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APR 11 2007

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

In re:)	Chapter 7
MARY DANESE DYKES,)	No. 4:05-bk-07711-JMM
)	Adversary No. 4:06-ap-00022-JMM
_____ Debtor.)	MEMORANDUM DECISION
RALPH WILKENS CO., INC.)	
Plaintiff,)	
vs.)	
MARY DANESE DYKES,)	
_____ Defendant.)	

The creditor Plaintiff has moved to amend its complaint in order to add a § 723(a)(3) allegation. Currently the complaint alleges only a § 523(a)(2)(A) count for fraud or misrepresentation in obtaining money, goods, or services on credit.

The complaint was filed on February 3, 2006. Trial is currently scheduled for April 24, 2007. The instant motion was filed April 11, 2007.

Shortly after the bankruptcy case (chapter 7 liquidation) was filed on October 14, 2005, the clerk sent all creditors a notice, advising them to file § 523 and/or § 727 complaints no later than February 17, 2006 (see Dkt. #11). The notice was dated November 1, 2005--18 months ago.

The Plaintiff complied with the notice and filed a complaint, selecting only § 523(a)(2)(A), seeking the non-dischargeability of only its debt. It did not ask to deny the Debtor's entire discharge.

1 Indeed, on March 7, 2006, this court entered the discharge of the Debtor (Dkt. #25), and that order is now
2 final. The order also stated, in pertinent part, that debts were not discharged which were in then pending
3 proceedings:

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5 h. Debts that the bankruptcy court specifically has decided or
will decide in this bankruptcy case are not discharged.

6 Therefore, procedurally, the creditor Plaintiff in this case now wishes to add, and plead,
7 for a denial of the Debtor's entire discharge (not just its debt). However, the creditor has not asked the
8 court to set aside the order, entered 13 months ago, which granted the Debtor a discharge from all of her
9 other debts. The Debtor is entitled to rely upon that order, as to everyone else, and that order, being final,
10 is entitled to repose.

11 Even if, however, one were to assume that the instant amendment motion could be
12 granted, without creating significant legal and procedural difficulty, the next issue is whether the facts
13 of the proposed amended complaint are, as Plaintiff suggests, the same ones that would support either
14 a non-dischargeable § 523(a)(2)(A) claim or operate to deny the Debtor her entire discharge under and
15 § 727(a)(3).

16 Section 727(a)(3) prevents the entry of a discharge to a debtor who has concealed,
17 destroyed, falsified, or failed to keep books and records from which a debtor's financial condition or
18 business transactions might be ascertained, unless such failure is justified under the circumstances of the
19 case.

20 The Plaintiff's primary grievance arrives out of a frustration, in pre-bankruptcy state court
21 litigation, wherein the Defendant failed to respond to discovery which then led, at least in part, to the
22 entry of a civil judgment against her.

23 However, § 727(a)(3) does not punish a debtor for lack of cooperation in a pre-bankruptcy
24 setting. The purpose of the statute is to ensure a debtor's cooperation in the bankruptcy case itself.
25 Complete disclosure in the bankruptcy case, to the trustee and the scheduled creditors, "is a quid pro quo
26 for discharge of debts." § 3 *Norton Bankruptcy Law and Practice 2d* at 74:9 (2006).

1 There is no allegation by this creditor Plaintiff that, in the context of the bankruptcy case,
2 the Debtor concealed or falsified records from the Trustee, or from a creditor, when asked. There is
3 nothing presented in the creditor's pleadings to suggest that the Debtor did not truly present her financial
4 condition to the bankruptcy Trustee, the bankruptcy court, or any scheduled bankruptcy creditor. There
5 is no allegation that, during the bankruptcy process, the Debtor failed to cooperate or withheld
6 information. As a result, the creditor here cannot present a § 727(a)(3) case for denial of the Debtor's
7 fundamental right to a discharge. See, generally, *Norton, supra; In re Cox*, 904 F.2d 1399 (9th Cir.
8 1990).

9 Next, addressing the creditor's position that its original § 523(a)(2)(A) case, and now its
10 § 727(a)(3) case, arise out of the same set of facts, the court upon review finds the creditor's position to
11 be misplaced. The § 523(a)(2)(A) pre-petition conduct and failure to cooperate in a state court
12 proceeding is not relevant to a § 727(a)(3) post-petition failure to cooperation with the bankruptcy case
13 and process. And, since no factual allegation of post-bankruptcy lack of cooperation has been made, the
14 § 727(a)(3) complaint does not present a claim upon which relief can be granted, and is therefore subject
15 to dismissal pursuant to FED. R. CIV. P. 12(b)(6) (made applicable to bankruptcy proceedings by FED. R.
16 BANK. P. 7012). Accordingly, the complaint should not be amended.

17 The next reason for disallowance of the motion is that its filing was untimely. Over a year
18 has passed since the Debtor received her discharge, and 14 months have passed since the non-
19 dischargeability challenge under § 523(a)(2)(A) was filed. The trial is set in two weeks. Since the two
20 statutes, §§ 523 and 727, cannot (in this case) arise out of the "same set of facts," the amended complaint
21 cannot possibly "relate back," as it must under FED. R. CIV. P. 15(c). See, *In re Valenti*, 310 B.R. 138,
22 149 (9th Cir. BAP 2004).

23 Thus, the motion presents not only a new legal theory, but the facts to support such a
24 theory must have occurred in a post-petition context and, therefore, are different than alleged. Thus, the
25 court must conclude that the attempt to amend and present a § 727 case is untimely and time-barred. If
26 such a case exists or existed, it was required to have been plead by the deadline set by the court, February


1 17, 2006, a period which ended 14 months ago. *See, e.g., In re Magno*, 216 B.R. 34 (9th Cir. BAP 1997);
2 *In re Markus*, 313 F. 3d 1146 (9th Cir. 2002); FED. R. BANKR. P. 4004(a) (a § 727(a) complaint “shall
3 be filed no later than 60 days after the first date set for the meeting of creditors. . . .”).

4 Now finally being raised within two weeks of trial, the attempt to amend is untimely. To
5 grant the request would, at this late date, be highly prejudicial to the Debtor, who has prepared to defend
6 herself only on § 523(a)(2)(A) grounds.

7
8 **CONCLUSION**

9
10 For any or all of the reasons set forth above, the creditor Plaintiff’s motion to amend its
11 complaint shall be DENIED. Trial is set for 3:00 p.m., April 24, 2007, in Courtroom 602, 230 North
12 First Avenue, Phoenix, Arizona.

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14 DATED: April 11, 2007.

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17 JAMES M. MARLAR
18 UNITED STATES BANKRUPTCY JUDGE
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1 COPIES mailed this 11
day of April, 2007, to:

2 Patricia A. Taylor
3 Joseph Watkins
2344 East Speedway Blvd.
4 Tucson, AZ 85719

5 James J. Palecek
Hunsaker & Palecek, PLLC
6 5050 E. Thomas Rd.
Phoenix, AZ 85018

7 Office of the United States Trustee
8 230 North First Avenue, Suite 204
Phoenix, AZ 85003-1706

9
10 By /s/ M. B. Thompson
Judicial Assistant

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