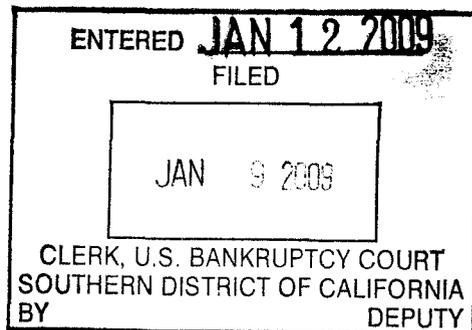


WRITTEN DECISION – NOT FOR PUBLICATION



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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:

Duane Utt

Debtor.

) Bankruptcy No. 07-01124-LT7

) Adversary No. 07-90420-LT

) MEMORANDUM DECISION

Brian Bradfield, William Sissel, Eileen
MacMillan, and Malcolm MacMillan

Plaintiffs,

v.

Duane Utt, and Martha C. Cruz

Defendants.

Plaintiffs Brian Bradfield, William Sissel, Eileen MacMillan and Malcolm MacMillan (collectively hereinafter "Bradfield") seek leave to amend their original complaint (the "Complaint") that was timely filed on June 11, 2007 initiating this adversary proceeding (the "Bradfield Adversary") against Debtor Duane Utt ("Debtor") and non-debtor Martha C. Cruz ("Cruz"). The Complaint identifies six claims for relief, three that

1 fall under section 523 of the Bankruptcy Code, in particular subsections (a)(2), (a)(4) and
2 (a)(6), excepting certain debts from discharge; and three others based on breach of contract,
3 promissory fraud, and fraudulent conveyance of real property. The Complaint was
4 concurrently filed with a complaint filed by Mike Sampson ("Sampson") against the Debtor
5 and Cruz, Adversary Proceeding No. 07-90419 (the "Sampson Adversary"). Bradfield and
6 Sampson are represented by the same attorney in their respective adversary proceedings and
7 the complaints are virtually identical, albeit the allegations differ with respect to the
8 plaintiffs and their relationship to Debtor and Cruz.

9 Bradfield's Motion for Leave to Amend (the "Motion"), filed concurrently with a
10 virtually identical motion in the Sampson Adversary (the "Sampson Motion") on August 6,
11 2008, seeks leave to add five new causes of action objecting to Debtor's discharge under
12 multiple subsections of section 727 of the Bankruptcy Code.¹ Although the Complaint
13 includes a prayer for relief under section 727 and is captioned a complaint "To Determine
14 Nondischargeability of Debt and to Deny Discharge [11 U.S.C. § 523]", it does not include
15 causes of action under section 727.

16
17 The initial hearing on the Motion was held concurrently with the hearing on the
18 Sampson Motion on September 4, 2008. The Court invited and authorized the parties to file
19 supplemental briefs addressing concerns and issues raised by the Court at the hearing. The
20 Court's issues include (1) whether amendment to add causes of action under section 727
21 would be futile given the time limits for filing actions to deny discharge set forth in Rule
22 4004(a); and (2) fundamental, definitional and/or factual weaknesses in Bradfield's proposed
23 9th, 10th and 11th claims for relief.² The parties agreed that the matter appropriately may
24 be decided upon the supplemental briefing without additional oral argument.

25
26 ¹ Hereinafter, references to code sections refer to Title 11 of United States Codes, also referred to
as the "Bankruptcy Code" unless otherwise specified. References to Rules refer to the Federal
Rules of Bankruptcy Procedure, unless otherwise indicated.

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28 ² Bradfield conceded that the Complaint did not contain causes of action nor did it "set forth
charging allegations supporting the determination of nondischargeability under §727" (Motion 4:21-

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2 This Court has jurisdiction to determine this matter pursuant to 28 U.S.C. §§ 1334
3 and 157(b)(1) and General Order No. 312-D of the United States District Court for the
4 Southern District of California. This is a core proceeding pursuant to 28 U.S.C.
5 § 157(b)(2)(I) & (J).
6

7 **BACKGROUND FACTS**
8

9 Debtor filed his voluntary chapter 7 petition on March 8, 2007. The 341a first
10 meeting of creditors was held April 11, 2007 and continued to and concluded on May 11,
11 2007. Bradfield filed the Complaint June 11, 2007. No discharge has been entered.³
12

13 Discovery was not initiated in this adversary proceeding until early 2008. Discovery
14 obtained by Bradfield at that time included documents that Bradfield believes contradict
15 Debtor's 341a testimony that he was unemployed and had no source of income himself.
16 Based in part on Bradfield's interpretation of the discovery, Bradfield filed the Motion
17 arguing that Debtor should be denied discharge primarily based on alleged false
18 concealment of income and Debtor's refusal to answer questions posed in deposition.
19 Debtor opposes the Motion on the grounds that Bradfield unnecessarily delayed initiation of
20 discovery, to Debtor's general prejudice, and that the proposed amendment would only
21 increase fees and costs in the action.
22

23 Neither the Motion nor Debtor's opposition thereto addresses timeliness of the
24 proposed amendments. The deadline under Rule 4004(a) required filing of any objection to
25 discharge no later than June 11, 2007, whereas Bradfield's Motion was not filed until

26 _____
27 22), and that the Motion did not include an argument for "relation back."

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

1 fourteen months later. The Court authorized supplemental briefing on the primary issue of
2 timeliness and asked the parties to consider the published decisions rendered in *Citibank v.*
3 *Emery (In re Emery)*, 132 F.3d 892 (2nd Cir. 1998) and *Employers Mutual Casualty Co. v.*
4 *Lazenby (In re Lazenby)*, 253 B.R. 536 (Bankr. W.D. Ark. 2000) that diverge on the issue of
5 whether an action filed after the Rule 4004(a) deadline may go forward, either objecting to
6 discharge or to revoke discharge, based on fraud discovered during the "gap period"
7 between the Rule 4004(a) deadline and entry of discharge.

8
9 In Bradfield's initial supplemental brief filed October 14, 2008, Bradfield indicated
10 he would not go forward with the proposed 9th, 10th and 11th causes of action in his First
11 Amended Complaint. Bradfield therefore did not respond to the Court's issues raised as to
12 these three abandoned proposed claims.

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

22
23 Debtor's supplemental opposition argues the Motion should be denied based on the
24 Rule 4004(a) bar date, because the section 727(a) causes of action do not relate back to the
25 Complaint. Debtor argues that even if the Court were to deem discharge entered as of the
26 4004(a) bar date, an action to revoke discharge would not be timely because the Motion was
27 filed more than one year later. In addition to the bar date arguments, Debtor contends that
28

1 the alleged facts supporting section 727(a) discharge denial were in Bradfield's possession
2 prior to the applicable bar date for such action, and Bradfield's interpretation of the term
3 "unemployed" is, in fact, a misinterpretation that fails to provide any support for Bradfield's
4 allegations of Debtor's fraudulent conduct.

5
6 **DECISION**

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8 The issue before the Court here is substantively identical to the issue presented in the
9 Sampson Adversary: whether justice requires that the Court allow Bradfield to file an action
10 to deny Debtor's discharge after the Rule 4004(a) bar date based on Bradfield's allegation
11 that he had no knowledge of facts to support a section 727(a) action until post-bar date and a
12 section 727(d) action to revoke discharge appears premature where no discharge has been
13 entered. Concurrently herewith, the Court is setting forth its decision on the Sampson
14 Motion in the Sampson Adversary in a written Memorandum Decision (the "Sampson
15 Memorandum Decision"). Based on the reasoning set forth in the Sampson Memorandum
16 Decision, which is incorporated herein by this reference, this Court concludes that justice is
17 best served by allowing Bradfield leave to amend the Complaint on a limited basis. The
18 Court makes no finding of the adequacy of Bradfield's proposed amendments, nor does this
19 decision make any determination regarding when Bradfield learned of the Debtor's alleged
20 misconduct or when he should have discovered it; these are matters for judgment on the
21 pleadings, summary judgment, or trial.

22
23 Bradfield is directed to submit an order consistent with this Memorandum Decision
24 within ten days.

25 DATED: January 8, 2009

26 
27 LAURA S. TAYLOR, JUDGE
28 United States Bankruptcy Court