

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**  
01 JUN -1 PM 2:36  
U.S. BANKRUPTCY COURT  
DIST OF SOUTH CAROLINA

IN RE:

W. Russell Peagler, Jr.,

Debtor.

Barbara R. Peagler,

Plaintiff,

v.

W. Russell Peagler, Jr.

Defendants.

C/A No. 99-05842-W

Adv. Pro. No. 01-80021-W

**JUDGMENT**

Chapter 7

**ENTERED**

JUN - 4 2001

**S. R. P.**

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, W. Russell Peagler, Jr.'s Motion for Summary Judgment is granted as to the argument that relief should be granted based on Fed. R. Civ. P. 60(b)(4) on the ground that the judgment was void and that the discharge should be revoked on the basis of §727(d)(1). Furthermore, Defendant's Motion for Dismissal is granted as to the remaining grounds; more specifically, the ground that Debtor's behavior constituted fraud and misrepresentation within the meaning of §523(a)(2), the ground that relief from the Order should be granted due to the fact that Defendant behaved fraudulently within the meaning of Fed. r. Civ. P. 60(b)(3), and lastly on the ground that Debtor's discharge should be revoked on the basis of §727(d)(2). However, at this time, the Court declines to award any attorneys' fees as requested by Defendant.

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

June 1, 2001

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**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was mailed on the date listed below to:

**JUN 4 2001**

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

**SHEREE R. PHIPPS**

Deputy Clerk

✓ Brown  
✓ Peagler (Def.)

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**ORDER**

Chapter 7

**ENTERED**

JUN - 4 2001

**S. R. P.**

THIS MATTER comes before the Court upon the Motion for Summary Judgment and Dismissal (the "Motion") filed by W. Russell Peagler, Jr. ("Defendant" or "Debtor") on April 25, 2001. In the Motion, Defendant sought relief from the adversary proceeding filed by Barbara R. Peagler ("Plaintiff") on February 2, 2001, on the basis that there was no genuine issue of material fact and that Defendant was entitled to judgment as a matter of law. By way of further defense, Defendant also moved pursuant to Fed. R. Civ. P. 12(b)(6) to Dismiss Plaintiff's adversary proceeding for failure to state a claim on which relief could be granted. Plaintiff filed the adversary action to set aside the Order of Default entered by the Court on February 4, 2000, and for relief from the judgment of default that was entered on February 7, 2000, and further to revoke the discharge of W. Russell Peagler, Jr. ("Defendant" or "Debtor") pursuant to 11 U.S.C.

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§727(d) and (e).<sup>1</sup> After considering the pleadings in the adversary proceeding, the affidavits and evidence presented in support of the Motions, and the arguments of counsel at the hearing; the Court makes the following Findings of Fact and Conclusions of Law:<sup>2</sup>

### FINDINGS OF FACT

1. Plaintiff and Defendant were ex-spouses. On or about May 19, 1994, the County of Berkeley Family Court entered a Decree of Divorce which granted Defendant a divorce on the grounds of the wife's adultery and provided, among other things:

[Defendant] will transfer to [Plaintiff] twenty-five (25) acres of land which is currently shown on a plat entitled "plat of 58.64 AC. Owned by W.R. Peagler Estate," said 25 acres to be all of Tract "A" except for 4.32 acres. [Defendant] will be allowed to keep 4.32 acres of Tract "A" and the remaining 25 acres will go to [Plaintiff]. This property will also be placed in the name of [Plaintiff's] son, Charles R. Fisher, Jr. . . .

There is currently a lien on the property that will be paid off in nine years and [Defendant] assumes full responsibility for said debt and agrees to hold [Plaintiff] harmless thereon.

2. On or about December 11, 1992, the parties mortgaged the property in question to Farmers & Merchants Bank of South Carolina in exchange for a loan in the amount of \$26,735.84.

3. On March 5, 1996, Farmers & Merchants Bank of South Carolina brought a foreclosure

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<sup>1</sup> Further reference to the Bankruptcy Code shall be by section number only.

<sup>2</sup> The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such; and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

action against Defendant and Plaintiff on the property specified above.

4. Subsequently, on April 9, 1996, the Berkeley County Family Court entered a Civil Contempt Order finding Defendant in violation of the Divorce Decree due to, among other things, his failure to make mortgage payments as specified in the Decree.

