

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

In the Matter of:	:	Chapter 7
	:	
JOHN B. GROT,	:	
	:	
Debtor	:	Case No. 98-41493 RFH
	:	
	:	
WALTER W. KELLEY, Trustee for	:	
PASCOE BUILDING SYSTEMS,	:	
INC.,	:	
	:	
Plaintiff	:	
	:	
vs.	:	
	:	
JOHN B. GROT,	:	
	:	
Defendant	:	Adversary Proceeding No. 98-4082

BEFORE

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

COUNSEL:

For Plaintiff:

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For Defendant:

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MEMORANDUM OPINION

John B. Grot, Defendant, filed on July 16, 2001, Defendant's Motion for Partial Summary Judgment. Walter W. Kelley, Trustee for Pascoe Building Systems, Inc., Plaintiff, filed a response on August 8, 2001. The Court, having considered the record and the arguments of counsel, now publishes this memorandum opinion.

Defendant was the president and CEO of Pascoe Building Systems, Inc. Pascoe filed a petition for relief under Chapter 11 of the Bankruptcy Code on September 4, 1997.¹ Defendant filed, as an individual debtor, a petition for relief under Chapter 7 of the Bankruptcy Code on July 13, 1998.

Pascoe's Official Creditors' Committee filed on December 21, 1998, a complaint to deny Defendant's discharge and to determine that Defendant's obligations to Pascoe are nondischargeable in bankruptcy.² The complaint is 40 pages in length, has 205 numbered paragraphs, and contains 20 counts. The complaint contends that Defendant should be denied a discharge under section

¹ See In re Pascoe Building Systems, Inc., Case No. 97-41881 RFH (petition filed Sept. 4, 1997).

² The Court entered an order on October 20, 1998, authorizing the Official Creditors' Committee to file this adversary proceeding on behalf of Pascoe Building Systems, Inc.

727(a)(2), (3), (4), (5), (6), and (7) of the Bankruptcy Code.³ The complaint also contends that Defendant's obligations to Pascoe are nondischargeable under section 523(a)(2)(A), (4), and (6) of the Bankruptcy Code.⁴

The complaint contends, in essence, that Defendant destroyed Pascoe's business records, misappropriated Pascoe's assets for Defendant's personal advantage, made false oaths or accounts in Pascoe's bankruptcy case, and caused Pascoe to file false bankruptcy schedules and statements. The complaint also contends that Defendant made false oaths or accounts in his bankruptcy case, that Defendant failed to produce his financial records, and that Defendant has hindered the Chapter 7 trustee.

The Court entered an order on March 23, 1999, converting Pascoe's Chapter 11 case to a Chapter 7 case. Walter W. Kelley was appointed to be the Chapter 7 Trustee of Pascoe's bankruptcy estate. The Court entered an order on March 13, 2000, substituting Mr. Kelley in the place of Pascoe's Official Creditors' Committee as the plaintiff in this adversary proceeding.

The Court entered an order on December 4, 2000, providing that discovery in this adversary proceeding was to be completed by February 19, 2001. The Court held a final pretrial hearing on May 29, 2001. The Court entered a pretrial

³ 11 U.S.C.A. § 727(a)(2), (3), (4), (5), (6), (7) (West 1993).

⁴ 11 U.S.C.A. § 523(a)(2)(A), (4), (6) (West 1993).

order on May 29, 2001.⁵

Defendant, in his motion for partial summary judgment, contends that Plaintiff has attempted to amend his complaint through the pretrial order. Defendant also contends that an amendment to the complaint at this late date would cause undue delay and undue prejudice and would not relate back to the filing of the complaint.⁶ Defendant contends that the pretrial order asserts new causes of action under section 523(a)(4) and (6) which were not asserted in the complaint. Defendant also contends that Plaintiff failed to plead with particularity certain acts of fraud.

Federal Rules of Civil Procedure 8 and 9⁷ provide, in part, as follows:

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

⁵ Defendant, in paragraph 2(b) of the pretrial order, reserved the right to file this motion for summary judgment. Defendant's counsel advised the Court at the pretrial hearing that Defendant would file its motion for summary judgment by July 16, 2001.

⁶ Defendant relies on Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001) (amendment to complaint need not be allowed where there has been undue delay or bad faith, where amendment would cause undue prejudice, or where amendment would be futile).

⁷ Fed. R. Civ. P. 8 and 9. These rules apply in adversary proceedings. Fed. R. Bankr. P. 7008 and 7009.

....

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

....

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

Fed. R. Civ. P. 8(a), (e)(1), (f).

Rule 9. Pleading Special Matters

....

(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed. R. Civ. P. 9(b).

Wright and Miller in their treatise on federal procedure state:

§ 1215. Statement of the Claim—In General

The test of a complaint's sufficiency is whether the complaint is detailed and informative enough to enable the defendant to respond. According to Rule 8(a)(2), the heart of an affirmative federal pleading need consist only of "a short and plain statement of the claim showing that the pleader is entitled to relief." All that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity. This portion of Rule 8 indicates the objective of the rules [is] to avoid technicalities and to require that the pleading discharge the function of giving the

opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved; the discovery process bears the burden of filling in the details.

5 A. Wright & A. Miller Federal Practice and Procedure § 1215 (2d 1990 & Supp. 2001).

“Unlike pleadings, usually based on information and belief, the pre-trial order defining the issues is the result of discovery in which . . . both parties hereto know the testimony of the other’s witnesses.” Case v. Abrams, 352 F.2d 193, 195 (10th Cir. 1965).

The pretrial order controls the subsequent course of the action unless modified by a subsequent order. Fed. R. Bankr. P. 7016; Fed. R. Civ. P. 16(e).

The Court has carefully compared Plaintiff’s averments in the complaint with Plaintiff’s averments in the pretrial order. The Court is persuaded that, with one exception, the averments satisfy the requirement that Defendant had “fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved.” The Court also is persuaded that the averments of fraud are stated with particularity.

The pretrial order, in the first paragraph of section 5 on pages 2 and 3, contends, in part, that Defendant caused Pascoe to fail to fund its employee health insurance plan and employee pension plan. Plaintiff contends that this failure either was a fraud or defalcation committed by Defendant while acting in a fiduciary

capacity or was a willful injury to Pascoe's estate. The Court does not find any reference to this averment in the complaint. The Court is persuaded that Defendant's motion for partial summary judgment should be sustained as to this contention, which is set forth in the first paragraph of section 5 on pages 2 and 3 of the pretrial order.

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

DATED the 17th day of December, 2001.

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