



**IT IS ORDERED as set forth below:**

**Date: May 10, 2011**

**James R. Sacca  
U.S. Bankruptcy Court Judge**

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

In Re:	)	
	)	
Ashutosh Ladha,	)	Chapter 7
	)	Case No. 10-89992-JRS
Debtor,	)	
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Agrawal Investments, L.P.,	)	
	)	
Movant,	)	Contested Matter
	)	
v.	)	
	)	
Ashutosh Ladha,	)	
	)	
Respondent.	)	
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**ORDER**

This matter came on for hearing on February 22, 2011, on Movant’s Motion for Extension of Time to Object to Discharge of Debtor<sup>1</sup>, filed on January 21, 2011 [Doc. No. 38] (the “Motion”).

<sup>1</sup> Movant also filed a “Motion Objecting to Discharge” in the main case on January 21, 2011 [Docket No. 39] (the “Objection to Discharge”). The proper way to file an objection to discharge is through a complaint in an adversary proceeding pursuant to Fed. R. Bankr P. 7001, et seq.

Movant also filed a post-hearing brief in support of its Motion [Doc. No. 47], and Respondent filed his own brief in response through counsel [Doc. No. 48]. The Court, having considered the Motion, post-hearing brief in support, brief in response, the presentations of counsel and all other matters of record, makes the following findings of fact and conclusions of law.

### **FINDINGS OF FACT**

On October 5, 2010, Debtor filed his petition for chapter 7 bankruptcy relief. On the same day, the clerk of court issued a notice scheduling the meeting of creditors pursuant to § 341 of the Bankruptcy Code (the “§ 341 Meeting”) for November 12, 2010 (the “Notice”). The Notice also indicated that the deadline to file objections to discharge or complaints to determine the dischargeability of debts was January 11, 2011. In addition, the certificate of service with respect to the Notice shows that it was served on Movant. Subsequently, the § 341 Meeting was rescheduled and held on December 15, 2010, at which it is undisputed that Debtor was present and that Movant was represented by counsel. The § 341 Meeting was thereafter further continued to January 11, 2011, the same day as the date of the deadline to file objections to discharge or complaints to determine the dischargeability of a debt.

Weather conditions forced the federal courts in the Northern District of Georgia, including the Bankruptcy Court, to close from Monday, January 10, 2011 through Wednesday, January 12, 2011. The Bankruptcy Court reopened for a limited number of hours each day for the following two days, January 13 and 14, 2011, and resumed normal hours the following Monday, January 16, 2011. The Court’s temporary closure prevented the § 341 Meeting from continuing on January 11, 2011, which, as mentioned above, was also the deadline to file objections to discharge or complaints to determine the dischargeability of a debt contained in the Notice. When the clerk’s office is

inaccessible, Fed. R. Bankr. P. 9006(a)(3)(A) provides that the last day to file a pleading is the “first accessible day that is not a Saturday, Sunday, or legal holiday.” *Id.* Because the clerk’s office reopened on January 13, 2011, that day became the new deadline to file objections to discharge or complaints to determine the dischargeability of a debt.

The § 341 Meeting was rescheduled, but it was not until January 21, 2011 that Movant filed its Motion and its Objection to Discharge, which was eight days after the Court reopened and the new deadline, pursuant to Fed. R. Bankr. P. 9006(a)(3)(A), to object to discharge or file a complaint to determine the dischargeability of a debt had passed. In the Objection to Discharge, Movant asserted the following<sup>2</sup>:

- (a) Pursuant to 11 U.S.C.A. § 523[(a)(2)(A)] the Debtor may not be discharged from debts that resulted from false pretenses, a false representation, or actual fraud; and
- (b) Pursuant to 11 U.S.C.A. § 523[(a)(4)] the Debtor may not be discharged from debts that are a result of fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; and
- (c) Pursuant to 11 U.S.C.A. § 523[(a)(6)] the Debtor may not be discharged from debts that constitute a willful and malicious injury by the Debtor to another entity or to the property of another entity; and
- (d) Pursuant to 11 U.S.C.A. § 523[(a)(13)] debtor may not be discharged from any payment of an order of restitution issued under Title 18 of the United States Code . . . .

