

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EMERY TOTH, ANDREA WILLIAMS,)
and DONALD R. RHULE,)
Appellants,)
vs.) NO: 95-CV-0023-PER
DAVID R. HAM and) (BK 94-50021/ADV 94-5039)
SHIRLEY J. HAM,)
Appellees.)

MEMORANDUM AND ORDER

RILEY, District Judge:

I. Introduction

Before this Court is an appeal from a November 1994 Order entered by United States Bankruptcy Judge Kenneth J. Meyers. Emery Toth, Andrea Williams and Donald Rhule ("Appellants") held a controlling interest in a corporation known as Ham Heating and Air Conditioning. David Ham served as President and Chief Operating Officer of the corporation, and Shirley Ham was its Secretary-Treasurer. David and Shirley Ham filed a Chapter 7 bankruptcy petition in January 1994. Appellants, creditors of the Hams, filed a "Complaint Objecting to Discharge" on June 2, 1994. The Hams moved to dismiss that complaint as being untimely-filed. Bankruptcy Judge Meyers granted the Hams' motion and dismissed Appellants' complaint on November 7, 1994. He denied a motion to reconsider that order on November 29, 1994. The parties fully briefed the issues on appeal and presented oral arguments to this Court on September 14, 1995. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. 158(a).

II. Standard of Review

Reviewing courts must accept a bankruptcy court's findings of fact unless they are clearly erroneous. FEDERAL RULE OF BANKRUPTCY PROCEDURE 8013. Conclusions of law, however, are governed by de novo review. Calder v. Camp Grove State Bank, 892 F.2d 629, 631 (7th Cir. 1990), citing In re Longardner & Assocs., Inc., 855 F.2d 455, 459 (7th Cir. 1988), cert. denied, 489 U.S.1015 (1989). The issues on appeal here involve legal conclusions and -- as such -- are subject to de novo review.

III. Procedural History

A recounting of key procedural details is necessary to resolution of this appeal. The Hams ("Debtors") filed their Chapter 7 petition on January 11, 1994. Pursuant to the Bankruptcy Court's January 26, 1994 Notice of Commencement of Chapter 7 Case, May 3, 1994 was the deadline "to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts." On March 14, 1994, Appellants filed a motion to conduct examinations of Debtors. Debtors were deposed by Appellants' attorney, Mark Goldenberg, on March 29, 1994. On April 27, 1994, another of Appellants' attorneys, Elizabeth Heller, called Debtors' counsel and advised her that Mr. Goldenberg's mother had died and that Appellants planned to file a motion seeking additional time in which to file a complaint objecting to discharge.

The following day, Appellants filed in the Bankruptcy Court a motion to extend the time in which to file "a complaint objecting to the discharge of the debtors" and a proposed order captioned "Order

Extending Time For Filing Objections to Discharge And/Or Dischargeability." The Clerk of the Bankruptcy Court forwarded a copy of the motion to the parties attached to a "Notice of Motion to Extend Discharge Date."

On May 17, 1994, Judge Meyers granted Appellants' motion for additional time. He did not use their proposed order but instead entered a three-sentence order which concluded: "IT IS ORDERED that the time for filing objections to discharge is extended for a period of 30 days, to and including June 2, 1994." On June 2, 1994, Appellants filed a "Complaint Objecting to Discharge." The gist of the complaint was that Debtors had breached the fiduciary duty they owed to the corporation and its shareholders (including Appellants) by taking unauthorized salary increases and loans from the corporation, making unauthorized hiring decisions, taking various other fraudulent actions and maliciously injuring the corporation.

On June 24, 1994, Debtors moved to dismiss the complaint on the grounds that it was time-barred because Appellants had not received additional time in which to obtain a determination of the "dischargeability" of debts, but instead had only been given additional time to object to "discharge." After having the parties brief the issue, Judge Meyers agreed with Debtors and entered an order dismissing Appellants' complaint. That November 1994 order ("the Opinion") is the source of this appeal and the subject of this Court's de novo review.

IV. Analysis

A. Discharge vs. Dischargeability

One of the central aims of our bankruptcy system is to give honest

debtors a "fresh start" by relieving them of debts incurred prior to filing a bankruptcy petition. One exception to this general rule is contained in Section 523 of the Bankruptcy Code.

Section 523(a) excludes ten specific categories of debt from discharge. In broad terms, these are debts that arise from the debtor's wrongful conduct or debts that are nondischargeable on public policy grounds (such as child support, taxes and school loans). Bankruptcy Rule 4007(c) sets the timetable for the filing of complaints to determine the dischargeability of debts under § 523(c).

In the case at bar, May 3, 1994 was the deadline for the filing of complaints regarding "dischargeability" of certain debts under § 523(c). It was also the deadline for the filing of complaints objecting to "discharge" under § 727(a). Appellants' motion seeking to extend that deadline did not expressly refer to either Code section. The proposed order submitted with the motion, however, sought additional time to object to "discharge and/or dischargeability" under both § 523 and § 727. The Bankruptcy Court entered its own order (instead of counsel's proposed order). Although the Court's order simply granted Appellants extra time "to file objections to debtors'¹ discharge" (thus more closely tracking the language of § 727 proceedings), this Court does not agree that Appellants' § 523 Complaint which was filed within the period of additional time allowed

¹All references herein to "the Code" refer to the Bankruptcy Code, Title 11 U.S.C. References to "Rules" refer to FEDERAL RULES OF BANKRUPTCY PROCEDURE.

by the Court was jurisdictionally barred as untimely.

Both the Bankruptcy Court's Opinion and Debtors' arguments to this Court emphasize the differences between § 523(c) "dischargeability" and § 727(a) "discharge." This Court agrees that these are separate causes of action, and that the Code distinguishes between the terms "discharge" and "dischargeability."² The mere existence of that distinction, however, does not justify dismissal of Appellants' complaint.

This Court believes that it is not prudent to view Appellants' motion for additional time in a vacuum or hyper-technically. Concededly, that motion did not reference either Code section and could possibly be read to simply seek extra time to file a § 727(a) objection to discharge. But the totality of circumstances surrounding that motion strongly undermine that constrained interpretation.

B. Appellants' §523 Complaint & the Order Granting Additional Time

Before any extension was sought or any complaint filed, Debtors were deposed by Appellants. Appellants' examination focused on Debtors' actions and misrepresentations as officers of Ham Heating & Air Conditioning and the debt owed to Appellants which was connected thereto. Those depositions plainly put Debtors on notice of the basis of Appellants' objection to the dischargeability of certain debts.

²A 1987 Minnesota bankruptcy decision cited by Appellees, In re Harrison, 71 B.R. 457, 459, explains that distinction. "In commencing a dischargeability proceeding under § 523(a), a creditor seeks to vindicate only its own debt. On the other hand, ... [s]ection 727(a) [denies] discharge to debtors who engage in objectionable conduct that is of a magnitude and effect broader and more pervasive than a fraud on, or injury to, a single creditor."

Furthermore, Appellants' counsel contacted Debtors' counsel the day before filing the motion for extra time and explained not only the fact they would seek an extension but also the details as to what type of complaint/objections they planned to file (see Heller Affidavit). Additionally, the proposed order accompanying the extension motion specifically identifies both Code sections and is captioned as an order extending time "For Filing Objections to Discharge And/Or Dischargeability." In short, Debtors cannot claim surprise that Appellants filed a complaint objecting to dischargeability under § 523.³

Nor does this Court find merit in Debtors' argument that Appellants should have moved to vacate the order granting them until June 2nd to file "objections to discharge." That order itself fails to reference either Code section. It does not state that the Court is granting extra time solely for filing pleadings under § 727. It does not state that the Court is declining to "extend the period to object to dischargeability" (Bankruptcy Opinion at p. 2, n.1). Appellants may well have reasonably believed that the order afforded them extra time to object to dischargeability, and thus they would have no cause to move to vacate the order.

Whatever the extension order said or did not say, this Court concludes that Debtors suffered no prejudice as the result of the filing of Appellants' § 523 complaint. This Court further concludes

³Also bearing note is the fact that the Bankruptcy Opinion states: "The debtors only received a copy of the plaintiff's motion to extend time, not the proposed order." This factual statement is clearly erroneous. The evidence before this Court, including the cover letter forwarding those documents, plainly proves that both the motion and the proposed order were furnished to Debtors' counsel.

that even if the Bankruptcy Court's May 17, 1994 order failed to grant it, Appellants' motion for additional time sought an extension of the deadline for filing a complaint either objecting to discharge of Debtors or seeking a determination as to the dischargeability of certain debts. And the nature of the relief sought by Appellant is the crucial inquiry here, because the Bankruptcy Court's Opinion is premised wholly on this point.

C. The Doctrine of Excusable Neglect

Appellants also argue that the doctrine of excusable neglect preserves their complaint from dismissal. General equitable principles do support the conclusion that the complaint should not have been dismissed, but this Court does not rely on the doctrine of excusable neglect to reach its decision here. In the Opinion, the Bankruptcy Court concluded that the doctrine of excusable neglect was inapplicable to this case. That doctrine, found in Bankruptcy Rule 9006(b)(1), provides that when the Rules require an act to be done within a specified period:

the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if the request therefor is made before the expiration of the period originally prescribed ... or (2) on motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of **excusable neglect** (emph. added).⁴

⁴The United States Supreme Court explained this doctrine in Pioneer Inv. Services Co. v. Brunswick Assocs. Limited Partnership, 113 S. Ct. 1489 (1993): By empowering the courts to accept late filings "where the failure to act was the result of excusable neglect, Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by

Rule 4007(c), which controls the time for filing a § 523(c) complaint, limits Rule 9006 by requiring that the court may extend the time period only if a motion has been made before the original time period expires. Based on Rule 4007's limiting language, the Bankruptcy Court concluded that the doctrine of excusable neglect was inapplicable. That doctrine would have allowed the Court to accept Appellants' motion even if that motion was filed after the May 3, 1994 deadline had elapsed.

We need not rely on that doctrine, however, because this Court concludes that Appellants filed a timely motion to file a § 523 complaint prior to the time the statutory deadline expired. Thus, Rule 4007(c)'s mandate was complied with, and the Bankruptcy Court had the authority to permit the filing of Appellants' § 523 complaint. Contrary to the Bankruptcy Court's Opinion (and the cases cited by Debtors), this is not a case in which the creditors sought to "amend" an untimely complaint, or in which they let the statutory deadline elapse without even moving for additional time.

Nor would the filing of Appellants' § 523 complaint have thwarted the Congressional purpose in enacting Rule 4007(c)'s short time period for filing dischargeability complaints. The legislative goal behind this narrow window was to protect a debtor's entitlement to a fresh start and to prevent a creditor from surprising an unsuspecting debtor with an eleventh-hour suit long after bankruptcy had been filed. Again, here Debtors knew full well that Appellants intended to object

intervening circumstances beyond the party's control."

to dischargeability, so their § 523 complaint neither came as a startling revelation nor worked any injustice upon Debtors.

The Bankruptcy Court erred in concluding that Appellants' motion for extension of time sought additional time in which to file only § 727 complaint. This crabbed view exalts form over substance. The Bankruptcy Court erred in concluding that Appellants' § 523 complaint was jurisdictionally barred. That complaint did not merit dismissal.

V. Conclusion

The judgment of the United States Bankruptcy Court, Southern District of Illinois, is hereby REVERSED. This case is remanded for further proceedings on the merits of Appellants' complaint.

IT IS SO ORDERED.

DATED this 15th day of September, 1995.

/s/ PAUL E. RILEY
United States District Judge