

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

IN RE:

CHAPTER: 7

DOUGLAS FOXWORTH and
CYNTHIA FOXWORTH,
Debtors.

CASE NO.: 03-20309-LMK

_____/

QUALITY TRAILER PRODUCTS, INC.,

Plaintiff,

vs.

ADV. CASE NO.: 03-90063-LMK

DOUGLAS FOXWORTH and wife
CYNTHIA FOXWORTH,

Defendants.

_____/

ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT

THIS MATTER came before the Court on March 26, 2004, for trial, on Douglas and Cynthia Foxworth's (jointly "Defendants") motion to dismiss amended complaint for failure to state a cause of action for objection to dischargeability due to the debtors obtaining credit through fraud or false pretenses as proscribed by 11 U.S.C. § 523(a)(2)(A). Plaintiff-creditor, Quality Trailer Products, Inc., instituted this adversary proceeding on July 3, 2003, to determine dischargeability of debts owed by Defendants in the aggregate amount of \$26,000. On December 22, 2003, the Plaintiff filed its' amended complaint. This Court has jurisdiction over this matter and this is a core proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(I). For the reasons set for herein, the motion to dismiss the amended complaint will be DENIED.

FACTS

The Defendant-debtors, Douglas and Cynthia Foxworth, are the principal officers and shareholders of Foxworth Enterprises, Inc. Both Foxworth Enterprises, Inc. and the Defendants have filed for Chapter 7. The Plaintiff's claim in this case results from goods sold and delivered to Foxworth Enterprises, Inc., and personally guaranteed by the individual defendants. After the corporate debtor fell behind on payments, the Plaintiff continued to ship merchandise to the corporate debtor on a cash on delivery ("COD") basis. In exchange for receipt of merchandise, the corporate debtor issued three checks (one of which is dated September 10, 2002, and two of which are dated September 17, 2002) to the Plaintiff which were subsequently dishonored for lack of funds.

During pendency of the adversary proceeding, the Defendants filed their motion to dismiss amended complaint for failure to state a claim. Therein, the Defendants argue that: 1) the issuance of a valueless check does not, in itself, constitute fraud so as to preclude the discharge of a debt; 2) the Plaintiff's amended complaint fails to establish a proper showing that defendants made representations of material facts, that the misrepresentations were made with the knowledge of their falsity, nor that the intent on the part of the defendants was to deceive the plaintiffs pursuant to 11 U.S.C. § 523(a)(2)(A); and 3) the amended complaint sets forth nothing but conclusory allegations which will not satisfy the requirement that fraud be pleaded with particularity pursuant to Bankruptcy Rule 7009.

DISCUSSION

A court is limited to the matters on the face of the complaint when dealing with a motion to dismiss. *In re Servico, Inc.*, 144B.R. 557, 559 (Bankr. S.D. Fla. 1992)(citing *Marine Coatings of Ala., Inc. v. U.S.* 792 F.D. 1565(11th Cir. 1986)). When considering a motion to dismiss for failure to state a cause of action, a court must accept the allegations of the complaint as true and construe the facts in favor of the plaintiff. See *In re Meridian Asset Mgmt., Inc.*, 296 B.R. 243, 249 (Bankr. N.D. Fla. 2003)(citing *Sec. and Exch. Comm. v. Lambert*, 38 F.Supp.2d 1348, 1350 (S.D.Fla.1999)); *Servico*, at 559(citing *Franklin v. Gwinnet County Pub. Sch.*, 911 F2d. 617 (11th Cir. 1990)). Dismissal is proper pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim if “it appears beyond doubt[,] that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Servico*, at 559 (quoting *Conley v. Gibson* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)).

Section 523(a)(2)(A) excepts from discharge any debt, for money, property, or services obtained by “false pretenses, false representation, or actual fraud.” 11 U.S.C. § 523(a)(2)(A) (West 2003). The elements of a cause of action for fraudulent misrepresentation under § 523(a)(2)(A) are:

1. that the debtor made materially false representations;
2. that the debtor knew the representations were false at the time he made them;
3. that the debtor made the representations with the intention and purpose of deceiving the creditor;
4. that the creditor reasonably relied upon the debtor’s materially false representations; and

5. that the creditor sustained loss and damages as a proximate result of the materially false representations by the debtor. *In re Miller*, 112 B.R. 937, 939 (Bankr. N.D. Ind. 1989); *In re Anderson*, 181 B.R. 943, 948 (Bankr. D. Minn. 1995); *In re Newell* 164 B.R. 992, 995 (Bankr. E.D. MO. 1994).

The issue before me is whether the issuing of an insufficient funds (“NSF”) check presented in exchange for C.O.D. goods constitutes the obtaining of goods, services, or credit through fraud or false pretenses under 11 U.S.C. § 523(a)(2)(A). The case at bar turns on the first two elements.

The first element is problematic because “the notion of a ‘false representation’ suggests an affirmative statement of fact, objectively and actively manifested by the debtor”. *Anderson*, at 948 (citing *In re Reder*, 60 B.R. 529, 535 – 36 (Bankr. D. Minn. 1986)). However, the presenting of an NSF check in exchange for goods is almost never accompanied by an overt representation that there is sufficient funds in the account to cover the check. *Id.* There is a split of authority concerning whether the mere giving of a NSF check, in and of itself, is a “representation” under § 523(a)(2)(A). Some courts have held that the delivery of a check carries an implied representation that sufficient funds exists to cover the check. See *Miller*, at 940; *Newell*, at 995. Other courts have held that the issuing of a NSF check is not an actionable representation that the check will be honored upon presentment. See *In re Pike*, 79 B.R. 41, 43 (Bankr. N.D. Ala. 1987) (“The issuance of a worthless check does not, in itself, constitute fraud so as to preclude the discharge of a debt”); *Anderson*, at 950 (“[T]he tender of a check is really no more than the drawer’s acknowledgment that his debt to the payee exists, combined with a promise to pay the statement amount if the drawee does not honor the check”). These jurisdictions view a check as nothing more than a directive to the bank

to transfer the face amount from the account of the drawer to the bearer of the check. *In re Brzakala*, 305 B.R. 705, 710 (Bankr. N.D. Ill. 2004).

The second element requires that the debtor knew the representations were false at the time he made them. The delivery of an NSF check alone, "without more, does not constitute an actionable representation under § 523(a)(2)(A)." *Newell*, at 995 (quoting *In re Tuggle*, 86 B.R. 612, 615 (Bankr. E.D. Mo. 1998)). When a debtor knew or should have reasonably known that the check will be dishonored, he may be found to have made a false representation with the intent to commit fraud. *Miller*, at 940. A debtor's knowledge that a check has been written from insufficient funds may be inferred from the surrounding circumstances concerning the issuance of the NSF check. *Id.*; *Newell*, at 995.

I agree with those decisions that hold that an issued check in exchange for goods carries an implied representation that it will be honored. This view merely recognizes "commercial realities and expectations which accompany payment by check." *Miller*, at 940 n.1. When a debtor makes a direct exchange of a check for goods, there is an implied representation that the check is good. The value represented by the check is what induces the creditor to tender goods. If that check is subsequently dishonored, the creditor sustains a loss equal to the face amount of the check. By tendering a NSF check, a debtor may be fraudulently inducing the creditor to tender goods.

The Debtor cites *Brzakala* for the proposition that a bad check is not a misrepresentation for purposes of § 523(a)(2)(A). *Brzakala* is distinguishable from the case at bar because the debtor in *Brzakala* issued bad checks for payment of an prior debt - unlike the situation at hand where bad checks were issued in exchange for goods. The distinction is that the debtor in *Brzakala* did not obtain anything by writing the bad checks for antecedent debt. When one exchanges a NSF check

for value that is in essence making a representation that the check will be honored, in order to obtain possession of said goods.

Alternatively, the issuing of an NSF checks may be classified as a “false pretense” under § 523(a)(2)(A) thus satisfying the first element. *See Anderson, at 951.* The *Anderson* court found that the exchange of bad checks for value by a debtor-gambler classified as a false pretense under 523(a)(2)(A). *Id.* The court states for purposes of the false pretense element of the fraud exception to discharge:

Where the debtor has possession of material information that may bear on the creditor’s willingness to extend a financial accommodation to him; knows that the creditor would consider it; fails to disclose it; creates or allows the creation of the semblance of a very different state of affairs; and reinforces that imposture by withholding of the material information, the debtor has acted in a way to trigger § 523(a)(2)(A). *Id.*

In sales transactions involving payment by check, an exchange of goods takes place because the debtor *appears* to pay the purchase price by tendering a check. The only reason the creditor relinquishes possession of goods to the debtor is because of the even-for-even exchange of goods for the checks. *Id.* Though the debtor issued NSF checks by “passive rather than active means, [the debtor’s] conduct nonetheless satisfies the first and second elements of § 523(a)(2)(A)”. *Id.*

In sum, the Defendants argue that the Plaintiff failed to establish the initial element of fraud because the Plaintiff’s amended complaint did not show that the Defendants made an affirmative representation that the check was good. However, a check presented in exchange for value or goods carries an implied representation that the check is good. Thus, it is not required that Plaintiff show

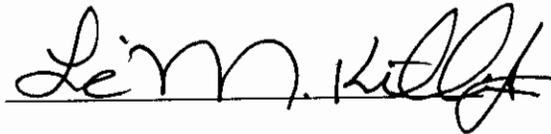
that the Defendants made an affirmative representation that there were sufficient funds to cover the check. Also, the amended complaint pleads that the checks themselves are a false pretense. I find that the issuance of a NSF check may be classified as a "false pretense" under § 523(a)(2)(A), thus the complaint is sufficiently plead.

The Defendants contend that the Plaintiff's amended complaint failed to establish a proper showing that the misrepresentations were made with the knowledge of their falsity. Additionally, the Defendants assert that the Plaintiff did not properly plead fraudulent intent. Federal Rule of Bankruptcy Procedure 7009 requires that knowledge and fraudulent intent and other states of mind need only be averred to generally in the complaint. *In re Arboleda*, 224 B.R. 640, 650 (Bankr. N.D. Ill. 1998). The intention to commit fraud can be inferred from the allegation that fraud was committed. *Servico*, at 561. The amended complaint states that Defendants knew at the time of issuance that the checks would be dishonored for lack of funds, and, in spite of this knowledge, they issued the NSF checks. The language of the complaint generally avers that the Defendants had knowledge of the falsity of the representation and had intent to commit fraud.

Based on the foregoing, I hold that the NSF checks presented in exchange for goods on a COD basis constitutes an implied representation that the checks are good for purposes of § 523(a)(2)(A). Additionally, the presenting of a NSF check may classify as a "false pretense" under § 523(a)(2)(A). The Plaintiff meets all the requirements of stating a claim under § 523(a)(2)(A). Therefore, the amended complaint is sufficiently stated to withstand a motion to dismiss.

ACCORDINGLY, it is ORDERED AND ADJUDGED that the motion to dismiss amended complaint is hereby DENIED.

DONE AND ORDERED in Tallahassee, Florida, this 14th day of April, 2004.



Lewis M. Killian Jr.

United States Bankruptcy Judge

cc: Jim Husbands
Jeffrey P. Whitton
Jason H. Egan
Ronald A. Mowrey
John E. Venn, Ch. 7 Trustee