

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

IN RE: ) In Proceedings  
RAYMOND J. JOHNSON and ) Under Chapter 7  
DARLENE M. JOHNSON )  
) No. BK 94-30308  
Debtor(s), )  
) Adv. No. 94-3068  
MERCANTILE BANK )  
OF ILLINOIS N.A., a banking )  
corporation, )  
)  
Plaintiff, )  
)  
V. )  
)  
RAYMOND J. JOHNSON and )  
DARLENE M. JOHNSON )  
)  
Defendants. )

OPINION

Raymond and Darlene Johnson (hereafter "defendants") filed a joint petition for relief under chapter 7 of the Bankruptcy Code on March 21, 1994. On the same day, a notice was mailed to all creditors and other parties in interest advising them, inter alia, that the meeting of creditors would be held on April 15, 1994, and that June 14, 1994, was the last date to file complaints objecting to the dischargeability of those types of debts which are discharged if a complaint is not timely filed.

On June 13, 1994, Mercantile Bank of Illinois (hereafter "plaintiff") filed a complaint against defendants pursuant to 11 U.S.C. section 523(a)(2)(A), asking the Court to determine that a debt owed to it by defendants is nondischargeable because it was obtained by false pretenses, a false representation, or actual fraud. A summons was issued to plaintiff on the same day.

Defendants received a discharge in bankruptcy<sup>1</sup> and their bankruptcy case was closed on June 20, 1994. The summons and a copy of the dischargeability complaint were served on defendants a day later, on June 21, 1994. Defendants then filed a response to the complaint which appears to contend, first, that the cause of action is time-barred because the summons and complaint were served after the deadline for filing complaints of this nature, and, second, that the matters at issue in the complaint have been rendered moot by defendants' discharge and closure of the bankruptcy case prior to service of the summons and complaint on defendants. The Court construes defendants' response as a motion to dismiss the complaint.

Section 523(a)(2)(A) of the Bankruptcy Code sets forth one of the several categories of debt which are excepted from the discharge

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<sup>1</sup>The order of Discharge provided, in pertinent part:

IT IS ORDERED THAT:

1. The . . . debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to . . . the following:

. . .

(b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4) and (6) of 11 U.S.C. Sec. 523(a) . . . .

Order of Discharge and Notice Thereof dated June 20, 1994 (emphasis added).

afforded under chapter 7. In pertinent part, this section provides:

(a) A discharge under section 727 . . . does not discharge an individual debtor from any debt--

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . . . .

11 U.S.C. § 523(a)(2)(A) (emphasis added).

However, a creditor who hopes to prevail under section 523(a)(2)(A) must move expeditiously. Section 523(c)(1) of the Bankruptcy Code provides, with certain exceptions not relevant here, that "the debtor shall be discharged from a debt of a kind specified in paragraph (2) . . . of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2) . . . of subsection (a) of this section." Section 523(c)(1), then, requires a creditor who is owed a debt that may be excepted from discharge under section 523(a)(2)(A) to initiate proceedings in the bankruptcy court to determine the dischargeability of the debt. 3 Collier on Bankruptcy ¶ 523.21, at 523-167 (15th ed. 1994).

Section 523(c)(1) itself, though, contains no hint of the procedure for initiating the proceedings or the time limit within which the creditor must act. These procedural aspects are addressed by Bankruptcy Rule 4007, which provides that a dischargeability proceeding

is an adversary proceeding initiated by a complaint, Bankr. R. 4007(a), (e), and which sets forth the limitations period for filing section 523(c) complaints in chapter 7 liquidation cases. Bankr. R. 4007(c).

Specifically, Bankruptcy Rule 4007(c) states, in pertinent part, that "[a] complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a)." Fed. R. Bankr. P. 4007(c) (emphasis added).<sup>2</sup> A complaint which is filed within the deadline need not be served within that time "as long as it is ultimately properly served under the rules." 8 Collier on Bankruptcy, ¶ 4007.05, at 4007-10 (15th ed. 1994); see also In re Riposo, 59 B.R. 563, 566 (Bankr. N.D. N.Y. 1986) (timeliness of dischargeability complaint is controlled by date on which complaint is filed, not date on which summons and complaint are served); In re Dahowski, 48 B.R. 877, 883-84 (Bankr. S.D. N.Y. 1985) (same).

In the instant case, the first date set for the meeting of creditors was April 15, 1994, and sixty days hence was June 14, 1994. Plaintiff filed its complaint on June 13, 1994, in compliance with Rule 4007(c), and a summons was issued on that same date. Plaintiff served the summons and a copy of the complaint on defendants eight days later on June 21, 1994, well within the ten day time limit during which the summons was viable pursuant to Bankruptcy Rule

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<sup>2</sup>This is consistent with Rule 3 of the Federal Rules of civil Procedure, made applicable to adversary proceedings by Bankruptcy Rule 7003, which instructs that "[a] civil action is commenced by filing a complaint with the court."

7004(f).<sup>3</sup> Defendants have raised no other grounds suggesting insufficiency of service of process, and the Court finds without merit their contention that serving the timely filed complaint a mere eight days after the complaint was filed and the summons was issued warrants dismissal of the complaint.<sup>4</sup>

Having determined that the dischargeability complaint was timely filed and timely served, the sole issue remaining is whether the intervening discharge and closure of the defendants' bankruptcy case rendered moot the dischargeability action. Defendants have offered no authority in support of their position and the Court is not persuaded by their argument.

It is clear from the statutory language that a discharge granted under section 727 of the Bankruptcy Code excepts debts determined to be nondischargeable pursuant to section 523. 11 U.S.C. §§ 523(a), 727(b). Additionally, the Order which granted a discharge to defendants mirrored the statutory language and expressly excepted from that discharge any debt thereafter determined by the Court to be nondischargeable under section 523(a)(2). There is nothing in the Code or in the order of Discharge to suggest that entry of the discharge

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<sup>3</sup>This Rule provides, in pertinent part, that "[i]f service is made by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days following issuance of the summons. If a summons is not timely delivered or mailed, another summons shall be issued and served."

<sup>4</sup>In fact, Bankruptcy Rule 7004 incorporates Rule 4(j) of the Federal Rules of Civil Procedure in effect on January 1, 1990 (now Fed. R. Civ. P. 4(m)) which provides for dismissal of the cause of action if service is not effected within 120 days after the filing of the complaint.

bars a later determination of the merits of a timely filed section 523(c) complaint. In fact, "[a]lthough a complaint that comes within § 523(c) must ordinarily be filed before determining whether the debtor will be discharged, the court need not determine the issues presented by the complaint filed under this rule until the question of discharge has been determined under Rule 4004." Bankr. R. 4007 advisory committee's note (1983) (emphasis added). Delaying this determination has logical integrity since the denial of a discharge under section 727 to an individual debtor will inure to the benefit of all estate creditors, including those who would otherwise be required to litigate the dischargeability of any specific debt owed to them.

Finally, the closing of the bankruptcy case did not moot the issues raised in the dischargeability complaint. The question of defendants' personal liability for the debt owed to plaintiff is a matter independent of the administration of the bankruptcy estate and remains in controversy despite the closure of the bankruptcy case. The Court, therefore, finds no basis to dismiss the adversary complaint.

See Order entered this date.

/s/ Kenneth J. Meyers  
U.S. BANKRUPTCY JUDGE

ENTERED: AUGUST 19, 1994