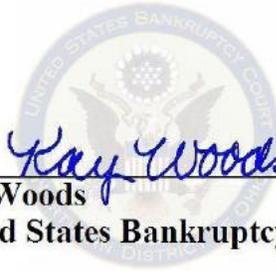


IT IS SO ORDERED.

Dated: November 9, 2016
11:30:04 AM



Kay Woods
 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DAVID A. HULL,

Debtor.

* * * * *

WARREN CONCRETE & SUPPLY CO.,

Plaintiff,

v.

DAVID A. HULL,

Defendant.

CASE NUMBER 15-41456

ADVERSARY NUMBER 15-04058

HONORABLE KAY WOODS

 MEMORANDUM OPINION REGARDING MOTION FOR SUMMARY JUDGMENT

Before the Court is Motion for Summary Judgment (Doc. 30)
 filed by Debtor/Defendant David A. Hull on September 19, 2016.

The Debtor requests summary judgment on the basis that the nondischargeability action filed by Plaintiff Warren Concrete & Supply Co. ("Warren Concrete") is barred by the Ohio statute of limitations for fraud. Warren Concrete filed Plaintiff's Response to Defendant's Motion for Summary Judgment ("Response") (Doc. 33) on October 12, 2016.¹ The Debtor filed Reply to Plaintiff's Response to David A. Hull's Motion for Summary Judgment ("Reply") (Doc. 35) on October 19, 2016. Warren Concrete filed Plaintiff's Sur-Reply Brief to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment ("Sur-Reply") (Doc. 36) on October 24, 2016.

For the reasons set forth herein, the Court will deny the Motion for Summary Judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

¹ After expiration of the time period for filing a response to the Motion for Summary Judgment, Warren Concrete was granted leave to file its response. (See Doc. 32.)

I. FACTS

The Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on August 13, 2015. The first date set for the meeting of creditors pursuant to 11 U.S.C. § 341(a) was October 6, 2015. Accordingly, December 7, 2015 was the last date to file a complaint objecting to the discharge of a debt pursuant to 11 U.S.C. § 523(c).² FED. R. BANKR. P. 4007(c) (2016) (“[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).”).³

On December 7, 2015, Warren Concrete filed Complaint Excepting Discharge of Debt Pursuant to 11 U.S.C. § 523(a)(2)(A) (“Complaint”) (Doc. 1), which commenced this adversary proceeding. The Complaint includes the following allegations, which the Court must view in the light most favorable to Warren Concrete in evaluating the Debtor’s Motion for Summary Judgment:

² 11 U.S.C. § 523(c)(1) states, in pertinent part,

[T]he debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c)(1) (2016) (emphasis added).

³ December 7, 2015 was the first non-weekend day following the 60th day after the first date set for the meeting of creditors. See FED. R. BANKR. P. 9006(a)(1)(C) (2016).

1. Warren Concrete owns and operates a concrete supply company, which supplies concrete on credit to parties it deems creditworthy. (Compl. ¶¶ 8-9.)
2. The Debtor and his ex-wife, JoAnne Hull, were affiliated with Tri-County Concrete, Inc. ("Tri-County"). (*Id.* ¶ 10.)
3. In February 1997, Tri-County obtained a line of credit from Warren Concrete. (*Id.*)
4. In 2005, the Debtor and JoAnne Hull divorced. (*Id.* ¶ 12.)
5. Pursuant to the Debtor and JoAnne Hull's divorce decree, the Debtor retained Tri-County and was solely responsible for its debts. (*Id.*)
6. Following his divorce from JoAnne Hull, the Debtor was no longer authorized to utilize Tri-County's line of credit with Warren Concrete. (*Id.* ¶ 14.)
7. Following his divorce from JoAnne Hull, the Debtor continued to charge concrete and services to Tri-County's line of credit with Warren Concrete and, in doing so, falsely represented that (i) he remained authorized to utilize Tri-County's line of credit with Warren Concrete; and (ii) Tri-County was a corporate entity, when in fact it was not. (*Id.* ¶¶ 13-14.)
8. The Debtor intended to deceive Warren Concrete, which justifiably relied on the Debtor's false representations. (*Id.* ¶¶ 15-16.)

9. In April 2008, the Debtor failed to pay three invoices for concrete and services charged to Tri-County's line of credit with Warren Concrete ("Invoices"). (*Id.* ¶ 17.)

10. On July 20, 2010, Warren Concrete obtained a default judgment in the amount of \$42,619.59 against the Debtor and Tri-County for the unpaid Invoices ("Judgment"), a copy of which is attached to the Complaint as Exhibit B. (*Id.*)

Warren Concrete requests the Court to find that the balance of the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) because it is a debt for property and services obtained by false pretenses, a false representation, or actual fraud.

On January 27, 2016, the Debtor filed Answer of the Debtor/Defendant to the Complaint Filed by the Plaintiff ("Answer") (Doc. 11), in which the Debtor asserts the statute of limitations and the doctrine of laches as affirmative defenses. (Ans. ¶¶ 21, 24.)

On September 19, 2016, the Debtor filed the Motion for Summary Judgment presently before the Court. The Debtor states that, on October 8, 2009, Warren Concrete filed suit against the Debtor, JoAnne Hull, and Tri-County for the unpaid Invoices in the Trumbull County, Ohio, Court of Common Pleas ("State Court Action"). (Mot. for Summ. J. ¶ 11.) The Debtor states that he did not file an answer in the State Court Action and, thus, default judgment

was entered in favor of Warren Concrete in the amount of the Judgment. (*Id.* ¶ 14.)

The Debtor asserts that, pursuant to Ohio Revised Code § 2305.09, the statute of limitations for a cause of action based on fraud is four years. The conduct serving as the basis for the Complaint – *i.e.*, the Debtor's failure to pay the Invoices – occurred in April 2008. Warren Concrete filed the Complaint on October 8, 2009 and received the Judgment on July 21, 2010. (*Id.* ¶¶ 11, 14.) However, the State Court Action "did not allege fraud or make any other allegations of deception or malicious behavior." (*Id.* at 7.) Because the present adversary proceeding is based on alleged fraud and misrepresentation that occurred in April 2008, but was not filed until December 7, 2015, the Debtor argues that this proceeding is barred by the four-year statute of limitations for fraud. (*Id.* at 8-9.)

In its Response, Warren Concrete argues, "[T]he statute of limitations for fraud actions is irrelevant and immaterial where debt has been established by a pre-bankruptcy judgment against the debtor. In this action to determine dischargeability of previously declared money judgments, the statutes of limitations do not apply." (Resp. at 3 (citations omitted).) "[T]his determination of nondischargeability is to be rendered by federal bankruptcy courts and [Warren Concrete] need not have anticipated making a

claim for *fraud* in its previous civil claim against [the Debtor].”
(*Id.* at 3-4.)

In his Reply, the Debtor presents the additional argument that Warren Concrete’s cause of action is barred by the doctrine of laches because “a legal right or claim will not be enforced or allowed if a long delay in asserting the right or claim has prejudiced the adverse party.” (Reply at 2-3.)

In its Sur-Reply,⁴ Warren Concrete first argues that the affirmative defense of laches should not be considered at this juncture because the Debtor failed to raise such defense in his Motion for Summary Judgment. In the alternative, should the Court consider the defense of laches, Warren Concrete argues that the Debtor has failed to demonstrate the necessary element of prejudice, which is ultimately an issue of material fact precluding summary judgment.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, states, in pertinent part:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material

⁴ This Court’s Adversary Case Management Initial Order (“Case Management Order”) (Doc. 6) states that, following the filing of a dispositive motion, a response thereto, and a reply thereto, “no further pleading will be permitted.” (Case Mgmt. Order ¶ 6(B).) Because the purpose of the Sur-Reply is to reply to “an additional affirmative defense [*i.e.*, the doctrine of laches] that was not raised in [the Debtor’s] motion for summary judgment” (Sur-Reply at 1), the Court hereby grants Warren Concrete leave to file the Sur-Reply *nunc pro tunc*.

fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (2016). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists "if a reasonable person could return a verdict for the non-moving party." *Jacob v. Twp. of W. Bloomfield.*, 531 F.3d 385, 389 (6th Cir. 2008) (citing *Anderson*, 477 U.S. at 248).

