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IT IS SO ORDERED.



Dated: October 31, 2024

Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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| In re: |) | |
| BENNY R. BRYANT |) | Case No. 23-12224 |
| |) | Chapter 7 |
| |) | Judge Buchanan |
| |) | |
| |) | |
| |) | |
| KAPITUS SERVICING, INC. |) | Adv. No. 24-1010 |
| |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| |) | |
| v. |) | |
| |) | |
| BENNY R. BRYANT |) | |
| |) | |
| |) | |
| Defendant |) | |
| |) | |
| |) | |

**MEMORANDUM OPINION DENYING DEFENDANT-DEBTOR'S MOTION TO
DISMISS CLAIMS OF PLAINTIFF KAPITUS SERVICING, INC.
[Docket Number 2]**

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334, and the standing General Order of Reference in this District. This matter is before this Court on the *Motion to Dismiss Claims of Plaintiff Kapitus Servicing, Inc.* [Docket Number 2] (“Motion to Dismiss”) filed by Defendant-Debtor Benny R. Bryant (“Defendant-Debtor” or “Debtor”); the *Response* [Docket Number 3] filed by Plaintiff Kapitus Servicing, Inc., f/k/a Colonial Funding Network, Inc., as agent of Strategic Funding Source, Inc. (“Kapitus” or “Plaintiff”); and the *Reply* [Docket Number 4] filed by the Defendant-Debtor.

Kapitus obtained a prepetition default judgment against the Debtor for breach of contract. Following the Debtor’s bankruptcy filing, Kapitus filed its adversary complaint to except the judgment debt from discharge under 523(a)(2)(A), (a)(2)(B) and (a)(6). In his Motion to Dismiss, the Debtor asserts that Kapitus’s bankruptcy claims to except the debt from discharge are time-barred by a state law statute of limitations.

For the reasons that follow, this Court concludes that the Debtor is incorrect – it is the Federal Rules of Bankruptcy Procedure, rather than a state law statute of limitations, that sets the deadline to file claims to except a previously established judgment debt from discharge. Consequently, the Debtor’s Motion to Dismiss is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on November 14, 2023. On February 16, 2024, the parties filed a joint stipulation extending the deadline for Kapitus to file a complaint to determine the dischargeability of its debt until March 21, 2024. Upon motion by Kapitus, the deadline was subsequently extended

to April 4, 2024. Kapitus filed its Adversary Complaint on April 4, 2024 [Docket Number 1] (“Adversary Complaint”) within the deadline, as extended.

Kapitus’s debt arises from the following facts alleged in the Adversary Complaint which, solely for purposes of the Motion to Dismiss, are deemed true. The Debtor is the owner and guarantor of Benny Bryant Construction, LLC (“Benny Bryant Construction”), a company which borrowed funds from Kapitus pursuant to a Loan Agreement, governed by Virginia law. The Loan Agreement was signed by the Debtor on behalf of Benny Bryant Construction in January of 2019. The agreement provided for Kapitus to advance \$150,000.00 up front and, in exchange, Benny Bryant Construction agreed to repay \$199,500.00 over time.

Simultaneously with signing the Loan Agreement, the Debtor signed, on behalf of Benny Bryant Construction, a Security Agreement in which the company’s assets, including receivables, were pledged as collateral. In addition, the Debtor executed a Guaranty as the guarantor of Benny Bryant Construction’s performance under the Loan Agreement.

On January 15, 2019, Kapitus fulfilled its obligations under the Loan Agreement. However, Kapitus asserts that Benny Bryant Construction never repaid the full amount due. Benny Bryant Construction repaid Kapitus a total of \$65,280.00 with the last payment of \$3,840.00 being made on May 14, 2019. That left a balance of approximately \$138,095.00 outstanding under the Loan Agreement. All further attempts by Kapitus to collect were not successful.

