

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

In re,

John L. Duffy and Rita S. Duffy,

Debtor(s).

David W. Brandli  
Lesley L. Brandli,

Plaintiff(s),

v.

John L. Duffy,

Defendant(s).

C/A No. 09-06778-DD

Adv. Pro. No. 09-80190-DD

Chapter 7

**ORDER DENYING MOTION TO  
DISMISS**

THIS MATTER is before the Court on John L. Duffy's ("Debtor" or "Defendant") Motion to Dismiss<sup>1</sup> ("Motion"). Defendant seeks relief from this Court under Fed. R. Civ. P. 12(b)(6). A response in opposition to Defendant's Motion was filed by David W. Brandli and Lesley L. Brandli ("Plaintiffs"). 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)(I).

***BACKGROUND***

John L. Duffy ("Defendant" or "Debtor") along with his spouse, Rita S. Duffy, filed a joint voluntary petition under chapter 7 of the Bankruptcy Code on September 15, 2009. The Defendant is a resident of Charleston County, South Carolina and the primary member of John L. Duffy Construction, LLC. The Defendant entered into a contract with Plaintiffs for the construction of a residence located at 2753 Fountainhead Way, Mount Pleasant,

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<sup>1</sup> Defendant's Motion was styled as a Motion for Summary Judgment, however his argument was for dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Defendant's counsel was contacted by Chambers and he informed the Court that it was his intention to proceed under Fed. R. Civ. P. 12(b)(6).

South Carolina. The agreement reflects that Defendant entered into this contract in his capacity as president of John Duffy Construction, LLC.<sup>2</sup>

The contract provides, “all of the Owner’s deposits and Progress Payments shall be placed in a separate account for this specific property by the Contractor.” It further provides that, “Contractor shall not commingle these funds with any other.” The Brandlis are the “owner” and John Duffy Construction, LLC is the “Contractor.” Plaintiffs allege that a separate account was not created for the Plaintiffs’ construction job, and thus their deposits and progress payments were not placed in a separate account. The Complaint claims that payments by the Plaintiffs to John L. Duffy Construction, LLC were commingled with funds for other construction projects and other funds of the Defendant. Plaintiffs additionally assert that the Defendant and John L. Duffy Construction, LLC failed to comply with the requirement of the contract for a detailed invoice for work completed to date and for a waiver of liens.

The Plaintiffs seek a determination that Debtor owes them a debt and that it should not be discharged because of the alleged fraudulent representations of the Defendant. The Plaintiffs argue that the Defendant made fraudulent representations including but not limited to the representations that all of the Plaintiffs’ deposits and progress payments would be placed into a separate account for the construction project and that the funds would not be commingled with any other funds. Plaintiffs allege that these representations were false. Plaintiffs further contend that Defendant knew these representations were false and that he intended that the representations be acted upon to the detriment of the Plaintiffs.

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<sup>2</sup> The company name is obviously not identical to that reflected in the articles of organization of John L. Duffy Construction, LLC. There is some dispute between the parties concerning the timing of the formation of the LLC as juxtaposed to the date of the contract and concerning when the handwritten notation “LLC” was added following “John Duffy Construction.”

Defendant contends that all of Plaintiffs' dealings were with John L. Duffy Construction, LLC. Defendant argues that the Plaintiffs have failed to allege facts that constitute a cause of action against the Defendant personally. The Defendant seeks dismissal of Plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6).

### ***STANDARD OF REVIEW***

Under Fed. R. Civ. P. 12(b)(6)<sup>3</sup>, 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 plaintiff must provide "more than mere 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 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***

The Plaintiffs' complaint seeks an exception to the discharge of Debtor pursuant to 11 U.S.C. § 523(a)(2). The Defendant's Motion contends that Plaintiff's complaint fails to state a claim upon which relief can be granted and therefore should be dismissed. Defendant further argues that the Plaintiffs knew they were dealing with a limited liability company and that the Defendant personally bears no responsibility because of the limited liability of a member of such entities.

Pursuant to Fed. R. Civ. P. 8, a pleading does not require detailed factual allegations, but it demands more than an unadorned "the-defendant-unlawfully-harmed-me" accusation.

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<sup>3</sup> This rule is made applicable to adversary proceedings in bankruptcy court by Fed. R. Bankr. P. 7012(b).

*Twombly*, 550 U.S. at 555. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements are insufficient. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009). Only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.* at 1950. 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).

An actionable claim pursuant to § 523(a)(2)(A) requires a plaintiff to 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 a proximate result of the false representation.

*In re Bleam*, 356 B.R. 643, 647 (Bankr. D.S.C. 2006). In this case, the Plaintiffs' allegations in the complaint are sufficient to survive a motion to dismiss. The complaint clearly alleges that Defendant made representations regarding the placement of the Plaintiffs' deposits and progress payments in a separate account and that the funds would not be commingled with other funds. The complaint also alleges that the representations were false and that Debtor had no intention of complying with his promise. The Plaintiffs argue that the representations were made to induce them to enter the contract, that they relied upon the representations and were damaged as a result. The allegations of the complaint are sufficient to give the Defendant adequate notice of the nature of the claim and otherwise meet the standards required by Federal Rules of Civil Procedure 8 and 12(b)(6). The

complaint contains more than mere labels, conclusions, and a formulaic recitation of the elements of the cause of action.

Turning to the Defendant's assertion that the Defendant bears no liability because he is protected by the shield of a limited liability company, it appears that the complaint is sufficient to survive under the Fed. R. Civ. P. 12(b)(6) standard.<sup>4</sup> The member of a limited liability company is personally liable for his own tortious conduct. The official comments to South Carolina Code § 33-44-303 states, "A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity." It is well settled South Carolina case law that the officers, directors, or controlling persons of a corporation are personally liable for tortious actions in which they have participated or directed. *See, Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 687 S.E.2d 714, 720 (S.C. Ct. App. 2009) (finding summary judgment was not proper because a defendant's status as an officer or a shareholder in a corporation does not automatically shield him from liability); *See also, BPS, Inc. v. Worthy*, 608 S.E.2d 155, 160 (S.C. Ct. App. 2005) (holding the president of a corporation was not shielded from direct liability in tort for his own actions and was personally liable for any tortious acts he participated in or directed). In this case, the Plaintiffs have pled that the Defendant committed fraud by making false representations. Viewing the allegations of the complaint in the light most favorable to the Plaintiffs, they state a claim which, if proven, would bring individual liability to the Defendant.

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<sup>4</sup> This is not a determination that Debtor is liable to the Plaintiffs; that awaits trial. Simply said, the complaint adequately puts the issue in play.

For these reasons it is hereby ordered that the Defendant's Motion to Dismiss is DENIED.

**AND IT IS SO ORDERED.**

**FILED BY THE COURT  
06/02/2010**



Entered: 06/03/2010

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

David R. Duncan  
US Bankruptcy Judge  
District of South Carolina