

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF GEORGIA  
COLUMBUS DIVISION

In the Matter of: : Chapter 7  
: :  
RICHARD J. DENZIK and : :  
PATRICIA C. DENZIK, : :  
: :  
Debtors : Case No. 98-41035 RFH  
: :  
: :  
COLUMBUS BANK AND TRUST : :  
COMPANY, : :  
: :  
Plaintiff : :  
: :  
: :  
vs. : :  
: :  
: :  
RICHARD J. DENZIK and : :  
PATRICIA C. DENZIK, : :  
: :  
Defendants : Adversary Proceeding  
: No. 98-4072

BEFORE

ROBERT F. HERSHNER, JR.  
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Plaintiff: ROBERT K. IMPERIAL and  
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For Defendants: FIFE M. WHITESIDE  
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**MEMORANDUM OPINION**

Columbus Bank and Trust Company, Plaintiff, filed on March 7, 2000, its Plaintiff's Motion to Amend Complaint to Determine Dischargeability of Debt and Objecting to Discharge. Richard J. Denzik and Patricia C. Denzik, Defendants, filed on March 23, 2000, their response. The Court, having considered the motion, the response, and the arguments of counsel, now publishes this memorandum opinion.

Defendants filed a joint petition under Chapter 7 of the Bankruptcy Code on May 15, 1998. The bar date to file a complaint objecting to discharge or to file a complaint objecting to the dischargeability of a debt was, by order of this Court, extended until November 2, 1998. Thus, the bar date for filing complaints was November 2, 1998. See Fed. R. Bankr. P. 4004(a); 4007(c).

Plaintiff is a judgment creditor of Richard Denzik. Plaintiff filed on November 2, 1998, its Complaint to Determine Dischargeability of Debt and Objecting to Discharge. Defendants filed a response on December 9, 1998.

Plaintiff, in its complaint, contends that (1) Defendants, with the intent to hinder, delay, or defraud, set up a real estate business in Patricia Denzik's name in order to transfer, remove, or conceal certain property; (2)

Defendants made a false oath or account by understating the value of their personal property; (3) Defendants failed to explain the dramatic decrease in Richard Denzik's income; (4) Defendants failed to explain the relationship between the amount of their unsecured obligations and the value of their assets; (5) Defendants caused a willful and malicious injury to Plaintiff; and (6) Richard Denzik published false financial statements upon which Plaintiff reasonably relied.

Plaintiff, in Counts 1, 2, and 3 of its complaint, contends that Defendants' discharge should be denied under section 727(a)(2), (4)(A), and (5) of the Bankruptcy Code.<sup>1</sup> Plaintiff contends, in Counts 4 and 5, that certain obligations owed to Plaintiff are nondischargeable under section 523(a)(2)(B) and (6) of the Bankruptcy Code.<sup>2</sup>

Plaintiff, in its motion to amend its complaint, "seeks to amend its Complaint by more specifically setting forth facts it has learned through discovery conducted in this case which Plaintiff contends supplements and supports various counts set forth in its original complaint." Plaintiff's Motion to Amend Complaint to Determine Dischargeability of Debt and Objecting to Discharge, paragraph 4 (filed March 7, 2000).

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<sup>1</sup> 11 U.S.C.A. § 727(a)(2), (4)(A), (5) (West 1993).

<sup>2</sup> 11 U.S.C.A. § 523(a)(2)(B), (6) (West 1993).

Plaintiff, in its amended complaint, seeks to add a new Count 6, which contends that Defendants' discharge should be denied under section 727(a)(3) of the Bankruptcy Code.<sup>3</sup>

Plaintiff's motion to amend its complaint was filed after the bar date to file a complaint objecting to discharge or to file a complaint objecting to dischargeability of a debt. See Fed. R. Bankr. P. 4004(a); 4007(c). Thus, Plaintiff's amended complaint, to be timely, must relate back to the filing of Plaintiff's original complaint. Federal Rules of Civil Procedure 15(c)(2),<sup>4</sup> applicable to this adversary proceeding,<sup>5</sup> provides:

Rule 15. Amended and Supplemental Pleadings

. . . .

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

. . . .

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

Fed. R. Civ. P. 15(c)(2).

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<sup>3</sup> 11 U.S.C.A. § 727(a)(3) (West 1993).

<sup>4</sup> Fed. R. Civ. P. 15(c)(2).

<sup>5</sup> Fed. R. Bankr. P. 7015.

In Moore v. Baker<sup>6</sup> the Eleventh Circuit Court of Appeals stated:

Leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). While a decision whether to grant leave to amend is clearly within the discretion of the district court, a justifying reason must be apparent for denial of a motion to amend. In the instant case, the lower court denied leave to amend on the ground that the newly asserted claim was barred by the applicable statute of limitations and that allowing the amendment would, therefore, be futile. If correct, the district court's rationale would be sufficient to support a denial of leave to amend the complaint.

. . . The critical issue in Rule 15(c) determinations is whether the original complaint gave notice to the defendant of the claim now being asserted.

989 F.2d at 1131.

"Thus, amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the preceding pleading fall within Rule 15(c). But, if the alteration of the original statement is so substantial that it cannot be said that defendant was given adequate notice of the conduct, transaction, or occurrence that forms the basis of the claim or defense, then the amendment will not relate back and will be time barred if the limitations period has expired." 6A

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<sup>6</sup> 989 F.2d 1129 (11<sup>th</sup> Cir. 1993).

Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, Civ. 2d § 1497 at 74-79 (1990).

In Terra International, Inc. v. Helms (In re Helms)<sup>7</sup> the creditor filed a timely complaint to determine the dischargeability of a debt under section 523(a)(2)(B) of the Bankruptcy Code. The creditor filed an amended complaint after the bar date. In the amended complaint, the creditor contended that the debtor's obligation was nondischargeable under section 523(a)(2)(A) based upon the same facts that were alleged in the original complaint. This Court allowed this part of the amended complaint. The creditor, in its amended complaint, also contended that the debtor's obligation was nondischargeable under section 523(a)(4) based upon additional facts that were not alleged in the original complaint. This Court did not allow this part of the amended complaint. This Court noted that the creditor was asserting a new cause of action through additional factual allegations.

See generally Hunt v. American Bank & Trust Co. of Baton Rouge Louisiana, 783 F.2d 1011, 1014 (11<sup>th</sup> Cir. 1986) (amended complaint asserting a separate incident of fraud did not relate back to date of original complaint).

The Court is persuaded that Plaintiff's amended complaint as to Counts 1, 2, 3, and 5 should be allowed.

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<sup>7</sup> Ch. 7 Case No. 96-60356, Adv. No. 96-6026 (Bankr. M.D. Ga. July 3, 1997) (Laney, J.).

Plaintiff is asserting additional factual allegations in support of the same causes of action asserted in its original complaint.

The Court is not persuaded that Plaintiff's amended complaint which seeks to add a new Count 6 should be allowed. In Count 6, Plaintiff contends that, during discovery, Defendants failed to produce certain bank statements, canceled checks, check registers, and deposit receipts. Plaintiff contends that Defendants' discharge should be denied under section 727(a)(3) because Defendants concealed, destroyed, or failed to keep or preserve information concerning their financial condition. None of these factual allegations nor any such cause of action under section 727(a)(3) was asserted in the original complaint. This is a substantial alteration of the original complaint which does not relate back and thus is barred by the bar date.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 15<sup>th</sup> day of June, 2000.

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ROBERT F. HERSHNER, JR.  
Chief Judge  
United States Bankruptcy Court