

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

Civil Case No. 19-cv-02875-WJM-NYW

HARVEY SENDER, AS RECEIVER FOR GARY DRAGUL,
GDA REAL ESTATE SERVICES, LLC,
AND GDA REAL ESTATE MANAGEMENT, LLC,

Plaintiff,

v.

BANK OF AMERICA, N.A.,
AMERICAN EXPRESS COMPANY,
AND DISCOVER BANK,

Defendants.

BANK OF AMERICA, N.A.'S ANSWER AND AFFIRMATIVE DEFENSES

Bank of America, N.A. (**BANA**) answers Plaintiff Harvey Sender, as Receiver for Gary Dragul, GDA Real Estate Services, LLC, and GDA Real Estate Management, LLC's (**Plaintiff**) Complaint (**Complaint**), as follows:

I. PARTIES

1. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and therefore denies these allegations.

2. To the extent the allegations in paragraph 2 concern a discrete written document, that document speaks for itself. To the extent the allegations in paragraph 2 are inconsistent with, contradict, or seek to characterize the written document, BANA denies those allegations. BANA

is without information sufficient to admit or deny the remaining allegations in paragraph 2 and, therefore, denies the allegations.

3. To the extent the allegations in paragraph 3 concern a discrete written document, that document speaks for itself. To the extent the allegations in paragraph 3 are inconsistent with, contradict, or seek to characterize the written document, BANA denies those allegations. BANA is without information sufficient to admit or deny the remaining allegations in paragraph 3 and, therefore, denies the allegations.

4. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in this Paragraph, and therefore denies these allegations.

5. BANA admits that it is a National Banking Association, organized and existing under the laws of the United States of America. BANA further admits that it maintains an office and principal place of business in Charlotte, Mecklenburg County, North Carolina. Except as expressly admitted herein, the allegations of Paragraph 5 of the Complaint are denied.

6. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 6, and therefore denies these allegations.

7. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 7, and therefore denies these allegations.

8. The allegations of Paragraph 8 of the Complaint call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

II. JURISDICTION AND VENUE

9. The allegations of Paragraph 9 of the Complaint call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

10. The allegations of Paragraph 10 of the Complaint call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

11. The allegations of Paragraph 11 of the Complaint call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

III. GENERAL ALLEGATIONS

12. The allegations of Paragraph 11 of the Complaint call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

13. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 13, and therefore denies these allegations.

14. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 14, and therefore denies these allegations.

15. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 15, and therefore denies these allegations.

16. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 16, and therefore denies these allegations.

17. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 17, and therefore denies these allegations.

18. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 18, and therefore denies these allegations.

19. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 19, and therefore denies these allegations.

20. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 20, and therefore denies these allegations.

21. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 21, and therefore denies these allegations.

22. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 22, and therefore denies these allegations.

23. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 23, and therefore denies these allegations.

24. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 24, and therefore denies these allegations.

25. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 25, and therefore denies these allegations.

26. To the extent the allegations in paragraph 26 concern a discrete written document, that document speaks for itself. To the extent the allegations in paragraph 3 are inconsistent with, contradict, or seek to characterize the written document, BANA denies those allegations. BANA is without information sufficient to admit or deny the remaining allegations in paragraph 26 and, therefore, denies the allegations.

27. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 27, and therefore denies these allegations.

28. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 28, and therefore denies these allegations.

29. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 29, and therefore denies these allegations.

30. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 30, and therefore denies these allegations.

31. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 31, and therefore denies these allegations.

32. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 32, and therefore denies these allegations.

33. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 33, and therefore denies these allegations.

34. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 34, and therefore denies these allegations.

35. Answering for itself, BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 35, and therefore denies these allegations. BANA also lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 35 as they may apply to co-Defendants American Express and Discover, and therefore denies these allegations.

36. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 36, and therefore denies these allegations.

37. BANA admits that Shelly Dragul held certain credit card account(s) with BANA and that BANA received certain payments on those credit card account(s). To the extent that the allegations of paragraph 37 make reference to a written document, that document speaks for itself.

To the extent that the allegations of paragraph 37 differ from, contradict, or seek to characterize the written document, the allegations are denied. BANA lacks sufficient information to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 37, and therefore denies these allegations.

38. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 38, and therefore denies these allegations.

39. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 39, and therefore denies these allegations.

40. The allegations of paragraph 40 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

41. BANA lacks sufficient information to form a belief as to the truth or falsity of the allegations contained in paragraph 41, and therefore denies these allegations.

42. The allegations of paragraph 42 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

FIRST CLAIM FOR RELIEF AGAINST ALL DEFENDANTS
(Turnover)

43. BANA incorporates by reference each and every response stated above to Paragraphs 1 through 42 as if set forth fully herein. To the extent a specific response to the allegations of this paragraph is required, they are denied.

44. The allegations of paragraph 44 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

45. The allegations of paragraph 45 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

SECOND CLAIM FOR RELIEF AGAINST ALL DEFENDANTS

(Actual Fraud – COLO. REV. STAT. § 38-8-105(1)(a))

46. BANA incorporates by reference each and every response stated above to Paragraphs 1 through 45 as if set forth fully herein. To the extent a specific response to the allegations of this paragraph is required, they are denied.

47. The allegations of paragraph 47 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

48. The allegations of paragraph 48 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

49. The allegations of paragraph 49 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

50. The allegations of paragraph 50 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

THIRD CLAIM FOR RELIEF AGAINST ALL DEFENDANTS

(Constructive Fraud – COLO. REV. STAT. § 38-8-105(1)(b))

51. BANA incorporates by reference each and every response stated above to Paragraphs 1 through 51 as if set forth fully herein. To the extent a specific response to the allegations of this paragraph is required, they are denied.

52. The allegations of paragraph 52 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

53. The allegations of paragraph 53 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

54. The allegations of paragraph 54 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

55. The allegations of paragraph 55 call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

56. The allegations of paragraph 56, including the “WHEREFORE” paragraph and all its subparts, call for a legal conclusion to which no response is required. To the extent a response is required, the allegations are denied.

57. BANA reserves the right to amend this Answer under the Federal Rules of Civil Procedure as further facts become known.

AFFIRMATIVE DEFENSES

BANA states the following defenses to Plaintiff’s Complaint, without assuming the burden of proof on any such defense that would otherwise rest on the Plaintiff, and reserving the right to amend and/or supplement its responses to Plaintiff’s allegations, as well as these avoidances and defenses, as additional information is obtained through the discovery process or otherwise.

First Affirmative Defense

Plaintiff has failed to allege facts with sufficient specificity that, if proven, establish a prima facie case for recovery against BANA, and by this failure has failed to state a claim upon which relief may be granted, including, without limitation, any claim for actual fraud under COLO. REV. STAT. § 38-8-105(1)(a).

Second Affirmative Defense

Plaintiff has failed to name, join or serve process upon the correct legal entity or entities that did business with any of the persons or entities in receivership, or that received or benefitted from any transfers of assets at issue in this action.

Third Affirmative Defense

To the extent that BANA received any of the transfers alleged in the Complaint (the “Transfers”), BANA provided reasonably equivalent (if not full, dollar-for-dollar) value in exchange for such Transfers. See, e.g., COLO. REV. STAT §§ 38-8-104, 38-8-109.

Fourth Affirmative Defense

To the extent that BANA received any of the Transfers, BANA took in good faith, provided reasonably equivalent (if not full, dollar-for-dollar) value and/or extinguished an antecedent debt in exchange therefor. See, e.g., COLO. REV. STAT §§ 38-8-104, 38-8-109.

Fifth Affirmative Defense

To the extent that BANA received any of the transfers referenced in the Complaint and BANA was not the initial transferee, Plaintiff cannot recover from BANA because BANA took the transfers for value (the satisfaction of a debt), in good faith, without knowledge of the voidability of the transfers. See, e.g., COLO. REV. STAT §§ 38-8-104, 38-8-109.

Sixth Affirmative Defense

Plaintiff cannot obtain a double-recovery of any transfers that are recovered or determined to be recoverable from any persons or entities in receivership or their insiders, from the beneficiaries of the alleged Transfers, or from any persons or entities other than BANA.

Seventh Affirmative Defense

Any claim by the Plaintiff for recovery of the transfers referenced in the Complaint fails to the extent that such claim is time-barred by the applicable statute of limitation, and/or to the extent that such claim exceeds the reach-back period for avoidance and recovery of such transfers provided under applicable law.

Eighth Affirmative Defense

Plaintiff's claims fail in whole or in part by his failure to join a party without whom the action cannot proceed.

Ninth Affirmative Defense

BANA denies each and every allegation of the Complaint not admitted or otherwise controverted or qualified, and further denies that Plaintiff is entitled to any relief whatsoever from BANA.

Tenth Affirmative Defense

BANA reserves its right to amend its pleading to assert such additional defenses as may arise during the continued course of discovery and investigation in this matter.

For these reasons, BANA respectfully requests that this Court:

1. Dismiss all of Plaintiff's claims against BANA on the merits and with prejudice;
- and
2. Grant BANA any other relief that the Court deems just and equitable.

Respectfully submitted, this the 15th day of October, 2019.

s/ Erin Edwards

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Bank of America, N.A.

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of October, 2019, a true and correct copy of the foregoing **BANK OF AMERICA, N.A.'S ANSWER AND AFFIRMATIVE DEFENSES** was filed and served electronically via CM/ECF on the following:

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