UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 7
JOSEPH A. TOMCZAK	:	
Debtor	:	Bankruptcy No. 00-12096F

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MEMORANDUM

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By BRUCE FOX, Bankruptcy Judge:

Mr. Anthony Cerone has filed a pleading styled "Motion to Determine the Dischargeability of Debt." The motion makes reference to certain non-dischargeability provisions of the Bankruptcy Code, specifically: "11 U.S.C. § 523(a) (2)(A) (4)." The motion also makes reference to certain provisions of the Code which address the denial of a bankruptcy discharge: viz, "11 U.S.C. § 727(a)(2) (4) (5)." The text of the motion itself may seek both forms of relief stating, in paragraph 8, that the prepetition debt is "non-dischargeable," and requesting in the "Wherefore" clause that the "Court deny the discharge of the outstanding debt ...."

Federal Rules of Bankruptcy Procedure 4004(a) provides that a request to deny a chapter 7 debtor a discharge shall be made by "complaint." Similar, Rule 4007(c) calls for a creditor to seek a determination of non-dischargeability under sections 523(a)(2), (a)(4), (a)(6) or (a)(15) by way of filing a "complaint." In both instances, such a complaint must be filed "no later than 60 days after the first date set for the meeting of creditors ...." Rule 4004(a); Rule 4007(c).

On February 17, 2000, Joseph Tomczak filed a voluntary petition in bankruptcy under chapter 7. The first date set for the meeting of creditors was April 7, 2000. Thus, sixty days from that hearing date was June 6, 2000. Mr. Cerone's "motion" was filed on May 30, 2000 - within the deadlines set by Rules 4004 and 4007.

Despite its timeliness, the debtor now seeks to dismiss that motion because the relief was not sought in the form of a complaint. No other basis for dismissal is mentioned.[1] Were such relief granted, the debtor also argues that the movant would now be precluded from filing the proper pleading due to the passage of the bar date. Indeed, the debtor argues that a bankruptcy court has no discretion but to dismiss with prejudice the instant motion. Debtor's Memorandum, at 2.

As a general principle, federal courts are hesitant to issue orders depriving parties from obtaining a hearing on the merits of their claims. Whether the issue be one of setting aside a default, see, e.g., Medunic v. Lederer, 533 F.2d 891, 893-94 (3d Cir. 1976) ("a standard of 'liberality,' rather than 'strictness' should be applied in acting on a motion to set aside a default judgment, and that '(a)ny doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits'") (quoting Tozer v. Charles A. Krause Mill. Co., 189 F.2d 242, 245-46 (3d Cir. 1951)), one of sanctions, see, e.g., Poulis v. State Farm Fire and Cas. Co., 747 F.2d 863, 867-68 (3d Cir. 1984) ("dismissals with prejudice or defaults are drastic sanctions, termed "extreme" by the Supreme Court ... and are to be

[1]For example, the debtor does not argue that the pleading is unclear or that it fails to state a cause of action.

reserved for comparable cases"), or one of improper pleading, see, e.g., 2 Moore's Federal Practice, § 12.34[5] at 12-76.1 (3d ed. 1999) ("[U]nless the facts alleged in the complaint clearly show that the plaintiff has no legitimate claim, courts ordinarily will allow the plaintiff leave to amend the complaint" if it is defective), federal courts will preclude a party from a hearing on the merits only in the strongest instances. This is especially true when the dispute concerns the enforcement of a procedural rule, as Fed.R.Bankr.P. 1001 echoes Fed.R.Civ.P. 1 in declaring that procedural rules will be "construed to secure the just … determination of every case and proceeding."

In bankruptcy cases, there are four types of pleadings which can initiate judicial actions. Some procedural rules call for adversary proceedings, see, e.g., Rules 4004, 4007, 7001 which are commenced by complaints, accompanied by a summons. See Fed.R.Bankr.P. 7001, et seq. Others call for contested matters, see, e.g., Rules 4001, 6006, which are commenced by motions. See Fed.R.Bankr.P. 9014. A third type of proceeding mentioned in the rules, see, e.g., Fed.R.Bankr.P. 1006(b)(1), is styled an "application." See generally In re O'Brien Environmental Energy, Inc., 188 F.3d 116, 124 n.5 (3d Cir. 1999). Finally, Rule 3007 refers to "objections" to proofs of claim as the pleading which will initiate claims litigation.

Consistent with the preference of federal courts to resolve claims on the merits, mentioned earlier, courts are loathe to deny a hearing or trial to a party due solely to the mis-styling of a pleading. For example, Fed.R.Bankr.P. 7008 - which governs adversary proceedings - incorporates Fed.R.Civ.P. 8. Rule 8(a) provides that a complaint or civil action shall be commenced by a pleading which contains, inter alia, a short and plain statement of the claim as well as a demand for the relief sought.

