SO ORDERED,

Judge Jamie A. Wilson
United States Bankruptcy Judge
Date Signed: August 16, 2022

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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

MAURICE M. JENKINS,	**CASE NO. 21-02042-JAW**
DEBTOR.	**CHAPTER 7**
1ST FRANKLIN FINANCIAL CORPORATION	**PLAINTIFF**
VS.	**ADV. PROC. NO. 22-00002-JAW**
MAURICE M. JENKINS	**DEFENDANT**

ORDER GRANTING MOTION TO DISMISS

This matter came before the Court for hearing on July 19, 2022 (the "Hearing") on the Motion to Dismiss (the "Motion") (Adv. Dkt. #12)[1] filed by the debtor, Maurice M. Jenkins ("Jenkins"); the Memorandum Brief in Support of Motion to Dismiss (the "Brief") (Adv. Dkt. #13) filed by Jenkins; and the Amended Response to Motion to Dismiss (the "Response") (Adv. Dkt. #18) filed by 1st Franklin Financial Corporation ("1st Franklin") in the Adversary. At the Hearing, Bryce Kunz ("Kunz") represented Jenkins, and Sean Akins represented 1st Franklin. After considering the pleadings and arguments of counsel, the Court finds the following:

[1] Citations to the record are as follows: (1) citations to docket entries in the above-referenced adversary proceeding (the "Adversary") are cited as "(Adv. Dkt. ____)"; and (2) citations to docket entries in the above-referenced bankruptcy case (the "Bankruptcy Case") are cited as "(Bankr. Dkt. ___)".

Jurisdiction

The Court finds that it has jurisdiction over the parties to and subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), and (O). Notice of the Hearing was proper under the circumstances.

Facts [2]

The following facts are gleaned from the amended Complaint to Determine Dischargeability and for Other Relief (the "Amended Complaint") (Adv. Dkt. #6) and the documents attached thereto. *See* FED. R. CIV. P. 10(c); FED. R. BANKR. P. 7010.

1st Franklin loaned Jenkins $2,987.70, as evidenced by the Note and Security Agreement (the "Note") (Adv. Dkt. #6 at 6-7) signed on November 24, 2021. The Note was payable at an annual interest rate of 40.22 percent (40.22%) in twenty-four monthly installments of $175.00 beginning January 5, 2022. Jenkins never made a payment on the loan.

Procedural History

On December 6, 2021, twelve days after Jenkins obtained the loan, he filed a chapter 13 petition for relief (the "Petition") (Bankr. Dkt. #1). Richard R. Grindstaff ("Grindstaff") signed the Petition as counsel of record for Jenkins. In his bankruptcy schedules, Jenkins identified 1st Franklin as a secured creditor. (Bankr. Dkt. #4 at 9). 1st Franklin filed a proof of claim for "Money Loaned" in the amount of $3,084.68 (Cl. #1-1), consisting of the principal amount of $2,987.70 and finance charges of $96.98. The repayment of the loan was secured by personal property, including a lawn mower, computer, and television set, valued at $4,400.00, but for reasons not disclosed in the record, 1st Franklin described its claim as unsecured. (Cl. #1-1 at 2). Jenkins thereafter converted his chapter 13 case to chapter 7 (Bankr. Dkt. #25, #27).

[2] The Court makes the following findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

On February 1, 2022, 1st Franklin filed a Complaint to Determine Dischargeability and for Other Relief (the "Original Complaint") (Adv. Dkt. #1), alleging that Jenkins knew or should have known when he signed the Note that he was having financial difficulties and would not be able to repay the loan. 1st Franklin requested: (1) a judgment in the amount of the balance of the loan, $3,084.68; (2) pre-judgment and post-judgment interest; (3) attorneys' fees of $1,028.22; (4) costs of $350.00; and (5) a determination that the total debt of $4,112.90[3] "is not dischargeable pursuant to 11 U.S.C. § 727."[4] (Adv. Dkt. #1 at 3). Grindstaff received notice of the filing of the Original Complaint, not by service of process, but by the notice automatically generated by the Court's Case Management/Electronic Case Filing ("CM/ECF") system.[5] (Bankr. Dkt. #41).

