UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

Cite as: [Unpublished]

Steven Derkson, Plaintiff v.
Tori L. Tomas-Haarstick, Defendant
(In re Tori L. Tomas-Haarstick, Debtor)
Bankruptcy Case No. 01-34821-7
Adversary Case No. 01-3227-7

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

December 7, 2001

Mitchell J. Barrock, Barrock & Barrock, Milwaukee, WI for Plaintiff
Edward A. Corcoran, Brennan, Steil & Basting, S.C, Madison, WI for Defendant

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

This case involves the arcane bankruptcy issue called the hypothetical discharge and its even more arcane procedural requirements. The debtor in this case, Tori L. Tomas-Haarstick, filed a Chapter 7 bankruptcy petition on August 21, 2001. Steven Derkson filed an adversary complaint on September 20, 2001 to determine whether a debt was dischargeable under §523(a)(6).[1] The debtor filed an answer on October 19, 2001. In his initial complaint, Derkson named Tori L. Tomas-Haarstick as the defendant. Derkson and his attorney had mistakenly thought that Tori L. Tomas-Haarstick was her husband Troy Haarstick against whom Derkson had previously received a tort judgment in the amount of $400,000 in state court.[2] Eventually realizing that Troy's wife, Tori, had filed bankruptcy and not Troy himself,

[1] The debtor's attorney contends that this complaint was not properly served because the summons that accompanied it had expired. However, this can technical defect of service can be easily cured if the plaintiff were to obtain a new summons and serve it within its ten day expiration period. See In re Dahowski, 48 B.R. 877 (Bankr. S.D. N.Y. 1985). In other words, the expired summons does not affect the timeliness of the complaint itself.

[2] This judgment is currently on appeal in state court.

Derkson's attorney amended the initial complaint on October 31, 2001 by adding allegations against Troy and objecting to the hypothetical discharge of his tortious debt under §524(a)(3) and §523(a)(6). However, Derkson's attorney did not ask for written consent of the debtor or court permission before making the amendment. Either consent or permission is required under Federal Rule of Civil Procedure 15(a) once a responsive pleading has been filed. In addition, the plaintiff did not name Troy as defendant in the amended complaint. The time limit to object to Tori's discharge has since passed. Tori has filed a motion to dismiss Derkson's adversary complaint contending that any complaint seeking to deny Troy's hypothetical discharge is now time barred. Derkson has responded by filing a motion to enlarge the time within which to bring the action under §523(a)(6), which motion is itself untimely[3] but which will be considered as a motion to further amend the complaint under Fed. R. Civ. P. 15(c).

We must now decide whether Derkson can amend his complaint to relate back to the date of the original complaint in order to object to a nondebtor/noninnocent spouse's hypothetical discharge in an innocent spouse's Chapter 7 case after the date to object to the innocent spouse's discharge has passed. The short answer is, yes. Although case law concerning the hypothetical discharge suggests that a nondebtor/noninnocent spouse be sued as a party in an innocent spouse's bankruptcy in order to object to the nondebtor/noninnocent spouse's hypothetical discharge in community property, Fed. R. Civ. P. 15(c)(3) would allow a plaintiff to relate back an amended complaint to the date of the original complaint. Derkson's attorney made a mistake in not naming Troy Haarstick in the adversary complaint objecting to discharge. Troy should have known that he would have been named in the complaint but for Derkson's attorney's mistake and Troy will not be prejudiced if he is brought into the adversary proceeding at this point.

One court summarized §523(a)(3): "if a debt is nondischargeable as to a spouse or the nondebtor spouse, the community does not receive a discharge, and objecting creditors may proceed against after-acquired community property." In re Smith, 140 B.R. 904 (Bankr. D. N.M. 1992). From a policy perspective, the hypothetical discharge "frustrates the 'fresh start' of the innocent debtor spouse, but Congress made the policy choice so that 'the economic sins of either spouse shall be forever visited upon the community property.'" Id. (quoting Pedlar, Alan "Community Property and the Bankruptcy Reform Act of 1978," 11 St. Mary's L.J. 349, 382, n. 22 (1979)). Section §524(a)(3) allays the "concern that a wrongdoing spouse would 'hide' behind the discharge of the innocent spouse." Id.

On the infrequent occasions when the issue of the hypothetical discharge has arisen, bankruptcy courts have not dealt with the procedural conundrum presently before us. However, they have speculated in dicta on who is the proper party in a hypothetical discharge adversary proceeding.

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[3] See Bankruptcy Rules 4007(c) and 9006(b)(3).

> The cases make it clear: whoever is alleged to have done the acts forming the basis of a real or hypothetical complaint objecting to discharge must be named and served. The 'innocent' spouse need not be named in the dischargeability complaint, but due process concerns dictate that the spouse accused of the wrongdoing must be given an opportunity to defend on the merits.

Id. at 912. Assuming that the preceding is a valid statement of the law, Derkson's complaint would likely be dismissed because he failed to name the proper party (i.e., the wrongdoing spouse) in his adversary complaint. As a result, he would be left without a remedy because the 60 day period to object to discharge has passed in the innocent spouse's bankruptcy case.

However, this is not the end of our inquiry. Federal Rule of Civil Procedure 15(c)(3) as incorporated by Bankruptcy Rule 7015 may keep the objection to Troy's hypothetical discharge alive by relating it back to the date of the original complaint filed in the innocent spouse's case. Debtor's counsel relies on Schiavone v. Fortune to defend against Derkson's attempt to have his amended complaint relate back. 477 U.S. 21, 106 S.Ct. 2379 (1986). However, Schiavone v. Fortune is no longer good law. See Fed. R. Civ. P. 15(c)(3) Advisory Committee's Note (1991) ("this paragraph has been revised to change the result in Schiavone v. Fortune with respect to the problem of a misnamed defendant"). Quoting the U.S. Supreme Court, the Seventh Circuit has pointed out that "'the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and affect the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Woods v. Indiana University-Purdue University at Indianapolis, 996 F.2d 880, 882 (1993) quoting Conley v. Gibson, 78 S.Ct. 99, 103 (1958). So the question is whether Derkson's attorney made the kind of misstep contemplated under Fed. R. Civ. P. 15(c)(3) that would allow him to amend his complaint and defeat the running of the 60 day period to object to discharge.

Woods provides the Seventh Circuit's analysis to answer this inquiry. In that case, the plaintiff originally filed a complaint against the "Indiana- University-Purdue University at Indianapolis and Indiana University Police Department of Indianapolis" for alleged violations of his civil rights. Id. at 883. It turned out that Indiana University was protected by the same Eleventh Amendment immunity as the State of Indiana and as a result the plaintiff's case was dismissed without prejudice. The plaintiff then amended his complaint to name a number of individuals in their official capacities all of whom worked for the University or its police department. This complaint was also dismissed. The third time around the plaintiff named those same individuals in their individual capacities. However, the two year statute of limitations for civil rights violations had expired before the plaintiff made this second amendment. The third complaint was dismissed as time barred by the district court. The Seventh Circuit reversed the district court's decision and remanded it for further findings.

In reaching its decision in Woods, the Seventh Circuit analyzed the requirements for

relation back amendments under 15(c)(3).[4] Such requirements are that: (1) the claim in the amended pleading arose out of the same conduct, transaction, or occurrence as set forth in the original pleading; (2) the plaintiff made a mistake as to the identity of the proper party to be sued; (3) the party named in the amendment knew or should have known it would have been sued but for the mistake; (4) the party to be added received sufficient notice; (5) and the quality of such notice was such to negate prejudice to the newly added defendant. See Id. at 886-88.

1. The amended claim arose out of the same conduct, transaction, or occurrence as set forth in the original pleading.[5]

Unsurprisingly, there is no law on this requirement with respect to the outlying case of the hypothetical discharge in bankruptcy. While it is true that the tortious injury claim arose out of conduct outside the bankruptcy case (i.e., Troy's alleged battering of Derkson), the claim here is an objection to the hypothetical discharge. And such a claim arises as a consequence of Tori's bankruptcy filing. As such, the objection to Troy's hypothetical discharge arises out of the same occurrence as set forth in the original pleading – Tori's bankruptcy.

2. The plaintiff made a mistake as to the identity of the party to be sued.

In Woods, Judge Shadur stated that a "'mistake' as used in Rule 15(c) applies to mistakes of law as well as fact." Id. at 887. It was "the legal blunder of Woods' counsel – his 'mistake' – that caused his continued (and fruitless) pursuit of state agencies rather than individual state actors as defendants in the case." Id. In the case at hand, Derkson's counsel made a legal blunder by bringing the adversary complaint against Tori instead of Troy. He failed to grasp the intricacies of the hypothetical discharge which is among the most (if it is not indeed the most) arcane of bankruptcy rules. He, perhaps, could have avoided this mistake and named Troy by consulting the dicta in the aforementioned In re Smith out of the

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[4] Fed. R. Civ. P. 15(c) states:

An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) [formerly 4(j)] for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

[5] The Woods court dealt with this element in a conclusory manner: "there is no question that the amended complaint arose out of the same facts as did the original complaint." Id. at 886.

District of New Mexico.[6] But Derkson's attorney's mistake is certainly no worse than that made by plaintiff's counsel in Woods. Woods' counsel would have had to look only to rulings of the U.S. Supreme Court on the law of sovereign immunity to learn that he would not have been able to sue a state university's police department for civil rights violations.[7] Nevertheless, the Seventh Circuit allowed the attorney's blunder in Woods to qualify as a mistake under Rule 15(c)(3); so too should plaintiff's counsel's mistake qualify here.[8]

3. The party named in the amendment knew or should have known it would have been sued but for the mistake.

According to the Woods decision, when a mistake involves a mistake of law this element can be satisfied if the new party should have known that it would have been sued because "the legal proposition at issue was 'clearly established.'" Id. The court believed that the legal proposition of sovereign immunity of the state agencies involved in Woods was so well established that the individual officers should have known that they would be vulnerable to suits in their individual capacities. Id. In our case, the pleading requirements in the case of an objection to a hypothetical discharge are not so "clearly established" that Troy Haarstick should have expected to have been named in the complaint. However, it was well established that Troy knew who Derkson was; after all, Troy had appealed Derkson's tort judgment against him. Thus, although this case does not fit into Woods' rationale perfectly, there is no question that Troy should have known he would have been named in the adversary complaint if Derkson's counsel knew that Troy should have been named.

4 and 5. The party to be added received sufficient notice and the quality of such notice was such to negate prejudice to the newly added defendant.

These final two elements can be taken together because as the Woods court noted these "are indeed entwined issues." Id. In Woods, Judge Shabur stated: "'Notice', as the term is employed in the rule [15(c)(3)], serves as the means for evaluating prejudice." Id. at 888.

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[6] Of course, adding to the confusion in this case is the similarity of the husband's and wife's names – Troy and Tori.

[7] See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441 (1908).

[8] Moore's Federal Practice sheds some more light on the mistake requirement for relation back purposes: "A court should not limit its findings of mistake merely to cases of misnomer. Rather it should focus on the new party's appreciation of the fact that the failure to include it in the original complaint was an error not a deliberate strategy. A court should allow an amendment to relate back to add a defendant that was not named at the outset, but was added later when plaintiff realized that the defendant should have been named. . ." Moore's Federal Practice, §15.19[3][d] at 15-90 (3rd ed. 2001). There is no doubt that Derkson's attorney did not leave out Troy's name as a deliberate strategy.

He then went on to sum up what the term notice encompasses by quoting Wright, Miller & Kane:

> It has been suggested that the requisite notice must be given by the content of the original pleadings. Other cases have taken a broader view and have held that it is sufficient if the opposing party was made aware of the matters to be raised by the amendment from sources other than the pleadings, a position that seems sound since it is unwise to place undue emphasis on the particular way in which notice is received. An approach that better reflects the liberal policy of Rule 15(c) is to determine whether the adverse party, viewed as a reasonably prudent person, ought to have been able to anticipate or should have expected that the character of the originally pleaded claim might be altered or that other aspects of the conduct, transaction, or occurrence set forth in the original pleading might be called into question.

Id. (citations omitted). The court added:

> [c]ircuit case law makes clear, for example, that relation back is proper 'if sufficient identity of interest exists between the new defendant and the original one so that relation back would not be prejudicial.

Id. (quoting Norton v. International Harvester, 627 F. 2d 18, 21 (7th Cir. 1980)). There is no doubt in the case at hand that Troy Haarstick was on notice that Derkson would object to his hypothetical discharge when an adversary complaint objecting to the discharge of a tortious debt was filed, even though Tori was named as the defendant. Troy did not likely forget that he was Derkson's tortfeasor by appealing Derkson's $400,000 judgment against him. Moreover, Troy not only has a similar name to his wife Tori, but he also has an identity of interest in community property that might be left untouchable to the involuntary creditor Derkson if the motion to dismiss were granted. And finally Troy cannot argue that he would be prejudiced if he were brought into this adversary proceeding; he was already litigating with Derkson in state court.

Upon the foregoing, the motion to amend the complaint to name Troy Haarstick as a defendant must be granted. It may so be ordered.