

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
APR 25 2005

DOCKET

IN THE MATTER OF:	:	CASE NUMBERS
	:	
LAWRENCE HOWARD WEINTRAUB:	:	BANKRUPTCY CASE
	:	NO. 04-75671-WHD
Debtor.	:	
_____	:	
	:	
RICHARD MALONEY,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 04-9207
v.	:	
	:	
LAWRENCE WEINTRAUB,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Amend Complaint, filed by Richard Maloney (hereinafter the "Plaintiff") in the above-captioned adversary proceeding. Diana Weintraub (hereinafter "Weintraub") and LHW, Inc. (hereinafter "LHW") object to the Motion. This matter arises out of the Plaintiff's complaint objecting to the discharge in bankruptcy of Lawrence Weintraub (hereinafter the "Debtor") and the dischargeability of a debt owed by the Debtor to the Plaintiff. Therefore, this matter is a core proceeding over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); (J).

PROCEDURAL HISTORY AND BACKGROUND

On December 14, 2004, the Plaintiff filed a complaint against the Debtor, in which he alleges that the Debtor's discharge should be denied pursuant to § 727(a)(2)(A) because

the Debtor transferred his assets within one year prior to the filing of his bankruptcy petition for either no consideration or less than reasonable equivalent value with the intent to hinder and delay the Plaintiff and the Debtor's other creditors from collecting amounts owed by the Debtor. Additionally, the Plaintiff contends that, pursuant to § 727(a)(4), the Debtor's discharge should be denied because he made a false oath in his bankruptcy schedules regarding said transfers, and pursuant to § 727(a)(5), his discharge should be denied because he has failed to satisfactorily account for his assets. The Plaintiff further asserts that the debt owed by the Debtor to the Plaintiff is nondischargeable pursuant to § 523(a)(4) because the entry of a judgment in favor of the Plaintiff by the state court prior to the filing of the bankruptcy petition imposed a constructive trust upon the Debtor, and the Debtor breached a fiduciary duty owed to the Plaintiff when he transferred his assets.

In his motion to amend his complaint, the Plaintiff alleges that the Debtor transferred his assets to Weintraub, who is the Debtor's wife, and LHW, Inc., a corporation wholly owned by Weintraub. The Plaintiff seeks to add Weintraub and LHW as defendants in the instant suit. If successful in amending his complaint, the Plaintiff would seek avoidance of the transfers. The Plaintiff alleges that Weintraub and LHW acted in concert with the Debtor to transfer the Debtor's assets with the intent to hinder the Plaintiff's collection efforts. In support of his motion, the Plaintiff argues that he will not be able to obtain complete relief without adding Weintraub and LHW as defendants and without amending his complaint to ask that the transfers be set aside. Although the Plaintiff has not cited any

statute that would permit such relief, the Court presumes that the Plaintiff would rely upon O.C.G.A. §18-2-70, Georgia's version of the Uniform Fraudulent Transfer Act, as grounds for setting aside the transfer.

In response, Weintraub and LHW argue that the Plaintiff is not entitled to rely upon Rules 15 and 19 of the Federal Rules of Civil Procedure, as cited by the Plaintiff, but instead, must rely upon Rules 21 and 20, which specifically deal with the misjoinder or nonjoinder of parties and the permissive joinder of parties. Weintraub and LHW assert that the Plaintiff cannot satisfy the requirements of Rule 20 for permissive joinder, which states that parties may be joined as defendants in a proceeding “if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.” FED. R. CIV. P. 20(a). Additionally, Weintraub and LHW argue that the Plaintiff is not the proper party to pursue an action to avoid the transfers at issue, as only the Chapter 7 trustee has standing to avoid transfers pursuant to §§ 548 and 544 of the Bankruptcy Code.

CONCLUSIONS OF LAW

Rule 15 of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by Rule 7015 of the Federal Rules of Bankruptcy Procedures, governs amended pleadings. *See* FED. R. CIV. P. 7015. In pertinent part, Rule 15 provides:

(a) A party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served . . . Otherwise, a party may amend

the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be given freely when justice so requires.

FED. R. CIV. P. 7015(a). Inasmuch as an answer was been filed before the Plaintiff filed his motion to amend, the Plaintiff cannot amend his complaint without leave of the Court.

A trial court has considerable discretion when determining whether to grant leave to amend a complaint. *See Jameson v. The Arrow Co.*, 75 F.3d 1528, 1534-35 (11th Cir. 1996). "Although '[l]eave to amend shall be freely given when justice so requires,' a motion to amend may be denied on 'numerous grounds' such as 'undue delay, undue prejudice to the defendants, and futility of the amendment.'" *Brewer-Giorgio v. Producers Video, Inc.*, 216 F.3d 1281, 1284 (11th Cir. 2000); *see also Foman v. Davis*, 371 U.S. 178, 181-82 (1962). It would be futile to allow the Plaintiff to amend its complaint to add a claim that would be immediately dismissed. *See generally Mackensworth v. S.S. American Merchant*, 28 F.3d 246 (2d Cir. 1994) (affirming lower court's denial of leave to amend complaint when new claim did not relate back to filing of original complaint and would have been time barred).

The Plaintiff, as a single creditor, has no standing to pursue the avoidance of a fraudulent transfer in the bankruptcy court. *See Nebraska State Bank v. Jones*, 846 F.2d 477, 478 (8th Cir. 1988) (notwithstanding the fact that the plaintiff creditor would have had a cause of action under state law to avoid a fraudulent transfer, the creditor lacked standing to do so because the debtor-in-possession was the sole party with standing to an avoidance

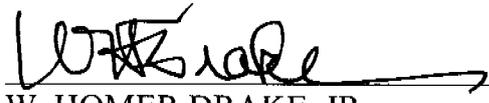
action in the Chapter 11 proceeding); *In re Milam*, 37 B.R. 865, 867-68 (Bankr. N.D. Ga. 1983) (Norton, J.) (holding that a creditor lacked standing to avoid a fraudulent conveyance under O.C.G.A. § 18-2-22 (predecessor to O.C.G.A. §18-2-70) in a Chapter 13 case). In this case, the Chapter 7 trustee, James Marshall (hereinafter the "Trustee"), is the only party with standing to file an avoidance action to recover the property that the Plaintiff contends was transferred by the Debtor to Weintraub and LHW, Inc, and the Trustee has not initiated such an action.¹ If the Court allowed the Plaintiff to amend his complaint to add this cause of action, the new defendants would be entitled to have the complaint dismissed for lack of standing. Under these circumstances, the Court finds that allowing the amendment would be futile and that the motion to amend should not be granted.

CONCLUSION

For the reasons stated above, the Plaintiff's Motion to Amend Complaint to Add Defendants is **DENIED**.

IT IS SO ORDERED.

At Atlanta, Georgia, this 25 day of April, 2005.


W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

¹ The Plaintiff has not indicated that it seeks a grant of derivative standing or that he would pursue this cause of action on behalf of the entire estate. Accordingly, the Court does not consider the question of whether the Plaintiff might be permitted to bring this action on behalf of the estate.