Thus, unless there is some prejudice suffered by a party caused by the filing of an improper pleading, a "motion" may be treated as though it were a "complaint" if it contains a short and plain statement of the claim asserted. Accord, e.g., In re Cannonsburg Environmental Associates, Ltd., 72 F.3d 1260, 1265 (6th Cir. 1996) ("although the Trustee should have filed an adversary complaint instead of a motion, this error was harmless"); In re Zolner, 249 B.R. 287, 292 (N.D.Ill. 2000) ("unless the party is able to demonstrate prejudice by the failure to file an adversary proceeding, a court will find the error [in filing a motion] constitutes harmless error"); In re Orfa Corp. of Philadelphia, 170 B.R. 257, 275 (E.D.Pa. 1994) ("Nevertheless, in some cases where a matter was improperly initiated by motion as a contested matter, 'courts have concluded that where the rights of the affected parties have been adequately presented so that no prejudice has arisen, form will not be elevated over substance and the matter will be allowed to proceed on the merits as originally filed'" (quoting In re Command Services Corp., 102 B.R. 905, 908 (Bankr. N.D.N.Y. 1989); In re Little, 220 B.R. 13, 17 (Bankr. D.N.J. 1998) ("Generally speaking, most courts are willing to overlook deficiencies in a pleading, including errors in presenting a complaint as a motion and vice versa, so long as the pleading substantially complies with the rules of pleadings.... Such pleading deficiencies are considered harmless error when it can be demonstrated that there exists no prejudice to the non-moving party because the filed pleading provides the non-movant with notice of the nature of the pending litigation"); In re Vandy, Inc., 189 B.R. 342, 346 (Bankr. E.D.Pa. 1995) (where no party raised the issue, and where no prejudice would result, the bankruptcy court overlooked the error in filing a motion instead of a complaint). See also In re Zinke, 1991 WL

107815, *4 (E.D.N.Y. 1991) (an "objection" submitted in response to a complaint would be treated as an "answer" to the complaint).

As a result, in In re Rand, 144 B.R. 253, 255-56 (Bankr. S.D.N.Y. 1992), the bankruptcy court held that a letter, which "sufficiently laid out [the creditor's] objection to the dischargeability of her debt," and which was filed before the Rule 4007 bar date, would be treated as though it were a complaint. The letter met the requirements of Rule 7008 in stating a claim and demanding relief.

Similarly, in In re Little a document styled "Objection to Discharge," which was not in the form of a complaint nor served with a summons, was treated as though it were a timely adversary proceeding. In so doing, the bankruptcy court noted that the pleading met the general requirements of Rule 7008 and thus gave adequate notice of the claim raised.

In In re Dominguez, 51 F.3d 1502, 1509 (9th Cir. 1995) The Ninth Circuit Court of Appeals "conclude[d] that the Discharge Memorandum, although a deficient pleading, is sufficient to place the debtor on notice of the [objection to discharge] against him and substantially complies with the notice pleading requirements of Rule 7008." See also In re Pace, 130 B.R. 338, 340 (Bankr.N.D.Fla. 1991) (upholding the validity of a dischargeability challenge captioned "objection" rather than "complaint," which the creditor filed with the court clerk on the last day for filing dischargeability complaints).

In the present dispute, Mr. Tomczak does not assert that the pleading filed by Mr. Cervone does not meet the requirements of Rule 7008. Compare In re Marino, 37 F.3d 1354 (9th Cir.1994) (an objection to a sale of property could not be considered

as a complaint seeking a determination of non-dischargeability). Nor does he suggest any prejudice to him were the motion treated as if it were a complaint.[2] The adversary proceeding discovery rules apply to contested matters, see Fed.R.Bankr.P. 9014, and the debtor will be accorded adequate time to prepare for trial. See In re Orfa Corp. of Philadelphia, 170 B.R. at 276 ("the Bank's claim of prejudice resulting [from the filing of a motion instead of a complaint] is frivolous").

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[2]The debtor referred at oral argument to the absence of service of a summons, which would accompany a complaint, as constituting some form of prejudice. I disagree.

As I noted in In re Antell, 155 B.R. 921, 930 (Bankr. E.D.Pa. 1992):

> The significance of a summons is derived from the long-standing notion that "process" is the means by which a court initially gains jurisdiction over a person, entity, or specific property. In re Brody, 97 B.R. at 160. See Lessee of Ambrose Walden v. Craig's Heirs, 39 U.S. 147, 154, 10 L.Ed. 393 (1840); Washington v. Norton Mfg., Inc., 588 F.2d 441, 443-44 (5th Cir.), cert. denied, 442 U.S. 942, 99 S.Ct. 2886, 61 L.Ed.2d 313 (1979).

Mr. Tomczak filed a voluntary petition in bankruptcy, thus consenting to this court's jurisdiction over him to resolve bankruptcy related disputes. Id., at 931. Therefore, the failure of Mr. Cervone to serve him with a writ of summons is not prejudicial in the sense that it is an improper attempt to gain jurisdiction over the debtor.

I recognize that in In re McKay, 732 F.2d 44, 46 n.3 (3d Cir. 1984), the Court of Appeals noted the argument that a large institutional creditor may not recognize the import of a motion instead of a complaint with summons, and thus the failure to proceed properly by complaint could deprive that creditor of adequate notice. This argument would not apply to this individual debtor, who clearly understands the importance of the relief being sought and received adequate notice.

