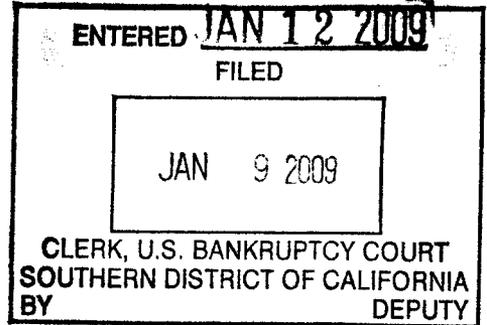


WRITTEN DECISION – NOT FOR PUBLICATION



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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:
Duane Utt

Debtor.

} Bankruptcy No. 07-01124-LT7
} Adversary No. 07-90419-LT

Mike Sampson

Plaintiff,

v.

Duane Utt and Martha C. Cruz,

Defendants.

} MEMORANDUM DECISION

Plaintiff Mike Sampson ("Sampson") seeks leave to amend his original complaint (the "Complaint") that was timely filed on June 11, 2007 against Debtor Duane Utt ("Debtor") and non-debtor Martha C. Cruz ("Cruz"). The Complaint identifies six claims for relief, three that fall under section 523 of the Bankruptcy Code, in particular subsections (a)(2), (a)(4) and (a)(6), excepting certain debts from discharge; and three others based on breach of contract, promissory fraud, and fraudulent conveyance of real property.

1 Sampson's Motion for Leave to Amend (the "Motion"), filed on August 6, 2008, seeks leave
2 to add five new causes of action objecting to Debtor's discharge under multiple subsections
3 of section 727 of the Bankruptcy Code.¹ Although the Complaint includes a prayer for
4 relief under section 727 and is captioned a complaint "To Determine Nondischargeability of
5 Debt and to Deny Discharge [11 U.S.C. § 523]", it does not include causes of action under
6 section 727.

7
8 At the September 4, 2008 initial hearing on the Motion, the Court invited and
9 authorized the parties to file supplemental briefs addressing concerns and issues raised by
10 the Court at the hearing. The Court's issues include (1) whether amendment to add causes
11 of action under section 727 would be futile given the time limits for filing actions to deny
12 discharge set forth in Rule 4004(a); and (2) fundamental, definitional and/or factual
13 weaknesses in Sampson's proposed 9th, 10th and 11th claims for relief.² The parties agreed
14 that the matter appropriately may be decided upon the supplemental briefing without
15 additional oral argument.

16
17 This Court has jurisdiction to determine this matter pursuant to 28 U.S.C. §§ 1334
18 and 157(b)(1) and General Order No. 312-D of the United States District Court for the
19 Southern District of California. This is a core proceeding pursuant to 28 U.S.C.
20 § 157(b)(2)(I) & (J).

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¹ Hereinafter, references to code sections refer to Title 11 of United States Codes, also referred to
26 as the "Bankruptcy Code" unless otherwise specified. References to Rules refer to the Federal
Rules of Bankruptcy Procedure, unless otherwise indicated.

27 ² Sampson conceded that the Complaint did not contain causes of action nor did it "set forth
28 charging allegations supporting the determination of nondischargeability under §727" (Motion 4:21-
22), and that the Motion did not include an argument for "relation back."

1 **BACKGROUND FACTS**

2
3 Debtor filed his voluntary chapter 7 petition on March 8, 2007. The 341a first
4 meeting of creditors was held April 11, 2007 and continued to and concluded on May 11,
5 2007. Sampson filed the Complaint June 11, 2007. No discharge has been entered.³
6

7 Discovery was not initiated in this adversary proceeding until early 2008. Discovery
8 obtained by Sampson at that time included documents that Sampson believes contradict
9 Debtor's 341a testimony that he was unemployed and had no source of income himself.
10 Based in part on Sampson's interpretation of the discovery, Sampson filed the Motion
11 arguing that Debtor should be denied discharge primarily based on alleged false
12 concealment of income and Debtor's refusal to answer questions posed in deposition.
13 Debtor opposes the Motion on the grounds that Sampson unnecessarily delayed initiation of
14 discovery, to Debtor's general prejudice, and that the proposed amendment would only
15 increase fees and costs in the action.
16

17 Neither the Motion nor Debtor's opposition thereto addresses timeliness of the
18 proposed amendments. The deadline under Rule 4004(a) required filing of any objection to
19 discharge no later than June 11, 2007, whereas Sampson's Motion was not filed until
20 fourteen months later. The Court authorized supplemental briefing on the primary issue of
21 timeliness and asked the parties to consider the published decisions rendered in *Citibank v.*
22 *Emery (In re Emery)*, 132 F.3d 892 (2nd Cir. 1998) and *Employers Mutual Casualty Co. v.*
23 *Lazenby (In re Lazenby)*, 253 B.R. 536 (Bankr. W.D. Ark. 2000) that diverge on the issue of
24 whether an action filed after the Rule 4004(a) deadline may go forward, either objecting to
25 discharge or to revoke discharge, based on fraud discovered during the "gap period"
26 between the Rule 4004(a) deadline and entry of discharge.

27 ³ Lack of entry of discharge is probably due to the fact that the caption of Sampson's
28 Complaint included reference to denial of discharge.

1 In Sampson's initial supplemental brief filed October 14, 2008, Sampson indicated he
2 would not go forward with the proposed 9th, 10th and 11th causes of action in his First
3 Amended Complaint. Sampson therefore did not respond to the Court's issues raised as to
4 these three abandoned proposed claims.

5
6 Sampson now seeks leave to add only two new causes of action based respectively on
7 sections 727(a)(3) and (a)(4). Sampson alleges that discovery of the alleged conduct
8 supporting the section 727(a) causes of action occurred after the Rule 4004(a) deadline but
9 before entry of discharge because discharge has never been entered. Under these
10 circumstances, Sampson argues that leave to object to discharge is not time-barred under
11 Rule 4004(a), and further requests that the Court construe these new causes of action as a
12 timely request to revoke discharge under section 727(d), notwithstanding the absence of
13 issuance of any discharge to date.

14
15 Debtor's supplemental opposition argues the Motion should be denied based on the
16 Rule 4004(a) bar date, because the section 727(a) causes of action do not relate back to the
17 Complaint. Debtor argues that even if the Court were to deem discharge entered as of the
18 4004(a) bar date, an action to revoke discharge would not be timely because the Motion was
19 filed more than one year later. In addition to the bar date arguments, Debtor contends that
20 the alleged facts supporting section 727(a) discharge denial were in Sampson's possession
21 prior to the applicable bar date for such action, and Sampson's interpretation of the term
22 "unemployed" is, in fact, a misinterpretation that fails to provide any support for Sampson's
23 allegations of Debtor's fraudulent conduct.

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3 **DECISION**

4 The issue before the Court is whether justice requires that the Court allow Sampson
5 to file an action to deny Debtor's discharge after the Rule 4004(a) bar date based on
6 Sampson's allegation that he had no knowledge of facts to support a section 727(a) action
7 until post-bar date and a section 727(d) action to revoke discharge appears premature where
8 no discharge has been entered. Based on the following, this Court concludes that justice is
9 best served by allowing Sampson leave to amend the Complaint on a limited basis. The
10 Court makes no finding of the adequacy of Sampson's proposed amendments, nor does this
11 decision make any determination regarding when Sampson learned of the Debtor's alleged
12 misconduct or when he should have discovered it; these are matters for judgment on the
13 pleadings, summary judgment, or trial.

14 Leave to amend a complaint should be freely given "when justice so requires." Fed.
15 R. Civ. P. 15(a)(2); Fed. R. Bankr. Proc. 15. Leave is not appropriate in all cases, however,
16 and in particular where amendment to add causes of action would be futile. *North Slope*
17 *Borough v. Rogstad (In re Rogstad)*, 126 F.3d 1224, 1228 (9th Cir. 1997). Section 727(c)
18 allows a creditor to object to the granting of a discharge on grounds set forth in
19 section 727(a). Under Rule 4004(a), a complaint objecting to the debtor's discharge under
20 section 727(a) "shall be filed no later than 60 days after the first date set for the meeting of
21 creditors under Section 341(a)." Once that deadline has passed, "the court shall forthwith
22 grant the discharge." Fed. R. Bankr. P. 4004(c). After discharge has been entered, a
23 creditor may seek revocation of discharge under section 727(d), which requires that the
24 creditor prove "both that the discharge was obtained through fraud and that the creditor had
25 no knowledge of the fraud until after the discharge was granted." Under section 727(e)(1), a
26 request by a creditor to revoke discharge under section 727(d)(1) must be made within one
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1 year after such discharge is granted, and if under Sections 727(d)(2) or (d)(3), before the
2 later of one year after granting discharge and the date the case is closed.

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4 This Court agrees with the Second Circuit's *Emery* decision that "in the ordinary
5 case, this scheme makes good sense." *In re Emery*, 132 F.3d at 895. If discharge is entered
6 timely, "Congress has provided the remedy of denying discharge to a fraudulent debtor from
7 the beginning of a case until one year after discharge." *Id.* However, where a discharge has
8 not been entered "forthwith" (or ever, as in this case), a gap period exists during which
9 neither objection to discharge nor a complaint to revoke discharge may be timely filed,
10 creating, in effect, a period of immunity. This Court does not believe "that Congress
11 intentionally drafted a statute to punish fraudulent conduct by debtors that at the same time
12 provides a period of immunity for such debtors." *Id.*

13
14 Here, the deadline to object to discharge was June 11, 2007. Sampson alleges
15 Debtor's fraud was discovered after the discharge deadline passed, and before discharge has
16 been entered. If true, and if this Court were to strictly apply the literal interpretation of the
17 deadlines, Debtor would not be prohibited from obtaining discharge despite his alleged fraud.
18 This Court finds justice would not be done by such a reading nor is such a literal reading
19 required by relevant Supreme Court precedence. *See, United States v. Ron Pair Enterprises, Inc.*,
20 489 U.S. 235, 242 (1989) (court may depart from plain language if "literal application
21 of the statute will produce a result demonstrably at odds with the intentions of [the statute's]
22 drafters.") Under the circumstances here, justice requires that leave be allowed.

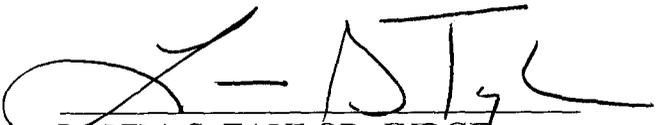
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24 This Court's grant of leave to amend is additionally supported by decisions of the
25 Bankruptcy Appellate Panel for the Ninth Circuit. In *England v. Stevens (In re Stevens)*,
26 107 B.R. 702 (9th Cir. BAP 1989), the Panel created the fiction that discharge had been
27 timely entered as of the date of expiration of the Rule 4004(a) bar date, to support its
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1 conclusion that a creditor could bring a revocation action under section 727(d) during the
2 gap period. In *Stevens*, the Panel reasoned that debtors "should not enjoy a period of
3 immunity from conduct that would otherwise be actionable, simply because the Bankruptcy
4 Rules do not address the situation [where discharge had not been entered upon expiration of
5 the Rule 4004(a) period]." *In re Stevens*, 107 B.R. at 703.

6
7 Debtor's arguments to the effect that Sampson's allegations fail to support his
8 proposed new causes of action, based on time of discovery as well as reasonable inferences
9 that may be drawn therefrom, do not support denial of leave to amend. Rather, such
10 arguments go to the strength of Sampson's causes of action, which will require full
11 development and presentation of admissible evidence before this Court would be prepared
12 to rule thereon.

13
14 Based on the foregoing, Sampson is directed to submit an order consistent with this
15 Memorandum Decision within ten days.

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17 DATED: January 8, 2009

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19 LAURA S. TAYLOR, JUDGE
20 United States Bankruptcy Court
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