United States Bankruptcy Court
Northern District of Illinois
Western Division

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re Tomasz Lemiszka

Bankruptcy No. 19-82572

Adversary Caption: Polish & Slavic Federal Credit Union v. Tomasz Lemiszka

Adversary No. 19-96032

Date of Issuance: March 9, 2021

Judge: Thomas M. Lynch

Appearance of Counsel:
Attorney for Plaintiff: David W Lipschutz, Trunkett & Trunkett, P.C.
Attorney for Defendant: David P. Lloyd, LaGrange, IL

Synopsis:

Creditor sought leave under Fed. R. Bankr. P. 7015 to amend its adversary complaint to add Bankruptcy Code sections 727(a)(2)(A) and (a)(4)(A) claims objecting to discharge. That request, however, came more than six months after discovery had closed, after the Credit Union's motion for summary judgment had been denied and more than a year after the Debtor obtained his discharge, with no explanation or justification given for the delay. The court, finding that the Credit Union's undue delay in seeking leave to amend would cause undue

prejudice and burden on both the Debtor and the court, denied the motion.

United States Bankruptcy Court, Northern District of Illinois

NAME OF ASSIGNED JUDGE	Thomas M. Lynch	CASE NO.	19-bk-82572
DATE	March 9, 2021	ADV NO.	19-ap-96032
CASE TITLE	Polish & Slavic Federal Credit Union v. Tomasz Lemiszka (In re Lemiszka)		
TITLE OF ORDER	ORDER DENYING MOTION FOR LEAVE TO AMEND		

DOCKET ENTRY TEXT

Polish & Slavic Federal Credit Union's Motion for Leave to File an Amended Complaint (ECF No. 39) is DENIED for the reasons set out below.

O[For further details see text below.]

STATEMENT

Six months after discovery closed, after an adverse ruling on its motion for summary judgment and almost one year after the deadline to object to discharge and the entry of the Debtor's discharge, plaintiff Polish & Slavic Credit Union (the "Credit Union") now seeks leave to amend its adversary complaint to object to discharge under sections 727(a)(2)(A) and (a)(4)(A) of the Bankruptcy Code. For the reasons discussed below, the Credit Union's motion to amend its complaint is denied.

FACTUAL AND PROCEDURAL BACKGROUND

The adversary complaint filed by the Credit Union on December 23, 2019, seeks a determination of non-dischargeability of its debt under sections 523(a)(2)(A), (a)(2)(B) and (a)(6) of the Bankruptcy Code. In its pleading, the Credit Union alleges that in late 2016 it loaned the Debtor $24,932.85, the loan to be secured by a lien in a 2010 BMW 5 Series vehicle. The vehicle

subsequently sustained "irreparable damage" in an accident for which the Debtor received $16,000 insurance proceeds, none of which was paid to the Credit Union. As of the petition date, $13,201.43 remained outstanding on the loan. The Credit Union argues that this debt is non-dischargeable because the Debtor allegedly failed to comply with his contractual obligations (1) to forward the certificate of title to the Credit Union after a pre-existing lender sent it to him, (2) to timely notify the Credit Union of the car accident, (3) to forward the insurance proceeds to the Credit Union, and (4) to make further loan payments to the Credit Union. The Credit Union asserts that the loan was obtained by false pretenses, false representations or actual fraud, alleging that the Debtor never intended to repay the loan, deliver or have the Credit Union's interest shown on the title, notify the Credit Union of collision damage or otherwise perform his obligations under the loan agreement. The Credit Union also asserts that the Debtor's failure to forward or have the Credit Union's lien shown on the certificate of title and his failure to remit insurance proceeds amounts to a "willful and malicious" injury for purposes of section 523(a)(6).

After a full opportunity for discovery,[1] the Credit Union moved for summary judgment on its complaint. The court denied its summary judgment motion in a detailed memorandum opinion issued December 30, 2020. With respect to the Plaintiff's section 523(a)(6) claims, the court found that the Credit Union had failed to demonstrate that the Debtor's alleged conduct, even if accepted, "constitutes an intentional tort" and was not simply "a matter of breach of contract." (ECF No. 37.) Based on its deemed admissions and for the other reasons discussed in the memorandum opinion, the court found that the Credit Union failed to demonstrate the required absence of a genuine dispute of material fact or that it was entitled to judgment as a matter of law.

