SO ORDERED.

SIGNED this 11 day of March, 2021.

Austin E. Carter
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

In re:	)	
	)	Case No. 20-10577-AEC
David Cory Kitchens and	)	
Kimberly J. Kitchens,	)	Chapter 13
	)	
Debtors.	)	
	)	
	)	
Craig Wheaton,	)	
	)	
Movant,	)	
	)	
v.	)	Contested Matter
	)	
David Cory Kitchens and	)	
Kimberly J. Kitchens,	)	
	)	
Debtors/Respondents.	)	
	)	

ORDER

Before the Court is Movant Craig Wheaton's *Motion to Stay Bankruptcy Pending Hearing on Debtor's Personal Liability and Motion for Extension of Time to File Complaint for Determination of Dischargeability of Debt* (Doc. 33). Movant

requests (1) an extension of the deadline to object to dischargeability of debt pursuant to 11 U.S.C. § 523(a)[1] and (2) a stay of the bankruptcy case and determination of personal liability. Movant seeks this relief so that he may explore possible theories under which Debtor David Kitchens might be held liable for the debt of a company of which Kitchens was an officer.

This Court has jurisdiction over this matter as a core proceeding under 28 U.S.C. §§ 157(b)(2)(I) and 1334(b). Based on the evidence presented (Affidavits at Doc. 45, 46) and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

I. Findings of Fact

The following facts are undisputed. Prior to this bankruptcy case, Debtor David Kitchens served as Chief Executive Officer, Chief Financial Officer, and Secretary of Karlee Communications, Inc. ("Karlee"), a company which he also owns. Movant filed a state court complaint against Karlee in 2016. Movant was represented by Robert W. Bauer in the state court matter; Bauer also represents Movant in this bankruptcy case. Both Karlee and Movant were represented and involved in the case through 2019. At some point during pendency of the state court case, Karlee's counsel withdrew, resulting in Karlee's failure to appear at a noticed deposition and a hearing on motion for summary judgment. Because Karlee failed to appear at the hearing on motion for summary judgment, the court granted the motion and entered judgment on February 24, 2020 in favor of the Movant, awarding $29,770.19. After the judgment, Karlee failed to respond to attempts by Movant at post-judgment discovery, which triggered a state court order granting a motion to compel and threatening contempt.

[1] Although the Motion cites both §§ 523(a) and 727(a), at the initial hearing on the Motion, the Movant clarified that he sought only to extend the deadline for filing of complaint to determine dischargeability under § 523(a).

The Debtors filed this bankruptcy case on July 10, 2020 (Doc. 1). The Debtors' Schedule A/B includes the Debtors' interest in Karlee, as well as in Raynet, Inc., another entity that Debtors owned (discussed later). The Notice of Chapter 13 Bankruptcy Case (Doc. 6) was served on Movant's attorney, Bauer, on July 15, 2020 (Doc. 7). That Notice reflected that the Debtors' § 341 Meeting of Creditors would be conducted on August 20, 2020, via teleconference (Doc. 6).

On August 5, 2020, both Movant and his attorney were served with the Debtors' Motion to Avoid Lien (Doc. 11).[2] On August 26, 2020, Movant, through his attorney, responded with opposition to the Motion to Avoid Lien (Doc. 17, 18).

Other than the response to the above-referenced avoidance motion, Movant took no action within this bankruptcy case. Movant failed to make any requests under Bankruptcy Rule 2004, such as an examination or a document production; nor did he seek discovery on an informal basis. Neither Movant nor his attorney attended the § 341 Meeting of Creditors.

The deadline for all creditors to file a complaint to challenge dischargeability of debts expired on October 19, 2020 (Doc. 6). Movant filed the instant Motion on the last date of the objection period, October 19, 2020 (Doc. 33). Despite his inactivity during the objection period, Movant now seeks an extension of time to take discovery that was available to him earlier during this case.

The Court held hearings on the Motion on November 19, 2020 and December 17, 2020.

II. Conclusions of Law

Under Bankruptcy Rule 4007(c), objections to dischargeability under § 523 must be filed no later than sixty days following the first date set for the § 341 meeting of creditors. Fed. R. Bank. P. 4007(c). This deadline is to be interpreted

[2] This motion was withdrawn as there exists no recorded judgment against the Debtors (Doc. 25).

strictly, and in a manner consistent with the Code's policies ... favor[ing the] fresh start for the debtor, and [the] prompt administration of the case." *In re Woods*, 260 B.R. 41, 43 (Bankr. N.D. Fla. 2001) (citation omitted); *see also In re Duncan*, Case No. 09-01255-TOM7, 2009 WL 2849539, at *5 (Bankr. N.D. Ala. Aug. 31, 2009).

A court has discretion to extend the deadline established by Bankruptcy Rule 4007(c) for cause. *See* Fed. R. Bankr. P. 4007(c). The burden of proof to show cause is on the Movant. *See In re Bressler*, 601 B.R. 318, 333 (Bankr. S.D.N.Y. 2019) ("The creditor asserting the non-dischargeability of a debt bears the burden of proof by a preponderance of the evidence.").

"Cause is not defined in the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure; therefore, the determination is committed to the Court's discretion." *In re Ballas*, 342 B.R. 853, 856 (Bankr. M.D. Fla. 2005), aff'd, 212 Fed. Appx. 867 (11th Cir. 2006). Bankruptcy courts in the Eleventh Circuit apply the following factors in analyzing cause: (1) whether the debtor refused in bad faith to cooperate; (2) whether the creditor had sufficient notice of the deadline and information so as to file an objection; (3) the possibility that proceedings pending in another forum will result in collateral estoppel on the relevant issues; (4) whether the creditor exercised diligence; and (5) the complexity of the case. *In re Ballas*, 342 B.R. at 856; *In re Duncan*, 2009 WL 2849539, at *4.[3]

"[T]he most important factor is whether a creditor exercised diligence." *In re Ballas*, 342 B.R. at 856; *In re Duncan*, 2009 WL 2849539, at *4; *see also Littell v. Littell (In re Littell)*, 58 B.R. 937, 938 (Bankr. S.D. Tex. 1986) ("Had movants used due diligence, they could have obtained the necessary information for timely preparation of a complaint."). Indeed, "[a] lack of diligent effort by a creditor can be

[3] The standard for "cause" under Bankruptcy Rule 4007(c) is the same as "cause" for an extension of the deadline to object to a debtor's discharge under Bankruptcy Rule 4004(b). *See In re Chatkhan*, 455 B.R. 365, 367 (Bankr. E.D.N.Y. 2011). Some of the cases cited in this Order include consideration of "cause" under Bankruptcy Rule 4004(b).

fatal to a creditor's last-minute attempt to achieve an extension of the deadline." *In re Woods*, 260 B.R. at 44-45; *see also In re Nowinski*, 291 BR 302, 306 (Bankr. S.D.N.Y. 2003) ("Knowledge of the deadline coupled with the failure to diligently seek discovery is, absent unusual circumstances, fatal to an extension motion"); *In re Chatkhan*, 455 B.R. 365, 368 (Bankr. E.D.N.Y. 2011) ("[T]here can be no cause justifying an extension of time . . . where the party seeking extension failed to diligently pursue discovery prior to expiration of the deadline."); *Western Wood Fabricators, Inc. v. Sirmans (In re Sirmans)*, No. CIV. S-08-2223 LLK, 2009 WL 1456813, at *3 (E.D. Cal. May 21, 2009) ("[C]ourts have . . . held that the creditor's counsel's failure to diligently pursue discovery was grounds to deny the motion for an extension.").

Here, Movant failed to conduct any discovery of the Debtors, formal or informal, prior to filing the instant motion for extension of time. At the November 19, 2020, hearing, Movant's counsel suggested that lengthy process of *pro hac vice* admission yielded the delay in his taking action in this case. This argument lacks merit as Movant's counsel was admitted *pro hac vice* on August 26, 2020, almost two months before the expiration of the period to object to dischargeability. Indeed, Movant's counsel filed two pleadings that date, an *Objection to Motion to Avoid Judicial Lien* (Doc. 17) and an *Amended Objection to Motion to Avoid Judicial Lien* (Doc. 18). Movant's counsel clearly was able to get filings on the docket and take action in this case. Moreover, before his *pro hac* admission was finalized, Movant's counsel could have approached Debtors' counsel with an informal discovery request, but such action was not taken.[4]

[4] At the December 17, 2020 hearing, Movant suggested that he attempted to contact Debtors' attorney on one occasion after the commencement of this case—by returning a call initiated by Debtors' attorney. The Court finds that this *de minimis* attempt at communication fails to meet the level of due diligence necessary to establish cause under Bankruptcy Rule 4007(c).

Other than the suggestion of delay connected to Counsel's *pro hac vice* admission, Movant provides no justification for his failure to act in this case prior to the last day of the dischargeability objection period. Instead, he argues that Movant is entitled to an extension of the dischargeability deadline because the Debtors' entity Karlee failed to respond to post-judgment discovery in the state court action prior to the Debtors' filing of this case. Movant also argues that Debtors potentially committed fraud by incorporating a new entity sharing the same address as Karlee, but with the Secretary of State's company officer records reflecting the reversal of Debtor David Kitchens' middle and last names. Movant suggests that the reversal of these middle and last names impeded creditors from connecting the new entity, Raynet, to the Debtors. Movant seeks extension of time for discovery based on Debtors' alleged obstruction in this Secretary of State registration for Raynet (even though Movant acknowledges that he does not know if this swapping of names was intentional).

In opposition, Debtor David Kitchens testified in his affidavit that Raynet is a separate entity involved in different trade than Karlee[5] (Doc. 46). The Debtors also point out that their Schedule A/B includes their interests in both Karlee and Raynet (Doc. 1).

The Court is not persuaded by Movant's arguments. The facts asserted by Movant in support of his extension request were known or available to him before this bankruptcy case was filed. Movant was certainly aware that Karlee had failed to respond to post-judgment discovery in the state court action. Likewise, Raynet was incorporated and in existence before the Debtors filed this case. The Debtors listed their interest in Raynet on their Schedule A/B in the same section where they

[5] Debtor David Kitchens testifies in his affidavit that: "Karlee Communications was a business primarily concerned with underground construction. . . . Raynet, Inc. is an internet service provider and wholesaler. Raynet, Inc. does not engage in the business of underground construction." (Doc. 46, ¶¶ 6-7).

listed their interest in Karlee.[6] Movant offers no explanation for his lack of diligence in serving timely discovery or taking any action in this case related to his argument of nondischargeability prior to his filing of the instant motion on the last day of the dischargeability objection period.

The Court finds persuasive the case of *Western Wood Fabricators, Inc. v. Sirmans (In re Sirmans)*, No. CIV. S-08-2223 LLK, 2009 WL 1456813 (E.D. Cal. May 21, 2009). There, the district court affirmed the bankruptcy court's order denying a request for extension of time under similar circumstances. Like Movant in our case, the requesting creditor in *Sirmans* sought additional time to take discovery related to a pre-petition state court case. *Id*. at *1. Like Movant, the creditor in *Sirmans* argued that the debtor's lack of response in the pre-petition discovery should justify the requested extension. The bankruptcy court denied the creditor's motion.

In affirming the bankruptcy court, the district court explained that "courts have . . . held that the creditor's counsel's failure to diligently pursue discovery was grounds to deny the motion for an extension." *Id*. at *3. The court reasoned that the bankruptcy court's order evaluated the entirety of the situation, acknowledging that the creditor experienced difficulty obtaining discovery from the debtor in the state court proceeding, but determined that such difficulties failed to justify the creditor's failure to seek discovery in the bankruptcy case or file a complaint. *Id.* Thus, the district court found that the bankruptcy court's order satisfied the standard for cause and affirmed the order denying extension of time.

Similarly, in *In re Woods*, 260 B.R. 41 (Bankr. N.D. Fla. 2001), the bankruptcy court found no cause to extend the filing deadline where the creditor

[6] Movant did not testify when he became aware of Raynet's existence, but that factor is immaterial, as Movant is charged with knowledge of the Debtors' interest in it no later than the filing of the Debtors' Schedules. Moreover, Movant has failed to demonstrate any relevance of Raynet to the present situation.

failed to attend the § 341 Meeting and failed to take any other steps during the objection period. Analogous to the case at bar, the creditor in *Woods* waited until the last day of the objection period to file its motion for extension. *Id.*, at 42. Also like Movant, the creditor in *Woods* failed to establish its "attendance at the section 341 meeting, the scheduling of a Rule 2004 examination of the Debtor, or independent investigation prior to the filing deadline." *Id.* at 43.[7]

As did the courts in *Sirmans* and *Woods*, this Court finds that Movant has failed to adequately explain his inaction during the bankruptcy case and has failed to demonstrate sufficient diligence to establish cause for his requested extension. A myriad of other cases support this Court's holding. *See, e.g., Emond v. Ryan McCarthy Investments, LLC (In re Emond)*, BAP No. NV-19-1157-GLB, Bk. No. 3:18-bk-51350-BTB, 2020 WL 3071975 (9th Cir. B.A.P. June 5, 2020); *Katz v. Miles (In re Miles)*, 453 B.R. 449 (Bankr. N.D. Ga. 2011); *In re Duncan,* 2009 WL 2849539; *In re Ballas,* 342 B.R. 853; *In re Nowinski,* 291 B.R. 302; *Kohl v. Loefgren (In re Loefgren)*, 305 B.R. 288 (W.D. Wisc. 2003).

The other *Ballas* factors also weigh against Movant. The Debtors did not refuse in bad faith to cooperate with Movant's efforts to obtain information, as Movant made no such efforts. Movant had sufficient notice of the dischargeability objection deadline and, as noted above, had relevant information. This record reveals no possibility that proceedings pending in another forum will result in collateral estoppel on the relevant issues. And last, this case is not so complex as to justify Movant's failure to take action earlier in the bankruptcy case. *See In re Ballas*, 342 B.R. at 856.

As to the request for stay of this case so that the Court may determine personal liability of Debtor David Kitchens for the debt of Karlee, the Movant cites

[7] Attendance at the § 341 Meeting in this case would have been particularly easy, even for an out-of-town party like Movant, as it was held via teleconference due to the ongoing COVID-19 crisis.

no authority in support of his request. The Court suspects that this failure is due to the lack of existing authority. Rather than stay the bankruptcy case until the court determines personal liability, it is incumbent upon a creditor in a nondischargeability action to establish the debt as part of his case. Indeed, establishing that a debt exists is the first element of a dischargeability action. *Worldwide Equip. of S.C., Inc. v. Willoughby (In re Willoughby)*, No. 16-57059-WLH, Adv. No. 16-5164-WLH, 2017 WL 3741256, at *3 (Bankr. N.D. Ga. Aug. 30, 2017) (holding that first element of creditor's nondischargeability action is for creditor to establish that debtor was liable as corporate officer for debt of his company); *see also Siragusa v. Collazo (In re Collazo)*, 817 F.3d 1047, 1051 (7th Cir. 2016) (holding that "the establishment of the debt itself" is the first of two distinct elements in dischargeability action). Further, "no extension is warranted to allow a creditor to engage in nothing more than a fishing expedition." *In re Loefgren*, 305 B.R. at 292 (citation omitted). Movant is not entitled to put the bankruptcy case on hold while he fishes for a theory by which he might assert that the Debtor is liable for the corporate debt of Karlee.

III. Conclusion.

For the foregoing reasons, the Court finds that Movant has failed to demonstrate cause for the requested extension of time under Bankruptcy Rule 4007(c) and has failed to demonstrate why this case should be stayed pending a determination of personal liability. The Court DENIES the Motion.

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