

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
JAMES & KIM MCCOOLIDGE,) CASE NO. BK96-82394
)
DEBTOR) A96-8139
_____)
FIRST NATIONAL BANK OF OMAHA,)
) CH.7
Plaintiff)
vs.)
)
JAMES STEVEN MCCOOLIDGE,)
)
Defendant)

MEMORANDUM

Hearing was held on January 15, 1998. Appearances: Richard Berkshire and Stephanie McCarthy for James McCoolidge and Donald Pavelka for First National Bank of Omaha. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(I).

Background

This adversary proceeding concerns a loan from First National Bank of Omaha (hereinafter "FNBO") to James McCoolidge (hereinafter "McCoolidge"), now a Chapter 7 debtor. This proceeding also concerns the car which was provided as security for the loan.

On September 11, 1993, FNBO loaned \$13,400.00 to McCoolidge, secured by a 1993 Dodge Dynasty automobile (hereinafter "the Dynasty"). McCoolidge allegedly submitted a personal financial statement to the Bank listing the value of the Dynasty at \$18,000.00. Sometime prior to McCoolidge filing bankruptcy, FNBO, which had received insurance proceeds for damage to the Dynasty, issued a check in the amount of \$3,049.88 to the order of Huxhold's Auto Body and James McCoolidge. FNBO alleged that this check was intended to be used for needed repairs to the Dynasty. FNBO further alleged that McCoolidge wrongfully converted the \$3,049.88 check and that McCoolidge made an unauthorized disposition of the Dynasty, thereby depriving FNBO of its collateral.

On December 23, 1996, FNBO filed an adversary proceeding seeking a determination that the debt McCoolidge owed to FNBO was nondischargeable under 11 U.S.C. § 523(a)(6) because of McCoolidge's alleged willful and malicious conversion of the Dynasty and the \$3,049.99 check. On July 14, 1997, partial summary judgment was granted to FNBO for conversion of the check in the amount of \$3,049.88, leaving the conversion claim concerning the Dynasty remaining to be decided.

On December 15, 1997, FNBO filed a motion to amend its complaint. During the course of discovery in preparation for trial, FNBO received information that McCoolidge had misrepresented the true value of the Dynasty to FNBO. Upon investigation, FNBO claims to have learned that the Dynasty had been purchased by McCoolidge in a wrecked condition for \$2,600.00. FNBO requested leave of the Court to amend its complaint by adding a claim for relief for fraud under 11 U.S.C. § 523(a)(2) claiming that McCoolidge had falsely represented to FNBO the true value of the Dynasty.

The debtor resists the proposed amendment on the ground that it is not timely and its allowance will be prejudicial to the debtor.

Issue

Should FNBO be allowed to amend its original complaint by adding a second claim for relief under 11 U.S.C. § 523(a)(2) for false representation?

Decision

The amendment is not allowed. It does not relate back to the original complaint, it is not timely and there is no exception to the time bar of Fed. R. Bankr. P. 4007(c) resulting from an inability to timely discover the false representation claim.

Conclusions of Law and Discussion

A. Timeliness

Bankruptcy Rule 4007(c) provides in pertinent part: "A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall not be filed later than

60 days following the first date set for the meeting of creditors held pursuant to section 341(a)." Fed. R. Bankr. P. 4007(c). (Section 523(c) referred to in Bankruptcy Rule 4007(c) governs section 523(a)(2) and section 523(a)(6) actions, among others.) The date set for the first section 341(a) meeting of creditors in this case was November 26, 1996. FNBO's December 15, 1997, proposed amended pleading comes more than one year following the section 341(a) meeting of creditors on November 26, 1996.

When a new claim for relief based on a new legal theory is proposed as an amendment to the original complaint, it must be determined whether the new claim relates back to the original claim. In re Kruszynski, 150 B.R. 209, 211 (Bank. N.D. Ill. 1993); In re Osburn, 203 B.R. 811, 813 (Bankr. S.D. Ga. 1996); In re Molded Acoustical Products, Inc., 18 F.3d 217 (1994). "If the new count has the same factual basis as the original count, and the same evidence could be used to support both counts, then the amendment arises out of the same transaction as the original pleading and relates back under [Federal Rule of Civil Procedure] 15(c)." In re Kruszynski at 211 (citations omitted). "However, an amendment which states a new claim based on a materially different set of facts will not relate back." Id. citing Forzley v. AVCO Corp., 826 F.2d 974, 981 (11th Cir. 1987); Holmes v. Greyhound Lines, Inc., 757 F.2d 1563, 1566 (5th Cir. 1985); In re Srour, 138 B.R. 413, 418 (Bankr. S.D.N.Y. 1942).

"The basic test for relation back is whether the evidence with respect to the second set of allegations could have been introduced under the original complaint, liberally construed." Id. (Citations omitted). Also to be considered is whether the same relief is sought under the new claim as that sought under the original complaint, whether the amendment appears to be proposed in bad faith and whether the plaintiff would lose the new claim if amendment is not allowed. Id. at 213; In re Osburn at 812.

When these considerations are applied to the facts of this case, it appears that FNBO's proposed amended claim under section 523(a)(2) does not relate back to its original claim under section 523(a)(6).

The evidence that supports FNBO's section 523(a)(6) claim concerns the alleged wrongful disposition of the Dynasty. It appears from FNBO's pleadings that this alleged conversion

occurred sometime after June of 1995. The evidence in support of FNBO's proposed amended claim concerns McCoolidge's purchase of the Dynasty on April 12, 1993 and the initial application and approval of FNBO's loan to McCoolidge on September 11, 1993. There is approximately a two-year time difference between the two events at issue. Aside from the loan application itself which establishes the creditor-debtor relationship between the two parties, the evidence supporting the section 523(a)(2) claim could not have been introduced in support of the section 523(a)(6) claim, even liberally construed.

FNBO is seeking the same ultimate relief under both its section 523(a)(6) and its section 523(a)(2) claims. Under both claims, FNBO is seeking a determination that McCoolidge's debt to it is non-dischargeable. However, its first claim is that the debtor converted the collateral, thereby wilfully and maliciously injuring FNBO. In its second claim, it asserts that two years prior to the conversion, the debtor obtained a loan by falsely representing the then value of the collateral. The two causes of action are materially different from one another, and so are the facts necessary to establish the prima facie cases.

B. Exception to Rule 4007(c) time bar

The general rule is that inability to discover a section 523(a)(2) claim before the bar date is not a ground for permitting a late filing of the section 523(a)(2) claim. The cases of In re Summit, 109 B.R. 534 (D. Mass. 1990) and In re Braun, 84 B.R. 192 (Bankr. D. Or. 1986) both hold that section 523(a)(3)(B) provides the only exception for untimely filing of a claim under sections 523(a)(2),(4) and (6). Section 523(a)(3)(B) prohibits the discharge of claims under these subsections, "unless such creditor had notice or actual knowledge of the case in time for such timely filing and request." 11 U.S.C. § 523(a)(3)(B). In this case, FNBO had actual knowledge of the case in time to file a section 523(a)(2) complaint on a timely basis, but it did not have a factual basis to permit it to file such a complaint.

On the other hand, the court in In re Wahl, 31 B.R. 471 (Bankr. W.D. Ky. 1983) held that an untimely filing seeking to add a claim under section 523(a)(2)(A) to an original claim under section 523(a)(2)(B) should be allowed because the two claims constitute a single statutory remedy and because the

claims arose out of the same transaction. Id at 472. The Wahl court applied the "relation back" test referred to above. However, the Wahl court did add to the list of the factors that should be considered in determining whether a claim relates back. The Wahl court asked whether the original claim foreshadowed the supplemental objection to discharge and whether the new claim is only an enlargement of the original pleadings. Id. In determining whether allowance of an untimely filing would result in prejudice to the defendant debtor, Wahl advises a consideration of the stage of the proceeding. Id. If the parties are still in discovery, "a decision on the merits cannot possibly prejudice the opposing party." Id.

Even after considering Wahl's expansive analysis, FNBO's proposed claim under section 523(a)(2) cannot fairly be said to be a mere enlargement of its original claim under section 523(a)(6) because the two arise from different transactions separated by approximately two years in time. By the same token, FNBO's original claim under section 523(a)(6) cannot fairly be said to have foreshadowed its later proposed claim under section 523(a)(2). The parties had a trial on the section 523(a)(6) claim scheduled for December of 1997. That trial was continued at FNBO's request to conduct discovery on the newly discovered potential section 523(a)(2) claim. The parties were not still in the pretrial discovery stage when FNBO asked for continuance.

Summary

The time bar of Fed. R. Bankr. P. 4007(a) is strictly construed and the fact that a plaintiff finds evidence to support a section 523(a)(2) claim after the bar date, does not justify an extension of the bar date.

The motion to amend complaint is denied.

Separate journal entry to be filed.

DATED: March 10, 1998

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

BERKSHIRE, RICHARD 397-4633
PAVELKA JR., DONALD 348-0904

Copies mailed by the Court to:

United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
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JAMES & KIM MCCOOLIDGE,) CASE NO. BK96-82394
) A96-8139
DEBTOR(S))
)
FIRST NATIONAL BANK OF OMAHA,) CH. 7
) Filing No. 30, 33
)
Plaintiff(s))
vs.) JOURNAL ENTRY
)
JAMS STEVEN MCCOOLIDGE,)
)
Defendant(s)) DATE: March 10, 1998
HEARING DATE: January
15, 1998

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Motion to Amend Adversary Complaint.

APPEARANCES

Richard Berkshire and Stephanie McCarthy, Attorneys for
debtors
Donald Pavelka, Attorney for Bank

IT IS ORDERED:

The motion to amend complaint is denied. See memorandum
entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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