



IT IS ORDERED as set forth below:

Date: March 03, 2008

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

CASE NO. 05-80212

David Ronald Michal and Christine Renee
Michal,

CHAPTER 7

Debtors.

JUDGE MASSEY

Patricia A. McColm,

Plaintiff,

v.

ADVERSARY NO. 06-9036

David Ronald Michal, et al.,

Defendants.

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS
AND PLAINTIFF'S MOTION TO AMEND**

In this adversary proceeding, Plaintiff Patricia A. McColm seeks a judgment revoking the discharges of Defendants and Debtors Christine Renee Michal and David Ronald Michal and

directing the turnover of property that Plaintiff alleges belongs to her. Defendants move to dismiss this adversary proceeding pursuant to Bankruptcy Rule 7012 on the grounds that the Court lacks jurisdiction over the subject matter and that Plaintiff lacks standing.

Plaintiff filed a response to the motion on February 29, 2008, challenging Defendants' contentions concerning jurisdiction and standing. In addition, Plaintiff moved for leave to amend the complaint if there is any "inadvertent defect" that could be cured by an amendment. For the reasons stated below, the motion to dismiss is denied. Plaintiff's motion to amend is denied as moot.

In arguing that the Court lacks subject matter jurisdiction, Defendants assert that Plaintiff failed to comply with Bankruptcy Rule 7008 in that the complaint does not "contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge." The complaint in fact contains a jurisdictional statement in paragraph 2 that the Court has jurisdiction under 28 U.S.C. § 1334(a). This statement is correct as far as it goes but is not complete. 28 U.S.C. § 1334 grants jurisdiction in bankruptcy cases and related matters to the district court. This Court's jurisdiction is based on 28 U.S.C. § 157, which permits district courts to refer bankruptcy cases to bankruptcy judges, and on Local Rule 83.7(A), entitled "Delegated Jurisdiction," of the U.S. District Court for the Northern District of Georgia, which refers bankruptcy cases and related proceedings filed in the Northern District of Georgia to the bankruptcy judges of this District.

Section 727(e) of the Bankruptcy Code provides:

The trustee, a creditor, or the United States trustee may request a revocation of a discharge-

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of--

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

11 U.S.C. § 727(e). Section 727(d) provides in relevant part:

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section;

11 U.S.C. § 727(d)(1-3).

Section 727(a)(6) provides that a debtor's discharge may be denied if

(6) the debtor has refused, in the case--

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify[.]

11 U.S.C. § 727(a)(6).

28 U.S.C § 157(b)(1) provides:

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

“Core proceedings include, but are not limited to . . . objections to discharges.” 28 U.S.C. § 157(b)(2)(J).

The revocation of a discharge, which is a form of objection to a discharge, is plainly a core proceeding. The failure to allege that the proceeding is core is not fatal to the amended complaint. Subject matter jurisdiction does not turn on whether a litigant properly alleges subject matter jurisdiction in the complaint. *See In re Mailman Steam Carpet Cleaning Corp.*, 196 F.3d 1, 5 (1st Cir. 1999)(“Affirmative pleading of the precise statutory basis for federal subject matter jurisdiction is not required as long as a complaint alleges sufficient facts to establish jurisdiction.”)(Citations omitted.). Therefore, Defendants’ motion to dismiss for lack of subject matter jurisdiction with respect to the claim for revocation of discharge is without merit. The present state of the record does not permit the Court to determine the extent of its jurisdiction concerning the claim for turnover of property that Plaintiff alleges belongs to her and alleges is in possession of one or both Defendants.

The second ground on which Defendants move to dismiss the complaint is that Plaintiff “has failed to allege with specificity that she is a creditor of all or any of these Defendants” and therefore lacks standing.

“Standing, a ‘threshold inquiry,’ properly is the basis to dismiss the complaint if it is found to be lacking. *Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. Unit A July 1981).” *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979, 983 (11th Cir. 1990).

Article III of the United States Constitution limits the power of federal courts to adjudicating actual “cases” and “controversies.” U.S. Const. art. III, § 2, cl. 1. “This case-or-controversy doctrine fundamentally limits the power of federal courts in our system of government, [citations omitted], and helps to ‘identify those disputes which are appropriately resolved through judicial process.’ ” *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1262 (11th Cir.1999) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990)).

The most significant doctrine of case-or controversy is the requirement of standing. *Georgia State Conference*, 183 F.3d at 1262. “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). To establish standing a plaintiff must meet the three-prong test proving that he had suffered “injury in fact”.

Wright v. Dougherty County, Ga., 358 F.3d 1352, 1355 (11th Cir. 2004).

Under the plain meaning of section 727(e), the only parties that may seek a revocation of discharge are “[t]he trustee, a creditor, or the United States trustee.” Plaintiff is neither the trustee nor the United States trustee, and therefore must at least assert that she is a creditor in order to have standing. In her response to the motion, Plaintiff argues in effect that it is implicit in her allegation that she was not listed as a creditor that she is a creditor. This assertion begs the question. One reason she may not have been listed as a creditor in the schedules could be that she is not a creditor. Or she may be. The complaint contains factual allegations that, if true, would give rise to a “claim” as that word is defined in 11 U.S.C. § 101(5), at least against Defendant David Michal, which would then qualify Plaintiff as a “creditor” as that term is defined in 11 U.S.C. § 101(10). Although the complaint fails to allege any factual detail, it is apparent that she is asserting a right to payment against Defendant Christine Michal as well.

Contrary to what the parties seem to think, the issue before the Court is not whether Plaintiff is a creditor. (In her response, Plaintiff assumes that it is a given that she is a creditor. She is mistaken and will have the burden of proving that she is a creditor at trial). Nor is the

issue whether Defendants have made “unconstitutionally vague and ambiguous contentions without evidentiary support to work an injustice on a valid ‘creditor’ with standing to bring instant action.” Plaintiff’s response, p. 3. Rather, “[a] motion to dismiss is only granted when the movant demonstrates ‘beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’ ” *Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir.1998) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Thus, the issue on the motion to dismiss for lack of standing is whether Defendants have shown beyond doubt that Plaintiff can prove no facts to support her contention that she is a creditor of each Defendant. Defendants’ standing argument misses that point in asserting merely that Plaintiff has not been specific about her alleged claims against Defendants. “[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 48, 78 S.Ct. 99, 103 (1957)(footnote omitted). If Defendants want more specificity, they may seek that specificity through discovery.

Plaintiff moves for leave to amend the complaint but has nothing specific in mind other than curing any defect that she had not previously spotted, if there is one. The stated ground for amending the complaint is probably an insufficient basis on which to grant such a motion, but the Court need not reach that issue for the simple reason that the motion was directed solely to the possibility that the Court might otherwise grant the motion to dismiss on some technicality. Because the Court is denying the motion to dismiss, the motion to amend is moot.

Plaintiff concludes her response to the complaint with a demand for a trial. Unless the Court were to grant a motion for summary judgment, which seems unlikely (because there appear to be issues of material fact) from the standpoints of both Plaintiff and at least Defendant David Michal, Plaintiff and Defendants should begin to plan for trial, which will be held in the summer or early fall of this year. As soon as an answer is filed, the Court will enter a scheduling order that sets deadlines for completing discovery and filing dispositive motions and that sets a trial date.

Accordingly, Defendants' motion to dismiss this adversary proceeding is DENIED, and Plaintiff's motion for leave to amend the complaint is DENIED as moot.

END OF ORDER