UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
	)	
DIANE BRODERICK,	)	CASE NO. 01-61603
	)	
Debtor.	)	JUDGE RUSS KENDIG
	)	
ESTATE OF MARIE S. GEORGEOFF,	)	ADV. NO. 02-6056
	)	
Plaintiff,	)	
	)	**MEMORANDUM OPINION**
v.	)	
	)	
DIANE BRODERICK,	)	
	)	
Defendant.	)	

Plaintiff, The Estate of Marie S. Georgeoff, (hereinafter "plaintiff" or "Estate"), commenced this adversary proceeding seeking to revoke the discharge of Diane Broderick (hereinafter "debtor") pursuant to 11 U.S.C. § 727(d)(1). Now before the court are cross-motions for summary judgment. Both motions are brought pursuant to Fed. R. Civ. P. 56 as incorporated into bankruptcy practice at Fed. R. Bankr. P. 7056.

The court has jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334 and the general order of reference entered in this district on July 16, 1984. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

I. Standard of Review

Fed. R. Bankr. P. 7056 provides that a motion for summary judgment should be granted "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, "'the inferences to be drawn from the underlying facts contained in the [moving party's] materials must be viewed in the light most favorable to

the party opposing the motion.'" *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 158-59 (1970) (quoting *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). If the evidence as presented "could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co*, 391 U.S. 253, 288-89 (1968)).

The moving party "bears the initial responsibility of informing the . . . court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Thereafter, the nonmoving party must come forward and demonstrate the existence of genuine issues of material fact. The nonmoving party cannot merely rely on the pleadings or a mere scintilla of evidence to demonstrate the existence of such facts, but instead must specifically set forth evidence sufficient to demonstrate the existence of disputed material facts. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex*, 477 U.S. at 324; *Cities Serv.*, 391 U.S. at 288. Only facts which could conceivably impact the outcome of the litigation are material. *See Liberty Lobby*, 477 U.S. at 248.

II. Facts

Debtor filed her chapter 7 bankruptcy petition on April 19, 2001, listing a civil judgment for $60,000.00 owed to plaintiff on Schedule F. Her Statement of Financial Affairs identified two pending suits regarding criminal charges for actions taken against plaintiff. The debtor's 341 meeting was scheduled for June 19, 2001 with the last date to objection to debtor's discharge being August 20, 2001. Plaintiff's attorney, Ronald Towne entered an appearance with this court on July 13, 2001. Debtor received her discharge on October 24, 2001. Plaintiff did not file a complaint to object to debtor's discharge until April 9, 2002. The parties argue about the facts, but they are not presented sequentially. Attached as Exhibit A is a time line of debtor's bankruptcy case and the relevant facts relating to the probate estate of Marie Georgeoff in the Probate Division of the Court of Common Please in Summit County. The time line is helpful to grasp the sequence of events leading up to these proceedings.

III. Arguments Presented

Plaintiff filed a complaint to revoke the debtor's discharge pursuant to 11 U.S.C. § 727(d)(1). It argues that debtor obtained her discharge through fraud by "falsif[ying] testimony regarding particularities of pending discharge," Complaint at ¶ 5, "intentionally omitt[ing] a substantial asset from proposed schedule," Complaint at ¶ 6, and because an "underlying state proceeding adjudicated debtor as criminally culpable for the concealment of assess of The Estate of Marie S. Georgeoff." Complaint at ¶ 7. Plaintiff also argues that it did not have knowledge of the bankruptcy proceeding or the alleged fraud until after the date to object to the discharge had passed.

Debtor argues that plaintiff has not pleaded any facts to support its claim that debtor

received her discharge through fraud. Plaintiff does not indicate what testimony was falsified by debtor or when and where the alleged false testimony was given. Debtor also argues that plaintiff failed to allege what assets were intentionally omitted from the debtor's schedules**.** Debtor counters that the plaintiff had knowledge of both the bankruptcy proceeding and any alleged fraud prior to the date of discharge due to the fact that plaintiff's attorney filed an appearance with this court on July 13, 2001, thirty-eight days before the last date to object to debtor's discharge.

