

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-13978

Chapter 7

DENNIS S. PAINTER

Debtor(s)

THE BRADLEY FACTOR, INC.

Plaintiff

v.

Adversary Proceeding

No. 98-1165

DENNIS S. PAINTER

Defendant

**MEMORANDUM**

Appearances: Shannon L. Clark, Wooden, Ray & Scarborough, P.C., Chattanooga,  
Tennessee, Attorney for Plaintiff

Kyle R. Weems, Weems & House, Chattanooga, Tennessee, Attorney for  
Defendant

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

The plaintiff commenced this action by filing a complaint against the defendant (the debtor) to determine the dischargeability of a debt. The complaint relies on Bankruptcy Code § 523(a)(2) and (a)(6). 11 U.S.C. § 523(a)(2) & (6). The plaintiff filed the complaint before the deadline for filing complaints under those provisions. 11 U.S.C. 523(c); *Fed. R. Bankr. P.* 4007(c). The question now before the court is whether to grant or deny the plaintiff's motion to amend the complaint. The debtor opposes the motion on the ground that the deadline for filing a complaint has passed, the amendment will not relate back to the filing of the original complaint before the deadline, and therefore, allowing the amendment would be futile.

The original complaint alleges fraud as follows:

4. The debtor transacted business with the plaintiff prior to the filing of the chapter 7 bankruptcy.
5. The plaintiff was in the business of factoring or buying invoices or accounts receivable from the debtor.
6. At the time of the bankruptcy, the debtor owed to plaintiff \$295,080.37.
7. A certain number of these invoices were fraudulent or false invoices which were factored with the plaintiff.
8. A certain number of these invoices reflected customers of the debtor that did not exist or were for goods not provided to the customers by the debtor.
9. The fraudulent invoices in the hands of the creditor are uncollectible.
10. Fraud was perpetrated by the debtor for the purpose of obtaining money and/or extensions of credit from the plaintiff.
11. Damages suffered by this creditor due to the actions of the debtor should be deemed nondischargeable pursuant to 11 U.S.C. § 523(a)(2) and (a)(6).

The debtor's answer requested dismissal of the original complaint on the ground that it failed to plead fraud with specificity as required by Rule 9(b). *Fed. R. Bankr. P. 7009; Fed. R. Civ. P. 9(b)*. The plaintiff's proposed amendment seeks to cure any such problem by alleging the particular invoices used in the alleged fraud.

The failure to plead fraud with specificity can be cured by an amendment to the complaint. *Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15*. In this case, however, the motion to amend was filed after the deadline for filing complaints under § 523(a)(2) or (a)(6). 11 U.S.C. § 523(c); *Fed. R. Bankr. P. 4007(c)*. This raises the question of whether the amendment can relate back to the original complaint that was filed before the deadline. *Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(c)*.

For the purpose of argument, the court assumes the original complaint did not meet the specificity requirement of Rule 9. Rule 15(c)(2) allows an amendment to relate back if "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." *Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(c)(2)*.

The debtor could argue that the plaintiff's fraud claim was not "set forth" in the original complaint because it did not meet the specificity requirement of Rule 9, and therefore, the amendment can not relate back. Rule 15(c)(2), however, allows an amendment to relate back if the earlier pleading "attempted" to set forth the conduct, transaction, or occurrence that is alleged in the amendment. In other words, the failure to the original complaint to meet the specificity requirement

of Rule 9 does not prevent relation back of an amendment to add the specifics. *Mission Viejo National Bank v. Englander (In re Englander)*, 92 B.R. 425 (B.A.P. 9<sup>th</sup> Cir. 1988).

The original complaint alleged that the debtor defrauded the plaintiff by selling it accounts receivable for customers that did not exist or for goods that were not sold to the customer shown on the invoice. These allegations in the original complaint were sufficient to give the debtor notice of the conduct alleged to be fraudulent. *Compare Lini, Inc. v. Schachter (In re Schacter)*, 214 B.R. 767 (Bankr. E. D. Pa. 1997) and *Stodd v. Mufti (In re Mufti)*, 61 B.R. 514 (Bankr. C. D. Cal. 1986); see generally 6A Charles A. Wright, et al., *Federal Practice and Procedure* § 1497 at 85-91 (2d ed. 1990). The proposed amendment deals with the same conduct; it alleges the specific customers involved and the amounts. In the words of Rule 15(c)(2), the amendment deals with the same conduct, transaction, or occurrence set forth or attempted to be set forth in the original complaint. An amendment to add details to facts already alleged in the complaint is exactly the kind of amendment that generally relates back under Rule 15(c)(2). 6A Charles A. Wright, et al., *Federal Practice and Procedure* § 1497 at 74-76 (2d ed. 1990). Finally, the debtor has not pointed out any particular prejudice to his trial preparation that will result from allowing the amendment. The court will allow the amendment, and it will relate back to the filing of the original complaint.

The debtor's opposition to the amendment does not assert that it also fails to meet the specificity requirement of Rule 9. Therefore, the court will not dismiss the complaint on the basis of Rule 9.

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

ENTER:

BY THE COURT

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R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

entered May 12, 1999

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE

In re:

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DENNIS S. PAINTER

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THE BRADLEY FACTOR, INC.

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**ORDER**

In accordance with the court's memorandum opinion entered this date,

IT IS ORDERED THAT the plaintiff's motion to amend the complaint is granted; and

IT IS FURTHER ORDERED THAT the defendant's request to dismiss the complaint on the ground that it fails to allege fraud with specificity, as required by Rule 9(b), is denied.

ENTER:

BY THE COURT

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R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

entered May 12, 1999