"The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The burden then shifts to the nonmoving party to present specific facts demonstrating the existence of a genuine dispute. *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). In evaluating a motion for summary judgment, "the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita*, 475 U.S. at 587).

III. ANALYSIS

The first issue before the Court is whether Warren Concrete's failure to bring a cause of action for fraud within the four-year Ohio statute of limitations bars the present proceeding, which was commenced more than four years after the alleged fraud and misrepresentation occurred. The Court finds that, because Warren Concrete possesses the Judgment and filed this adversary proceeding within the time limit prescribed by Federal Rule of Bankruptcy Procedure 4007(c), the Ohio statute of limitations has no bearing on this proceeding.

This precise issue was previously addressed by this Court in *Ally Financial Inc. v. Mercure (In re Mercure)*, No. 11-40258, Adv. No. 11-04145, Docs. 34-35 (Bankr. N.D. Ohio June 7, 2012), in which the Court concluded, "[S]o long as a creditor timely establishes a debt, the creditor may later seek a determination that such debt is non-dischargeable, regardless of the state statutes of limitations." *Id.* at *12-13. In ruling in the *Mercure* case, this Court focused on *Brown v. Felsen*, 442 U.S. 127 (1979), wherein the Supreme Court considered a similar argument but in the context of a defense of *res judicata* or claim preclusion. In *Brown*, the debtor argued that, because the state court judgment did not specify that it was based on fraud, claim preclusion prohibited the creditor from asserting that the debt was nondischargeable due to fraud. The Supreme Court rejected the debtor's defense and

concluded, “[W]e hold that the bankruptcy court is not confined to a review of the judgment and record in the prior state-court proceedings when considering the dischargeability of [the debtor]’s debt.” *Id.* at 138-39. The Supreme Court first noted that determinations of dischargeability are within the exclusive jurisdiction of the bankruptcy court and stated, “If a state court should expressly rule on [dischargeability] questions, then giving finality to those rulings would undercut Congress’ [sic] intention to commit [dischargeability] issues to the jurisdiction of the bankruptcy court.” *Id.* at 135. The Supreme Court further discussed the policy reasons supporting its finding:

When [dischargeability] issues are not identical to those arising under state law, the parties have little incentive to litigate them. In the collection suit, the debtor’s bankruptcy is still hypothetical. The rule proposed by [the debtor] would force an otherwise unwilling party to try [dischargeability] questions to the hilt in order to protect himself against the mere possibility that a debtor might take bankruptcy in the future. In many cases, such litigation would prove, in the end, to have been entirely unnecessary

Id.

A statute of limitations defense nearly identical to that presented by the Debtor was addressed by the Bankruptcy Court for the Southern District of Ohio in *Spinnenweber v. Moran (In re Moran)*, 152 B.R. 493 (Bankr. S.D. Ohio 1993), in which the debtor moved to dismiss a dischargeability proceeding on the basis that the underlying Ohio statute of limitations for breach of fiduciary

duty had expired. The bankruptcy court denied the debtor's motion and reasoned,

Implicit in the debtor's motion is the premise that the [creditors] must have alleged a breach of fiduciary duty in state court to preserve their claim against the debtor under Ohio's statute of limitations and to bring the same claim in bankruptcy court. There is a fundamental flaw in the debtor's position in that it fails to recognize the distinction between a suit brought under state law to enforce state created rights and a suit filed in bankruptcy court to determine dischargeability issues under § 523(a) of the Bankruptcy Code.

Id. at 495. The court further concluded that its analysis applies equally in situations where a creditor receives a judgment under one theory of recovery and later asserts that the judgment is nondischargeable under a different theory.

