ORDERED.

Dated: January 29, 2019

Karen S. Jennemann
United States Bankruptcy Judge

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

In re ELY SHADINA DIAZ, Debtor.	)	Case No. 6:10-bk-18209-KSJ Chapter 7
84 LUMBER COMPANY, Plaintiff, vs. ELY SHADINA DIAZ, Defendant.	)	Adversary No. 6:18-ap-0080-KSJ

MEMORANDUM OPINION GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The issue raised by the Defendant's Motion for Summary Judgment[1] is whether an unscheduled creditor, here 84 Lumber Company, can continue to collect a debt after discharge when no other creditor received a distribution and the claim is otherwise dischargeable. Finding

[1] Doc. No. 10. Plaintiff filed an opposition and additional authorities. Doc. Nos. 17 and 19. Defendant filed a reply. Doc. No. 18.

that 84 Lumber has established no basis to except their debt from the Debtor's discharge, the Motion for Summary Judgment is granted.

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."[2] The moving party must establish the right to summary judgment.[3] A "material" fact is one that "might affect the outcome of the suit under the governing law."[4] A "genuine" dispute means that "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[5] Once the moving party has met its burden, the nonmovant must set forth specific facts showing there is a genuine issue for trial.[6] 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."[7]

On July 15, 2009, 84 Lumber got a judgment of $44,649.16 against the Debtor for building materials she purchased.[8] Debtor later filed this Chapter 7 bankruptcy case on October 11, 2010.[9] The case was uneventful. On December 17, 2010, the Chapter 7 Trustee located no assets to distribute to creditors and filed a Report of No Distribution, meaning no creditors received any monies. Nor did the Court ever set a bar date to file claims because no distributions were expected. Debtor did not list the Judgment or 84 Lumber as a creditor in her bankruptcy schedules but that caused them no direct harm because NO creditor received any monies in this Chapter 7 case. Debtor received a Discharge on March 21, 2011.[10]

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[2] Fed. R. Civ. P. 56(a).
[3] *Fitzpatrick v. Schlitz (In re Schlitz)*, 97 B.R. 671, 672 (Bankr. N.D. Ga. 1986).
[4] *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).
[5] *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510.
[6] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 10 S. Ct. 1348 (1986).
[7] *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007).
[8] Doc. No. 1, Exh. A.
[9] Doc. No. 1 in the Main Case, 6:10-bk-18209-KSJ.
[10] Doc. No. 44 in the Main Case, 6:10-bk-18209-KSJ.

After 84 Lumber discovered the bankruptcy years later, Debtor sought to reopen her bankruptcy case belatedly to add 84 Lumber as a creditor.[11] 84 Lumber simultaneously sought an award of damages for the fruitless legal collection costs it incurred in trying to collect the Judgment after the Discharge was entered.[12] Eventually, the Court reopened this case[13] and ordered the Debtor to pay 84 Lumber $6,557.82 to reimburse it for any prejudice and costs it incurred by the Debtor not timely informing 84 Lumber of her bankruptcy case or scheduling the Judgment (the "Post-Petition Attorney Fees.")[14]

84 Lumber then filed this adversary proceeding including four separate counts to establish the Judgment is not discharged. The first three counts assert the Discharge never should have entered under §§ 727 (a)(3), (4), and (5) of the Bankruptcy Code.[15] The last count argues that Judgment is not dischargeable under § 523(a)(3) of the Bankruptcy Code because the Debtor failed to list 84 Lumber as a creditor.

As to the three § 727(a) counts, 84 Lumber argues that the Debtor never should have received a Discharge under the three cited subsections. This argument fails because, once a Discharge is entered, the only remedy to "undo" the Discharge is to revoke it under § 727(d) of the Bankruptcy Code in an action brought within one year of its entry as required by § 727(e). 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)."[16]

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[11] Doc. No. 49 in the Main Case, 6:10-bk-18209-KSJ.
[12] Doc. Nos. 65, 72 in the Main Case, 6:10-bk-18209-KSJ.
[13] Doc. No. 105 in the Main Case, 6:10-bk-18209-KSJ.
[14] Doc. No. 84 in the Main Case, 6:10-bk-18209-KSJ. The Court is unaware of whether the Debtor paid this amount but confirms that this award is a *new* post-petition debt that is not affected by this bankruptcy or the Discharge. If unpaid, 84 Lumber remains able to collect this amount from the Debtor.
[15] All references to the Bankruptcy Code refer to 11 U.S.C. §§101, *et. seq*.
[16] *Cadle Co. v. Matos (In re Matos)*, 267 Fed. App'x. 884, 887 (11th Cir. 2008).

A complaint under § 727(d)(1) "must be read liberally in favor of the debtor."[17] "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] 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."[19] Further, § 727(e) 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."[20]

This adversary proceeding was filed on August 1, 2018, over seven years after the entry of the Discharge on March 21, 2011. And, 84 Lumber knew and first appeared in this bankruptcy case no later than April 18, 2017,[21] well over one year before filing this adversary proceeding. So, 84 Lumber failed to meet the one-year filing requirement of §727(e) of the Bankruptcy Code under any analysis. Even assuming this Court extended this one-year period on equitable grounds as a minority of courts have allowed,[22] 84 Lumber pleads no ground to revoke the discharge. Summary judgment for the Defendant is appropriate on Counts 1 -3 because 84 Lumber has failed to plead

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[17] *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).

