



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 29, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

JUSTIN K. SIMS,

CASE NO. 14-13926-NPO

DEBTOR.

CHAPTER 13

JUSTIN K. SIMS

PLAINTIFF

VS.

ADV. PROC. NO. 15-01085-NPO

JEREMY J. ROLLINS

D/B/A DISCOUNT CASH ADVANCE

DEFENDANT

**MEMORANDUM OPINION AND ORDER
DENYING MOTION TO DISMISS ADVERSARY COMPLAINT**

This matter came before the Court for hearing on January 21, 2016 (the "Hearing"), on the Motion to Dismiss Adversary Complaint (the "Motion") (Adv. Dkt. 7)¹ filed by Jeremy J. Rollins d/b/a Discount Cash Advance, the defendant (the "Defendant"), and the Plaintiffs' [*sic*] Response in Opposition to Defendant's Motion to Dismiss (Docket #7) (the "Response") (Adv. Dkt. 10) filed by the plaintiff, Justin K. Sims (the "Plaintiff"), in the Adversary. At the Hearing, Arnold D.

¹ The bankruptcy docket in Bankruptcy Case No. 14-13926-NPO (the "Bankruptcy Case") will be cited as "Dkt. ___." The docket in Adversary Case No. 15-01085-NPO (the "Adversary"), will be cited as "Adv. Dkt. ___."

Lee (“Lee”) represented the Plaintiff and William B. Palmertree (“Palmertree”) represented the Defendant. Having considered the matter and being fully advised in the premises, the Court ruled from the bench denying the Motion to the extent that it asked the Court to dismiss the Plaintiff’s Complaint for Contempt of Court, Injunctive Relief, Damages, Mississippi Tort Law, Disallowance of Claim and Other Relief in a Core Adversary Proceeding (the “Complaint”) (Adv. Dkt. 1) in its entirety. The Court reserved ruling on whether it would consider each cause of action separately under Federal Rule of Bankruptcy Procedure 7012 (“Rule 7012”). This Opinion memorializes and supplements the Court’s bench ruling.

Jurisdiction

The Court has jurisdiction over the Adversary pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Motion and the Hearing was proper under the circumstances.

Facts

I. Bankruptcy Case

1. The Plaintiff filed a voluntary petition for relief in the Bankruptcy Case on October 21, 2014. (Dkt. 1).

2. The Defendant filed his proof of claim (the “POC”) on June 23, 2015. (Bankr. Claim No. 5). According to the POC, the Defendant loaned the Plaintiff the amount of \$200.00. (POC at 3).

II. Adversary

3. The Plaintiff filed the Complaint on October 6, 2015. The Plaintiff sought to recover actual, punitive, and compensatory damages, sanctions, attorney fees, and costs “for the

defendant’s willful and negligent actions that constitute invasion of the plaintiff’s privacy. . . .” (Compl. at 1). In the Complaint, the Plaintiff alleged that the POC displayed the Plaintiff’s entire Social Security Number (“SSN”) and banking information, which made the Plaintiff’s “private, sensitive and personal nonpublic information available to the general public.” (*Id.* at 2).

A. Causes of Action

4. The Plaintiff alleged four (4) causes of action in the Complaint: (1) Objection to Claim; (2) Violation of Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809 (the “GLBA”); (3) Contempt of Court and Violation of Federal District Court and Bankruptcy Court Orders and Policies Against Disclosure of Personal Identifiers and Sensitive Data (the “Local Rules”); and (4) Contempt of Court and Violation of Federal Rule of Bankruptcy Procedure 9037 (“Rule 9037”).

5. In the first cause of action, the Plaintiff argued that the Court should strike the POC and preclude the Defendant from “filing any amended, modified or substitute claim” in the Bankruptcy Case and that the “underlying debt be canceled and forever discharged. . . .” (Compl. at 5). The basis for the cause of action hinges on the Plaintiff’s argument that the Defendant intentionally revealed the Plaintiff’s private information to the public in violation of Rule 9037 and the Local Rules. (*Id.*).

6. The Plaintiff’s second cause of action is based on the Defendant’s alleged violation of the GLBA. (*Id.*). According to the Plaintiff, the GLBA “sets the appropriate standard of care for the protection, security and confidentiality of the nonpublic personal information and private data of the defendant’s customers” and the Defendant violated the standard of care by disclosing “nonpublic personal information by releasing the plaintiff’s social security numbers [*sic*] and other sensitive information in a public records forum.” (*Id.* at 6). The Plaintiff argued that he suffered

“an increased exposure to identity theft and the defendant is liable to the plaintiff for damages, future damages, future credit monitoring [,] attorney fees, sanctions, and costs.” (*Id.*)

7. The Complaint also outlined the Plaintiff’s third cause of action for contempt of Court based on the Defendant’s alleged violation of the Local Rules. (*Id.* at 7-8). The Plaintiff argued that the Local Rules prohibit the disclosure of personal identifiers, and when the Defendant publically disclosed the Plaintiff’s entire SSN, he violated the Local Rules. (*Id.*)

8. The Plaintiff’s fourth cause of action alleges that the Defendant violated Rule 9037, which requires a SSN to be redacted. (*Id.* at 8-9). The Plaintiff argued that the Court has the inherent authority under § 105(a)² to enforce Rule 9037 and to prevent an abuse of process. (*Id.* at 9).

B. Motion and Response

9. The Defendant filed the Motion on November 10, 2015. The Defendant contended that the Court should dismiss the Complaint “with prejudice for failure to state a claim and/or a lack of subject matter jurisdiction. . . .” (Mot. at 12). In the Motion, the Defendant argued that he “sought to have [the POC] put under seal” immediately after learning of his “mistake” in disclosing the Plaintiff’s SSN. (*Id.* at 2). According to the Defendant, after the Court resolved an issue regarding the Defendant’s status as a sole proprietor, the POC was placed under seal and “no person that is not a member of the Court or the Clerk’s office has had access to the original Claim” since then. (*Id.*) The Defendant further asserted that the Plaintiff did not allege actual or specific damages, “but rather that he could potentially suffer damages in the form

² All Code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless stated otherwise.

of identity theft.” (*Id.*).

10. In regard to the first cause of action, the Defendant claimed in the Motion that the Plaintiff’s objection to claim argument is moot because “to the extent Plaintiff seeks to place the original Claim filed by the Defendant under seal, such relief was granted by the Court on the request of the Defendant weeks prior to the Plaintiff filing his Complaint.” (*Id.* at 3). The Defendant further argued that objections to claim are considered under § 502, which provides that a claim is deemed allowed unless it falls into one of the nine (9) enumerated categories listed in the statute. (*Id.*). According to the Defendant, the POC does not fall into any of the nine (9) categories and should therefore be allowed. (*Id.*).

11. In the Motion, the Defendant argued that the Plaintiff failed to state a claim under the GLBA because “Plaintiff fails to recognize that the GLBA cannot form the basis for a private right of action against Defendant or any other financial institution.” (*Id.* at 5). The Defendant also maintained that the Local Rules do not give the Plaintiff a private cause of action. (*Id.* at 5-6).

12. In response to the Plaintiff’s assertion in the Complaint that the Defendant should be held in contempt for violating Rule 9037, the Defendant argued in the Motion that it is “not sufficient to simply allege a violation of the rule or that such violation was intentional.” (*Id.* at 6). According to the Defendant, the Plaintiff must show that the Defendant “flaunted the law with knowledge of its proscriptions, failed to take remedial actions once violations were discovered, or acted deliberately as opposed to mistakenly or inadvertently.” (*Id.*). The Defendant reasoned that because he immediately moved to remediate the issue, there is no proof that he acted “willfully, intentionally or otherwise disclosed the relevant information of Plaintiff.” (*Id.* at 8).

13. In addition to arguing that the Complaint should be dismissed, the Defendant also claimed that the Plaintiff did not properly file his claims. (*Id.* at 8). The Defendant contended that Federal Rule of Bankruptcy Procedure 9020 requires contempt proceedings to be filed as a contested matter under Federal Rule of Bankruptcy Procedure 9014 rather than as an adversary proceeding. (*Id.* at 8). The Defendant reasoned that the Adversary should be dismissed because the Plaintiff improperly filed his claims. (*Id.* at 9).

14. Finally, the Defendant argued that federal law preempts any state law claims that the Plaintiff may have successfully asserted. (*Id.*). According to the Defendant, the Bankruptcy Code is so lengthy and comprehensive that it demonstrates Congress' intent to preempt state law causes of action "for alleged misconduct[] that occurs in connection with a bankruptcy case." (*Id.* at 10). Essentially, the Defendant contended that because his alleged misconduct occurred in the Bankruptcy Case, state law should be preempted. (*Id.* at 10-12).

15. In the Response, the Plaintiff cited *Dixon v. Bay Financial, Inc. (In re Dixon)*, Case No. 09-5009-NPO, 2010 WL 501547 (Bankr. S.D. Miss. Feb. 5, 2010). According to the Plaintiff, in *In re Dixon*, this Court "basically addressed [the Defendant's] arguments and denied a similar motion to dismiss" (Resp. at 2). The Plaintiff also noted that Federal Rule of Bankruptcy Procedure 7001 provides that adversary proceedings are proper for a proceeding to obtain an injunction or other equitable relief, and for a proceeding to obtain declaratory judgment. (*Id.* at 2-3). The Plaintiff also argued that even though the original POC is now under seal, the Plaintiff's information is still available because multiple companies "immediately collect PACER bankruptcy data from all fifty states and make debtors' data available to the general public." (*Id.* at 3).

C. Hearing

16. At the Hearing, Palmertree stated that he did not argue in the Motion that the Complaint should be dismissed in its entirety, but that the Motion outlined why each cause of action should be dismissed separately. He further concluded that at least some of the Plaintiff's claims should be dismissed to narrow the scope of the Adversary because it would be difficult for the Defendant to defend all four claims.

17. Lee argued at the Hearing that there is no basis for Palmertree's argument that the entire Complaint should be dismissed with prejudice. He further contended that the Court should not overturn its previous decision holding that a motion to dismiss should not be granted in an almost identical situation. According to Lee, the Court's precedent clearly indicates that the Plaintiff should be allowed to proceed with the Adversary.

Discussion

This Court is guided by the precedent it set in two previous cases that were factually similar to the Adversary: *McKenzie v. Biloxi Internal Medicine Clinic, P.A. (In re McKenzie)*, Case No. 09-05006-NPO, 2010 WL 917262 (Bankr. S.D. Miss. Mar. 10, 2010) and *In re Dixon*. The Court will follow the precedent it set in those cases in determining whether the Complaint satisfies the Rule 7012 standard. Then, the Court will consider the Defendant's arguments that the Plaintiff's claims were improperly filed and that any state law claims are preempted by federal law.

I. Standard for Dismissal

Pursuant to Rule 7008(a) of the Federal Rules of Bankruptcy Procedure ("Rule 7008"), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A defendant can file a motion to dismiss under Federal Rule of Civil Procedure

12(b)(6), which is made applicable to adversary proceedings by Rule 7012, for failure to state a claim upon which relief can be granted. The Supreme Court has said that “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matters, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

A naked assertion of wrongdoing devoid of “further factual enhancement” falls short of the pleading requirements of Federal Rule of Civil Procedure 8(a)(2) [and Rule 7008(a)]. *Howard v. ABN AMRO Mortg. Grp., Inc.*, No 1:13CV543-KS-MTP, 2014 WL 1237317, *3 (S.D. Miss. Mar. 26, 2014) (quoting *Twombly*, 550 U.S. at 557)). “Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all allegations in the complaint are true.” *Twombly*, 550 U.S. at 555; see *In re Dixon*, 2010 WL 501547, at *1. On the other hand, “when ‘the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.’” *In re Dixon*, 2010 WL 501547, at *1 (quoting *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007)). The Fifth Circuit Court of Appeals has held that “[w]here the complaint is devoid of facts that would put the defendant on notice as to what conduct supports the claims, the complaint fails to satisfy the requirement of notice pleading.” *Anderson v. U.S. Dep’t of Hous. & Urban Dev.*, 554 F.3d 525, 528 (5th Cir. 2008).

II. Application of Standard to Complaint

At the Hearing, Palmertree argued that the Defendant sought to have each cause of action

considered individually. He stated that the Motion separately provided reasons why each cause of action should be dismissed. The relief requested in the Motion, however, was that the Court enter an order “dismissing Plaintiff’s Complaint, with prejudice” (Mot. at 12). Notwithstanding whether the Court considers the causes of action together or separately, the Court has ruled on this issue at least twice before and it will not deviate from this precedent in the Adversary. Thus, it is inconsequential whether the Court considers the causes of action together or separately. Accordingly, for the sake of clarity and convenience, the causes of action will be considered collectively.

In *In re McKenzie* and *In re Dixon*, this Court denied motions to dismiss based on the defendants’ allegations that the plaintiffs failed to state a claim under the GLBA, the Local Rules, and Rule 9037 because the Court has the inherent power to enforce these statutes and rules pursuant to § 105(a). *In re McKenzie*, 2010 WL 917262, at *3; *In re Dixon*, 2010 WL 501547, at *2. In *In re McKenzie*, this Court considered a motion to dismiss in a factually similar case where a debtor sued a creditor for disclosing her SSN and other personal information in a proof of claim. *In re McKenzie*, 2010 WL 917262, at *1. The plaintiff alleged that the defendant violated the Local Rules, Rule 9037, and Civil Rule 5.2. *Id.* Similarly to the Adversary, the defendant in *In re McKenzie* filed a motion to dismiss, arguing that there was no private cause of action under the statutes or the Local Rules. *Id.* at *1-2. The Court, however, held that it “need not address that assertion . . . because the Court may use its equitable powers under § 105(a) to enforce Bankruptcy Rule 9037 and Civil Rule 5.2.” *Id.* at *3 (citing *Sanchez v. Ameriquest Mortg. Co. (In re Sanchez)*, 372 B.R. 289, 309-12 (Bankr. S.D. Tex. 2007)).

This Court further held in *In re McKenzie* that “the Court has authority under § 105(a) to

issue sanctions pursuant to its civil contempt power.” *Id.* (citing *Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 613 (5th Cir. 1997)). The Fifth Circuit has held that the “language of [§ 105] is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code.” *Id.* (quoting *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 613); *see also Harris v. Wash. Mut. Home Loans, Inc. (In re Harris)*, 297 B.R. 61, 70 (Bankr. N.D. Miss. 2003) (“[Section] 105 provides a bankruptcy court with statutory contempt powers, in addition to whatever inherent contempt powers the court may have.”). The Court found that it was undisputed that the defendant violated Rule 9037 and the Local Rules by including the debtor’s personal information on the claim, so the plaintiff did state claim upon which relief could be granted, and § 105(a) gave the Court the power to grant relief. *Id.* at *4.

Similarly, the plaintiff in *In re Dixon* sued a creditor who displayed his SSN and other personal identifiers in its proof of claim. *In re Dixon*, 2010 WL 501547, at *1. The plaintiff asserted four causes of action: (1) injunctive relief to remove the document from public access; (2) violation of the GLBA; (3) violation of the Local Rules; and (4) invasion of privacy under Mississippi law. *Id.* Like the Defendant, the defendant in *In re Dixon* argued that the plaintiff did not have a private right of action under the statute or rules. *Id.* However, like *In re McKenzie*, the Court held that it was unnecessary to address that argument because “the Court may use its equitable powers under § 105(a) to enforce [these rules].” *Id.* at *2. The Court held that it has the authority to “issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code.” *Id.* (quoting *In re Terrebonne Fuel & Lube*,

Inc., 108 F.3d at 613). Thus, because it was undisputed that the defendant violated the GLBA and the Local Rules, the debtor “pled sufficient facts to withstand the Motion to Dismiss.” *Id.* at *3.

In the Adversary, it is undisputed that the Defendant violated the statute and the Local Rules by disclosing the Plaintiff’s SSN. The Defendant simply argued that the Plaintiff lacks a remedy because no private cause of action exists. This Court has the authority pursuant to § 105(a) to remedy the violation of the GLBA, the Local Rules, and Rule 9037. The Plaintiff has therefore pled sufficient facts to withstand the Motion. The Plaintiff may be able to prove by credible evidence that he suffered damages as a result of the Defendant’s disclosure of his full SSN, and the Court has the authority to grant such relief. Thus, the Plaintiff stated a claim upon which relief can be granted.

III. Defendant’s Additional Arguments

Notwithstanding the fact that the Plaintiff satisfied Rule 7008(a), in the Motion, the Defendant argued that the Plaintiff’s claims were not properly filed because they should have been made by a motion in the Bankruptcy Case. The Defendant also argued that to the extent the Plaintiff stated any claims under state law, those claims are preempted by federal law. The Court will first consider whether the Plaintiff’s claims were properly filed and then it will consider whether any state law claims are preempted by federal law.

A. Claims Properly Filed as Adversary

The Defendant argued that the Plaintiff’s claims should be contested matters in the Bankruptcy Case. But in *In re Walls*, 496 B.R. 818 (Bankr. N.D. Miss. 2013), this Court held that a demand for relief of the kind specified in Federal Rule of Bankruptcy Procedure 7001 may be pursued in an adversary proceeding. *Id.* at 826. The Complaint states a demand for relief under

two separate provisions of Rule 7001 that allow for a party to initiate an adversary proceeding: (1) Rule 7001(7) proceedings to obtain an injunction or other relief; and (2) Rule 7001(9) proceedings to obtain a declaratory judgment. Accordingly, the Plaintiff properly filed the Adversary to allege the claims set forth in the Complaint.

B. Preemption not Ripe for Review

The Defendant argued that “to the extent that Plaintiff has properly alleged a common law claim for invasion of privacy. . . the claim is still barred as being preempted by the federal bankruptcy law scheme. . .” (Mot. at 9). Although the Plaintiff makes passing references to state law in the Complaint, he does not appear to be pursuing a remedy under state law. Accordingly, the question of whether any state law causes of action are preempted by federal law is not ripe for review and this Court cannot decide the issue in this Opinion. If the Plaintiff does intend to pursue a cause of action based on state law, he will need to do so by seeking permission to amend the Complaint.

Conclusion

The Plaintiff did state a claim upon which the Court may grant relief pursuant to § 105(a). Further, the Plaintiff properly alleged his claims by initiating the Adversary under Federal Rule of Civil Procedure 7001. Finally, the Defendant’s preemption argument is not ripe for review because it does not appear that the Plaintiff is pursuing a remedy under state law. Accordingly, the Court finds that the Motion should be denied.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF OPINION##