

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

In re

Case No. 03-36422

KARL JOSEPH CARROLL
a/k/a JOE CARROLL
f/d/b/a CARROLL CONSTRUCTION
TOBIE SHAE CARROLL
f/d/b/a CUTS & CURLS SUNTAN STATION

Debtors

JAMES KEITH HUDGINS

Plaintiff

v.

Adv. Proc. No. 04-3043

KARL JOSEPH CARROLL and
TOBIE SHAE CARROLL

Defendants

MEMORANDUM ON MOTION TO DISMISS

APPEARANCES: THOMAS F. DILUSTRO, ESQ.
531 South Gay Street
Suite 602
Knoxville, Tennessee 37902
Attorney for Plaintiff

JOHN P. NEWTON, JR., ESQ.
Post Office Box 2069
Knoxville, Tennessee 37901
Attorney for Defendants/Debtors

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

This adversary proceeding is before the court upon the Objection to Discharge of Debtor's [sic] Estate in Bankruptcy (Complaint) filed by the Plaintiff on March 1, 2004, requesting that the court "disallow" discharge of a debt concerning a "wilful and malicious injury by the debtor to the Plaintiff," alleging that pursuant to 11 U.S.C.A. § 523(a) (6) (West 1993 & Supp. 2004), "discharge is improper[.]"

On May 28, 2004, the Defendants filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. The Defendants aver that the Plaintiff has not alleged any facts to support a denial of their discharge. Furthermore, the Defendants argue that no facts have been pled on any theory regarding Mrs. Carroll. Pursuant to Local Bankruptcy Rule 7007-1 of the United States Bankruptcy Court for the Eastern District of Tennessee, on June 21, 2004, the Plaintiff filed a Brief in Opposition to Motion to Dismiss, agreeing that he has pled insufficient facts to support any cause of action against Mrs. Carroll, but asserting that his Complaint provides sufficient allegations to put the Defendant, Mr. Carroll, on notice of the basis therefor.

I

The Plaintiff's Complaint alleges that on July 2, 2003, the Plaintiff, who is a process server, completed service of process on the Defendant, Mr. Carroll, and as the Plaintiff was leaving, the Defendant assaulted the Plaintiff, resulting in injuries to the Plaintiff. The Complaint also states that the Plaintiff had not filed suit in state court, because the statute of

limitations has yet to expire, but in the meantime, the Defendants filed their bankruptcy case listing the Plaintiff as a creditor. The Plaintiff's Complaint further avers that

[t]he Defendant is attempting [to] abuse the process of this Honorable Court and the provisions of the United States Code in that no case has yet been filed by the Plaintiff and, in any event, the acts of the Defendant resulted in a wilful and malicious injury by the debtor to the Plaintiff. As such, discharge is improper under 11 USC 523(a) (6).

The Plaintiff's prayer for relief asks the court to "enter its orders such that the discharge in bankruptcy under Chapter 7 of Title XI of the United States Bankruptcy Code of the debt as stated by the Defendant in his Petition for Bankruptcy relative to the Plaintiff be disallowed."

In their Motion to Dismiss, the Defendants seek to dismiss the Complaint for failure to state a claim upon which relief may be granted, arguing that the Complaint requests a denial of discharge, which is only available under § 727(a) (West 1993), and not, as attempted by the Plaintiff, under § 523(a) (6), which concerns nondischargeability of specific debts, and that the Plaintiff has failed to cite factual allegations to establish a prima facie case for denial of discharge under § 727(a). Accordingly, the Defendants aver that because the Plaintiff has not pled facts for denial of discharge under § 727, the Complaint should be dismissed. In the alternative, the Defendants ask that the Complaint be limited to the dischargeability issue actually raised pursuant to § 523(a) (6), and that they be allowed ten days to file an answer to the Complaint. Finally, the Defendants argue that the Plaintiff has pled no facts to sustain an action against Mrs. Carroll.

II

A defendant may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6) (applicable in adversary proceedings pursuant to FED. R. BANKR. P. 7012(b)). When contemplating a motion to dismiss under Rule 12(b)(6), the court should “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 (6th Cir. 2001). All factual allegations are accepted as true, but the court is not required to accept legal conclusions or unwarranted factual inferences as true. *Mich. Paytel Joint Venture v. City of Detroit*, 287 F.3d 527, 533 (6th Cir. 2002). Instead, the focus should be upon “whether the plaintiff has pleaded a cognizable claim[,]” *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 452 (6th Cir. 2003), and 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 (6th Cir. 2001) (quoting *Conley v. Gibson*, 78 S. Ct. 99, 102 (1957)).

A

The Plaintiff, in his response to the Motion to Dismiss, acknowledges that the Complaint alleges insufficient facts to sustain a cause of action against Mrs. Carroll. The court agrees, and the Motion to Dismiss as it relates to Mrs. Carroll will be granted.

B

With respect to Mr. Carroll, the Plaintiff's Complaint states that he is objecting to the discharge of a possible judgment, and expressly denotes 11 U.S.C.A. § 523(a) (6) and states that the Plaintiff incurred a "wilful and malicious injury" at the hands of the Defendant. Although the Complaint mistakenly requests "disallowance" of discharge, it expressly cites § 523(a) (6) as the statutory authority under which the Plaintiff seeks relief. Furthermore, the Complaint sufficiently sets forth factual allegations to put the Defendant on notice that the actual cause of action is a determination of nondischargeability of any possible judgment obtained by the Plaintiff against the Defendant as a result of the events of July 2, 2003. Taking the pleadings in a light most favorable to the Plaintiff, the court finds that the Complaint sufficiently sets forth specific citation to § 523(a) (6), thus providing the Defendant with adequate notice that the Plaintiff is seeking a determination of nondischargeability thereunder. As such, the Motion to Dismiss as it relates to Mr. Carroll shall be denied.

An order consistent with this Memorandum will be entered.

FILED: June 28, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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Defendants

ORDER

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

1. The Motion to Dismiss filed by the Defendants on May 28, 2004, is, as to the Defendant Tobie Shae Carroll, GRANTED. The Plaintiff's Objection to Discharge of Debtor's [sic] Estate in Bankruptcy filed March 1, 2004, is, as to this Defendant, DISMISSED.

2. The Motion to Dismiss filed by the Defendants on May 28, 2004, is, as to the Defendant Karl Joseph Carroll, DENIED. The Plaintiff's action shall proceed as to this

Defendant solely as an action to determine the nondischargeability of a debt under 11 U.S.C.A. § 523(a) (6) (West 1993 & Supp. 2004).

SO ORDERED.

ENTER: June 28, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE