

IT IS SO ORDERED.

Dated: May 3, 2012
03:03:16 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SPENCER LEE MUNION, JR.,

Debtor.

CASE NUMBER 11-42621

* * * * *

DONNA BURGRAF,

Plaintiff,

v.

ADVERSARY NUMBER 12-4024

SPENCER L. MUNION, JR.,

Defendant.

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING DISMISSAL OF ADVERSARY PROCEEDING

On September 6, 2011, Debtor Spencer Lee Munion, Jr. ("Debtor") filed a voluntary petition pursuant to chapter 7 of Title 11. The Debtor did not list Donna Burgraf ("Burgraf") as a creditor on any

of his Schedules, but he did list the pre-petition lawsuit styled "*Joes [sic] Tree Removal LLC vs. Donna V. Burgraf*," Case No. 2011 CV 01295, Trumbull County Court of Common Pleas ("Burgraf Lawsuit"), as a pending collections case.

The First Meeting of Creditors pursuant to 11 U.S.C. § 341 was scheduled for November 1, 2011 ("341 Meeting Date"). As a consequence, the last day to oppose the Debtor's discharge and/or file an adversary complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(2), (a)(4) or (a)(6) was January 3, 2012 ("Bar Date").¹ See FED. R. BANK. P. 4004(a) (West 2011); FED. R. BANK. P. 4007(c) (West 2011).

Despite not being listed as a creditor, Burgraf was aware of the Debtor's bankruptcy case no later than December 9, 2011, when she filed, through counsel Michael J. McGee, Esq., Motion to Extend Time to Object to Discharge ("Motion to Extend Time") (Main Case, Doc. # 18). In the Motion to Extend Time, Burgraf requested "up to and including February 17, 2012" to file "an objection to the discharge of Debtor in this proceeding" because "the Trustee is currently investigating irregularities in Debtor's schedules and irregularities which were discovered during the Debtor's 341 conference." (Mot. to Extend Time at 1.) Burgraf never obtained an order from the Court that extended the time to object to the Debtor's discharge, as requested in the Motion to Extend Time.

¹January 3, 2012, was the first non-weekend or holiday after the 60th day following the 341 Meeting Date, which was December 31, 2011.

Andrew W. Suhar, the Chapter 7 Trustee in the Debtor's bankruptcy case ("Trustee"), did not request an extension of time to object to the Debtor's discharge. No party filed any complaint or motion objecting to the Debtor's discharge. As a consequence, on February 9, 2012, the Court entered Discharge of Debtor in a Chapter 7 Case ("Discharge Order") (Main Case, Doc. # 31). Notice of the Discharge Order was sent to Mr. McGee, as counsel for Burgraf.

On December 30, 2011, upon the Trustee's request, the Court sent Notice of Need to File Proof of Claim Due to Recovery of Assets ("Notice") (Main Case, Doc. # 27) to all known creditors, including "Michael J. McGee on behalf of Creditor Donna Burgraf." (Main Case, Doc. # 29 at 3). The Notice provided that the last date to file claims was April 9, 2012. Burgraf timely filed a proof of claim, denominated Claim No. 2, on February 15, 2012. Claim No. 2 was filed as a general unsecured claim in the amount of \$25,000.00 and asserted as the basis of the claim, "money owed from debtors [sic] fraudulent conduct; lawsuit pending." (Claim No. 2 at 1.) Attached to Claim No. 2 was Amended Counterclaim and Third Party Complaint ("Third Party Complaint") filed by Burgraf against the Debtor in the Burgraf Lawsuit.²

On February 15, 2012, the same date that Burgraf filed Claim No. 2, she commenced the instant adversary proceeding to

²The Third Party Complaint was filed in Case No. 2010 CVF 2510, Warren Municipal Court, Trumbull County. The docket in Case No. 2010 CVF 2510 indicates that the Burgraf Lawsuit was transferred to the Trumbull County Court of Common Pleas on or about June 1, 2011.

determine the dischargeability of a debt. Complaint to Determine Dischargeability of Debt/Claims ("Complaint") (Doc. # 1) alleges that it is based on § 523(a)(3), (a)(2), (a)(4) and/or (a)(6). (See Compl. ¶ 6.)

The Debtor filed Motion to Dismiss (Doc. # 8) on April 3, 2012, which asserts that this adversary proceeding should be dismissed based on the fact that Joe's Tree Removal, L.L.C. ("Tree Removal") is a limited liability company and that the Debtor does not have liability for Tree Removal's debts. That same day, April 3, 2012, Burgraf filed Response to Motion to Dismiss ("Response") (Doc. # 10), which counters that the Debtor, although an agent for Tree Removal, "is liable for his own tortious conduct." (Resp. at 2.)

The issue before the Court is whether, despite not having been raised by the Debtor, the Discharge Order encompassed all debts the Debtor had to Burgraf, thus making this adversary proceeding, which was filed after entry of the Discharge Order, a nullity.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 2012-7) 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). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. THE COMPLAINT WAS REQUIRED TO BE FILED BEFORE THE BAR DATE

A. Rule 4007

Federal Rule of Bankruptcy Procedure 4007(c) provides:

Except as provided in subdivision (d),³ a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

FED. R. BANKR. P. 4007 (West 2011).

Section 523(c)(1) states:

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c)(1) (West 2011). As set forth above, Burgraf's Complaint alleges that a debt owed by the Debtor to her is non-dischargeable under § 523(a)(2), (a)(4) and/or (a)(6). Thus, the time limitation set forth in Rule 4007(c) applies to this adversary proceeding.

The 341 Meeting Date was November 1, 2011. As a consequence, the 60-day period referenced in Rule 4007(c) ran as of the January 3, 2012 Bar Date. Burgraf filed the Motion to Extend Time

³Subdivision (d) deals with a complaint to determine the dischargeability of a debt under § 523(a)(6) in a chapter 13 case, which is not relevant here.

prior to expiration of the 60-day period, but she failed to obtain an order of the Court granting an extension of time to object to the Debtor's discharge. Significantly, Burgraf never requested an extension of time to file a complaint regarding the non-dischargeability of a debt. The Motion to Extend Time sought an extension of approximately 45 days for the sole purpose of filing an objection to the discharge of the Debtor. Burgraf did not file a complaint objecting to the Debtor's discharge, but instead filed the instant Complaint, which objects to the discharge of an alleged debt owed by the Debtor to Burgraf. Absent a court order that extended the time in which to file a complaint objecting to the dischargeability of debts, which was never obtained, the last date to determine the dischargeability of a debt under § 523(a)(2), (a)(4) and/or (a)(6) was the Bar Date. Because the Complaint was not filed prior to expiration of the Bar Date, the alleged debt owed to Burgraf by the Debtor was discharged upon entry of the Discharge Order.⁴ See *In re Parks*, 281 B.R. 899, 904 (Bankr. E.D. Mich. 2002) ("[B]ecause [the creditor] had notice of the bankruptcy case and did not timely file a complaint to determine the dischargeability of debt, the Court concludes that its debt was discharged.")

B. Section 523(a)(3)

Burgraf also alleges § 523(a)(3) as the basis for this

⁴The Discharge Order was entered on February 9, 2012 – approximately nine weeks after the Motion to Extend Time was filed. Had Burgraf filed the Complaint prior to entry of the Discharge Order, she may have preserved the issue of whether the alleged debt was excepted from discharge.

adversary proceeding although the only references to § 523(a)(3) in the Complaint are in the recitation of allegedly applicable subsections in paragraph 6 and the prayer for relief. While it is true that the Debtor failed to schedule Burgraf as a creditor, Burgraf had actual notice of the Debtor's bankruptcy case.

Section 523(a)(3)(B) excepts from discharge debts—

(3) neither listed nor scheduled under 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

* * *

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request[.]

11 U.S.C. § 523(a)(3)(B) (West 2011) (emphasis added).

“[S]ection 523(a)(3)(B) clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from [sic] the court of various pertinent dates.” *Pavlik v. Burdel (In re Burdel)*, 126 B.R. 278, 279 (Bankr. N.D. Ohio 1991) (quoting *Byrd v. Alton (In re Alton)*, 837 F.2d 457, 460 (11th Cir. 1988)) (emphasis added). “Moreover, [§ 523(a)(3)(B)] places a burden on creditors with knowledge of a bankruptcy proceeding to act in order to protect their rights.” *Id.* (citing *Sanchez Ramos v. Compton (In re Compton)*, 891 F.2d 1180, 1187 (5th Cir. 1990)). “It is a well-established and widely-held

rule that a creditor having actual knowledge of a bankruptcy filing and a reasonable opportunity to object to the discharge of a debt pursuant to § 523(a)(2)(A) may not file an a [sic] complaint after the prescribed deadline for doing so has passed." *Muse v. Muse (In re Muse)*, 289 B.R. 619, 623 (Bankr. W.D. Pa. 2003) (citations omitted) (emphasis in original).

Certain courts have held that, pursuant to Rule 4007(c),⁵ 30 days' notice is necessary to satisfy the requirements of § 523(a)(3)(B). See *Harper v. Burrier (In re Burrier)*, 184 B.R. 32, 34 (Bankr. N.D. Ohio 1995) (citing *Mfrs. Hanover v. Dewalt (In re Dewalt)*, 961 F.2d 848 (9th Cir. 1992)) ("[A] creditor must have either formal or inquiry notice of the bar date for filing dischargeability complaints at least 30 days prior to the deadline in order to be bound thereby.")⁶ Other courts have held that § 523(a)(3)(B) does not mandate that the creditor receive 30 days' notice; the creditor need only be given sufficient opportunity to object to the discharge of a debt. See *In re Burdel*, 126 B.R. 278 (finding more than 60 days' notice was sufficient); *Sec. of Labor v. Bateman (In re Bateman)*, 254 B.R. 866 (Bankr. D. Md. 2000) (finding 26 days' notice was sufficient); *Grossie v. Sam (In re Sam)*, 894 F.2d 778 (5th Cir. 1990) (finding 18 days' notice was

⁵The relevant provision in Rule 4007(c) states, "The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002." FED. R. BANKR. P. 4007(c) (West 2011).

⁶In *In re Dewalt*, the Ninth Circuit Court of Appeals stated, "[T]he 30-day notice provision of Rule 4007(c) provides a guide to the minimum time within which it is reasonable to expect a creditor to act at penalty of default." *In re Dewalt*, 961 F.2d at 851.

sufficient); *Tomblin v. Robbins (In re Robbins)*, 2007 Bankr. LEXIS 1419 (Bankr. E.D. Tenn. Apr. 19, 2007) (finding four days' notice was not sufficient).

This Court finds that, pursuant to § 523(a)(3)(B), whether the creditor had sufficient time to object to the discharge of a debt is to be determined on a case-by-case basis, depending on the totality of the circumstances. As stated by the Fifth Circuit Court of Appeals:

[T]he purpose of the notice requirement is satisfied when the creditor has actual knowledge of the case in time to permit him to take steps to protect his rights. Under such circumstances, technical compliance with Rule 4007(c)'s requirement that the creditor receive thirty days notice of the bar date frustrates the expeditious and efficient administration of cases in the bankruptcy court and is unnecessary to provide adequate notice.

In re Sam, 894 F.2d at 781. Based on the facts in the present case, the Court finds that Burgraf had adequate opportunity to object to the discharge of the debt allegedly owed to her by the Debtor, but Burgraf failed to do so prior to expiration of the Bar Date and entry of the Discharge Order.

Burgraf had actual knowledge of the Debtor's bankruptcy no later than December 9, 2011 – which was 25 days prior to the Bar Date – as evidenced by the filing of the Motion to Extend Time. Although Burgraf requested only an extension of time to object to the Debtor's discharge, the Bar Date applied equally to objections to the discharge of a particular debt. Thus, Burgraf had knowledge of the Bar Date for a minimum of 25 days.

In addition, Burgraf was aware of her cause of action against

the Debtor when she received notice of the Debtor's bankruptcy case. In fact, the Complaint mirrors the Third Party Complaint Burgraf had filed previously in the Burgraf Lawsuit. Mr. McGee represents Burgraf in both the Burgraf Lawsuit and the instant proceeding. As a result, 25 days provided Burgraf ample opportunity to object to the discharge of the alleged debt or, at a minimum, to obtain an extension of time in which to do so. Burgraf did not file the Complaint until February 15, 2012, which was more than six weeks after the Bar Date and nine weeks after Burgraf had actual knowledge of the Debtor's bankruptcy.

Based on the circumstances, the Court finds that Burgraf had sufficient notice and opportunity to object to the discharge of the alleged debt owed to Burgraf by the Debtor prior to the Bar Date. As a consequence, the Court finds that the alleged debt is not excepted from discharge pursuant to § 523(a)(3)(B).

II. CONCLUSION

The Bar Date, which was the last day to object to the discharge of the alleged debt owed to Burgraf by the Debtor, was January 3, 2012. The Discharge Order was entered on February 9, 2012. Burgraf did not file the Complaint until February 15, 2012, and did not seek an extension of time to object to the discharge of the alleged debt. Because the Complaint was not timely filed, the alleged debt owed to Burgraf by the Debtor was discharged when the Court entered the Discharge Order.

Burgraf had actual knowledge of the Bar Date on or before

December 9, 2011. Burgraf had at least 25 days to file a complaint objecting to the discharge of the alleged debt prior to the Bar Date. Burgraf also failed to obtain an extension of time to file such complaint. Burgraf had prior knowledge of the instant cause of action, which is materially the same as the cause of action in the Burgraf Lawsuit. As a consequence, Burgraf had sufficient notice and opportunity to object to the discharge of the alleged debt. Because Burgraf had actual knowledge of the Debtor's bankruptcy and adequate time to protect her rights, the alleged debt is not excepted from discharge pursuant to § 523(a)(3)(B).

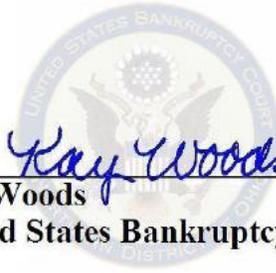
For the reasons set forth above, the Court finds that (i) the Complaint was not timely filed; (ii) the alleged debt owed to Burgraf by the Debtor was discharged upon entry of the Discharge Order; and (iii) the alleged debt is not excepted from discharge pursuant to § 523(a)(3)(B). Accordingly, the instant adversary proceeding will be dismissed.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: May 3, 2012
03:03:17 PM



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 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

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Defendant.

CASE NUMBER 11-42621

ADVERSARY NUMBER 12-4024

HONORABLE KAY WOODS

ORDER DISMISSING ADVERSARY PROCEEDING

On February 15, 2012, Donna Burgraf ("Burgraf") filed Complaint to Determine Dischargeability of Debt/Claims ("Complaint") (Doc. # 1), which commenced the instant adversary proceeding. The

Complaint requested the Court to determine the dischargeability of a debt pursuant to 11 U.S.C. § 523(a)(3), (a)(2), (a)(4) and/or (a)(6).

For the reasons set forth in this Court's Memorandum Opinion Regarding Dismissal of Adversary Proceeding entered on this date, the Court hereby finds that:

1. The last date to file a complaint objecting to the discharge of a debt was the January 3, 2012 Bar Date;
2. Because Burgraf did not file the Complaint prior to expiration of the Bar Date, the alleged debt owed to Burgraf by the Debtor was discharged upon entry of the Discharge Order on February 9, 2012;
3. Burgraf had actual knowledge of the Debtor's bankruptcy case no later than December 9, 2011, and, as a consequence, she had adequate opportunity to object to the discharge of the alleged debt owed to her by the Debtor prior to expiration of the Bar Date; and
4. The alleged debt owed to Burgraf by the Debtor is not excepted from discharge pursuant to 11 U.S.C. § 523(a)(3)(B).

As a consequence, the Court hereby dismisses the instant adversary proceeding.

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