

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
JODY ANN CARNIVALE, \*  
\* CASE NUMBER 01-40690  
Debtor. \*  
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KIM CARNIVALE, \*  
\* ADVERSARY NUMBER 01-4118  
Plaintiff, \*  
\*  
vs. \*  
\*  
JODY ANN CARNIVALE, \*  
\* THE HONORABLE KAY WOODS  
Defendant. \*

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M E M O R A N D U M O P I N I O N  
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This matter came before the Court on Debtor Jody Ann Carnivale's ("Debtor") motion to dismiss (the "Motion") the adversary proceeding commenced by Kim Carnivale ("Plaintiff"). Debtor filed the Motion on the grounds that (i) the merits of Plaintiff's claims were required to be determined in state court, and (ii) Plaintiff has failed to prosecute this action. Plaintiff did not respond to the Motion.

I. FACTS

Debtor filed for protection under Chapter 7 of the Bankruptcy Code on March 2, 2001. Prior to the petition date, Debtor and Plaintiff were married in 1989 and were subsequently divorced in 1997. Debtor and Plaintiff have one child.

On June 25, 2001, Plaintiff initiated this adversary proceeding by filing a complaint (the "Initial Complaint") purporting to object to dischargeability of a debt. Plaintiff's Initial Complaint alleges that Debtor: (Count I) interfered with his parental

rights; (Count II) induced Plaintiff to forego use of the judicial system to adjudicate his rights; (Count III) acted unreasonably, fraudulently, intentionally and not in good faith; (Count IV) removed property from the marital premises without Plaintiff's approval; (Count V) procured an "excessive child support order" by misrepresentation; and (Count VI) received "moneys [sic] and property to which [Debtor] was not legally entitled." Plaintiff's Initial Complaint fails to allege that Debtor is indebted to him; indeed, the only allegation of any debt is that "*Plaintiff* was ordered to pay [*Debtor*] the sum of \$798 per month, plus poundage, as and for child support." (Initial Complaint at ¶ 10, emphasis added.)

On August 10, 2001, Debtor moved to dismiss (the "First Motion to Dismiss") the adversary proceeding on the grounds that the action was moot because it was based on child support issues that had been resolved by a decision of the Court of Appeals, Eleventh District, Trumbull County, Ohio.

On September 10, 2001, this Court ruled on the First Motion to Dismiss stating that the First Motion to Dismiss was in essence a motion for a more definite statement. Furthermore, the Court found that the Initial Complaint did not seek a dischargeability determination, but rather sought this Court to invoke jurisdiction to hear a state law claim arising under state law and that the Initial Complaint even requested the Court to impose punitive damages under state tort law. The Court noted that "the six counts in Plaintiff's complaint do not cite to 11 U.S.C. § 523 a single time." (Order at 2.) The Court granted Plaintiff "thirty (30) days to amend the complaint to state a cause of action under 11 U.S.C. § 523 with more specificity." (Order at 2.) The Court further noted that the "cause of action and the

remedies sought must be consistent with the jurisdiction and authority Congress has granted to the Bankruptcy Court under 28 U.S.C. § 157." (Order at 2.)

On October 10, 2001, Plaintiff filed the Amended Complaint. Plaintiff's Amended Complaint realleges the same facts as set forth in the Initial Complaint, but added 11 U.S.C. § 523(a)(2)(A) and (B), § 523(a)(4) and § 523(a)(6) as the alleged bases for the relief sought. The Amended Complaint seeks damages based on claims that Debtor: (Count I) interfered with his parental rights; (Count II) induced Plaintiff to forego the use of the judicial system to adjudicate his right; (Count III) acted unreasonably, fraudulently, intentionally and not in good faith; (Count IV) removed property from the marital premises without Plaintiff's approval; (Count V) procured an "excessive child support order" by misrepresentation; and (IV) received "moneys [sic] and property to which [Debtor] was not legally entitled." However, despite the amendments, Plaintiff still fails to allege that Debtor owes him money; indeed, the only allegation of debt is the monthly child support that *Plaintiff* owes Debtor. (Amended Complaint at ¶ 10.)

On December 13, 2005, Debtor filed the Motion, which is presently before the Court.

## **II. DISCUSSION**

### **A. Failure to State a Claim**

Despite being provided an opportunity to amend the Initial Complaint to state a cause of action "consistent with the jurisdiction and authority Congress has granted the Bankruptcy Court under 28 U.S.C. § 157" (Order at 2), Plaintiff's Amended Complaint continues to assert only allegations based upon state tort law.

Although the Amended Complaint is allegedly based on Section 523 of the Bankruptcy Code, this reliance is misplaced. Section 523, which covers exceptions from discharge, of necessity requires that there must be a *debt owed by the debtor* before it can be excepted from discharge. In the instant case, Plaintiff wholly fails to state that Debtor owes him any money or any kind of debt. Instead he merely contends that certain alleged conduct by Debtor constitutes tortious action pursuant to state law for which he is entitled to compensatory and punitive damages. In short, Plaintiff fails to allege that Debtor owes him any debt at all, let alone one that may constitute an exception from discharge. As a consequence, Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and, pursuant to FED. R. BANKR. P. 7012(b), which incorporates FED. R. CIV. P. 12(b)(6), the Amended Complaint must be dismissed.

If a plaintiff fails to state a cognizable claim, the court can dismiss the complaint.<sup>1</sup> In determining whether to grant a motion to dismiss, the court must analyze the complaint. To withstand dismissal, the complaint must provide a plain and clear statement of the claim that shows the plaintiff is entitled to relief, provide the defendant with notice of the claim, and the grounds upon which the claim rests. See FED. R. CIV. P. 8(a); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "The complaint need not specify all the particularities of the claim, and if the complaint is merely vague or ambiguous, a motion under Fed.R.Civ.P. 12(e) for a more definite statement is the proper avenue rather than under Fed.R.Civ.P. 12(b)(6)." *Aldridge v. United States*, 282 F. Supp. 2d 802, 803 (2003) (citing 5A CHARLES

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<sup>1</sup>The court's dismissal of meritless claims precludes the waste of judicial resources. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989).

ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d. ed. 1990)).

FED. R. CIV. P. 12(b)(6), applicable to this case through FED. R. BANKR. P. 7012, requires that a complaint be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff cannot prove a set of facts to support a claim that would entitle the plaintiff to relief. *Conley*, 355 U.S. at 45-46. In determining the sufficiency of a complaint, the court must construe the complaint in the light most favorable to the plaintiff, accept the allegations set forth as true, and resolve any ambiguities in favor of the plaintiff. *Jackson v. Richards Medical Co.*, 961 F.2d 575, 577-78 (6th Cir. 1992); *Aldridge*, 282 F. Supp. 2d. at 803. However, the court is not required to accept "sweeping unwarranted averments of fact," *Official Committee of Unsecured Creditors v. Austin Financial Services, Inc. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 502 (Bankr. S.D. N.Y. 1999) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)), or "conclusions of law or unwarranted deduction." *KDI Holdings Inc.*, 277 B.R. at 502 (quoting *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 771 (2d Cir. 1994)); see also *Lewis v. ABC Business Services, Inc.*, 135 F.3d 389, 405-06 (6th Cir. 1998). Thus, in evaluating a 12(b)(6) motion, the court should construe the complaint very liberally. *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976).

As set forth above, Plaintiff's Amended Complaint does not and cannot state a claim upon which relief can be granted because it is totally devoid of any allegation that Debtor owes a debt to Plaintiff that is an exception to discharge. In a feeble attempt to comply with this Court's September 10, 2001 Order, Plaintiff amended his Initial Complaint to reference Section 523 of the Bankruptcy Code.

However, as set forth above, this citation is misplaced because Plaintiff has failed to allege that Debtor owes him any debt (as opposed to allegations that Debtor has engaged in bad conduct) that could be an exception to discharge, as required by Section 523.

Section 523 states that "[a] discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title **does not discharge an individual debtor from any debt.**" 11 U.S.C. § 523(a) (emphasis added). Plaintiff failed to allege any debt owed to him by Debtor in the Amended Complaint. Indeed, the only debt referenced in the Amended Complaint is the debt that Plaintiff owes to Debtor. Rather than alleging that Debtor owes him a debt, Plaintiff alleges that Debtor is interfering with his parental rights and argues against the findings made by the family court in the divorce proceedings. Under the facts alleged, Plaintiff's invocation of this Court's jurisdiction is not warranted. Since Plaintiff fails to state a claim under any provision of 11 U.S.C. § 523 and fails to cite any other applicable section of the Bankruptcy Code to support his allegations, Plaintiff has failed to state a cognizable claim upon which relief can be granted.

#### **B. Failure to Prosecute**

As an additional ground for dismissal, Debtor contends that this adversary proceeding has been pending for four years without "appropriate activity from Plaintiff." This Court agrees that Plaintiff's failure to pursue this action for years constitutes an independent basis for dismissing the case. The Initial Complaint was filed June 25, 2001. The Amended Complaint was filed October 10, 2001. Although more than four years have passed since Plaintiff filed the Amended Complaint, Plaintiff has taken no action to move this case

forward. At the Court's instance, a telephonic status conference was held on October 17, 2005, at which time the Court inquired about the complete absence of activity in the case. At that time, Plaintiff's counsel indicated that he would likely dismiss the case within two weeks, but no motion to dismiss was ever filed.

Plaintiff's failure to take any discovery or otherwise move the case toward trial is prejudicial to Debtor. The Court cannot and will not countenance such a cavalier attitude toward litigation. When a plaintiff invokes the jurisdiction of the Court, it should be for a legitimate purpose. If there is a claim or cause of action to pursue, the plaintiff is obligated to pursue it. Letting an adversary proceeding lie dormant for more than four years is unconscionable. Plaintiff's failure to prosecute this action (including failure to respond to the Motion) constitutes an abandonment of the action and requires dismissal of the Amended Complaint.

### **III. CONCLUSION**

In viewing the Amended Complaint in the light most favorable to Plaintiff, Plaintiff has failed (i) to allege a debt required by Section 523 of the Bankruptcy Code, or (ii) to state any other applicable section of the Bankruptcy Code as a basis for relief. Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted. Moreover, Plaintiff has abandoned the instant adversary proceeding by failing to take appropriate action for more than four years, which inactivity has been prejudicial to Debtor. Accordingly, Debtor's motion to dismiss is hereby granted.

An appropriate order will follow.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

