



IT IS ORDERED as set forth below:

Date: July 16, 2009

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| IN RE: | CASE NO. 07-71950 |
| William Boulware, | |
| | CHAPTER 7 |
| Debtor. | JUDGE MASSEY |
| _____ | |

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|------------------------|-----------------------|
| Anthony Tow, | |
| Plaintiff, | |
| v. | ADVERSARY NO. 08-9028 |
| William Boulware, Jr., | |
| Defendant. | |
| _____ | |

**ORDER GRANTING MOTION FOR RECONSIDERATION
AND DENYING MOTION TO DISMISS**

In an order entered on June 18, 2009, the Court denied Defendant's motion for judgment on the pleadings or in the alternative to dismiss for failure to state a claim for relief. Defendant moves for reconsideration, citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). In that case, the

Supreme Court reversed the Court of Appeals for the Fifth Circuit which had affirmed dismissal of a complaint for lack of jurisdiction. The complaint was brought under Title VII of the Civil Rights Act of 1964 for sexual harassment. That Act is applicable only to persons having 15 or more employees. The case was tried to a jury, which returned a verdict for the plaintiff. Two weeks later the defendants moved to dismiss the case on the ground that the district court lacked jurisdiction because the company that employed plaintiff had fewer than 15 employees. The lower courts ruled that there was no jurisdiction because the defendants belatedly showed that certain persons counted as employees by plaintiff were not employees for purposes of the Act.

The Supreme Court held that the lower courts had erred by conflating subject-matter jurisdiction with the elements of the claim and that whether the employer had the requisite number of employees was an element of the claim. The Court explained the distinction between a motion to dismiss for lack of jurisdiction and a motion to dismiss for failure to state a claim, stating as follows:

The objection that a federal court lacks subject-matter jurisdiction, see Fed. Rule Civ. Proc. 12(b)(1), may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment. Rule 12(h)(3) instructs: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *See Kontrick v. Ryan*, 540 U.S. 443, 455, 124 S. Ct. 906, 157 L. Ed. 2d 867 (2004). By contrast, the objection that a complaint "fails to state a claim upon which relief can be granted," Rule 12(b)(6), may not be asserted post-trial. Under Rule 12(h)(2), that objection endures up to, but not beyond, trial on the merits: "A defense of failure to state a claim upon which relief can be granted . . . may be made in any pleading . . . or by motion for judgment on the pleadings, or at the trial on the merits." *Cf. Kontrick*, 540 U.S., at 459, 124 S. Ct. 906, 157 L. Ed. 2d 867.

Id. at 506-507.

It is this portion of the opinion that Defendant here cites as support for his motion for reconsideration. *Arbaugh* does not hold that a motion to dismiss under Civil Rule 12(b)(6),

made applicable by Bankruptcy Rule 7012, or a motion for judgment on the pleadings may be made at any time. This court's June 18 order pointed out that a motion under Civil Rule 12(b)(6) must be made before a responsive pleading is filed and that a motion for judgment on the pleadings must be made before trial. In this adversary proceeding, the trial has begun. The court continued it because the parties were not prepared to try the case in an efficient manner.

Defendant correctly points out however, that the court failed to address the portion of his motion to dismiss under Civil Rule 12(h)(2), which provides in relevant part:

(h)(2) When to Raise Others. Failure to state a claim upon which relief can be granted . . . may be raised:

- (A) in any pleading allowed or order under Rule 7(a);
- (B) by a motion under Rule 12(c); or
- (C) at trial.

The Court denies the motion to dismiss for failure to state a claim under Civil Rule 12(h)(2)(C) for two reasons. First, the court ordered the parties to present a proposed consolidated pretrial order on the request of Defendant's counsel. That request waived whatever defects may exist in the complaint because the pretrial order will define the factual elements that Plaintiff will try to prove. If those elements do not add up to a claim for relief, Defendant may renew his motion at the continuation of the trial.

Second, the Court was too hasty in stating at the beginning of trial that the complaint did not state a claim for relief. On further inspection of the complaint, it goes further than merely reciting the statute and contains enough factual allegations apart from the language of section 727 to withstand a motion to dismiss.

For these reasons, Defendant's motion for reconsideration is GRANTED, and upon reconsideration, his motion to dismiss is DENIED. Plaintiff is directed to present a proposed

consolidated pretrial order in Chambers no later than July 23, 2009. Failure to do so will result in dismissal of this adversary proceeding.

END OF ORDER