On February 2, 2022, 1st Franklin filed the Amended Complaint. The only difference between the Original Complaint and the Amended Complaint is that a copy of the Note is attached as an exhibit to the Amended Complaint. A summons was issued by the Clerk of the Bankruptcy Court (the "Clerk") on February 2, 2022. (Adv. Dkt. #7). The certificate of service filed by 1st Franklin attests that it attempted to serve the summons and Amended Complaint on Jenkins by regular, first-class mail on February 3, 2022 at the following address:

Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to:
Maurice M. Jenkins, 913 Layfair Dr. Flowood, MS 39232

(Adv. Dkt. #8). At the Hearing, counsel for 1st Franklin stated that Jenkins was served at the same address listed in the Petition, but the Petition lists a different address for Jenkins, as shown below:

2945 Layfair Drive, Apt. 913
Flowood, MS 39232
Number, Street, City, State & ZIP Code

[3] $4,112.90 = $3,084.68 + $1,028.22. 1st Franklin does not include the alleged costs of $350.00 in this sum.
[4] Counsel for 1st Franklin later clarified at the Hearing that 1st Franklin's claim for relief arises from 11 U.S.C. § 727(a)(4)(C).
[5] When an adversary proceeding is filed, the complaint automatically appears on the docket of the related bankruptcy case.

(Bankr. Dkt. #1). Before 1st Franklin attempted to serve Jenkins, Grindstaff had filed a notice of address change in the Bankruptcy Case indicating that Jenkins had moved out of state to the following address:

Maurice M Jenkins
3047 86th St., Apt. 105
Sturtevant WI 53177

(Bankr. Dkt. #36); *see* FED. R. BANKR. P. 4002(a)(5) (requiring a debtor to file a statement of any change of address).

On March 3, 2022, Jenkins filed the Motion, asking the Court to dismiss the Amended Complaint for failure to properly serve the summons or, in the alternative, for failure to state a claim for relief. (Adv. Dkt. #12). Jenkins also requests attorneys' fees and costs incurred in defending the Adversary under 11 U.S.C. § 523(d). (Adv. Dkt. #13 at 5). Kunz signed the Motion as counsel of record for Jenkins in the Adversary.[6]

The Court set March 25, 2022 as the deadline for Jenkins to file a written response and memorandum brief and April 8, 2022 for 1st Franklin to file a reply. (Adv. Dkt. #14); *see* MISS. BANKR. L.R. 7012-1. 1st Franklin filed the Response on April 11, 2022,[7] alleging that the Motion is "without factual basis" and that the "claim of [1st Franklin] is that [Jenkins]'s actions are specifically what is excepted from discharge in Section 523(a)(2)(c) [sic]." (Adv. Dkt. #18 at 1-2). The Amended Complaint does not mention 11 U.S.C. § 523. At the Hearing, counsel for 1st Franklin stated that the citation to 11 U.S.C. § 523(a)(2)(C) in the Response was a mistake. (Hr'g at 10:14-10:15(July 19, 2022)).[8] Jenkins did not file a reply to the Response.

[6] Kunz is an associate attorney in Grindstaff's law firm.
[7] 1st Franklin filed the Response late without first obtaining leave of Court. Because Jenkins did not object and because the Response was filed only three days after the deadline, the Court will consider it in ruling on the Motion.
[8] The Hearing was not transcribed. Citations to the Hearing are to the timestamp of the audio recording.

The Hearing was initially set for April 26, 2022 (Adv. Dkt. #14) but was reset to May 10, 2022 (Adv. Dkt. #15) and again to July 19, 2022 (Adv. Dkt. #19). Before the rescheduled Hearing, 1st Franklin filed a certificate of service indicating that it had attempted to serve the summons and Amended Complaint on Jenkins on May 25, 2022 by regular, first-class mail at the following address:

Mail service: Regular, first class United States mail, postage fully pre–paid, addressed to:
Maurice M. Jenkins, 3047 86th St., Apt 105, Sturtevant, WI 53177

(Adv. Dkt. #21). The Clerk, however, did not issue an alias summons; 1st Franklin served Jenkins with the same summons issued on February 2, 2022. *See* FED. R. BANKR. P. 7004(e). Another certificate of service indicated that 1st Franklin served Kunz with a copy of the Amended Complaint through the Court's CM/ECF system on May 25, 2022. (Adv. Dkt. #20). 1st Franklin, however, did not serve a copy of the summons on Kunz.

