IT IS SO ORDERED.

Dated: 10:59 AM April 19 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 05-57747
	)	
Glenn E. Musser,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	
Marco and Kathryn Bocciarelli,	)	ADVERSARY NO. 06-5055
	)	
PLAINTIFF(S),	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	**ORDER DENYING DEFENDANT'S**
Glenn E. Musser	)	**MOTION TO DISMISS AND**
	)	**DEFENDANT'S MOTION TO**
DEFENDANT(S).	)	**DISQUALIFY**

This matter is before the Court on the Motion of Glenn E. Musser ("Debtor" or "Defendant") to Dismiss the Complaint of Marco and Kathryn Bocciarelli ("Plaintiffs") and the Plaintiffs' Response, and the Debtor's Motion to Disqualify Kathryn Bocciarelli as counsel. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the

Standing Order of Reference entered in this District on July 16, 1984.

Background

On October 8, 2005, the Debtor filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. The last day to file a complaint to determine dischargeability of certain debts was set as February 6, 2006. On February 6, 2006, in the main case, the Plaintiffs filed a complaint to determine dischargeability of a debt (docket #19) (the "Complaint"). The Complaint was signed by Kathryn Bocciarelli, as counsel for the Plaintiffs. The Court sent the Plaintiffs a Notice of Filing Deficiency instructing the Plaintiffs to open an adversary proceeding and re-file the complaint (docket #20). On February 7, 2006, Plaintiffs did open an adversary proceeding and re-file the Complaint (docket #21).

The Motion to Dismiss

In the Motion to Dismiss, the Debtor requests the Court dismiss the adversary due to "Plaintiffs' failure to file said complaint in a timely fashion in accordance with Fed. R. Bankr. P. 4007, or, in the alternative, dismiss the Complaint due to Plaintiffs' failure to state a claim upon which relief can granted under 11 U.S.C. § 523."

Timeliness

Fed. R. Bankr. P. 4007 provides, in pertinent part, that "a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." A complaint is filed with the court when it is delivered to the clerk of the appropriate court. *New Boston Dev. Co. v. Toler (In re Toler)*, 999 F.2d 140, 142 (6th Cir. 1993) (finding a nondischargeability complaint to be timely filed, despite procedural defect of failing to file summons simultaneously); See Fed. R. Civ. P. 5(e)

as incorporated by Fed. R. Bankr. P. 7005. "Mistakes or errors can be corrected after the document is filed." *In re Toler*, 999 F.2d at 142. On February 6, 2006, the Plaintiffs filed their Complaint with the Court electronically in the Debtor's bankruptcy case. *See* docket #19.[1] Their mistake was a technical one: electronically filing the Complaint as a pleading in the Main Case, rather than electronically opening an adversary proceeding and filing the Complaint in the adversary proceeding. Notwithstanding their failure to "open an adversary proceeding," the Plaintiffs complied with Fed. R. Bankr. P. 4007 by filing the Complaint with the Court, and they did so in a timely fashion.

Furthermore, rules governing form of pleading should be liberally construed, and motions to dismiss complaints based on pleading errors are to be disfavored. *In re Little*, 220 B.R. 13 (Bankr. D. N.J. 1998). In the *Little* case, an objection to discharge, rather than a complaint, was filed prior to the deadline set by the bankruptcy rules. The debtor argued that the objection was not a complaint and thus, no complaint was filed before the expiration of the deadline. The *Little* court found that a judgment creditors' objection, filed before the expiration of the deadline to file a complaint objecting to discharge, was sufficient to constitute a complaint. *Id.* at 19. Therefore, the court held that although defective in form, the objection was timely filed and could be amended, and such amendments were deemed to relate back to the date of the initial filing. *Id*. at 19-20.

In this case, the Plaintiffs' timely filed their Complaint, albeit in the main case. On

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[1] The Debtor's motion does not mention the February 6, 2006 filing of the Complaint by Plaintiffs in the main case. Debtor's motion ignores this filing and argues that the February 7, 2006 filing is untimely.

the date it was filed, February 6, 2006, the Complaint was served electronically on Debtor's counsel. The Plaintiffs promptly remedied the procedural defect - failing to open an adversary proceeding- by opening an adversary proceeding on February 7, 2007 and re-filing the Complaint. The Complaint was timely filed and the correction of the procedural defect the following day relates back to the date the Complaint was filed in the main case.

Failure to State a Claim

The Plaintiffs hold a state court default judgment against Debtor for violation of the Ohio Consumer Sales Practices Act. The Plaintiffs seek to have this Court determine that the state court default judgment is not dischargeable. The facts that gave rise to the state court default judgment are set forth in Plaintiffs' Complaint:

> 7. In January 2004, Plaintiffs entered into an oral agreement ("Contract") with Defendant wherein Plaintiffs hired Defendant to identify the cause of a leak in the master bathroom shower and to repair same.
>
> 8. Plaintiffs decision to enter into the Contract with Defendant was premised upon Defendant's false and fraudulent assertions and representations that he, among other things,:
>
> a) was incorporated in the State of Ohio; and
> b) had performed complete renovations on multi-million dollar homes and had satisfactorily completed many home repairs and was therefore capable of completing the work requested by Plaintiffs.
>
> 9. Plaintiffs relied on said representations in determining to enter into the aforementioned contractual relationship with Defendant.
>
> 10. Defendant performed the work initially contracted for as well as additional related work within the month of January 2004. All additional work was authorized by Plaintiffs upon the belief, induced by further fraudulent statements of Defendant, that such work was necessary and that Defendant was capable of performing such work.
>
> 11. The aforementioned work Defendant performed was both negligent and incomplete, and caused substantial damage to Plaintiff's property.
>
> 12. Plaintiff compensated Defendant in the amount of $1,085 for work performed prior to discovering that the work had been performed in a negligent manner, thereby breaching the Contract.

> 13. Defendant's negligence caused approximately $7,600 in damage to Plaintiff's property.

In the Sixth Circuit, creditors seeking to exempt a debt from discharge under § 523(a)(2)(A) must prove that:

> [1] the debtor obtained money through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to is truth;
> [2] the debtor intended to deceive the creditor;
> [3] the creditor justifiably relied on the false representation; and
> [4] its reliance was the proximate cause of the loss.

Field v Mans, 516 U.S. 59, 116 S.Ct. 437, 439 (1995); *Longo v. McClaren (In re McLaren*), 3 F.3d 958, 961 (6th Cir. 1993); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998).

Debtor argues that even if he misrepresented the corporate status of his company or his skill level, those misrepresentations are not "material misrepresentation[s] which can possibly rise to the level of fraud." A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so. Restatement (Second) of Contracts § 162; *accord Longo v. McLaren (In re McLaren)*, 136 BR. 705, 711 (Bankr. N.D. Ohio 1992)(finding that the debtor's statement that his prior oil and/or gas ventures were successful was a material misrepresentation of the facts). The Plaintiffs allege that their decision to enter into a contract with Debtor was, at least in part, based on his represented skill level and corporate status.

As Debtor points out, in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012, the court must view the allegations in the light most favorable to the nonmoving party. The court should only grant the motion

to dismiss if those allegations, when construed in plaintiff's favor, do not entitle plaintiff to relief. Plaintiffs have alleged that the Debtor made material misrepresentation upon which Plaintiffs justifiably relied to their detriment. In this case, Plaintiffs have made allegations which if true appear to state a claim for relief under § 523(a)(2). Debtor's motion to dismiss for failure to state a claim is not well taken.

The Motion to Disqualify

The Debtor requests the Court disqualify Attorney Kathryn Bocciarelli from further representation of herself and her husband Marco Bocciarelli. Debtor cites DR 5-102 of the Code of Professional Responsibility for the proposition that Kathryn Bocciarelli should not act as counsel in this case where she and/or her husband will likely be called as fact witnesses.

> DR 5-102(A) does not render an attorney incompetent to testify as a witness in a proceeding in which he is representing a litigant. When an attorney seeks to testify, his employment as counsel goes to the weight, not the competency, of his testimony.
>
> When an attorney representing a litigant in a pending case requests permission or is called to testify in that case, the court shall first determine the admissibility of the attorney's testimony without reference to DR 5-102(A). If the court finds that the testimony is admissible, then that attorney, opposing counsel, or the court sua sponte, may make a motion requesting the attorney to withdraw voluntarily or be disqualified by the court from further representation in the case. The court must then consider whether any of the exceptions to DR 5-102 are applicable and, thus, whether the attorney may testify and continue to provide representation. In making these determinations, the court is not deciding whether a Disciplinary Rule will be violated, but rather preventing a potential violation of the Code of Professional Responsibility.

Mentor Lagoons, Inc. V. Rubin, 31 Ohio St.3d 256 (1987). Disqualification "should ordinarily be granted only when a violation of the Canons of the Code of Professional

Responsibility poses a significant risk of trial taint." *Glueck v. Jonathan Logan, Inc.*, 653 F.2d 746 (2d Cir. 1981). One spouse may continue to represent the other spouse, even if it is possible that the attorney spouse could be called as a fact witness.

> Reviewing the totality of this matter, it is hard to determine where the prejudice to Mrs. Jackson would be if Mr. Jackson is called as a witness by the opposition. Pursuant to the exception contained within DR 5-102(B), where legal counsel learns, or it is obvious that he will be called as a witness by the opposition, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

Jackson v. Bellomy, 105 Ohio App.3d 341, 663 N.E.2d 1328 (Ohio App. 10 Dist. 1995).

Debtor's motion to disqualify is premature. No one has identified witnesses and the Court does not have sufficient information to make a determination on the Motion to Disqualify at this point. In addition, Plaintiffs appear to have retained Patrick Keating, Esq. as co-counsel. *See* signature block of Plaintiffs' Response to the Motion to Dismiss. Thus, Debtor's motion to disqualify is not well taken.

For the reasons discussed above, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that

> Defendant's Motion to Dismiss [docket #8] is denied and Defendant's Motion to Disqualify [docket #7] is denied.

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cc: (via electronic mail) Patrick Keating
Peter Tsarnas

(via U.S. mail) Kathryn Bocciarelli