

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

ROBERT HENRY WADDELL,

Debtor.

No. 03-32076
Chapter 7

ROBERT VALIGA,

Plaintiff,

vs.

ROBERT HENRY WADDELL,

Defendant.

Adv. Pro. No. 03-3179

MEMORANDUM

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is before the court on the plaintiff's motion filed January 11, 2005, to amend his complaint to add 11 U.S.C. § 727(a)(4) as a ground for denial of discharge. Because the court concludes that the proposed amendment relates back to the plaintiff's original complaint, the motion will be granted. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(J).

I.

In his original complaint, timely filed on October 16, 2003, the plaintiff Robert Valiga cited 11 U.S.C. § 727(a)(3) and (5) as the statutory basis for his request that the debtor's discharge be denied. As the factual predicate for his request, the plaintiff stated that he has obtained a judgment against the debtor in state court for breach of contract arising out of the construction of a residence for the plaintiff. According to the plaintiff, since the time the debtor "knew that he had probable personal exposure to [the plaintiff]," he has "engaged in a series of financial transactions and used certain business practices which have the effect of misleading potential creditors and the Court as to his true income and assets." More specifically, the plaintiff alleged that the debtor "works full time as the only surveyor employed by Waddell Surveying and Design, Inc.," a corporation purportedly owned by the debtor's wife and children, that the debtor is president of the corporation and his wife the secretary, that the corporation provided "numerous unsecured loans" to the debtor, "graciously provided full college scholarships" to his children, and makes the payment on a car purchased in the debtor's wife's name. The original complaint asserted that the debtor stated in his bankruptcy schedules that he owns no stock or other interest in incorporated or nonincorporated businesses, but cited specific examples of financial statements provided by the debtor or on his behalf which include the representation that the debtor is the owner of Waddell Surveying and Design, Inc. The complaint also set forth alleged inconsistent statements regarding the debtor's income and ownership of his home and contended that based on these inconsistencies, the debtor's discharge

should be denied pursuant to 11 U.S.C. § 727(a)(3) for “falsifying, or failing to keep or preserve recorded information from which his financial condition and business transactions may be ascertained” and pursuant to § 727(a)(5) for “fail[ing] to satisfactorily explain his alleged loss of assets, or the deficiency of his assets to meet his liabilities.”¹

In his proposed amended complaint attached to his motion to amend, the plaintiff seeks to substitute a new paragraph 24 for the paragraph 24 in the original complaint and include 11 U.S.C. § 727(a)(4) in the introductory paragraph and in the prayer for relief as an additional ground for denying the debtor a discharge. Section 727(a)(4) provides in part that a court may deny a debtor a discharge if “the debtor knowingly and fraudulently, in or in connection with the case ... made a false oath or account.” Paragraph 24 in the original complaint stated:

Plaintiff has attempted to investigate this matter as thoroughly as possible. However, Home Federal Bank did not honor the subpoena duces tecum served upon it, and additional investigation remains to be performed. Nevertheless, the documented inconsistencies set forth above leave no doubt that Mr. Waddell’s discharge should be denied.

Paragraph 24 in the amended complaint states:

Mr. Waddell’s loan file from Home Federal Bank reveals that Mr. Waddell wrote Home Federal in October 1993 to say that he and his wife were the sole shareholders in Waddell Surveying & Design, Inc. In addition, Mr. Waddell provided the bank with personal income tax returns for 1991 and 1992. Those returns stated that Mr. Waddell owned 80% of the corporation while his wife owned 20%. The continued representations that Mr. Waddell was the controlling owner of the corporation, for a decade after the purported issue of stock certificates, clearly show that Mr. Waddell retains his ownership.

¹Section 727(a) of the Bankruptcy Code provides in part that “[t]he court shall grant the debtor a discharge, unless ... (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor’s financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case” or “(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor’s liabilities.”

Thus, his statements under oath, and in connection with this case, were deliberately false. His discharge should be denied pursuant to 11 U.S.C. § 727(a)(5) [sic].

Although the debtor has not filed an objection per se to the plaintiff's motion to amend, in the parties' joint pretrial statement filed on January 10, 2005, the debtor indicates that he "strongly opposes" any attempt by the plaintiff to "interject an action under 11 U.S.C. § 727(a)(4)."

II.

Federal Rule of Bankruptcy Procedure 7015 provides that Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceedings. Paragraph (a) of Rule 15 states:

Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Paragraph (c) of Rule 15 provides in part:

Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

- (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
- (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

Under Rule 15(c)(2), "[a] party's amended pleading relates back to the date of the original filing if the claim arises out of the conduct, transaction, or occurrence set forth in the original pleading." *Farmer v. Osburn (In re Osburn)*, 203 B.R. 811, 812-13 (Bankr. S.D. Ga. 1996). As stated by one court:

[I]f the original complaint identifies the factual circumstances out of which the amended

claim arose, the amendment may “relate back,” and be deemed to fall within the time strictures of Rule 4004(a). [Citation omitted.] If, however, the amendment states an entirely new claim based upon a different set of facts, it does not relate back. The general inquiry is whether the defendant is on notice, as stated in the general fact situation set forth in the complaint, he may be held liable for particular conduct. Thus, if a defendant has notice that he is sought to be held liable for particular conduct or under a particular transaction, the plaintiff may later amend the complaint, beyond the time limitation, to add theories of liability, so long as liability is based upon that same conduct or transaction.

Employers Mut. Cas. Co. v. Lazenby (In re Lazenby), 253 B.R. 536, 539 (Bankr. E.D. Ark. 2000).

Applying this standard to the present case, it is clear that the amended complaint relates back to the original complaint in this action. Numerous allegations were set forth in the original complaint regarding the true ownership of Waddell Surveying & Design, Inc. and the debtor’s alleged inconsistent statements as to the corporation’s ownership. Rather than “an entirely new claim based upon a different set of facts,” the amended complaint merely adds another alleged inconsistent statement regarding such ownership and a new legal basis for a denial of discharge on these same facts. Because the debtor has been on notice since the timely filing of the original complaint that the plaintiff was seeking to hold him accountable for alleged misrepresentations as to the ownership of Waddell Surveying & Design, Inc., the amended complaint is not inappropriate. *See Michener v. Brady (In re Brady)*, 243 B.R. 253, 260 (E.D. Pa. 2000) (citing *In re Ishkhanian*, 210 B.R. 944, 955 (Bankr. E.D. Pa. 1997)) (“[W]here the text and substance of a newly-asserted claim require no additional factual allegations besides those recited in the original complaint to support it, and the amendment merely seeks to add an additional legal ground by which the discharge or dischargeability of a specific debt is challenged, an amendment to the pleadings may be allowable.”); *Tri-Ex Enters., Inc., v. Morgan Guar. Trust Co. of New York*, 586 F. Supp. 930, 932 (S.D.N.Y. 1984)(“[I]f the litigant has been advised at the outset of the general facts from which the

belatedly asserted claim arises, the amendment will relate back even though the statute of limitations may have run in the interim.”). In accordance with the foregoing, the court will enter contemporaneously with the filing of this memorandum opinion an order granting plaintiff’s motion to amend complaint.

FILED: January 14, 2005

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE