

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

FILED
JAMES J. WALDRON, CLERK

March 7, 2008

U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY: /s/Diana Reaves, Deputy

IN RE:

CHAPTER 7

CARLOS I. SALAZAR,

CASE NO.: 06-13227 (NLW)

Debtor.

JANICE C. MENSAH, Pro Se,

Adv. No.: 07-1755

Plaintiff,

v.

OPINION

CARLOS I. SALAZAR (RIDGE
CONSTRUCTION), et al,

Defendant.

Before: HON. NOVALYN L. WINFIELD

A P P E A R A N C E S :

Janice C. Mensah
1058 Grove Street
Irvington, NJ 07111
Plaintiff Pro Se

Alphonse De Simone, Esq.
Miller, Platt, De Simone & Galarce, PC
290 Westville Avenue
PO Box 1108
West Caldwell, NJ 07007
Attorneys for Defendants

Plaintiff has moved to amend her complaint to add counts directed at denial of the debtor's discharge. The debtor opposes the motion on the ground that the new claims are time barred. As set forth below the Court will permit amendment of the complaint solely to add counts under 11 U.S.C. § 727(a)(3) and § 727(a)(4)(A).

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Standing Order of Reference dated July 23, 1984, issued by the United States District Court for the District of New Jersey. The motion to amend the complaint is a core matter under 28 U.S.C. § 157(b)(2)(I) and (J). The following constitutes the court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052.

FACTS

On April 18, 2006 Carlos I. Salazar ("Salazar") filed for relief under Chapter 7 of the Bankruptcy Code. In his petition Salazar disclosed that he was employed by Ridge Construction Corp. ("Corp.") and that he was the 100% owner of that entity as well as Ridge Construction Group, LLC ("Ridge LLC"). He scheduled Corp. as having a value of zero¹, and Ridge LLC as having a value of \$500.00. He also scheduled various creditors as holding claims for alleged breaches of construction contracts. The amounts for these claims were uniformly described as unknown. Salazar also scheduled as unsecured creditors, several individuals as holding claims based on monies loaned to Corp. These claims were stated as fixed sums, ranging from \$5,000 to \$194,500.

The trustee administered the bankruptcy case and ultimately filed a No-Asset Report on August 29, 2006.

Janice C. Mensah, the plaintiff ("Plaintiff") in this adversary proceeding was one of the

¹A Chapter 7 petition for Ridge Construction Corp. was filed on April 18, 2006. The case was closed as a no-asset case in October, 2006.

creditors scheduled as holding an unsecured claim based on a breached construction contract. The instant adversary proceeding was filed after Plaintiff obtained an order permitting her to file her complaint out of time. The Plaintiff's complaint consisted of five counts and sought relief under Bankruptcy Code §§ 523(a)(2)(A), (a)(4), and (a)(6) as well as counts for duress and to pierce the corporate veil of Corp. Now, after the complaint has been pending for several months, the Plaintiff seeks to amend her complaint to add counts under Bankruptcy Code §§ 727(a)(1), (a)(2)(A), (a)(3) and (a)(4).

Without elaboration, Plaintiff claims that all of the facts and circumstances that give rise to her motion to amend the complaint were set forth in the complaint as originally filed. Plaintiff also urges that amendment of the complaint should be allowed because the discovery that she has conducted confirms that Salazar does not have adequate financial records and that at least two of the creditors that are listed as having made loans to Corp. "could not support the loan amounts as shown in [Salazar's] petition." (*Plaintiff's Motion at 2*) Plaintiff further states that Salazar's books and records do not reflect any loans from the listed creditors. (*Id.*)

The Court compared the complaint with Plaintiff's proposed amended complaint and finds that most of the paragraphs are essentially the same. However, certain facts and allegations are new, and are set forth verbatim by reference to the paragraph of the proposed amended complaint:

31. Salazar did not safeguard the assets of the corporation, but rather committed a defalcation and larceny while acting in a fiduciary capacity.
- 31(b). Salazar exhibited false pretenses, false representations, and actual fraud in reporting the monies paid to him from Ridge Construction Corporation on his 1040 Individual Federal Tax Return. For all tax years, he reported 1099 income rather than W2 income as an employee of the Corporation. Salazar also deducted expenses which he used to offset his income. Mr. Salgado, the preparer of his return, was given no support for the deductions. He was just instructed by Salazar to place them on the Schedule C return.

- 31(c). Salazar used the corporation as his alter ego, taking money at will with no evidence of any notes reflecting principle [sic] payments or interest payments to the corporation. Salazar had stated that the reason for his financial problems was due to non-payments by his clients. When asked where his accounts receivable was, he couldn't verify that any accounts receivable ever existed.
- 31(d). The Ridge Construction Corporation books and records do not identify any loans or accounts payable. There are no books and records that reflect any deposits of loans from those creditors noted on Petition. Two of the largest creditors deposed cannot decisively verify any loans to the corporation in the amounts specified by Salazar on the Petition; and that they never received any interest payments. The deposits of these loans cannot be traced within the accounting records.
- 31(f). In the Bankruptcy Petition filed by Salazar, he deliberately omitted the facts pertinent to his refinancing of his personal residence, which his wife owned just prior to her transferring 50% ownership to him before the refinancing of their home. The monies received from the refinancing was never disclosed to the Trustee, all of the funds were deposited into the wife's account and disbursed without the knowledge of the Trustee. Salazar filed bankruptcy April 18, 2006; and a 50% interest was transferred to his name just before the transfer took place on February 6, 2006.
- 31(g). Salazar under false pretenses, made a materially false representation which plaintiff relied upon when entering into the promissory note agreement, for which he used his personal residence as collateral. At that time he didn't even own it, but was owned by his wife who never worked. It should also be noted that at this time Salazar was insolvent and Ridge Construction Corporation was also insolvent due to Salazar's defalcation and larceny while acting in his fiduciary capacity.
36. Schedule C of the corporate Chapter 7 bankruptcy petition of Ridge Construction contains no disclosure of a checking account at the Bank of America, but does list a personal checking account at Wachovia Bank.
37. Schedule C of Salazar's personal Chapter 7 bankruptcy petition does not disclose an account at the Bank of America, but does list a personal checking account at Wachovia.

DISCUSSION

Under Federal Rules of Civil Procedure 15(a)(2), incorporated by Fed. R. Bankr. P. 7015, if a responsive pleading has been filed, a party may amend its pleading “only with the opposing party’s written consent or the court’s leave.” *Fed. R. Civ. P. 15(a)(2)*. However, the rule also provides that leave should be freely given when justice so requires. *Id.* Moreover, the Supreme Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962) has stated that:

In the absence of any apparent or declared reason such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.---the leave sought should, as the rules require, be “freely given.”

The problem that arises here is that the time for filing objections to discharge has long since passed. However, Fed. R. Civ. P. 15(c)(1)(B) provides a solution if the Plaintiff can demonstrate that “the amendment asserts a claim ... that arose out of the conduct, transaction, or occurrence set out---or attempted to be set out---in the original pleading.” The basic test is whether the newly pleaded amendment is based on the same facts alleged in the original complaint. *Bularz v. Prudential Ins. Co. of Am.*, 93 F.3d 372, 379 (7th Cir. 1996)(new claim must be based on the same core of facts). Amendments to a complaint should be permitted if a sufficient factual nexus exists between the original complaint and the amended complaint such that the original pleading gives fair notice of the factual situation on which the amended pleading is based. *Grattan v. Burnett*, 710 F.2d 160, 163 (4th Cir. 1983).

In the matter at hand, Salazar’s counsel correctly points out that facts supporting nondischargeability of a debt under 523(a)(4) and (a)(6) are largely different from facts necessary to sustain a denial of discharge under § 727. However, that point does not address what Plaintiff

actually pleaded in her complaint. There is no question that paragraphs 14 through 29 of the original complaint and 15 through 30 of the proposed amended complaint all address the construction contract between Plaintiff and Salazar and constitute the primary basis for Plaintiff's nondischargeability claims. However, Plaintiff also alleges in both complaints that Salazar's books and records do not accurately reflect his income, and that supporting financial records are lacking. Based on the alleged inadequate records, Plaintiff alleges in her original complaint that Salazar has destroyed, falsified or failed to keep adequate records. (*Plaintiff's Comp. at ¶¶ 30, 30(a), and 30(c).*). In the original complaint these allegations were not asserted as a basis for a claim under Bankruptcy Code § 727(a)(3), but Plaintiff certainly could have done so, and it is thus appropriate to permit an amendment to the complaint to make such a claim. Addressing a like issue, in *Guar. Corp. v. Fondren (In re Fondren)*, 119 B.R. 101 (Bankr. S.D. Miss. 1990) the court permitted a plaintiff to add a § 523(a)(6) cause of action because the plaintiff was simply adding a new legal theory based on facts already pleaded. In paragraph 36 of the original complaint the Plaintiff also asserts that Salazar falsely listed creditors as holding unsecured claims when there is no evidence supporting the existence of any loans that give rise to claims. Again, though Plaintiff did not premise any request for relief on these alleged facts, she certainly could have pleaded an objection to discharge alleging a false oath or account under Bankruptcy Code § 727(a)(4)(A) on these alleged facts, and it is not impermissible for her to seek to add such a claim in an amended complaint.²

The additional allegations set forth in paragraphs 31(b), 31(d), 36 and 37 of the proposed amended complaint are really just further elaborations of allegations made in the original complaint

²The court wishes to stress the point that pleading a cause of action and proving a cause of action are distinctly different matters. At this stage the focus is solely on whether the pleadings give the defendant fair notice of the plaintiff's claim.

and are thus unnecessary, as they exceed the requirements of Fed. R. Civ. P. 8. This rule, made applicable to these proceedings by Fed. R. Bankr. P. 7008, simply requires “a short and plain statement of the claim showing that the pleader is entitled to relief.” Accordingly, Plaintiff only needs to plead sufficient facts to give notice of her claim and is not required to set forth every item of evidence she believes will support her claim. However, the Court will not require the pro se Plaintiff to “weed” the unnecessary allegations from her proposed amended complaint. It is likely such an endeavor will be unnecessarily time-consuming, and will only serve to further delay this already protracted proceeding.

However, Plaintiff’s effort to amend her complaint to add a claim under Bankruptcy Code § 727(a)(1) fails. Section 727(a)(1) provides that only an individual may receive a discharge. There is no allegation in either the original complaint or the proposed amended complaint that supports a contention that Salazar is any thing other than an individual debtor. As such, he is entitled to a discharge, unless the requirements of one of the other subsections of § 727 are met. Plaintiff seems to suggest that Salazar and Corp. should be viewed as a single entity, but that theory does not transform Salazar into a corporation.

The Plaintiff’s effort to amend the original complaint to add a cause of action under § 727(a)(2)(A) also fails. Section 727(a)(2)(A) provides in pertinent part that:

- a) The court shall grant the debtor a discharge, unless –
 - (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed —
 - (A) property of the debtor, within one year before the date of the filing of the petition;

11 U.S.C. § 727(a)(2)(A). None of the allegations in the original complaint set forth facts from

which one could conclude that Salazar intended to transfer, conceal, destroy or mutilate estate property. In paragraph 31(f) of the proposed amended complaint Plaintiff now sets forth allegations regarding the refinance and ownership of the marital residence. These are completely new facts and therefore cannot form a basis for a § 727(a)(2)(A) claim. The time for raising such an objection has passed. Accordingly, Plaintiff cannot meet the relation back test found in Rule 15.

CONCLUSION

For the reasons set forth above Plaintiff may amend her complaint to add causes of action under § 727(a)(3) and § 727(a)(4). Plaintiff's request to amend her complaint to add claims under § 727(a)(a) and § 727(a)(2)(A) is denied.

Dated:

NOVALYN L. WINFIELD
United States Bankruptcy Judge