Discussion

A. Failure to Properly Serve the Summons & Amended Complaint

Proper service of process stems from the Due Process Clause of the Fifth Amendment, which requires that defendants receive adequate notice of proceedings against them. *Dusenberry v. United States*, 534 U.S. 161, 167 (2002). The plaintiff bears the burden of demonstrating the validity of service. *Sys. Sign Supplies v. U.S. Dep't of Justice*, 903 F.3d 1011, 1013 (5th Cir. 1990).

In the Motion, which was filed before 1st Franklin's second attempt to serve process, Jenkins alleges that service of the summons and Amended Complaint on February 3, 2022 was ineffective for two reasons. First, 1st Franklin mailed the summons and a copy of the Amended Complaint to Jenkins at an address that was not his current address. (Adv. Dkt. #13 at 1). Second, it did not serve a copy of the summons and Amended Complaint on Grindstaff. (Adv. Dkt. #13 at 1). Jenkins

asserts that 1st Franklin's failure to properly serve the summons warrants dismissal of the Amended Complaint pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure ("Civil Rule 12(b)(5)").[9] (Adv. Dkt. #13 at 1). "A motion to dismiss under Rule 12(b)(5) turns on the legal sufficiency of the service of process." *Holly v. Metro. Transit Auth.*, 213 F. App'x 343, 344 (5th Cir. 2007).

The requirements for service of a summons and complaint in an adversary proceeding are set out in Rule 7004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). It appears that 1st Franklin attempted to serve Jenkins pursuant to Bankruptcy Rule 7004(b)(9), which provides:

> [S]ervice may be made within the United States by first class mail postage prepaid . . . [u]pon the debtor, after a petition has been filed by or served upon the debtor and until the case is dismissed or closed, by mailing a copy of the summons and complaint to the debtor at the address shown in the petition or to such other address as the debtor may designate in a filed writing.

FED. R. BANKR. P. 7004(b)(9). 1st Franklin did neither: it mailed the summons and Amended Complaint to Jenkins on February 3, 2022 to an address that was not his then-current address in Sturtevant, Wisconsin, which Jenkins had provided proper notice of in the Bankruptcy Case. Counsel for 1st Franklin argued at the Hearing that service was nevertheless proper because the summons and Amended Complaint were mailed to Jenkins at the address listed in the Petition and Bankruptcy Rule 7004(b)(9) allows service by mail either "at the address shown in the petition *or* to such other address as the debtor may designate in a filed writing." FED. R. BANKR. P. 7004(b)(9) (emphasis added).

The Court need not address this argument because even assuming that 1st Franklin's reading of Bankruptcy Rule 7004(b)(9) is correct—that service by mail is permissible at the address listed

[9] Civil Rule 12(b)(5) is made applicable to adversary proceedings by Rule 7012 of the Federal Rules of Bankruptcy Procedure.

in the petition, even if that address is outdated—1st Franklin did not actually serve Jenkins at the address listed in the Petition. A side-by-side comparison of the address that appears in the Petition with the address shown in the certificate of service, shows that 1st Franklin mistook apartment number 913 for the street address.

2945 Layfair Drive, Apt. 913 Flowood, MS 39232 Number, Street, City, State & ZIP Code	Mail service: Regular, first class United States mail, postage fully pre-paid, addressed to: Maurice M. Jenkins, 913 Layfair Dr. Flowood, MS 39232

(Bankr. Dkt. #1; Adv. Dkt. #8). This significant defect in the street address renders the service ineffective. *See Nabulsi v. Nahyan,* No. 04-03780, 2009 WL 1658017, at *4 (S.D. Tex. June 12, 2009).

Moreover, 1st Franklin made no attempt to serve Jenkins' counsel in the Bankruptcy Case. Under Bankruptcy Rule 7004(g), service on a debtor must be accompanied by service upon the debtor's counsel, as follows:

> If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F.R.Civ.P.

FED. R. BANKR. P. 7004(g). Service of a copy of the summons and complaint on a debtor's attorney is necessary "to avoid the possibility that a Debtor, represented by counsel in the bankruptcy case, could be served with process in an adversary proceeding, without counsel's knowledge, setting up conditions for a default judgment if the Debtor did not respond." *Clune Co. v. Johnson (In re Johnson)*, No. 09-6165, 2011 WL 482837, at *3 (Bankr. D. Kan. Feb. 7, 2011). Under Bankruptcy Rule 7004, therefore, service of process upon a debtor is not sufficient unless both the debtor and his attorney are served with the summons and complaint. *See Dreier v. Love (In re Love)*, 232 B.R. 373, 378 (Bankr. E.D. Tenn. 1999). The failure to serve Jenkins' attorney is another defect that

renders the attempted service on February 3, 2022 ineffective.

1st Franklin does not address either of these service errors in its Response. Instead, 1st Franklin attempted, but failed, to remedy the service errors by mailing the summons and Amended Complaint to Jenkins on May 25, 2022 and sending a copy of the Amended Complaint (but not the summons) to Kunz electronically through the Court's CM/ECF system. At that juncture, however, the summons issued for Jenkins on February 2, 2022 was stale, and the deadline for serving the Amended Complaint had expired.

In that regard, there are two important time limits governing the service of a summons and complaint in an adversary proceeding. The first appears in Bankruptcy Rule 7004(e), which provides, in pertinent part:

> If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued. If a summons is not timely delivered or mailed, another summons will be issued for service.

FED. R. BANKR. P. 7004(e). Bankruptcy Rule 7004(e) thus required 1st Franklin to mail the summons and Amended Complaint by February 9, 2022. *See Ruthe v. Dohring (In re Dohring)*, 245 B.R. 262, 263 (Bankr. N.D. Tex. 2000) (holding that the service of an expired summons was a nullity). This requirement is necessary because unlike the Federal Rules of Civil Procedure, the Bankruptcy Rules calculate the deadline to answer a duly served complaint from the date of the issuance of the summons rather than from the date of its service. *Compare* FED. R. BANKR. P. 7012(a) (thirty days after issuance of the summons) *with* FED. R. CIV. P. 12(a)(1)(A)(i) (twenty-one days after being served).

The second important time limit appears in Rule 4(m) of the Federal Rules of Civil Procedure ("Civil Rule 4(m)"), which Bankruptcy Rule 7004(a) incorporates by reference. Civil Rule 4(m) provides, in pertinent part:

> If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

FED. R. CIV. P. 4(m). The ninety-day deadline imposed by Civil Rule 4(m) required 1st Franklin to serve the summons and Amended Complaint under Bankruptcy Rule 7004(e) by May 2, 2022. *See Premier Capital, Inc. v. DeCarolis*, No. 01-126-M, 2002 WL 47134, at *6 (D.N.H. Jan. 2, 2002). There are two additional service issues, both of which arise from 1st Franklin's failure to comply with Bankruptcy Rule 7004(g). First, 1st Franklin failed to serve the summons on Kunz. *See Love*, 232 B.R. at 378 (holding that service upon a debtor is incomplete unless both the debtor and his attorney are served with the summons and complaint). Second, 1st Franklin served the Amended Complaint on Kunz electronically through the Court's CM/ECF system. 1st Franklin's counsel argued at the Hearing that electronic service was proper under Rule 5(b) of the Federal Rules of Civil Procedure ("Civil Rule 5(b)"). Indeed, Bankruptcy Rule 7004(g) allows for service on a debtor's attorney by any means authorized under Civil Rule 5(b), which generally authorizes electronic service on registered filers. Local Rule 5005-1(a) of the Uniform Local Rules of the U.S. Bankruptcy Courts for the Northern and Southern Districts of Mississippi, however, excepts a summons and complaint from electronic service. MISS. BANKR. L.R. 5005-1(a)(2)(A).