IV. Analysis

A. 11 U.S.C. § 727(d)(1)

1. Debtor's discharge was not obtained through fraud.

Plaintiff filed a complaint to revoke debtor's discharge pursuant to 11 U.S.C. § 727(d)(1). This section reads as follows:

> (d) On request of . . . a creditor . . . and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if-
>
> > (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of the discharge;

11 U.S.C. § 727(d)(1) (West 2003). Plaintiff must prove both elements in order to prevail. The debtor must have committed a fraud in fact which would have barred the discharge had the fraud been known. *In re Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991); *In re Peli*, 31 B.R. 952, 955 (Bankr. E.D.N.Y. 1983). To satisfy the second element, plaintiff must show that it did not know of any facts that would have put it on notice of a possible fraud. *Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991) citing *West Suburban Bank v. Arianoutsos (In re Arianoutsos)*, 116 B.R. 116, 118-19 (Bankr. N.D. Ill. 1990). This requires the creditor to diligently investigate any possibly fraudulent conduct before the discharge. *Id*. citing *In re Jones*, 71 B.R. 682, 683 (S.D. Ill. 1987); *In re Hollis & Co.*, 86 B.R. 152, 156 (Bankr. E.D. Ark. 1988); *In re Baker*, 66 B.R. 652, 653 (Bankr. D. Nev. 1986). Plaintiff cannot prove these elements.

Initially, any complaint brought alleging fraud must be pleaded with particularity pursuant to Fed. R. Civ. P. 9(b)(1). Fed. R. Bankr. P. 7009 incorporates Fed. R. Civ. P. 9(b)(1) which requires that a compliant brought pursuant to § 727(d) set forth "the circumstances constituting fraud . . . [which] shall be stated with particularity." Fed. R. Civ. P. 9(b). While Fed. R. Civ. P. 9(b) is to be liberally construed in conjunction with Fed. R. Civ. P. 8, the Sixth Circuit requires a plaintiff to allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants and the

resulting injury to the plaintiff in order to satisfy the pleading standard. *Morrison v. Steiman*, No. 2:01-CV-1143, 2002 U.S. Dist. LEXIS 21507, at * 5 (S.D. Ohio Sept. 6, 2002), citing *Coffey v. Foamex L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1992). Plaintiff has failed to meet this standard and has not pleaded fraud with particularity.

Plaintiff's complaint alleges that the debtor's "discharge was obtained through fraud of the debtor in that the Defendant falsified testimony regarding particularities of pending discharge," Complaint at ¶ 5, and that the "discharge was obtained through fraud of the debtor in that debtor intentionally omitted a substantial asset from proposed schedule (See Exhibit 'A')." Complaint at ¶ 6. Lastly it alleges that the "discharge was obtained through fraud of the debtor in that the underlying state proceeding adjudicated debtor as criminally culpable for the concealment of assets of The Estate of Marie S. Georgeoff (See Exhibit 'B')." Complaint at ¶ 7. These allegations are not factually supported.

Plaintiff's complaint is devoid of specific allegations of fraud and contains only broad allegations. Plaintiff has not provided any evidence that debtor committed a fraud in fact which would have barred the discharge. Neither the complaint, nor plaintiff's motion for summary judgment, contain facts as to the content of the misrepresentation, the time or the place of the false testimony, or what assets were omitted from the schedules or concealed from the court. The obvious reason is that such evidence does not exist relating to the subject of revocation of discharge.

Regardless of the fact that plaintiff has failed to plead fraud with particularity, upon the court's review of the file, the debtor has not engaged in fraudulent activity relating to the subject of revocation of discharge. Debtor listed both the civil judgment owed to the Estate on Schedule F and the criminal and probate proceedings regarding the Estate in Statement of Financial Affairs question four. The answer to question four was brutally frank, listing both cases by case name, number, and the specific courts and division. One was specifically identified as a "Criminal Prosecution" with a status of "Pending" and the other as "Exceptions to Inventory and *Concealment of Assets*" (italics added) with a status of "Pending." This is as subtle and deceptive as a sledgehammer.

The court is aware that debtor was convicted of concealing assets from the probate estate, but that is not per se evidence that she concealed assets from the bankruptcy court. Debtor listed the criminal proceeding in her petition as pending. Debtor even attempted to dismiss her bankruptcy case after counsel for the plaintiff entered his appearance but the chapter 7 trustee objected and the debtor thereafter withdrew the request. The trustee, Michael Demczyk, filed the minutes of the meeting of creditors on September 18, 2001. The minutes indicate that the trustee recommended action by the U.S. Trustee's office due to the special circumstances of the case. On October 17, 2001 the trustee filed a no asset report. Plaintiff provides no evidence as to what Georgeoff Estate assets debtor is still in possession of. Plaintiff even admits that the

debtor returned many of the assets that she had been convicted of concealing.[1] During his deposition, the administrator was extremely vague when questioned about assets that were not accounted for. He named no specific assets but only stated that some were still missing.[2] While debtor may have had Estate assets, there is no evidence that she had them at the time she filed her bankruptcy petition. Instead of being listed on the petition as an asset she has, it was listed as debt she owed.

