

THIS OPINION NOT INTENDED FOR PUBLICATION

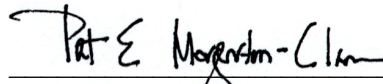
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:)	Case No. 04-21911
)	
DANIEL WAKELING,)	Chapter 7
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
_____)	
NATIONAL CITY BANK,)	Adversary Proceeding No. 05-1141
)	
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
DANIEL WAKELING,)	
)	
Defendant.)	

For the reasons stated in the memorandum of opinion filed this same date, National City Bank's amended motion to file an amended complaint is granted and the opposition is overruled. (Docket 40, 42).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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DANIEL WAKELING,)	Chapter 7
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Debtor.)	Judge Pat E. Morgenstern-Clarren
_____)	
)	
NATIONAL CITY BANK,)	Adversary Proceeding No. 05-1141
)	
Plaintiff,)	
)	
v.)	<u>MEMORANDUM OF OPINION</u>
)	
DANIEL WAKELING,)	
)	
Defendant.)	

The plaintiff National City Bank, successor by merger with Provident Bank,¹ filed a timely complaint to deny the debtor-defendant Daniel Wakeling a discharge under 11 U.S.C. § 727(a)(3). The discharge was entered administratively a few days later. More than a year after that, National City filed an amended motion for leave to file an amended complaint (the motion) to ask that the debtor's discharge be revoked under 11 U.S.C. § 727(d)(1).² The time for filing an independent complaint to revoke the debtor's discharge had elapsed by that time. The debtor opposes the motion on the ground that the amendment would be futile because the proposed amended complaint does not relate back in time to the original complaint.

¹ For ease of reference, the plaintiff is referred to in this opinion as National City.

² Docket 40, 42.

For the reasons stated below, the proposed amended complaint relates back to the timely filed original complaint, the amendment would not, therefore, be futile, and the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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)(A) and (J).

FACTS

The chapter 7 case

National City holds a 2002 state court judgment against the debtor Daniel Wakeling. The debtor filed his chapter 7 case on September 17, 2004. Soon thereafter, National City moved for an order requiring the debtor to appear for an examination under bankruptcy rule 2004. The court granted the motion, but the debtor failed to appear. National City then moved for an order directing the debtor to show cause as to why he should not be held in contempt for failing to comply with the court order.³ The parties preliminarily resolved this issue when the debtor agreed to appear for examination and produce documents.⁴ When the debtor finally appeared for examination on January 19, 2005, however, he failed to produce the requested documents. National City then moved for and received an extension of time to March 15, 2005 in which to file a complaint determining dischargeability and objecting to discharge.⁵

³ See Case No. 04-21911, Docket 11.

⁴ See Case No. 04-21911, Docket 24; *and see* docket entry for 1/20/2005.

⁵ *Id.*, Docket 24, 25, 32.

The adversary proceeding

On March 15, 2005, National City filed this adversary proceeding. The complaint asked that the debtor be denied a discharge under 11 U.S.C. § 727(a)(3) on the ground that he had repeatedly failed to provide requested documents concerning his financial condition, which led National City to conclude that the debtor had “concealed, destroyed, falsified or failed to keep or preserve any recorded information from which the Defendant’s financial condition or business transactions might be ascertained.”⁶ On March 18, 2005, the debtor received his discharge through an administrative order.

On May 3, 2006, National City filed an amended motion for leave to amend its complaint. The proposed amended complaint states that the debtor finally produced the long-sought documents and they disclosed new issues, specifically that the debtor failed to schedule his interest in MH Asset Services Company, an entity with \$614,000.00 in gross income in 2004. The allegations continue that the debtor knowingly and fraudulently made a false oath in his bankruptcy case and intended to deceive by failing to disclose this material information about his assets and that, as a result, he obtained his discharge by fraud. Consequently, National City seeks to have the discharge revoked under 11 U.S.C. § 727(d)(1).

THE POSITIONS OF THE PARTIES

National City argues that its proposed amended complaint will not act as a hardship and should be granted in the interest of justice. The debtor contends that the proposed amended cause of action is time-barred and thus will be futile. National City responds that the amended

⁶ Docket 1 at ¶ 12. The caption incorrectly states that it is a complaint to determine the dischargeability of a debt, but it is clear from the body of the complaint and the prayer for relief that National City sought to deny the debtor a discharge.

complaint will relate back to the timely filed complaint. The debtor does not challenge the legal sufficiency of National City's proposed § 727(d)(1) cause of action.

DISCUSSION

Federal rule of civil procedure 15(a) provides that, under the circumstances of this case, National City may amend its complaint only with leave of court, which "leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a), made applicable by FED. R. BANKR. P. 7015. Leave "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 Mkt., Inc.*, 249 F.3d 509, 519 (6th Cir. 2001) (internal citations omitted).

The parties agree that National City timely filed its original complaint asking that the debtor be denied a discharge under bankruptcy code § 727(a)(3). They also agree that if National City had filed a new adversary proceeding to revoke the debtor's discharge under bankruptcy code § 727(d)(1) instead of the motion, that new action would be untimely because it was filed more than one year after the discharge was issued.⁷ The only way that the proposed amended complaint to revoke the discharge is timely is if relates back to the original filing.

An amended complaint will relate back to the original complaint to the extent "the claim . . . asserted in [it . . . arises] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading[.]" Fed. R. Civ. P. 15(c)(2) (made applicable by FED. R. BANKR. P. 7015). The relation back concept comes from:

⁷ A complaint to revoke a discharge under § 727(d)(1) must be filed within one year after the discharge is granted, or in this case by March 18, 2006. National City filed its original motion for leave to amend on April 24, 2006. (Docket 36).

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

In this case, both the original complaint and the proposed amended complaint ask for essentially the same relief: that the debtor not be discharged from his debts based on his own conduct in withholding material financial information. The original complaint relied on the debtor's failure to produce documents despite repeated requests to do so. The proposed amended complaint states that when the debtor finally produced the documents, after the adversary proceeding was filed and the discharge had been entered, they showed that the debtor failed to disclose all of his assets in his bankruptcy petition under circumstances that allegedly warrant revoking the discharge.

This proposed claim certainly arises out of the conduct, transactions, or occurrences alleged or attempted to be alleged in the original complaint. The parties and their relationship remain the same, the problem stems from the same documents relating to the debtor's financial condition, and the relief requested is that the debtor not be discharged from his debts. The debtor has had fair notice about this issue since he filed the bankruptcy case, so he is not prejudiced in any legally significant way. The court also notes that the timeliness problem is solely of the debtor's own making; if he had produced the documents when first requested through the 2004 examination order, National City would have had the information in time to file an original complaint to deny the discharge based on the omitted assets. It would be grossly unfair to permit

the debtor to benefit from his inaction by refusing to let National City amend its complaint at this point. The amended complaint, therefore, relates back to the original complaint and states a timely cause of action.

CONCLUSION

For the reasons stated, National City's amended motion to file an amended complaint is granted and the opposition is overruled. A separate order will be entered reflecting this decision.

A handwritten signature in black ink, appearing to read "Pat E. Morgenstern-Clarren". The signature is written in a cursive, somewhat stylized font.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge