

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

IN RE:

In Proceedings Under Chapter 7

ALLAN C. GOCIO

Case No. 05-43593

Debtor(s).

WILLIAM HENSON

Plaintiff(s),

Adv. No. 06-4044

v.

ALLAN C. GOCIO

Defendant(s).

OPINION

THIS MATTER is before the Court on the defendant's Motion to Dismiss the plaintiff's amended complaint. The basis of the defendant's motion is two-fold: (1) that the plaintiff has failed to allege facts sufficient to support a claim pursuant to 11 U.S.C. § 727(a)(4)(A); and (2) that the plaintiff's claim pursuant to 11 U.S.C. § 727(a)(5) does not "relate back" to the date of the filing of the original complaint and, therefore, is time-barred.

The plaintiff's amended complaint alleges that the defendant is not entitled to a discharge because he has knowingly and fraudulently made a false oath or account pursuant to 11 U.S.C. § 727(a)(4)(A). In support of this allegation, the plaintiff contends that in 1992, the debtor and an individual named George Eldridge purchased 200 acres of Arkansas real estate. The debtor paid \$200,000 for his one-half share of the property. According to the debtor's Statement of Financial Affairs, the debtor subsequently sold his interest in the property to Mr. Eldridge in 2005 for \$30,000. During a 2004 examination conducted by the plaintiff, the debtor testified that Mr. Eldridge had loaned him some money, although the amount loaned was not specified. He also indicated that the transfer of the property

to Mr. Eldridge “could be considered a ‘gift’” to Mr. Eldridge, although no such gift was disclosed in paragraph 7 of the debtor’s Statement of Financial Affairs. The plaintiff alleges that the omission of this “gift” from the debtor’s schedules constitutes a “false oath or account” and, therefore, the debtor’s discharge should be denied.

Section 727(a)(4)(A) of the Bankruptcy Code states:

(a) The court shall grant the debtor a discharge unless—

(4) the debtor knowingly and fraudulently, in connection with the case—

(A) made a false oath or account.

11 U.S.C. § 727(a)(4)(A). This section is designed to ensure that a debtor fully discloses his financial affairs and provides those with an interest in the case with reliable information. Richardson v. Von Behren, 314 B.R. 169 (Bankr. C.D. Ill. 2004); In re Carlson, 231 B.R. 640, 655 (Bankr. N.D. Ill. 1999). In order to prevail under § 727(a)(4)(A), the plaintiff must establish (1) that the debtor made a statement under oath; (2) that the statement was false; (3) that the debtor knew that the statement was false; (4) that the debtor made the statement with the intent to deceive; and (5) that the statement related materially to the bankruptcy case. In re Bailey, 147 B.R. 157, 163 (Bankr. N.D. Ill. 1992). Because this section is grounded in fraud, it is also necessary that the complainant satisfy Federal Rule of Civil Procedure 9(b), which requires that “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. . . .” Fed. R. Civ. P. 9(b). This requires the pleader to set forth the time, place, and nature of the misrepresentation “so that the defendant’s intent to defraud is evident in the complaint.” Ross v. Bolton, 904 F.2d. 819, 823 (2nd Cir. 1990); Flex-Van Leasing, Inc. v. Perez, 173 B.R. 284, 294 (Bankr. E.D. N.Y. 1994).

In the amended complaint, the only “false oath or account” alleged by the plaintiff is the debtor/defendant’s failure to denote the transfer of real estate to Mr. Eldridge as a gift. There is no allegation that the defendant knew that his Statement of Financial Affairs was false, nor has the plaintiff provided any facts specifically indicating that there was an intent to defraud or deceive by the omission.

It is well established that “a properly pled complaint under § 727(a)(4)(A) must include more than just a bare allegation that a debtor failed to list something on his schedules.” In re Damrill, 232 B.R. 767, 774 (Bankr. W.D. Mo 1999). There must also be some indicia of fraud or misrepresentation by the debtor. Id. Here, the plaintiff has alleged no factual basis from which the Court can even infer the existence of fraud.

The plaintiff’s amended complaint also seeks to deny the debtor a discharge pursuant to 11 U.S.C. § 727(a)(5). This section bars discharge where “the debtor has failed to explain satisfactorily. . . any loss of assets or deficiency of assets to meet the debtor’s liabilities.” 11 U.S.C. § 727(a)(5). The defendant seeks dismissal of this claim as untimely under Federal Rule of Bankruptcy Procedure 4004(a).

Rule 4004(a) requires that all complaints objecting to a Chapter 7 debtor’s discharge be filed within 60 days of the first day set for the meeting of creditors. Fed. R. Bankr. P. 4004(a). This time limit is to be strictly enforced, as it is designed to protect a debtor’s “fresh start” in bankruptcy. Themys v. Yu, 6 F.3d 688 (10th Cir. 1993); Ichinose v. Homer, 946 F.2d 1169 (5th Cir. 1991); In re Barnes, 114 B.R. 579 (Bankr. S.D. Ill. 1990). However, an otherwise untimely amendment may “relate back” to the date of the original pleading where “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. Civ. P. 15(c)(2). Under the “relation back” doctrine, the general inquiry is “whether the original complaint puts the defendant on notice of the general wrong or conduct to which the amendment pertains. The inquiry should focus on the notice given by the general fact situation as set forth in the original pleading.” Melohn v. Klein, 31 B.R. 947, 950 (Bankr. E.D.N.Y. 1983). See also Employers Mutual Casualty Co. v. Lazenby, 253 B.R. 536, 539 (Bankr. E.D. Ark. 2000).

In the instant case, the plaintiff filed his original complaint objecting to the debtor’s discharge on February 21, 2006, which was also the deadline for filing such a complaint under Rule 4004(a). That complaint alleged nothing more than that the debtor should be denied a discharge under § 727(a)(4)(A).¹

¹The original complaint was dismissed on March 14, 2006 on the defendant’s motion for failure to state a claim.

The amended complaint setting forth the facts on which the plaintiff was basing his complaint as well as the new cause of action under § 727(a)(5) was not filed until March 28, 2006, which was after the expiration of the deadline imposed by Rule 4004(a). Therefore, this new cause of action is untimely, unless it can be related back to the filing of the amended complaint under Federal Rule of Civil Procedure 15(c). Unfortunately for the plaintiff, because the original complaint was completely devoid of *any facts whatsoever*, there is no “conduct, transaction, or occurrence” to which the plaintiff’s amendment under § 727(a)(5) can relate. While an original complaint need not be “perfectly pled. . . , it must provide enough substance to which the amendment can attach.” Damrill, 232 B.R. at 773. There is nothing in the original complaint which would put the defendant on notice that plaintiff’s cause of action was based on the Arkansas land sale. Therefore, the Court determines that Rule 15(c)(2) does not apply in this case and the plaintiff’s claim under § 727(a)(5) is time-barred.²

For the reasons set forth above, the defendant’s Motion to Dismiss plaintiff’s cause of action is granted. However, the plaintiff is granted leave to file a Second Amended Complaint which complies with the requirements of 11 U.S.C. § 727(a)(4)(A) and Federal Rule of Civil Procedure 9(b) within ten (10) days of the date of this Order.

SEE WRITTEN ORDER.

ENTERED: July 27, 2006

/s/ Kenneth J. Meyers
UNITED STATES BANKRUPTCY JUDGE

²Because the Court determines that the plaintiff’s § 727(a)(5) claim is time-barred, it is unnecessary for the Court to address the defendant’s contention that the amended complaint also fails to state a cause of action under § 727(a)(5).