

**SO ORDERED.**

**SIGNED this 14th day of April, 2020.**



*Catharine R Aron*

UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION**

**In re:**

**DEREK LEE WILSON,**

**Debtor.**

**BIESECKER, TRIPP, SINK & FRITTS,  
LLP,**

**Plaintiff,**

**v.**

**DEREK LEE WILSON,**

**Defendant.**

**Case No. 19-50563  
Chapter 7**

**Adv. Pro. No. 19-06035**

**ORDER**

This adversary proceeding came before the Court on April 8, 2020, to consider the Motion to Dismiss the Amended Complaint and Request for Attorney's Fees [Doc. #27] (the

“Motion to Dismiss”) filed by Derek Lee Wilson (“Defendant”) on February 19, 2020. At the hearing, Christopher A. Raines appeared on behalf of Plaintiff, Biesecker, Tripp, Sink & Fritts, LLP (“Plaintiff”), and Benjamin D. Busch appeared on behalf of Defendant. After considering the Amended Complaint (the “Amended Complaint”) [Doc. #26], the Motion to Dismiss, Plaintiff’s Brief in Opposition to the Motion to Dismiss [Doc. #31], the arguments of counsel, and the record in this proceeding, the Court finds that the Motion to Dismiss should be granted for the reasons which follow. Defendant’s request for attorney’s fees was withdrawn.

### **JURISDICTION**

The Court has jurisdiction in this proceeding pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 83.11 of the United States District Court for the Middle District of North Carolina. This is a core proceeding under 28 U.S.C. § 157(b)(2). 28 U.S.C. § 157(b)(2)(I) (stating that core proceedings include “determinations as to the dischargeability of particular debts”).

### **BACKGROUND**

On August 17, 2016, Plaintiff and Defendant entered into a written contract in which Plaintiff agreed to represent Defendant in his divorce, custody, and equitable distribution case (the “Divorce Proceeding”) in exchange for attorney’s fees. [Amended Complaint. Doc. #26].

On November 1, 2018, the Divorce Proceeding was resolved via a consent order, and Defendant was awarded \$9,619.62. *Id.* The consent order provided that the check would be forwarded to Plaintiff on behalf of Defendant and payable to both Plaintiff and Defendant. *Id.* Defendant requested that the check be made out solely to himself, but Plaintiff did not accede to this request. *Id.* Plaintiff received the financial settlement on Defendant’s behalf and deposited the settlement funds into Plaintiff’s trust account. *Id.* This money was subject to application by Plaintiff toward outstanding attorney’s fees. *Id.*

As of the conclusion of the Divorce Proceeding, Defendant owed Plaintiff \$14,750.00 in attorney's fees. *Id.* Upon being asked to make a substantial payment toward the attorney's fees owed, Defendant stated via email on November 7, 2018, that "as far as an initial payment on this balance[,] I can do \$2,500.00 at [the] time being and begin to make large payments going forward. The timing of this is bad at the moment and [given] my current circumstances this is the best I can do especially right here at Christmas. ...[T]his is the best I can do at this particular moment. I can assure you that your firm will be [paid] in full in a timely manner. ... [T]hings will get a lot better for me starting at the middle to end of December." *Id.*

Rather than applying the settlement funds held in trust toward the outstanding attorney's fees, Plaintiff agreed to release the entirety of the settlement funds to Defendant in exchange for Defendant's promise to satisfy his \$14,750.00 debt over the next few months. *Id.* To memorialize this agreement, Defendant signed a written Addendum to Fee Contract (the "Addendum") on November 26, 2018, agreeing to make an initial payment of \$2,500.00 upon execution of the Addendum, followed by five monthly payments of the remaining balance. *Id.*

Defendant only made the initial payment of \$2,500.00. *Id.* On May 31, 2019, Defendant filed for bankruptcy under Chapter 7 of the Bankruptcy Code. *Id.* On September 5, 2019, Plaintiff initiated this proceeding. *Id.* The complaint requests that the Court declare Defendant's debt in the amount of \$12,250.00 to be non-dischargeable. *Id.* Plaintiff alleges the debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) because Defendant obtained the settlement funds by falsely and fraudulently promising to repay Plaintiff over time when he had no intent to do so. *Id.*

On November 5, 2019, Defendant filed a motion to dismiss, requesting that the Court: (1) dismiss the complaint for failure to state a claim upon which relief may be granted under Rule

12(b)(6) of the Federal Rules of Civil Procedure, and (2) enter an award of attorney's fees pursuant to 11 U.S.C. § 523(d). [Doc. #12]. On November 27, 2019, Plaintiff filed its Response, defending the sufficiency of the complaint and requesting, in the alternative, that it be given an opportunity to amend the complaint. [Doc. #17]. On December 17, 2019, the Court held a hearing on the motions and entered an Order on January 28, 2020 [Doc. #24] , granting Defendant's motion to dismiss without prejudice, granting Plaintiff's motion for leave to amend their complaint, and denying Defendant's motion for attorney's fees.

Plaintiff filed its Amended Complaint on February 18, 2020. Defendant then filed this Motion to Dismiss which is presently before the Court on February 19, 2020, again requesting that the Court: (1) dismiss the complaint for failure to state a claim upon which relief may be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and (2) enter an award of attorney's fees pursuant to 11 U.S.C. § 523(d). On April 6, 2020, Plaintiff filed its Brief in Opposition to the Motion to Dismiss.

### **STANDARD OF REVIEW**

Federal Rule of Civil Procedure 12(b)(6), made applicable in this proceeding via Rule 7012 of the Federal Rules of Bankruptcy Procedure, provides that a complaint should be dismissed if "it fails to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To satisfy this pleading standard, the complaint must allege facts sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if the plaintiff pleads facts that allow the Court to reasonably infer that the plaintiff is entitled to his sought-after relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When considering a 12(b)(6) motion to dismiss, the Court must accept the complaint's alleged facts as true and view these facts in the light most favorable to the plaintiff. *Id.*

## **DISCUSSION**

The Court has now reviewed the Amended Complaint, the Defendant's renewed Motion to Dismiss and Request for Attorney's Fees, and Plaintiff's Brief in Opposition to the Motion to Dismiss. The Court finds that no new facts were alleged in the Amended Complaint to support this adversary proceeding going forward, and Defendant's Motion to Dismiss should be granted.

### **I. Legal Analysis**

In this case, Plaintiff alleges that the debt at issue is non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A). Plaintiff contends that the debt is non-dischargeable because Defendant induced Plaintiff to enter into the Addendum by making false and fraudulent representations that he intended to make the payments called for in the Addendum, when he in fact had no intent to pay.

In order to provide the debtor with a fresh start, "exceptions to discharge under § 523 are narrowly construed against the creditor, and any doubts should be resolved in favor of discharge." *In re Etheridge*, No. 18-11303, 2019 WL 6726832, at \*17 (Bankr. M.D.N.C. Dec. 10, 2019) (citing *In re Rountree*, 478 F.3d 215, 219 (4th Cir. 2007)). Section 523(a)(2)(A) of the Bankruptcy Code prohibits debtors from discharging debts for money, property, services, or credit obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). It is established that "statements respecting a debtor's financial condition 'are ... outside the scope of 11 U.S.C. § 523(a)(2) and can not [sic] be the basis for preventing discharge of the bankrupt.'" *Etheridge*, 2019 WL 6726832, at \*17 (quoting *Blackwell v. Dabney*, 702 F.2d 490, 492 (4th Cir. 1983) (citations omitted)). There are five elements that must be established by the plaintiff in order to sustain a claim under § 523(a)(2)(A):

- (1) That the debtor made a representation; (2) That at the time the representation was made, the debtor knew the representation was false; (3) That the debtor made the false representation with the intention of deceiving the creditor; (4) That the creditor relied on such representation; and (5) That the creditor sustained the alleged loss and damage as the proximate result of the false representation.

*Etheridge*, 2019 WL 6726832, at \*17-18 (quoting *In re Simos*, 209 B.R. 188, 191 (Bankr.

M.D.N.C. 1997)). A complaint that merely alleges a breach of contract or a breach of promise to pay in order to prove fraudulent intent does not assert a plausible § 523(a)(2)(A) claim.

*Etheridge*, 2019 WL 6726832, at \*19.

Plaintiff contends that Defendant induced Plaintiff to enter into the Addendum, and thus turn the settlement funds over to Defendant, by making false and fraudulent misrepresentations that he intended to make the payments called for in the Addendum, when he in fact had no intent to make payments to Plaintiff. The two alleged fraudulent misrepresentations at issue are the statements made by Defendant via email on November 7, 2018 and the Addendum itself, as Plaintiff contends Defendant had fraudulent intent of not performing the contract at the time it was signed.

*a. Defendant's Alleged Fraudulent Misrepresentations Made Via Email*

The first alleged fraudulent misrepresentations were the statements made by Defendant via email on November 7, 2018. Per the Amended Complaint, Defendant wrote via email to Plaintiff that “as far as an initial payment on this balance[,] I can do \$2,500.00 at [the] time being and begin to make large payments going forward. The timing of this is bad at the moment and [given] my current circumstances this is the best I can do especially right here at Christmas. ...[T]his is the best I can do at this particular moment. I can assure you that your firm will be [paid] in full in a timely manner. ... [T]hings will get a lot better for me starting at the middle to

end of December.” Plaintiff contends that these fraudulent misrepresentations induced Plaintiff to enter into the Addendum with the Defendant.

However, these statements amount to nothing more than statements respecting a debtor's financial condition, which are outside the scope of consideration for 11 U.S.C. § 523(a)(2). *See Etheridge*, 2019 WL 6726832, at \*17. Thus, these representations are not actionable.

b. *Defendant’s Alleged Fraudulent Misrepresentation of Signing the Addendum*

Plaintiff next contends that Defendant’s promise to make payments as called for in the signed Addendum was fraudulent, as he had no intent to make those payments at the time of signing. In order to demonstrate fraudulent intent, Plaintiff points to 1) Defendant’s inability to make the payments called for in the Addendum and 2) Defendant’s subsequent bankruptcy.

Plaintiff alleges that Defendant fraudulently signed the Addendum when he had no intention of making the payments called for in the Addendum, because Defendant knew he did not have the ability to make such payments.<sup>1</sup> Plaintiff makes this allegation based on the fact that the Defendant had other debts at the time of signing the Addendum.<sup>2</sup>

When “determining whether a debtor had a present intention to pay at the time he promised to do so, a court may not rely solely upon a debtor's inability to pay.” *In re Boles*, No. 03-53196C-11W, 2005 WL 1288106, at \*4 (Bankr. M.D.N.C. Apr. 11, 2005). Rather, the focus of the inquiry must be on the debtor’s intention to pay, instead of on the debtor’s ability to repay.

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<sup>1</sup> Defendant did make the first payment of \$2,500.00.

<sup>2</sup> The other debts enumerated by the Plaintiff were an outstanding default judgment entered on June 11, 2018, with a principal sum of \$10,373.94 along with attorney’s fees of \$1,566.48 and \$12,653.08 owed to Bank of America. Bank of America commenced an action to collect the debt of \$12,653.8 on December 20, 2018, which was after the signing of the Addendum in November 2018, and thus would not have had an effect on Defendant’s present intent to pay at the time of signing the Addendum. Plaintiff also contends that after entering the Addendum, Defendant did not obtain or hold employment except for a brief time in May 2019. Again, this allegation is regarding the time period after the signing of the Addendum and has no bearing on his present intent at the time of signing. Plaintiff also points to the nonpriority unsecured debt listed by the Defendant on his bankruptcy schedules; however, it is unclear which debts were incurred prior to the signing of the Addendum, and which were incurred afterwards.

*See Id.* at \*4 (citing *In re Widner*, 285 B.R. 913, 918 (Bankr. W.D. Va. 2002)). The fact that Defendant had other debts at the time of signing the Addendum, is not enough to establish fraudulent intent sufficient to support a claim under § 523(a)(2)(A).

Plaintiff also attempts to demonstrate Defendant's fraudulent intent by claiming that at the time of signing the Addendum, Defendant had already formed the intent to file for bankruptcy, and thus had no intention of making the payments as required under the Addendum. The Addendum was signed on November 26, 2018. In January 2019, Defendant made some payment to his bankruptcy counsel, as reflected in the Statement of Financial Affairs, in connection with the commencement of a bankruptcy proceeding. Defendant filed for bankruptcy on May 31, 2019, six months after the signing of the Addendum.

Filing for bankruptcy shortly after signing a contract in which one promises to make payments, does not meet the pleading requirements for fraud under § 523(a)(2)(A). *See In re Zering*, 560 B.R. 671, 678 (Bankr. M.D.N.C. 2016); *see also In re Fatone*, No. 13-00081-8-RDD, 2013 WL 5798999 at \*2–3 (finding that the plaintiff's allegations of the debtor's fraudulent conduct based on engaging in negotiations and signing a contract one month prior to filing for bankruptcy, thus amounting to having no intent to pay, were insufficient to meet pleading requirements for fraud under § 523(a)(2)(A)). The fact that Defendant later filed for bankruptcy is not enough to establish fraudulent intent as required by § 523(a)(2)(A). Therefore, the Amended Complaint fails to state a claim under § 523(a)(2)(A) with respect to all of the alleged fraudulent misrepresentations.



## **CONCLUSION**

NOW, THEREFORE, for the above stated reasons, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is GRANTED WITH PREJUDICE.<sup>3</sup>

[END OF DOCUMENT]

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<sup>3</sup> Defendant's Request for Attorney's Fees was withdrawn, and thus the Court need not make a ruling as to attorney's fees.

## SERVICE LIST

Christopher Raines  
Attorney for Plaintiff

Benjamin Busch  
Attorney for Defendant

William Miller  
US Bankruptcy Administrator

C. Edwin Allman, III  
Trustee