Plaintiff has not pleaded fraud with particularity and has put forth no facts illustrating debtor's discharge was obtained through fraud in order to carry its burden under the first element of § 727(d)(1).

2. Plaintiff knew of any fraud prior to debtor's discharge.

Even assuming plaintiff proved debtor received her discharge through fraud, plaintiff cannot meet the second prong of 11 U.S.C. § 727(d)(1). The second element of § 727(d)(1) requires that the plaintiff did not know of the fraud until after the discharge was granted. Debtor received her discharge on October 24, 2001. Plaintiff claims that it did not receive notice of the bankruptcy [3], and did not know of the proceeding until after the debtor received her discharge[4] and, therefore did not have knowledge of the fraud until after the discharge went on.[5] This claim is not supported by the record.

To satisfy the second element, plaintiff must show that it did not know of any facts that would have put it on notice of a possible fraud. *Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 888 (8th Cir. 1991) citing *West Suburban Bank v. Arianoutsos (In re Arianoutsos)*, 116 B.R. 116, 118-19 (Bankr. N.D. Ill. 1990). This requires the creditor to diligently investigate any possibly fraudulent conduct before the discharge. *Id*. citing *In re Jones*, 71 B.R. 682, 683 (S.D. Ill. 1987); *In re Hollis & Co.*, 86 B.R. 152, 156 (Bankr. E.D. Ark. 1988); *In re Baker*, 66 B.R. 652, 653 (Bankr. D. Nev. 1986). Plaintiff received timely notice of debtor's bankruptcy and had sufficient time to investigate any alleged fraud on debtor's part in order to file its objection prior to the date the discharge was entered. Realistically, no investigation was needed. Plaintiff knew

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1 See David T. Georgeoff, fiduciary for the Estate, depo. tr. pg. 12, lines 17-18.

2 Id. at pg. 11, lines 17-21.

3 Complaint ¶ 8.

4 Plaintiff's Brief in Support of Motion for Summary Judgment, pg. 3.

5 Plaintiff incorrectly states that debtor received her discharge on February 19, 2002. See, Plaintiff's Brief in Support of Motion for Summary Judgment, pg. 3. Debtor received her discharge on October 24, 2001. See, Notice of Discharge. The notice of discharge was served on creditors, including the Estate, via first class mail on October 26, 2001.

what it needed to know from the prior legal proceedings but failed to object to the discharge. The current proceeding is an attempt to endrun that gaffe.

Schedule F of debtor's bankruptcy petition lists the Estate as a creditor for a civil judgment of $60,000.00. The notice was sent care of Reminger & Reminger Co., L.P.A. (hereinafter "Reminger"), 113 St. Clair Building, Cleveland, Ohio 44114. The certificate of service indicates that notice of the debtor's bankruptcy petition was served on creditors, including the Estate, by first class mail on April 25, 2001. The record indicates that Leon Weiss of Reminger was the attorney for the Estate until January 16, 2002 when he withdrew as counsel for the Estate.[6] The debtor's file does not contain any returned mail, which signals notice of debtor's bankruptcy petition was properly served on the Estate care of Reminger. It is neither the fault of the court nor the debtor that proper action was not taken when the notice was received. The facts clearly indicate that plaintiff, through its attorney at Reminger, received notice of the bankruptcy on April 25, 2001. Even if this information was not communicated to the plaintiff by the attorney at Reminger, plaintiff had actual knowledge of the bankruptcy no later than July 13, 2001 when Ronald Towne entered an appearance with this court on behalf of the Estate.[7]

Plaintiff relies solely on its argument that it did not receive notice of the bankruptcy proceeding to meet the second element of § 727(d)(1). The evidence does not support plaintiff's claim that it did not receive notice of debtor's bankruptcy petition, and it fails to provide evidence that it did not know of any alleged fraud prior to August 20, 2001.

