

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

In re

Case No. 02-34050

DANIEL HIPSHER  
CHARLENE HIPSHER

Debtors

LLOYD W. RHINES

Plaintiff

v.

Adv. Proc. No. 02-3189

DANIEL HIPSHER and  
CHARLENE HIPSHER

Defendants

**MEMORANDUM ON MOTION TO DISMISS**

**APPEARANCES:** M. J. HOOVER, III, ESQ.  
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Attorney for Plaintiff

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Attorney for Defendants/Debtors

**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

This adversary proceeding is before the court upon the Complaint filed by the Plaintiff, Lloyd W. Rhines, on November 8, 2002, objecting to the dischargeability of a debt. The Plaintiff requests that the court enter judgment in favor of the Plaintiff for money expended pursuant to a lease/purchase agreement between the Plaintiff and the Debtors and that the court determine that the judgment is nondischargeable. The Plaintiff seeks the determination of nondischargeability pursuant to 11 U.S.C.A. § 502 (West 1993 & Supp. 2002) and 11 U.S.C.A. § 507 (West 1993 & Supp. 2002).

The Debtors filed a Motion to Dismiss on February 6, 2003, requesting that the court dismiss the Complaint for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. 12(b)(6) and FED. R. BANKR. P. 7012 (making FED. R. CIV. P. 12(b) applicable in adversary proceedings). In support of their Motion to Dismiss, the Debtors assert that the Plaintiff has not set forth any statutory basis for the court to make a determination of nondischargeability.

The Plaintiff filed a Motion to Extend Time to Reply to Defendants' Motion to Dismiss (Motion to Extend Time) on March 4, 2003. The Motion to Extend Time stated that the deadline for filing a response to the Debtors' Motion to Dismiss was March 3, 2003, and requested a ten-day extension beyond that date.

Under the Local Bankruptcy Rules,

A motion filed in a[n adversary] proceeding shall be accompanied by a brief setting forth the facts and the law supporting the motion. Unless the court directs otherwise, the opposing party shall respond within twenty days after the date of filing of the motion. Any opposing response shall be supported by a brief setting forth the facts and the law in opposition to the motion. A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief

requested by the motion. After the time for response has expired, the court may rule on the motion without a hearing. A party may request a hearing.

E.D. Tenn. LBR 7007-1. Accordingly, the Plaintiff's deadline for filing a response to the Debtors' Motion to Dismiss was February 26, 2003. The Motion to Extend Time was not filed for an additional six days.<sup>1</sup> The Plaintiff's Motion to Extend Time will be denied.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

## I

When faced with a motion to dismiss pursuant to Rule 12(b)(6), the court must "construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief." *Bovee v. Coopers & Lybrand, C.P.A.*, 272 F.3d 356, 360 (6<sup>th</sup> Cir. 2001). Although all factual allegations are accepted as true, the court "need not accept as true legal conclusions or unwarranted factual inferences." *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6<sup>th</sup> Cir. 2002) (quoting *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6<sup>th</sup> Cir. 1987)). The complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Buchanan v. Apfel*, 249 F.3d 485, 488 (6<sup>th</sup> Cir. 2001) (quoting *Conley v. Gibson*, 378 U.S. 99, 102 (1957)).

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<sup>1</sup> The Motion to Extend Time was erroneously filed in the United States District Court on March 3, 2003; however, it was not filed in the United States Bankruptcy Court until March 4, 2003. Regardless, the Motion to Extend Time was still filed almost one week after the deadline for filing a response to the Debtors' Motion to Dismiss imposed by E.D. Tenn. LBR 7007-1.

## II

The Plaintiff and the Debtors entered into a Lease/Purchase Agreement in October 1999 for the lease and sale of real property located at 1616 Robert Huff Street, Knoxville, Knox County, Tennessee (the Real Property). In reliance upon the Lease/Purchase Agreement, the Plaintiff avers that he expended thousands of dollars in payments to the Debtors for the lease/purchase of the Real Property. Additionally, the Plaintiff avers that he expended thousands of dollars making improvements to the Real Property and to the Debtors' residence in reliance upon the terms of the Lease/Purchase Agreement.

On August 6, 2002, the Debtors filed a Voluntary Petition commencing their Chapter 7 bankruptcy case. The Plaintiff filed the Complaint initiating this adversary proceeding on November 8, 2002.

## III

In his Complaint, the Plaintiff first seeks a determination of nondischargeability pursuant to 11 U.S.C.A. § 502, which provides in pertinent part:

- (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.
- (b) Except as [otherwise] provided in . . . this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

. . . .

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates[.]

11 U.S.C.A. § 502. Section 502, however, concerns allowance of claims. It has no application whatsoever to whether a debt is nondischargeable.

The Plaintiff also requests a determination of nondischargeability pursuant to 11 U.S.C.A. § 507(a)(6), which provides:

(a) The following expenses and claims have priority in the following order:

. . . .

(6) Sixth, allowed unsecured claims for individuals, to the extent of \$1,800 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.

11 U.S.C.A. § 507(a)(6). This section of the Bankruptcy Code addresses priority of claims.

Again, it does not govern, in any manner, whether or not a debt is nondischargeable.

