

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re: :

GLENN R. AHLBORG : BK No. 11-12073
Debtor Chapter 7

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STARWOOD TIVERTON, LLC :

Plaintiff

v. : A.P. No. 11-1063

GLENN R. AHLBORG :

Defendant

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DECISION GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

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BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on the Defendant/Debtor's ("Ahlborg") Motion to Dismiss Plaintiff/("Starwood's") Complaint, on the grounds that: 1) the three counts based upon 11 U.S.C. § 523(a)(2)(A) are identical, redundant, and should be consolidated and simplified; 2) the § 523(a)(2)(B) allegations do not pertain to the Debtor's financial condition, as required by the statute; 3) the allegations based upon §727(a)(4)(A), (B) and (C) do not pertain to matters in or in connection with the bankruptcy case; and 4) the remaining five-counts state common law claims which are not statutory grounds for denial of discharge in bankruptcy. Defendant/Debtor's Motion to Dismiss, ¶8-27.

For the reasons discussed below, Ahlborg's Motion to Dismiss Counts V, VI, VII, VIII, IX, X, XI, and XII is **GRANTED** , and **DENIED** as to Counts I, II, III, and IV.

APPLICABLE LAW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) or Fed. R. Bankr. P. 7012(b)(6), the plaintiff must allege sufficient facts which, if accepted as true, "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (2007). Further, the Court must "accept[] as true all well-pleaded facts in the complaint and draw[] all reasonable inferences in the

plaintiffs' favor." *Freedom From Religion Foundation v. Hanover School District*, 626 F.3d 1,6 (1st Cir. 2010).

FACTS AND DISCUSSION

Starwood's thirty-four page, 210 paragraph Complaint Objecting to Discharge, set out in twelve counts, is most notable for its length and repetitiveness, which has resulted only in unproductive additional expense for the litigants. The Plaintiff's claims all arise from a contract between the developer Starwood, and the general contractor Austin Ross, Inc., whose principal and spokesperson was the debtor-to-be, Glenn Ahlborg. Starwood alleges that in order to induce payments that were not yet due, Ahlborg falsely represented to Starwood that the subcontractors had been paid, which turned out not to be the case. Each claim for relief incessantly and needlessly repeats the same lengthy allegations.

COUNTS I, II and III

The first three counts of the Complaint seek denial of discharge under 11 U.S.C. § 523(a)(2)(A), which provides that a debt is not discharged "for money, property, services, or an extension, renewal, or financing of credit, to the extent obtained by ... false pretenses, false representation, or actual fraud." Starwood also alleges false pretenses in Count I, false representation in Count II and actual fraud in Count III. As

drafted, such excessive and wordy style of pleading should not be, and is not encouraged by this Court. Indeed, in chambers conference, the Court bluntly expressed its opinion on the subject and Starwood's counsel perceptively conceded and agreed to abbreviate and restate the allegations, this time more concisely. The Court readily accepts Starwood's offer to consolidate and amend Counts I, II and III into a single count, and to ease the redundancy.

COUNT IV

Ahlborg challenges Count IV on the ground that the allegations "do not pertain to the Debtor's financial condition." The Debtor's financial condition is a disputed issue of fact and should not, except in unusual circumstances, be adjudicated in the context of a 12(b)(6) motion. Accordingly, drawing all reasonable inferences of disputed fact in the Plaintiff's favor, Defendant's Motion for Dismissal of Count IV is **DENIED**.

COUNTS V, VI and VII

Starwood's Counts V, VI, and VII are brought under 11 U.S.C. § 727(a)(4)(A), (B) and (C). Violation of this section is a ground for denial of discharge for "knowingly and fraudulently, in or in connection with the case" making a false oath, presenting or using a false claim or giving, offering, receiving or attempting to

obtain money, property or advantage or promise of same by acting or forbearing to act. 11 U.S.C. § 727(a)(4)(A),(B),(C). The key words here are "in or in connection with the case." As Ahlborg points out, all of the misconduct alleged by Starwood occurred pre-petition, which by definition excludes matters in or in connection with the bankruptcy case, and which therefore is not actionable under § 727. Accordingly, Ahlborg's Motion to Dismiss Counts V, VI, and VII is **GRANTED**.

COUNTS VIII, IX, X, XI and XII

The remaining counts of the complaint seek denial of discharge based on *common law* theories of fraud, fraudulent inducement, unjust enrichment, intentional misrepresentation, and conversion. This Court's authority to determine the dischargeability of particular debts or to deny discharge is limited to and derives solely from 11 U.S.C. § 523 and § 727. Because Starwood's alleged causes of action are not statutory grounds for denial of discharge, they, regretfully, may not be adjudicated by a bankruptcy court. *See Stern v. Marshall*, 541 U.S. ___, 131 S.Ct. 2594 (2011) (bankruptcy court "lack[s] the constitutional authority to enter final judgment on a state law counterclaim that is not resolved in the process of

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ruling on a creditor's proof of claim.")¹ Accordingly, Ahlborg's Motion to Dismiss Counts VIII, IX, X, XI and XII is **GRANTED**.

While the resolution of this part of the litigation consumed a large and basically useless block of time, the Court is hopeful that, going forward and with reasonable cooperation of counsel, this matter can proceed on a timely basis to an early hearing on the merits.

Enter.



Arthur N. Votolato
U.S. Bankruptcy Court

Entered on docket: 4/13/12

¹ Although *Stern* has created a firestorm of disagreement and lack of unanimity in the bankruptcy community, this Court does not have the temerity to construe that holding as narrowly to its facts as its detractors might argue.