The court set the matter for general status at which trial would be scheduled. On January 22, 2021, shortly before the hearing date, the Credit Union filed the pending motion to add objections to discharge under sections 727(a)(2)(A) and (a)(4)(A). The Credit Union seeks to additionally allege that Debtor failed to disclose that he transferred $12,500 from his personal account to an entity in which he is involved within one year of the petition date in his Statement of Financial Affairs. It also seeks to allege that the Debtor's bankruptcy schedules indicate an incorrect amount for the insurance proceeds he received pre-petition, which amount should have been listed as $18,095.31. Acknowledging that the Debtor received his discharge on February 19, 2020, the proposed amended complaint seeks "an order revoking the Debtor's discharge pursuant to 11 U.S.C. §727 and §727(a)(2)(A) . . . and §727(a)(4)(A)." (ECF No. 39, Ex. A.)

The Debtor's chapter 7 petition was filed November 5, 2019, and his section 341 meeting was held on December 17, 2019. As such, the deadline to object to discharge was February 18,

[1] See Order, ECF No. 21 (ordering written discovery to complete on June 24, 2020, and all deposition discovery to complete by July 24, 2020). The Credit Union neither objected to the discovery schedule set by the court nor requested additional time.

2020. No one moved to extend the deadline and the discharge was entered on February 19, 2020. The case closed five days later. As discussed in the court's order denying the Plaintiff's February 17, 2021 oral request to extend the one-year deadline to seek revocation of discharge under section 727(e) (Case No. 19-bk-82572, ECF No. 21), the entry of discharge was not in error, as no adversary complaint objecting to discharge or motion to extend was filed before the filing deadline passed.

Neither the pending motion for leave to amend nor the proposed amended complaint offer any reason or explanation why the Credit Union did not timely object to the Debtor's discharge or request amendment prior to filing the pending motion in January 2021, more than a year after filing the original complaint and after closure of discovery and losing on the motion for summary judgment. Indeed, in its February 10, 2021 reply memorandum in support of its motion for leave to amend, the Credit Union alleges in a vague and conclusory manner that "[a]fter the Defendant received a discharge and during the pendency of the adversary case, the Credit Union learned of additional facts that showed a continuation of the Defendant's fraudulent actions to warrant a revocation of discharge under 11 U.S.C. §727." (ECF No. 45.) The Credit Union does not elaborate on what these "additional facts" are, or how or when it learned such facts between February 19, 2020 and January 22, 2021, or why it could not have sought relief earlier.

DISCUSSION

Rule 15(a) permits one amendment as a matter of course within 21 days after service of the complaint. Later amendment is permitted only with the opposing party's written consent or with leave of court. Fed R. Civ. P. 15(a)(2) (incorporated by Fed. R. Bankr. P. 7015). While the "Federal Rules of Civil Procedure adopt a liberal standard for amending," *Life Plans, Inc. v. Sec. Life of Denver Ins. Co.*, 800 F.3d 343, 357-358 (7th Cir. 2015),[2] the ability to amend is not unfettered. "[C]ourts may deny a proposed amended pleading if, for example, the moving party unjustifiably delayed in presenting its motion to the court, repeatedly failed to cure deficiencies, or if the amendment would be futile." *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865, 868-69 (7th Cir. 2013); *see also, e.g., Foman v. Davis*, 371 U.S. 178, 182 (1962) ("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.'"). Ultimately, so long as there is a "justifying reason," the "grant or denial of an opportunity to amend is within the discretion of the [court]." *Forman*, 371 U.S. at 182.

[2] *See* Fed. R. Civ. P. 15(a)(2) (stating that the "court should freely give leave when justice so requires").

While "[d]elay on its own is usually not reason enough for a court to deny a motion to amend," the "longer the delay, the greater the presumption against granting leave to amend." *Soltys v. Costello*, 520 F.3d 737, 743 (7th Cir. 2008). As the Seventh Circuit points out, its "case law uniformly advis[es] that a plaintiff's leave to amend, when filed after discovery has been closed and after a defendant's motion for summary judgment has been filed, is considered unduly delayed and prejudicial." *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 774 (7th Cir. 1995). In this case, the court finds that the Credit Union fails to explain or justify its delay in presenting its request to amend, and at this point — more than six months after discovery closed, after the Credit Union's motion for summary judgment was denied and more than a year after the Debtor obtained his discharge — leave to amend would cause undue prejudice to the Debtor.

The Seventh Circuit cautions that "[p]arties to litigation have an interest in speedy resolution of their disputes without undue expense." *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379 (7th Cir. 1990) (quoting *Feldman v. Allegheny Int'l, Inc.*, 850 F.2d 1217, 1225 (7th Cir. 1988)). For example, in *Park v. City of Chicago*, it found that the district court "acted well within its discretion in concluding that [the plaintiff's] six-month wait constituted undue delay." 297 F.3d 606, 613 (7th Cir. 2002). This is even more so in bankruptcy, where matters are expected to be adjudicated expeditiously. Bankruptcy Rule 4004(a) sets a short deadline to object to discharge, 60 days after the date initially set for the meeting of creditors, to promote the "expeditious and definitive resolution of the question of dischargeability" and further the "prompt administration of bankruptcy estates and protection of the 'fresh start' objective of the Code." *In re Kontrick*, 295 F.3d 724, 732 (7th Cir. 2002), *aff'd sub nom.*, *Kontrick v. Ryan*, 540 U.S. 443 (2004). By doing so, the deadline "allow[s] the debtor to enjoy finality and certainty of relief." *Id.*

Indeed, "the need for finality is an important bankruptcy policy." *In re Taylor*, 449 B.R. 686, 692 (Bankr. E.D. Pa. 2011). The one-year limitation to seek revocation of discharge in 11 U.S.C. 727(e) and Bankruptcy Rule 9024 mirrors this policy interest as it promotes the finality of discharge orders. Further, while the Credit Union's original complaint under Section 523 was a purely two-party dispute, objection to or revocation of discharge under Section 727 potentially affects all creditors, many of whom may have stopped following the bankruptcy case after it was closed more than a year ago.[3]

[3] Loosely permitting a creditor who chooses to bring a section 523 action to add a section 727 claim after losing on the merits could create dangerous incentives. A creditor who believes it has a valid action under both section 523 and section 727 may strategically prefer the section 523 action, since it affects the dischargeability of only its own debt. If successful, the creditor may find itself with fewer competitors for enforcement against the debtor's post-petition assets than if the debtor were denied a discharge in its entirety. Denial of discharge prevents the discharge of all debts and would make permanently non-dischargeable all pre-petition debts. *See* 11 U.S.C. § 523(a)(10) (excepting from discharge any debt in a future bankruptcy case "that was or could have been listed or scheduled" in a case in which the debtor is denied a discharge under sections 727(a)(2) or (a)(4)).

The original complaint neither provided notice that the Credit Union would seek to prevent the Debtor's discharge in full, nor raised the factual allegations on which the Credit Union now proposes to base its discharge claims. The original section 523 complaint focuses on the Debtor's actions and intent at the time of the original loan in 2016, almost three years before the bankruptcy petition, and his alleged failure to turn over insurance proceeds in February 2019, almost one year before the petition date. While the original complaint contained a single reference to and attached a copy of the Debtor's Statement of Financial Affairs, it did not allege that any information in the statement was false. In contrast, the proposed amended section 727 counts are based on the schedules and statements filed by the Debtor in his bankruptcy case.

The proposed amendment raises new facts, new theories and new remedies, all of which might well require further discovery. The Seventh Circuit has noted that reopening closed discovery for newly amended claims – particularly after the requesting party loses on the merits and shows no reason why it was unable to obtain evidence earlier – can impose undue costs not only on the opposing party but on the judicial system. The court explained:

> [If amendment were permitted,] the parties would be forced to reopen discovery, including the gathering of new evidence, and the identification of appropriate legal arguments. All this would have taken time if the parties were to have an opportunity for meaningful trial preparation, which would result in additional expenditures by the parties. Beyond prejudice to the parties . . . [d]elay impairs the public interest in the prompt resolution of legal disputes. The interests of justice go beyond the interests of the parties to the particular suit; delay in resolving a suit may harm other litigants by making them wait longer in the court queue. Hence, when extreme, delay itself may be considered prejudicial. The judicial system would be endlessly burdened if the parties could merely amend their pleadings after an order granting a new trial, thereby, delaying every other matter before the court indefinitely.

Fort Howard, 901 F.2d at 1379-80 (citations and quotation marks omitted). While this burden and risk of harm often is greater after trial, as in *Fort Howard,* there is still clear danger after summary judgment. To freely permit parties to amend after losing on summary judgment would allow parties to use summary judgment as a method to test the waters of one theory before seeking to reopen discovery and add a new theories and factual bases if unsuccessful. *See, e.g., Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 973 (7th Cir. 2020) ("Summary judgment is the proverbial 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.")

The Credit Union principally relies upon *Disch v. Rasmussen* to support its motion. 417 F.3d 769 (7th Cir. 2005). In that case, the court of appeals found that a bankruptcy court had authority under Bankruptcy Rule 9024 to vacate a Chapter 7 discharge six months after its issuance and did not abuse its discretion under Rule 15(a) to allow amendment of a creditor's

section 523(a) complaint to add objection to discharge under section 727(a) or to allow the amended pleading to relate back to the date of the original complaint under Rule 15(c) even though the request was not made until trial. *Id.* at 776.[4] However, a key distinction is that in *Rasmussen* the debtor did "not take[] issue with" the bankruptcy court's conclusion that she "failed to meet the conditions [for discharge] stated in § 727(a)" and the court of appeals noted that the "record from the adversary proceeding strongly supports the conclusion that she concealed property within one year of her Chapter 7 filing, failed to keep adequate business records, and failed satisfactorily to explain her losses . . . [bringing] her within the conditions described in § 727(a)(2), (a)(3), and (a)(5), any one of which would defeat her right to a general discharge." *Id.* at 775. Moreover, the court noted that the original complaint "alleged that [the debtor] failed or refused to provide an adequate accounting of [her business's] activities and the financial status of the company" and at depositions and at trial was asked to but failed to explain her lack of records or "the disappearance of the assets." *Id.* at 776. Thus, in *Rasmussen*, the original complaint alleged facts sufficient to support objection to discharge under sections 727(a)(3) and (5) for failure to maintain financial records or satisfactorily explain loss of assets, and her actions in the deposition and at trial themselves constituted a failure to satisfactorily explain loss of assets. The court of appeals found that the debtor "had ample notice that she would have to explain what she did" with dissipated assets and had "failed to show that she was prejudiced by the addition of the § 727 issues" or to identify any "evidence or argument to dispute the bankruptcy court's conclusion that her conduct did not entitle her to a discharge." *Id.*

In contrast, nothing in the Credit Union's initial complaint states any factual or legal grounds for objection to discharge. While the proposed amendment is based on alleged false statements in the Debtor's schedules and statements filed in his bankruptcy case, the original complaint makes no reference to any bankruptcy schedule and only refers to the Debtor's statement of financial affairs as evidence that he received insurance proceeds, without making any allegations as to the falsity of any statement thereon.[5] The Credit Union's proposed amended count under section 727(a)(2)(A) is premised upon the Debtor's alleged transfer of $12,500 to his company Bounce Party, LLC within one year of the bankruptcy petition and alleges that the Debtor "concealed disclosure of this transfer in his bankruptcy filings." (ECF No. 39, Ex. A.) It is unclear whether in addition to concealment in the bankruptcy filings the Credit Union also means to argue the transfer itself was "with intent to hinder, delay, or defraud a creditor" and grounds for objection under section 727(a)(2)(A). But, even if so, there are no

[4] While the court found authority to vacate discharge under Bankruptcy Rule 9024, it specifically held that the court's general equitable powers under section 105(a) of the Bankruptcy Code do not include such power. *Rasmussen*, 417 F.3d at 778 (explaining that "such a broad interpretation of § 105(a) would make the list of grounds for revoking a discharge found in § 727(d) meaningless").

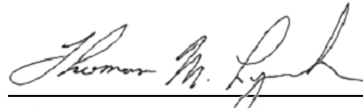
[5] Because the proposed section 727 counts do not "arise[] out of the same conduct, transaction or occurrence," Rule 15(c) would not permit relation back to the original complaint filing date and they would likely be untimely under Rule 4004(a). *See Rasmussen*, 417 F.3d at 777.

allegations in the initial complaint as to Bounce Party, LLC, or such transfer. Nor has the Credit Union suggested that any of the alleged facts are newly discovered. To the contrary, the Credit Union mentioned at least as early as papers it filed in connection with its motion for summary judgment on August 19, 2020, the alleged transfer to the Debtor's company and that the insurance proceeds were more than $18,000. (ECF No. 26.) Yet, the Credit Union offers no explanation for why it waited more than five months before seeking leave to amend its complaint.

CONCLUSION

After carefully weighing the circumstances and the history of the bankruptcy case and this adversary proceeding, the court concludes that in light of the Credit Union's undue and unexplained delay in requesting amendment and the undue prejudice and burden on both the Debtor and the court that would result from amendment at this point, the Credit Union's motion will be denied.

ENTER



Thomas M. Lynch
United States Bankruptcy Judge