On July 23, 2019, Kapitus filed a state court complaint for breach of contract against Benny Bryant Construction and the Debtor in the Circuit Court of the City of

Richmond, Virginia. Neither Benny Bryant Construction nor the Debtor filed a responsive pleading, and on September 30, 2020, Kapitus obtained a judgment by default on its contract claims (the “Virginia Judgment”). By way of the Virginia Judgment, Kapitus is a judgment creditor of the Debtor in the principal amount of \$138,095,00 plus interest at 6% from September 30, 2020, plus attorney fees of \$33,555.00.

In the Adversary Complaint, Kapitus asserts that the Debtor made various false representations¹ in the Loan Agreement and in connection with obtaining the loan proceeds from Kapitus. Kapitus asserts that the Debtor knew the representations were false and made them with the intent to induce Kapitus to make the loan. Kapitus further asserts that it relied on the representations in extending the loan. As such, Kapitus asserts that the debt owed by the Debtor to Kapitus should be excepted from discharge under 11 U.S.C. §§ 523(a)(2)(A) and/or 523(a)(2)(B). In addition, Kapitus asserts that the Debtor’s misrepresentations amount to willful and malicious conduct making the debt nondischargeable pursuant to 11 U.S.C. § 523(a)(6).

Based on these assertions, Kapitus requests a determination that the Virginia Judgment debt owed by the Debtor is nondischargeable under 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B) and/or (a)(6). Kapitus further requests a money judgment “according to proof,” including all damages, attorney fees, costs, and interest from the date of default.

¹ The various false representations are set forth in detail within Kapitus’s Complaint. For brevity’s sake and because the specific allegations are not relevant to the statute of limitations issue, the specific allegations of false representations are not included in this opinion.

II. LEGAL ANALYSIS

A. Legal Standard for a Motion to Dismiss

Through his Motion to Dismiss, the Debtor seeks dismissal of Kapitus's Adversary Complaint for "failure to state a claim," pursuant to Federal Rule of Civil Procedure ("Civil Rule") 12(b)(6), made applicable in adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b).

A motion to dismiss under Civil Rule 12(b)(6), for failure to state a claim upon which relief can be granted, challenges the legal sufficiency of a complaint. Because "[t]he statute of limitations is an affirmative defense, . . . a plaintiff generally need not plead the lack of affirmative defenses to state a valid claim[.]" *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012) (citing *Jones v. Bock*, 549 U.S. 199, 216 (2007)). Accordingly, a motion under Civil Rule 12(b)(6) is "generally an inappropriate vehicle for dismissing a claim based upon the statute of limitations." *Id. See also Richardson v. Huntington Nat'l Bank (In re CyberCo Holdings, Inc.)*, 382 B.R. 118, 124 (Bankr. W.D. Mich. 2008) ("It is quite clear under the applicable rules that statute of limitations is an affirmative defense that is to be raised in conjunction with the defendant's response to the plaintiff's complaint."). However, dismissal may be appropriate when the allegations in the complaint affirmatively show that the claim is time-barred. *Cataldo*, 676 F.3d at 547.

In determining a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)). However, in

determining such a motion, a court “need not accept as true legal conclusions or unwarranted factual inferences.” *Id.*

Because a defendant is entitled to fair notice of what the plaintiff’s claim is and the grounds upon which it rests, the plaintiff’s factual allegations must be enough to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Consequently, to survive the filing of a motion to dismiss, the complaint “must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory.” *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6th Cir. 2001).

B. A State Statute of Limitations Does Not Bar Kapitus’s Claims to Except a Debt from Discharge

The Debtor contends that Kapitus’s claims to except the Debtor’s Virginia Judgment debt from discharge should be dismissed as time-barred. The Debtor points to Virginia statutes of limitations for certain state law actions including fraud and argues that they bar Kapitus from pursuing its claims to except debt from discharge under federal bankruptcy law, specifically 11 U.S.C. §§ 523(a)(2)(A), (a)(2)(B), and (a)(6). Kapitus disputes this argument noting that the Federal Rules of Bankruptcy Procedure, rather than a state statute of limitations, provide the deadline for filing a complaint to except the debt from discharge, a deadline that Kapitus met.

To better understand the applicability of these deadlines, this Court begins with Section 523(a) of the Bankruptcy Code which provides a mechanism for excepting certain types of debts from discharge in a debtor’s bankruptcy case. The types of debts that may be excepted from discharge include debts arising from fraud and from willful and malicious injuries pursuant to §§ 523(a)(2) and (a)(6) respectively. To except debts from discharge

under § 523(a)(2) or (a)(6), a creditor must file an adversary complaint by the applicable “statute of limitations” or deadline set forth in Federal Rule of Bankruptcy Procedure 4007(c). *Matthyssen v. Richardson (In re Richardson)*, 520 B.R. 659, 662 (Bankr. W.D. Mich. 2014) (“The deadline imposed by Bankruptcy Rule 4007(c) is not phrased as a ‘statute of limitations,’ but essentially functions in that regard.”). Rule 4007(c) provides, that:

a complaint to determine dischargeability of a debt under § 523(c)² shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). . . . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007(c). In this instance, Kapitus filed its Adversary Complaint on April 4, 2024 within the applicable time limit, as properly extended, under Rule 4007(c).

Nonetheless, the Debtor argues that any determination of the fraudulent nature of the underlying debt required to except the debt from discharge should be subject to the applicable state law statute of limitations for fraud. The Debtor argues that under Virginia law, the law applicable to the parties’ underlying contract, a claim for damages resulting from fraud and other torts without a specific limitation must be brought within two years.³ Because the false representations and other conduct described in Kapitus’s Adversary Complaint occurred in January of 2019, the Debtor argues that Kapitus’s claims to except the debt from discharge under §§ 523(a)(2) and (a)(6) are time-barred by Virginia law.

² Debts under § 523(c) include debts described in §§ 523(a)(2) and (a)(6).

³ The Debtor cites to Virginia Code Title 8.01-243 which states that “every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues” and Virginia Code Title 8.01-248 which states that “every personal action accruing on or after July 1, 1995 for which no limitation is otherwise prescribed, shall be brought within two years after the right to bring such action has accrued.”

The Debtor's argument confuses the deadline for filing a complaint to determine the dischargeability of a debt, a claim specific to federal bankruptcy law, with the deadline under state law to determine the existence and amount of the debt itself. *See Spinnenweber v. Moran (In re Moran)*, 152 B.R. 493, 495 (Bankr. S.D. Ohio 1993). While a state statute of limitation, like the one cited by the Debtor under Virginia law, governs the deadline for filing a suit under state law to establish the existence and amount of the debt, it does not impose a deadline on filing claims to except debts from discharge under § 523(a), claims that do not even exist until a bankruptcy case is filed. *Id.* (noting that a plaintiff has no cause of action under § 523(a) until a debtor files a petition for relief under the Bankruptcy Code). *See also Long v. Piercy (In re Piercy)*, 21 F.4th 909, 918 (6th Cir. 2021) (citing *Sill v. Sweeney (In re Sweeney)*, 276 B.R. 186, 195-96 (B.A.P. 6th Cir. 2002) and noting that “[w]hether a debt is nondischargeable under 11 U.S.C. § 523(a) is a matter separate from the merits of the debt itself.”).

For purposes of a nondischargeability action under 11 U.S.C. § 523(a), “[t]he only relevant question with respect to [a state] statute of limitations is whether the plaintiffs sought to *enforce* their ‘*debt*’ against the debtor within the period prescribed by the statute of limitations.” *Moran*, 152 B.R. at 495 (emphasis in original); *Jennings v. Bodrick (In re Bodrick)*, Nos. 14-56551, 14-2333, 2017 Bankr. LEXIS 3752, at *12-13, 2017 WL 4877266, at *5 (Bankr. S.D. Ohio Sept. 18, 2017) (quoting *Moran*, 152 B.R. at 495). In this instance, Kapitus sought to enforce its debt in a state law proceeding that ended with the state court's entry of a default judgment against the Debtor on September 30, 2020, prior to the Debtor's bankruptcy filing. Because Kapitus's underlying debt has been

established through a judgment in the state court proceeding, the state statute of limitation is no longer material.

The Debtor, however, notes that the Virginia Judgment that Kapitus obtained sounds in contract rather than fraud. To the extent Kapitus wanted to except the judgment debt from discharge based on fraud, the Debtor asserts that Kapitus should have brought a state law fraud claim in the Virginia state court proceeding. Because Kapitus did not do so, the Debtor theorizes that the state statute of limitations now bars Kapitus from raising fraud under § 523(a)(2) or (a)(6) as a basis to except the debt from discharge in bankruptcy.

The Debtor's theory is incorrect. As explained in *Moran*:

. . . there is no requirement that the allegations of a complaint filed in state court prior to a debtor filing a petition in bankruptcy correspond to the elements of the grounds contained in § 523(a) of the Bankruptcy Code. Otherwise, plaintiffs in state court would be required to anticipate the bankruptcy of every defendant and litigate every conceivable issue under § 523(a) in the event a defendant should subsequently file bankruptcy. Such needless litigation is not required by the Bankruptcy Code.

152 B.R. at 496 (citing *Frank v. Daley (In re Daley)*, 776 F.2d 834 (9th Cir. 1985)). See also *Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331, 337 (10th Cir. 1994) (“In this case, the debt has already been established, so the state statute of limitations is immaterial.”); *Banks v. Gill Distribution Ctrs., Inc. (In re Banks)*, 263 F.3d 862, 869 (9th Cir. 2001) (“While an action may seem to be non-fraud-based for state purposes, this does not foreclose a later determination by the bankruptcy court that what occurred was fraudulent and therefore nondischargeable.”) (citations omitted); *Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1454 (9th Cir. 1997) (“The state limitations period for fraud actions is irrelevant to the dischargeability of an established debt.”). This Court agrees with these courts’ conclusion. Kapitus was under no obligation to include state law

claims in its pre-petition litigation against the Debtor that would match exceptions to discharge under the Bankruptcy Code in anticipation of a possible bankruptcy filing.

With that, this Court concludes that the Virginia statute of limitations for fraud is not applicable to and does not preclude Kapitus's claims to except the Debtor's debt from discharge under §§ 523(a)(2) and (a)(6).⁴

III. CONCLUSION

For the reasons stated, the Debtor's Motion to Dismiss is **DENIED**. The Court will enter a separate order consistent with this decision.

SO ORDERED.

Distribution List:

Darlene E. Fierle, Esq.
Keri P. Ebeck, Esq.

⁴ In the Adversary Complaint's prayer for relief, and in the Response to the Debtor's Motion to Dismiss, Kapitus appears to suggest that it may be entitled to an additional monetary judgment beyond the Virginia Judgment it already obtained. *See* Docket Number 1, p. 22 (stating that Kapitus seeks a "money judgment according to proof"); Docket Number 3, p. 5, ¶ 26 (noting Kapitus's belief that if it is successful in its adversary complaint, it would be awarded the nondischargeability of a debt and that it could reduce its nondischargeability judgment to a monetary judgment). To clarify, this Court's authority is limited to determining whether the Virginia Judgment debt is nondischargeable; it cannot add to, change or replace that state court judgment with a different monetary amount. *Brown v. Ausley (In re Ausley)*, 507 B.R. 234, 242 (Bankr. W.D. Tenn. 2014) ("When a prior state court judgment calculates a debt and that debt is at issue in a dischargeability proceeding, the bankruptcy court cannot issue its own judgment on the debt to replace the state court judgment. The bankruptcy court is only authorized to determine whether or not that state court judgment is dischargeable."). Furthermore, any request for an additional monetary judgment based on the same conduct, transaction or occurrence at issue in the Virginia state court proceeding would be subject to the applicable state law statute of limitations as well as preclusive principles such as res judicata. However, this does not preclude the granting of costs and attorney fees to a plaintiff in appropriate circumstances. *See, e.g., Slates v. Grove (In re Grove)*, Nos. 14-30647, 14-3078, 2018 Bankr. LEXIS 2070, at *3-5 (Bankr. S.D. Ohio May 23, 2018) (concluding that a debt owed to a creditor, which was previously determined to be nondischargeable, may include nondischargeable attorney fees where the creditor had a valid contractual right to attorney fees under state law).