

**United States Bankruptcy Court  
Western District of Wisconsin**

Cite as: [Unpublished]

**Organic Family, LLC, Rolf Klefstad,  
Roger Klefstad, Gregory Hetrick,  
Samuel Danzinger, and Steven Pechacek, Plaintiffs,  
v. Chad L. Pawlak and Jo Ann Pawlak, Defendants**

(In re: Chad L. Pawlak and Jo Ann Pawlak, Debtors)

Bankruptcy Case No. 10-11787-7

Adv. Case No. 10-148

United States Bankruptcy Court  
W.D. Wisconsin, Eau Claire Division

June 3, 2011

Donald R. Marjala, Spangler, Nodolf, Bruder & Klinkhammer, LLC, Eau Claire , WI, for plaintiffs  
Erik H. Monson, Coyne, Schultz, Becker & Bauer, S.C., Madison, WI, for defendants

Thomas S. Utschig, United States Bankruptcy Judge

**DECISION AND ORDER**

The Court conducted a hearing in this adversary proceeding on May 9, 2011. The plaintiffs were represented by Donald R. Marjala and Tanya M. Bruder, and the defendants were represented by Erik H. Monson.

The defendants have moved to dismiss a portion of the plaintiffs' second amended complaint. They contend that two of the causes of action do not state a claim upon which relief may be granted and should be dismissed under Fed. R. Civ. P. 12(b)(6) and Fed. R. Bankr. P. 7012(b). While the federal rules require only a "short and plain statement" of the plaintiffs' claim, there must be enough alleged to state a claim that is "plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). The debtors contend that the objection to their discharge under 11 U.S.C. § 727(a)(4)(C) must be dismissed. The complaint alleges that after entry of a state court judgment against him, Mr. Pawlak filed a malpractice action against his former attorney and obtained a settlement of \$120,000.00. The net proceeds from the settlement were disbursed to a law firm as a "non-refundable retainer" toward the anticipated defense of this action. The key allegation of the complaint is that Mr. Pawlak's actions and representations about the settlement and the retainer constitute some sort of fraud.

Section 727(a)(4)(C) provides that the debtor may not receive a discharge if he "knowingly and fraudulently, in or in connection with a case . . . gave, offered, received,

or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act.” This section focuses on extortion in connection with a bankruptcy case. Fiala v. Lindemann (In re Lindemann), 375 B.R. 450, 471 (Bankr. N.D. Ill. 2007) (the section “addresses any attempted or actual extortion or bribery in connection with a bankruptcy case”). Here, the plaintiffs allege a transfer of money, but do not indicate how that transfer involved an inappropriate “action or forbearance” in connection with the instant case. Certainly the payment of a retainer is not actionable as a bribe. The Court must agree with the debtors that the complaint does not contain factual allegations to support a claim under § 727(a)(4)(C). As such, that claim must be dismissed.

The creditors also complain that Mr. Pawlak’s behavior in connection with the settlement proceeds gives rise to a nondischargeable claim under § 523(a)(2)(A). The debtor seeks to dismiss this cause of action on the grounds that there is no allegation that he tricked creditors into loaning them money or giving them property through fraudulent means. The focal point of this section is on fraud. As the Seventh Circuit has observed, “actual fraud” in the context of the statute is broader than, and need not take the form of, a specific misrepresentation. McClellan v. Cantrell, 217 F.3d 890 (7<sup>th</sup> Cir. 2000). Fraud is a generic term which covers any means by which an individual gains an advantage over another “by false suggestions or by the suppression of truth.” Id. at 893. It includes any unfair way by which another is cheated. Id. The problem with the plaintiffs’ complaint is that there is no suggestion that Mr. Pawlak’s disbursement of the settlement proceeds was part of a scheme to obtain something *from* the plaintiffs. There is no allegation that the settlement proceeds belonged to the plaintiffs or that the plaintiffs were tricked into disbursing money or giving up something. As such, the claim also does not state a cause of action under § 523(a)(2)(A) and will be dismissed.

Accordingly,

IT IS ORDERED that the motion to dismiss the plaintiffs’ claims under § 727(a)(4)(C) and § 523(a)(2)(A) is granted. A trial as to the remaining matters is scheduled for January 19, 2012, and January 20, 2012, at 9:30 a.m., at the Federal Building, 500 S. Barstow Street, Eau Claire, WI.