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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 01-21916
)
MARIA M. MICELI,) Chapter 7
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
_____)
)
FEDERAL INSURANCE COMPANY,) Adversary Proceeding No. 02-1054
)
Plaintiff,)
)
v.) **MEMORANDUM OF OPINION**
)
MARIA M. MICELI,)
)
Defendant.)

Federal Insurance Company (“Federal”) filed this Adversary Proceeding to assert that it is owed a debt by the Debtor-Defendant Maria Miceli and titled the complaint as one to obtain a determination of the dischargeability of that debt. The parties filed three motions which address the sufficiency and timeliness of Federal’s dischargeability request: (1) Federal’s motion for leave to amend its complaint; (2) the Debtor’s motion for summary judgment; and (3) the Debtor’s motion for relief from judgment entered in the Chapter 7 case which extended the time for Federal to file a dischargeability complaint. (Docket 12; Docket 6; and Case No. 01-21916, Docket 10).¹

¹ Each party opposes the other’s request. (Docket 17; Docket 21; Case No. 01-21916, Docket 11). Federal also filed a motion for summary judgment, but the Court will not address it at this time. (Docket 20).

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JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS

A.

In voluntary Chapter 7 cases, debtors are required to file a complete list of their creditors with their Chapter 7 petition. FED. R. BANKR. P. 1007(a). The clerk's office then sends a notice to the creditors advising them, among other things, of the last date for filing a complaint to determine the dischargeability of certain debt. See 11 U.S.C. § 523(c); FED. R. BANKR. P. 4007(c). On occasion, a debtor will omit a creditor from the original filing. The debtor corrects that omission by filing an amendment to the relevant schedule. On receipt of such an amendment, the clerk's office routinely asks the Court to issue an order extending the deadline to determine dischargeability of debt solely for the newly-added creditor.

B.

In this case, the Debtor did not include Federal in her initial list of creditors. The clerk's office sent other creditors notice of the March 4, 2002 deadline for filing dischargeability complaints. (Case No. 01-21916, Docket 2). Although Federal was not scheduled as a creditor, it nevertheless filed the complaint that commenced this Adversary Proceeding (the "Complaint") on February 1, 2002. On March 7, 2002, the Debtor filed a motion for summary judgment on the ground that the Complaint does not adequately request nondischargeability and the deadline for filing such complaints had elapsed a few days earlier.

On April 18, 2002, the Debtor amended her Schedule F in the main bankruptcy case to include previously omitted creditors, including Federal. That amendment triggered the clerk's

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office to request the Court to issue an order in the main case extending the dischargeability complaint deadline to May 22, 2002 as to the newly-named creditors, only, which the Court did. (Case No. 01-21916, Docket 9).

The Court held an initial pretrial in the Adversary Proceeding on April 18, 2002. (Docket 3). Following that conference, the Court issued an Adversary Case Management Scheduling Order that, among other things, set an April 26, 2002 deadline for amending pleadings and adding parties. (Docket 11 ¶ 4).

On April 25, 2002, Federal filed its Motion for Leave to amend the Complaint. The Debtor opposes this motion on the ground that the Complaint as filed is defective and she is entitled to summary judgment. She also asks that the order extending the dischargeability deadline for Federal to May 22, 2002 be vacated because it is unnecessary and deprives her of her untimeliness defense to the Complaint. Federal opposes the Debtor's motions.

C.

Federal's Complaint is titled "COMPLAINT TO OBTAIN DETERMINATION OF DISCHARGEABILITY OF DEBT." Paragraph one states:

1. Jurisdiction is vested in this Court by reason of the Debtor filing a petition for Relief under Chapter 7 of the bankruptcy Reform Act. This immediate action is brought pursuant to 11 USC Sections 523(a)(2)(A), 523(a)(4), and 523(a)(6), and is a core proceeding pursuant to 28 USC Section 157(b)(2)(I).

The Complaint sets forth these operative facts: the Debtor was employed by the Cleveland Indians; she diverted and converted \$134,311.51 from her employer during the employment; the Debtor pleaded guilty to theft of these funds; Federal insured the Cleveland Indians against such losses; Federal paid its insured; and Federal is now subrogated to the extent of that payment. The Complaint requests judgment against the Debtor based on claims of conversion, forgery, fraud,

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and breach of fiduciary duty; it does not specifically request a § 523 nondischargeability determination.

DISCUSSION

A. The Adversary Case Management Scheduling Order

The issue of amending pleadings came up at the initial pretrial and the order that followed set an April 26, 2002 deadline for such amendments. Federal could, therefore, simply have filed its amended complaint under the terms of that order. Inasmuch as Federal filed its Motion for Leave to amend the Complaint *instanter* before that deadline, the filing was timely under the Court's order, wholly apart from the order entered in the main bankruptcy case that extended the date for filing nondischargeability complaints. Under this analysis, Federal did not need to move for leave, Federal timely filed the amended complaint, and the remaining issues are moot. Arguably, however, the Debtor is also asking the Court to reconsider this scheduling order and so, in the interest of fairness, the Court will address the merits of the Motion for Leave to Amend.

B. Federal's Motion for Leave to Amend

1.

Federal Civil Rule 15 governs amended pleadings. FED. R. CIV. P. 15 (made applicable by FED. R. BANKR. P. 7015). Federal, having timely filed a complaint, asks for leave to amend to request a dischargeability determination under §§ 523(a)(2), (4), and (6). *See* FED. R. BANKR. P. 4007(c) (establishing the time for filing dischargeability complaints). “[A] party may amend [a pleading] only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” FED. R. CIV. P. 15(a). Leave to file an amended complaint “should not be denied unless there is evidence of undue delay, bad faith, undue prejudice to the non-movant, or futility.” *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 519

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(6th Cir. 2001). The Debtor argues that leave should be denied because of undue delay, prejudice to the Debtor, and futility.

2.

The Debtor contends that Federal should not be permitted to amend its Complaint because Federal unduly delayed filing its motion. In support, the Debtor points out that Federal filed its motion after the initial bar date and forty seven days after the Debtor filed her motion for summary judgment. The Debtor, however, filed her summary judgment motion about one month after the Complaint was filed, with Federal's motion following about six weeks later. Based on these circumstances, Federal requested leave early on in the proceedings and any delay in the filing was not undue.

The next consideration is whether leave should be denied as futile because the dischargeability bar date has passed.² The amendment will be futile unless the amended complaint relates back to the original timely filed Complaint. Federal Civil Rule 15(c) provides that an amended complaint will relate back to the original filing to the extent "the claim . . . asserted in [it . . . arises] out of the conduct, transaction, or occurrence set forth in the original pleading[.]" FED. R. CIV. P. 15(c)(2) (made applicable by FED. R. BANKR. P. 7015).³ Relation back is premised on:

the notion that once litigation involving a particular conduct or a given transaction or occurrence has been instituted, the parties are

² For purposes of this discussion, the Court is not considering the existence or effect of the Order extending the time for Federal to file a dischargeability complaint.

³ Federal Civil Rule 15(c)(1) provides that an amended complaint relates back to the date of the original complaint if "relation back is permitted by the law that provides the statute of limitations applicable to the action." FED. R. BANKR. P. 15(c)(1) (made applicable by FED. R. BANKR. P. 7015). That provision does not apply here because Bankruptcy Rule 4007(c) which establishes the time for filing a complaint to determine dischargeability does not address the relation back issue. FED. R. BANKR. P. 4007(c).

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not entitled to the protection of the statute of limitations against the later assertion by amendment of . . . claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading.

Brown v. Shaner, 172 F.3d 927, 932 (6th Cir. 1999). See also, *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 248 (6th Cir. 2000) (“[W]hether a statute of limitations will be permitted to bar an amended claim turns on whether the amended claim arose out of the same conduct, transaction, or occurrence as that set forth in the original complaint.”). Additionally, notice and substantial prejudice to the opposing party are critical considerations in determining whether an amendment relates back. *Miller*, 231 F.3d at 250. See also, *Gschwend v. Markus (In re Markus)*, 268 B.R. 556, 563-64 (B.A.P. 9th Cir. 2001); *KBHS Broadcasting Co. v. Sanders (In re Bozeman)*, 226 B.R. 627, 630-31 (B.A.P. 8th Cir. 1998).

Federal’s proposed amended complaint is based on the same facts as its original Complaint and arises out of the same conduct, transactions and occurrences. The Debtor had notice that Federal was disputing the dischargeability of its debt because the original Complaint clearly states that it is brought under §§ 523(a)(2), (a)(4), and (a)(6). Amending the Complaint in the manner requested by Federal will not prejudice the Debtor under the facts of this case. Leave to amend the Complaint is appropriate and the amended complaint will relate back.

The *Bozeman* decision cited by the Debtor does not compel a different result. *KBHS Broadcasting Co. v. Sanders (In re Bozeman)*, 226 B.R. 627 (B.A.P. 8th Cir. 1998). *Bozeman* addressed a request to amend a complaint for breach of contract and breach of fiduciary duty arising out of contract. The creditors filed their complaint in district court; when the defendant filed bankruptcy, the case was transferred to the bankruptcy court at the creditors’ request. The day after the deadline for filing nondischargeability complaints, the creditors moved to amend their complaint to assert a § 727 objection to discharge and § 523 nondischargeability. The

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bankruptcy court denied the motion because those allegations were well beyond the scope of the original pleading. The case before this Court has significantly different facts than those presented in *Bozeman*. Here, it was clear from the start that Federal intended to contest the dischargeability of its debt. The Bankruptcy Code sections on which Federal relies are stated on the face of the Complaint. And the proposed amended complaint is within the scope of the original Complaint because Federal is merely adding a nondischargeability request based on the same facts.

For these reasons, Federal's Motion for leave to file the amended complaint is granted.

C. The Debtor's Motion for Summary Judgment

The Debtor requested summary judgment because the original Complaint did not include a request for a dischargeability determination.⁴ As Federal has now been given leave to file the amended complaint which does include a § 523(a) request, this Motion is denied as moot.

D. The Debtor's Motion for Relief from Judgment

The Debtor also filed a motion for relief from judgment requesting that the Order which extended the time for Federal to file a dischargeability proceeding be vacated. (Case No. 01-21916, Docket 10). That Motion is also moot because Federal has been given leave to file the amended complaint and the amendment will relate back to the timely filed Complaint. The Motion for relief from judgment is, therefore, denied on that basis.

⁴ Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(C), made applicable by FED. R. BANKR. P. 7056; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Summary judgment may be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Northland Ins. Co. v. Guardsman Prods., Inc.*, 141 F.3d 612, 616 (6th Cir. 1998) (quoting *Agristor Fin. Corp. v. Van Sickle*, 967 F.2d 233, 236 (6th Cir. 1992)).

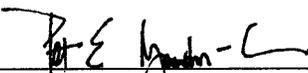
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CONCLUSION

For the reasons stated: (1) Federal's Motion for leave to amend its complaint is granted; (2) Debtor's Motion for summary judgment is denied; and (3) Debtor's Motion for relief from judgment is denied.

As the Debtor's Motion for Relief from Judgment is filed in the main case, the Clerk's office is directed to docket this Memorandum of Opinion in both the main case and the adversary proceeding. Separate orders will be entered reflecting these decisions.

Date: 17 September 2002



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Andrew Kasle, Esq.
Sheldon Stein, Esq.

By: Joyce L. Gordon, Secretary
Date: 9/17/02

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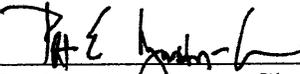
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Debtor.) Judge Pat E. Morgenstern-Clarren
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FEDERAL INSURANCE COMPANY,) Adversary Proceeding No. 02-1054
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Plaintiff,)
)
v.) **ORDER**
)
MARIA M. MICELI,)
)
Defendant.)

For the reasons stated in the Memorandum of Opinion filed this same date: (1) the Motion of Federal Insurance Company for leave to amend its complaint is granted (Docket 12); and (2) the Debtor's Motion for summary judgment is denied as moot. (Docket 6).

IT IS SO ORDERED.

Date: 17 Sept 2002



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Andrew Kasle, Esq.
Sheldon Stein, Esq.

By: Joyce L. Gordon, Secretary
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**
)

For the reasons stated in the Memorandum of Opinion filed this same date, the Debtor's Motion for relief from judgment is denied as moot. (Docket 10).

IT IS SO ORDERED.

Date: 17 September 2002

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by mail on: Andrew Kasle, Esq.
Sheldon Stein, Esq.

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