

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

Case No. 3:14-bk-809-PMG

Vincent Lawrence Marino,

Debtor.

Chapter 7

Sunseeker Investments, Inc.,

Plaintiff,

vs.

Adv. No. 3:14-ap-211-PMG

Vincent Lawrence Marino,

Defendant.

**ORDER ON MOTION FOR REHEARING OR RECONSIDERATION
OF ORDER DISMISSING ADVERSARY PROCEEDING**

THIS CASE came before the Court for hearing on the Motion of Sunseeker Investments, Inc. (Sunseeker) for Rehearing or Reconsideration of Order Dismissing Adversary Proceeding. (Doc. 18).

Sunseeker commenced this action by filing an “Adversary Proceeding Complaint of Sunseeker Investments, Inc. to Dismiss Chapter 7 Bankruptcy of Vincent Lawrence Marino and for Dischargeability of Debt.” (Doc. 1). On November 19, 2014, the Court entered an Order dismissing the adversary proceeding. (Doc. 9).

The dismissal of the action was not manifest error, because (1) the allegations in the Complaint did not fall within the exceptions to dischargeability provided by §523(a) of the Bankruptcy Code, (2) the Complaint could not be amended to assert a timely objection to discharge, because Sunseeker did not request denial of the Debtor's discharge under §727(a) of the Bankruptcy Code, and (3) the factual allegations in the Complaint did not state a plausible claim that the Chapter 7 case was filed in bad faith under §707(a) of the Bankruptcy Code. Consequently, Sunseeker's Motion for Rehearing of the Order dismissing the adversary proceeding should be denied.

Background

The Debtor, Vincent Lawrence Marino, filed a petition under Chapter 7 of the Bankruptcy Code on February 24, 2014.

On May 27, 2014, Sunseeker filed a Complaint "to Dismiss Chapter 7 Bankruptcy of Vincent Lawrence Marino and for the Dischargeability of Debt." (Doc. 1). In the Complaint, Sunseeker alleged that the Debtor is the sole shareholder and alter ego of two entities known as Vinco, Inc. and Best Affordable Contractors, LLC, and that the Debtor listed the value of the entities as "\$0.00" on his bankruptcy schedules. (Complaint, ¶¶ 6, 7, 11, 12). In paragraphs 16 and 17 of the Complaint, Sunseeker alleged:

16. The profit and loss statement for the year 2013 list total sales for Best Affordable Contractors, LLC at \$552,570.39 and adjusted gross profits of \$305,343.22.

17. In January and February of 2014, Best Affordable Contractors, LLC deposited \$86,000.00 into its Fifth Third Bank account.

(Complaint, ¶¶ 16, 17). Based on these factual allegations, Sunseeker alleged in paragraphs 21 and 22 of the Complaint:

21. At the time of the filing of the Debtor's Chapter 7 Bankruptcy, the Debtor knew the value of Best Affordable Contractors, LLC and the income that it generates; however, as stated above, the Debtor listed the value of Best Affordable Contractors, LLC at \$0.00.

22. At the time of the filing of the Debtor's Chapter 7 Bankruptcy, the Debtor knew of the income and benefits he personally received from Best Affordable Contractors, LLC; however, the Debtor grossly understated his income and benefits on his Schedule I.

(Complaint, ¶¶ 21, 22). Consequently, Sunseeker alleged that "the facts stated in paragraphs 21 and 22 are material misrepresentations of facts known directly by the Debtor," and that the "Debtor has filed his Individual Chapter 7 Bankruptcy in bad faith as he has misled creditors regarding his true income and assets." (Complaint, ¶¶ 23, 24).

In the prayer for relief, Sunseeker requested "this Court to dismiss Debtor's Chapter 7 Bankruptcy case for bad faith, misrepresentation and fraud and/or determine Sunseeker's debt owed by Debtor is not dischargeable." (Complaint, p. 3).

On November 19, 2014, the Court entered an Order dismissing the Complaint. (Doc. 9). In the Order, the Court found that (1) the grounds alleged in the Complaint did not fall within the exceptions to dischargeability set forth in §523(a) of the Bankruptcy Code, (2) the Complaint did not provide the Debtor with adequate notice that Sunseeker was objecting to the Debtor's discharge pursuant to §727(a) of the Bankruptcy Code, and (3) the remedy to address the misconduct alleged in the Complaint is provided by §727(a) of the Bankruptcy Code, rather than dismissal of the case for cause under §707(a) of the Bankruptcy Code.

