United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Virginia Scott

Bankruptcy No. 05 B 16227

Adversary Caption: Access Lending Corp., a Texas corporation v. Virginia Scott; Mohammad Taghi Kakvand; Robert M. Francisco; Charles C. Witte; Synovation Development LLC, an Illinois limited liability company; Evelyn Francisco; Fabiola Torres; Angelica Torres; and Infiniti Financial Corp., a Michigan corporation

Adversary Nos. 05 A 1677, 05 A 1715 (consolidated)

Date of Issuance: January 18, 2006

Judge: A. Benjamin Goldgar

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 7
	)	
VIRGINIA SCOTT,	)	No. 05 B 16227
	)	
Debtor.	)	
	)	
	)	
ACCESS LENDING CORP., a Texas corporation,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Nos. 05 A 1677 (consolidated)
	)	
VIRGINIA SCOTT; MOHAMMAD TAGHI KAKVAND; ROBERT M. FRANCISCO; CHARLES C. WITTE; SYNOVATION DEVELOPMENT LLC, an Illinois limited liability company; EVELYN FRANCISCO; FABIOLA TORRES; ANGELICA TORRES; and INFINITI FINANCIAL CORP., a Michigan corporation,	)	
	)	
Defendants.	)	Judge Goldgar

MEMORANDUM OPINION

In its amended complaint in this consolidated adversary proceeding, plaintiff Access Lending Corporation asserts that the defendants, including debtor Virginia Scott, conspired to perpetrate an elaborate mortgage fraud scheme, one to which Access Lending fell victim. Under the alleged scheme, the defendants set up the false purchase of an apartment building, obtained loans for the purchase using inflated appraisals and false loan applications, and then absconded with the loan proceeds. Now before the court for ruling are (1) the motion of debtor-defendant Virginia Scott to dismiss Counts II, III and IV of the amended complaint, and (2) the motion of

non-debtor defendants Robert M. and Evelyn Francisco to dismiss Count IV of the amended complaint.

For the reasons that follow, Scott's motion will be granted in part and denied in part. Her motion to dismiss Counts II and III will be denied, but Count III will be stricken as redundant of Count II. The Franciscos' motion to dismiss Count IV, on the other hand, will be granted based on Access Lending's lack of standing to assert the claim in that count.

1. Background

The amended complaint alleges the following. In June 2004, defendant Synovation Development, a limited liability company owned by defendants Mohammad Taghi Kakvand, Robert Francisco, and Charles C. Witte, purchased an apartment building in Chicago for $540,000. Synovation later filed a condominium declaration for the building.

Kakvand, Francisco, and Francisco's wife, Evelyn, then recruited Scott to act as a "straw buyer" for nine of the twelve units in the building. Scott submitted loan applications to defendant Infiniti Financial Corporation. In the applications, Scott represented that she had more than $390,000 in cash; that she had more than $50,000 in equity in her personal residence; that each condominium unit generated $1,450 in monthly rental income; that she had not borrowed any part of the down payment; and that she would purchase the units. All of these representations were false. Scott also submitted false appraisals of the units – appraisals prepared by Infiniti employees who were themselves parties to the scheme.

Armed with the false applications and false appraisals, Scott obtained loans totaling more than $1.3 million from Infiniti – or, more accurately, from Access Lending. Under a long-standing agreement with Infiniti, Access Lending purchased all loans that Infiniti originated as long as Access Lending's underwriters approved them. On September 8, 2004, Access Lending

accordingly funded the nine loans to Scott, transferring $1.3 million to the closing agent for the condominium purchases. But there were no purchases. Instead, Access Lending alleges, the various defendants made off with the money.

Faced with a civil action against her in Illinois state court brought by Access Lending, in April 2005 Scott sought protection under chapter 7 of the Bankruptcy Code.

This consolidated adversary proceeding began as two separate adversary proceedings brought by Access Lending in Scott's bankruptcy. The complaint in the first proceeding, No. 05 A 1677, asserted seven state law claims for damages against Scott and the non-debtor defendants, including the Franciscos. The complaint in the second proceeding, No. 05 A 1715, alleged claims only against Scott, asking that she be denied a discharge under section 727 of the Code, 11 U.S.C. § 727, or alternatively that her debt to Access Lending be declared non-dischargeable under section 523, 11 U.S.C. § 523.

After the court consolidated the two proceedings, Access Lending filed an amended complaint. The amended complaint includes the section 727 and 523 claims against Scott as Counts I and II, respectively. Count III, also aimed at Scott, cites section 523 and asks the court to "enter an order fixing the amount of [Access Lending's] claim" against her at just over $1.3 million. Count IV, meanwhile, is limited to the non-debtor defendants and combines the state law claims originally alleged in the complaint in No. 05 A 1677. But rather than assert them as straight damage claims as it had first done, Access Lending now invokes section 542 of the Code, 11 U.S.C. § 542, asserts that the non-debtor defendants have "contribution obligations" to Scott, and asks the court to "fix" the amount of these obligations and order their turnover to the bankruptcy estate.

2. Discussion

The pending motions to dismiss are not actually directed at the amended complaint. Scott and the Franciscos moved to dismiss Access Lending's original complaint in No. 05 A 1677, and they filed no new motions after Access Lending submitted its amended complaint in the consolidated proceeding. The parties have ignored this deficiency, however, and have treated the original motions to dismiss as if they were motions to dismiss the amended complaint. The court will do the same.

Transforming the original arguments into arguments for dismissal of the amended complaint takes some doing, but the motions can fairly be interpreted as asking the court to dismiss Count II for failure to plead "reasonable reliance" with "particularity" (Scott's terminology); dismiss Count III as an improper request for damages against a debtor in a chapter 7 case; and dismiss Count IV for lack of subject matter jurisdiction.[1/]

a. Count II

Scott's contention that Count II should be dismissed for failure to plead reasonable reliance with particularity is a non-starter. It is true that in Count II Access Lending attempts to allege a claim under section 523(a)(2)(A) – although that Count also contains claims under other parts of section 523. It is also true that one element of a section 523(a)(2)(A) claim is "justifiable reliance" (not "reasonable reliance," which is a higher standard). *See Field v. Mans,*

[1/] Scott contended that the original complaint improperly sought damages against her and improperly joined the non-debtor defendants. These would seem to be arguments to dismiss Counts III and IV of the amended complaint. The Franciscos argued that the court lacked jurisdiction to entertain Access Lending's claims against them. This again would be a reason to dismiss Count IV. Scott and the Franciscos also maintained that the complaint failed to allege "with particularity" what they called "reasonable reliance." For Scott, this is an argument to dismiss Count II. For the Franciscos, it is presumably aimed at Count IV.

516 U.S. 59, 70-71 (1995); *In re Bero*, 110 F.3d 462, 465 (7th Cir. 1997). But the amended complaint plainly alleges Access Lending's reliance on the misrepresentations. It does so in detail and more than once. (*See* Am. Compl. ¶¶ 22, 26).

Scott's argument is not so much that the amended complaint fails to allege reliance, but that it nowhere alleges Scott knew Access Lending rather than Infiniti was funding the loans. Scott contends that the complaint contains no facts showing she was aware Access Lending even existed. Therefore, she says, Count II states no claim against her for defrauding Access Lending.

In making this argument, Scott mistakes the nature of notice-pleading under Rule 8 of the Federal Rules. Fed. R. Civ. P. 8 (made applicable by Fed. R. Bankr. P. 7008(a)). Certainly, the amended complaint alleges no facts from which it might be inferred that Scott knew of Access Lending. But in federal court a plaintiff "need not plead facts." *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005); *see also McCormick v. City of Chicago*, 230 F.3d 319, 324 (7th Cir. 2000). The question on a motion to dismiss is not whether the complaint alleges or fails to allege particular facts that might be necessary, say, under Illinois state court practice. The question is simply whether the complaint gives the defendant notice of the claim. *Doe*, 429 F.3d at 708. "A complaint need only state the nature of the claim; details can wait for later stages." *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 919 (7th Cir. 2002).

That a complaint happens to be missing certain facts will not warrant dismissal as long as it is "possible to hypothesize facts . . . that would make out a claim." *Graehling v. Village of Lombard*, 58 F.3d 295, 297 (7th Cir. 1995); *see also Doe*, 429 F.3d at 708 (stating that a "complaint suffices if any facts consistent with its allegations . . . could be established by affidavit or testimony at a trial"). Assuming the facts that Scott claims are missing must ultimately be proved in this case (a point the parties vigorously dispute), it is not hard to

hypothesize them: that Scott knew Access Lending purchased all loans that Infiniti originated and so knew Access Lending would end up bearing the loss of the alleged fraud. Whether Access Lending must indeed prove these hypothesized facts is something that can be addressed later, on summary judgment or at trial. At this stage, Count II passes muster.

It is worth noting, lastly, that Scott's knowledge is not subject to the more stringent pleading requirements of Rule 9(b), Fed. R. Civ. P. 9(b) (made applicable by Fed. R. Bankr. P. 7009), as Scott may be suggesting through her use of the word "particularity." The first sentence of Rule 9(b) does require that "fraud" be pled "with particularity." *Id.* To comply, a complaint must identify who made the alleged fraudulent misrepresentation; state the time, place and content of the misrepresentation; and describe how the misrepresentation was communicated. *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 593 (7th Cir. 2003). The second sentence of Rule 9(b), however, states that "knowledge . . . may be averred generally." Access Lending had no obligation to plead Scott's knowledge with particularity. *See McCormick*, 230 F.3d at 326.

Scott's motion to dismiss Count II is denied.

b. Count III

Scott fares little better in her quest to dismiss Count III – but only because Access Lending's amended complaint has removed the basis for Scott's initial objection. Scott sought to dismiss the original complaint in No. 05 A 1677 (and properly so) because it alleged state law damage claims against her.[2/] In the amended complaint, however, the state law claims appear

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[2/] A creditor with a pre-petition claim against a chapter 7 debtor asserts that claim by filing a proof of claim in the bankruptcy (assuming the case is an "asset" case), *see* 11 U.S.C. §§ 501, 502; Fed. R. Bankr. P. 3001, 3002, not by suing the debtor for damages in the bankruptcy case as Access Lending did here. In filing her bankruptcy petition, Scott did not simply change forums, trading the Illinois state court for this one.

only in Count IV as claims against the non-debtor defendants. In Count III, Access Lending now asks the court simply to "fix" the amount of its claim against Scott.

This is a perfectly acceptable request for a creditor to make. *See Newsub Magazine Servs. LLC v. Rey (In re Rey),* Nos. 04 B 35040, 04 A 4443, 04 A 4446, 2005 WL 894820, at *5 (Bankr. N.D. Ill. Apr. 18, 2005) (noting that a creditor in its adversary complaint may seek to "liquidate the debt" owed it). It is unnecessary, though, for the creditor to make that request in a separate count of its complaint. Count II already alleges a non-dischargeability claim under section 523, and one of the issues with every such claim is whether the debtor owes the creditor a "debt" in the first place. *Banks v. Gill Distrib. Ctrs., Inc. (In re Banks),* 263 F.3d 862, 869 (9th Cir. 2001); *Sill v. Sweeney (In re Sweeney),* 276 B.R. 186, 195-96 (B.A.P. 6th Cir. 2002). Whether Scott owes Access Lending a "debt" is something Access Lending will have to prove on Count II. If successful, Access Lending can establish the amount of the debt at the same time, and the court can enter a money judgment. *See N.I.S. Corp. v. Hallahan (In re Hallahan),* 936 F.2d 1496, 1508 (7th Cir. 1991).

Under Rule 12(f), the court can order stricken from a pleading "any redundant . . . matter." Fed. R. Civ. P. 12(f) (made applicable by Fed. R. Bankr. P. 7012(b)); *Smith v. St. James Hosp. & Health Ctrs.,* No. 02 C 2953, 2003 WL 174195, at *2 (N.D. Ill. Jan. 27, 2003). Count III of the amended complaint is redundant of Count II. Scott's motion to dismiss Count III is construed as a motion to strike, and Count III is stricken.

c. Count IV

The Franciscos' motion to dismiss Count IV, finally, will be granted, though not on jurisdictional grounds. Count IV contains the state law claims originally asserted against the non-debtor defendants in No. 05 A 1677. In the amended complaint, however, Access Lending

has converted its state law claims into a single claim in Count IV for turnover under section 542. Access Lending contends that Scott has what it terms "contribution" claims against the non-debtor defendants, and Access Lending seeks to assert those claims.

The conversion of the state law claims to a claim under section 542 cures any jurisdictional defect (since turnover actions are core proceedings, *see* 28 U.S.C. § 157(b)(2)(E)), but it introduces a new one: a creditor has no standing to seek turnover under section 542.[3/] Section 704(1) gives the trustee of the debtor's bankruptcy estate the duty to collect property of the estate and liquidate it. 11 U.S.C. § 704(1). The authority to collect property of the estate "is vested exclusively in the trustee," and creditors may not exercise that power on behalf of the estate. *In re Perkins*, 902 F.2d 1254, 1257 (7th Cir. 1990); *see also Black v. U.S. Postal Serv. (In re Heath)*, 115 F.3d 521, 523 (7th Cir. 1997) (noting trustee's "exclusive right to sue on behalf of the debtor's estate"). The trustee is therefore the party to bring turnover actions for the estate; creditors cannot bring them. *Perkins*, 902 F.2d at 1257-58; *Austin v. Cockings (In re Cockings)*, 195 B.R. 915, 916 (Bankr. E.D. Ark. 1996).

Only under "narrow circumstances" will a creditor be permitted to prosecute an action for the trustee. *Perkins*, 902 F.2d at 1258. A creditor can bring a turnover action on the estate's behalf when (a) the trustee unjustifiably refuses a demand to pursue the action; (b) the creditor has a colorable claim; and (c) the creditor seeks and obtains leave from the bankruptcy court to prosecute the action "for and in the name of the trustee." *Id.* at 1258; *see also Fogel v. Zell*, 221 F.3d 955, 965-66 (7th Cir. 2000) (noting that "[i]f a trustee unjustifiably refuses a demand to

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[3/] "Standing" here means statutory standing, not Article III standing. *See Jeffrey M. Goldberg & Assocs., Ltd. v. Holstein (In re Holstein)*, 299 B.R. 211, 223 (Bankr. N.D. Ill. 2003) (explaining the distinction). Unlike Article III standing, statutory standing is not jurisdictional. *See Ameritech Benefit Plan Comm. v. Communication Workers of Am.*, 220 F.3d 814, 819 (7th Cir. 2000).

bring an action to enforce a colorable claim of a creditor, the creditor may obtain the permission of the bankruptcy court to bring the action in place of, and in the name of, the trustee"); *Louisiana World Exposition v. Federal Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988).

None of these criteria has been satisfied here.

• Access Lending has not alleged (and nothing in the record suggests) that the chapter 7 trustee, Ilene Goldstein, has unjustifiably refused a demand to bring the claims Access Lending tries to allege in Count IV. The trustee apparently has not refused such a demand at all, let alone unjustifiably, since as far as the record shows no demand has ever been made of her.

• The claim that Access Lending alleges in Count IV is not colorable – at least to the extent that it purports to seek "contribution" from Scott's fellow tortfeasors. Contribution in Illinois is statutory. The Joint Tortfeasor Contribution Act, 740 ILCS 100/1 *et seq.* (2002), provides a right of contribution among two or more persons who are "subject to liability in tort." 740 ILCS 100/2(a) (2002). Despite the breadth of this language, however, no contribution is available among intentional tortfeasors. *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 205-06, 538 N.E.2d 530, 542 (1989). The amended complaint makes clear that Scott was an intentional tortfeasor. (Certainly, she is not claimed to have acted negligently in committing fraud.) Therefore, she had no pre-petition contribution right to which the bankruptcy estate can have succeeded. There is no colorable claim for Access Lending to assert.

• Access Lending did not seek, and so did not obtain, leave from the bankruptcy court to bring its claim in Count IV of the amended complaint. The amended complaint with the new Count IV inserted was simply filed spontaneously after the two adversary proceedings were consolidated.

Access Lending, then, lacks standing to pursue the section 542 claim in Count IV, and

this is not one of those rare cases in which a creditor has acquired standing to assert the trustee's rights. "When a third party tries to assert an action still vested in the trustee, the court should dismiss the action." *Perkins*, 902 F.2d at 1258. Count IV is dismissed.[4/]

3. Conclusion

The motion of Virginia Scott and the motion of Robert M. and Evelyn Francisco to dismiss are taken as motions to dismiss the amended complaint of Access Lending Corporation and are granted in part and denied in part. Scott's motion to dismiss Count II is denied. Scott's motion to dismiss Count III is also denied, but Count III is stricken as redundant of Count II. The Franciscos' motion to dismiss Count IV is granted, and all claims against the non-debtor defendants are dismissed. Scott's answer to Counts I and II of the amended complaint must be

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[4/] It is important to note that if the amended complaint had not been filed, the court would have had no jurisdiction to entertain Access Lending's state law claims against the non-debtor defendants in No. 05 A 1677. Bankruptcy jurisdiction is limited to claims that "arise under" title 11 or that "arise in" or are "related to" a case under title 11. 28 U.S.C. § 1334(a), (b). The claims here did not "arise in" a case under title 11 because they did not concern "administrative matters that arise *only* in bankruptcy cases." *Wood v. Wood (In re Wood),* 825 F.2d 90, 97 (5th Cir. 1987) (internal quotation omitted) (emphasis in original). They did not "arise under" title 11 because they were state law claims, not claims "created or determined by a statutory provision of title 11." *Id.* at 96. And the claims were not "related" to a case under title 11, either. Under this circuit's narrow interpretation of "related to" jurisdiction, a dispute between two non-debtor third parties is "related to" a bankruptcy only if "the dispute affects the amount of property for distribution . . . or the allocation of property among creditors." *In re Fedpak Sys., Inc.*, 80 F.3d 207, 213-14 (7th Cir. 1995) (internal punctuation omitted). Mere overlap between the dispute and the debtor's affairs is not enough. *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989). In this case, a damage award in favor of Access Lending against the Franciscos or any of the other non-debtor defendants could not possibly affect Scott's bankruptcy estate or the distribution of property to her creditors. *See Bethlahmy v. Kuhlman (In re ACI-HDT Supply Co.),* 205 B.R. 231, 237-38 (B.A.P. 9th Cir. 1997) (finding no jurisdiction over third parties' damage claims against other third parties); *Wayne Film Sys. Corp. v. Film Recovery Sys. Corp.*, 64 B.R. 45, 52-53 (N.D. Ill. 1986) (dismissing creditor's damage claims against third parties as not "related to" bankruptcy); *In re O'Malley,* 252 B.R. 451, 458-59 (Bankr. N.D. Ill. 1999) (dismissing non-debtor's fraud claims against other non-debtors).

filed on or before February 17, 2006.

A separate order will be entered in accordance with this opinion.

Dated: January 18, 2006

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A. Benjamin Goldgar
United States Bankruptcy Judge