The McKay decision is further distinguishable as it involved an attempt by a debtor to obtain relief against a creditor - not by filing a motion instead of a complaint - but by including a provision for that relief in a chapter 13 plan instead of filing a complaint. The Circuit Court of Appeals concluded that the procedural defect improperly shifted the burden from the debtor to the creditor and that the debtor's "pleading" did not meet the requirements of Rule 8. Id., at 48.

Rather, the debtor refers to decisions, such as Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), which uphold the enforceability of bankruptcy deadlines in general, and the bar date for filing an objection to discharge or to a dischargeability complaint in particular. Those decisions are inapposite, in that the pleading filed by Mr. Cervone was filed before the expiration of the June 6th deadline. The defect complained of here is not one of timeliness but one of form.[3] See generally, e.g., In re Emory, 219 B.R. 703 (Bankr.D.S.C. 1998) (a "defective complaint" objecting to the debtor's discharge, which was filed within the bar date, was timely and valid despite its numerous defects).

Therefore, I conclude that dismissal of the instant "motion" - simply because it is not styled a complaint - would be unwarranted. The debtor is on adequate notice of the relief sought by Mr. Cervone, and the basis for such relief. Furthermore, a dismissal on the procedural ground asserted could preclude a determination of the merits of these claims as the complaint deadline has expired. Accordingly, the debtor's motion to dismiss shall be denied by appropriate order.

[3]Indeed, the debtor's supporting memorandum does not refer to any decision which dismissed a challenge to a discharge or a non-dischargeability request filed within the deadline set by Rules 4004 and 4007 simply because it was not styled as a "complaint."

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ORDER

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AND NOW, this 19th day of July, 2000, for the reasons stated in the foregoing memorandum, the debtor's motion to dismiss the pleading entitled "Motion to Determine Dischargeability of Debt," filed by Mr. Anthony Cerone, is denied.

It is further ordered that the debtor shall have 15 days from the date of this order to answer this pleading.

Upon the filing of debtor's answer, the parties shall:

1. File on or before September 8, 2000, all motions for summary judgment;

2. File on or before September 8, 2000, all motions in limine;

3. Complete all discovery on or before September 29, 2000;

4. File a joint pretrial statement with a copy to chambers on or before October 27, 2000. The joint pretrial statement shall be signed by all counsel. It is the obligation of the movant's counsel to initiate the procedures for its preparation and to assemble and submit the proposed pretrial statement to the court. Movant's counsel shall submit a proposed joint pretrial statement to debtor's counsel not less than 7 days prior to the deadline for its submission. Counsel are expected to make a diligent effort

to prepare a proposed pretrial statement in which will be noted all of the issues on which the parties are in agreement and all of those issues on which they disagree. The proposed pretrial order shall govern the conduct of the trial and shall supersede all prior pleadings in the case. Amendments will be allowed only in exceptional circumstances and to prevent manifest injustice.

The joint pretrial statement shall be in the following form:

I. Statement of uncontested facts.

II. Statements of facts which are in dispute. (No facts should be disputed unless opposing counsel expects to present contrary evidence on the point at trial, or genuinely challenges the fact on credibility grounds.)

III. Damages or other relief. A statement of damages claimed or relief sought. A party seeking damages shall list each item claimed under a separate descriptive heading, shall provide a detailed description of each item and state the amount of damages claimed. A party seeking relief other than damages shall list the exact form of relief sought with precise designations of persons, parties, places and things expected to be included in any order providing relief.

IV. Legal issues presented and the constitutional, statutory, regulatory and decisional authorities relied upon. (Counsel should include a brief statement regarding which party has the burden of proof on each legal issue.)

V. Witnesses listed in the order they will be called along with a brief statement of the evidence the witness will give.

VI. A list of all exhibits to be offered into evidence which shall be serially numbered and physically marked before trial in accordance with the schedule.

VII. A list of each discovery item and trial deposition to be offered into evidence. (Counsel shall designate by page portion of deposition testimony and by number the interrogatories which shall be offered in evidence at trial.)

VIII. Estimated trial time.

5. A mandatory final pretrial/settlement conference shall be held on November 3, 2000 at 2:15 P.M. in Bankruptcy Courtroom No. 2 at the Robert N. C. Nix Federal Building & Courthouse, 900 Market Street, 2nd Floor, Philadelphia, Pennsylvania.

6. If the contested matter is not resolved prior to the conclusion of the conference, the contested matter shall then be placed in a trial pool beginning on a date set at the conference. Once the contested matter is placed in the trial pool, the case may be called on not less than twenty-four (24) hours' notice to counsel. Notice may be provided in writing or telephonically. Counsel may learn of the status of the contested matter in the pool from the courtroom deputy. Disputes shall be called to trial in the approximate order in which they enter the trial pool.

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BRUCE FOX
Chief Bankruptcy Judge

IN RE: Chapter 7
JOSEPH A. TOMCZAK Bankruptcy No. 00-12096F

Copies of the Bankruptcy Judge's Memorandum and Order dated July 19, 2000, were mailed on said date to the following:

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