

4/23/2007

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
TERRANCE OWENS,	:	BANKRUPTCY CASE
	:	NO. 04-17420-WHD
Debtor.	:	
<hr/>		
ORLANDERS LOONEY	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 05-1706
v.	:	
	:	
TERRANCE OWENS,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion to Dismiss, filed by Terrance Owens (hereinafter the "Debtor"). This motion arises in connection with an objection to the Debtor's discharge and a complaint to determine the dischargeability of a debt filed by the Plaintiff, both of which constitute core proceedings, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. §§ 157(b)(2)(I)-(J); § 1334.

BACKGROUND

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on August 31, 2004. The Court granted the Debtor's motion to convert the case to Chapter 7

on November 9, 2004. The Plaintiff filed a complaint¹ against the Debtor in which he seeks a denial of the Debtor's discharge pursuant to section 727(a)(4)(A) and (B), section 727(a)(4)(C), and section 727(a)(5). Finally, the Plaintiff seeks a determination that a debt for unpaid rent allegedly owed by the Debtor is nondischargeable under section 523(a)(2)(A) because the Debtor made false statements to the Plaintiff to induce him to lease the Property to the Debtor.

On July 13, 2005, the Debtor filed a motion to dismiss the Complaint, which the Court considered as a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On August 5, 2005, the Court denied the Debtor's motion to dismiss after noting that, when evaluating a Rule 12(b)(6) motion to dismiss, the Court must only dismiss a complaint for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also The S. Florida Water Management Dist. v. Montalvo*, 84 F.3d 402, 406 (11th Cir. 1996); *Mills v. Polar Molecular Corp.*, 12 F.3d, 1170, 1174 (2d Cir. 1993). After construing the complaint "in a light most favorable to the plaintiff and the factual allegations taken as true," *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997), the Court found that the facts alleged in the Complaint were sufficient to support a denial of the Debtor's discharge

¹ When considering a motion to dismiss, the Court must assume that the facts alleged in the complaint are true. *See Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997). Of course, the Debtor will have an opportunity to present evidence to the contrary later in these proceedings.

pursuant to section 727 and that the debt owed the Plaintiff is nondischargeable pursuant to section 523(a)(2)(A). Thereafter, the Court has ruled on numerous discovery disputes, motions for sanctions, and cross motions for summary judgment. The last significant activity taking place in this case occurred on October 11, 2006, at which time the Court denied the Plaintiff's Motion to Amend the Complaint.

On February 5, 2006, the Court issued an order directing the Plaintiff to file a status report within twenty days of the date of the entry of the order. The February 5th Order stated that the adversary proceeding would stand dismissed if the Plaintiff failed to file a timely status report. On February 8, 2007, the Debtor filed the instant motion to dismiss, which the Court construes once again as a motion to dismiss for failure to state a claim. On March 2, 2007, the Plaintiff filed a status report in which he has requested that the Court consider his status report to have been timely filed. The status reports explains that his delay in filing the status report was the result of his inability to reach his attorney, Ms. Janella Rich, who apparently passed away on November 20, 2006. The Plaintiff's status report also requests additional time for discovery. The Debtor opposes both requests.

CONCLUSIONS OF LAW

As noted in the Court's earlier order on the Debtor's first motion to dismiss for failure to state a claim, the Court cannot dismiss the Plaintiff's complaint unless it appears that the Plaintiff can prove no set of facts that would establish the Plaintiff's entitlement to a

judgment. The Debtor has offered the Court nothing more to support a finding that this is the case. Accordingly, the Court must again deny the Debtor's motion to dismiss.

The Debtor has also requested that the Court find that the Complaint was dismissed and should remain dismissed due to the Plaintiff's failure to file timely his status report. Federal Rule of Civil Procedure 41(b), made applicable to this adversary proceeding by Rule 7041 of the Federal Rules of Bankruptcy Procedure, provides that the Court may dismiss a claim or claims against a defendant "for failure of the plaintiff to prosecute or to comply with" the Federal Rules of Civil Procedure or an order of the Court. FED. R. CIV. P. 7041(b). Unless the Court otherwise orders, a dismissal under Rule 41(b) is an adjudication upon the merits and is considered a dismissal with prejudice. *See id.*; *see also In re Greenberg*, 2006 WL 1594202, *2 (11th Cir. 2006). Additionally, under Bankruptcy Local Rule 7041-1, the Court "may, with or without notice to the parties, dismiss an adversary proceeding or contested matter for want of prosecution if . . . "[a] plaintiff or movant willfully fails or refuses to make an adversary proceeding or contested matter ready or refuses to cause same to be made ready for placement on the trial calendar" or "[a]n adversary proceeding or contested matter has been pending in the Bankruptcy Court for more than six months without any substantial proceedings of record having been taken, as shown by the record docket or other manner." BLR 7041-1.

In determining whether a dismissal under Rule 41(b) is appropriate, this Court must consider the fact that "a dismissal *with prejudice*, whether on motion or *sua sponte*, is an extreme sanction that may be properly imposed *only* when: (1) a party engages in a clear pattern of delay or willful contempt (contumacious conduct); and (2) the district court

specifically finds that lesser sanctions would not suffice." *In re Greenberg*, 2006 WL 1594202, *3 (11th Cir. 2006). Additionally, the Court must be cognizant of the "usual preference that cases be heard on the merits rather than resorting to sanctions that deprive a litigant of his day in court." *Id.*

Pursuant to the Court's order, the Plaintiff was required to file his status report on or before February 28, 2007. *See* FED. R. BANKR. P. 9006(f) (three days shall be added to the time period for responding to a notice that is served by mail). As the Plaintiff filed his status report on March 2, 2007, his report was only two days late. No party, including the Court, has been injured by this short delay. Additionally, it is clear from the prior activity in this case that the Plaintiff has, at all times, been diligent about prosecuting this adversary proceeding. Prior to the entry of the Court's February 5th Order, only four months has passed since the Court ruled on pending matters. The Plaintiff has also adequately explained and justified his failure to file the report within the prescribed period. For these reasons, the Court concludes that the Plaintiff's conduct does not rise to a level at which the Court should consider the Plaintiff to have abandoned his claims. As the Court always prefers to decide matters on the merits, the Court will permit the Plaintiff a further opportunity to prosecute this case.

That being said, in an effort to ensure that these matters are not delayed further and to bring finality to the Debtor's bankruptcy proceeding, the Court will not provide any additional time for discovery and will set this matter for trial.

CONCLUSION

For the reasons stated above, the Debtor's Motion to Dismiss is hereby **DENIED**.

The Plaintiff's Request for Extension of Discovery Period is **DENIED**.

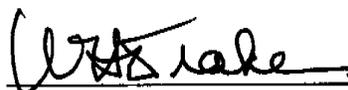
IT IS FURTHER ORDERED that:

On or before May 18, 2007, the Debtor and the Plaintiff shall each file with the Court, and serve upon each other by first-class mail, a list of witnesses they intend to call at trial and a list of documents they intend to introduce into evidence.

The Court will hold a trial on the Plaintiff's complaint on June 18, 2007 at 10:00 a.m. in Second Floor Courtroom, 18 Greenville Street, Newnan, Georgia.

IT IS ORDERED.

At Newnan, Georgia, this 23 day of April, 2007.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

05-1706

I certify that on the date stated below, I served a copy of the foregoing document on each of the persons and entities named in the following list by United States Mail.

Orlanders Looney
P.O. Box 142939
Fayetteville, GA 30214

Terrance Owens
1367 Highway 138
Riverdale, GA 30296

Janella Rich
P.O. Box 743104
Riverdale, GA 30274

April 23, 2007



Karen Balkcom
Courtroom Deputy Clerk
to Judge Drake