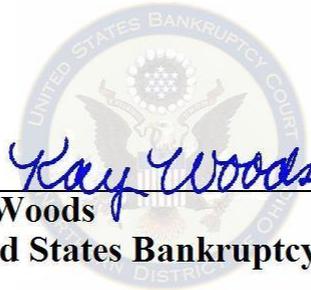


IT IS SO ORDERED.



Dated: August 02, 2011  
02:13:16 PM

Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

CARL V. MACE and  
CINDY A. MACE,

Debtors.

\* \* \* \* \*

THOMAS R. SKELTON and  
AMY L. SKELTON,

Plaintiffs,

v.

CARL V. MACE and  
CINDY A. MACE,

Defendants.

CASE NUMBER 10-42899

ADVERSARY NUMBER 10-04239

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER DENYING MOTION TO DISMISS  
\*\*\*\*\*

This cause is before the Court on Motion to Dismiss (Doc. # 9) and Memorandum in Support of Motion to Dismiss ("Memo") (Doc. # 10) (collectively, "Motion to Dismiss") filed by Defendants/Debtors

Carl V. Mace and Cindy A. Mace on March 11, 2011. On April 28, 2011, Plaintiffs Thomas R. Skelton and Amy L. Skelton (a/k/a Amy Montgomery) filed Memorandum in Opposition to Defendants' Motion to Dismiss ("Response") (Doc. # 15).<sup>1</sup> For the reasons set forth herein, the Court will deny the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

#### **I. FACTUAL AND PROCEDURAL BACKGROUND**

The Defendants filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on July 30, 2010, which was denominated Case No. 10-42899 ("Main Case"). In Schedule F - Creditors Holding Unsecured Nonpriority Claims, the Defendants scheduled the Plaintiffs as the holders of a disputed claim in an unknown amount based on a civil suit. (Main Case, Doc. # 1, Sch. F at 5.) In Statement of Financial Affairs, the Defendants scheduled a civil suit pending in the Mahoning County Court of Common Pleas ("Mahoning Court") captioned "First National Bank of PA vs. Thomas Skelton, et. [sic] al. vs. Carl Mace" and denominated Case

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<sup>1</sup>Upon the Plaintiffs' motion (Doc. # 12), the Plaintiffs were granted an extension of time, until April 28, 2011, to file the Response (Doc. # 13).

No. 08-CV-4321 ("Mahoning Litigation"). (Main Case, Doc. # 1, S.O.F.A. at 3.)

On November 1, 2010, the Plaintiffs filed Complaint (Doc. # 1), which commenced the instant adversary proceeding. The Plaintiffs assert causes of action against the Defendants based on (i) misrepresentation and fraud (Compl. ¶¶ 13-31); (ii) breach of contract (*id.* ¶¶ 32-35); (iii) conversion (*id.* ¶¶ 36-40); (iv) breach of corporate formalities (*id.* ¶¶ 41-47); and (v) indemnification, contribution and subrogation (*id.* ¶¶ 48-49). The Plaintiffs represent that the above-referenced causes of action are also presently pending before the Mahoning Court in the Mahoning Litigation. (*Id.* at 7.) The Plaintiffs request the Court to (i) either enter judgment in their favor in an amount in excess of \$350,000.00 or allow the Mahoning Litigation to proceed; and (ii) find that any judgment in favor of the Plaintiffs against the Defendants is not dischargeable pursuant to 11 U.S.C. § 523(a)(2), (4) and (6). (*Id.*)

On November 4, 2010, the Plaintiffs filed Claim No. 18-1 ("Claim 18-1"), which asserted an unsecured claim in the amount of \$350,000.00 based on "[f]raud and [m]isrepresentation." (Claim 18-1 at 1.) The Defendants filed Objection to Proof of Claim # 18-1 Filed by Thomas Skelton and Amy Montgomery ("Objection to Claim 18-1") (Main Case, Doc. # 56) on December 14, 2010. The Defendants objected to Claim 18-1 because it was "not supported by a statement of facts or other documents to support the basis of the

claim." (Obj. to Claim 18-1 ¶ 2.) The Defendants also denied "any and all liability to the [Plaintiffs] on their claim or otherwise." (Id. ¶ 3.) On January 14, 2011, the Plaintiffs filed Corrected Request for Hearing and Response to Debtor's [sic] Objection to Proof of Claim ("Response to Objection to Claim 18-1") (Main Case, Doc. # 67). The Plaintiffs asserted that the Defendants had knowledge of the basis for Claim 18-1 due to the Mahoning Litigation and this adversary proceeding. (Response to Objection to Claim 18-1 at 1.)

The Court held a hearing on the Objection to Claim 18-1 on February 3, 2011, at which appeared (i) Gary J. Rosati, Esq. on behalf of the Defendants; and (ii) John H. Chaney, III, Esq. on behalf of the Plaintiffs. At the hearing, the Court granted the Plaintiffs until February 24, 2011, to file a brief in support of Claim 18-1. The Plaintiffs failed to timely file a brief. On March 7, 2011, the Court issued Order Sustaining Objection to Claim [18-1] ("Order Sustaining Objection") (Main Case, Doc. # 87), which sustained the Objection to Claim 18-1 and disallowed Claim 18-1 because the Plaintiffs "failed to establish a valid basis for Claim [18-1]."<sup>2</sup> (Order Sustaining Obj. at 3-4.)

The Defendants filed the Motion to Dismiss on March 11, 2011. The Defendants move to dismiss the instant adversary proceeding on the basis that, because Claim 18-1 was disallowed, "[t]he Plaintiffs

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<sup>2</sup>After the Order Sustaining Objection was filed, on March 7, 2011, the Plaintiffs filed Brief (Main Case, Doc. # 86) in support of Claim 18-1. The Brief was not timely filed and, thus, not addressed by the Court.

have no claim that is subject to a dischargeability action and no standing to object to the [Defendants]' discharge." (Memo at 2 (citations omitted).)

On March 29, 2011, the Plaintiffs filed Motion for Relief from Judgment and/or Motion for Reconsideration ("Motion to Reconsider") (Main Case, Doc. # 92), which requested the Court to reconsider and grant relief from the Order Sustaining Objection. On that same date, the Plaintiffs filed Claim No. 18-2 ("Claim 18-2"), which asserted an unsecured claim in the amount of \$313,781.36 based on "breach of contract, conversion, indemnification, contribution, subrogation, fraud, and misrepresentation." (Claim 18-2 at 1.)

The Court held a hearing on the Motion to Reconsider on April 28, 2011, at which Mr. Chaney appeared on behalf of the Plaintiffs. Prior to the hearing, on April 27, 2011, the Plaintiffs filed Supplemental Brief in Support of Claim and Request for Reconsideration (Main Case, Doc. # 100). At the hearing, the Court orally denied the Motion to Reconsider. On April 29, 2011, the Court entered Order Denying Motion for Relief from Judgment (Main Case, Doc. # 102), memorializing its oral ruling denying the Motion to Reconsider.

Following the hearing on the Motion to Reconsider, on April 28, 2011, the Plaintiffs filed the Response. The Plaintiffs reiterate the argument that their claim against the Defendants was wrongfully disallowed and, thus, contend that the Motion to Dismiss should be denied. (See Resp.)

On May 26, 2011, the Defendants filed Amended Objection to Proof of Claim # 18-2 Filed by Thomas Skelton and Amy Montgomery ("Objection to Claim 18-2") (Main Case, Doc. # 113). The Defendants objected to Claim 18-2 on the grounds that "the claim was previously disallowed and therefore the Claim cannot be amended. The [Defendants] further object to the claim as it is a new claim filed after the bar date for filing proof of claims . . . ." (Obj. to Claim 18-2 at 1.) The Objection to Claim 18-2 was scheduled for hearing on July 28, 2011. Prior to the hearing, on July 28, 2011, the Plaintiffs filed Motion for Leave to File Amended Claim ("Motion for Leave") (Main Case, Doc. # 128), which requested the Court to grant the Plaintiffs leave, *nunc pro tunc*, to March 29, 2011, to file Claim 18-2.

The Court held hearings on the Objection to Claim 18-2 and the Motion for Leave on July 28, 2011, at which appeared (i) Mr. Rosati on behalf of the Defendants; and (ii) Mr. Chaney on behalf of the Plaintiffs. Based on the representations made by the parties at the hearings and equitable considerations, the Court orally (i) overruled the Objection to Claim 18-2; and (ii) granted the Motion for Leave. On that same date, to memorialize its rulings, the Court entered Order Overruling Objection to Claim 18-2 (Main Case, Doc. # 130) and Order Granting Motion for Leave ("Order Granting Leave") (Main Case, Doc. # 131). In the Order Granting Leave, the Court expressly stated, "Claim No. 18-2 is deemed timely filed." (Order Granting Leave at 1.)

## II. ANALYSIS AND CONCLUSION

As the sole basis for the Motion to Dismiss, the Defendants state, "It follows from the Court's Order [Sustaining Objection] that the herein Adversary action should be dismissed. The Plaintiffs have no claim that is subject to a dischargeability action and no standing to object to the [Defendants]' discharge." (Memo at 2 (citations omitted).) In support of their position, the Defendants cite, among other cases, *Bishara v. O'Callaghan (In re O'Callaghan)*, 304 B.R. 500 (Bankr. M.D. Fla. 2003).

In *O'Callaghan*, the bankruptcy court disallowed the claimant's proof of claim, which was based on fraud and tortious interference, because the claimant failed to properly establish the underlying claims. *Id.* at 510. Prior to disallowance of the proof of claim, the claimant had commenced an adversary proceeding against the debtor asserting that, *inter alia*, the debt owed to the claimant was not dischargeable pursuant to § 523(a)(2)(A). *Id.* The bankruptcy court entered judgment for the debtor in the adversary proceeding and stated, "Since [the claimant]'s claim is disallowed, as explained above, the cause of action based on § 523(a)(2)(A) should be dismissed. [The claimant] is not the holder of a claim that is subject to a dischargeability action." *Id.* at 511.

Much like the debtor in *O'Callaghan*, the Defendants argue that the Plaintiffs are not the holders of a claim against the Defendants and, thus, do not have standing to bring this adversary proceeding. At the time the Motion to Dismiss was filed, on March 11, 2011, the

Defendants were correct to state that the Plaintiffs did not have a claim pending against the Defendants in the Defendants' bankruptcy proceeding. As set forth above, the Court disallowed Claim 18-1 on March 7, 2011, and Claim 18-2 was not filed until March 29, 2011.<sup>3</sup> However, since the filing of the Motion to Dismiss, the Court has entered (i) the Order Overruling Objection to Claim 18-2; and (ii) the Order Granting Leave, which held that "Claim No. 18-2 is deemed timely filed." (Order Granting Leave at 1.)

Based on the subsequent filing of Claim 18-2 and the Court's ruling that Claim 18-2 is timely filed, the basis for the Motion to Dismiss - *i.e.*, the Plaintiffs do not have a claim pending against the Defendants - is no longer accurate or applicable to the instant adversary proceeding. The Court hereby finds that, because Claim 18-2 is timely filed, the Plaintiffs have standing to bring this adversary proceeding. As a consequence, the Court hereby denies the Motion to Dismiss.

**IT IS SO ORDERED.**

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<sup>3</sup>In addition, the Plaintiffs did not file the Motion to Reconsider until March 29, 2011.