In the current Motion, Sunseeker asks the Court to reconsider the Order dismissing its Complaint pursuant to Rule 9023 of the Federal Rules of Bankruptcy Procedure and Rule 59 of the Federal Rules

of Civil Procedure. (Doc. 18). The Court will consider the Motion for Rehearing as timely filed. (See Docs. 12, 13, 14, 16, 17, 18).

Discussion

Reconsideration of an order under Rule 9023 and Rule 59 is an extraordinary remedy that should be applied sparingly due to the interest in preserving the finality of a court's decisions. "In the Eleventh Circuit, the only grounds for granting a motion for reconsideration 'are newly discovered evidence or manifest errors of law or fact.'" In re Pearlman, 2011 WL 3585869, at 1 (Bankr. M.D. Fla.), quoting In re Kellogg, 197 F.3d 1116, 1119 (11th Cir. 1999)).

In this case, the Order dismissing Sunseeker's Complaint was not manifest error, because (1) the allegations in the Complaint did not fall within the exceptions to dischargeability provided by §523(a) of the Bankruptcy Code, (2) the Complaint could not be amended to assert a timely objection to discharge, because Sunseeker did not request denial of the Debtor's discharge under §727(a) of the Bankruptcy Code, and (3) the factual allegations in the Complaint did not state a plausible claim that the Chapter 7 case was filed in "bad faith" under §707(a) of the Bankruptcy Code.

A. Section 523

In the Complaint, Sunseeker alleged that the Debtor misrepresented his income and the value of his wholly-owned corporation on his bankruptcy schedules.

In the Order of dismissal, the Court found that the Complaint did not state a claim to determine the dischargeability of the debt owed to Sunseeker, because the allegations in the Complaint did not relate to the particular debt claimed by Sunseeker, and the grounds alleged in the Complaint did not fall within the exceptions to dischargeability provided by §523(a) of the Bankruptcy Code.

At the hearing on its Motion for Reconsideration, Sunseeker did not appear to challenge the Court's determination that the Complaint failed to state a claim under §523(a).

B. Section 727

In the Order of dismissal, the Court also found that the Complaint could not be amended to state an objection to the Debtor's discharge, because no claim under §727(a) was asserted before the deadline provided by the Bankruptcy Rules.

Sunseeker contends, however, that its Complaint contains sufficient factual allegations to state a claim for denial of the Debtor's discharge, and that it should be permitted to amend the Complaint to include a reference to §727(a) as the statutory basis for the claim. According to Sunseeker, any deficiency in the Complaint could be cured by a citation to §727(a), and the proposed amendment would not include any additional factual allegations.

Sunseeker acknowledges that a key factor in evaluating its Complaint is whether the Debtor received adequate notice of the claims being asserted against him.

The primary criterion, then, in determining whether a deficient pleading constitutes a complaint under Rule 7008 is notice of the nature of relief claimed.

In re Caldwell, 2004 WL 4960380, at 4 (Bankr. D. Idaho)(Emphasis supplied). In Caldwell, for example, the Court found that the debtor "was not adequately apprised of the nature of Creditor's claims nor her basis for relief" in the claimant's original filings. In re Caldwell, 2004 WL 4960380, at 7.

In this case, the Complaint did not provide the Debtor with adequate notice that Sunseeker was objecting to his discharge under §727(a). The Complaint requested dismissal of the bankruptcy case and a determination that Sunseeker's debt was not dischargeable, but did not request the denial of the

Debtor's discharge as to all of his prepetition debts. The three forms of relief have separate meanings and consequences in bankruptcy law.

Under the Bankruptcy Code and Rules, whether a debtor is eligible for a discharge under §727(a) is a question quite distinct from whether a particular debt is excepted from discharge under §523(a). An objection to discharge, filed as an adversary proceeding under Rule 7001(4), seeks to prevent a debtor from obtaining a discharge of any and all debts. 11 U.S.C. §727(c).

In re Caldwell, 2004 WL 4960380, at 3. Denial of a debtor's discharge under §727(a) is a more extreme remedy than the relief provided by §523(a), which excepts only particular debts from the debtor's general discharge.

Additionally, the denial of a debtor's discharge under §727(a) is generally regarded as a more severe remedy than dismissal of the debtor's case under §707. If a case is dismissed under §707, the debtor does not receive his discharge, and the examination of the debtor's financial affairs is concluded. If a discharge is denied under §727, however, the debtor is not released from his debts, but the trustee continues to administer his assets in the pending case. See In re Piazza, 460 B.R. 322, 325 (Bankr. S.D. Fla. 2011), *aff'd*, 469 B.R. 388 (S.D. Fla. 2012), *aff'd*, 719 F.3d 1253 (11th Cir. 2013).

In other words, the denial of a debtor's discharge under §727 is a very different remedy from the relief provided by either §523(a) or §707(a), with very different consequences to the debtor. In re Piazza, 719 F.3d 1253, 1268 (11th Cir. 2013). "Denial of discharge is among the harshest sanctions this Court can levy on a debtor." In re Tickemyer, 2011 WL 1230326, at 8 (Bankr. D. Idaho). For this reason, a debtor should receive sufficient notice of the claim if a creditor is requesting the sanction. See In re Caldwell, 2004 WL 4960380, at 8.

In this case, Sunseeker's Complaint is entitled Complaint "to Dismiss Chapter 7 Bankruptcy of Vincent Lawrence Marino and for Dischargeability of Debt." In its prayer for relief, Sunseeker

requested “this Court to dismiss Debtor’s Chapter 7 Bankruptcy case for bad faith, misrepresentation and fraud and/or determine Sunseeker’s debt owed by Debtor is not dischargeable.” (Complaint, p. 3).

The Complaint did not refer to §727(a) of the Bankruptcy Code, and did not contain a request to deny the Debtor’s discharge of any and all of his prepetition debts. Although the Complaint included requests for different, less extreme remedies, it did not include a request for the “drastic penalty” provided by denial of a discharge under §727(a). In re Weathers, 2011 WL 3207950, at 2 (Bankr. W.D. Ark.).

Denial of a debtor’s discharge is a harsh remedy and should be specifically requested. See In re Henderson, 423 B.R. 598, 615, 616 (Bankr. N.D.N.Y. 2010). The Complaint in this case lacked both the statutory basis for the claim, and a request to deny the Debtor’s discharge. The Complaint did not provide the Debtor with adequate notice that Sunseeker was asking the Court to deny his discharge, and cannot be amended to state a claim under §727(a) of the Bankruptcy Code.

C. Section 707(a)

Finally, in the Order of dismissal, the Court found that the Complaint did not state a claim for dismissal of the Debtor’s Chapter 7 for “cause” under §707(a), because the Complaint was based exclusively or primarily on conduct that was addressed by §727(a) of the Bankruptcy Code.

Sunseeker asserts that the Eleventh Circuit Court of Appeals considered the interplay of §707(a), §727(a), and §523(a) in In re Piazza, 719 F.3d 1253 (11th Cir. 2013), and determined that a creditor may state a claim for dismissal under §707(a), even if the factual allegations also support a claim under §727(a) or §523(a). In re Piazza, 719 F.3d at 1268 (“These differences demonstrate that, even if §§ 727 and 523 are more specific provisions, there is no reason for them to ‘trump’ the more general ‘for cause’ inquiry under § 707(a).”).

In Piazza, the Eleventh Circuit first found that “the power to dismiss ‘for cause’ in §707(a) includes the power to involuntarily dismiss a Chapter 7 case based on prepetition bad faith.” Id. at 1261. The Eleventh Circuit then evaluated the legal standard to determine bad faith under §707(a):

In light of its inherently discretionary nature, a totality-of-the-circumstances approach is the correct legal standard for determining bad faith under §707(a). The totality-of-the-circumstances inquiry looks for “atypical” conduct, *see Marrama*, 549 U.S. at 375 n. 11, 127 S.Ct. at 1111 n.11, that falls short of the “honest and forthright invocation of the [Bankruptcy] Code’s protections,” *Kestell*, 99 F.3d at 149. In making that determination, bankruptcy courts must, as they so often do, “sift the circumstances surrounding a claim to see that injustice or unfairness is not done.” (Citations omitted). Under this inquiry, bad faith is ultimately “evidenced by the debtor’s deliberate acts or omissions that constitute a misuse or abuse of the provisions, purpose, or spirit of the Bankruptcy Code.” (Omissions omitted).

In re Piazza, 719 F.3d at 1271-72. A petition is filed in bad faith under §707(a) if the totality of the circumstances show that the debtor intended to abuse the purpose of the Bankruptcy Code. See In re Wierzbicki, 506 B.R. 935, 945 (Bankr. M.D. Fla. 2014).

In this case, Sunseeker alleged that the Debtor misrepresented his income and assets on his bankruptcy schedules by listing the value of his wholly-owned company as zero. According to Sunseeker, the valuation was incorrect and evidenced the Debtor’s bad faith, because the company’s financial statement reflected a gross profit in the year prior to the bankruptcy petition.

The Complaint did not contain sufficient factual allegations to state a plausible claim that the Chapter 7 case was filed in bad faith under the totality of the circumstances test of §707(a). See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 126 S.Ct. 1955, 167 L.Ed.2d 868 (2007). The Court has considered the allegations in the Complaint regarding bad faith, and cannot draw the reasonable inference that the Debtor intended to abuse the Bankruptcy Code. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949 (2009).

First, Sunseeker does not allege that the Debtor has attempted to frustrate its collection efforts by filing multiple bankruptcy cases. The pending Chapter 7 is the Debtor's only case as of the date of this Order.

Second, Sunseeker does not allege that the Debtor attempted to hide his corporate interests or the source of his income. The Debtor disclosed his 100% ownership in Best Affordable Contractors, LLC and Vinco, Inc. on his original bankruptcy schedules and Statement of Financial Affairs, and also disclosed the name and address of his accounting service. (Docs. 5, 7). The Debtor amended his Schedule of Income on April 7, 2014, and attached a copy of Best Affordable's 2013 Profit and Loss Statement to the amendment. (Doc. 17). The Profit and Loss Statement was cited by Sunseeker as evidencing the Debtor's undervaluation of his assets and income, but the Profit and Loss Statement had actually been produced by the Debtor and filed in his bankruptcy case before Sunseeker filed its Complaint. The Profit and Loss Statement shows that Best Affordable earned net ordinary income in 2013 of \$21,554.13, after subtracting the company's total expenses from its gross profits.

Third, Sunseeker does not allege that the Debtor has failed to cooperate in his bankruptcy case. The Debtor attended his §341 meeting of creditors on March 27, 2014, and the Trustee scheduled a 2004 examination of the Debtor for September 11, 2014. (Doc. 30). There is no indication in the record that the Debtor has withheld information from the Chapter 7 Trustee. In fact, the Trustee has provided "notice of recovery of assets" in the main bankruptcy case, and has filed an Objection to Exemptions based on Best Affordable's alleged status as the Debtor's alter ego. (Docs. 20, 21).

Fourth, Sunseeker does not allege that it is the Debtor's largest or primary creditor. On the contrary, Iberiabank has filed an unsecured Claim in the amount of \$3,054,576.10 based on a deficiency judgment, the Internal Revenue Service has filed a Claim in the amount of \$234,830.92

based in part on income taxes that were assessed in 2007, and Vystar Credit Union has filed two unsecured Claims in the aggregate amount of approximately \$34,842.00. (Claims 2, 3, 5, 6). In other words, the Debtor appears to have a legitimate financial need for the bankruptcy process.

Finally, unlike the circumstances in Piazza, Sunseeker has not alleged that the Debtor made a number of prepetition transfers of his property, or that the Debtor enjoys an extravagant lifestyle at the expense of his creditors. In re Piazza, 719 F.3d at 1274.

Under Piazza, a finding of bad faith depends on the totality of the circumstances. Id. at 1271-72. Sunseeker alleged that the Debtor misrepresented his income and assets by undervaluing his wholly-owned corporation on his bankruptcy schedules. The Complaint did not include sufficient allegations to satisfy the “totality of the circumstances” approach to bad faith under Piazza. The factual allegations in the Complaint did not state a plausible claim that the Chapter 7 case was filed in bad faith under §707(a) of the Bankruptcy Code.

Conclusion

Sunseeker commenced this action by filing an “Adversary Proceeding Complaint of Sunseeker Investments, Inc. to Dismiss Chapter 7 Bankruptcy of Vincent Lawrence Marino and for Dischargeability of Debt.” On November 19, 2014, the Court entered an Order dismissing the adversary proceeding.

The dismissal of the action was not manifest error, because (1) the allegations in the Complaint did not fall within the exceptions to dischargeability provided by §523(a) of the Bankruptcy Code, (2) the Complaint could not be amended to assert a timely objection to discharge, because Sunseeker did not request denial of the Debtor’s discharge under §727(a) of the Bankruptcy Code, and (3) the factual allegations in the Complaint did not state a plausible claim that the Chapter 7 case was filed in bad

faith under §707(a) of the Bankruptcy Code. Consequently, Sunseeker's Motion for Rehearing of the Order dismissing the adversary proceeding should be denied.

Accordingly:

IT IS ORDERED that the Motion of Sunseeker Investments, Inc. for Rehearing or Reconsideration of Order Dismissing Adversary Proceeding is denied.

DATED this 17 day of March, 2015.

BY THE COURT



PAUL M. GLENN
United States Bankruptcy Judge