

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of

DAVID MICHAEL TOMLIN,  
KARLA JAN TOMLIN,

Case No. 86-2515-C

Adv.Pro.No. 86-0293

Debtors.

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID MICHAEL TOMLIN,  
KARLA JAN TOMLIN,

Defendants.

ORDER ON MOTION TO DISMISS AND MOTION TO STRIKE

On April 2, 1987 a hearing on motions to dismiss and motion to strike filed on behalf of the defendants (debtors) on January 7, 1987 and a resistance thereto filed on behalf of the plaintiff on January 14, 1987 was held before this court in Des Moines, Iowa. Anita L. Shodeen appeared on behalf of the debtors and Linda R. Reade appeared on behalf of the plaintiff. Supporting case law was submitted by both parties and the matter was considered fully submitted on April 10, 1987.

On November 28, 1986 the plaintiff filed a complaint in two counts objecting to the debtors' discharge. Count I seeks to deny a discharge pursuant to 11 U.S.C. section 727(a)(2) and alleges that at some date within one year before the date

of filing the petition in bankruptcy the debtors transferred, removed or concealed specific property in which the plaintiff had a security interest, with the intent to hinder, delay or defraud the plaintiff. Count II seeks to deny a discharge pursuant to 11 U.S.C. section 727(a)(5) and alleges that the debtors failed to satisfactorily explain the loss or deficiency of specific property in which the plaintiff holds a security interest.

On January 5, 1987, prior to the filing of a responsive pleading, the plaintiff filed an amendment to its objection to discharge. The amendment adds two counts to the complaint which replead and incorporate the jurisdictional and explanatory allegations set forth in the original complaint. Count III seeks to deny a discharge pursuant to 11 U.S.C. section 727(a)(4) and alleges that the debtors made a false oath or account in connection with the bankruptcy case. Count IV seeks to prohibit the discharge of the debt in question pursuant to 11 U.S.C. section 523(a)(2) and alleges that the debtors obtained money from the plaintiff or an extension, renewal or refinance of credit by false pretenses, false representations or actual fraud.

On January 7, 1987 the debtors filed the motions to dismiss and motion to strike at issue. The first motion to dismiss is brought pursuant to Bankruptcy Rule 7012(b) and Federal Rule of Civil Procedure 12(b)(6) and alleges that the plaintiff's complaint fails to state a claim upon which relief can be granted. Pursuant to Bankruptcy Rule 7009 and Federal

Rule 9(b) the debtors also move to dismiss the complaint for failure to aver the circumstances constituting fraud, false oath, false pretenses or representations with particularity. The motion to strike is brought pursuant to Bankruptcy Rule 7012(b) and Federal Rule 12(f) and seeks to strike Count IV of the plaintiff's amended complaint as untimely.

The plaintiff filed a resistance to the debtors' motions on January 14, 1987. The plaintiff contends that each count makes allegations sufficient to state a claim under Bankruptcy Rule 7008(a). The plaintiff contends that only Counts I and IV allege fraudulent acts and that they sufficiently outline the circumstances relative to the fraud. In the alternative the plaintiff requests leave to aver more facts surrounding the allegations of fraud. Finally, the plaintiff contends that Count IV was timely filed as an amendment which arose out of the same conduct of the debtors as set forth in the original pleading and thus relates back to the original date pursuant to Bankruptcy Rule 7015 and Federal Rule 15(c).

To facilitate an orderly resolution of each motion the court will address each count in the original and amended complaint.

#### Count I

Count I seeks to deny a discharge pursuant to 11 U.S.C. section 727(a)(2) which provides:

- (a) The court shall grant the debtor a discharge unless--

(2) the debtor, with intent to hinder, delay, or defraud a creditor...has transferred, removed, destroyed, mutilated, or concealed...

(a) property of the debtor, within one year before the date of the filing of the petition.

Since section 727(a)(2) is phrased in the disjunctive, it is not necessary for the plaintiff to prove fraud--proof of "an intent to hinder or delay suffices." Matter of Schwartzman, 63 B.R. 348, 360 (Bankr. N.D. Ohio 1986) citing In re Cycle Accounting Services, 43 B.R. 264, 271 (Bankr. E.D. Tenn. 1984). Accordingly, Federal Rule 9(b) requiring specificity in pleading fraud is not applicable to this count. Rather the general rules of pleading enunciated in Fed.R.Civ.P. 8 and adopted by Bankruptcy Rule 7008 apply.

Federal Rule 8 requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief. In considering a motion to dismiss, a court must view the facts alleged in the complaint in a light most favorable to the plaintiff. Schever v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80(1957). A complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Price v. Moody, 677 F.2d 676, 677 (8th Cir. 1982), quoting Conley, 355 U.S. at 45-46, 78 S.Ct. at 101-102.

"[T]he complaint... need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided." Wright and Miller, Federal Practice and Procedure: Civil section 1216 at 120-122 (1969). Furthermore, a complaint is sufficient if it "contains[s] allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." Id. at 122-123.

The debtors assert that Count I of the plaintiff's complaint fails to allege grounds sufficient to state a claim under section 727(a)(2). The complaint states that at various dates the plaintiff loaned sums of money to the debtors, that the plaintiff was given a security interest in specific property, that within one year of bankruptcy (or thereafter) the debtors transferred, removed or concealed specific property in which the plaintiff had a security interest, and that the debtors so acted with the intent to hinder, delay or defraud the plaintiff. The court believes that Count I is sufficiently particular to notify the debtors of the substance of the claim. See e.g. Matter of Schwartzman, 63 B.R. at 354, 360. The pleading identifies the specific property pledged as collateral and allegedly removed or concealed. At the pleading stage, specific evidence of intent is not required. Id. Specific instances of transfer, removal or concealment likewise need not be specifically detailed. While a section 727 denial of discharge is construed liberally in favor of the debtor and strictly against the objecting party, the burden of

proof is imposed at trial and not on the allegations of the complaint. See In re Adub, 787 F.2d 1339, 1342-43 (9th Cir. 1986). Accordingly, the debtors' motion to dismiss Count I must be denied.

#### Count II

Count II seeks to deny discharge pursuant to section 727(a)(5) which provides:  
(a) the court shall grant the debtor a discharge, unless--

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtors' liabilities.

Unlike section 727(a)(2) the element of intent need not be shown in pleading or proving a cause of action under section 727(a)(5). Matter of Schwartzman, 63 B.R. 348, 360 (Bankr. S.D. Ohio 1983). To provide the debtor with sufficient notice of a claim under section 727(a)(5) a creditor need only state that the debtor had possessed assets, and that there was an unexplained disappearance of the assets shortly before the debtor filed bankruptcy. Id.; In re Shapiro, 59 B.R. 844, 848 (Bankr. E.D. N.Y. 1986).

Count II of the plaintiff's complaint states that certain property was pledged as security for the plaintiff's loans to the debtors, and that there has been an unexplained loss of the specified property. The plaintiff's failure to allege

factors indicative of bad faith or unbusinesslike conduct on the part of the debtors is of no consequence. Accordingly, Count II sufficiently states a claim upon which relief can be granted and the debtors' motion to dismiss must be denied.

Count III

Count III seeks to deny a discharge pursuant to section 727(a)(4) which provides:

(a) The court shall grant the debtor a discharge unless--

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account.

This ground for denial of discharge centers on the wrongdoing or fraud of the debtor in connection with the bankruptcy case. Accordingly, in addition to the concept of notice pleading provided in Fed.R.Civ.P. 8, there exists the requirement of specificity under Fed.R.Civ.P. 9. Rule 9(b) provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

To satisfy Rule 9(b) a pleading must contain a factual basis to support the allegations of fraud. In re Janikowski, 60

B.R. 784, 790 (Bankr. N.D. Ill. 1986); In re Kerr, 58 B.R. 171, 173 (Bankr. E.D. Ark. 1985). The purpose of the rule is to provide the debtor with sufficient detail so that the facts pled may be admitted or denied in good faith as well as to protect the debtor from unjustified injury to reputation. In re Kerr, 58 B.R. at 173; In re Doppelt, 57 B.R. 124, 126 (Bankr. N.D. Ill. 1986).