5. On July 12, 1999, Defendant filed for relief under Chapter 7 of the Bankruptcy Code. Schedule D listed Farmer & Merchants Bank as a mortgagee on the property in the amount of \$15,000. Furthermore, Debtor's Statement of Intention, filed with the petition, indicated his intention to surrender his interest in the property in question to Farmers & Merchants Bank.

6. On December 2, 1999, the Court entered an Order, without objection, granting Debtor's discharge pursuant to §727.

7. On December 29, 1999, Debtor filed an adversary action ("First Adversary Proceeding") to determine the dischargeability of the marital debt concerning his assumed responsibility of the mortgage payments on the property pursuant to §523(a)(15). The Complaint alleged that Debtor did not have "the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a defendant of the debtor . . ." and further stated that "[d]ischarging the debt from the Debtor . . . would result in a benefit to the debtor that outweighs the detrimental consequences to the spouse, former spouse, or child of the debtor."

8. The Summons in said First Adversary Proceeding was filed by the Court on December 30, 1999. Furthermore, on January 11, 2000, Myra Dix of Debtor attorney's office filed a Certificate of Mailing certifying that on January 7, 2000 she served a copy of the Summons and Complaint by mail on the Chapter 7 Trustee, Plaintiff, and Plaintiff's attorney.

9. On February 3, 2000, Debtor's attorney filed an Affidavit of Default; as a result, an Entry of Default was filed by the Court on February 4, 2000; and, on February 7, 2000, the Court entered an Order finding that Plaintiff was in default in the adversary proceeding initiated by Debtor on December 29, 1999 and further finding that "[t]he debt of the . . . debtor described in the Divorce Decree dated May 16, 1994 is . . . discharged."

10. To further show that Defendant failed to answer despite proper service, Myra Dix of Debtor attorney's office filed an Affidavit of Service on November 9, 2000, which supported the fact that on January 7, 2000 she had mailed a copy of the Summons and Complaint to the proper parties. She also attached a copy of the Receipt for Certified Mail postmarked on January 7, 2000 and a copy of the Return Receipt which reflected that the Summons and Complaint were received on January 11, 2000 and bore Plaintiff's signature acknowledging receipt of said documents. At the hearing, Plaintiff did not appear, but her counsel did not contest that Plaintiff did receive the Summons and Complaint in the First Adversary Proceeding.

11. On February 2, 2001, Plaintiff brought the adversary action which is at issue in this Order, seeking to set aside the Order of Default that was entered on February 4, 2000 and seeking the relief from the judgment that was entered on February 7, 2000. Furthermore, the Complaint sought to revoke the discharge of Debtor pursuant to §§727(d) and (e).<sup>3</sup>

12. Plaintiff's adversary proceeding sought the setting aside of the Default Order and the revocation of the discharge on several specific grounds. First, Plaintiff claimed that Defendant

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<sup>3</sup> In the Complaint, Plaintiff stated that she was seeking "to revoke a discharge pursuant to 11 U.S.C. 127(d) and (e)." However, the Court notes that the relief sought under that specific section must have been a typographical mistake as there is no §127 in the Bankruptcy Code; rather, the appropriate section that deals with revocation of discharge is §727(d).

did not realize a discharge of the marital debt in question because in his adversary complaint initiated on December 29, 1999, he allegedly knowingly concealed and withheld from the Court the true and complete circumstances surrounding the case. More specifically, Plaintiff alleged that due to Debtor's default, she had to advance the monthly mortgage installment to the Farmers & Merchants Bank in order to prevent foreclosure on the property. Thus, Plaintiff alleged that Debtor's behavior constituted fraud and misrepresentation within the meaning of Fed. R. Civ. P. 60(b)(3) as well as §§523(a)(2) and 727(a)(4). Plaintiff further based the adversary complaint seeking the setting aside of the Default Order on Fed. R. Civ. P. 60(b)(4), on the ground that service of process was never obtained upon her in the adversary proceeding as prescribed in Fed. R. Civ. P. 4(c)(1) and that such service was not within the requirements of Fed. R. Bankr. P. 7004(e),<sup>4</sup> thus causing it to be void. Lastly, Plaintiff based her adversary action on §727(d) and

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<sup>4</sup> Fed. R. Bankr. P. 7004(e) provides:

Service made under Rule 4(e), (g), (h)(1), or (l), or (j)(2) F.R. Civ. P. shall be by delivery of the summons and complaint within 10 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued. If a summons is not timely delivered or mailed, another summons shall be issued and served.

This argument has no merit given the fact that the Summons in the adversary proceeding commenced by Defendant on December 29, 1999 was filed by the Court on December 30, 1999 and the Certificate of Mailing reflects that the Summons and Complaint were served on the appropriate parties on January 7, 2000; thus complying with the 10-day deadline set forth in Fed. R. Bankr. P. 7004(e). Plaintiff abandoned this argument at the hearing and in her Memorandum in Opposition to Debtor/Defendant's Summary Judgment and Dismissal; however, Plaintiff still alleged that the Entry of Default and Order of Discharge were void and should thus be set aside pursuant to Fed. R. Bankr. P. 60(b) on the basis that Defendant failed to comply with the provisions of Fed. R. Civ. P. 4(l).

sought the revocation of Debtor's discharge.<sup>5</sup>

13. The Summons for the Adversary Proceeding commenced by Plaintiff on February 2, 2001 was filed by the Court on February 5, 2001. On March 7, 2001, a Certificate of Service was filed by the Deputy Sheriff of Berkeley County reflecting that Defendant was served with a copy of the Summons and Complaint on February 24, 2001, more than 10 days after the issuance of the Summons.<sup>6</sup>

14. On March 16, 2001, Defendant filed an Answer and Counterclaim to Adversary Complaint in which he alleged that the adversary proceeding was *res judicata*, as no appeal was taken in the previous adversary proceeding in which the marital debt at issue was discharged due to Plaintiff's default in the matter.

15. On April 25, 2001, Defendant filed a Motion for Summary Judgment and Dismissal, arguing that the present adversary proceeding was barred by the doctrine of *res judicata* and requesting summary judgment and the imposition of costs associated with the defense of the action. Furthermore, Defendant moved pursuant to Fed. R. Civ. P. 12(b)(6) on the basis that the adversary proceeding should be dismissed for failure to state a claim in that the allegations of fraud raised in the Complaint require the specific pleadings of certain facts, none of which were pled in Plaintiff's Complaint. Lastly, Defendant moved to dismiss the action due to Plaintiff's

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<sup>5</sup> The Order in the First Adversary Proceeding found the debt dischargeable pursuant to §523(a)(15) and did not conclude issues relating to §523(a)(5). Furthermore, Plaintiff did not raise the issue of whether the subject debt could be deemed nondischargeable pursuant to §523(a)(5) in neither the pleadings nor at the hearing on Defendant's Motion in the second adversary proceeding; thus the plausibility of whether the debt could still be excepted from discharge on that ground is not at issue in this Order.

<sup>6</sup> Ironically enough, Plaintiff violated Fed. R. Bankr. P. 7004(e), the same rule that she wrongfully alleged had been violated by Defendant.

failure to comply with Fed. R. Civ. P. 7004(e), requiring service of process within 10 days after the Summons is issued.<sup>7</sup>

16. On May 17, 2001, on the day of the hearing, Plaintiff filed a Memorandum in opposition to Defendant's Summary Judgment and Dismissal, arguing that the marital debt at issue should not have been discharged pursuant to §523(a)(15) and further arguing that due to Defendant's noncompliance with the provisions of Fed. R. Civ. P. 4(l), the Entry of Default that was entered and filed on February 4, 2000 and the Order of Discharge that was entered and filed on February 7, 2000 should be declared void and thus set aside.

### CONCLUSIONS OF LAW

The Court has had to sort and sift through the procedural intricacies of this case to decipher the issues brought before it and to narrow them down to the essentials. Plaintiff's

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<sup>7</sup> As to this last ground, the Court first notes that Defendant did not raise it in his Answer. Furthermore, the Court notes that "failure to complete service within ten days following issuance of the summons is not a fatal defect requiring dismissal of the action." Dixie Specialty Co. v. Thompson (In re Thompson), C/A No. 96-72119-W; Adv. Pro. No. 96-8163-W (Bankr. D.S.C. 12/20/1996) (quoting In re Dahowski, 48 B.R. 877 (Bankr. S.D. N.Y. 1985)); see also Corn v. Mongelli, 1995 WL 170089 (E.D. N.Y. 1995) ("Appellee's six-day delay in serving appellant with the summons and complaint, occasioned in part by the heavy workload of the clerk's office, does not constitute a jurisdictional defect. Rule 7004(f) [now (e)] explicitly states that, if a summons is not timely delivered or mailed, another summons shall be issued and served. The statute clearly does not contemplate the dismissal of a complaint due to a plaintiff's failure to comply with the 10-day rule."); Williston Coop. Credit Union v. Horob (In re Horob), 54 B.R. 693, 696 (Bankr. D.N.D. 1985) ("Rule 7004(f) [now (e)] provides that if a summons is not timely delivered or mailed, another summons may be issued which suggests that lack of simultaneous service is not de facto fatal to jurisdiction. Nevertheless, plaintiffs are required to use diligence in making service of process, and courts will dismiss an action where there is substantial delay between the filing of the complaint and service of the summons.").

adversary proceeding is basically seeking the setting aside of the Order of Default entered by the Court on February 7, 2000 whereby, upon Plaintiff's default in the Defendant's adversary proceeding seeking the discharge of the marital debt concerning the mortgage payments on ex-marital property, the Court found that Debtor's debt described in the Divorce Decree of May 16, 1994 was discharged. The grounds on which Plaintiff is effectively seeking relief are four: First, Plaintiff bases her adversary Complaint on the ground that Debtor's behavior constituted fraud and misrepresentation within the meaning of §523(a)(2). Second, Plaintiff seeks relief from the Order of Default pursuant to Fed. R. Civ. P. 60(b)(4) on the ground that the judgment was void. Second, she is seeking relief from the Order on the ground that Defendant behaved fraudulently within the meaning of Fed. R. Civ. P. 60(b)(3). Lastly, Plaintiff seeks revocation from discharge on the basis of §727(d). In return, Defendant filed a Motion for Summary Judgment and Dismissal which is the subject of this Order claiming that he should be entitled to summary judgment as a matter of law, and that Plaintiff failed to state a claim on which relief could be sought.

The Court finds that the claims asserted in Plaintiff's adversary proceeding have no merit and that Defendant should be entitled to the relief sought. First, the Court notes that Plaintiff failed to timely respond to Defendant's Motion, thus violating SCLBR 9014-4(c) which states in pertinent part:

When any order, plan, notice, statute, rule, pleading or any other document (any one of which is hereinafter referred to as the "document") requires parties in interest which oppose the relief sought in the document to make a written objection, return, or response, the objection must:

...

(c) Be served on all parties in interest, and filed, along with a certificate of service, no later than five (5) business days before any hearing on the document unless a different time is prescribed by the court, or by the local rules; or, if no hearing is set, not later than fifteen (15) days after service of the document or not later than the deadline given in the document giving notice of the proposed action.

Despite being properly served with Defendant's Motion and receiving notice that a hearing on said Motion was scheduled for May 17, 2000, Plaintiff failed to file an Objection to the Motion until the morning of the hearing. Even though SCLBR 9014-4 further provides that "[a]ny objecting party failing to comply with this local rule may be denied the opportunity to appear and to be heard in the hearing before the Court," the Court gave Plaintiff the benefit of the doubt and heard Plaintiff's counsel arguments in opposition to Defendant's Motion.

As to the first ground on which Plaintiff bases her adversary action, the Court finds that Plaintiff's references to §523(a)(2) are inapplicable in that the record shows that Plaintiff failed to meet the deadline pursuant to Fed. R. Bankr. P. 4004(a) for filing a complaint requesting an exception to discharge upon such grounds; therefore, this ground is dismissed. As to the second ground, the Court finds that there is no merit to her argument that the Entry of Default filed on February 4, 2001 and the Order of Default filed on February 7, 2001 are void within the meaning of Fed. R. Civ. P. 60(b)(4) in that, prior to the entry and filing of either, Defendant did not file or cause to be filed an Affidavit of Service of the person effective the service of process upon Plaintiff as required by Fed. R. Civ. P. 4(1). Said rule provides in pertinent part:

(1) Proof of Service. If service is not waived, the person effective service shall make proof thereof to the court. If service is made by a person other than a United States Marshall or deputy United States marshal, the person shall make affidavit thereof. . . . Failure to make proof of service does not affect the validity of the service

thereof. The court may allow proof of service to be amended.

Plaintiff claims that on January 11, 2000, a Certificate of Service dated January 7, 2000 was filed by Myra Dix, indicating that she served by mail a copy of the Summons and Complaint upon the proper parties. Then on November 9, 2000, an Affidavit of Service was filed with the Court by the same Myra Dix where she deposed that on January 7, 2000, she had mailed a copy of the documents on the parties and which included a copy of the Receipt for Certified Mail and Return Receipt bearing Plaintiff's acknowledgment of receipt of the documents. Furthermore, at the hearing, Plaintiff's counsel did not deny that Plaintiff actually received service of the Summons and Complaint by certified mail. The Court notes that Plaintiff's argument is basically an argument of form over substance with which the Court disagrees. Furthermore, it is clear from the express language in the Rule that "[f]ailure to make proof of service does not affect the validity of service," and that the "court may allow proof of service to be amended." See, e.g. Lautman v. Loewen Group, Inc., 2000 WL 772818, \*9 (E.D. Pa. 2000); Brown v. Pfizer, Inc., 1996 WL 706836, \*1 (E.D. N.Y. 1996). In this case, even if an Affidavit of Service had never been filed, Plaintiff could not have been granted relief pursuant to Fed. R. Civ. P. 60(b)(4) in that Defendant's failure to strictly comply with the requirements of Fed. R. Civ. P. 4(l) would not have affected the validity of the service and the acquisition of personal jurisdiction over his ex-wife in the adversary proceeding seeking the dischargeability of the marital debt. Furthermore, Defendant's lawyer did file an Affidavit of Service on November 9, 2000 to which she attached proof of service in the form of an undisputed Receipt of Certified Mail and Return Receipt. Thus, even if the Certificate of Service filed on January 11, 2000 was not sufficient to meet the requirements of Fed. R. Civ. P. 4(l), then the Affidavit of Service later filed would have

cured the defect. See, e.g. Lautman v. Loewen Group, Inc., 2000 WL 772818, \*9 (E.D. Pa. 2000) (“Because Rule 4(1) is liberal about allowing proof of service to be amended, . . . , and because [Defendant] does not claim to have been prejudiced by the form of the original proof of service, . . . [the court] will consider [Plaintiff’s] amended affidavit of service to be valid. Because the amended proof of service states that [Defendant] was served with both a summons and a complaint, I will not dismiss the complaint on this ground.”). The Court finds that Plaintiff did acquire personal jurisdiction over his ex-wife and his failure to strictly comply with the requirements of Fed. R. Civ. P. 4(1) at first, but later amending the deficiency in the proof of service as allowed by the Rule, did not affect the validity of service; thus, relief cannot be granted pursuant to Fed. R. Civ. P. 60(b)(4). The Court finds that as to this ground, there is no issue as to any material fact and summary judgment should be granted as a matter of law.<sup>8</sup>

Plaintiff further claims that the Order of Discharge should be set aside pursuant to Fed. R. Civ. P. 60(b)(3) which provides: “On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons . . . : (3) fraud (whether heretofore denominated intrinsic or extrinsic),

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<sup>8</sup> Fed. R. Civ. P. 12(b) provides in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Because in this case the parties relied, and the Court took into consideration, documents and evidence outside the four corners of the pleading, summary judgment is the appropriate relief to be granted as it relates to this ground.

misrepresentation, or other misconduct of an adverse party.” Fed. R. Civ. P. 60(b)(3) was enacted “to make it clear that a motion will lie for relief from a judgment obtained by fraud, misrepresentation, or other misconduct of an adverse party.” Wright, Miller, & Kane, 11 Federal Practice and Procedure §2860 (1995). The burden of proof is on the moving party to demonstrate, by clear and convincing evidence, “that such misconduct prevented him from fully and fairly presenting his claim or defense.” Square Constr. Co. v. Washington Metropolitan Area Transit Authority, 657 F.2d 68, 71 (4th Cir. 1982); see also Potter v. Mosteller, 199 F.R.D. 181, 185 (4th Cir. 2000) (citations omitted) (“It is well settled that the clear and convincing standard of proof applies in Rule 60(b)(3) cases alleging fraud upon the court. The Fourth Circuit recognizes that the ‘fraud upon the court’ exception must be narrowly construed so that this ‘otherwise nebulous concept’ does not ‘overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule.’ Examples of subsection (b)(3) fraud include fraud by bribing a judge, or tampering with a jury or court officer, including an attorney.”); McLawhorn v. John W. Daniel & Co., Inc., 924 F.2d 535, 538 (4th Cir. 1991).

