

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 08-03242

ADVERSARY PROCEEDING NO: 08-80215

ORDER ON MOTION TO DISMISS COMPLAINT TO DENY DISCHARGE

The relief set forth on the following pages, for a total of 6 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
02/20/2009



Entered: 02/23/2009

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re,

Daniel Ray Vidis,

Debtor(s).

W. Clarkson McDow, United States Trustee
Region Four,

Plaintiff(s),

v.

Daniel Ray Vidis,

Defendant(s).

C/A No. 08-03242-DD

Adv. Pro. No. 08-80215-DD

Chapter 7

**ORDER ON MOTION TO DISMISS
COMPLAINT TO DENY
DISCHARGE**

THIS MATTER is before the Court on Daniel Ray Vidis's ("Defendant" or "Debtor") Motion to Dismiss Complaint to Deny Discharge ("Motion") in the adversary complaint filed by W. Clarkson McDow, Jr., United States Trustee for Region Four ("Plaintiff" or "UST"). Both Plaintiff and Defendant, by and through their counsel, appeared to argue the Motion. Defendant's Motion was made pursuant to Fed. R. Civ. P. 12(b)(6), made applicable in this adversary proceeding by Fed. R. Bankr. P. 7012.

MOTION TO DISMISS STANDARD

A court should not grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) "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." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All well-pleaded factual allegations are assumed to be true and are viewed in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Dismissal for failure to state a claim is proper "only if it is clear that no relief could be granted under any set of facts

that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Relief under Rule 12(b)(6) requires the pleader to provide more than “mere labels and conclusions, and a formulaic recitation of all the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

It is improper to consider the merits of a claim in the context of a Fed. R. Civ. P. 12(b)(6) motion and if determination of the issue requires application of the law to particular facts of the case, dismissal is improper. *Adams v. Bain*, 697 F.2d 1213, 21216-19 (4th Cir. 1992). Matters outside of the pleadings are excluded and will not be considered by the Court at this time, as discovery has only recently started.¹ A Fed. R. Civ. P. 12(b)(6) motion tests the sufficiency of the complaint, not the facts surrounding a case, the merits, or defenses. *Campbell v. Cathcart (In re Derivium Capital, LLC)*, 380 B.R. 407, 416 (Bankr. D.S.C. 2006).

DISCUSSION

The UST’s Complaint to Deny Discharge alleges six causes of action for: (i) false oath or account pursuant to 11 U.S.C. § 727(a)(4)(A),² (ii) intent to defraud a creditor by transferring, concealing, or permitting to be transferred or concealed property of the bankruptcy estate after the date of filing the bankruptcy petition pursuant to § 727(a)(2)(B), (iii) failure to keep or preserve recorded information pursuant to § 727(a)(3), (iv) failure to satisfactorily explain a loss of assets pursuant to § 727(a)(5), (v) revocation of discharge obtained by fraud pursuant to § 727(d)(1), and (vi) revocation of discharge based upon fraudulent acquisition and disposal of estate property pursuant to § 727(d)(2).

¹ Courts sometimes convert Motions to Dismiss to Motions for Summary Judgment, where the parties rely on matters outside the pleadings. This is appropriate only after the parties have engaged in discovery.

² Further reference to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, will be by section number only.

§ 727(a) Claims

Section 727 mandates that the Court must grant a discharge to a chapter 7 debtor unless grounds exist for the denial of a discharge. 11 U.S.C. § 727(a)(1-12). The procedural compliment to § 727 is found in Fed. R. Bankr. P. 4004.³ Rule 4004(a) provides, in part, that “[i]n a chapter 7 liquidation case a complaint objecting to the debtor’s discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a).”

The pleadings and record in this case show that Debtor’s meeting of creditors was held on July 1, 2008. Plaintiff attended the meeting and Defendant responded to all questions asked to him by Plaintiff. The Court set September 2, 2008 as the last day to file an objection to Debtor’s discharge under § 727(a). Plaintiff did not request an extension of time to file its complaint. Plaintiff did not request any discovery, nor conduct a Rule 2004 examination of Defendant, until after the Rule 4004(a) deadline.

Defendant argues in his Motion that the Plaintiff knew or should have known that the debtor might be engaged in the concealment of bankruptcy estate assets or in committing other fraudulent acts before the time for objecting to the Defendant’s discharge expired. If the allegations of the complaint are admitted and viewed in a light most favorable to the plaintiff, the UST’s complaint is insufficient with regards to § 727(a) causes of action on account of UST’s failure to object prior to the expiration of the Rule 4004(a) deadline. These four causes of action are dismissed with leave to the Plaintiff to amend it’s pleading to incorporate into the § 727(d) causes of action any necessary factual allegations from the first four causes of action.

³ Further reference to the Federal Rules of Bankruptcy Procedure will be by rule number only.

§ 727(d) Claims

The last two grounds on which Plaintiff bases the complaint are found in § 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

Generally, the process of revocation is restricted to those frauds that are discovered after discharge is granted. 6 *Collier on Bankruptcy* ¶ 727.15[3], p. 727-75 (rev. 15th ed. 2008). However, where compliance with this rule is impossible, courts have created an exception. *See, Citibank, N.A. v. Emery (In re Emery)*, 132 F.3d 892 (2d Cir. 1998).

In *Emery*, the Second Circuit decided the issue of whether a creditor could seek revocation of discharge under §727(d) when the creditor learned of the debtor's fraud after the expiration of the time period in which the creditor was allowed to object to discharge, but before the discharge order was entered. *Id.* The *Emery* court based its decision on the public policy ground that a rule barring such a complaint pursuant to § 727(d) would pressure creditors to move for precautionary extensions of the objection deadline based on the slightest suspicion of fraud, and thus interfere with the policy in favor of a prompt discharge for deserving debtors. *In re Emery*, 132 F.3d at 896. Our Court of Appeals has held that the *Emery* exception does not apply where the party seeking to revoke a Debtor's

discharge fails to present evidence that it did not learn of the fraud until after the time for objecting to discharge has expired. *Citicorp Real Estate v. Damaia (In re Damaia)*, 217 F.3d 838 (Table), 2000 WL 977395 (4th Cir. July 17, 2000).

In this case, the allegations of complaint viewed in a light most favorable to Plaintiff are sufficient and the Defendant's Motion should be denied as to claims pursuant to § 727(d). Plaintiff asserts in the complaint that it did not know of Defendant's alleged fraud until after the time to object to the discharge had passed. If the Plaintiff can prove that they were unaware of Debtor's alleged fraud prior to the deadline to object to discharge under Rule 4004(a), there exists a set of facts that would entitle the Plaintiff to relief. As to causes of action pursuant to § 727(d), dismissal for failure to state a claim upon which relief can be granted is improper.

CONCLUSION

Therefore, it is ORDERED that Defendant's Motion is GRANTED as to Counts I, II, III, and IV, with leave to amend the factual allegations of the complaint to support Plaintiff's other causes of action.

IT IS FURTHER ORDERED that that Defendant's Motion is DENIED as to Counts V and VI.

AND IT IS SO ORDERED.

Columbia, South Carolina
February 20, 2009