



plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, (1957). The Tenth Circuit Court of Appeals has observed that “the Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim.” Maez v. Mountain States Telephone and Telegraph, Inc., 54 F.3d 1488, 1496 (10<sup>th</sup> Cir. 1995) (quoting Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381, 386 (5th Cir. 1985)).

It is against this backdrop that the court must view a motion to dismiss which alleges a failure to comply with Fed. R. Bankr. P. 7009. That rule, which adopts Fed. R. Civ. P. 9(b), provides that in pleading fraud, “the circumstances constituting fraud . . . shall be stated with particularity.” Consequently, a claim of fraud must “set forth the time, place and contents of the false representation, the identity of the party making the false statement and the consequences thereof” Lawrence National Bank v. Edmonds (In re Edmonds), 924 F.2d 176, 180 (10<sup>th</sup> Cir. 1991) (concerning fraud claim under § 727(d)). But the Court must strike a balance between application of Fed. R. Bankr. P. 7009 and application of Fed. R. Bankr. P. 7008 which adopts the liberal notice pleading requirements of Fed. R. Civ. P. 8(a). That rule provides that a claim for relief shall include “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

Thus, assuming the truth of all of the well pleaded facts in the Amended Complaint, this Court can only grant Defendant’s motion to dismiss if it cannot conceive of a circumstance under which proof of the following facts and all of the reasonable inferences to be drawn from these facts could entitle Plaintiff to the relief it seeks:

1. The Defendant established a home equity line of credit with the Plaintiff on August 23, 2000, by executing a note secured by a deed of trust on real estate commonly known as 3526 Bluestem Ave., Longmont, CO 80503.
2. The line of credit carried a credit limit of \$30,000.00.
3. The credit line carried a balance of \$30,157.01 on May 7, 2001, when it was fully paid as part of a refinancing transaction.
4. At the time of the refinancing transaction, Defendant authorized a title company to request a release of the Plaintiff’s deed of trust and a cancellation of her line of credit.
5. The title company did request a release of the deed of trust at the time of the refinancing transaction.

6. On May 25, 2001, 18 days after the refinancing transaction, the Defendant requested a \$20,000.00 advance from the Plaintiff on the same home equity account.
7. On June 1, 2001, 25 days after the refinancing transaction, the defendant requested an additional \$9,000.00 advance from the Plaintiff on the same home equity account.
8. The Plaintiff had not processed the lien release request in its normal course of business when the Defendant made her advance requests.
9. The Plaintiff gave Defendant the requested advances totaling \$29,000.00.
10. The Plaintiff no longer had an enforceable security interest in Defendant's real estate at the time the advances were made.
11. The Plaintiff relied on Defendant's representations that the advances were properly requested.

The Court believes that Plaintiff has stated the speaker, time, place, contents and consequences of the misrepresentation with adequate particularity to carry it past a Rule 7012 motion to dismiss. It is a fair implication, from the facts which have been pleaded, that the Defendant knew, or should have known, that she was not entitled to draw new funds from a line of credit which had been refinanced and on which Plaintiff's deed of trust was to be released. It is fair to imply that she intended to take advantage of an error or weakness on Plaintiff's procedures to procure the requested advances. Whether this is factually accurate and whether it rises to the level of fraud shall, for the time being, remain open questions.

The Court does not mean to imply that its decision on Defendant's motion is not a close call. Assuming the truth of the allegations in Plaintiff's Amended Complaint, the Defendant did, after all, obtain the subject advances a full 18 and 25 days after the account was paid off in the refinancing. While the Court can conceive of the facts developing through discovery in such a manner as to allow Plaintiff to meet its burden in this case and, at this juncture, is unwilling to foreclose that possibility, it is not unmindful of the challenges Plaintiff faces under the facts which appear in Plaintiff's pleadings. For the foregoing reasons, it is

ORDERED that Defendant's Motion to Dismiss Amended Complaint is hereby DENIED and the Defendant is granted until **Monday, March 10, 2003** to answer or otherwise respond to the Amended Complaint.

Dated this 20<sup>th</sup> day of February, 2003.

BY THE COURT:

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Howard R. Tallman, Judge  
United States Bankruptcy Court