

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	
DENNIS DEAN LUNDHOLM, SR.,)	Case No. 02-24959 EEB
SSN: xxx-xx-8229)	
)	Chapter 7
Debtor.)	
)	
AIR HIGH EQUIPMENT RENTAL, INC.,)	
)	
Plaintiff,)	
)	Adversary No. 02-1528 HRT
v.)	
)	
DENNIS DEAN LUNDHOLM, SR.,)	
)	
Defendant.)	

**ORDER RE: DEBTOR-DEFENDANT’S MOTION TO DISMISS
PLAINTIFF’S COMPLAINT, OR IN THE ALTERNATIVE,
MOTION FOR MORE DEFINITE STATEMENT**

This case comes before the Court on Debtor-defendant’s Motion to Dismiss Plaintiff’s Complaint, or in the Alternative, Motion for More Definite Statement. The Court has reviewed the pleadings and the case file in this matter and makes the following ruling.

The Court will deny the Motion to Dismiss and will grant in part and deny in part the Motion for More Definite Statement.

Under Fed.R.Civ.P. 12(b)(6), this Court may dismiss a complaint for failure to state a claim upon which relief can be granted if it appears beyond a doubt that the 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, 2 L.Ed.2d 80 (1957). In addition, the Tenth Circuit Court of Appeals has acknowledged 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 (10th Cir. 1995).

Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires a “short and plain statement of the claim showing that the pleader is entitled to relief.” The statement need not contain detailed facts, but it “must give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley*, 355 U.S. at 47, 78 S. Ct. at 103. A Plaintiff is

not required to state precisely each element of the claim. Nonetheless, a Plaintiff must “set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.” *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 515 (1st Cir. 1988). Based on a review of the pleadings before it, this Court cannot conclude that the Plaintiff can show no facts which would support its claims for relief.

Plaintiff in this matter has adopted a form of pleading that the Court is not anxious to encourage. Plaintiff has elected to simply reference the state court complaint and judgement under each of its claims for relief in lieu of outlining the facts relevant to each cause of action by setting out averments in individual numbered paragraphs in accordance with Rule 10(b). While the practice of adopting an attached document by reference is permitted by Rule 10(c), it hardly makes for a complaint which is a model of clarity.

It appears from the Complaint that a judgment was entered against Mr. Lundholm in the state court based on the allegations which appear in that state court action and are incorporated into Plaintiff’s Complaint herein. The fact that a corporation may have served as the contractor does not appear to have deterred the state court from finding Debtor liable under the Colorado statute based on the pleaded facts. Indeed, it is clear that, under appropriate facts, the decision-makers of a corporate contractor may be held liable for violating fiduciary obligations under Colo. Rev. Stat. § 38-22-127. *Flooring Design Assoc. Inc. v. Novick*, 923 P.2d 216, 221 (Colo. Ct. App. 1995); *Alexander Co. v. Packard*, 754 P.2d 780, 782 (Colo. Ct. App. 1988). Consequently, this Court finds that sufficient facts appear in the Complaint related to the causes of action which have been pleaded to avoid dismissal under Rule 12(b).

While Plaintiff’s claims for relief under 11 U.S.C. §§ 523(a)(4) and 523(a)(6) satisfy the relatively modest standards of the federal notice pleading system, the claim for relief under 11 U.S.C. § 523(a)(2) fails the test. Where fraud is being alleged, “a complaint must ‘set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof.’” *Schwartz v. Celestial Seasonings, Inc.*, 124 F.3d 1246, 1252 (10th Cir. 1997) (quoting *Lawrence Nat’l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir.1991)). The Court does not find the required information clearly set out in the Complaint. Consequently, with respect to Plaintiff’s First Claim for Relief, Defendant’s Motion for More Definite Statement will be granted. It is, therefore,

ORDERED, that Defendant’s Motion to Dismiss is DENIED; it is further

ORDERED, that Defendant’s Motion for More Definite Statement is DENIED with respect to Plaintiff’s Second Claim for Relief (11 U.S.C. § 523(a)(4)) and with respect to Plaintiff’s Third Claim for Relief (11 U.S.C. § 523(a)(6)); it is further

ORDERED, that Defendant’s Motion for More Definite Statement is GRANTED with respect to Plaintiff’s First Claim for Relief (11 U.S.C. § 523(a)(2)(A)); it is further

ORDERED, that Plaintiff shall have fourteen (14) days from the date of this Order to file an amended complaint and that if an amended complaint is not timely filed, the Court shall dismiss Plaintiff's First Claim for Relief; and it is further

ORDERED, that Defendant is hereby directed to file an Answer or otherwise respond, within thirty (30) days from the date of this Order, to the amended complaint, if one is filed, or to Plaintiff's Second Claim for Relief and Plaintiff's Third Claim for Relief, if no amended complaint is timely filed.

Dated this 16th day of April, 2003.

BY THE COURT:

Howard R. Tallman, Judge
United States Bankruptcy Court