IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC — **PLAINTIFF**

vs. — **ACTION NO. 3:20-CV-232-CWR-FKB**

JON DARRELL SEAWRIGHT — **DEFENDANT**

JON DARRELL SEAWRIGHT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS ADVERSARY COMPLAINT

For the reasons set forth in Mr. Seawright's motion to dismiss [Doc. 7] and supporting memorandum [Doc. 8], the Court should dismiss the Receiver's adversary complaint against him pursuant to Bankruptcy Rule 7012(b) and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).[1] The Receiver's opposition shows that her adversary complaint fails to state a claim for which relief may be granted; not only does the Receiver lack standing, but she also failed to allege any facts to support the elements that are essential to her nondischargeability claims under Section 523(a) of the Bankruptcy Code. The Receiver's opposition brief confirms that she has not alleged, and cannot allege, facts demonstrating: (a) Seawright *actually knew* about the fraud perpetuated by Adams and Madison Timber; (b) Seawright was a *fiduciary* to Adams, Madison Timber, or anyone else; or (c) Seawright had a *subjective intent to cause willful or malicious injury*.

[1] The Receiver initially filed her Adversary Complaint in the United States Bankruptcy Court for the Southern District of Mississippi, Case No. 20-00011-NPO, Doc. 1, which is related to the bankruptcy action filed by Mr. Seawright in the same Bankruptcy Court, Case No. 19-03921-NPO (Chapter 7).

I. The Receiver lacks standing to bring her Adversarial Complaint.

Again, the Receiver lacks standing to bring her Adversarial Complaint because she is not a "creditor" and has no underlying "claim."[2] The Receiver cites no authority for her proposition that she does have a "claim" and is a "creditor" for standing purposes. *See* Doc. 14 at 8. It is clear she does not and is not. A creditor is an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A).

The Receiver relies on her amended complaint filed in the underlying district-court litigation (3:18-cv-00866-CWR-FKB) to state that she has a "claim" and is a "creditor," but any such alleged claim against Seawright is invalid because she violated the automatic stay by filing it. The Receiver filed her original complaint in the underlying district-court litigation against Seawright and others on December 18, 2018. Seawright filed Chapter 7 bankruptcy on November 3, 2019, activating the automatic stay that prohibits all actions against him, with certain exceptions that do not apply. *See* 11 U.S.C. § 362. Shortly thereafter, on November 22, 2019, the Receiver filed an amended complaint against Seawright in direct violation of the automatic stay. In her opposition brief in this action, the Receiver contends she has standing for the reasons set forth in her amended complaint in the underlying litigation. However, the Receiver's amended complaint is invalid against Seawright because it was filed in violation of the automatic stay. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850–51 (5th Cir. 1990). Accordingly, Seawright requests the Court strike and exclude from consideration any references to, or citation of, the Receiver's amended complaint in the underlying litigation for standing purposes or otherwise.

[2] In order "to bring a nondischargeability action based on § 523[]" the complaint "must be brought by a creditor." *In re Davis*, 194 F.3d 570, 574 (5th Cir. 1999); *see* 11 U.S.C. § 523(c).

The Receiver also states that she is a creditor in Seawright's bankruptcy case pursuant to 11 U.S.C. § 101(10)(A) because she is listed as such in his schedules. However, the Receiver is listed on Seawright's schedules[3] as a party with a disputed, contingent, and unliquidated claim which actually means she is a party asserting a potential claim that has not been allowed. *See In re Ford*, 967 F.2d 1047, 1051 (5th Cir. 1992) (quoting *In re All Media Properties*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980), *aff'd*, 646 F.2d 193 (5th Cir. 1981)). Seawright's bankruptcy case was noticed[4] as a no-asset Chapter 7 case and creditors were informed that no property appeared to be available to pay creditors so it was unnecessary for creditors to file a proof of claim unless subsequently notified. As a result, the Receiver has not been required to file a proof of claim and no determination has been made as to whether the Receiver has an allowed claim. Such determination will not be made in the bankruptcy case unless the Chapter 7 case trustee subsequently finds assets that can be liquidated for a distribution to creditors. 11 U.S.C. § 502.

Without such determination and in order for the Receiver to be a creditor, she must have a right to payment which she does not have at this time. 11 U.S.C. § 101(5). The only way for the Receiver to establish a right to payment is through the litigation pending in case number 3:18-cv-00866-CWR-FKB. Unless she obtains a final judgment against Seawright in that case, she has no standing to pursue the nondischargeability action in this case. As discussed in Seawright's memorandum in support of his motion to dismiss, the Receiver has no "claim" and is no "creditor" here because her claims in the underlying litigation are due to be dismissed.

