

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

In re:

Case No. 3:09-bk-824-PMG

CRAIG RICHARD GREGORY  
and MICHELLE LYNN GREGORY,

\_\_\_\_\_  
Debtors.

Chapter 7

TIM NOWAK  
and MARY NOWAK,

Plaintiffs,

vs.

Adv. No. 3:09-ap-246-PMG

CRAIG RICHARD GREGORY  
and MICHELLE LYNN GREGORY,

\_\_\_\_\_  
Defendants.

**ORDER ON MOTION TO DISMISS ADVERSARY PROCEEDING**

**THIS CASE** came before the Court for hearing to consider the Motion to Dismiss Adversary Proceeding filed by the Debtors, Craig Richard Gregory and Michelle Lynn Gregory.

The Plaintiffs, Tim Nowak and Mary Nowak, commenced this adversary proceeding by filing a Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. §523(a)(4).

In the Motion presently under consideration, the Debtors primarily contend that the Complaint was not timely filed and should be dismissed.

## **Background**

The Debtors filed a petition under Chapter 7 of the Bankruptcy Code on February 10, 2009. The Debtors listed the Plaintiffs as creditors on their bankruptcy schedules, and the Plaintiffs were included on the mailing matrix filed with the petition.

On February 11, 2009, the Court issued a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines. (Doc. 5). Pursuant to the Notice, the §341 Meeting of Creditors was scheduled for March 12, 2009, and the deadline to file a complaint to determine the dischargeability of a debt was listed as May 11, 2009. The Notice was served on the Plaintiffs on February 13, 2009. (Doc. 7).

On May 11, 2009, the Plaintiffs filed a pleading that was docketed as an Objection to Debtor's Claim of Exemptions.

On May 12, 2009, the Clerk's Office made a "Corrective Entry" on the docket, which stated that the Objection to Debtor's Claim of Exemptions was filed in the incorrect case, and that the party was notified to file the correct pleading within ten days.

On May 22, 2009, the Plaintiffs filed the Complaint that initiated this adversary proceeding. Generally, the Plaintiffs allege in the Complaint that the Debtor, Craig Richard Gregory, was previously a member of National Manufactured Home Brokers, LLC, and that Craig Richard Gregory had "obtained draw payments, totaling \$25,000.00, paid by Plaintiffs to National Manufactured Home Brokers, LLC, by means of embezzlement and/or larceny or otherwise through an act of defalcation." (Doc. 1, paragraph 11). Consequently, the Plaintiffs request a determination that the debt owed to them by the Debtor is nondischargeable pursuant to §523(a)(4) of the Bankruptcy Code.

In the Motion presently under consideration, the Debtors assert that the Complaint should be dismissed for three reasons. First, the Debtors contend that the Complaint was not filed by the deadline established pursuant to Rule 4007(c) of the Federal Rules of Bankruptcy Procedure, and that the Complaint should therefore be dismissed as untimely. Second, the Debtors contend that the Plaintiffs failed to include any allegations to support a claim for relief against the Debtor, Michelle Lynn Gregory. Third, the Debtors contend that the Plaintiffs did not "state with particularity the circumstances constituting" the alleged fraud, as required by Rule 9(b) of the Federal Rules of Civil Procedure, as made applicable to this proceeding by Rule 7009 of the Federal Rules of Bankruptcy Procedure.

#### **Discussion**

The Court has considered the record in this case, and finds that the adversary proceeding was not timely filed and should be dismissed.

Rule 4007(c) of the Federal Rules of Bankruptcy Procedure provides:

#### **Rule 4007. Determination of Dischargeability of a Debt**

...

**(c) TIME FOR FILING COMPLAINT UNDER §523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT CASE, OR CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE; NOTICE OF TIME FIXED.** Except as provided in subdivision (d), a complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

F.R.Bankr.P. 4007(c)(Emphasis supplied). The deadline established by Rule 4007(c) should be "interpreted strictly, and in a manner consistent with the Code's policies . . . favor[ing the] fresh start for the debtor, and [the] prompt administration of the case." In re Woods, 260 B.R. 41, 43 (Bankr. N.D. Fla. 2001)(quoting Taylor v. Freeland & Kronz, 503 U.S. 638 (1992)). The Rule implements the policy "of fixing a certain deadline after which a debtor will no longer be exposed to dischargeability claims." In re Yohler, 127 B.R. 492, 494 (Bankr. S.D. Fla. 1991).

Based on Rule 4007(c) and its underlying policies, it is generally recognized that courts have no discretion to allow a late-filed complaint, unless a motion to extend the deadline was filed prior to the expiration of the 60-day time period. In re Tucker, 263 B.R. 632, 637 (Bankr. M.D. Fla. 2001)(quoting In re Yohler, 127 B.R. at 493, and citing In re Alton, 837 F.2d 457, 459 (11<sup>th</sup> Cir. 1988)). The Court has no discretion, for example, to allow an untimely dischargeability complaint on the basis of excusable neglect. In re Johnson, 282 B.R. 43, 44 (Bankr. M.D. Fla. 2002).

In this case, it is undisputed that the Plaintiffs received notice of the deadline in accordance with Rule 4007(c) and Rule 2002 of the Federal Rules of Bankruptcy Procedure. The Plaintiffs were listed as creditors on the Debtors' schedules, and were served with the Notice of Chapter 7 Bankruptcy Case on February 13, 2009. The Notice clearly provided that the deadline to file a complaint to determine the dischargeability of a debt was May 11, 2009.

On the last date established for filing dischargeability complaints, the Plaintiffs filed a pleading that was docketed as an Objection to Debtor's Claim of Exemptions. The following day, the Clerk's Office made a "corrective entry" on the docket, indicating that the pleading was filed in the incorrect case, and that the Plaintiffs were notified to file a correct pleading within ten days.

The Plaintiffs do not contend that the pleading docketed on May 11 was improperly rejected by the Clerk's Office. Nor do the Plaintiffs contend that the pleading timely and effectively notified the Debtors that they intended to object to the dischargeability of a debt. Instead, at the hearing on the Motion to dismiss the adversary proceeding, the Plaintiffs asserted:

[O]n May 11<sup>th</sup> we did actually file an objection to debtors' claim of exemptions. It was improperly captioned and it was the incorrect pleading. We were notified the next day by the clerk of that and we were notified that we had ten days to file the correct pleading. We did file the correct pleading, the adversary complaint within ten days being on 5/22. So I believe that it is not time barred based on the notification that we had ten days to file the correct pleading.

(Transcript, pp. 5-6).

The Court has considered the Debtors' Motion and the Plaintiffs' response, and finds that the Complaint was not timely filed and should be dismissed.

First, the Complaint filed on May 22, 2009, should not relate back to the pleading filed on May 11, 2009. The Plaintiffs filed the pleading on May 11 as an Objection to Debtor's Claim of Exemptions. A claim of exemption involves property belonging to the debtor as of the date that the bankruptcy petition was filed. By claiming such property as exempt, the debtor seeks to remove the property from the estate created under §541 of the Bankruptcy Code. Owen v. Owen, 500 U.S. 305, 308 (1991); In re Urban, 361 B.R. 910, 913 (Bankr. D. Mont. 2007). A party in interest may object to a debtor's claim of exemption by initiating a contested matter pursuant to §522(l) of the Bankruptcy Code and Rules 4003(b) and 9014 of the Federal Rules of Bankruptcy Procedure.

A dischargeability complaint, on the other hand, involves a debt owed by the debtor to a creditor. Generally, a debtor receives a discharge of his scheduled debts pursuant to §727 of the Bankruptcy Code. A creditor may object to the dischargeability of a particular debt, however, for any of the reasons

specified in §523(a) of the Bankruptcy Code. An objection to dischargeability is asserted by initiating an adversary proceeding pursuant to Rules 4007 and 7001 of the Federal Rules of Bankruptcy Procedure.

A dischargeability complaint, therefore, differs materially from an objection to exemptions in substance, form, and purpose. The filing of an objection to exemptions is irrelevant as an indicator of whether a creditor intends to object to the dischargeability of a debt. Absent unusual circumstances, therefore, an objection to exemptions does not serve as notice to the debtor that the creditor may subsequently file a dischargeability action, and any subsequent dischargeability action should not relate back to an objection to exemptions. This result is consistent with the policy underlying Rule 4007(c) of establishing a fixed deadline after which the debtor will no longer be exposed to dischargeability claims. In re Yohler, 127 B.R. at 494. See In re Davis, 2008 WL 5213667, at 4-5 (Bankr. N.D. Tex.)(no relation back to an objection to confirmation, in view of Rule 4007's policy of assuring debtors that they will know which debts are excepted from discharge within sixty days.).

In this case, the Plaintiffs were served with the Notice of Chapter 7 Bankruptcy Case. (Doc. 7). The Notice listed the deadline for filing a dischargeability complaint, and also listed a separately designated deadline for objecting to exemptions. The Plaintiffs ultimately filed their Complaint pursuant to one of the specific exceptions to dischargeability provided by §523(a) of the Bankruptcy Code. Under these circumstances, the Complaint does not relate back to the Objection to Exemptions.

Second, the Plaintiffs cannot excuse the untimely filing by relying on the notice from the Clerk's Office indicating that they had ten days to file the correct pleading. Where a creditor has actual notice of the bankruptcy case in time to protect his rights, courts have generally found that the receipt of

incomplete or incorrect information from the Clerk's Office does not relieve the creditor of his obligation to comply with Rule 4007(c). See In re Lett, 2009 WL 798864, at 5-6 (S.D. Ala.). In a case in which the Clerk's Office had provided inaccurate information about the Rule 4007 deadline, for example, the Eleventh Circuit Court of Appeals stated:

The fact that the notice stated that the deadline was "to be set" does not relieve Durham of its duty to file within the time period prescribed by Rule 4007. . . .

...

Durham had actual notice of the bankruptcy proceeding. Even though the initial notice said that the filing deadline was "to be set," Durham was on notice of the proceeding and the requirements of Rule 4007. . . . This conflict could have been easily avoided by Durham by filing within the sixty day period. Durham could very easily have determined the outside deadline itself. It was unreasonable to rely on future information.

In re Williamson, 15 F.3d 1037, 1040 (11<sup>th</sup> Cir. 1994).

Similarly, in this case, the Plaintiffs had actual notice of the Bankruptcy case in time to prepare the appropriate pleading and comply with the deadline established pursuant to Rule 4007. The notification from the Clerk's Office after the deadline had expired should not excuse their noncompliance.

### **Conclusion**

The Debtors' Motion to Dismiss Adversary Proceeding should be granted. The Complaint to Determine Dischargeability of Debt was not timely filed, and should be dismissed. Under the circumstances of this case, the Complaint does not relate back to the Objection to Exemptions filed by the Plaintiffs, and the Plaintiffs are not relieved of their obligation to comply with Rule 4007(c) by virtue of the subsequent notification provided by the Clerk's Office.

Accordingly:

**IT IS ORDERED** that:

1. The Motion to Dismiss Adversary Proceeding filed by the Debtors, Craig Richard Gregory and Michelle Lynn Gregory, is granted.
2. This adversary proceeding is dismissed.

**DATED** this 14 day of January, 2010.

**BY THE COURT**

/s/ Paul M. Glenn

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PAUL M. GLENN  
Chief Bankruptcy Judge