Count III of the amended complaint merely repleads the allegations regarding the debtors' debt to the plaintiff and argues that the debtors have made a false oath or account in connection with this bankruptcy proceeding. The court finds this count wholly insufficient to state a claim pursuant to section 727(a)(4). The court also notes, although not specifically raised by the debtors, that Count III was filed after the deadline for filing objections to discharge which was fixed as December 3, 1986 and that no extension of time to file such objections was filed prior to that date. Thus, Count III is untimely unless it "relates back" to the timely filed complaint objecting to discharge. See Fed. R. Civ. P. p. 15(c)

Rule 15(c) provides that "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth...in the original pleading, the amendment relates back to the date of the original pleading." An amendment which states an entirely new claim for relief based on different facts will not relate back. In re Tester, 56 B.R. 208, 210 (W.D. Va. 1985). Only



where there is "sufficient identity" between the causes of action asserted in the amended complaint and in the original complaint will the amendment relate back. In re Grant, 45 B.R. 262, 264 (Bankr. D. Me. 1984).

The plaintiff apparently would assert that Count III arises out of the same transaction or occurrence set forth in the original complaint. The court, however, fails to see that nexus. Accordingly, the debtors' motion to dismiss or strike will be granted unless the plaintiff can present authority and facts to constitute sufficient identity between Count III and the original complaint as well as a more definite statement of facts constituting fraud for purposes of section 727(a)(4) within 10 days of this order.

#### Count IV

Count IV seeks to deny the discharge of the debt to the plaintiff pursuant to section 523(a)(2) which provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), 1328(b) of this title does not discharge an individual debtor from any debt--

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by--

(A) false pretences, a false representation, or actual fraud...

The debtors contend that Count IV fails to aver specific circumstances which constitute fraud and was untimely filed.

As noted earlier a claim involving fraud must be plead with particularity. Generally a complaint is considered sufficient when it sets forth the time, place, particular contents of the false representations, the identity of the party-making the misrepresentations, and the consequences of the misrepresentations. In re Janikowski, 60 B.R. 784, 790 (Bankr. N.D. Ill. 1986); In re Lionel Corp., 41 B.R. 804, 805 (Bankr. S.D. N.Y. 1984). Count IV of the amended complaint merely repleads the allegations regarding the debtors' debt to the plaintiff and states "defendants [debtors] obtained money from [plaintiff] ... by false pretenses, false representations or actual fraud." Such averments are void of any information sufficient to allow the debtors to adequately respond.

The debtors have also challenged Count IV as untimely and unrelated to the allegations contained in the original complaint. Although leave to amend was not required under Fed.R.Civ.P. 15(a) in this case as the amended complaint was filed on January 5, 1987 prior to a responsive pleading, the deadline for filing complaints to determine dischargeability was fixed as December 3, 1986. No extension of time to file such complaints was filed prior to that date. See Fed. R. Bankr. P. 4007(c) (note only complaints under section 523(a)(2), (4) or (6) are subject to this deadline). Count IV is thus untimely unless it "relates back" to the timely filed complaint objecting to discharge. See Fed.R.Civ.P. 15(c).

The plaintiff's original complaint focuses solely on the assets securing the loans made by the plaintiff to the

defendant, i.e., whether they were transferred or concealed and whether their loss was unexplained. Count IV of the amended complaint focuses on the original financing process, i.e., whether money was loaned as a result of fraud. The original complaint objecting to discharge would not have put the debtors on notice of any ground to deny dischargeability of a particular debt. In re Mufti, 61 B.R. 514, 517 (Bankr. C.D. Cal. 1986); In re Fehrle, 34 B.R. 974 (Bankr. N.D. Ky. 1983). Accordingly, Count IV does not relate back to the date of the original complaint, was untimely filed and must be dismissed.

WHEREFORE, based on the foregoing analysis this court finds that Counts I and II of the plaintiff's complaint sufficiently set forth claims showing that the plaintiff is entitled to relief. Counts III and IV, however, are insufficient to state a claim for relief and were filed untimely.

THEREFORE, IT IS ORDERED that the debtors' motion to dismiss Counts I and II are hereby denied. The debtors' motion to dismiss or strike Count III will be granted unless within 10 days the plaintiff files an amended complaint setting forth information consistent with this opinion. The debtors' motion to dismiss or strike Count IV is hereby granted.

Signed and filed this 25th day of September, 1987.

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE