

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re:

Case No. 10-72007-ast

Yaakov Herman and
Maureen M. Herman,

Chapter 7

Debtors.

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Epic Wholesalers, Inc. and
Star Diamonds & Jewelry, Inc.,

Adv. No. 10-08312-ast

Plaintiffs,

v.

Yaakov Herman and Maureen M. Herman,

Defendants.

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**ORDER GRANTING IN PART AND DENYING
IN PART DEBTORS' MOTION TO DISMISS**

Issues presented

On July 25, 2010, Plaintiffs, Epic Wholesalers, Inc. and Star Diamonds & Jewelry, Inc. (“Plaintiffs”), filed a complaint (the “Complaint”) [dkt item 1], and thereby commenced this adversary proceeding. Plaintiffs object to Debtors’ Yaakov Herman and Maureen M. Herman (“Debtors”) receiving a discharge under 11 U.S.C. Section 727(c), seek to deny Debtors’ discharge under Section 727(d),(e), and object to dischargeability of certain alleged debts under 11 U.S.C. Section 523(a)(2), alleging false pretenses, false representation and/or actual fraud, under Section 523(a)(4), alleging fraud as fiduciary, embezzlement and/or larceny, and under Section 523(a)(6), alleging willful and malicious injury.

Now pending before the Court is Debtors’ Motion to Dismiss the Complaint (the

“Motion”), Plaintiffs response, and Debtors’ reply. [dkt items 3, 8, 9] For the reasons set forth herein, the Court has determined that the Motion should be granted in part and denied.

Factual background

Debtors filed a petition pursuant to Chapter 7 of the Bankruptcy Code on March 24, 2010 (the “Petition Date”). [main case dkt item 1] Upon the filing of their petition, the Clerk of the Court issued a Notice of Commencement of Case (the “Notice of Commencement”), which, *inter alia*, scheduled the Section 341 Meeting for May 6, 2010, and gave notice of the last day to oppose discharge or dischargeability as July 6, 2010.¹ [main case dkt item 5]

On May 6, 2010, at the 341 meeting, an attorney from the Hirschel Law Firm, PC. appeared representing Plaintiffs and questioned Debtors.

The duly appointed trustee in this case, Allan B. Mendelsohn, closed the 341 meeting on May 7, 2010, and noted this case as a “no asset” case on the Court’s official CM/ECF docket by a docket entry made by the trustee.

By “Stipulation to Settle Controversy Regarding Dischargeability of Claim” dated June 28, 2010, and filed with this Court on June 28, 2010 (the “Stipulation”), counsel for Epic Wholesalers, Inc. (“Epic Wholesalers”) and counsel for Debtors presented an agreement to the Court for consideration. Part of the Stipulation was an agreement to extend Epic Wholesaler’s time to “object to the dischargeability of the debt in question until July 25, 2010.” [main case dkt item 12] Due to the Court’s concerns about the lack of clarity of the Stipulation, and the lack of notice of the Stipulation if it was in fact a compromise governed by Rule 9019, the Court notified

¹ These deadlines to oppose discharge or dischargeability are fixed by Rules 4004 and 4007, and are operative regardless of notice from the Clerk of Court.

the parties that a hearing would be held on the Stipulation. However, the parties were unavailable for the date selected by the Court for the hearing. Given the pending expiry of the Section 523 and 727 deadlines, the Court “So Ordered” the following part of the Stipulation on July 8, 2010, and struck the remainder:

Debtors Yaakov Herman and Maureen Herman, by their undersigned attorney, and Epic Wholesalers, Inc. by their undersigned attorney, hereby enter into the following Stipulation on July 8, 2010.

[6.] The Debtors further agree to extend the time for Creditor to object to the dischargeability of the debt in question until July 25, 2010.

[main case dkt item 13]

Debtors now seek to dismiss the Complaint on various grounds. As to the Section 727 claims, they seek dismissal based on untimeliness of the filing of the Complaint. As to the Section 523 claims of Star Diamonds & Jewelry, Inc. (“Star Diamonds”), Debtors also seek dismissal based on untimeliness of the Complaint. As to the Section 523 claims of Epic Wholesalers, Debtors seek dismissal for untimeliness and for failure to state a claim upon which relief can be granted, and, in the alternative, seek abstention. Debtors also assert Plaintiffs should be estopped to claim status as creditors.

Plaintiffs’ request to revoke Debtors’ discharge does not present a justiciable controversy

It is unclear from the pleadings presently before the Court whether Plaintiffs’ are seeking to revoke Debtors’ discharge under Sections 727(d), (e). However, to the extent they seek such relief, such request does not present a justiciable controversy, as Debtors have not received their discharge. Therefore, Plaintiffs’ request to revoke Debtors’ discharge should be denied.

Plaintiffs' objection to Debtors' discharge is untimely

Plaintiffs' objection to discharge under Section 727(c) claim is untimely.² This is a similar case to a case decided by Chief Judge Craig of this Court. In *In re Yashaya* addressing the Section 523 deadline applicable therein, Judge Craig noted:

Bankruptcy Rule 4007(c) provides, in pertinent part:

Based upon the first date set for the meeting of creditors under § 341(a) in this case, the deadline to file a complaint objecting to the dischargeability of a debt pursuant to §523(c) was April 14, 2008. Pursuant to a stipulation dated April 17, 2008, and filed on April 18, 2008, Plaintiff's deadline was extended to May 5, 2008. The dispute arises from the stipulation filed with the Court on May 5, 2008, which extends the Plaintiff's time to object to the dischargeability of its claim pursuant to § 523(c) to May 12, 2008.

In re Yashaya, 403 B.R. 278, 284 (Bankr. E.D.N.Y. 2009). As Judge Craig noted, the parties' agreement to extend a § 523 deadline should be enforced, as should an agreement to extend the § 727 deadline. Here, however, the Stipulation does not extend the time to object to discharge and, while it contains express references to Section 523, it makes no mention of Section 727. The only deadline extended is expressly for an objection to dischargeability. Therefore, the Section 727(c) claims are untimely as filed after July 6, 2010.

Further, there is no basis for equitable tolling or equitable estoppel here, even if those doctrines apply in a Section 523 or 727 context. "In general, the deadlines provided in the Bankruptcy Rules 'are to be interpreted strictly and in a manner consistent with the Code's

²Bankruptcy Rule 4007(c) provides, in pertinent part:

[A] complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). . . . On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007(c).

policies in favor of providing a fresh start for the debtor and prompt administration of the case." *Yashaha* at 285 citing *In re Weinstein*, 234 B.R. 862, 866 (Bankr. E.D.N.Y. 1999) (quoting *Dombroff v. Greene (In re Dombroff)*, 192 B.R. 615, 621 (S.D.N.Y. 1996)). There is no suggestion or evidence that Debtors somehow procured Plaintiffs late filing of the Complaint, or mislead Plaintiffs into thinking the § 727 deadline was other than the July 6, 2010 date as established by Rule 4004 and as originally set out in the Notice of Commencement.

Further, the parties had agreed in their Stipulation as follows:

In the event that the Court shall decline to approve this Stipulation, then both parties shall preserve all rights, claims and defenses that they held previously.

Thus, Plaintiffs Section 727(c) claims are untimely and should be dismissed.

Star Diamonds' objection to dischargeability is untimely

Similarly, Star Diamonds' objection to dischargeability is untimely. The deadline to object to dischargeability under Section 523 ran on July 6, 2010. The Stipulation was expressly and only between Debtors and Epic Wholesalers.

Epic Wholesalers, Inc. ("Creditor") intends to file a complaint against the debtors, alleging that the claimed obligation is in whole or in part nondischargeable pursuant to Section 523 on the Bankruptcy Code.

The Complaint alleges that Epic Wholesalers and Star Diamonds are each "a domestic corporation duly organized and existing under the laws of the State of New York, and maintains its principal place of business within the County of Kings." [dkt item 1, para. 2, 3]. Thus, each entity was obligated to seek and obtain on their own behalf an extension of the Section 523 deadline. Having failed to do so, Star Diamonds' Section 523 claims are untimely, and should be dismissed.

Plaintiff Epic Wholesalers' objection to dischargeability is timely

Debtors assert that the Complaint being filed on the last day the parties had agreed somehow renders the Complaint as untimely. Debtors state:

This stipulation between the parties which was So Ordered by the court was an agreement and order to "extend the time for Creditor to object to the dischargeability of the debt in question until July 25, 2010." Miriam Websters online dictionary <http://www.merriam-webster.com/dictionary/until> defines the word "until" as meaning "before".

Motion, para 9. This Court will not give such a rigid and out of the ordinary construction to the Stipulation. While Black's Law Dictionary does not contain a definition of "until," this Court's construction of the Stipulation as So Ordered by this Court is that Epic Wholesalers had to file a complaint on or before July 25, 2010, such that "until" is synonymous with "on or before."

Plaintiff Epic Wholesalers should be required to replead its claims under Section 523 with particularity

In the Complaint, Epic Wholesalers recites the statutory elements it must meet to carry its burden of proof under 523(a)(2), to establish false pretenses, false representation and/or actual fraud, under Section 523(a)(4), to establish fraud as fiduciary, embezzlement and/or larceny, and under Section 523(a)(6), to establish willful and malicious injury. However, Epic Wholesalers does not state with particularity the facts, transactions or occurrences which it alleges entitle it to relief under Section 523. Although Plaintiffs responded to the request for dismissal for failure to plead with particularity by referring to allegations within the Complaint before this Court and a pleading filed in a state court action annexed to the Complaint, such is not a proper manner of federal court pleading, even under notice pleading.

Based thereon, and under Rules 8(a) and 9(b), as incorporated by Bankruptcy Rules 7008(a) and 7009(b), Plaintiff Epic Wholesalers shall have twenty-one (21) days from entry of this Order to file and serve an amended Complaint alleging the facts, transactions or occurrences

which it alleges entitle it to relief under Section 523. The failure to timely amend the Complaint shall result in dismissal of all remaining claims.

Debtors' request for estoppel to claim creditor status should be denied

Debtors' request for estoppel to claim creditor status should be denied. This issue is an affirmative defense of Debtors', and is not appropriate for a dilatory Rule 7012 Motion, and should therefore be denied by the Court as a basis for dismissal.

Debtors' request for abstention is deferred pending re-pleading

Debtors' request for abstention should be by deferred pending re-pleading by Epic. Certainly, this Court is aware of its authority to abstain from hearing aspects of this adversary proceeding. In *Barbaro v. Wider* this Court noted that abstention can be granted or denied upon consideration of the following factors:

(1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention; (2) the extent to which state law issues predominate over bankruptcy issues; (3) the difficulty or unsettled nature of the applicable state law; (4) the presence of a related proceeding commenced in state court or other non-bankruptcy court; (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334; (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case; (7) the substance rather than the form of an asserted 'core' proceeding; (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court; (9) the burden of [the court's] docket; (10) the likelihood that the commencement of the proceeding in a bankruptcy court involves forum shopping by one of the parties; (11) the existence of a right to a jury trial; and (12) the presence in the proceeding of non-debtor parties.

Barbaro v. Wider (In re Wider), No. 09-8313-ast, 2009 WL 4345411 (Bankr. E.D.N.Y.

November 30, 2009) citing *Wallace v. Guretzsky*, No. CV-09-0071, 2009 WL 3171767 at *2 (E.D.N.Y. Sept. 29, 2009).

Here, the facts alleged as entitling Epic Wholesalers to relief need to be plead so as to inform this Court as to whether the proper requirements for abstention are present.

Finally, the fact that the parties originally desired to litigate before the state court will be considered by this Court once Epic Wholesalers has re-plead. In that regard, much of the motion practice presently before this Court could likely have been avoided had the parties appeared to explain their Stipulation when the matter was first brought to this Court's attention and the Court scheduled a hearing thereon.

Rulings

Based on the above, it is hereby

ORDERED, that Plaintiffs claims under Section 727 are hereby **DISMISSED**; and it is further

ORDERED, that Plaintiff Star Diamonds & Jewelry, Inc.'s claims under Section 523 are hereby **DISMISSED**; and it is further

ORDERED, that Debtor's request for dismissal based on estoppel is hereby **DENIED**; and it is further

ORDERED, that Plaintiff Epic Wholesalers, Inc. shall have 21 days from entry of this Order to file and serve an amended complaint alleging the facts, transactions or occurrences which it alleges entitle it to relief under Section 523; and it is further

ORDERED, that if Plaintiff Epic Wholesalers, Inc. fails to file and serve an amended complaint alleging the facts, transactions or occurrences which it alleges entitle it to relief under Section 523 within 21 days from entry of this Order, Plaintiff Epic Wholesalers, Inc.'s claims under Section 523 shall be **DISMISSED**; and it is further

ORDERED, that Debtors' request for abstention is deferred pending re-pleading by Plaintiff Epic Wholesalers, Inc.

IT IS SO ORDERED

Dated: March 17, 2011
Central Islip, New York
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Alan S. Trust
United States Bankruptcy Judge