In this case, Plaintiff’s Complaint alleges that Defendant knowingly withheld from the Court the following facts:

- a. That because of his default Plaintiff advanced payments to the Mortgagee Farmer and Merchants Bank in his behalf, thereby protecting his 4.32 acres from becoming the subject of a foreclosure.
- b. That because of his default Plaintiff satisfied in part his obligation to her and simultaneously satisfied in part an obligation belonging to and assumed by him per the provisions of the marriage settlement agreement.

Plaintiff thus alleges that Defendant's failure to fully and completely inform the Court of the circumstances, through which Plaintiff became a creditor of Defendant, constituted fraud on his part within the meaning of Fed. R. Civ. P. 60(b)(3). The Court, however, is of the opinion that the alleged fraud on the part of Defendant is not the same type of fraud intended by Congress in the enactment of Fed. R. Civ. P. 60(b)(3). In fact, in meeting the burden of proof on Fed. R. Civ. P. 60(b)(3), the moving party is required to show, by clear and convincing evidence, that the misconduct of the opposing party prevented him or her from fully presenting his or her defense. In this case, Plaintiff had the fair opportunity to defend Defendant's request that the marital debt be deemed discharged pursuant to §523(a)(15); yet, her own failure to timely answer placed her in default, and the discharge was granted. Given the fact that Plaintiff has not presented any basis on which the Order of Default could be set aside pursuant to Fed. R. Civ. P. 60(b)(3), the Court grants Defendant's Motion to Dismiss on that ground.

The Last ground on which Plaintiff bases her complaint is §727(d) which governs the revocation of discharge. Section 727(d) provides:

On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

- (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
- (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or
- (3) the debtor committed an act specified in subsection

(a)(6) of this section.<sup>9</sup>

Despite the fact that Plaintiff's pleadings are less than clear on the exact grounds on which she was pursuing the revocation of the marital debt's discharge, at the hearing on the Motion for Summary Judgment and Dismissal, Plaintiff's counsel stated that he was pursuing the revocation under both subsections (1) and (2). However, the Court finds that revocation should not be granted on either grounds. As to § 727(d)(2), which allows revocation of discharge in the situation where the debtor fraudulently failed to disclose the acquisition or entitlement to property that would be categorized as property of the estate; the Court finds that there are no grounds that were alleged by Plaintiff that would support such finding, thus dismissal is appropriate as it relates to that specific ground.

Furthermore, as to §727(d)(1), the Court finds that Plaintiff's argument also fails on the basis that if there was any fraud or fraudulent activities on the part of Defendant, as alleged, then Plaintiff knew or should have known about them prior to the time for objecting to the discharge. In fact, at the hearing, Plaintiff's counsel indicated that he raised these same issues dealing with

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<sup>9</sup> Section 727(e) specifies the time within which a creditor or the trustee may request a revocation of discharge under either sections. More specifically, it provides:

- (1) under subsection (d)(1) of this section within one year after such discharge is granted; or
- (2) under subsection (d)(2) or (d)(3) of this section before the later of--
  - (A) one year after the granting of such discharge; and
  - (B) the date the case is closed.

In this case, the discharge was granted on February 7, 2001, and the adversary proceeding which is at issue in the case was filed on February 2, 2001, within a year of the discharge. Furthermore, Defendant's Chapter 7 petition is yet to be closed. Therefore, the deadlines for filing the revocation of discharge specified in §727(e) were complied with.

fraud on the part of Debtor with the Chapter 7 Trustee at the §341 meeting, which took place prior to the deadline for objecting to Debtor's discharge. Thus, Plaintiff cannot seek revocation of the discharge this late in the proceeding, after an Order of Default was entered.

The Court has previously addressed this issue in the case of Anderson v. Varian, 219 B.R. 691 (Bankr. D.S.C. 1997). In that case, the Chapter 7 trustee had filed a complaint to revoke the debtor's discharge as having been fraudulent procured. The Court ultimately denied the complaint on the basis that the trustee had failed to exercise the required diligence in responding to evidence of possible fraudulent conduct on the part of the debtor. More specifically, the Court noted:

Upon a review of §727 and the within cited authorities, this Court is of the opinion that in a revocation action under §727(d)(1), the plaintiff must show due diligence in investigating and responding to possible fraudulent conduct once he or she is aware of it or is in possession of facts such that a reasonable person in his or her position should have been aware of it or is in possession of facts such that a reasonable person in his or her position should have been aware of a possible fraud. This standard is consistent with case law from other jurisdictions and is consistent with the goal of Chapter 7 to grant debtors a fresh start. This is not to say that a trustee is required to suspect that every debtor is committing fraud in his schedules. As a general rule, the trustee is entitled to rely on the truthfulness and accuracy of the debtor's schedules and is not required to assume that the debtor is lying. However, once the trustee is in possession of facts that would put a reasonable person on notice of a possible fraud, he has a duty to diligently investigate to determine if grounds exist for the denial of the Debtor's discharge and if so to timely file a complaint. . . .

...

The above information, while not necessarily giving the trustee absolute proof of fraud, certainly gave the Trustee a knowledge of possible fraudulent conduct. The trustee contends that he could not bring an action to challenge the Debtor's discharge until after

February 18, 1997, on which date he had sufficient facts constituting the fraud because he would otherwise be exposing himself to a Rule 11 violation charge. Even if this were a concern, the Trustee could have moved under Rule 4004(b) for an extension of time to file a complain objecting to the discharge.

Id. 696-98. For the above reasons, the Court ultimately granted the debtor's summary judgment and dismissed the adversary proceeding seeking the revocation of the discharge. See also Chester Housing Authority v. Johnson (In re Johnson), 250 B.R. 521, 527 (Bankr. E.D. Pa. 2000) (“Revocation of a discharge is a drastic measure that runs contrary to the Bankruptcy Code’s general policy of giving Chapter 7 debtors a ‘fresh start.’ . . . The first element which the Plaintiff must prove is that the Debtor has acted in a fraudulent manner. Specifically, the debtor must have committed fraud in the procurement of the discharge which would have been sufficient to prevent the discharge from being granted. . . . even if the Debtor’s action are deemed to be fraudulent, revocation of discharge is only appropriate if the Plaintiff did not know of the alleged fraud until after the discharge was granted.”).

In this case, the fraud, which Plaintiff alleges should lead to a revocation of discharge, consists of Defendant’s failure to inform the Court, in conjunction with the adversary proceeding seeking the discharge of the marital debt pursuant to §523(a)(15), about his default in the mortgage payments that he was supposed to make pursuant to the Divorce Decree, thus causing Plaintiff to be forced to advance payment to Farmers and Merchants Bank to protect the interest in the property. As for the ground dealing with the setting aside of the Order of Default pursuant to Fed. R. Civ. P. 60(b)(3), the Court is not of the opinion that the type of fraud alleged by Plaintiff is the same type of fraudulent conduct contemplated in or meets the requirements of

§727(d)(1). Even if Defendant's behavior did constitute fraud, the Court notes that Plaintiff knew of such conduct at the time that Defendant's dischargeability action had been filed, and should thus have defended her position accordingly. As the Court noted in In re Vereen, "the Court cannot ignore the requirements of §727(d)(1) which require diligence not only in investigation but in timely acting to oppose discharge. The Court cannot allow a revocation action to continue when it appears as a matter of law that [the plaintiff] had sufficient knowledge of the Debtor's alleged fraud prior to the discharge." In re Vereen, 219 B.R. at 699. Thus, the Court finds that the granting of Summary Judgment on this ground in favor of Defendant is appropriate.

### CONCLUSION

From the arguments set forth above, it is therefore;

ORDERED that Defendant's Motion for Summary Judgment is granted as to the argument that relief should be granted based on Fed. R. Civ. P. 60(b)(4) on the ground that the judgment was void and that the discharge should be revoked on the basis of §727(d)(1). Furthermore, Defendant's Motion for Dismissal is granted as to the remaining grounds; more specifically, the ground that Debtor's behavior constituted fraud and misrepresentation within the meaning of §523(a)(2), the ground that relief from the Order should be granted due to the fact that Defendant behaved fraudulently within the meaning of Fed. r. Civ. P. 60(b)(3), and lastly on the ground that Debtor's discharge should be revoked on the basis of §727(d)(2).

IT IS FURTHER ORDERED that, at this time, the Court declines to award any attorneys'

fees as requested by Defendant.

**AND IT IS SO ORDERED.**

Columbia, South Carolina,  
June 1, 2001.

  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

**JUN 4 2008**

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

SHEREE B. PHIPPS

Deputy Clerk

✓ Brown  
✓ Peagler (Def.)