

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re: :

SEAN T. HEALEY : BK No. 01-12418
Debtor Chapter 7

MARTIN J. PESKIN, individually and :
as Trustee of the MARTIN J. PESKIN, :
D.D.S., LTD. PENSION PLAN :
Plaintiff :
v. A.P. No. 01-1117

SEAN T. HEALEY :
Defendant

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TITLE: *Peskin v. Healey (In re Healey)*

CITATION: 2002 WL 31433287 (Bankr. D.R.I. Aug. 9, 2002)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

APPEARANCES:

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BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on the Defendant's Motion to Dismiss Count I of Plaintiffs' Amended Complaint. In February 2002, I granted an earlier motion to dismiss the same count, with leave to amend to plead fraud with particularity as required by Fed. R. Civ. P. 9(b).¹ As to the Plaintiffs' Amended Complaint the Defendant again seeks dismissal, on the ground that even as amended the Complaint still fails to plead fraud with particularity. The Defendant argues that the Amended Complaint alleges at most a cause of action for breach of contract, and contains only conclusory allegations regarding fraud. I agree, and for the reasons argued by the Defendant, rule that the Amended Complaint still falls short for Rule 9(b) purposes. To fix his complaint, the Plaintiff needs to allege *inter alia* (if in good faith he can do so) that when the Defendant obtained money from the Plaintiff, he did so with the intent not to purchase the securities as agreed. Under notice pleading standards there must be a sufficient allegation of wrongdoing to apprise the

¹ Rule 9(b) of the Federal Rules of Civil Procedure is incorporated into bankruptcy by Fed. R. Bankr. P. 7009.

Defendant of the nature of the fraud claimed.² The amended complaint says basically that the Defendant promised to do certain things, that he obtained money from the Plaintiff, and that he failed to perform as agreed - this is garden variety breach of contract language. While the Court appreciates the problems of alleging with particularity a Defendant's inner intent, the Plaintiff must at least allege facts sufficient to support a reasonable inference that a fraud has been committed. At the hearings on both Motions to Dismiss, the Plaintiff argued at length about the misdeeds allegedly committed by the Defendant, but to date he has failed to commit these allegations to writing as part of the complaint.³ Although he may have alleged a verbal cause of action, statements of counsel made

² The elements of fraud under 11 U.S.C. § 523(a)(2)(A) are: (1) the defendant knowingly made a false representation or a representation made in reckless disregard for the truth; (2) the defendant intended to deceive; (3) the defendant intended to induce reliance upon the false statement; (4) the creditor actually relied upon the misrepresentation; (5) the creditors' reliance was justifiable; and (6) the reliance upon the false statement caused damages. *Gem Ravioli, Inc. v. Creta (In re Creta)*, 271 B.R. 214, 217 (B.A.P. 1st Cir. 2002).

³ Another problem with the instant Complaint is the lumping of all the transactions into a single count.

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during oral argument may not be incorporated into the papers to salvage a defective pleading.

Accordingly, the Motion to Dismiss Count I is GRANTED. The Plaintiffs are allowed one final opportunity to cure things by filing a second amended compliant within thirty (30) days.

Dated at Providence, Rhode Island, this 9th day of August, 2002.

/s/ Arthur N. Votolato
Arthur N. Votolato
U.S. Bankruptcy Judge