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U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
AKRON

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

|                               |   |                               |
|-------------------------------|---|-------------------------------|
| IN RE:                        | ) | CASE NO. 03-56684             |
|                               | ) |                               |
| MICHAEL RYAN MEHLING,         | ) | CHAPTER 7                     |
|                               | ) |                               |
| DEBTOR.                       | ) |                               |
|                               | ) |                               |
| <hr/> MARINA ANTON aka MARINA | ) | <hr/> ADVERSARY NO. 04-5071   |
| MALEK,                        | ) |                               |
|                               | ) | JUDGE MARILYN SHEA-STONUM     |
| PLAINTIFF,                    | ) |                               |
|                               | ) |                               |
| vs.                           | ) |                               |
|                               | ) | <b>MEMORANDUM OPINION RE:</b> |
| MICHAEL RYAN MEHLING          | ) | <b>DEFENDANT-DEBTOR'S</b>     |
|                               | ) | <b>MOTION TO DISMISS</b>      |
| DEFENDANT.                    | ) |                               |

This matter comes before the Court on the Motion of Michael Ryan Mehling (the "Defendant-Debtor") to dismiss [docket #17] (the "Motion") the complaint filed by Marina Anton (the "Plaintiff"), Plaintiffs' response to the Motion [docket #21] and the Defendant-Debtor's reply [docket #22]. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

## BACKGROUND

Based on the matters of record in this adversary proceeding, in the related main case and the stipulations of the parties, the Court makes the following findings of fact:

On December 22, 2003 (the "Petition Date") Defendant-Debtor filed a voluntary chapter 7 bankruptcy petition. Plaintiff is listed in Defendant-Debtor's schedules as holding a claim in the bankruptcy case. *See* Schedule F. On February 24, 2004, the chapter 7 trustee administering Defendant-Debtor's main bankruptcy case filed a "No Asset Report" [docket #5].

The Notice of 341 Meeting of Creditors (the "Notice"), entered as a matter of record on December 23, 2003 [docket #3] did not set forth a date by which a proof of claim had to be filed. *See* Stipulation, ¶ 2. In fact, the Notice specifically directed the recipients **not** to file a proof of claim, unless they received additional notice to do so. *See* Notice, docket #3. As such, the Plaintiff did not file a proof of claim in the underlying bankruptcy. *See* Stipulation, ¶ 2.

Prior to the Petition Date, the Common Pleas Court of Summit County, in the action entitled *Marina Anton v. Pinnacle Builders, et al.*, case number CV 2002 12 7377, as set forth in an Order, dated November 17, 2003, granted to the Plaintiff, Marina Anton, a default judgment against the Defendant Michael Ryan Mehling, on her complaint for violations of the Ohio Consumer Sales Practice Act and for breach of contract. Fraud was not mentioned in either. *See* Stipulation ¶ 1 and Exhibits 1 and 2, thereto.

Pursuant to the Notice the deadline for filing a complaint to determine the dischargeability of a particular debt was April 9, 2004. On April 8, 2004, Plaintiff timely filed

a Complaint commencing this adversary proceedings to determine the nondischargeability of her claim pursuant to 11 U.S.C. § 523(a)(2).

Thereafter, as a matter of routine case administration, the Court issued a Discharge Order on June 16, 2004 (the "Discharge Order") [docket #8]. The Discharge Order specifically excludes from its operation those debts whose dischargeability is being challenged. *See* Discharge Order, p.2 subsection (g).

### STANDARD OF REVIEW

In his motion to dismiss, Defendant-Debtor contends that Plaintiff's complaint to determine the dischargeability of a particular debt should be dismissed "since no proof of claim has been filed by the Plaintiff." When considering a motion to dismiss, a court must construe the challenged complaint in the light most favorable to the non-moving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue that must be decided is not whether plaintiff will ultimately prevail but whether plaintiff is entitled to offer evidence to support the claims stated in his complaint. *Id.* Thus, a motion to dismiss for failure to state a claim will not be granted unless it appears *beyond doubt* that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* (emphasis added). However, a court need not accept as true legal conclusions and unwarranted factual inferences and it need not conjure up unpleaded facts that might turn a frivolous claim into a substantial one. *See, e.g., Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6<sup>th</sup> Cir. 1987).

### DISCUSSION

In reliance on *Tennessee Student Assistance Corp. v. Hood*, 124 S.Ct. 1905 (2004), Defendant-Debtor's Motion to Dismiss suggests that because Plaintiff did not file a proof of

claim in the Defendant-Debtor's no-asset chapter 7 case, Plaintiff lost her claim against the Defendant-Debtor and she does not have standing to object to the dischargeability of any of the Defendant-Debtor's debts.

This Court's analysis of the Defendant-Debtor's Motion to Dismiss begins with an analysis of who has standing to object to the dischargeability of a debtor's debts.

In order to have standing to object to the Debtor's discharge and the dischargeability of certain debts, the Plaintiff must be a "creditor" within the meaning of the Bankruptcy Code. *See* Fed. R. Bankr. P. 4007(a) ("A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt.") ...

The Bankruptcy Code defines a "creditor" as an entity that has a pre-petition claim. *See* § 101(10). ...

*Compagnone v. Compagnone (In re Compagnone)*, 239 B.R. 841, 842-43 (Bankr. D. Mass. 1999). The Bankruptcy Code defines a "claim" broadly. 11 U.S.C. § 101(5). Nothing in the definition of "claim" requires or is dependent upon the filing of a "proof of claim."

The Court finds that the Plaintiff has a pre-petition "claim" against the Debtor. Therefore, the Plaintiff is a creditor and has standing to challenge the dischargeability of any of the debtor's debts. *See* Fed. R. Bankr. P. 4007(a). The next question is whether Plaintiff's failure to file proof of such claim creates a bar to Plaintiff's ability to challenge the dischargeability of the debt allegedly owed to her.

This precise issue was addressed by the bankruptcy court in *Great American Insurance Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 592-93 (Bankr. E.D. N.Y. 1983).

As a preliminary matter, a creditor's failure to file a proof of claim does not act as a bar to an action to determine dischargeability although it will preclude a recovery against debtor's bankruptcy estate in the event no claim is filed on creditor's behalf. *See* B. WEINTRAUB & A. RESNICK, BANKRUPTCY

LAW MANUAL, ¶ 5.04 (1980). The legislative history to the Code addresses this issue in its discussion of the basis for allowing the trustee or debtor to file a proof of claim on behalf of the creditor in liquidation cases.

“the trustee or debtor may file a proof of claim if the creditor does not timely file. The purpose of this subsection [501(c)] is mainly to protect the debtor if the creditor's claim is nondischargeable. If the creditor does not file, there would be no distribution on the claim, and the debtor would have a greater debt to repay after the case is closed than if the claim were paid in part or in full in the case ....”

H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 351 (1977), reprinted in Appendix 2 Collier on Bankruptcy (15th ed. 1983); see S.Rep. No. 95-989, 95th Cong., 2d Sess. 61 (1978), U.S.Code Cong. & Admin.News, pp. 5787, 5847 reprinted in Appendix 3 Collier on Bankruptcy (15th ed. 1983).

Thus, the legislature clearly intended that an adversary proceeding could be brought by a creditor to determine nondischargeability notwithstanding such creditor's failure to file a proof of claim.

Such legislative intent may be corroborated by reference to the definitional sections of the Code and applicable Bankruptcy Rules. ...

Therefore, so long as an entity has a claim against the debtor, as distinguished from a claim against the debtor's estate, that entity may commence a proceeding to determine the dischargeability of a debt (see 11 U.S.C. § 502).

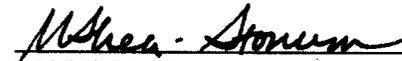
*Great American Insurance Co. v. Graziano (In re Graziano)*, 35 B.R. 589, 592-93 (Bankr. E.D. N.Y. 1983); cf. Fed. R. Bankr. P. 4007(a) (“A debtor or any creditor may file a complaint to obtain a determination of the dischargeability of any debt”); 11 U.S.C. § 101(5) and (10).

This Court agrees with the holding of the *Graziano* court; a creditor's failure to file a proof of claim does not act as a bar to an action to determine dischargeability. Nothing in the Supreme Court's decision in *Tennessee Student Assistance Corp. v. Hood* requires a contrary decision.

Furthermore, the Court finds the Defendant-Debtor's suggestion that pursuant to Fed. R. Bankr. P. 3002, the Plaintiff failed to file a timely proof of claim to be without merit. In a no-asset case there is no deadline by which a proof of claim must be filed. See *Judd v.*

*Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996) (“Because this is a ‘no-asset’ Chapter 7 case, the time for filing a claim has not, and never will, expire unless some unexempt assets are discovered.”); Fed. R. Bankr. P. 3002(c)(5) (providing that a proof of claim is timely filed in a no-asset chapter 7 case if it is filed within 90 days after the mailing of notice that in fact there are assets available for distribution to creditors).

Based on the above findings of fact and conclusions of law, the Court finds that the Defendant-debtor’s motion to dismiss is not well taken and will be denied. An entry of judgment consistent with this Memorandum Opinion will be entered separately in this case.

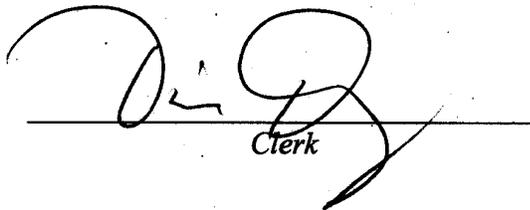
  
MARILYN SHEA-STONUM  
Bankruptcy Judge

**CERTIFICATE OF SERVICE:**

The undersigned hereby certifies that on this 31 day of October 2004, the foregoing Memorandum Opinion was sent via regular U.S. Mail to:

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Clerk