

THIS OPINION IS NOT INTENDED FOR PUBLICATION.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 02-54704
)	
RICHARD & KRISTEAN KUCHA,)	CHAPTER 7
)	
DEBTOR(S))	
)	
FIRST PLACE BANK,)	ADVERSARY NO. 03-5002
)	
PLAINTIFF(S),)	JUDGE MARILYN SHEA-STONUM
)	
vs.)	
)	
RICHARD KUCHA)	MEMORANDUM OPINION RE:
)	DISMISSAL OF AMENDED
DEFENDANT(S).)	COMPLAINT

This matter comes before the Court on the following pleadings: (1) a complaint filed by First Place Bank (“Plaintiff”) on January 15, 2003 [docket #1] (the “Original Complaint”); (2) an amended complaint filed by Plaintiff on March 28, 2003 [docket #10] (the “Amended Complaint”); (3) a motion to strike the Amended Complaint filed by Richard and Kristean Kucha on April 2, 2003 [docket #11]; (4) a motion to dismiss the Amended Complaint filed by Richard and Kristean Kucha on April 2, 2003 [docket #12]; (5) a response to the motion to strike the Amended Complaint filed by Plaintiff on April 9, 2003 [docket #13]; and (6) a Response to the motion to dismiss the Amended Complaint filed by Plaintiff on April 9, 2003 [docket #14]. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (I) and

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(O) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the foregoing pleadings and the pleadings on file in debtors' main chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following conclusions of law.

BACKGROUND

1. Richard and Kristean Kucha filed a voluntary chapter 7 bankruptcy petition on October 11, 2002.

2. The deadline for filing complaints objecting to discharge of debtors and dischargeability of certain debts was set for February 7, 2003.

3. On January 15, 2003 Plaintiff initiated this adversary proceeding by filing the Original Complaint. That pleading was captioned "First Place Bank, Plaintiff v. Richard A. Kucha, Defendant" and styled "Complaint under §523(C) of the Bankruptcy Code to Determine the Dischargeability of a Debt." Notwithstanding the fact that only one defendant was named in the caption, Plaintiff includes the name of six other individuals or entities in the body of that document and uses the word "defendant" to modify those names. For example, paragraph two of the complaint sets forth the following: "Upon information and belief, Defendant, Susan Scheible, was a witness to the forged signatures on the fraudulent Deed." [Compl. at ¶2, Docket #1].

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4. Paragraphs six and eight contain the only reference in the Original Complaint to Kristean Kucha and they state, as follows:

- (6) Defendant, Robert J. Andrews, Jr., Defendant, Kristean Kucha, Defendant, Richard Kucha, and the Garrettsville Corporation, subsequently executed a mortgage in favor of the Ravenna Savings Bank. Said mortgage is an encumbrance upon the property.

* * *

- (8) The Defendant, Kristean Kucha, committed fraud against Ravenna Savings Bank by fraudulently misrepresenting to it that The Garrettsville Corporation had an ownership interest in the subject real estate in order to induce Ravenna Savings Bank to loan money to him [sic] based upon said ownership interest.

[Compl. at ¶¶6 and 8, Docket #1]. Plaintiff's prayer for relief requests "judgment in its favor against Defendants, jointly and severally." [Compl. at pg. 2, Docket #1].

5. Plaintiff included a certificate of service with the Original Complaint which sets forth that a copy was mailed to twelve separate individuals or entities, however, these listed recipients do not include all of the same individuals or entities that were referenced in the body of the Original Complaint. Moreover, that certificate of service references parties who are not even a part of this adversary proceeding, for example: "Thomas Reitz, Attorney for Intervenor/Plaintiffs, R. Blair and Marilyn L. Savage, Christley, Herington & Pierce, 215 West Garfield Road, Suite 230, Aurora, OH 44202". [Compl. at pg. 3, Docket #1]. That certificate of service also states that a copy was mailed to "Kristean Kucha, 10571 White Street, Garrettsville, OH 44231." [Compl. at pg. 3, Docket #1].

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6. The Clerk of Court's Office issued a summons in this proceeding on January 23, 2003 [docket #3] (the "Summons"). Plaintiff has never filed a certificate evidencing that the Summons was served on the named defendant, Richard Kucha, or any other individual or entity referenced in the body of the Original Complaint.¹

7. On February 12, 2003 Richard Kucha filed an answer to the Original Complaint. [Docket #7].

8. An initial pre-trial conference was held in this matter on March 19, 2003. Appearing at that pre-trial conference were Michael McGhee as counsel for Plaintiff and Richard Wilson as counsel for Richard Kucha.² During the pre-trial Mr. Wilson indicated that he was not representing Kristean Kucha in this adversary proceeding as it is her position that she is not a defendant in this matter.

9. During the pre-trial conference, upon questioning by the Court, Mr. McGhee indicated that it was his client's intention to name only debtors, Richard Kucha and Kristean Kucha, as defendants. Mr. McGhee also indicated that his client was relying upon §523(a)

¹ On January 29, 2003 Plaintiff filed the "certificate of service" page of the Summons. That page contained the typewritten name of "Karen L. Sampson" in the introductory sentence which indicates who is effectuating service and also contains, at the bottom of the page, a signature of "Karen L. Sampson." That document does not set forth the names of *any* individuals or entities who Ms. Sampson purportedly served. Additionally, the box next to the following pre-printed information was checked: "State Law: The defendant was served pursuant to the laws of the State of _____, as follows: [Describe briefly]" and in the blank next to "State of" the word "Ohio" was typed. That document does not comport with any of the requirements of FED. R. CIV. P. 7004 and will not be considered any further in this matter.

² Mr. Wilson is also counsel for debtors in their main chapter 7 case.

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and not §523(c) of the Bankruptcy Code for relief. Based upon the deficiencies in the Original Complaint and Mr. McGhee's representations, the Court granted Plaintiff until March 26, 2003 in which to amend the Original Complaint. Such filing deadline was explicitly set without any prejudice to the ability of Richard or Kristean Kucha to object to the filing of an amended complaint.³

10. The March 26, 2003 filing deadline was also memorialized in a memorandum of the pre-trial conference which set forth, *inter alia*, "[t]he Court **FURTHER ORDERED** that the parties and/or their counsel shall comply with the following: . . . [t]hat plaintiff has until **March 26, 2003** in which to file an amended complaint, the filing of which in no way prejudices defendant-debtor's ability to object to such filing." [Mem. at pg. 2, Docket #9 (emphasis in original)]. A copy of this pre-trial memorandum was sent to both Mr. McGhee and Mr. Wilson.

11. Plaintiff filed the Amended Complaint on March 28, 2003. In that document Plaintiff cited to §523(a)(2)(A) of the Bankruptcy Code as the basis for its requested relief. Plaintiff also named both Richard Kucha and Kristean Kucha as defendants in the caption and in the body of that document. Plaintiff attached a certificate of service to the Amended Complaint which again lists the names and addresses of individuals or entities that are not a party to this action, for example: "James E. Hogle, Attorney for Defendant, Dan S. Timmons,

³ During the pre-trial conference, Mr. McGhee noted that he had, most likely, just copied a complaint filed by Plaintiff in state court and then only edited the caption of that document before filing it in this Court. Such action does not constitute acceptable practice of law before this Court.

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202 South Prospect Street, P.O. Box 767, Ravenna, OH 44266.” [Am. Compl. at pg. 3, Docket #10].

DISCUSSION

Notwithstanding the Court imposed deadline of March 26, 2003 for the filing of the Amended Complaint, that pleading was not filed by Plaintiff until March 28, 2003. Based upon such late filing, Kristean Kucha filed motions seeking that the Amended Complaint be dismissed against her. [Docket #11 and #12]. In response to those motions, Plaintiff acknowledges the late filing but contends that FED. R. BANKR. P. 9006(f) somehow permitted it to ignore the Court’s March 26, 2003 filing deadline:

2. However, the First Amended Complaint in this matter was placed in the United States mail to the Clerk of the Court and to Defendant’s counsel and other parties on the Certificate of Service on March 25, 2003.
3. Rule 9006(F) [sic] of the Federal Rules of Bankruptcy Procedure provides “when there is a right or requirement to do some act or undertake some proceeding within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.” This mailbox rule, in effect, extends the deadline given of March 26, 2003 to March 29, 2003.

[Pl. Resp. to Mot. to Strike at pg. 2, Docket #13]. Other than the reference to Rule 9006(f), Plaintiff offers no legal support for its contention. Such contention ignores the language of Bankruptcy Rule 9006 and also evidences a basic misunderstanding of the function of that rule.

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Bankruptcy Rule 9006(a) sets forth the standard for “computing any period of time prescribed or allowed by these rules or by the Federal Rules of Civil Procedure made applicable by these rules” FED. R. BANKR. P. 9006(a). Bankruptcy Rule 9006(f) allows the addition of three days to the basic computation of time if (1) the “service of a notice or other paper” requires an affirmative action by the recipient within a prescribed period of time and (2) the “service of the notice or other paper” was effectuated by mail. FED. R. BANKR. P. 9006(f). The setting of a deadline with reference to a “period of time” is necessary because the date of the event which triggers a deadline will vary from case to case and within each case and the deadline extension in Bankruptcy Rule 9006(f) is necessary to account for time delay when service is effectuated by mail.

The deadline at issue here was set by an order of this Court with reference to a *date certain* and not a “period of time.” Once a date certain is set, the computational directives in Bankruptcy Rule 9006 are no longer operative. Accordingly, the Amended Complaint was not timely filed.

Plaintiff was required to file a complaint objecting to the dischargeability of debts in debtors’ chapter 7 case by not later than February 7, 2003. As to debtor, Richard Kucha, Plaintiff timely filed the Original Complaint on January 15, 2003, arguably objecting to the discharge of its claim. Although there is no evidence in the file that the Summons was served upon Richard Kucha, Mr. Kucha has answered the Amended Complaint and has not objected to the service deficiency.

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Plaintiff did not properly name Kristean Kucha as a defendant in the Original Complaint nor has it provided any evidence that she has been served with a summons, nor that actions necessary to cause the issuance of a summons addressed to Mrs. Kucha had been taken. Accordingly, as to Kristean Kucha, Plaintiff did not object to dischargeability in her chapter 7 case by the February 7, 2003 deadline.⁴ By granting Plaintiff until March 26, 2003 in which to file the Amended Complaint, this Court was provisionally extending the February 7th bar date.⁵ *See In re Begue*, 176 B.R. 801 (Bankr. N.D. Ohio 1995) (in which this Court held that the bar date for filing nondischargeability actions is not jurisdictional but instead in the nature of a statute of limitations which, under certain circumstances, could be equitably tolled). *But see Ohio Farmers Ins. Co. v. Leet (In re Leet)*, 274 B.R. 695 (6th Cir. B.A.P. 2002) (holding that the bar date for filing nondischargeability actions is jurisdictional and can only be extended if a motion seeking an extension is filed *before* the deadline has passed). When Plaintiff failed to file the Amended Complaint by March 26, 2003, any right it may have had to an extension of the bar date for filing a nondischargeability action against Kristean Kucha had terminated.

⁴ In its response to the motions to dismiss filed by Kristean Kucha Plaintiff contends that the filing of the Amended Complaint should “relate back” to the filing of the Original Complaint pursuant to Rule 15(c) of the Federal Rules of Civil Procedure which apply to adversary proceedings pursuant to Bankruptcy Rule 7015. Plaintiff would only be permitted to make such argument if the Amended Complaint were timely filed. Because the Amended Complaint was not timely filed, the Court need not address the applicability of Rule 15(c) any further.

⁵ Such extension was provisional given that it was set without any prejudice to Kristean Kucha’s right to object to the filing of an amended complaint.

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CONCLUSION

Based upon the foregoing the Court finds that the Amended Complaint should be dismissed as to debtor, Kristean Kucha. The Court further finds that as to debtor, Richard Kucha, the Amended Complaint should not be dismissed. An entry of judgment consistent with this opinion shall be entered as a separate pleading in this case.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: April 21, 2003