The exclusive method for requesting a determination of nondischargeability is by filing an adversary proceeding pursuant to one of the subsections of 11 U.S.C.A. § 523(a) (West 1993 & Supp. 2002), which governs nondischargeability of debts and lists nineteen specific types of debts that are nondischargeable. *See Dollar Corp. v. Zebedee (In re Dollar Corp.)*, 25 F.3d 1320, 1325 (6<sup>th</sup> Cir. 1994) (dischargeability determinations are governed by § 523); *In re Miklas*, 265 B.R. 312, 316 (Bankr. M.D. Fla. 2001) (“The dischargeability of debts is determined exclusively by [§] 523(a).”).

These debts include (1) customs taxes; (2) property obtained by false representations, false pretenses, or actual fraud, or by using documents representing the debtor’s financial condition that is materially false with an intent to deceive; (3) certain unscheduled debts; (4) fiduciary fraud, embezzlement, or larceny; (5) alimony and/or child support; (6) judgments against the debtor for willful and malicious injuries; (7) fines, penalties, and/or forfeitures; (8) student loans; (9) personal injury or wrongful death judgments against the debtor arising from his driving under the influence of alcohol or drugs; (10) debts scheduled in a prior Chapter 7 case in which the debtor was denied or voluntarily waived discharge; (11) judgments against the debtor arising from fiduciary fraud in connection with any bank or credit union; (12) malicious or reckless failure by the debtor to maintain capital of a bank or credit union; (13) any restitution awarded under title 18 of the U.S.C.A.; (14) debts incurred to pay taxes referenced in § 523(a)(1); (15) property settlements in a divorce proceeding; (16) condominium fees or assessments past due; (17) filing fees required under title 28 of the U.S.C.A.; (18) social security benefits in the nature of support; and (19) fines or judgments assessed for violation of the Securities Exchange Act or fraudulent sale or purchase

of securities. See 11 U.S.C.A. § 523(a)(1) through (19). This list is also exclusive; i.e., the only types of debts that can be nondischargeable are set forth in § 523(a)(1) through (19). *Baker v. United States*, 100 B.R. 80, 83 (M.D. Fla. 1989) (“The exclusive list of exceptions to discharge is found in § 523, and case law states that the exceptions are to be strictly construed.”); *Rowan v. Morgan (In re Rowan)*, 15 B.R. 834, 840 (Bankr. N.D. Ohio 1981) (“[In the legislative history of the Bankruptcy Code,] Congress evidenced its intent that all nondischargeable debts be set forth in [§] 523.”).

All of the debts listed in § 523(a) are nondischargeable, *per se*, with the exception of those debts “specified in paragraph (2), (4), (6), or (15) of subsection (a) of [§ 523].” However, the bankruptcy court must make a determination of nondischargeability pursuant to an adversary proceeding. See FED. R. BANKR. P. 4007 (governing the determination of dischargeability of debts); FED. R. BANKR. P. 7001(6) (“[A] proceeding to determine the dischargeability of a debt” is an adversary proceeding.). Each adversary proceeding must contain a statement that the proceeding is “core or non-core.” FED. R. BANKR. P. 7008(a). Additionally, the party seeking nondischargeability of a debt should specify the subsection under which the debt falls and must provide facts supporting the necessary elements under each subsection. See, e.g., *Laughter v. Speight*, 167 B.R. 891, 893 (W.D. Ark. 1993); *Boan v. Damrill (In re Damrill)*, 232 B.R. 767, 776 (Bankr. W.D. Mo. 1999).<sup>2</sup> Finally, the party seeking a determination of nondischargeability

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<sup>2</sup> The failure to specify under which subsection a party is requesting a determination of nondischargeability is not, in and of itself, fatal to the Complaint. See, e.g., *Cnty. Mem’l Hosp. v. Gordon (In re Gordon)*, 231 B.R. 459, 461 n.3 (Bankr. D. Conn. 1999). However, any complaint must offer enough factual information for the court to make an assumption as to which subsection should be applied. In this case, the Complaint did not offer the court any guidance as to which subsection might apply. Accordingly, the court is unable to make even an “educated guess” in this instance.

under any subsection of § 523(a) has the burden of proof by a preponderance of the evidence. *Grogan v. Garner*, 111 S. Ct. 654, 661 (1991).

#### IV

Only debts provided for by § 523(a)(1) through (19) may be nondischargeable, and the court may make a determination of nondischargeability only pursuant to that section of the Bankruptcy Code. The Plaintiff's Complaint does not provide the court with sufficient allegations to infer which section, if any, his claim against the Debtors would fall. Because the Plaintiff has not stated a claim upon which relief may be granted, the Debtors' Motion to Dismiss shall be granted. An order consistent with this Memorandum will be entered.

FILED: March 13, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE



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**ORDER**

For the reasons stated in the Memorandum on Motion to Dismiss filed this date, the court directs the following:

1. The Motion to Extend Time to Reply to Defendants' Motion to Dismiss filed by the Plaintiff on March 4, 2003, is DENIED.
2. The Defendants' Motion to Dismiss filed February 6, 2003, is GRANTED. The Complaint filed by the Plaintiff on November 8, 2002, is accordingly DISMISSED.

SO ORDERED.

ENTER: March 13, 2003

BY THE COURT

/s/

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE