

So Ordered.

Dated: September 30, 2021



Katherine M. Perhach
Katherine Maloney Perhach
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:
Cheryl Lynn Hobbs,
Debtor.

Chapter 7
Case No. 20-27572-kmp

Ina Kasper,
Plaintiff,

v.

Adv. No. 21-2021

Cheryl Lynn Hobbs,
Defendant.

DECISION AND ORDER DENYING MOTION TO DISMISS

Ina Kasper has filed a complaint to determine the dischargeability of debt she alleges Cheryl Hobbs, the Chapter 7 Debtor in this case, owes to her. Before the Debtor filed this bankruptcy case, Ms. Kasper filed an action against her in Milwaukee County Circuit Court (the “State Court Action”). Ms. Kasper’s complaint in the State Court Action contained claims for (1) intentional misrepresentation/fraud; (2) conversion; (3) civil theft; (4) unjust enrichment; and (5) breach of contract. The complaint contained a demand of \$130,026.42, which includes Ms. Kasper’s actual damages of \$43,342.14 and exemplary damages. The Debtor filed an answer

and asserted several counterclaims. The Debtor removed the State Court Action to Bankruptcy Court and the Court consolidated the two adversary proceedings. *See Kasper v. Hobbs (In re Hobbs)*, Adv. No. 21-2007 (Docket No. 17). The only question posed in the consolidated adversary proceedings is whether the Debtor owes Ms. Kasper a nondischargeable debt pursuant to 11 U.S.C. § 523(a)(2)(A) as a debt “obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition,” or pursuant to § 523(a)(4) as a debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.”¹

The Debtor has filed a motion to dismiss the consolidated adversary proceedings. The Debtor’s meandering memorandum of law is difficult to follow but her main goal appears to be obtaining a determination that the State Court Action is time-barred, or subject to dismissal and a new action would be time-barred, and Ms. Kasper cannot now pursue her for any debt that might have been established in the action. Because the thrust of the motion to dismiss the adversary proceeding appears to be that Ms. Kasper cannot establish the existence of a “debt” that is nondischargeable, the Court will construe the motion as a motion to dismiss for “failure to state a claim upon which relief can be granted” pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, incorporated in adversary proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

More than half of the Debtor’s brief is devoted to arguing that service of process in the State Court Action was defective. In state court, success on this argument would result in

¹ Ms. Kasper has filed a proof of claim in the Debtor’s Chapter 7 bankruptcy case for the full amount of her demand in the State Court Action. *See In re Hobbs*, No. 20-27572-kmp, Claim No. 6. There are assets available for distribution in the bankruptcy case, and the Debtor has objected to the claim. This claim objection raises a separate question of the amount of the debt owed by the Debtor to Ms. Kasper, since Ms. Kasper will be paid a pro rata share of the amount of her allowed claim, regardless of whether the remainder is discharged in the Chapter 7 case.

dismissal of the action for lack of personal jurisdiction, and the Debtor argues all claims would then be time-barred except Ms. Kasper's breach of contract claim.² The Debtor also argues that Ms. Kasper failed to plead her fraud claim with particularity in the State Court Action under Wisconsin Statute Section 802.03(2), though the state court already dismissed this claim without prejudice. Finally, the Debtor argues that laches would bar at least the fraud claim in the State Court Action, even if the statute of limitations did not.

Legal Standard

Under Rule 12(b)(6), the Court accepts as true all of the allegations in the complaint, and this factual content must be sufficient for the Court to draw the reasonable inference that the Debtor-Defendant is liable for the alleged misconduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Further, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (internal quotation marks omitted).

Analysis

For the reasons that follow, the Court denies the Debtor's motion to dismiss for failure to state a claim under 11 U.S.C. § 523(a)(2)(A) and § 523(a)(4). Both § 523(a)(2)(A) and § 523(a)(4) require the existence of a debt, which is what the Debtor appears to challenge with this motion to dismiss. Accepting all the allegations in the complaint as true, it sufficiently

² The motion states as the bases for dismissal Rule 12(b)(2) of the Federal Rules of Civil Procedure (lack of personal jurisdiction), Rule 12(b)(4) (insufficient process), and Rule 12(b)(5) (insufficient service of process). The Debtor's arguments pertain to service in the State Court Action. Because the motion to dismiss contains no argument that service of the summons and complaint in this adversary proceeding was improper, the Court will disregard these citations.

alleges the existence of a debt, notwithstanding the Debtor's arguments to the contrary. The Debtor appears to assert that questions of fact exist as to when Ms. Kasper's fraud claim accrued and whether it is barred by the statute of limitations, though she has yet to develop her implicit argument that a time-barred debt is automatically discharged in bankruptcy. She also argues that even if the limitations period had not yet run when the claim was filed in the State Court Action, laches barred the suit. None of these arguments establish that Ms. Kasper has failed to state a claim under § 523(a)(2)(A) and/or § 523(a)(4).

I. Service in the State Court Action Was Proper.

The Debtor filed a timely answer drafted with the assistance of the attorney who is now representing her in this adversary proceeding and therefore was not prejudiced by any alleged defects in service. *See Kasper v. Hobbs*, Adv. No. 21-2007, Docket No. 1, Ex. D (answer filed in State Court Action). Still, the Debtor continues to focus on arguments that Ms. Kasper's service of the summons and complaint in the State Court Action was defective.

The Debtor already brought a motion to dismiss the State Court Action in part based on lack of personal jurisdiction, and the state court denied that part of the motion. *See* Transcript of September 22, 2020 Milwaukee County Circuit Court Hearing, p. 32:3-13; Debtor's Ex. H. Counsel attempted to raise new arguments in an untimely brief, and the state court declined to consider them. Transcript, p. 15-16:6. Counsel now brings the arguments to this Court, though it is not apparent how he would have raised them in state court. By bringing a new motion to dismiss? Nonetheless, the Court will address the Debtor's arguments about service of the summons and complaint in the State Court Action.

A. The State Court Already Ruled That Any Failure to Include Exhibits with the Complaint in the Mailing for Service Amounted to a Technical Error.

The Debtor argues at length that Ms. Kasper's mailing of the complaint was defective because it did not contain all of the exhibits. Judge Martens already rejected this argument in the State Court Action:

even if we were to assume that there was failure to serve -- to include those exhibits as part of the mailings, that that is in this circumstance a technical defect, and I indicated further that I find that there was no prejudice to the defendant as a result of that. And therefore denying [sic] any motion to dismiss based on the argument that the Court lacks jurisdiction due to that particular defect in the mailings.

Transcript, p. 32:5-13; *see also* Debtor's Ex. H ("Plaintiff effectively served Defendant and any failure to include Complaint exhibits in a mailing for service would have amounted to a technical error—not a fundamental error—that would not have prejudiced Defendant."). The issue was actually litigated by the parties and determined by Judge Martens after a hearing, the order denying the motion to dismiss was a final judgment, and applying issue preclusion would not be fundamentally unfair. *See In re Estate of Rille ex rel. Rille*, 2007 WI 36, 300 Wis. 2d 1, 728 N.W.2d 693; *In re Jaynes*, 377 B.R. 880, 886 (Bankr. W.D. Wis. 2007) (denial of a motion to dismiss is sufficiently firm to be given preclusive effect). Thus, the Debtor is precluded from relitigating the same issue in this Court.

B. Ms. Kasper's Service of an Unauthenticated Publication Summons Was Sufficient.

In the State Court Action, the Debtor made an untimely attempt to argue that the publication summons was not authenticated and filed, asserting that it should have been authenticated and filed. Judge Martens did not consider this argument, and the Debtor raises it

now in the context of her motion to dismiss.³ The Court rejects it. In *Burnett v. Hill*, 207 Wis. 2d 110, 557 N.W.2d 800 (1997), the Wisconsin Supreme Court determined that although a failure to authenticate a publication summons constitutes a defect in service, it is merely a technical error, not a fundamental error that would deprive the Circuit Court of personal jurisdiction. In that case, the plaintiff mailed “authenticated copies of the summons and complaint at the same time he mailed an unauthenticated copy of the publication summons.” *Burnett*, 207 Wis. 2d at 128. The Debtor in this adversary proceeding was mailed exactly the same documents in the State Court Action. *See* Debtor’s Ex. C (affidavit of mailing “an authenticated copy of the Summons and Complaint, and Publication Summons and Complaint”).

The *Burnett* court then examined whether the service had prejudiced the defendant, concluding that it did not. 207 Wis. 2d at 128. The authenticated summons, authenticated complaint, and the summons published in the newspaper contained the case number, and these informed the defendant that an action had been filed against him and a response was required. The same is true in this case. The service of an unauthenticated publication summons was sufficient. *See* Debtor’s Ex. G (copy of summons published in *The Daily Reporter*, containing case number).

C. Ms. Kasper’s Publication in a Milwaukee Newspaper Was Sufficient.

The Debtor also argues in her motion to dismiss that Ms. Kasper should have published the summons in a Waukesha County newspaper in addition to a Milwaukee County one, since

³ In the September 22, 2020 hearing, Judge Martens stated,

There are arguments and issues raised for the first time in reply that were not part of the original motion . . . [including] the issue of latches [sic], an argument regarding where publication occurred and whether it’s statutorily compliant, and an argument regarding whether or not the publication summons had been filed and again whether or not that’s statutorily compliant. Those are new issues, and I’m not going to consider those issues today

Transcript, p. 15:10-23.

one of the addresses Ms. Kasper used for mailing was located in Brookfield, in Waukesha County. This was also an argument she attempted to make in the State Court Action that the state court did not consider because it was untimely. *See* footnote 3, *supra*. She argues that publication in the Daily Reporter, a Milwaukee newspaper, is not likely to give notice to persons with Waukesha addresses. *See* Wis. Stat. § 985.02. Here, however, the Brookfield address used by Ms. Kasper for mailing was a Post Office Box. *See* Debtor’s Ex. C (affidavit of mailing). The other two addresses were Milwaukee addresses. The Milwaukee addresses included the address the Debtor listed as her homestead and mailing address in this Chapter 7 bankruptcy case and testified was her homestead at the time Ms. Kasper initiated the State Court Action. *See In re Hobbs*, No. 20-27572-kmp, Docket No. 1 at 2; Docket No. 32 (recording of hearing held February 19, 2021). Publication of the summons in the Daily Reporter was likely to give notice to the Debtor and was proper.

II. It Is Irrelevant Whether Ms. Kasper Pled Her Misrepresentation/Fraud Claim with Particularity in the State Court Action, and Moreover, the State Court Already Dismissed That Claim Without Prejudice.

The Debtor argues that Ms. Kasper failed to plead her fraud claim with particularity under Wisconsin Statute Section 802.03(2) in the State Court Action. Since the inquiry in this adversary proceeding would be whether Ms. Kasper pled her 11 U.S.C. § 523(a)(2)(A) claim with particularity in her adversary complaint pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, it is irrelevant how Ms. Kasper pled the claim in the State Court Action. Moreover, Judge Martens already agreed with the Debtor and dismissed the claim in the State Court Action without prejudice. *See* Debtor’s Ex. H (“Whereas, Plaintiff failed to meet the heightened standard for pleading fraud, as required by 802.03(2) . . . Defendant’s Motion for Partial

Dismissal as to Plaintiff's claim for misrepresentation/fraud is granted, and Plaintiff's claim for misrepresentation/fraud is hereby dismissed without prejudice.”).

The Court is unsure what to make of the Debtor's argument. It certainly does not warrant dismissal of Ms. Kasper's § 523(a)(2)(A) or § 523(a)(4) claims under Rule 12(b)(6). The Debtor may argue that Ms. Kasper cannot pursue a debt because the statute of limitations has run. However, the question of when the fraud claim accrued, that is, when Ms. Kasper first had knowledge of the actions giving rise to the fraud claim, is a question of fact, not something the Court can address on a motion to dismiss.

III. The Court Cannot Determine Whether Laches Negates the Existence of a Debt on a Motion to Dismiss.

The Debtor also argues that laches may bar a suit even if the limitations period has not yet expired, and that Ms. Kasper's delay in bringing suit was “unreasonable.” Again, the Court is unsure what to make of this argument. It raises a question of fact, but it is also not clear what the legal significance would be of a determination that Ms. Kasper unreasonably delayed in filing the State Court Action. On its own, the argument does not show that Ms. Kasper has failed to plead the existence of a debt in her nondischargeability complaint and thus does not show that she has failed to state a claim under § 523(a)(2)(A) or § 523(a)(4). If the Debtor believes laches is a defense to the § 523(a)(2)(A) claim and/or the § 523(a)(4) claim, she may raise it as such.

Conclusion

To quote Judge Martens, this is a case that “has spun out of control a bit in terms of just the tremendous amount of [filings] and litigation on a matter that really otherwise might seem fairly straightforward,” first in state court and now in adversary proceedings and claim objection litigation in this Court. *See* Transcript, 2:22-25. Ms. Kasper's adversary complaint has stated claims pursuant to 11 U.S.C. § 523(a)(2)(A) and § 523(a)(4). Unless the parties reach a

settlement or a timely motion for summary judgment is filed, the Court will conduct a trial to determine whether Ms. Kasper can meet her burden of proving all the elements of § 523(a)(2)(A) and/or § 523(a)(4). The issues to be decided at any trial in the consolidated adversary proceedings and the evidentiary hearing on the claim objection include the following: (1) whether there is a debt; (2) the amount of the debt; (3) whether the entire debt or a portion of the debt is nondischargeable based upon false representations, fraud, fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; and (4) the amount of the nondischargeable debt. Accordingly,

IT IS THEREFORE ORDERED: the Motion to Dismiss is denied.

IT IS FURTHER ORDERED: the Court will hold a status conference by telephone on **October 19, 2021 at 12:15 p.m.** to schedule the matter for further proceedings. To appear by telephone, you must call the Court conference line at 1-888-675-2535, and enter access code 9918878 before the scheduled hearing time.

IT IS FURTHER ORDERED: nothing in this Order alters the time to file and serve a responsive pleading established in Rule 7012(a) of the Federal Rules of Bankruptcy Procedure.

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