UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of

BERNHARD G. WILTFANG and BERNADINE WILTFANG, d/b/a WILTFANG FARMS,	Case No. 86-146-C
Debtors,	Adv. No. 86-0114
CARROLL M. NEARMYER and CAROLYN NEARMYER,	Chapter 7
Plaintiffs, vs.	
BERNHARD G. WILTFANG and BERNADINE WILTFANG, d/b/a WILTFANG FARMS,	
Defendants.	

ORDER - APPLICATION TO AMEND COMPLAINT

On March 29, 1988, a hearing was held on Plaintiffs' application to amend complaint. Lawrence L. Marcucci and John C. Conger appeared on behalf of the Plaintiffs. Wade R. Hauser, III and Elizabeth A. Nelson appeared on behalf of the Defendants. At the conclusion of said hearing, the Court took the matter under advisement.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I). The Court, upon review of the pleadings and arguments of counsel, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

FINDINGS OF FACT

1. Defendants filed their joint Chapter 7 petition on January 21, 1986.

2. The deadline for filing a section 523(c) complaint to determine the dischargeability of a debt was extended by consent and Court Order to May 27, 1986.

3. On May 23, 1986, Plaintiffs filed this adversary proceeding. In said complaint, Plaintiffs' sole legal theory for recovery was under section 523(a) (2) (A).

4. On June 11, 1987, Plaintiffs filed an application to amend complaint. In said application, Plaintiffs requested leave of Court to amend their complaint to include an additional legal theory for recovery under section 523(a)(6).

5. The proposed amendment relies upon the facts as alleged in the original complaint.

6. On June 18, 1988, Defendants filed their resistance to Plaintiffs' application and argued said application should be denied because it was untimely filed and did not relate back to the date of the filing of the original complaint, pursuant to Fed. R. Civ. P. 15(c).

7. On December 8, 1987, Defendants filed a supplement to their June 18, 1988, resistance and urged the Court to follow Judge Jackwig's rationale in Matter of Tomlin, Case

No. 86—2515-C, Adv. Pro. No. 86-0293, unpub. op. (Bankr. S.D. Iowa September 25, 1987).

8. On December 10, 1988, Plaintiffs filed a response to Defendants' resistance and supplement thereto and argued the proposed amended complaint should relate back to the date of filing of the original complaint.

9. On December 22, 1988, Defendants filed a further resistance attempting to distinguish Plaintiffs' arguments in their previous response.

DISCUSSION

The issue in this case is whether Plaintiffs should be allowed to amend their complaint to add a new legal theory over one year after the deadline for filing a section 523(c) complaint. Resolution of this issue requires the Court to consider the interaction and interplay of two procedural rules. Federal Rule of Civil Procedure (hereinafter "Rule") 15 is made applicable to this adversary proceeding pursuant to Bankruptcy Rule 7015, and provides in relevant part:

> (a) A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served.... Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.
>
> (c) Whenever 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, the amendment relates back to the date of the original pleading. [emphasis added]

The other applicable rule is Bankruptcy Rule 4007(c) which provides in relevant part:

> A complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a).

As a general rule, an additional ground for objecting to discharge cannot be added in the form of an amended complaint after the deadline for filing complaints has passed. In re Herrera, 36 B.R. 693, 694 (Bankr. D. Cob. 1984). However, if the proposed amendment satisfies the requirements of Rule 15(c), the amendment will relate back to the date of the original complaint. Fed. R. Civ. P. 15(c). The test for relation back is whether the defendant's specified conduct, upon which the plaintiff is relying to enforce his amended claim, is identifiable with the original claim. In re Dean, 11 B.R. 542, 545 (B.A.P. 9th Cir. 1981). An amendment that adds or changes the statutory provision relied upon while relying on the same facts in the original complaint will relate back. See Herrera, 36 B.R. at 695 (citations omitted).

Under Rule 15(a), the grant or denial of leave to amend is within the sound discretion of the court. In re Wahl, 28 B.R. 688, 690 (Bankr. W. D. Ky. 1983). The requirement "when justice so requires" in Rule 15(a) requires the court

to consider the equities of each case. In re Harrison, 71 B.R. 457, 458 (Bankr. D. Minn. 1987). In considering the relevant equities in a dischargeability adversary proceeding, the court cannot ignore the 60—day statute of limitations of Bankruptcy Rule 4007(c). Harrison, 71 B.R. at 459. This statute of limitations is one of the shortest under federal law and is designed to further a debtor's "fresh start" by allowing the debtor to "enjoy finality and certainty in relief from financial distress as quickly as possible." Id.

In the case at bar, a consideration of the equities involved requires the Court to deny the application to amend the complaint for three reasons. First, while Plaintiffs' proposed amended complaint relies on the facts from the original complaint, the Court believes the new cause of action under section 523(a)(6) would require the introduction of additional evidence relating to the elements of proof of malice and intent under section 523(a)(6). As a result, the amended complaint does not rely on the same facts in the original complaint and, thus, does not relate back. See Herrera, 36 B.R. at 695.

Second, because Plaintiffs' amended complaint does not relate back, an injustice would result if Plaintiffs were allowed to circumvent Bankruptcy Rule 4007(c)'s 60-day statute of limitations and amend their complaint over one year after the section 523(c) filing deadline when such

amendment could easily have been included in the timely-filed original complaint. Such a result would be inconsistent with the Code's principal objective of a "fresh start." See Harrison, 71 B.R. at 460.

Finally, the Court must deny the application on general equitable grounds in order to avoid a result prejudicial to Defendants. The operative facts and specified conduct in the original complaint are plead to support and identify the allegations of misrepresentation and fraud, pursuant to section 523(a)(2)(A). Said facts and conduct relate solely to the alleged misrepresentations. The original complaint does not plead operative facts identifying willful and malicious injury to another entity or to the property of another entity, pursuant to section 523(a) (6). Permitting the proposed amendment at this time would introduce an element of misdirection which, although not purposefully done, would nevertheless be prejudicial to Defendants.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that since Plaintiffs' amended complaint would require the introduction of additional evidence relating to the elements of proof of malice and intent under section 523(a)(6), the amended complaint does not rely upon the same facts in the original complaint and, thus, does not relate back under Rule 15(c).

FURTHER, the Court concludes that since Plaintiffs' amended complaint, filed over one year after the section 523(c) deadline, does not relate back, it violates Bankruptcy Rule 4007(c) and Defendants' fresh start.

FURTHER, the Court concludes that permitting the proposed amendment would be prejudicial to Defendants.

IT IS ACCORDINGLY ORDERED that Plaintiffs' application to amend complaint is hereby denied.

Dated this 29th day of July, 1988.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

AO 450 (Rev.5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA – CENTRAL DIVISION

BERNARD G. WILTFAND, et al JUDGMENT IN A CIVIL CASE

V.

CARROLL M. NEARMYER, et al. CASE NUMBER: 88-1457-E

V. Bankruptcy # 86-146-C

BERNARD G. WILTFANG, et al.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff's amendment should be allowed.

January 18, 1989
Date

James R. Rosenbaum
Clerk

(By) Deputy Clerk

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

IN RE:

BERNHARD G. WILTFANG and
B. BERNADINE WILTFANG,
f/d/b/a Wiltfang Farms,

Debtors.

Bankr. No. 86-146-E
Adv. No. 86-0114

CARROLL N. NEARNYER, et al.,

Plaintiffs,

vs.

BERNHARD C. WILTFANG, et al.,

Defendants.

CIVIL NO. 88-1457-E

ORDER

This matter is before the court on Plaintiff Carroll Nearmyer's appeal from a decision by the bankruptcy court denying plaintiff's motion to amend. Defendant Wiltfang has resisted. A hearing was held on this appeal. After careful consideration of all briefs submitted and oral argument, it is the decision of this court that plaintiff's appeal is granted and he should be allowed to amend his complaint to add a count under 11 U.S.C. §523(a)(6). This court is persuaded that the amendment will not substantially change the bottom-line issues.

This court is aware that the granting or denial of leave to amend is a matter of discretion of the bankruptcy court. This court is also aware that the bankruptcy court's decision on an

issue of this kind is subject to reversal on appeal only for an abuse of that discretion, see In re.Wahl, 28 Bankr. 688, 690 (W.D.Ky. 1983).

In discussing abuse of discretion, the court in O'Brien v. Continental Illinois Nat. Bank & Trust, 593 F.2d 54 (7th Cir. 1979), stated:

> "Abuse of discretion" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

O'Brien, 593 F.2d at 63, quoting United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

The bankruptcy court carefully considered the issues and in effect concluded two things: One, that it had to follow bankruptcy rule 4007(c) which states that you must file a specific complaint within sixty days setting out the nature of the claims that you have against the debtor, and, two, that even if that section was not strictly followed a claim that did not relate back to the claims that were filed within sixty days could not be maintained.

This court agrees with the bankruptcy court that section 4007(c) is one of the shortest limitation statutes found in the federal law. It is designed to further a bankrupt's fresh start by allowing the debtor to enjoy finality and certainty and relief from financial stress as soon as possible. That premise is very important and should be followed. However, this case has been going on for three or four years and was a viable case in state

court before the bankruptcy was commenced. The bottom—line reason for certainty and finality after sixty days is really no longer present. This court is persuaded that while section 4007(c) is usually controlling, it is not so controlling in this case when it comes head to head with rule 15 concerning amendments.

Rule 15 states in pertinent part:

> Whenever 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, the amendment relates back to the date of the original pleading.

In Nearmyers' original adversary complaint, they stated a cause of action under 11 U.S.C. § 523(a) (2) (A), which reads in part:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by --
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition . .

As mentioned, Nearmyers have filed a motion for leave to amend their complaint to add a claim under 11 U.S.C. § 523(a) (6), which states in part:

> (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> (6) for willful and malicious injury by the debtor to another entity or to the property of another entity . . .

In its decision, the bankruptcy court states in paragraph 5 of its findings that the amended complaint does rely on the same facts as the original complaint. Plaintiff did not allege any additional facts to support this complaint. However, later in its ruling, the bankruptcy court held that the allowance of plaintiff's amendment would require the introduction of additional evidence relating to the elements of malice and intent, and that this would require proof beyond the fraud originally pleaded in plaintiffs' complaint. In Sinnard v. Roach, 414 N.W.2d 100 (Iowa 1987), the Iowa Supreme Court reiterated the seven elements necessary to plead fraud in Iowa. They are: "(1) material, (2) false, (3) representation coupled with (4) scienter and (5) an intent to deceive, which the other party (6) relies upon with (7) resulting damages to the relying party." 414 N.W.2d at 105, n. 1.

Plaintiffs contend there has never been any change in the essence of their claim, which is that the defendants wrongfully and intentionally took their property through a fraudulent scheme. The alleged injury remains essentially the same and this court is persuaded that whether the alleged wrong is labeled fraud or willful and malicious injury to property is a distinction without much, if any, difference. The court in In re Herrera, 36 Bankr. 693 (Bankr. D.Col. 1984), was faced with a similar situation and stated:

> [A]lthough the first complaint contained only a reference to Sec. 523(a) (6) for willful and malicious injury to property, it contained allegations that the defendants intentionally made false representations to the plaintiffs that defendants would transfer 50% of the corporation stock to the plaintiffs . . . . Thus,

> a cause of action under Sec. 523(a) (2) (A) for obtaining property by false presenses, false representation, or fraud was stated in the original complaint though the plaintiffs did not cite to the applicable statutory provision.

36 Bankr. at 695.

This court is persuaded that the matter currently before the court is analogous to the situation in Herrera.

In concluding that plaintiffs' motion to amend should have been granted, this court is reminded of Judge Sanborn's weighty words in Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377 (8th Cir. 1950), where he stated:

> The record consists in large part of colloquies between the trial judge and counsel with respect to the admissibility of evidence, for which discussions there was, in our opinion, little excuse, since no jury was present and no technical rulings on evidence were necessary or desirable.
>
> In the trial of a nonjury case it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. . . . On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted. In the case of Donnelly Garment Co. v. National Labor Relations Board, 8 Cir., 123 F.2d 215, 224, we stated our views upon this subject as follows: ~,* * * We think that experience has demonstrated that in a trial or hearing where no jury is present, more time is ordinarily lost in listening to arguments as to the admissibility of evidence and in considering offers of proof than would be consumed in taking the evidence proffered, and that, even if the trier of facts, by making close rulings upon the admissibility of evidence, does save himself some time, that saving will be more than offset by the

> time consumed by the reviewing court in considering the propriety of his rulings and by the consequent delay in the final determination of the controversy. One who is capable of ruling accurately upon the admissiblity of evidence is equally capable of sifting it accurately after it has been received, and, since he will base his findings upon the evidence which he regards as competent, material and convincing, he cannot be injured by the presence in the record of testimony which he does not consider competent or material. Lawyers and judges frequently differ as to the admissibility of evidence, and it occasionally happens that a reviewing court regards as admissible evidence which was rejected by the judge, special master, or trial examiner. If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided. We say this in the hope of preventing a repetition of what occurred in the case now before us, and to obviate any misunderstanding as to what the attitude of this Court is with respect to the taking of evidence in a hearing before a special master or a trial examiner."
>
> The instant case is almost a perfect example of how technical rulings on evidence will frequently frustrate the trial of a nonjury case and put the litigants to the trouble and expense of a new trial.

179 F.2d at 379 (citations omitted).

Plaintiff argued that defendants are trying to keep their "new" theory out as though this was a rule 12(b) (6) motion. Plaintiff further argues that it is not a 12(b) (6) matter; it is a matter of being able to amend. Plaintiffs state that they ought to be able to amend and then if defendants want to seek dismissal on a 12(b) (6) matter, they can try.

The point the court wishes to make by citing Builders Steel is simply that it considered Judge Sanborn's directive would be folowed if the trial court considered the plaintiffs' "late" claim and then whether or not there may be a viable 12(b) (6)

motion. It may be that sufficient evidence does not exist to support plaintiffs' complaint under 11 U.S.C. § 523(a) (6) or that there is no evidence to show that the claim related back. If this proved to be the situation, the trial judge could sustain a proper motion at the close of all the evidence and yet satisfy Judge Sanborn's mandate.

IT IS THEREFORE ORDERED that plaintiffs' amendment should be allowed for all the reasons set forth in this order and in plaintiffs' brief.

January 13, 1989.

Donald E. O'Brien, Judge
UNITED STATES DISTRICT COURT