In short, there is no requirement that the allegations of a complaint filed in state court prior to a debtor filing a petition in bankruptcy correspond to the elements of the grounds contained in § 523(a) of the Bankruptcy Code. Otherwise, plaintiffs in state court would be required to anticipate the bankruptcy of every defendant and litigate every conceivable issue under § 523(a) in the event a defendant should subsequently file bankruptcy. Such needless litigation is not required by the Bankruptcy Code. When a creditor is attempting to obtain a judgment in state court it may be assumed that it is the success of the litigation and the amount of recovery that are significant to the creditor and not the particular theory of recovery.

Id. at 496; see also *Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331, 337 (10th Cir. 1997) ("[T]he question of the dischargeability of the debt under the Bankruptcy Code is a distinct issue governed solely by the limitations periods established by bankruptcy law. In this case, the debt has already

been established, so the state statute of limitations is immaterial."); *Lee-Benner v. Gergely (In re Gergely)*, 110 F.3d 1448, 1454 (9th Cir. 1997) ("[The Creditor]'s debt is established. The state limitations period for fraud actions is irrelevant to the dischargeability of an established debt.").

The Debtor has presented no binding or persuasive authority to cause this Court to reconsider its holding in *Mercure*. In this proceeding, there is no dispute that Warren Concrete obtained the Judgment against the Debtor. There is also no dispute that Warren Concrete timely filed this proceeding pursuant to Federal Rule of Bankruptcy Procedure 4007(c). The fact that Warren Concrete did not assert a cause of action for fraud or misrepresentation in the State Court Action is of no consequence. Likewise, because the debt owed to Warren Concrete in the form of the Judgment is already established, the Ohio statute of limitations for fraud is of no consequence.

Similarly, this proceeding is not barred by the doctrine of laches. Because the Debtor raised the doctrine of laches for the first time in his Reply, it is untimely. However, even if laches had been timely addressed, the argument is unavailing. As previously stated, Congress vested bankruptcy courts with the exclusive jurisdiction to determine issues of dischargeability. *Brown*, 442 U.S. at 135-36. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and

(2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961) (citations omitted). Because bankruptcy courts possess exclusive jurisdiction over dischargeability proceedings, Warren Concrete could not have filed this proceeding until after the Debtor filed his bankruptcy petition. Warren Concrete commenced this proceeding less than four months after the Debtor filed his bankruptcy petition and within the time prescribed by Federal Rule of Bankruptcy Procedure 4007(c). As a consequence, the Court finds that the doctrine of laches is not a defense to this timely-filed proceeding.

The Debtor is not entitled to judgment as a matter of law based on the affirmative defenses of the statute of limitations and the doctrine of laches. As a consequence, the Court will deny the Motion for Summary Judgment.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: November 9, 2016
11:30:21 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

DAVID A. HULL,

Debtor.

* * * * *

WARREN CONCRETE & SUPPLY CO.,

Plaintiff,

v.

DAVID A. HULL,

Defendant.

CASE NUMBER 15-41456

ADVERSARY NUMBER 15-04058

HONORABLE KAY WOODS

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Before the Court is Motion for Summary Judgment (Doc. 30)

filed by Debtor/Defendant David A. Hull on September 19, 2016.

The Debtor requests summary judgment on the basis that the nondischargeability action filed by Plaintiff Warren Concrete & Supply Co. ("Warren Concrete") is barred by the Ohio statute of limitations for fraud. Warren Concrete filed Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 33) on October 12, 2016. The Debtor filed Reply to Plaintiff's Response to David A. Hull's Motion for Summary Judgment (Doc. 35) on October 19, 2016. Warren Concrete filed Plaintiff's Sur-Reply Brief to Defendant's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 36) on October 24, 2016.

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion for Summary Judgment entered on this date, the Court hereby finds:

1. As a matter of law, the Ohio statute of limitations for fraud is not an affirmative defense to this proceeding.
2. As a matter of law, the doctrine of laches is not an affirmative defense to this proceeding.
3. The Debtor is not entitled to judgment as a matter of law.

As a consequence, the Court hereby denies the Motion for Summary Judgment.

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