

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-01095

ADVERSARY PROCEEDING NO: 09-80086

ORDER GRANTING MOTION TO DISMISS

The relief set forth on the following pages, for a total of 6 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
08/25/2009



Entered: 08/27/2009

A handwritten signature in black ink, appearing to read "S. R. O.", written over a horizontal line.

US Bankruptcy Court Judge
District of South Carolina

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

In re,

Frederick James Cerrato and
Marjorie Ann Cerrato,

Debtor(s).

Thaddeus Segars,

Plaintiff(s),

v.

Frederick James Cerrato,

Defendant(s).

C/A No. 09-01095-DD

Adv. Pro. No. 09-80086-DD

Chapter 7

**ORDER GRANTING MOTION TO
DISMISS**

THIS MATTER is before the Court on Frederick James Cerrato's ("Debtor" or "Defendant") Motion to Dismiss for Failure to State a Cause of Action or, In the Alternative, for Summary Judgment ("Motion"). A hearing was held in this matter on August 19, 2009 in Charleston, South Carolina. This order confirms and provides the rationale for the ruling on the record granting the motion to dismiss. The Court has jurisdiction over the parties and 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)(A) and (I).

FACTS

In June 2004, Thaddeus Segars ("Plaintiff") purchased real property on Hilton Head Island, South Carolina with Debtor and others for a purchase price of one million eight hundred thousand dollars (\$1,800,000.00). The real property is undeveloped land fronting the Atlantic Ocean in the Singleton Beach section of Hilton Head Island. There are issues

with the Ocean and Coastal Resource Management (“ORCM”) coastal zone management line that affect development on the property.

Contemporaneous with the purchase Plaintiff, Defendant, Stephen Cerrato, and Steve Carb executed a purchase money promissory note with Suntrust Bank for \$1,800,000.00. The Singleton Beach property is titled in the names of Frederick J. Cerrato, Stephen Cerrato, Thaddeus Segars, and Steve Carb. The parties also entered into a joint venture agreement whereby Frederick J. Cerrato and Stephen Cerrato were each granted a 1/3 interest in the title, Segars was granted a 2/9 interest, and Carb was granted a 1/9 interest.

In or around July 2006, the parties refinanced the Suntrust debt, borrowing two million one hundred thousand dollars (\$2,100,000.00). Certain sums of the refinance transaction were escrowed for future loan payments. Carb and Segars guaranteed this note. Segars alleges that he agreed to become obligated for a greater loan amount to accommodate the Cerratos.

In or around December 2007, the parties defaulted on the Suntrust loan. Suntrust Bank filed suit against the Cerratos, Segars, and Carb (Beaufort County case 2008-CP-07-1607) and has obtained summary judgment on its note against Segars for \$2,218,364.28. Segars has filed a motion for leave to file cross claims against the Cerratos and Carb for indemnification and contribution in the state court litigation. The Cerratos have filed a separate lawsuit against Segars alleging negligent misrepresentation (Beaufort County case 2007-CP-07-2007), which has been stayed by S.C. R. Civ. P. 40(j).

STANDARD OF REVIEW

Under Fed. R. Civ. P. 12(b)(6)¹, a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. In order to survive a motion to dismiss, a

¹ This rule is made applicable in bankruptcy by Fed. R. Bankr. P. 7012(b).

plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading which states a claim for relief must contain “a short and plain statement of the claim showing that the pleader is entitled to relief....” Fed. R. Civ. P. 8(a)(2); Fed. R. Bankr. P. 7008. A statement showing entitlement to relief under Rule 8(a)(2) must include “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.

CONCLUSIONS OF LAW

Segars’ complaint contains two separate causes of action for exception to discharge pursuant to 11 U.S.C. § 523(a)(2) and (3)², as well as for equitable relief pursuant to Fed. R. Bankr. P. 7001(7). The Defendant contends that Segars’ complaint fails to state a claim upon which relief can be granted and therefore should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

The Supreme Court recently adopted a heightened pleading standard under Fed. R. Civ. P. 8(a)(2) and Fed. R. Civ. P. 12(b)(6). See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (U.S. 2009). The plaintiff must plead sufficient factual allegations to establish a claim for relief that is plausible. Under Fed. R. Civ. P. 8, the pleading does not require detailed factual allegations, but it demands more than an unadorned “the-defendant-unlawfully-harmed-me” accusation. *Twombly*, 550 U.S. 555. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice. *Iqbal*, 129 S.Ct. at 1949. Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1950.

² Further reference to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, will be by section number only.

To establish a claim under § 523(a)(2)(A) a creditor must allege:

- (1) that the debtor made a representation,
- (2) that at the time the representation was made, the debtor knew it was false,
- (3) that the debtor made the false representation with the intention of defrauding the creditor,
- (4) that the creditor justifiably relied upon the representation, and
- (5) that the creditor was damaged as the proximate result of the false representation.

In re Bleam, 356 B.R. 643, 647 (Bankr. D.S.C. 2006). Plaintiff's complaint fails to allege any element necessary to establish a claim pursuant to § 523(a)(2)(A). Granting every inference to the Plaintiff, the complaint is deficient in that it fails to plead sufficient factual allegations to establish any claim under § 523(a)(2)(A).

Claims pursuant to § 523(a)(2)(B) require a false written statement respecting the financial condition of the debtor or an insider. *Bleam*, 356 B.R. at 647. In this case, the complaint does not set forth an allegation of the use of a false written statement. Because there is no cause of action under § 523(a)(2)(B) set forth in the complaint, dismissal is proper for failure to state a claim for which relief can be granted.

Section 523(a)(3) provides an exception to discharge when a creditor is neither listed nor scheduled by the debtor. The complaint makes no allegations that Plaintiff was not listed in Debtor's schedules nor is there an allegation that Plaintiff did not have actual notice of the bankruptcy filing in time to have filed a claim. The complaint fails to state a cause of action under § 523(a)(3).

Plaintiff's final cause of action is for equitable relief pursuant to Fed. R. Bankr. P. 7001(7). The Bankruptcy Rules govern procedure in the bankruptcy courts and do not create causes of action. Perhaps there is some state law cause of action hidden in the facts of

this case but the Court cannot discern it from the complaint and Plaintiff could not articulate it at the hearing.

For these reasons the Plaintiff's complaint is dismissed. Plaintiff is granted ten (10) days from the entry of this order to file any amended complaint.

AND IT IS SO ORDERED.

Columbia, South Carolina
August 25, 2009