*Movant’s Objection to Discharge*, ¶ 3, Doc. No. 39. Attached to the Objection to Discharge was a complaint filed by Movant against Debtor on October 7, 2009 in the Superior Court of Clarke County, Georgia, Case No. SU-09-CV-2424-S (the “State Court Complaint”). In the State Court Complaint, Movant sued Debtor to collect on promissory notes, but also asserted claims for fraud, conversion and breaches of fiduciary duty (collectively, the “Pre-Petition Causes of Action”). The

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<sup>2</sup> Movant did not specify the subsections of 11 U.S.C § 523 under which it objected to dischargeability, but it is clear from the text of the Objection to Discharge that subsections (a)(2), (4), (6), and (13) apply.

Pre-Petition Causes of Action are all claims that could form the basis of a complaint to determine the dischargeability of debt under 11 U.S.C. § 523, which, presumably is why the Movant attached the State Court Complaint to its Objection to Discharge.

The Motion came on for hearing on February 22, 2011, at which the Court heard presentations by counsel for the Debtor and counsel for Movant.<sup>3</sup>

### CONCLUSIONS OF LAW

Movant seeks an extension of time, pursuant to Rule 4007 of the Federal Rules of Bankruptcy Procedure, to file objections to Debtor's discharge under 11 U.S.C. § 523. Movant's objections to the dischargeability of its debt appear to be based on 11 U.S.C. §§ 523 (a) (2), (4), and (6) (collectively, the "Fraud, Conversion and Malicious Injury Subsections") and 11 U.S.C. § 523(a) (13) (the "Title 18 Restitution Subsection"). Under Rule 4007, the time limits to initiate dischargeability proceedings under the Fraud, Conversion and Malicious Injury Subsections differ from those under the Title 18 Restitution Subsection. *See* Fed R. Bankr. P. 4007(b), (c); 11 U.S.C. § 523(c) (2011).

Under Rule 4007(c), complaints to determine the dischargeability of claims under the Fraud, Conversion and Malicious Injury Subsections must be filed no later than sixty (60) days after the first date set for the meeting of creditors, unless a motion seeking an extension of time is filed *before that time expires*. Fed R. Bankr. P. 4007(c).<sup>4</sup> It is undisputed that Movant filed neither the Motion nor

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<sup>3</sup> At the hearing and in the Motion and Post-Hearing Brief in Support, Movant made several allegations regarding Debtor's difficult behavior at the § 341 Meeting and Debtor's unwillingness to cooperate with requests for depositions. None of these allegations have been supported by testimony or any other evidence and are disputed by Debtor.

<sup>4</sup> Rule 4007(c) provides in relevant part:  
[A] complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The

the Objection to Discharge prior to the expiration of the time to file a complaint to determine the dischargeability of a debt.

Debtor directs this Court to the decision of the United States Court of Appeals for the Eleventh Circuit in *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11<sup>th</sup> Cir. 1988) (per curiam), wherein the Court held that Rule 4007(c) does not allow any discretion to grant a late filed motion seeking an extension of time to file a dischargeability complaint. *Id.* at 459. In *Alton*, Byrd argued that under the circumstances, the court should allow his late-filed complaint on equitable grounds. The bankruptcy court disagreed and ruled against Byrd, which ruling the district court upheld. *Id.* at 458-59.

On appeal to the Eleventh Circuit, Byrd maintained that because the debtor caused him to miss the filing deadline, equity required that he be able to file his complaint. *Id.* at 458. The Court agreed that the facts were harsh but stated that bad facts “should not be allowed to make bad law,” *Id.* at 459 (quoting *FCC v. Woko, Inc.*, 329 U.S. 223, 229, 67 S. Ct. 213, 216 (1946)) (internal quotation marks omitted), and it held that “the provisions of F.R.B.P. 4007(c) are mandatory and do not allow the Court any discretion to grant a *late filed* motion to extend time to file a dischargeability complaint.” *Id.* (quoting *In re Maher*, 51 B.R. 848, 852 (Bankr. N.D. Iowa 1985)) (internal quotation marks omitted).

Movant argues that *Alton* was abrogated by the Supreme Court of the United States in *Kontrick v. Ryan*, 540 U.S. 443, 124 S. Ct. 906 (2004). Specifically, Movant contends that *Alton*

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court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007(c).

held that Rule 4007(c) imposed a jurisdictional bar on a bankruptcy court's ability to hear late-filed dischargeability complaints, but that the Supreme Court in *Kontrick* disagreed and held that the time period in Rule 4007(c) is not jurisdictional in nature.

Regardless of *Kontrick's* effect on *Alton*, lower courts in the Eleventh Circuit have discussed the circumstances under which extensions or tolling of the time period in Rule 4007(c) may be permitted. See *In re Lett*, 416 B.R. 780, 788, 789 (S. D. Ala. 2009) (holding that "equitable relief is not warranted" when there is no evidence of affirmative misconduct or concealment); *In re Mascarenhas*, 382 B.R. 857, 859 (Bankr. S.D. Fla. 2008) (holding that the court could not equitably toll the time to file a complaint to determine dischargeability, despite its inclination otherwise, when the movant filed its complaint one day late because it could not obtain a password to the bankruptcy court's CM/ECF system in time); *In re Hilton*, 2005 Bankr. LEXIS 2675, at \*4 (Bankr. N.D. Ga. Nov. 3, 2005)(denying motion to extend time because, although the movant was not listed on the debtor's schedules, it had actual notice of the bankruptcy case twelve (12) days before the deadline to file a complaint to determine dischargeability); *In re Phillips*, 288 B.R. 585, 593 (Bankr. M.D. Ga. 2002) (holding that "an equitable tolling argument would not be frivolous" if the movant could prove its assertion that it was unable to timely file its complaint to determine dischargeability because of debtor's fraudulent act); *In re Hershkovitz*, 101 B.R. 816, 819 (Bankr. N.D. Ga. 1989) ("The Court agrees that, in almost all instances, Bankr.Rule 4007(c) should be strictly enforced. The Court will only step in under extreme circumstances with its equitable powers under § 105 to relieve a party from Rule 4007(c)'s explicit time table."). The common thread in these cases is that equitable relief may only be appropriate when the movant's "grievance is [not] of its own making." *Phillips*, 288 B.R. at 592.

The circumstances of this case simply do not justify tolling or otherwise the granting the extension of time requested by Movant in the Motion. Movant's assertions that the Debtor actively misled it regarding its cause of action are not supported by any testimony or evidence, nor has Movant shown that Debtor's actions prevented it from timely filing the Motion or Objection to Discharge.<sup>5</sup> Movant was able to assert fraud, conversion and breach of fiduciary duty claims against Debtor pre-petition in the State Court Complaint which shows the Court that Movant could have asserted a complaint to determine the dischargeability of its debt prior to the expiration of the deadline to do so.

Movant also argues that the time to file should be tolled because of the snowstorm which prevented it from filing its complaint on January 11, 2011. As noted previously, Rule 9006(a)(3)(A) of the Federal Rules of Bankruptcy Procedure, concerning the inaccessibility of the Clerk's Office, is applicable here and provided Movant with two extra days to file the Motion or an objection to discharge or complaint to determine the dischargeability of a debt. Here, Movant filed its Motion and Objection to Discharge on January 21, 2011, eight days after the Court reopened on Thursday, January 13, 2011. On or before January 13, 2011, Movant could have and should have filed the motion or a similar motion, or a complaint seeking a determination of the dischargeability of its debt.

The Motion and Objection to Discharge were untimely. As a result, Movant's Objection to Discharge with respect to the claims under the Fraud, Conversion and Malicious Injury Subsections is barred by Rule 4007(c). However, any claim Movant has or may have under the Title 18

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<sup>5</sup> In *In re Rychalsky*, 318 B.R. 61 (Bankr. D. Del. 2004), upon which Movant heavily relies, the Debtor's misleading actions and failure to disclose information obscured the plaintiff's dischargeability claim until after the time to file had passed. *Id.* at 64-65. Here, Movant argues that its untimely motion for extension should be granted because "[a]dditional time is vital to investigate the *still unknown* grounds for creditors' objections to discharge." *Post-Hearing Brief in Support*, Doc. No. 48 (emphasis added). To the contrary, the State Court Complaint shows that Movant's grounds were not "still unknown."

Restitution Subsection has not been barred by any deadline. In fact, Movant need not file a complaint regarding the dischargeability of a claim under Title 18 Restitution Subsection at all. *See* 11 U.S.C. § 523(c).<sup>6</sup>

### **CONCLUSION**

Because Movant failed to timely file its Motion and the Objection to Discharge, itself, it is hereby ORDERED that the Motion and the Objection to Discharge are DENIED with respect to any claims Movant has under 11 U.S.C. § 523(a)(2), (4), and (6). No extension of time is necessary with respect to any claims Movant has or may have under 11 U.S.C. § 523(a)(13).

**[END OF DOCUMENT]**

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<sup>6</sup> Section 523(c) only requires creditors who seek nondischargeability of their debts under the Fraud, Conversion and Malicious Injury Subsections to request a notice and a hearing to have their claims deemed nondischargeable or else the debtor will be discharged from those claims. 11 U.S.C. § 523(c).