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United States Bankruptcy Court,
D. Idaho.

In re: Kenneth L. CALDWELL, Debtor.

No. 02–41931. | May 17, 2004.

Attorneys and Law Firms

John Avery, Idaho Falls, Idaho, for Debtor.

Lindscy M. Clark, Oakland, California, Creditor, pro se.

Craig W. Simpson, Simpson & Gauchay, Idaho Falls, Idaho, for Westmark Federal Credit Union.

Opinion

MEMORANDUM OF DECISION

PAPPAS, Chief Bankruptcy J.

Background

***1** Debtor Kenneth Caldwell's former spouse, Lindsey Clark ("Creditor"), alleges that Debtor owes her money as a result of their divorce, and that these debts should not be discharged in his Chapter 7 case. She appears in this case without counsel. Creditor has filed a motion requesting the Court to "reconsider" its entry of an order of discharge in Debtor's favor so that she may contest the dischargeability of the debts Debtor owes her. Docket No. 65.

Creditor has never filed a proper, timely adversary complaint to obtain a dischargeability determination. Instead, she filed two pleadings with the Court purporting to object to either Debtor's discharge, or to the dischargeability of certain debts. Before the Court can resolve Creditor's motion to reconsider Debtor's discharge, the Court must consider whether either of the two pleadings Creditor filed can be characterized as a timely adversary complaint. What follows are the Court's findings of fact, conclusions of law, and disposition of the issues. Fed. R. Bankr.P. 7052.

Facts [1]

1 To recount the pertinent facts, the Court takes judicial notice of its file in this matter. Fed.R.Evid. 201.

Debtor filed a petition under Chapter 13 of the Bankruptcy Code on October 4, 2002. Docket No. 1. At his request, the case was converted to a Chapter 7 case on August 28, 2003. Docket No. 45. Debtor did not list Creditor in either his original or amended schedules of debt. *See* Docket Nos. 9, 50.

The Court is uncertain of how Creditor learned of the pendency of Debtor's bankruptcy case, or when. [2] However, when she did, Creditor attempted to contest Debtor's right to discharge the debts she claims Debtor owes her in connection with the parties' divorce proceedings. She did this on November 10, 2003, by filing a pleading captioned "Chapter 7 Objection to Discharge" in Debtor's bankruptcy case. Docket No. 56. Although this pleading expressly references § 523 [3] and § 727 as the grounds for

relief, the pleading was not in the form of an adversary complaint as required by Rules 7001(4) or (6) and 7010, nor was it accompanied by a filing fee, an adversary cover sheet, or a proposed summons for issuance by the Clerk. The pleading was therefore deficient under this Court's Local Rules. *See* L.B.R. 7003.1. In addition, because the pleading contained a certificate of service indicating that Creditor had mailed a copy of the document only to the Chapter 7 Trustee, L.D. Fitzgerald, it appears service on the Debtor was inadequate when compared to that required for a summons and adversary complaint under Fed. R. Bankr.P. 7004. Docket No. 56.

2 Lacking the facts, and the issue not having been raised or argued by the parties, the Court expresses no opinion regarding whether any of the debts Debtor may owe to Creditor are excepted from discharge under § 523(a)(3), dealing with unscheduled debts.

3 Unless otherwise noted, all statutory references are to title 11 of the United States Code and all references to "Rules" are to the Federal Rules of Bankruptcy Procedure.

In reviewing this pleading, the Clerk correctly assumed Creditor was attempting to object to Debtor's right to a discharge, and therefore, that Creditor's pleading would be governed by Part VII of the Bankruptcy Rules. *See* Rules 4004(d) and 4007(e) (prescribing that an objection to discharge, or a request to determine the dischargeability of a debt, are proceedings requiring the filing of a complaint and are governed by Part VII of the Rules). However, because Debtor did not submit a filing fee, adversary cover sheet or summons, the Clerk simply filed and docketed the pleading in the bankruptcy case, taking no further action.

***2** December 9, 2003, was the date established by Rules 4004(a) and 4007(b) as the last day to file an adversary complaint objecting to Debtor's discharge under § 727(c) or to determine the dischargeability of a debt under § 523(c). As reflected by the file, a "Notice of Commencement of Case" setting forth this deadline was sent to listed creditors in Debtor's case on September 12. A copy of the Notice was placed in Debtor's file on September 16, 2003.

The day before the deadline, on December 8, 2003, Creditor filed another pleading with the Clerk. This document is entitled "Motion for Extension of Time to Object to Discharge Against Debtor," Docket No. 57, and as its title implies, in it, Creditor sought more time within which to object to Debtor's discharge. The Court granted Creditor's motion in an order entered December 15, 2003, Docket No. 58, and extended the deadline for filing an adversary complaint to January 10, 2004.

No complaint was filed. Instead, Creditor filed a second motion for extension of time on January 12, 2004. Docket No. 59. Although this motion was technically filed after the new deadline had passed, the Court entered an order the same day granting a second extension of time to file a complaint to February 10, 2004.[4] Docket No. 60. This order provided that no further extensions would be granted without a hearing. *Id.*

4 The Court notes it erred when it granted the second extension request because Creditor's request for further relief was untimely. Rules 4004(b) and 4007(c) both require that a request for extension of the time to file a § 727(c) or § 523(c) complaint be made before the deadline. Creditor's request for a second extension of time was made two days *after* the January 10, 2004, deadline. In the Court's opinion, as it turns out this error was harmless because it will not affect the Court's disposition of the issues, as explained below.

The February 10 deadline passed without further submissions by Creditor. When, in the opinion of the Clerk, no timely complaint objecting to discharge had been filed, on February 18, 2004, the Clerk entered an Order of Discharge in favor of Debtor. Docket No. 61. On February 26, 2004, the Clerk received yet another pleading from Creditor entitled "Objection to Discharge and to Determine Dischargeability," which was again filed in the bankruptcy case. Docket No. 67. However, this pleading was accompanied by an adversary cover sheet and two summonses for issuance by the Clerk: one addressed to Debtor; the other addressed to a third party, Westmark Federal Credit Union ("Westmark").[5] It appears from the documents that copies of the unissued summonses had been mailed by Creditor to Debtor's attorney and to Westmark's attorney.

5 Ms. Clark did not include a filing fee with the documents she sent to the Clerk. She delivered a money order to the Clerk at the March 23, 2004, hearing. The Clerk has retained the money order, uncashed, pending the disposition of the issues presented here.

When she became aware a discharge order had been entered, Creditor next filed a "Motion to Reconsider Discharge" on March 19, 2004. This motion was set for hearing on March 23, 2004. Docket No. 62. Debtor had apparently already received a copy of Creditor's motion before it was filed with the Court, because on March 18, he filed an "Objection to Reconsideration of Discharge." Docket No. 64.

The Court conducted the hearing on Creditor's motion on March 23, 2004. Creditor appeared *pro se*. Debtor and Westmark both appeared through their attorneys. Minute Entry, Docket No. 66. [6] At the hearing, Creditor argued that her untimely submission, the February 26 "Objection to Discharge and to Determine Dischargeability," Docket No. 67, should be construed by the Court to be an adversary complaint, and that her failure to timely file the pleading should be deemed "excusable." Therefore, Creditor argued, Debtor's discharge order should be set aside. Creditor explained that she was in poor health, had been hospitalized for a time, was homeless, lacked transportation, and that she had not had access to any meaningful legal assistance. When the Court asked her at the hearing why she did not file a complaint after the Clerk pointed out the problems, she explained that she thought what she had filed was adequate. [7]

6 The minute entry for the hearing indicates it was held on March 22, 2004. The hearing was actually held on its scheduled date of March 23, 2004. The Court presumes the minutes contain a typographical error.

7 The Clerk's office communicated with Creditor several times concerning the problems it noted with Creditor's submissions. After Creditor filed the first objection, the Clerk's office sent Creditor a letter notifying her that her pleading was insufficient under the Rules to commence an adversary proceeding, and that it lacked a cover sheet, summons, and the required filing fee. On February 13, 2004, Creditor sent a money order corresponding to the amount required to file an adversary complaint, as well as an adversary cover sheet, but no other documents. The Case Administrator wrote to Creditor informing her that the Clerk's office would keep the cover sheet and fee, but would await a complaint and a summons. When those documents were not forthcoming, the discharge order was entered and the Case Administrator sent another letter to Creditor returning the money order and the adversary cover sheet, explaining that she never received either a complaint or summons. Creditor's second objection was filed with two summonses and so adversary cover sheet, but no filing fee.

