

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

IN RE: DAMON STRINGER, Debtor

No. 5:12-bk-70499

Ch. 13

DAMON STRINGER

PLAINTIFF

v.

5:12-ap-7078

**COAST CAPITAL INVESTMENT ADVISORS;
J.P. MORGAN CHASE BANK, N.A.**

DEFENDANTS

ORDER DENYING MOTION TO DISMISS

Before the Court are the *Amended Motion to Dismiss J.P. Morgan Chase Bank, N.A.* and the *Amended Brief in Support of J.P. Morgan Chase Bank, N.A.'s Motion to Dismiss Complaint*, both filed on August 28, 2012; the debtor's *Response to Motion to Dismiss Adversary Proceeding*, filed on October 1, 2012; and the parties' *Joint Stipulations by Plaintiff and Defendant J.P. Morgan Chase Bank, N.A. Regarding Chase's Motion to Dismiss*, filed on October 23, 2012. J.P. Morgan Chase Bank, N.A. [Chase] bases its motion to dismiss on Federal Rule of Bankruptcy Procedure 7012(b), which states that Federal Rule of Civil Procedure 12(b) - (i) applies in adversary proceedings. Specifically, in response to the debtor's adversary proceeding, Chase states that the debtor has failed to state a claim upon which the Court can grant relief and that the debtor's complaint must be dismissed. The Court disagrees and denies Chase's motion to dismiss the debtor's complaint.

To survive a motion to dismiss under Rule 12(b)(6), the complaint must provide the defendant with a "short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Bankr. P. 7008 (incorporating Fed. R. Civ. P. 8(a)(2)). Although detailed factual allegations are not required, the "allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The debtor's complaint to determine the validity of the liens held by the defendants and to strip those liens from the debtor's property to the extent the liens are unsecured alleges the following:

1. The debtor occupies a residence and shares an ownership interest in the residence with his non-filing spouse.
2. The value of the property is approximately \$270,000 and the property is subject to a first mortgage in the approximate amount of \$301,000, a second mortgage in the approximate amount of \$80,000, and a third mortgage in the approximate amount of \$137,000.
3. The debtor believes the second and third mortgages are unsecured.

In this instance, the debtor has stated a plausible claim for relief and provided the defendant with sufficient information to which a response is requisite. A recent case from the Bankruptcy Appellate Panel of the Eighth Circuit recognized the right of a debtor to “strip off” a wholly unsecured lien from his residence. *In re Fisette*, 455 B.R. 177, 182 (B.A.P. 8th Cir. 2011). The appellate court also recognized that its finding was in agreement with all Circuit Courts of Appeal that have addressed the issue. *Id.* In the debtor’s prayer for relief, the debtor asks the Court to (1) determine that the junior liens are wholly unsecured and (2) strip the junior liens from the subject property. This does not mean that the debtor necessarily prevails in the legal arguments the parties are attempting to make to the Court. The allegations that are contained in the complaint are simply allegations and are inapplicable to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The parties also filed a set of agreed stipulations and invited the Court to use the “joint stipulations in ruling on Chase’s motion to dismiss and that the motion not be considered or converted by the Court into a motion for summary judgment.” The Court declines the parties’ invitation. The stipulations are not relevant to the Court’s decision and are an attempt to circumvent the normal judicial process. If the Court were to consider the stipulations in the light of the allegations in the debtor’s complaint for the purpose of determining the legal issue the parties have framed for the Court, the Court would be issuing an advisory opinion--a nonbinding statement by the Court of its interpretation of the law. *Black’s Law Dictionary* 1119 (7th ed. 1999). Federal courts decide “cases and controversies” and are precluded from rendering advisory opinions. *Bender v. Educ. Credit Mgmt. Corp. (In re Bender)*, 368 F.3d 846, 847-48 (8th Cir. 2004) (citing *Flast v.*

Cohen, 392 U.S. 83, 96-97 (1968)).¹

Based solely on the allegations stated in the debtor's complaint, the Court finds that the debtor has stated a claim against which relief can be granted and, accordingly, denies Chase's motion to dismiss. It is now Chase's turn to admit or deny the allegations asserted against it by the debtor and state in plain terms its defenses to the debtor's claims. *See* Fed. R. Civ. P. 8(b).

IT IS SO ORDERED.


Ben Barry
United States Bankruptcy Judge
Dated: 10/25/2012

cc: Charles T. Ward
Steven T. Robbins

¹ If the Court did consider the stipulations, despite the parties request to the contrary the Court would have to treat the motion to dismiss as a motion for summary judgment. According to Federal Rule of Civil Procedure 12(d), when matters outside the pleadings are presented to the court, the motion *must* be treated as one for summary judgment. Further, if the Court treated the motion as a motion for summary judgment, it would be limited to the facts that are contained in the joint stipulations; the Court would not consider the allegations contained in the debtor's complaint as statements of fact for the purpose of summary judgment. *Iqbal*, 556 U.S. at 678.

When the Court compares the joint stipulations with the debtor's complaint, the lack of factual information becomes apparent. First, the stipulations only reference one mortgage to which the property is subject and only one note secured by the mortgage. The debtor's complaint references three separate mortgages and three separate creditors' claims. Second, the stipulations do not state who is the holder of the single mortgage or who is favored by the note. In the debtor's complaint, the debtor references three separate creditors and three separate mortgages. Finally, the stipulations provide no evidence concerning the value of the subject property or the amount of the unnamed creditor's claim against the property, nor any suggestion that there are any other claims against the property. Without this information, the Court could not make a legal determination concerning the stripping of the alleged junior mortgages, much less the legal issue surrounding the debtor's and his spouse's ownership of the property as tenants by the entirety. A comparison of the joint stipulations with the debtor's complaint indicates to the Court that there may be a genuine dispute as to the material facts at issue in this case. Accordingly, the Court would have to deny a motion for summary judgment.