In summary, 1st Franklin's attempt to cure the service errors on May 25, 2022 failed because it served an expired summons on Jenkins, did not serve the Amended Complaint within ninety days, failed to serve a copy of the summons on Kunz, and served the Amended Complaint on Kunz electronically. In short, its second attempt on May 25, 2022 was outside the time limits set forth in Bankruptcy Rule 7004(e) and Civil Rule 4(m) and otherwise failed to comply with Bankruptcy Rule 7004(g).

Although Jenkins and Kunz received actual notice of the Adversary, as shown by the filing of the Motion, actual notice is not a substitute for proper service of process. *Omni Capital Int'l v. Rudolf Wolf & Co.*, 484 U.S. 97, 104 (1987); *Way v. Mueller Brass Co.*, 840 F.2d 303, 306 (5th Cir. 1988); 1 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 4.03[3][a] (3d ed. 2000) ("Generally independent knowledge by defendant that an action has been commenced is insufficient, in the absence of proper service of process to confer jurisdiction over defendant.").

Under these facts, the Court could dismiss the Amended Complaint without prejudice for insufficient service of process under Civil Rule 12(b)(5). *See George v. U.S. Dep't of Labor Occupational Safety & Health Admin.*, 788 F.2d 1115, 1116 (5th Cir. 1986) ("The district court enjoys a broad discretion in determining whether to dismiss an action for ineffective service of process."). After all, 1st Franklin was made aware of the service defects when the Motion was filed on March 3, 2022, but waited until May 25, 2022 to attempt to effectuate proper service. The Court hesitates to dismiss the Amended Complaint based solely on these service issues because the deadline for filing a complaint objecting to Jenkins' discharge under 11 U.S.C. § 727(a)(4)(C)[10] expired on March 29, 2022. (Bankr. Dkt. #28). A dismissal at this point, even if *without* prejudice, could have the effect of a dismissal *with* prejudice. FED. R. BANKR. P. 4004, 4007. Moreover, as Jenkins concedes in his Brief, the service issues are curable. (Adv. Dkt. #13). 1st Franklin could ask the Clerk to issue an alias summons, and the Court could exercise its discretion to extend the time to serve the Amended Complaint. *See* FED. R. CIV. P. 4(m) advisory committee's note to 1993 amendment ("Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action."). Extending the deadline, however, makes sense only if allowing 1st Franklin to cure the service defects would not be futile. That question requires the Court to consider Jenkins'

[10] Hereinafter, all references to code sections are to the U.S. Bankruptcy Code found at title 11 of the U.S. Code.

alternative argument that the Amended Complaint should be dismissed for failure to state a plausible claim for relief. The Court pivots to that issue now.

B. Failure to State a Claim for Relief

In support of his request for the dismissal of the Amended Complaint, Jenkins relies on Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Civil Rule 12(b)(6)"), as made applicable to adversary proceedings by Bankruptcy Rule 7012(b). Civil Rule 12(b)(6) tests the formal sufficiency of a claim for relief rather than the substantive merits of the case. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1356 (3d ed. 2004). For purposes of the Motion, the Court reviews the facts and inferences to be drawn from them in the light most favorable to 1st Franklin. *See Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010).

1. Civil Rule 12(b)(6) Standard

The pleading standards that apply to a motion to dismiss under Civil Rule 12(b)(6) arise out of the requirement in Rule 8(a)(2) of the Federal Rules of Civil Procedure ("Civil Rule 8(a)(2)")[11] that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief" giving the defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). In *Twombly*, the Supreme Court explained that to survive such a motion, the plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A pleading that includes "labels and conclusions" and "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. In *Iqbal*, the Supreme Court described application of the "plausibility" standard in *Twombly* as a two-part analysis. *Iqbal*, 556

[11] Civil Rule 8(a) is made applicable to adversary proceedings by Bankruptcy Rule 7008.

U.S. at 678-79. First, a court should identify those allegations in the complaint that, unlike non-conclusory factual allegations, are not entitled to the assumption of truth. *Id.* at 678-79. Second, a court should determine whether the nonconclusory factual allegations in the complaint plausibly suggest a claim for relief. *Id.* at 679. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, even if doubtful in fact. *Twombly*, 550 U.S. at 555.

In addition to the pleading requirements of Civil Rule 8(a)(2), allegations in a complaint that require a showing of actual fraud must meet the more demanding pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure ("Civil Rule 9(b)").[12] Because claims based on fraud pose "a high risk of abusive litigation," *Twombly*, 550 U.S. at 569 n.14, a plaintiff "must state with particularity the circumstances constituting fraud or mistake" pursuant to Civil Rule 9(b). FED. R. CIV. P. 9(b). In short, the plaintiff must lay out the "who, what, when, where, and how" of the alleged actual fraud. *Williams v. WMX Techs.*, 112 F.3d 175, 177 (5th Cir. 1997).

2. 1st Franklin's Claim

1st Franklin alleges in the Amended Complaint that on November 24, 2021 Jenkins made "express and implied representations to [1st Franklin] that he was able to make payments pursuant to the terms of the Note" when he "knew or should have known he was having financial difficulties and that he was not able to repay the loan." (Adv. Dkt. #6 at 2-3). According to 1st Franklin, Jenkins never made a loan payment before he filed bankruptcy, and Jenkins "acted in bad faith when he obtained the subject loan." (Adv. Dkt. #6 at 3).

[12] Civil Rule 9(b) is made applicable to adversary proceedings by Bankruptcy Rule 7009(b).

The Amended Complaint cites § 727 as the sole legal basis for 1st Franklin's claim against Jenkins. Section 727(a) enumerates twelve exceptions to a debtor's discharge. At the Hearing, 1st Franklin's counsel narrowed its claim to subparagraph (a)(4)(C). (Hr'g at 10:13-10:14).

Section 727(a)(4)(C) deprives a debtor of a discharge if the debtor "knowingly and fraudulently, in or in connection with the 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." 11 U.S.C. § 727(a)(4)(C). Because debts that fall within § 727(a)(4)(C) are those obtained by fraud, allegations in support of such a claim must meet the heightened pleading standard of Civil Rule 9(b). *See Haber Oil Co. v. Swinehart (In re Haber Oil Co.)*, 12 F.3d 426, 439 (5th Cir. 1994) (noting that bankruptcy courts "should and do insist that the stringent standard imposed by Bankruptcy Rule 7009 be observed by parties claiming fraud, particularly if the party asserting fraud has first hand knowledge of the fraudulent transaction.").

There are few reported cases addressing claims under § 727(a)(4)(C). According to a leading bankruptcy treatise, § 727(a)(4)(C) penalizes a debtor who accepts or offers a bribe or who commits or attempts to commit extortion. 6 COLLIER ON BANKRUPTCY ¶ 727.06 (16th ed. 2022). The few cases that discuss § 727(a)(4)(C) agree with this interpretation of the statute. *See Edwards v. Zemek (In re Zemek)*, No. 11-01012-JDW, 2013 WL 4677879, at *7 (Bankr. N.D. Miss. Aug. 30, 2013); *In re Stewart*, 577 B.R. 581, 585 (Bankr. W.D. Okla. 2017). Indeed, the statute tracks the language of the sixth paragraph in 18 U.S.C. § 152, which concerns the bankruptcy crimes of bribery and extortion.[13]

[13] Under 18 U.S.C. § 152(6), a person who knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise for acting or forbearing to act in any bankruptcy case is guilty of a felony punishable by a fine up to $5,000 or imprisonment of up to five years or both.

The Court finds that the facts alleged in the Amended Complaint, taken as true, fail to support a plausible claim barring Jenkins' discharge under § 727(a)(4)(C). At bottom, the Amended Complaint alleges that Jenkins obtained the loan from 1st Franklin on the eve of filing bankruptcy with no intention of repaying the Note. 1st Franklin's counsel argued at the Hearing that § 727(a)(4)(C) denies a discharge to a debtor who "knowingly and fraudulently received money or property." (Hr'g at 10:13-10:14). The problem with that argument is that § 727(a) requires that a debtor's fraudulent actions occur "in or in connection with the case" but Jenkins obtained the loan *before* he commenced the Bankruptcy Case. When confronted at the Hearing with the "in or in connection with the case" element of the statute, counsel for 1st Franklin insisted that the allegations in the Amended Complaint "lay that out" because of the short period of time between the date Jenkins incurred the debt and the date he filed bankruptcy. (Hr'g at 10:23-10:24). 1st Franklin's insistence demonstrates a misunderstanding of the nature of a claim under § 727(a)(4)(C).

The purpose of § 727(a)(4)(C) is to punish the efforts of a debtor "to subvert the bankruptcy process itself." *Anderson v. Wendt (In re Wendt)*, 381 B.R. 217, 225 (Bankr. S.D. Tex. 2007). For this reason, the timing of the alleged fraudulent conduct is important. *Deavens v. Sears (In re Sears)*, 2012 WL 1414822, at *3 (Bankr. N.D. Ala. Apr. 23, 2012). Here, the allegations in the Amended Complaint concern Jenkins' conduct before he commenced the Bankruptcy Case. Other courts have held that § 727(a)(4)(C) does not apply to such actions. *See Crescent Centre Apts. v. Fries (In re Fries)*, 436 B.R. 26, 2 (Bankr. W.D. Ky. 2010); *In re Tyrrell*, 363 B.R. 58 (Bankr. D.N.D. 2005); *In re Riposo*, 59 BR. 563 (Bankr. N.D.N.Y. 1986).

In a case where a debtor's discharge was denied under § 727(a)(4)(C), the debtor clearly took steps to influence the outcome of his bankruptcy case and related adversary proceeding. *Persica v. Gioele (In re Gioele)*, 452 B.R. 581 (Bankr. M.D. La. 2011). There, the debtor, Tommy Joe

Gioele ("Gioele"), purchased a restaurant from Manuel Persica, III ("Persica"). *Id*. at 584. Gioele subsequently discovered that the restaurant was encumbered by tax liens. These unpaid tax liabilities caused the business to lose its liquor and video gaming licenses. Eventually, the restaurant failed. Gioele filed bankruptcy. Persica commenced an adversary proceeding objecting to Gioele's discharge under § 727(a)(4)(C) based on an encounter between Gioele and James H. Roth, III ("Roth"), a neighbor of Persica's father, that occurred the day before a scheduled pretrial conference. Gioele, whom Roth had never previously met, came onto Roth's property and angrily stated that he was there to kill horses belonging to Persica's father. Gioele then showed him a large wad of cash, and asked "how many of these bills would it take" for Roth to shoot the horses for him. He offered to buy Roth a rifle for that purpose but warned him that the rifle would have to be destroyed afterward. During their conversation, Gioele mentioned that he had a court date with Persica the next day. Roth told Gioele to leave his property and reported the incident to law enforcement. Gioele was arrested for inciting a felony. At trial, Gioele admitted that he approached Roth that day and that he might have said what Roth claimed he said but insisted that he was only joking. The bankruptcy court found Roth's version of events more credible than Gioele's and ruled that his attempt to pay Roth to kill the horses demonstrated an intent to adversely affect the proceeding and Persica's claim against him in the bankruptcy case.

Unlike Gioele's conduct, Jenkins' alleged fraudulent conduct in obtaining the loan occurred before Jenkins commenced the Bankruptcy Case and, therefore, could not have influenced the outcome of his Bankruptcy Case. Moreover, there are no allegations in the Amended Complaint that Jenkins committed or attempted to commit either bribery or extortion. For these reasons, the allegations in the Amended Complaint do not state a plausible claim for relief under § 727(a)(4)(C).

The Fifth Circuit Court of Appeals has held that when a complaint fails to state a plausible claim for relief, a court ordinarily should grant the plaintiff at least one chance to amend the pleading. *See Byrd v. Bates*, 220 F.2d 480, 482 (5th Cir. 1955); *Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."). The Fifth Circuit has also acknowledged that the amendment of a complaint is permissible even under circumstances such as these where the bar date has passed. *See Bank of La. v. Bercier (In re Bercier)*, 934 F.2d 689, 693 n.7 (5th Cir. 1991). The Court finds that the deficiencies in the Amended Complaint are not resolvable by amendment.

At the Hearing, 1st Franklin made it clear that the sole basis for its claim is § 727(a)(4)(C). This is not a scenario where 1st Franklin conflated a claim objecting to a debtor's discharge under § 727(a) with a claim challenging the dischargeability of a debt under § 523(a). Unlike § 727(a), which denies a debtor a discharge of all his debts, § 523(a) denies a debtor a discharge of only a particular debt. 1st Franklin understands the difference between these statutes, as demonstrated by its counsel's statement at the Hearing, "This is not a case where you just simply defrauded the creditor. If simply defrauding the creditor, we would simply go under some different statute." (Hr'g at 10:24-10:25). Instead, 1st Franklin sought to deny Jenkins a discharge of all his debts, a harsh remedy reserved for only the most egregious misconduct by a debtor. Counsel for 1st Franklin asked for permission to amend the Amended Complaint, if necessary, to add subparagraph (a)(4)(C) to its citation to § 727 but did not ask to restate its claim under § 523.[14] That proposed

[14] The Court does not address whether 1st Franklin's claim would have survived the Motion if 1st Franklin had asked to restate its claim under § 523(a).

amendment, if allowed, would not render its claim plausible in the absence of any allegations about Jenkins' conduct after he commenced the Bankruptcy Case.

C. Attorney's Fees & Costs

A debtor is entitled to fair and meaningful notice of the claims asserted against him and the grounds upon which they rest. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. 1st Franklin failed to properly allege the grounds for its entitlement to relief under subparagraph (a)(4)(c) of § 727 in the Amended Complaint. 1st Franklin added to the uncertainty about the nature of its claim by switching from a discharge claim under § 727 in the Amended Complaint to a dischargeability claim under § 523(a)(2)(C) in the Response, and then back again to a discharge claim under § 727 at the Hearing, where it revealed for the first time that the basis of its claim was actually subparagraph (a)(4)(C) of § 727.

1st Franklin's waffling, no doubt, caused Jenkins to incur unnecessary attorney's fees and costs. It is thus no surprise that Jenkins seeks to recover his attorney's fees and costs. To that end, Jenkins invokes § 523(d) in the Response. That statute allows a debtor to recover his reasonable attorney's fees and costs incurred in defending a dischargeability proceeding brought by a creditor under § 523(a)(2) if the debt in question was in fact discharged and if the position asserted by the creditor was not substantially justified. 11 U.S.C. § 523(d). The purpose of § 523(d) is "to discourage creditors from bringing objectively weak false financial statement exception litigation in the hopes of extracting a settlement from a debtor anxious to avoid paying attorney's fees to defend the action." 4 COLLIER ON BANKRUPTCY ¶ 523.08[8] (16th ed. 2022). Section 523(d), however, allows a debtor his reasonable attorney's fees and costs only in a proceeding to determine the dischargeability of a debt under § 523(a)(2). Before the Hearing, the nature of 1st Franklin's claim was unclear. Now that 1st Franklin has clarified that it initiated the proceeding under § 727, not § 523(a)(2), § 523(d)

does not apply. The Court, therefore, finds that Jenkins' request for attorney's fees and costs should be denied.

D. Extension of Time to Serve Amended Complaint

The Court now circles back to Jenkins' argument that the Amended Complaint should be dismissed for improper service of process. Having concluded that 1st Franklin has failed to state a plausible claim for relief, the Court declines to exercise its discretion to extend the time for service of the Amended Complaint under Civil Rule 4(m). *See also* FED. R. BANKR. P. 9006(b). Any such extension would be futile under these circumstances.

Conclusion

1st Franklin failed to comply with Bankruptcy Rule 7004 when it attempted to serve the summons and Amended Complaint on Jenkins on February 3, 2022 and again on May 25, 2022. Because the Amended Complaint fails to plead facts that, taken as true, state a plausible claim for relief under § 727(a)(4)(C) and because the deficiencies in the Amended Complaint are not resolvable by amendment, allowing 1st Franklin to cure these service errors would be futile. The Court, therefore, finds that the Amended Complaint should be dismissed with prejudice. The Court also finds that Jenkins' request for attorneys' fees and costs under § 523(d) should be denied.

IT IS, THEREFORE, ORDERED that the Amended Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED that Jenkins' request for attorney's fees and costs under § 523(d) is hereby denied.

The Court will enter a final judgment consistent with this Order pursuant to Bankruptcy Rule 7058.

##END OF ORDER##