

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
TOLEDO



Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|-------------------------|---|-----------------------|
| In Re: |) | Case No.: 07-32359 |
| |) | |
| Joe A. Whelan and |) | Chapter 7 |
| Janet M. Whelan, |) | |
| |) | Adv. Pro. No. 07-3263 |
| Debtors. |) | |
| |) | Hon. Mary Ann Whipple |
| Kimberly A. Koberstein, |) | |
| |) | |
| Plaintiff, |) | |
| v. |) | |
| |) | |
| Joe A. Whelan, et al., |) | |
| |) | |
| Defendants. |) | |

**MEMORANDUM OF DECISION AND ORDER REGARDING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This adversary proceeding is before the court on Defendants' unopposed motion for summary judgment [Doc. # 13]. In her complaint, Plaintiff seeks an order revoking Defendants' discharge that was entered in their underlying Chapter 7 case and a determination that a debt allegedly owed to her by Defendants is excepted from discharge under 11 U.S.C. § 523(a)(6).

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine objections to discharge and the dischargeability of particular debts are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(I) and (J). For the reasons that follow, Defendants' motion will be granted.

FACTUAL BACKGROUND

Defendants filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 4, 2007. On Bankruptcy Schedule F, Defendants list Plaintiff as an unsecured creditor at the same address as set forth by Plaintiff in the caption of her complaint. They describe Plaintiff's claim as a "pending lawsuit for medical claims." [Case No. 07-32359, Schedule F, p. 9]. On June 7, 2007, Plaintiff was served by first class mail with a notice that the first meeting of creditors would be held on July 23, 2007, and notice that the deadline to file a complaint objecting to discharge or to the dischargeability of a particular debt was September 21, 2007.¹ [See *Id.*, Doc. # 6].

Plaintiff filed the complaint commencing this adversary proceeding on October 26, 2007. She alleges that Defendants "are indebted to Plaintiff for medical bills of over \$9,099.86 for failure to pay premiums on insurance coverage that were provided to defendants by Plaintiff," that Defendants willfully and maliciously caused her harm and that, as a result, the debt should be declared nondischargeable under § 523(a)(6). [Doc. # 1, Complaint, ¶¶ 7-9]. She further alleges that Defendants "have committed acts described in § 727(a)(7)," that they have "willfully and maliciously engaged in conduct to commit fraud against [her]," and that Defendants' discharge should, therefore, be revoked under § 727(e). [*Id.* at ¶¶ 11-14].

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

¹ Although Defendants state in their motion that Plaintiff attended the first meeting of creditors and elicited oral testimony from Defendants regarding the claims that are the subject of her complaint, they offer no supporting affidavit or other evidence as required by Federal Rule of Civil Procedure 56. Defendants' statement is not evidence and is not being considered.

574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of informing the court of the basis for its motion, “and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party “may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.* Although, as in this case, a party fails to respond to a motion for summary judgment, the court must nevertheless satisfy itself that the moving party has met the demands of Rule 56 before granting the motion. *See Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 407 (6th Cir. 1992).

II. Plaintiff’s Dischargeability Claim Is Barred As Untimely

Plaintiff seeks to have the debt allegedly owed to her by Defendants declared nondischargeable under § 523(a)(6). A complaint to determine the dischargeability of a debt under § 523(a)(6) must be filed no later than sixty days after the first date set for the meeting of creditors, unless the court extends the time for cause on motion of a party in interest. *See Fed. R. Bankr. P. 4007(c)*. Creditors are entitled to “no less than thirty days notice of the time so fixed.” *Id.* If a complaint is not filed before the deadline set forth in Rule 4007(c), the debt is discharged. *See id.*; 11 U.S.C. § 523(c). An exception to this rule exists and the debt is not discharged if the debt is of a kind specified in § 523(a)(2), (4), or (6), and it was not listed or scheduled by the Debtor, and the creditor did not receive or have actual knowledge of the case in time to timely file a complaint to determine dischargeability. 11 U.S.C. § 523(a)(3)(B).

In this case, the court record reflects, and there is no dispute, that Plaintiff not only had timely notice of this Defendants’ Chapter 7 case but also had timely notice of the deadline for filing a complaint to determine dischargeability of a debt owed by Defendants. Plaintiff did not seek an extension of time to file her complaint. Nevertheless, she filed her complaint more than thirty days after the September 21, 2007, deadline to file a dischargeability action. Plaintiff is, therefore, time-barred from now seeking a dischargeability determination.

III. Revocation of Discharge

Plaintiff also requests that the court revoke Defendants’ Chapter 7 discharge “under § 727(e).” [Doc. 1, Complaint, ¶ 14]. Section 727(e) sets forth the time within which a complaint for revocation of discharge under § 727(d) must be brought. Plaintiff’s complaint as to this claim is timely.

A discharge can be revoked pursuant to Section 727(d) under any one of the following

circumstances:

- (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 such discharge;
- (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;
- (3) the debtor committed an act specified in subsection (a)(6) of this section [providing that the debtor has refused to obey a lawful order of the court or to answer certain material questions]; or
- (4) the debtor has failed to explain satisfactorily--
 - (A) a material misstatement in an audit referred to in section 586(f) of title 28; or
 - (B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

Although Plaintiff does not specifically identify the subsection of § 727(d) under which she seeks revocation of discharge, she alleges in connection with this claim that “Debtors have willfully and maliciously engaged in conduct to commit fraud against the Plaintiff.” [*Id.* at ¶ 12]. Thus, only § 727(d)(1) is potentially applicable. The party requesting revocation has the burden of proving all of the elements contained in the statute. *In re Perryman*, 111 B.R. 227, 229 (Bankr. E.D. Ark. 1990).

One of the elements that must be proven under § 727(d)(1) is that the plaintiff lacked knowledge of the fraud until after the debtor’s discharge has been granted. *In re Rivera*, 338 B.R. 318, 324 (Bankr. N.D. Ohio 2006). Defendants argue that Plaintiff cannot satisfy this element. Plaintiff has failed to show the existence of any such evidence, and has failed to even allege such lack of knowledge regarding the fraud in her complaint, and thus, has failed to set forth facts showing that there is a genuine issue for trial. The court will, therefore, grant Defendants’ motion for summary judgment.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Defendants’ motion for summary judgment [Doc. # 13] be, and hereby is, **GRANTED**. A separate judgment in accordance with this Memorandum of Decision and Order will be entered.