

UNITED STATES BANKRUPTCY COURT
Eastern District of Tennessee
Southern Division

In re

HANES LLEWELYN BOYD

Bankruptcy Case
No. 99-11760

JOHN KAIN

Adversary Proceeding
No. 99-1228

Plaintiff

v.

HANES LLEWELYN BOYD

Defendant

MEMORANDUM

Appearances: James A. Fields, Fields & Bible, P.C., Chattanooga, Tennessee,
Attorney for Plaintiff

Thomas E. Ray, Wooden, Ray & Scarborough, P.C., Chattanooga,
Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The plaintiff brought this suit against the debtor to except certain debts from discharge pursuant to Bankruptcy Code § 523(a). 11 U.S.C. § 523(a). This memorandum deals with two motions filed by the debtor, a motion to dismiss for insufficient service of process and a motion for partial dismissal for failure to state a claim.

The court will first consider the motion to dismiss for insufficient service of process. The plaintiff filed the complaint on October 12, 1999. Service of process is subject to two time limits. First, a summons must be served within ten days after it is issued. *Fed. R. Bankr. P. 7004(e)*. Second, the plaintiff must make a legally effective service of process within 120 days after the filing of the complaint. *Fed. R. Bankr. P. 7004(a)*; *Fed. R. Civ. P. 4(m)*. The plaintiff's 120 days has not expired. The court has previously held that it would not dismiss a complaint for ineffective service of process when the plaintiff still has time within the 120 days to make a legally effective service of process. *Gillis v. Gillis (In re Gillis)*, Adv. Proc. No. 97-1111, Bankr. Case No. 97-11851 (Bankr. E. D. Tenn. Aug. 13, 1997). A copy of the opinion is attached. The debtor has not set out any reason for the court to rule differently in this adversary proceeding. Therefore, the court will deny the motion to dismiss for insufficient service of process.

The court turns now to the motion for partial dismissal. The motion for partial dismissal relates to a claim made by the plaintiff on behalf of Boca Development, LLC. "LLC" stands for limited liability company. The complaint states that it includes a derivative claim by the plaintiff on behalf of Boca Development. In this regard, the complaint alleges that plaintiff was at the relevant times a member of Boca Development and that the debtor, while acting in a fiduciary capacity, converted funds that belonged to Boca Development.

The motion for partial dismissal relies on Rule 12(b)(6). It allows the court to dismiss a complaint to the extent it fails to state a claim upon which relief can be granted. *Fed. R. Bankr. P. 7012(b)*; *Fed. R. Civ. P. 12(b)(6)*. A motion under Rule 12(b)(6) asserts that even if the plaintiff has a valid claim against the defendant, the facts alleged in the complaint are not sufficient to state a legally enforceable claim against the defendant. 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure 2d* § 1357 at 304-310 (1990).

The first question is whether, or in what circumstances, a member of a limited liability company can bring suit on behalf of the company. In his motion for partial dismissal, the debtor relies on Tennessee Code § 48-217-101(c), which provides:

(c) A member, holder of a financial interest, governor, or manager of an LLC is not a proper party to a proceeding by or against an LLC except:

(1) Where the object of the proceeding is to enforce such person's right against or liability to the LLC;

(2) In a derivative action brought pursuant to chapters 201-248 of this title, the articles or the operating agreement;

(3) Where the proceeding asserts personal liability of such member, holder of a financial interest, governor, or manager as described in the last sentence of subsection (a).

Tenn. Code Ann. § 48-217-101(c)

The statute sets out a general rule that a member is not a proper party to a suit by the LLC or against the LLC. This is an odd method of saying that a member generally is not the correct person to sue if the claim is against the LLC and that a member

generally is not the correct person to bring suit on a claim by the LLC against someone else. This meaning becomes apparent from paragraph (2), the second exception to the general rule. Paragraph (2) allows a member to be a plaintiff or defendant in a derivative suit, which means a suit brought on behalf of the LLC. The complaint in this case states that the plaintiff is making a derivative claim on behalf of the LLC. The complaint states a claim on behalf of the LLC for conversion of funds that belonged to the LLC. The debtor contends, however, that the complaint does not include allegations sufficient to establish the plaintiff's entitlement to bring a derivative suit on the LLC's behalf. The court will deal with that question later.

First, there are other questions with regard to whether other statutory provisions allow the plaintiff, as a member of the LLC, to bring suit against the defendant on behalf of the LLC. Section 48-217-101(c) contains two other exceptions in paragraphs (1) and (3). For the sake of completeness, the court will determine whether either of them applies. The plaintiff also relies on another statute. The court must determine whether it applies.

Arguably, paragraph (1) of § 48-217-101(c) applies because the complaint seeks to enforce the liability of a member to the LLC. Paragraph (2), however, recognizes that a member can sue another member on behalf of the LLC by bringing a derivative suit. The exception made by paragraph (2) for derivative suits would be unnecessary if paragraph (1) allowed a member to sue another member to enforce his liability to the LLC. Paragraph (1) apparently was intended to allow a a suit *by the LLC* to enforce a member's

liability to it. Thus, the plaintiff's claim on behalf of the LLC does not come within paragraph (1).

Paragraph (3) refers to the last sentence of subsection (a). The last sentence of subsection (a) states that a member, holder of a financial interest, governor, manager, employee, or other agent of an LLC "may become personally liable in contract, tort or otherwise by reason of such person's own acts or conduct." *Tenn. Code Ann.* § 48-217-101(a). A person's status as a member of an LLC could possibly make him liable for the actions of the company or someone associated with it. Subsection (a) of § 48-217-101 generally bars this kind of claim against a member of an LLC. On the other hand, a member may be personally liable as a result of his own actions in dealing with the plaintiff. The last sentence of subsection (a) prevents it from barring this kind of claim against a member of an LLC. *Walker v. Virtual Packaging, LLC*, 493 S.E.2d 551 (Ga. Ct. App. 1997). The plaintiff's complaint in this case does not attempt to set out a personal claim against the debtor; it expressly asserts a derivative claim on behalf of the LLC. Therefore, paragraph (3) does not allow the plaintiff's complaint against the debtor.

This brings the court to the other statute on which the plaintiff relies, *Tenn. Code Ann.* 48-230-105. It provides:

If an LLC or a manager or governor of the LLC violates a provision of chapters 201-248 of this title, a court in this state may, in an action brought by a member of the LLC, grant any equitable relief in considers just and reasonable in the circumstances and award expenses, including counsel fees and disbursements, to the member.

Tenn. Code Ann. § 48-230-105.

This statute must be considered in context. It is part of the chapter providing for derivative actions by members of an LLC. *Tenn. Code Ann.* §§ 48-230-101 – 48-230-105. An earlier provision in the same chapter supports the debtor's argument regarding the allegations that must be made to allow a derivative suit. It provides:

A complaint in a proceeding brought in the right of an LLC must allege with particularity the demand made, if any, to obtain action by the board of governors or managers and either that the demand was refused or ignored or why the member did not make the demand.

Tenn. Code Ann. 48-230-102. Rule 23.1 imposes essentially the same requirement. *Fed. R. Bankr. P.* 7023.1; *Fed. R. Civ. P.* 23.1.

The complaint does not contain any allegations that the plaintiff made a demand for action by the LLC. The complaint does not make any allegations expressly directed to why the plaintiff did not make a demand. The complaint does, however, allege that the LLC was a joint venture formed by the plaintiff and the debtor. This implies that the plaintiff and the debtor were the only members of the LLC. That would go far toward showing the futility of a demand for action by the LLC. But this implication is not clear from the complaint. Furthermore, even if they were the only members, there may have been managers or others who had authority to bring suit. Thus, the allegations of the complaint are not sufficient to show the futility of making a demand on the LLC to bring suit against the debtor.

The debtor's motion requests dismissal due to this failure. The correct procedure, however, is to allow the plaintiff an opportunity to amend the complaint to cure

the problem, if it can be cured. *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993); *Van Schaak v. Phipps*, 558 P.2d 581. (Colo. Ct. App. 1976); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure 2d* § 1357 at 361-367 (1990).

This memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE