on all causes of action set forth in the state court complaint, including fraud and violation of securities laws. However, pursuant to South Carolina’s election of remedies doctrine, Plaintiff was only allowed to recover under one cause of action and elected SCUPTA remedies. *See Smith v. Strickland*, 314 S.C. 192, 197, 442 S.E.2d 207, 210 (Ct. App. 1994) (“In South Carolina, a plaintiff is generally permitted to assert all viable causes of action, whether they are consistent or not. A plaintiff, however, can only have one recovery for a single wrong.”).

As a result of Plaintiff’s election of remedies in state court, Defendants challenge Plaintiff’s Complaint with this 12(b)(6) Motion, arguing that by electing the SCUPTA remedy, Plaintiff lost her right to pursue this action in bankruptcy court alleging any other

³ The Complaint was filed on September 7, 2010, and amended on November 11, 2010. The Complaint uses the words “deny discharge” but from the context, it appears that Plaintiff has requested only that the debts due to her be excepted from discharge pursuant to §§ 523(a)(2)(A) and (a)(19).

⁴ Further reference to the Bankruptcy Code, 11 U.S.C. § 101 *et. seq.*, will be by section number only.

theory of recovery. Specifically, Defendants claim that Plaintiff is now barred from asserting fraud under § 523(a)(2)(A) and a violation of state securities laws under §523(a)(19) as grounds for excepting the debts in question from discharge in bankruptcy.

Pursuant to Fed. R. Civ. P. 12(b)(6)⁵, a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. A motion pursuant to Fed. R. Civ. P. 12(b)(6) challenges the legal sufficiency of a complaint and should be considered with the assumption that the facts alleged in the complaint are true. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (citations omitted), *see also*, *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007), Fed. R. Civ. P. 8(a)(2); Fed. R. Bankr. P. 7008, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) “Given the Federal Rules' simplified standard for pleading, ‘[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 998 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, (1984)).

“The Bankruptcy code has long prohibited debtors from discharging liabilities incurred on account of their fraud, embodying a basic policy animating the Code of affording relief only to an ‘honest but unfortunate debtor’” *Cohen v. de la Cruz*, 523 U.S. 213, 217, 118 S.Ct. 1212, 1216 (1998) (citations omitted). The plain language of § 523(a)(2)(A) “demonstrates that Congress excepted from discharge not simply any debt incurred as a result of fraud but only debts in which the debtor used fraudulent means to obtain money, property, services, or credit.” *Nunnery v. Rountree (In re Rountree)* 478 F.3d 215, 219 (4th Cir. 2007). In addition, § 523(a)(2)(A) excepts from discharge “any liability arising from money, property, etc., that is fraudulently obtained, *including treble damages*,

⁵ This rule is made applicable to adversary proceedings by Fed. R. Bankr. P. 7012(b).

attorney’s fees, and other relief that may exceed the value obtained by the debtor.” *Cohen*, 523 U.S. at 223, 118 S.Ct. at 1219 (emphasis added). The Fourth Circuit has clarified that, “the Bankruptcy Act excepts ‘from discharge . . . all fraud claims creditors have successfully *reduced to judgment.*’” *Rountree*, 478 F.3d at 220. (emphasis added).

Section 523(a)(19) prohibits the discharge of a debt that:

(A) is for—

- i. the violation of . . . any of the State securities laws, or any regulation or order issued under such . . . State securities laws; or
- ii. common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results before, on, or after the date on which the petition was filed, from—

- i. any judgment, order, consent order, or decree entered in any . . . State judicial or administrative proceeding . . .
- iii. [or] any court . . . order or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

§ 523(a)(19). Therefore, § 523(a)(19) “involve[s] two elements which must be established: (1) a debt that is for a violation of state securities laws; and (2) the debt results from a judgment or order in a federal or state judicial proceeding.” *Okla. Dept. of Sec. ex rel. Faught v. Mathews*, 423 B.R. 684, 687-88 (W.D. Okla. 2010).

Notwithstanding the general narrow application of the statutory exceptions to discharge . . . the § 523(a)(19) exception has an express purpose and is broadly construed to achieve that purpose. The exception is designed to be broadly applied because [its] purpose . . . is to protect investors and hold accountable those who violate securities laws.

Id. at 689 (citing *In re Civiello*, 348 B.R. 459, 463 (Bankr. N.E. Ohio 2006)).

In the instant case, the state court’s order found Defendants “liable for violation of the SC Securities Act, SC Code 35-1-509; common law negligence, fraud and constructive fraud, quantum meruit, and SC Unfair Trade Practices Act. Accordingly, under these theories of liability, this Court finds Plaintiff is damaged under each theory and Defendants

are liable in the actual amount of \$42,830.68.” *Voss*, C/A No. 07-CP-23-0180, slip op. at 3. Pursuant to the election of remedies doctrine, Plaintiff then elected her remedy under SCUPTA. *See Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 153 (2010) (“The basic purpose of election of remedies is to prevent double recovery for a single wrong. ‘When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both.’” (quoting *Save Charleston Found v. Murray*, 286 S.C. 170, 333 S.E.2d 64 (Ct. App. 1985)); *see also Adams v. Grant*, 292 S.C. 581, 585, 358 S.E.2d 142, 144 (Ct. App. 1986) (“When the facts alleged entitle a party to alternative remedies, he should have a full opportunity to prove his claim to some form of relief, but he should not receive double recovery.” (citations omitted)).

After a review of applicable law applied to the facts set forth in the Complaint and its attachments, the Court finds no authority from which it can determine that this election of remedies precludes Plaintiff from reasserting violations of the SC Securities Act, SC Code 35-1-509, and fraud as bases for excepting Defendants’ debt to Plaintiff from any discharge Defendants may receive in this bankruptcy case. Plaintiff’s Complaint is sufficient to survive a 12(b)(6) challenge to the § 523(a)(2)(A) and 523(a)(19) claims.

IT IS THEREFORE, ORDERED, that Defendants’ Motion to Dismiss is **DENIED.**