


ORDERED.

Dated: August 15, 2018



Karen S. Jennemann
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re)	
)	
GRACINDA BENTO CARDOSO,)	Case No. 6:15-bk-06359-KSJ
)	Chapter 7
Debtor.)	
_____)	
)	
WILLIAM A. EADIE,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 6:17-ap-00081-KSJ
)	
GRACINDA BENTO CARDOSO,)	
)	
Defendant.)	
_____)	

ORDER GRANTING DEBTOR’S MOTION FOR SUMMARY JUDGMENT

William A. Eadie, the Plaintiff, filed this adversary proceeding¹ against Gracinda Bento Cardoso, the Debtor, seeking the revocation of the Debtor’s discharge under § 727(d) of the Bankruptcy Code.² Debtor moved for summary judgment and contends the Plaintiff failed to meet

¹ Doc. No. 1. All Doc. No. citations refer to pleadings filed in Adversary Proceeding 6:17-ap-00081-KSJ unless otherwise noted. Documents cited in the other cases will be cited like this: “Doc. No. ___ in 15-bk-06359” or “Doc. No. ___ in 15-ap-00128.”

² All references to the Bankruptcy Code refer to 11 U.S.C. § 101, *et seq.*

his burden of proof because he knew or should have known his allegations prior to the discharge.³

The Court agrees.

Debtor filed a Chapter 7 bankruptcy petition in July 2015.⁴ Plaintiff timely filed an adversary complaint against the Debtor two months later where he objected to the discharge of a debt because of fraud “in connection with the bankruptcy case, including perjury by providing false information on the bankruptcy petition and schedules, transferring title or property to another person to avoid inclusion in the bankruptcy, and lying to the bankruptcy trustee during the creditor’s meeting.”⁵ The adversary proceeding raising virtually identical allegations to those asserted in this adversary proceedings was dismissed for failure to pay the filing fee.⁶

Debtor received her discharge on May 25, 2016.⁷ Plaintiff moved to reopen Chapter 7 case on May 9, 2017.⁸ The adversary proceeding seeking revocation of the Debtor’s discharge was filed on June 29, 2017.⁹ The complaint states the Debtor lied on her bankruptcy petition and schedules by failing to disclose other names used by Debtor, nature of business, nature of debts, fair market value of exempt homestead property, and intellectual property.¹⁰ Debtor now seeks summary judgement arguing Plaintiff failed to prove under § 727(d)(1) he did not know about the alleged fraudulent events before the Debtor’s discharge was granted.¹¹

Summary Judgment Standard

Rule 56(a) provides that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”¹² The moving party must establish the right to summary judgment.¹³ A “material”

³ Doc. No. 94; *see also* Plaintiff’s Response (Doc. No. 105); Debtor’s Reply (Doc. No. 106).

⁴ Doc. No. 1 in 6:15-bk-06359-KSJ.

⁵ Doc. No. 1 in 6:15-ap-00128-KSJ.

⁶ Doc. No. 5 in 6:15-ap-00128-KSJ.

⁷ Doc. No. 30 in 6:15-bk-06359-KSJ.

⁸ Doc. No. 35 in 6:15-bk-06359-KSJ.

⁹ Doc. No. 1.

¹⁰ *Id.* at 1-13.

¹¹ Doc. No. 94.

¹² Fed. R. Civ. P. 56(a).

¹³ *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).

fact is one that “might affect the outcome of the suit under the governing law.”¹⁴ A “genuine” dispute means that “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”¹⁵ Once the moving party has met its burden, the nonmovant must set forth specific facts showing there is a genuine issue for trial.¹⁶ In determining entitlement to summary judgment, “facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.”¹⁷

Revocation of Discharge

“Revocation of discharge is an extraordinary remedy and is construed liberally in favor of the debtor and strictly against those seeking to revoke the discharge.”¹⁸ A complaint under § 727(d)(1) “must be read liberally in favor of the debtor.”¹⁹ Section 727(d)(1) allows a court to revoke a debtor's discharge if the creditor can prove “(1) the debtor obtained the discharge through fraud; (2) the creditor possessed no knowledge of the debtor's fraud prior to the granting of the discharge; and (3) the fraud, if known, would have resulted in the denial of the discharge under § 727(a).”²⁰

According to the Eleventh Circuit, revocation under § 727(d) requires “both the existence of fraud in procuring the discharge *and* proof that the party requesting the revocation of the discharge did not know of such fraud until after the granting of the discharge.”²¹ The party seeking

¹⁴ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Find What Investor Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011).

¹⁵ *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.

¹⁶ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 10 S. Ct. 1348 (1986).

¹⁷ *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).

¹⁸ *Fitzhugh v. Birdsell (In re Fitzhugh)*, No. 2:15-AP-00101-PS, 2018 WL 1789596, at *4 (B.A.P. 9th Cir. Apr. 13, 2018); *Underwood v. Britt & Sons Elect. Wholesale (In re Underwood)*, No. 10-77907-WLH, 2013 WL 4517905, at *2 (Bankr. N.D. Ga. Aug. 15, 2013) (internal citations omitted) (“Revocation of discharge is an extraordinary remedy that directly rescinds the ‘fresh start’ to debtors that bankruptcy is meant to provide.”); *Houghton v. Marcella (In re Marcella)*, No. 05-50261-HJB, 2009 WL 3348251, at *13 (Bankr. D. Mass. Oct. 15, 2009) (internal citations omitted) (“Revocation of discharge is an extraordinary remedy[that] runs contrary to the general policy of the Bankruptcy Code of giving Chapter 7 debtors a fresh start.”).

¹⁹ *Zedan v. Habash (In re Habash)*, 360 B.R. 775, 778 (N.D. Ill. 2007), *aff'd sub nom. Zedan v. Habash*, 529 F.3d 398 (7th Cir. 2008), *as modified* (June 24, 2008).

²⁰ *Cadle Co. v. Matos (In re Matos)*, 267 Fed. App'x. 884, 887 (11th Cir. 2008).

²¹ *Id.*; *see also Grant v. Putnam (In re Putnam)*, 85 B.R. 881, 883 (Bankr. M.D. Fla. 1988); *Gebhardt v. Seedor (In re Seedor)*, No. 3:13-AP-00434-PMG, 2014 WL 1600857 at *5-6 (Bankr. M.D. Fla. Apr. 17, 2014).

revocation of a discharge must prove the conditions of § 727(d) have been met by a preponderance of the evidence.²² Most courts have found that “a party asking for revocation must have diligently investigated any possibly fraudulent conduct as soon as he or she becomes aware of facts indicating fraud.”²³

Here, Plaintiff failed to meet his burden because he knew or should have known of his allegations of fraud before the Debtor received her discharge. Debtor is entitled to summary judgement under § 727(d). Plaintiff was on notice of the bankruptcy, extensively questioned the Debtor at the 341 meeting about her businesses and intellectual property disputes,²⁴ and filed an adversary proceeding in the bankruptcy case raising allegations very similar to the ones in this bankruptcy case.²⁵

The complaint addresses “undisclosed” fraudulent events that occurred years prior to the bankruptcy petition, were part of public record, or were raised by the Plaintiff and/or the Trustee at the 341 meeting including 1) other names used by the Debtor, specifically the name “Rio Rivers;”²⁶ 2) nature of businesses and debts, including R&D Promotions;²⁷ and 3) intellectual

²² *Grogan v. Garner*, 498 U.S. 279, 289, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991); see also *Fitzhugh*, 2018 WL 1789596 at *5 (Trustee failed to prove he has not aware of alleged fraud before discharged was entered).

²³ *Lancioni v. Faragasso (In re Faragasso)*, 2017 Bankr. LEXIS 2200, *7 (Bank. N.J. Aug. 4, 2017) (internal citations omitted) (Plaintiffs did not meet the standard of § 727(d) when they failed to show “they could not have discovered [alleged] facts until after the discharge was entered” when they were put on notice at 341 meeting about the possibility of the debtor continuing to operate his business); *10 W. Chase v. Shepard (In re Shepard)*, No. 09-17489, 2011 WL 1045081, at *4 (Bankr. D. Md. Mar. 16, 2011) (finding § 727(d) standard “includes the burden to investigate diligently any possibly fraudulent conduct before discharge.”).

²⁴ Doc. No. 93 (“341 Transcript”), pp. 28-57. The 341 meeting was held on September 8, 2015.

²⁵ Doc. No. 1 in 6:15-ap-00128-KSJ.

²⁶ Doc. No. 93 “341 Transcript,” p. 8:18-19 (Trustee: “What name did you operate under?” Debtor:” Rio Rivers.”).

²⁷ *Id.* at p. 6:20-24. Debtor disclosed numerous trade names and business names at the 341 meeting. Here are a few: (Debtor: “I produce, with no disrespect, I produce events for strippers,” Trustee: “I understand that Camila Productions is the name that you’re operating under,” Debtor: “Right”); 9:1-3 (Debtor: “We opened a corporation called R & D Promotions”); 16:6-12 (Debtor: “I went into this public auction, purchased Exotic Nights Magazine. By then I also owned Excalibur Enterprises that owned nothing. It was just another corporation that I had made it for my husband so he can start his male pageants...which never took off.”); 35:20-21 (Plaintiff: “Did you dissolve and never reinstate your business, R & D Promotions, Inc.?”); 37:8-10 (Plaintiff: “did you create or cause to be created your second business, the Worlds Pageants comma LLC, a State of Florida limited liability company?”); 40:3-5 (Plaintiff: “Did you claim your second business, The Worlds Pageants, LLC, was the owner of record for the Ms. Nude International mark (sic)?”); 44:18-25 (Plaintiff: “you created your third business, The World’s Pageants no comma LLC, using the identical name as your second business, this time as a State of New Hampshire limited liability company?”) (Plaintiff: “Were you the managing member of your third business, The World’s Pageants LLC, no comma?”); 55:11-14.

property disputes involving the Debtor's previous companies.²⁸ Plaintiff also makes allegations that are irrelevant to a revocation of discharge under § 727(d) such as that the Debtor failed to disclose the fair market value of her exempt homestead property.²⁹

Plaintiff simply is rehashing old arguments in this new adversary proceeding to further hassle the Debtor and deprive her of her deserved fresh start. But even if Plaintiff had been able to prove he did not learn of certain fraudulent event's before the discharge was granted, *which he did not*, courts have consistently found that revocation of discharge under § 727(d)(1) is not proper where a creditor is not diligent and knows "facts such that he or she is put on notice of possible fraud."³⁰

Here, Plaintiff's questions to the Debtor at the 341 meeting³¹ and the adversary complaint filed in the first bankruptcy alleging the Debtor committed fraud in her petition and schedules,³² shows Plaintiff knew or should have known of possible fraudulent activities. He had the ability to inquire about the Debtor's financial affairs prior to her discharge but he chose not pursue his complaint to deny the Debtor a discharge. He failed to pay the filing fee and the adversary

²⁸ *Id.* at p. 2:14-25; 9:24; 10:1-15 (Debtor: "R& D Promotions only had the right to use the trademarks"); 18:11-19; 19:9-23; 20:1-13, 26:2-19 (Debtor: "[Plaintiff] has purchased every single debt that's under my name because for the time — for the past I believe five or six years he has told everyone in the industry including the trademark attorney that he was going to do everything in his power to make me and force me to file bankruptcy so he can have what he wants which is the trademarks that he thinks I own and today is the first time ever that he's finding out that I really don't own anything."); 33:8-12 (Plaintiff: "Was your business, R & D Promotions, Inc., pursuant to the records of the United States Patent and Trademark Office the owner of record for the Ms. Nude International and other trademarks?"); 38:10-13; 39:4-7; 40:13-24; 41:4-7 (Plaintiff: "Did you file your notice of opposition to further obstruct the registration of the Ms. Nude International trademark with the United States Patent and Trademark Office?"); 42:1-25; 43:1-25; 44:1-7; 47:6-11; 49:4-10; 65-6-10.

²⁹ Doc. No. 1, p. 9.

³⁰ *Shepard*, 2011 WL 1045081, at *4 (internal citations omitted); *see also Habash*, 360 B.R. at 779 (internal citations omitted).

³¹ Doc. No. 93 ("341 Transcript"), p. 45:4-25 (Plaintiff: "Did you create your third business... The World's Pageants, LLC to further obstruct my collection of assets based on a valid an enforceable State of Florida judgment?"); 52:2-9 (Plaintiff: "Well, it's interesting because you first had the Worlds Pageants comma LLC, you then had a New Hampshire business called the Worlds Pageants no comma LLC, and now you have not used the entity that you disclosed on your bankruptcy petition in June - no later than June 15th of 2015, you're now using a third variation of the same Camila - I'm sorry - the World, W-O-R-L-D, apostrophe S Pageants."); 56:16-22 (Plaintiff: "Was a reason for you filing your petition of bankruptcy - my filing of criminal charges against you for fraud and extortion with the Flagler County Sheriff's Office now directed to the multi-jurisdictional Florida Department of Law Enforcement?").

³² Doc. No. 1 in 6:15-ap-00128-KSJ.

proceeding was dismissed.³³ Now, he would like a “do over” under a more stringent standard to revoke a discharge. He does not deserve a second chance.

Plaintiff’s complaint also is untimely and should be dismissed under § 727(e). The section requires the trustee, a creditor, or the United States Trustee to request a revocation of discharge “under subsection (d)(1) of this section within **one year** after such discharge is granted” or if it is a request under (d)(2) or (d)(3), the later of “one year after the granting of discharge; and the date the case is closed.”³⁴

Federal Rules of Bankruptcy Procedure 7001(4) requires an adversary proceeding in a “proceeding to object or revoke discharge, other than an objection to discharge under §§ 727(a)(8), (a)(9), or 1328(f).”³⁵ Further, Rule 9024(e) provides “a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code.”³⁶ The appropriate date to calculate whether a request to revoke discharge is timely made under § 727(e) is the date the complaint is filed in the adversary proceeding. Here, Debtor’s discharge was entered on May 25, 2016.³⁷ Plaintiff filed a Motion to Reopen case on May 9, 2017,³⁸ but he filed his complaint to revoke the Debtor’s discharge more than a year after discharge was granted on June 29, 2017.³⁹ The complaint, therefore, is untimely.

Accordingly, it is

ORDERED:

1. Debtor’s Motion for Summary Judgment (Doc. No. 94) is **GRANTED** under §§ 727(d), and (e).

³³ Doc. No. 5 in 6:15-ap-00128-KSJ.

³⁴ *Dennis v. Poff (In re Poff)*, 344 F. App’x 523, 524 (11th Cir. 2009) (Eleventh Circuit affirmed bankruptcy court, which found creditor’s complaint to revoke discharge was untimely when he had notice of the bankruptcy and “more than two years had passed since the discharge had been ordered.”)

³⁵ Fed. R. Bankr. P. 7001(4).

³⁶ Fed. R. Bankr. P. 9024(e).

³⁷ Doc. No. 30 in 6:15-bk-06359-KSJ.

³⁸ Doc. No. 35 in 6:15-bk-06359-KSJ.

³⁹ Doc. No. 1.

2. Judgment is entered is entered in favor of the Defendant/Debtor finding no grounds to revoke her discharge.
3. Trial scheduled for 10:00 a.m. on September 13, 2018, is **CANCELED**.

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Attorney, Stephen Caplan, is directed to serve a copy of this order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this order.