



ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the order of the Court.

Signed December 29, 2004.

United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:

**JACK BUNTON and
DONNA K. BUNTON,**

Co-Debtors.

**CASE NO. 03-47008-RFN-7
CHAPTER 7**

**JACK E. BUNTON and
DONNA K. BUNTON,**

Co-Plaintiffs,

v.

**JEANELLA LAPLANT,
INDIVIDUALLY and
ST. CLAIR NEWBERN III,**

Defendants.

ADVERSARY NO. 04-04303

**ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT**

Before the Court is Defendants' Motion to Dismiss First Amended Complaint and Motion for More Definite Statement (the "Motion"). The Court finds that the Motion should be granted for the reasons stated herein.

The Motion is directed to Plaintiffs' "1st Amended Pleadings for Damages for Willful Violation of the 11 U.S.C. § 362(a), (h), Tortious Actions & Declaratory Judgements" (the "Complaint"). In the Complaint, Plaintiffs allege six causes of action, all of which Defendants Jeanella Laplant and St. Clair Newbern III ("Defendants") argue should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) and Fed. R. Bank. P. 7012(b).

1. The Claims of Plaintiff Donna K. Bunton

First, Defendants contend that all causes of action asserted by or on behalf of Plaintiff Donna K. Bunton must be dismissed because (1) Donna K. Bunton did not sign the Complaint and (2) Plaintiff Jack E. Bunton cannot represent Donna K. Bunton because Mr. Bunton is not an attorney. Defendants are correct in these assertions and all claims asserted on behalf of Donna K. Bunton are dismissed for failure to state a claim.

2. Jack Bunton's First Cause of Action

In his first cause of action, Plaintiff Jack E. Bunton asserts a claim for "tortious negligent misrepresentation of law, fact or opinion and/or negligent misrepresentation of material facts." In this cause of action, Plaintiff complains that Defendants made certain misrepresentations that led to improper relief being awarded by the Court in the Final Default Judgment (the "Default Judgment") entered in adversary proceeding number 02-04299 (the "Adversary Proceeding") on March 26, 2003. Plaintiff also argues that

certain language in the Default Judgment is “inconsistent with relevant law.” Specifically, Plaintiff complains that he was damaged by that portion of the Default Judgment that provides that the judgment “shall be non-dischargeable within the meaning of 11 U.S.C. Sec. 523 in this or any other bankruptcy proceeding regarding the Defendant, Jack Bunton.” Plaintiff also complains that the award of attorneys’ fees in the Default Judgment was improper because attorneys’ fees were not allowable as a matter of law given the relief awarded in the Default Judgment. Plaintiff’s claims are in fact defenses that could have and should have been raised by Plaintiff in opposition to the claims asserted against him in the Adversary Proceeding. *See Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 934 (5th Cir. 1999), *cert. denied* 527 U.S. 1004 (1999). Therefore, Plaintiff’s claims in the first cause of action are barred by *res judicata*, and, accordingly, must be dismissed for failure to state a claim.

3. Jack Bunton’s Second Cause of Action

In his second cause of action, Plaintiff complains that Defendants violated the automatic stay in his current bankruptcy case by filing the Default Judgment in state court and seeking recovery from the Real Estate Recovery Fund, a fund maintained by the Texas Real Estate Commission to provide recovery to victims of real estate fraud. Contrary to Plaintiff’s assertions, Court records reflect that on December 18, 2003, Defendants filed a motion for relief from stay seeking authorization to pursue the relief complained of by Plaintiff and that, on January 30, 2004, the Court entered an order lifting the automatic stay to permit Defendants to pursue such relief. Accordingly, Plaintiff’s second cause of action is dismissed for failure to state a claim.

4. Jack Bunton's Third Cause of Action

Plaintiff's third cause of action is addressed to Defendants' alleged "wrongful interference with prospective advantage and/or employment." In this cause of action, Plaintiff makes vague allegations concerning Defendants' actions that allegedly have prevented Plaintiff from conducting his real estate business. Plaintiff fails to state the time frame during which the facts giving rise to his claims in this cause of action occurred. If the claims arose before Plaintiff's current petition in bankruptcy, November 4, 2003, the claims in this cause of action are assets of Plaintiff's bankruptcy estate, unless they were exempted by Plaintiff or abandoned by the chapter 7 trustee. Plaintiff's schedules shed no light on this issue. Instead, Plaintiff failed to schedule the claims as assets, much less exempt them. To the extent that Plaintiff's claims are prepetition claims, Plaintiff has no standing to prosecute them unless (1) he exempted them, (2) the trustee abandoned them, or (3) the Plaintiff filed a motion seeking to prosecute the claims on the estate's behalf. Because Plaintiff has made no showing that any of the foregoing conditions exist and the record in his bankruptcy proceeding reveals that no such conditions exist,¹ Plaintiff's prepetition claims arising under this cause of action must be dismissed for lack of standing. *See United States v. Hays*, 515 U.S. 737 (1995); *In re Brown*, 113 B.R. 318 (Bankr. W.D. Tex. 1990).

Conversely, if Plaintiff's claims under this cause of action arose after November 4, 2003, such claims are not assets of Plaintiff's bankruptcy estate. In that case, these claims do not implicate either the Court's core or "related to" jurisdiction. *See Wood v.*

¹ The Court takes judicial notice of the Plaintiff's bankruptcy filings. *See MacMillan Bloedel, Ltd. v. Flintkote Co.*, 760 F.2d 580 (5th Cir. 1985).

Wood (In re Wood), 825 F.2d 90 (5th Cir. 1987). Consequently, Plaintiff's third cause of action must be dismissed for failure to state a claim due to lack of jurisdiction.

5. Jack Bunton's Fourth Cause of Action

In his fourth cause of action, Plaintiff asserts a claim for "fraudulent claim against real property." Plaintiff's claims in this cause of action are based entirely upon facts that the Plaintiff would have shown, but failed to show in the Adversary Proceeding that gave rise to the Default Judgment. These claims are barred by *res judicata*, and Plaintiff's fourth cause of action must be dismissed for failure to state a claim. *See Southmark*, 163 F.2d 925.

6. Jack Bunton's Fifth Cause of Action

In his fifth cause of action, Plaintiff alleges "fraudulent misrepresentation of material facts, fraud." Once again, these allegations are nothing more than a recitation of facts that Plaintiff would have shown, but failed to show in the Adversary Proceeding that concluded in the Default Judgment. Accordingly, the claim is barred by *res judicata*, and must be dismissed for failure to state a claim.

7. Jack Bunton's Sixth Cause of Action

In his sixth cause of action, Plaintiff alleges "tortious invasion of interest in reputation by defamation and/or slanderous imputations of criminal conduct and/or slanderous imputations affecting business, trade, profession, or office." Here, Plaintiff complains of representations made by Defendants to the Texas Real Estate Commission in connection with Defendant Laplant's attempts to recover from the Real Estate Recovery Fund. Plaintiff fails to identify the substance or the date of the statements of which he complains. To the extent that Plaintiff complains that the Default Judgment

itself constitutes libel and slander, that order is a final order of the Bankruptcy Court and, as such, cannot form the basis for a claim of libel or slander. To the extent that Plaintiff complains of other statements made by Defendants before the Texas Real Estate Commission, the Court's analysis with respect to the third cause of action applies. That is, if such claims predate Plaintiff's petition in bankruptcy, he has no standing to pursue them because (1) he has not exempted them, (2) the trustee has not abandoned them, and (3) Mr. Bunton has not moved to prosecute such claims on behalf of the estate. If the claims post-date Plaintiff's petition in bankruptcy, the claims are not property of the bankruptcy estate and the claims do not implicate the Court's core or "related to" jurisdiction. Accordingly, Plaintiff's claims in the sixth cause of action must be dismissed for failure to state a claim.²

For the foregoing reasons, Plaintiff's claims in this adversary proceeding are dismissed for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Rule 7012 of the Federal Rules of Bankruptcy Procedure.

SO ORDERED.

END OF ORDER

² Although Defendants have not alleged that Plaintiff's claims must be dismissed for lack of jurisdiction, the Court is charged with the duty to examine its jurisdiction in each case. *U.S. v. Hays*, 515 U.S. 737, 742.