[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); *Houghton v. Marcella (In re Marcella)*, No. 05-50261-HJB, 2009 WL 3348251, at *13 (Bankr. D. Mass. Oct. 15, 2009) (internal citations omitted).

[19] *Lancioni v. Faragasso* (*In re Faragasso*), 2017 Bankr. LEXIS 2200, *7 (Bank. N.J. Aug. 4, 2017) (internal citations omitted); *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.").

[20] *Dennis v. Poff (In re Poff)*, 344 F. App'x 523, 524 (11th Cir. 2009).

[21] Doc. No. 55 in the Main Case, 6:10-bk-18209-KSJ. 84 Lumber filed a Motion to Reconsider And/ Or Rehear Order to Reopen Case on April 17, 2017.

[22] *See, e.g., In re Dombroff*, 192 B.R. 615, 618–20 (S.D.N.Y.1996). *But see*, majority of courts finding equitable tolling not applicable to § 727(e). *In re Underwood*, No. 10-77907-WLH, 2013 WL 4517905, at *3 (Bankr. N.D. Ga. Aug. 15, 2013); *In re Andersen*, 476 B.R. 668 (1st Cir. BAP 2012); *In re Fellheimer*, 443 B.R. 355, 371 (Bankr. E.D. Pa. 2010); *Murrietta v. Fehrs (In re Fehrs)*, 391 B.R. 53, 66–67 (Bankr. D. Ida. 2008).

or to timely file any claim to revoke the Debtor's discharge under § 727(d) of the Bankruptcy Code.

84 Lumber's Count 4 under § 523(a) is more promising but also ultimately fails. Section 523(a)(3) establishes two situations where an unscheduled creditor without knowledge of a bankruptcy case may continue to collect a debt after a discharge enters. First, § 523(a)(3) provides a debt is excepted from discharge in a bankruptcy case if the creditor did not know of the bankruptcy case in time to file a proof of claim. Second, the debt may survive the bankruptcy discharge if the claim is not dischargeable under §§ 523(a)(2), (a)(4), or (a)(6) of the Bankruptcy Code.

On the first situation, 84 Lumber was not prevented from timely filing a proof of claim because no bar date to file claims was ever imposed. This is a no asset case. No creditor received a distribution. No creditor, included 84 Lumber, was ever asked to file a proof of claim. That 84 Lumber was not initially told of the Debtor's bankruptcy case is irrelevant. It will receive what every other creditor received on their scheduled unsecured claim—*nothing*.

On the second situation, 84 Lumber does not request or contend that the Judgment arose from a type of debt not dischargeable under §§ 523(a)(2), (a)(4), or (a)(6) of the Bankruptcy Code. These types of debts arise from fraud, embezzlement, theft, defalcation by a fiduciary, or through willful or malicious injury. Here, the Judgment arose because the Debtor failed to pay for building supplies she purchased. 84 Lumber does not contend the debt arose through any bad action, only that she failed to inform 84 Lumber of her bankruptcy case. 84 Lumber has established no material factual disputes that would prevent summary judgment as a matter of law.

Rather, 84 Lumber points to the Eleventh Circuit Court of Appeals decision of *In re Baitcher* to argue that summary judgment typically is not appropriate when a debtor fails to schedule a creditor to avoid liability for one type of debts not dischargeable under §§ 523(a)(2),

(a)(4), or (a)(6) of the Bankruptcy Code.[23] But, as just noted, 84 Lumber is not asserting that the original debt was attributable to any bad action. If the Debtor originally had listed 84 Lumber in her schedules, she could have discharged the Judgment. The same should hold true now.

Defendant's Motion for Summary Judgment is granted as a matter of law. 84 Lumber may not seek *in personam* relief against the Debtor to collect the Judgment. A separate Final Summary Judgment simultaneously shall enter for the Debtor.

84 Lumber, however, retains any rights it has as a *secured* creditor to proceed *in rem* against real property owned by the Debtor. After a trial, the Court denied the Debtor's Motion to Avoid Creditor's Lien filed in her main bankruptcy case.[24] To the extent 84 Lumbers holds a properly filed lien that encumbers any real property owned by the Debtor, it may continue to exercise its legal rights to collect the Judgment against the value of this property. The Discharge also does not prevent 84 Lumber from collecting the Post-Petition Attorney's Fees against the Debtor.

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Attorney Frank Wolff is directed to serve a copy of this order on all interested parties and file a proof of service within 3 days of entry of the order.

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[23] *In re Baitcher (Samuel v. Baitcher*), 781 F.2d 1529 (11th Cir. 1986). Plaintiff also cites *In re Francis*, 426 B.R. 398 (Bankr. S.D. Fla. 2010) where the court denied summary judgment to give the debtor a chance to demonstrate "absence of fraud or interior design." A similar inquiry is not necessary in this case because fraud was not plead under Count IV of the complaint. To the extent the Plaintiff argues it was not necessary to find that the Judgment arose from a type of debt not dischargeable under §§ 523(a)(2), (a)(4), or (a)(6), such interpretation would go against the plain language of the Bankruptcy Code.

[24] Doc. No. 131 in 6:10-bk-18209-KSJ. The trial was held on November 15, 2018.