

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

In re,

George Robert Walker and Sherry Denise
Walker,

Debtor(s).

George Robert Walker and Sherry Denise
Walker,

Plaintiff(s),

v.

UpRight Law, Law Solutions Chicago, LLC,
Law Solutions Chicago LLC,

Defendant(s).

C/A No. 18-04406-HB

Adv. Pro. No. 18-80075-HB

Chapter 13

ORDER ON MOTION TO DISMISS

THIS MATTER came before the Court upon the Motion to Dismiss filed by Defendant UpRight Law, Law Solutions Chicago, LLC, and Law Solutions Chicago LLC. (collectively, “Upright”¹ pursuant to Fed. R. Civ. P. 12(b)(6).² Plaintiffs George Robert Walker and Sherry Denise Walker filed an Objection.³

ALLEGATIONS OF THE COMPLAINT⁴

The Walkers filed for Chapter 13 relief on August 29, 2018 and are represented by F. Lee O’Steen. Prior to retaining O’Steen, the Walkers contacted Upright for bankruptcy advice

¹ ECF No. 5, filed Nov. 9, 2018.

² Made applicable to this adversary proceeding by Fed. R. Bankr. P. 7012.

³ ECF No. 13, filed Nov. 26, 2018.

⁴ In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), the Court “must accept as true all of the factual allegations contained in the complaint,” drawing “all reasonable inferences” in the non-moving party’s favor. *E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (citations omitted).

and representation in response to an advertisement on the internet. Upright is an Illinois entity that advertises itself to be a national law firm to attract debtors, including debtors who reside in South Carolina. The advertisement stated that debtors could “Start Bankruptcy for \$0 Down 100% Free Consultation.” This led the Walkers to believe they would receive a consultation from a licensed attorney for free and, if advisable, obtain legal representation for no money upfront. In actuality, the advertised free consultation consisted of the Walkers speaking with a non-lawyer salesperson who provided advice about their circumstances and filing for bankruptcy relief. The Walkers signed a contract for representation by Upright and were required to pay \$50.00 to set up a payment plan for its fees. Overall, the Walkers paid \$1,290.00 toward their “deposit” to Upright.

As a part of its representation of the Walkers, Upright was to handle any communication or contact by their creditors. The Walkers were given a phone number for Upright to provide to any creditors that contacted them. However, the calls to that phone number went unanswered and the creditors continued to contact the Walkers. Therefore, no benefit was received from the payments made to Upright.

Upright advertises that it has partners who are licensed in South Carolina, but the Walkers were never able to contact their alleged local attorney. Despite the advertisement and unbeknownst to the Walkers, they were not able to speak with an attorney licensed to practice in South Carolina until the deposit was paid in full to Upright. Upon receiving the full deposit amount, Upright searches for a local attorney to take on the case for the remaining contract amount, which would be paid by the Chapter 13 trustee through the plan. At no time during their representation by Upright were the Walkers contacted by or allowed to speak with an attorney licensed to practice in South Carolina.

After receiving no benefit from Upright, the Walkers requested a refund of their \$1,290.00 deposit. In order to incentivize the Walkers to continue to obtain representation through Upright, they were informed that if the deposit was refunded, various fees would be incurred and deducted from the refund.

The Walkers assert that rather than operating as a law firm, Upright is a referral service that only refers debtors' cases to licensed attorneys after a fee has been paid and if the local attorney agrees to representation. Upright earns income by retaining clients through misleading advertisements and forcing them to stay with Upright by requiring a nonrefundable deposit and/or imposing unwarranted fees should debtors request a return of their deposit.

The Walkers assert causes of action for fraud and "breach of contract/unauthorized practice of law," and request a refund of the \$1,290.00 deposit as well as additional actual damages and punitive damages. The Walkers also assert that a substantial sanction should be imposed against Upright to prevent these practices from harming other debtors in South Carolina.

MOTION TO DISMISS

Upright filed a Motion to Dismiss, alleging the Walkers' Complaint fails to state a claim for relief and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). With regard to the fraud cause of action, Upright asserts that the alleged misrepresentations did not occur and, therefore, cannot be the premise for a fraud claim. Upright argues there was no false advertising because it does have attorneys in South Carolina, the Walkers were only required to pay Upright after the consultation when they decided to retain Upright, and Upright never advertised that the free consultation would be provided by an attorney. Upright also asserts there is no private right of action for the unauthorized practice of law in South Carolina.

Further, Upright argues the Walkers have failed to allege any conduct or legal theory for the Court to issue a “substantial sanction” as requested in the Complaint. While the Complaint refers to § 105 for relief, Upright asserts the Walkers have not alleged that it has violated any provision of the Bankruptcy Code for the Court to assert its equitable powers under § 105(a) and that Code section alone does not create a private right of action. Upright also contends the Complaint fails to provide sufficient detail of its wrongdoing to put it on notice as due process dictates.

DISCUSSION AND CONCLUSIONS OF LAW

This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b) and 28 U.S.C. § 157. A motion filed under Fed. R. Civ. P. 12(b)(6) challenges the legal sufficiency of the complaint and provides that a party may move to dismiss for failure to state a claim upon which relief can be granted. The legal sufficiency of the complaint is measured by whether it meets the standards for a pleading set forth in Fed. R. Civ. P. 8, which provides the general rules of pleading, and Fed. R. Civ. P. 12(b)(6), which requires the complaint to state a claim upon which relief can be granted. *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). Rule 8 provides that a complaint 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).

In order to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting in *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). While the plausibility standard does not require “detailed factual allegations,” *Twombly*, 550 U.S. at 555, it does require the plaintiff to demonstrate more than a “sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. A complaint meets

the plausibility standard when it “articulate[s] facts, when accepted as true, that ‘show’ that the plaintiff has stated a claim entitling him to relief, i.e., the ‘plausibility of entitlement to relief.’” *Giacomelli*, 588 F.3d at 193 (quoting *Iqbal*, 556 U.S. at 678). “Even though the requirements for pleading a proper complaint are substantially aimed at assuring that the defendant be given adequate notice of the nature of a claim being made against him, they also provide criteria for defining issues for trial and for early disposition of inappropriate complaints.” *Id.* at 192.

FRAUD

“Fraud is an intentional perversion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right.” *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (App. 2003) (citing Black’s Law Dictionary 660 (6th ed. 1990)). Under South Carolina law, to prevail on a claim for actual fraud, the plaintiff must show the following elements:

(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance on its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent proximate injury.

Id. (citations omitted).

Fraud claims are subject to heightened pleading requirements. Under Fed. R. Civ. P. 9(b), a party alleging fraud “must state with particularity the circumstances constituting fraud or mistake.” In interpreting Fed. R. Civ. P. 9(b), courts have found “that a plaintiff alleging fraud must make particular allegations of the time, place, speaker, and contents of the allegedly false acts or statements.” *Mincey v. World Savings Bank, FSB*, 614 F. Supp. 2d 610, 626 (D.S.C. 2008) (quoting *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 249-50 (D. Md. 2000)). Nevertheless, “a court should hesitate to dismiss a complaint under Rule 9(b) if the

court is satisfied: ‘(1) that the defendant has been made aware of the particular circumstances for which [it] will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts.’” *Id.* (quoting *Adams*, 193 F.R.D. at 250).

The Complaint alleges Upright made a representation that the Walkers could obtain legal advice and file for bankruptcy relief for no initial fees. The Walkers relied on this advertisement when contacting Upright and it was ultimately not true because they had to pay a deposit in full before they could speak with an attorney. Upright knew its advertisement was false and that it required debtors to pay a certain amount before legal advice from a licensed attorney would be provided. As a result, the Walkers were injured the \$1,290.00 they paid to Upright and by continuing to receive calls from creditors despite retaining Upright to represent them for this purpose. A review of the allegations indicates that the Walkers have sufficiently alleged the elements of fraud.

Further, the allegations of the Complaint are pled with sufficient particularity to meet the heightened requirements of Fed. R. Civ. P. 9(b) and place Upright on notice of the alleged fraudulent conduct. Indeed, Upright’s Motion argues that the misrepresentations complained of are true representations and, therefore, cannot serve as the basis for a fraud claim. Fed. R. Civ. P. 12(b)(6) measures whether a Complaint has stated a claim to sufficiently provide for relief, not whether the claim will ultimately be successful. *See Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014) (noting that the standard of review for Fed. R. Civ. P. 12(b)(6) and 12(c) motions is the same and stating that “[a] Rule 12(c) motion tests only the sufficiency of the complaint and does not resolve the merits of the plaintiff’s claims or any disputes of fact.” (citing *Butler v. United States*, 702 F.3d 749, 752 (4th Cir. 2012))). Upright’s request for dismissal based on the underlying merits of the Walkers’ fraud claim is

premature at this early stage of the litigation. *See Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978) (“The standard of proof for dismissal under Rule 12(b)(6) is demanding because the Federal Rules of Civil Procedure are premised on the notion that disputes should be decided on their facts, as developed through discovery and at trial, rather than on the skill or ineptitude with which the pleadings are drawn.”).

BREACH OF CONTRACT/UNAUTHORIZED PRACTICE OF LAW

Upright asserts this cause of action should be dismissed because there is no private right of action for the unauthorized practice of law. In response, the Walkers argue they were promised legal services in their agreement with Upright and were only provided legal advice from a non-attorney sales representative without the supervision of a South Carolina attorney. Therefore, Upright breached its agreement and the Walkers are entitled to the fees paid for the legal services they did not receive.

South Carolina does not recognize a private right of action for the unauthorized practice of law. *See Linder v. Ins. Claims Consultants, Inc.*, 348 S.C. 477, 496, 560 S.E.2d 612, 623 (2002) (explaining that South Carolina allows for individuals to bring a declaratory judgment action to determine whether certain conduct is authorized and “there are statutes which prevent the unauthorized practice of law, and while they state such activity will be deemed a crime, they do not sanction a private cause of action.” (citing S.C. Code Ann. §§ 40-5-310 and -320 (2001))). Therefore, to the extent the Complaint asserts a claim for unauthorized practice of law, any such cause of action must be dismissed.

The elements for a breach of contract are: “1) a binding contract entered into by the parties; 2) breach or unjustifiable failure to perform the contract; and 3) damage as a direct and proximate result of the breach.” *King v. Carolina First Bank*, 26 F. Supp. 3d 510, 517

(D.S.C. 2014) (citations omitted). The Walkers assert they had an agreement with Upright to provide legal services for their bankruptcy and to field calls from creditors in exchange for a fee, neither the representation nor any benefit from Upright's services was realized, and the Walkers have suffered damages that include the deposit amount. Therefore, the Complaint alleges sufficient facts to support a claim for breach of contract.

SANCTIONS PURSUANT TO 11 U.S.C. § 105

In addition to Fed. R. Bankr. P. 9011, “[t]he bankruptcy court has the inherent power, incidental to all courts to discipline attorneys who appear before it. This inherent power includes the power to suspend or disbar attorneys from practicing before the court.” *In re Lewis*, 611 F. App’x 134, 136 (4th Cir. 2015) (internal quotation marks and citations omitted).⁵ In addition to the Court’s inherent authority to regulate attorneys and their fees, the Bankruptcy Code and Bankruptcy Rules provide additional authority and guidance. *See* 11 U.S.C. §§ 329, 526; Fed. R. Bankr. P. 2016, 9011. Specifically, § 105 authorizes the Court to:

issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

Regardless of whether the Walkers have a private right of action to complain of Upright’s conduct, the Court has the inherent and statutory authority to review the alleged

⁵ In *Lewis*, the Fourth Circuit rejected the argument that under *Stern v. Marshall*, 131 S. Ct. 2594, 180 L. Ed. 2d 475 (2011), bankruptcy courts lack authority over attorney disciplinary matters because “[t]he bankruptcy court clearly had jurisdiction over this matter based on the fact that [the attorney] voluntarily presented himself in the bankruptcy court as an attorney and officer of the court,” and “the sanctions [that] were imposed arose from, and were dependent upon, the bankruptcy proceeding.” 611 F. App’x at 137.

misconduct by attorneys appearing before it and to issue sanctions if appropriate. Further, the Complaint includes specific allegations with sufficient detail to put Upright on notice of the conduct the Walkers allege is sanctionable by the Court. It details the alleged deceptive advertising by Upright and mechanisms imposed to prevent the Walkers from receiving a full refund of their deposit. Accordingly, at this stage of the litigation, the Walkers' request for sanctions pursuant to § 105(a) can continue.

IT IS, THEREFORE, ORDERED THAT:

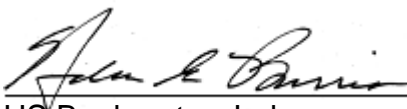
1. to the extent the Complaint asserts a cause of action for the unauthorized practice of law, any such cause of action is dismissed;
2. all other grounds for relief requested in Upright's Motion to Dismiss are denied; and
3. pursuant to Fed. R. Bankr. P. 7012, Upright shall serve its responsive pleading within fourteen (14) days from entry of this Order.

AND IT IS SO ORDERED.

**FILED BY THE COURT
12/20/2018**



Entered: 12/20/2018


US Bankruptcy Judge
District of South Carolina