B. Plaintiff is not entitled to the application of the doctrine of equitable tolling.

In an effort to justify the late filing of its motion, plaintiff argues that it should not be barred from filing its complaint after the sixty day period set out in Bankruptcy Rule 4004(a) because the administrator of the Estate did not have letters of authority to act on behalf of the estate until January 16, 2002. While not specifically argued, it appears that plaintiff is asking

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[6] See Plaintiff's Reply to Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, Exhibit A- Pre-trial Order of the Probate Court, Medina County, Ohio dated January 16, 2002.

[7] Additionally, Erica L. Eversman, who was with Reminger until February 2001, appeared at debtor's first 341 meeting on behalf of the Estate. Eversman claims that she did not receive notice of the meeting through the clerk's office but from outside sources, possibly the attorneys at Reminger. It is not apparent from the record why Erica Eversman, no longer with Reminger, appeared at debtor's 341. The probate court's pre-trial order states that Reminger was still counsel for the Estate, which would indicate that Eversman did not take the case with her when she left the firm. Nonetheless, the Estate had a legal representative at debtor's first 341 meeting on June 19, 2001.

the court to apply the doctrine of equitable tolling.

The list of facts illustrating the Estate's problems with administrators and attorneys is long and complicated. Nevertheless, none of these problems were due to any fault of the debtor. The record indicates that David T. Georgeoff was appointed administrator of the Estate on January 18, 2001 by order of Judge Heck. He did not receive letters of authority until January 16, 2002 by order of the Probate Court, Medina County, Ohio. Ronald Towne, attorney for the Estate in this adversary proceeding, entered an appearance for the Estate with this court on July 13, 2001. Attorney Towne argues even though he made an appearance in this case thirty-eight days before the last date to object to debtor's discharge, he did not have any authority to act on the Estate's behalf until January 25, 2002 when he filed a notice of appearance in the Medina County Probate Court as attorney for the Estate. Plaintiff appears to rely on these facts to assert its right to legitimately file an untimely objection to discharge.

Under Bankruptcy Rule 9006(b)(3) the court is only permitted to enlarge the time period to object to a debtor's discharge under Bankruptcy Rule 4004(a) according to the terms of Rule 4004(a) itself. Bankruptcy Rule 4004(a) sets a deadline for filing an objection to discharge in a chapter 7 case. The deadline is set at sixty days after the first date set for the meeting of creditors under § 341(a). The sixty day time period imposed by Bankruptcy Rule 4004(a) is strictly enforced, unless an extension of time to object is obtained. *Peoples Savings & Loan Co. v. Legge*, 138 B.R. 188, 189 (Bank. S.D. Ohio 1991), (citations omitted). Bankruptcy Rule 4004(b) states that an extension must be obtained by motion made prior to the expiration of the bar date. The last date to object to debtor's discharge was August 20, 2001. Plaintiff did not file a motion for extension of the bar date. The debtor received her discharge on October 24, 2001. Plaintiff filed its complaint to object to debtor's discharge on April 9, 2002. This is well beyond the August 20, 2001 date set to object to the debtor's discharge.

Even in light of the strict standards set out in Rules 4004(a) and 9006(b)(3) courts have still pondered whether the doctrine of equitable tolling is applicable to Rule 4004(a). The U.S. Supreme Court has defined the doctrine of equitable tolling as follows:

> Where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'

Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946) (quoting *Bailey v. Glover*, 88 U.S. 342 (1874)); *OTT v. Midland-Ross Corp.*, 600 F.2d 24,30 (6th Cir. 1979) (quoting *Holmberg*). To toll the running of the limitations period, the plaintiff must show: "(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until

discovery of the facts." *Jarrett v. Kassel*, 972 F.2d 1415,1424, n.6 (6th Cir. 1992) (quoting *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir. 1975)), cert. denied 113 S.Ct. 1272 (1993). "It is important to note that 'the doctrine of concealment involves a matter of fraud or constructive fraud on the part of the party sought to be held responsible, *for it makes little sense to impose the responsibility for delay upon a party innocent of causing it.*'"(italics added), *Kandel v. Society Bank (In re Bendle)*, No. 688-00389, 1994 Bankr. Lexis 1525, at * 5 (Bankr. N.D. Ohio Sept. 13, 1994) (quoting *Diminnie v. United States*, 728 F.2d 301, 305 (6th Cir. 1984) (agreeing with *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), cert. denied, 462 U.S. 1131(1983)), cert. denied, 469 U.S. 842 (1984).