The Court is sympathetic to the Clerk's predicament in attempting to deal fairly with unrepresented parties who lack the necessary familiarity with the Rules and Code to navigate the bankruptcy process. The Clerk must be able to articulate and enforce the requirements of the law without rendering legal advice to an unrepresented party, while at the same time, not acting to prejudice a party's rights. This can be a challenging task, indeed, and the Court offers no criticism of the Clerk's actions in this case.

***3** Debtor and Westmark contend that the Court should not accept Creditor's pleadings as complaints, and that Creditor should not be allowed to go forward with an adversary proceeding. They point out that, despite all of the excuses Creditor offered for not timely filing a complaint, she had managed to file several pleadings in the case, including two requests for an extension of time. Given the content of these pleadings and the relief requested, they contend that Creditor was sufficiently acquainted with the Code and Rules so as to require that she file a timely, adequate complaint. Westmark also objects to Creditor's request that she be excused from any deadline, arguing that Westmark would not be a proper party to any adversary complaint objecting to Debtor's discharge or to the dischargeability of individual debts. [8]

8 Of course, to the extent Creditor is entitled to some remedy as against Westmark, the timeliness of the filing of her pleadings is not an issue. However, the nature of the relief sought by Creditor as to Westmark in her "objections" is not at all clear. The Court seriously doubts whether Westmark, another creditor, is a proper party to Creditor's action questioning the propriety of Debtor's discharge. Creditor should carefully examine this issue before involving Westmark in further proceedings.

Disposition

A. The Issues.

Procedurally, the only motion properly before the Court for disposition is Creditor's Motion to Reconsider Discharge. Docket No. 65. In it, Creditor asks the Court to reconsider its entry of the Order of Discharge, and to allow her second objection, Docket No. 67, as a timely filed adversary complaint even though it was filed after the deadline for objecting to discharge.

There are a number of issues, though, implicated by Creditor's request. Before the Court can dispose of Creditor's motion, it must first determine whether either of the two pleadings purporting to object to Debtor's discharge filed by Creditor in this case can be considered a legally sufficient adversary complaint, and if so, whether or not they were timely. If either constitutes a timely and sufficient complaint, the Court must then determine whether Creditor has alleged facts entitling her to relief under § 523(a) or § 727(a). If Creditor has filed a timely adversary complaint contesting the eligibility of Debtor for a discharge under § 727(c), the Court would be inclined to set aside or suspend the effect of the order of discharge pending the resolution of Creditor's action.

B. The Code and Rules.

Under the Bankruptcy Code and Rules, whether a debtor is eligible for a discharge under § 727(a) is a question quite distinct from whether a particular debt is excepted from discharge under § 523(a). An objection to discharge, filed as an adversary proceeding under Rule 7001(4), seeks to prevent a debtor from obtaining a discharge of any and all debts. 11 U.S.C. § 727(c). To obtain a denial of discharge, a creditor must file an adversary complaint by the deadline that always precedes entry of the discharge order.

Even if a Chapter 7 discharge is entered, though, there are limits to its scope. The order discharges all debts that arose before the date the petition was filed "[e]xcept as provided in section 523 of [title 11]." 11 U.S.C. § 727(b). A discharge entered under § 727 does not, therefore, operate to discharge a debtor from any debt incurred under the circumstances listed in § 523(a). *See* 11 U.S.C. § 523(a) (stating that "[a] discharge under section 727 ... does not discharge an individual debtor from any debt" listed in § 523(a)).

***4** Most of the kinds of debt included in § 523(a) are excepted from discharge "as a matter of law," or in other words, without the necessity that the bankruptcy court adjudge the debts nondischargeable. For example, a debtor's obligation for alimony or support is excepted from discharge by the Code without the need that the creditor take any further action. On the other hand, a few types of debts will only be excepted from discharge if the creditor makes a timely request that this Court declare those debts excepted from discharge. Rule 7001(6) requires that such a request be made by, again, commencing an adversary proceeding. 11 U.S.C. § 523(c). The debts that require a bankruptcy court's determination of nondischargeability include "non-support" debts owed to a former spouse arising from a divorce, 11 U.S.C. § 523(a)(15); debts incurred as a result of the debtor's fraudulent conduct, 11 U.S.C. § 523(a)(2); debts for fiduciary fraud, embezzlement, or larceny, 11 U .S.C. § 523(a)(4); and debts incurred as a result of the debtor's willful and malicious injuries to the creditor or her property, 11 U .S.C. § 523(a)(6).

Therefore, the timely filing of an adversary complaint is crucial if a creditor objects to a debtor's eligibility for a discharge under § 727(a), or objects to the discharge of the particular types of debts referenced in § 523(c). Rules 4004(c) and 4007(c), respectively, require that such a complaint be filed within sixty days after the first date set for the meeting of creditors under § 341(a). In contrast, if a creditor alleges debts are excepted from discharge under the provisions of § 523(a) other than subsections (2), (4), (6) or (15), an adversary complaint to determine dischargeability may be filed "at any time," Fed. R. Bankr.P. 4007(b), even after entry of the discharge order.

The rules discussed above illustrate why the nature of the allegations made in Creditor's pleadings bear upon the Court's decision in this case. It is not necessary that Debtor's order of discharge be "set aside" if Creditor merely desires to pursue an adversary complaint contesting the dischargeability of those debts enumerated in § 523(a), because the scope of the order of discharge expressly excludes such debts. Conversely, if Creditor contests Debtor's discharge under any provision in § 727(a), and argues that Debtor should not receive a discharge at all, the Court is inclined to set aside the discharge order, or to at least suspend its effect, while Creditor's action proceeds.

C. The Adequacy And Timeliness of Creditor's Objections.

The general rules of pleading for an adversary complaint are set forth in Fed.R.Civ.P. 8, as incorporated by Rule 7008. Most importantly, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief,

and ... a demand for judgment for the relief the pleader seeks." Fed.R.Civ.P. 8(a). "In the bankruptcy context, we construe a deficient pleading liberally if the pleading substantially complies with the requirements of a complaint by giving the debtor 'fair notice of what the plaintiff's claim is and the grounds upon which it rests...." ' *Markus v. Gschwend* (*In re Markus*), 313 F.3d 1146, 1149 (9th Cir.2002) (quoting *Dominguez v. Miller* (*In re Dominguez*), 51 F.3d 1502, 1508 (9th Cir.1994), in turn quoting *Classic Auto Refinishing, Inc. v. Marino* (*In re Marino*), 37 F.3d 1354, 1357 (9th Cir.1994)). The primary criterion, then, in determining whether a deficient pleading constitutes a complaint under Rule 7008 is notice of the nature of relief claimed. *Dominguez,* 51 F.3d at 1509.

1. Creditor's Second Objection Is Untimely Notwithstanding its Adequacy Under Rule 7008.

***5** Creditor argues that her second objection should be construed to "stand on its own" and, even though filed after the deadline established by the Court, be treated as timely filed due to her extraordinary circumstances. The Court disagrees.

Even if the second objection meets the requirements of Rule 7008 to be considered an adversary complaint, the applicable case law requires that the time limits imposed by Rule 4007(c) be strictly enforced:

> [A]lthough courts within the Ninth Circuit have indicated in dicta that there is an exception to Rule 4007(c)'s time limit for "unique" or "extraordinary" circumstances, the validity of the doctrine remains doubtful.... We noted that if equitable powers to extend the time for filing under section 4007(c) exist at all, they are limited to "situations where a court *explicitly misleads* a party."

Marino, 37 F.3d at 1358 (quoting *Allred v. Kennerley* (*In re Kennerley*), 995 F.2d 145, 147, 148 (9th Cir.1993) (internal citations omitted)). It is only when the court misleads a creditor into filing the "untimely" complaint, such as by sending out an incorrect notice of the bar date, that a late filing can be excused. *Allred,* 995 F.2d at 148.

Creditor's *pro se* status does not excuse her from complying with court rules. *Briones v. Riviera Hotel & Casino,* 116 F.3d 379, 382 (9th Cir.1997). Unrepresented parties, even those who lack the expertise to understand them, are still expected to comply with the Rules. While Creditor was apparently experiencing some personal challenges, she was able to file several pleadings with the Court before the deadline for filing a complaint finally passed. None of the reasons offered by Creditor for her delay in acting are sufficient to excuse the late filing of her second objection.

2. Creditor's First Objection Is An Adequate and Timely Complaint Under § 523(a).

Recall, however, that Creditor's original "Objection to Chapter 7 Discharge," Docket No. 57, was filed on November 10, 2003, well before the original deadline expired. In this context, then, the Court must consider whether the objection gave Debtor adequate notice that Creditor was objecting to Debtor's right to a discharge on any of the grounds enumerated in either § 523(a) or under § 727(a).

Examining Creditor's objection, the Court discerns three claims she asserts against Debtor. First, Creditor alleges that Debtor has failed to pay her spousal support payments, medical bills, medical and auto insurance premiums, and automobile payments, contrary to the parties' divorce decree. Objection at 4, Docket No. 56. If she is correct, and if these debts are truly in the nature of support, they would be excepted from discharge under § 523(a)(5). Second, even if these debts are not for her support, because they arise out of the parties' divorce, Creditor can assert they are excepted from discharge under § 523(a)(15). Creditor's third claim is that Debtor's failure to maintain her auto and medical insurance resulted from his "willful malice" and caused Creditor to suffer great harm based upon her inability to obtain proper medical care. Objection at 3, Docket No. 56. Although the objection does not refer to a specific subsection of either § 523 or § 727, such a claim could conceivably be excepted from discharge under § 523(a)(6) as a debt "for willful and malicious injury by the debtor to another entity."

***6** Reviewing Creditor's pleading as a whole, the Court is persuaded that Creditor's objection satisfies the criteria discussed above and should be deemed a complaint for relief under either § 523(a)(5) or § 523(a)(15), and under § 523(a)(6). *See Dominguez,* 51 F.3d at 1509 (finding that a creditor's memorandum satisfied the notice pleading requirements for a complaint objecting to a debtor's discharge when it stated the statutory criteria, referenced specific evidence, and stated a claim for relief). But despite the passing reference to § 727 in this pleading, Creditor made no factual allegations in her objection that could be considered a request for relief under that section. Therefore, the objection can not be fairly considered a complaint for denial of discharge. Thus, Creditor is time barred from pursuing a § 727 claim.

3. The New Claims Alleged in Creditor's Second Objection Do Not Relate Back.

Even though Creditor's second objection, Docket No. 67, cannot be considered a timely complaint standing alone, it can nonetheless be considered if it is construed to be a proper amendment to Creditor's first objection. And, to the extent it asserts new claims, Creditor can pursue them if they "relate back" to the first objection. Fed.R.Civ.P. 15(c), Fed. R. Bankr.P. 7015.

The Court concludes that Creditor's second objection, although not styled a complaint, also meets the liberal pleading requirements embodied in Fed.R.Civ.P. 8, and can be considered as an amended complaint. However, to "relate back," and therefore be timely, any new claims alleged in the second objection must satisfy the requirements of Rule 15(c):

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the forgoing provision (2) is satisfied, and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c).

New claims asserted in an amended pleading must arise "from the same 'conduct, transaction, or occurrence' as the original claim" before they will relate back. *Markus,* 313 F.3d at 1150 (quoting *Dominguez,* 51 F.3d at 1510). Such a link will be found if "the claim to be added will likely be proved by the 'same kind of evidence' offered in support of the original pleading." *Dominguez,* 51 F.3d at 1510 (quoting *Percy v. San Francisco Gen. Hosp.,* 841 F.2d 975, 978 (9th Cir.1988), in turn quoting *Rural Fire Protection Co. v. Hepp,* 366 F.2d 355, 362 (9th Cir.1966)).

***7** Comparing Creditor's two objections side by side, it is evident that several of Creditor's claims in the second objection are nearly identical to the claims she attempts to articulate in the first. First, Creditor again claims any damages she has suffered for willful injury as a result of Debtor's removal of insurance benefits should not be discharged, and she cites § 523(a)(6). *Compare* Objection at 8, ¶ h, Docket No. 67, *with* Objection at 3, ¶ 2, Docket No. 56. Creditor also alleges that Debtor has failed to pay spousal support, medical bills, and auto payments, and that those debts should not be discharged under § 523(a)(5). *Compare* Objection at 8, ¶ i, Docket No. 67, *with* Objection at 3, 4, Docket No. 56. These claims are not new, and simply amend and supplement the claims previously stated, although more vaguely, in her first objection. Thus, Creditor's claims asserted under § 523(a)(5) and (a)(6) "relate back" and are properly considered by the Court.

However, Creditor added several other, different claims in her second objection that are not referenced in her first pleading and arise out of conduct unrelated to the divorce decree. Those claims therefore do not relate back to the first pleading and are untimely. Specifically, those claims are that Debtor allegedly: (1) falsified and destroyed records, arguably stating a claim for denial of discharge under § 727(a)(3); (2) failed to satisfactorily explain any losses of assets, which could state a claim for denial of discharge under § 727(a)(5); (3) failed to list all of his creditors, and as a result, that he made a false oath in connection with his bankruptcy case contrary to § 727(a)(4); (4) transferred, concealed, or destroyed assets with the intent to hinder his

creditors, a claim falling within § 727(a)(2); (5) committed fraud while acting in a fiduciary capacity, which would except her claim from discharge under § 523(a)(4); (6) removed funds from her bank account causing her injury, excepting the claim from discharge under § 523(a)(6); and (7) owes Creditor one-half of educational debts Creditor incurred, a claim presumably excepted from discharge under § 523(a)(8). Objection at 5–7,¶¶ a, 6, [sic] c, d, e, f, and j, Docket No. 67. While Creditor may have cited § 727 and § 523 generally in her first, timely objection, none of these specific claims nor any supporting factual allegations can be found in her original submission. Therefore, Debtor was not adequately apprised of the nature of Creditor's claims nor her basis for relief until the second objection was filed, and none of these allegations can be said to relate back to the date of filing of the first objection.

Conclusion

In summary, for the reasons explained above, the Court concludes Creditor's initial "Objection to Chapter 7 Discharge," Docket No. 56, filed on November 10, 2003, (the "first objection") should be construed as a defective but adequate and timely adversary complaint requesting a determination that some of her claims against Debtor be excepted from discharge under § 523(a)(5), (a)(15) or (a)(6).

***8** Creditor's "Objection to Discharge and to Determine Discharge-ability," Docket No. 67, filed after the bar date on February 26, 2004, (the "second objection") cannot be considered a timely "stand alone" complaint. Instead it will be treated as an amendment to the first objection.

Creditor may proceed with the claims stated in the first and second objection for relief falling under § 523(a)(5), or in the alternative, (a)(15), and under (a)(6). However, Debtor's request in the second objection that the Court deny Debtor a discharge under § 727(c) does not relate back and is time barred. [9]

9 Of course, as noted above, Creditor's failure to properly obtain a summons issued by the Clerk and to serve either her first or second objection as required by the Rules for an adversary complaint continues as a problem in this case. *See* Fed. R. Bankr.P. 7004(b)(9) (service by mail on a debtor represented by an attorney); 7004(e) (requiring the summons and complaint, if served by mail, to be deposited in the mail within 10 days after a summons is issued); L.B.R. 7003.1 (requiring clerk to issue the summons). Creditor must effect proper service on the defendants or her action is subject to dismissal.

Because Creditor did not timely object to Debtor's discharge under § 727(a), Creditor's "Motion to Reconsider Discharge," Docket No. 65, will be denied. There is no need to set aside the discharge order merely to allow Creditor to proceed with her action to determine dischargeability of debts under § 523(a).

A separate order will be entered.

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