The Receiver also does not have standing here because she does not have standing to bring claims against Seawright in the underlying district court litigation. The Receiver fails to even respond to Seawright's citation of *Latitude Solutions, Inc. v. DeJoria*, for the proposition

[3] Doc. 3 at 15, In re: *Jon Darrell Seawright*, case no. 19-03921 (Bankr. S.D. Miss.).
[4] Doc. 8, In re: *Jon Darrell Seawright*, case no. 19-03921 (Bankr. S.D. Miss.).

that a receivership estate's unpaid debts do not "injure" the estate and do not therefore bestow Article III standing upon the Receiver. 922 F.3d 690, 696 (5th Cir. Apr. 30, 2019), *cert. denied*, Case No. 19-340, 2019 WL 6107784 (Nov. 18, 2019). The Receiver also cannot overcome the *Reneker* line of cases, which make clear that the Receiver does not have standing to pursue damages of investors, as opposed to damages of the estate. *See Reneker v. Offill*, 2012 WL 2158733, at *5 (N.D. Tex. June 14, 2012) (receiver lacked standing because alleged claim based on increased liabilities incurred by defrauded investors); *Reneker v. Offill*, 2009 WL 804134 (N.D. Tex. Mar. 26, 2009) (receiver lacked standing because "only harm alleged is the Receivership Estate's inability to satisfy its liabilities"); *see also Janvey v. Dem. Sen. Campaign Comm.*, 712 F.3d 185, 190 (5th Cir. 2013) ("federal equity receiver has standing to assert only the claims of the entities in receivership"). And the Receiver's attempt to create standing by claiming, without any factual support, that she has obtained alleged assignments from investors is insufficient. The Receiver does not identify any details of the allegedly assigned claims.[5]

II. The Receiver again failed to establish any ground on which to deny dischargeability of Seawrights's debts.

The Receiver claims that Seawright owes a "debt" to the receivership estate. Doc. 14 at 3. The Receiver contends this alleged "debt" is nondischargeable under 11 U.S.C. § 523(a)(2)(A), false pretenses, false representations, or actual fraud pursuant; § 523(a)(4), fraud or defalcation while acting in a fiduciary capacity; and § 523(a)(6), willful and malicious injury.

It is interesting that the Receiver here, in order to get her way with Seawright's adversary complaint, argues that she has alleged fraud with particularity in the underlying district-court

[5] The Court should "'accept all *well-pleaded* facts as true'" but should not "'accept as true conclusory allegations or unwarranted deductions of fact.'" *Great Plains Trust Co. v. Morgan Stanley Dean & Witter & Co.*, 313 F.3d 305, 312-13 (5th Cir. 2002) (emphasis added) (quoting *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999)). A court should not accept "conclusory allegations, unwarranted factual inferences, or legal conclusions." *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007).

litigation. However, in pleadings related to the Receiver's *identical claims* against Trustmark, Southern Bancorp, and others, the Receiver stated as follows in her brief in opposition to the defendants' motions to dismiss: "In fact, the complaint does not allege that Defendants are liable for fraud; neither fraud nor scienter are elements of the Receiver's claims." *See* Case No. 3:19-cv-00941-CWR-FKB, at Doc. 48, at 4-5. The Receiver's underlying claims against Seawright are identical to the claims in that case, and her claims fall woefully short of satisfying the heightened pleading standard required for fraud under Rule 9(b). *See In Re Berjac*, 538 B.R. 67, 74 (D. Ore. 2015) (citing *Vess v. Ciba–Geigy Corp. U.S.A.*, 317 F.3d 1097, 1105 (9th Cir. 2003)). Accordingly, the Court should dismiss all fraud claims and allegations made by the Receiver including the false pretenses and false representation claims since those involve fraud.

Pursuant to 11 U.S.C. § 523(c)(1), a debtor shall be discharged from a debt of a kind specified in paragraph (2), (4) or (6) of subsection (a), unless, on a request of a creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge. A creditor objecting to dischargeability has the burden of proof to establish by a preponderance of the evidence that a particular debt should be excepted from discharge. *Grogan v. Garner*, 498 U.S. 279, 286 (1991). Exceptions to discharge are to be narrowly construed in favor of the debtor. *Miller* v. *Abrams* (*In re Miller*), 156 F.3d 598, 602 (5th Cir. 1998).

A. §523(a)(2)

Generally speaking, for a debt to be nondischargeable under § 523(a), the plaintiff must establish two (2) elements: (1) the debt itself must be valid and; (2) the debt must satisfy all of the requirements of one of the subsections of § 523(a). *In re Bayer*, 521 B.R. 491, 499 (Bankr. E.D. Pa. 2014) (citing *In re August*, 448 B.R. 331, 346-47 (Bank. E.D. Pa. 2011)). As pointed

out, *supra*, the Receiver has not established a valid debt and, in fact, is owed no debt by Seawright.

In order for a debt to be determined nondischargeable under § 523(a)(2)(A) based on false pretenses or false representations, a plaintiff must prove that:

> (1) The debtor made the representations;
> (2) That at the time he knew they were false;
> (3) The debtor made the representation with the intention and purpose of deceiving the creditor;
> (4) That the creditor relied on such representations; and
> (5) That the creditor sustained the alleged loss and damage as the proximate result of the representations having been made.

In re Acosta, 406 F.3d 367, 372 (5th Cir. 2005)*; In re Bayer*, 521 B.R. at500, (citing *In re Ricker*, 475 B.R. 445, 456 (Bankr. E.D. Pa. 2012); *In re Russell*, 203 B.R. 303 (Bankr. S.D. Cal. 1996). Debts that satisfy the scienter requirement are debts obtained by frauds involving "moral turpitude or intentional wrong, and any misrepresentations must be knowingly and fraudulently made." *Acosta*, 406 F.3d at 372 (*In re Martin*, 963 F.2d 809, 813 (5th Cir. 1992)). The Receiver has alleged no facts to establish that Seawright acted with actual knowledge of Adams's fraud.

The Receiver painted her case with a very broad brush, and she has failed to meet the legal standard for pleading fraud by failing to identify the alleged false representations made by Seawright; facts to show he knew the representations were false; the creditors represented by the Receiver and who relied on such representations; the loss of such creditors; and, most importantly, facts to support the scienter requirement. The Receiver must plead such allegations of falsity and fraud with "particularity." *In re Monteagudo*, 536 F. App'x at 458; *In re Ramon*, 2010 WL 9073554, at *2. The Complaint's conclusory allegations that Seawright "knew his conduct was unlawful" and "made false representations of fact" are wholly insufficient to state a claim, especially under the heightened pleading standard that governs.

Although the Receiver baldly asserts that she alleged "several knowing and fraudulent falsehoods" by Seawright, the only alleged misrepresentations she identifies are (1) Seawright's representation that he personally inspected property (which she admits he actually did on several occasions) and (2) Seawright's representation that he saw agreements with timber mills (which he did at every closing, as the Receiver is well aware from her review of the documents). In the Receiver's complaint in the underlying litigation, she concedes that Seawright inspected properties with Adams, and she concedes that Seawright crafted a closing checklist that included review of the timber mill agreements. *See* Case No. 3:18-cv-866 at Doc. 1. It is obviously not Seawright's fault if Adams did not actually own the land or if the timber mill agreements were fraudulent; the Receiver sets forth no factual allegations to show Seawright *actually knew* that was the case.[6]

The Receiver's threadbare assertions fall short of the pleading requirements for false pretenses and false representations. Even if the Receiver's allegations are accepted as true—and they are not because they are not well pled—they do not demonstrate that Seawright was *aware* Adams was operating a Ponzi scheme, a prerequisite to alleging Seawright made the representation with the intention and purpose of deceiving the creditor. And assuming *arguendo* that Seawright was obligated to inspect the timber and mill agreements, the false allegation that he failed to do so obviously does not equate to an allegation that he failed to do so *because he knew* Adams was operating a Ponzi scheme and wished to defraud creditors.

The Receiver further states on page 10 of her opposition that she need only allege that Defendant unwittingly participated in a fraudulent scheme, but she cites no authority for this

[6] Moreover, the allegations related to inspections of the properties are "unwarranted factual inferences." *Ferrer*, 484 F.3d at 780. The Receiver cites a March 5, 2017 Equity Term Sheet to support the allegation that "Alexander and Seawright" agreed to inspect the timber and mill agreements. The Equity Term Sheet she cites actually defines "Company" as Alexander Seawright Timber Fund I, LLC, a separate legal entity, not Alexander and Seawright individually. *See* Exhibit A to Doc. 40 in Case No. 3:18-cv-866.

incorrect position. Her statement totally fails to meet the heightened pleading standard required for fraud allegations in Rule 9(b). *In re Berjac*, 538 B.R. at 74. In addition, the Receiver's reliance on *In re Burk* to support her contention that a person who receives and benefits from fraudulent funds has committed fraud is misplaced. *In re Burk*, 583 B.R. 655 (Bankr. N.D. Miss. 2018). In *Burk*, the court found that the objecting creditor failed to satisfy the elements of § 523(a)(2)(A), (a)(4), or (a)(6). *Id*. Here, of course, the Receiver has also not alleged facts to show that Seawright knowingly received a transfer of fraudulent funds.

The allegations in the Complaint are consistent with the fact that Seawright, like many others, believed Madison Timber was a legitimate enterprise and was deceived by Adams. The Complaint does not allege Seawright made any misrepresentations with intent to deceive anyone, much less Adams and Madison Timber, in whose shoes the Receiver stands. *Id.* The Receiver does not allege Adams and Madison Timber relied on any misrepresentations by Seawright. Of course, Adams and Madison Timber are the fraudsters here. It follows that the Court should dismiss the claims in the Adversary Complaint seeking nondischargeability under § 523(a)(2)(A).

B. § 523(a)(4)

With regard to the Receiver's claim of fraud or defalcation while acting in a fiduciary capacity, the Receiver fails to sufficiently allege either a fraud or defalcation or that Seawright was acting in a fiduciary capacity within the meaning of Section 523(a)(4). First, the Receiver has failed to allege and support that Seawright was acting in a fiduciary capacity of any kind. The Receiver relies on *In re Smith* to support her allegations concerning a traditional, pre-existing fiduciary capacity as understood by state law principles. *In re Smith*, 585 B.R. 359, 372 (Bankr. N. D. Miss. 2018). The Receiver cherry-picked the quote from *In re Smith* for the

proposition that Section 523(a)(4) is broader than "technical trusts." [Doc. 14 at 11]. However, the immediately preceding paragraph states:

> To determine whether a debtor was acting in a fiduciary capacity under § 523(a)(4), the Court must look to federal law. The definition of "fiduciary" for purposes of section 523(a)(4) is *narrower* than under common law, as it is "*limited to instances involving express or technical trusts*. The trustee's duties must . . . arise independent of any contractual obligation." Such a trust must exist prior to the alleged wrongful acts and without reference to those acts.

In re Smith, 585 B.R. at 371–72 (emphasis added).[7]

Here, the Receiver does not allege sufficient facts to show that Seawright, the debtor, "was a fiduciary" to Adams or Madison Timber. In fact, the Receiver *does not even allege* that Seawright owed a fiduciary duty to Adams or Madison Timber. Instead, the Receiver states in conclusory fashion: "Seawright owed fiduciary duties *to investors* of Madison Timber." Compl. at ¶ 78 (emphasis added). That is, of course, not the same as owing a fiduciary duty to Madison Timber or Adams. To be clear, the Receiver *does not represent* the "investors of Madison Timber."

But even if the Receiver alleged a fiduciary relationship—which she did not—the Receiver does not dispute that she must plead a fraud or defalcation. "Defalcation" requires a "*willful* neglect of duty." *In re Davis*, 3 F.3d 113, 115 (5th Cir. 1993) (emphasis added). Defalcation requires a "culpable state of mind" akin to that required in criminal law. *Bullock*, 569 U.S. at 269, 273–74. To constitute "defalcation" requires "an intentional wrong [or] reckless conduct of the kind set forth in the Model Penal Code." *Bullock*, 569 U.S. at 273–74. The Receiver does not even attempt to argue there was any defalcation, and she relies on the same threadbare allegations of fraud discussed above. The Receiver for the second time relies on her

[7] In *Smith*, before getting to the fiduciary issue, the court found the first step is to determine whether there is in fact a "debt" owed to the creditor. *Id*. at 371. As explained, *supra*, the Receiver does not hold a right to payment against Seawright and, therefore, there is no debt owed by Seawright to the Receiver.

accusations concerning Defendant's alleged representations that he inspected property (she admits in her complaint that he did so) and saw agreements with timber mills (she admits that was part of his closing checklist). As explained more fully above, the Receiver fell well short of establishing facts to show fraud and defalcations while acting in a fiduciary capacity and the arguments contained in the Receiver's opposition do not bring those shortcomings to the required standard.

The Receiver's allegations show that Seawright, like many others, believed that Adams and Madison Timber were engaged in a legitimate enterprise and that Seawright, like many others, was deceived by Adams. These allegations fall well short of alleging the culpable state of mind required under Section 523(a)(4). Accordingly, the Court should dismiss the Receiver's claims for nondischargeability under § 523(a)(4).

C. § 523(a)(6)

Finally, the Receiver has failed to dispute that her complaint does not sufficiently allege a willful or malicious injury, as required to avoid dischargeability under § 523(a)(6). Section 523(a)(6) provides that a debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). The Receiver again cites the same alleged misrepresentations regarding inspections of timber property and evaluation of timber mill agreements. Even if assumed to be true for purposes of argument (and they are not), such alleged misrepresentations clearly do not amount to "willful and malicious conduct" aimed at intentionally injuring Adams, Madison Timber, or anyone else.

The Supreme Court has held that "[t]he word 'willful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional *injury*, not merely a deliberate or intentional *act* that leads to injury." *In re Miller*, 156 F.3d 598, 603 (5th Cir. 1998)

(quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998)); *see also In re Arnette*, 454 B.R. 663, 700 (Bankr. N.D. Tex. 2011). The Receiver has not alleged any facts that might enable her to bring a claim against Seawright that is based on an intentional injury. Again, the Receiver has not even alleged facts to show that Seawright *actually knew* Adams was perpetuating a Ponzi scheme. And if Seawright did not know about the Ponzi scheme, then he of course could not have had a "subjective intent" to injure anyone, much less Adams or Madison Timber. Accordingly, the Court should dismiss the Receiver's claims for nondischargeability under § 523(a)(6).

D. *In pari delicto* and Mississippi's wrongful conduct rule

The Receiver discusses the *in pari delicto* doctrine and the wrongful conduct rule, but she fails to offer any argument that is sufficient to defeat a motion to dismiss on these grounds. The Court should apply *in pari delicto* here because it is apparent from "the face of the complaint" that Adams and Madison Timber were far more culpable than Seawright. *See Latham v. Johnson*, 2018 WL 3121362, at *10 (Miss. Ct. App. June 26, 2018). As expected, the Receiver cites *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955 (5th Cir. 2012), as the basis for her objection to *in pari delicto.* Again, the Receiver's reliance on *Jones* is misplaced because there is no "fundamental distinction" between Adams and Madison Timber; in other words, Adams's actions can and should be rightfully imputed to Madison Timber. *See* 666 F.3d at 955–58.[8]

The Receiver relies on principles of "equity" and "public policy" when it is convenient to do so, but she ignores equity and policy for her argument that she, while standing in the shoes of

[8] In *Jones*, the court declined to apply *in pari delicto* because it would have the inequitable consequence of preventing other owners of W Financial from recovering against Wells Fargo Bank. *Jones*, 666 F.3d at 958, 966-67 (application of *in pari delicto* "depends upon the peculiar facts and equities of the case, and the answer usually given is that which it is thought will better serve public policy"). No such inequity would result here by applying *in pari delicto*.

Adams and Madison Timber, should be able to proceed with tort claims against Seawright. The Mississippi public is well served by applying established law that prevents joint tortfeasors from suing one another for contribution. Standing in Adams's shoes, the Receiver should not be able to bring tort claims against those she alleges were somehow involved in Adams's fraud. That would be inequitable.[9]

Similarly, as stated in Seawright's opening brief, the Receiver's claims are barred by Mississippi's wrongful conduct rule. *See, e.g.*, *Price v. Purdue Pharma Co*., 920 So. 2d 479, 483 (Miss. 2006) ("If a plaintiff cannot open his case without showing that he has broken the law, a court will not aid him."). Adams broke the law, by and through Madison Timber, and absent his illegal conduct, the Receiver would have no alleged claims against Seawright. For this additional reason, the Court should dismiss the Receiver's claims.

III. Conclusion

It appears the best the Receiver has to offer for her opposition to Defendant's motion to dismiss is a one-sided view of Defendant's alleged representations that he personally inspected property and saw agreements with timber mills. These threadbare allegations are insufficient to withstand any pleading standard, much less the heightened pleading standard under Rule 9. Therefore, the Receiver's complaint should be dismissed with prejudice. Seawright requests such other and further relief as the Court deems just and appropriate.

Dated: June 22, 2020.

[9] The Receiver cites *Janvey v. Adams & Reese, LLP*, 2013 WL 12320921, at *3 (N.D. Tex. Sept. 11, 2013), but the Fifth Circuit in that case made clear that the decision was based purely on Texas law and that "*in pari delicto* could apply to the Receiver in some jurisdictions." Likewise, in *Greenberg Traurig, LLP*, 2014 WL 12572881, at *4, the Court applied Texas law and held that *in pari delicto* does not apply when a Receiver seeks to reclaim assets for innocent investors. Again, the Receiver in this case stands in Madison Timber's shoes and does not have the authority to assert claims of third-party investors.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, R. Michael Bolen, do hereby certify that I have this day served by electronic mail, electronic filing transmission, hand delivered or mailed by first class mail, postage prepaid, a true and correct copy of the foregoing answer to the parties listed below on this the 22nd day of June, 2020.

/s/ R. Michael Bolen
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