Whether or not it is proper for courts to apply the doctrine of equitable tolling in a § 727 case, plaintiff is not entitled to its application in this case. It is not the debtor's fault that the Estate wandered in the legal wilderness for 363 days with an administrator with no letters of authority. Debtor's prior conduct was not exemplary, but the procedural miscues in the administration of the Estate, or the absence of any administration of the Estate, are not grounds to prejudice the debtor or alter fixed deadlines that are the cornerstone of the bankruptcy system. Debtor's bankruptcy was filed three months after the administrator's appointment and the discharge was entered over nine months following the appointment. The court cannot wink at the clear language of the acts of Congress because the debtor was a bad actor prior to filing her bankruptcy case.

Debtor complied with all duties required of her by the law. She listed the debt owed to the Estate on her petition and served it upon the Estate's attorney. None of the debtor's actions were responsible for the plaintiff's delay in filing its complaint to object to discharge. This court cannot apportion the fault for the obvious lapse in the affairs of the Estate. While we do not know exactly who or what caused this lapse, we know that this was not a result of debtor's conduct. Because the debtor did not cause the plaintiff's delay in filing its complaint and because the plaintiff did not act diligently in its administration, this court refuses to apply the doctrine of equitable tolling.

IV. Conclusion

The court finds plaintiff's motion for summary judgment is not well taken, and the court finds defendant Diane Broderick's motion is well taken.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE

Broderick Timeline- Exhibit A

March 29, 2000	Probate court judgment against debtor.
July 2000	Jennifer Hensel withdraws as administrator to the Georgeoff Estate.
*January 18, 2001	Probate Court Judge Heck's Order reflecting Hensel's withdrawal and appointing David Georgoff as administrator.
January 19, 2001	Probate court judgement entry of verdict finding debtor guilty of concealment of assets.
April 2001	Debtor found guilty of felony theft.
April 19, 2001	Debtor's bankruptcy petition filed in Canton.
June 19, 2001	Debtor's 341 meeting scheduled. Erica Eversman appears on behalf of the Estate, but the meeting did not go forward.
July 13, 2001	Attorney Ronald Towne enters an appearance on behalf of the Estate with the bankruptcy court.
August 20, 2001	Last date to object to debtor's discharge.
September 13, 2001	Debtor's 341 held from jail.
October 24, 2001	Debtor received her discharge.
*January 16, 2002	Letters of authority issued to David Georgeoff.
January 16, 2002	Order of Medina County Probate Court allows Attorney Leon Weiss of Reminger & Reminger to withdraw as counsel for the Estate, but orders that Attorney Towne file a notice of appearance immediately.
January 25, 2002	Towne filed notice of appearance in Medina County Probate Court as attorney for the estate. This is the day Towne indicates he was first authorized to act on behalf of the estate in the bankruptcy court.
March 5, 2002	Debtor's bankruptcy case closed.
April 9, 2002	Estate filed complaint to revoke debtor's discharge.
April 17, 2002	Debtor's bankruptcy case reopened.

* Estate without an effective fiduciary for 18 months- July 2000 to January 2002; fiduciary was appointed January 18, 2001 but didn't have letters of authority until January 16, 2002.

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Memorandum Opinion and Order was mailed, via regular United States Mail, to the following on the _____day of March, 2003.

Ronald N. Towne
Linda M. Malek
2210 First National Tower
Akron, Ohio 44308

Edwin Breyfogle
921 Lincoln Way East
Massilon, Ohio 44646

_____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CHAPTER 7
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DIANE BRODERICK,	)	CASE NO. 01-61603
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Debtor.	)	JUDGE RUSS KENDIG
	)	
ESTATE OF MARIE S. GEORGEOFF,	)	ADV. NO. 02-6056
	)	
Plaintiff,	)	
	)	**ORDER DENYING PLAINTIFF'S**
v.	)	**MOTION FOR SUMMARY**
	)	**JUDGMENT AND GRANTING**
DIANE BRODERICK,	)	**DEFENDANT'S MOTION FOR**
	)	**SUMMARY JUDGMENT**
Defendant.	)	

For the reasons set forth in the accompanying memorandum opinion, plaintiff's motion for summary judgment is **DENIED**, and defendant's motion for summary judgment is **GRANTED**.

It is so ordered.

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RUSS KENDIG
U.S. BANKRUPTCY JUDGE