

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G08-20892-REB
	:	
ISAAC W. SWOFFORD,	:	
	:	
Debtor.	:	
	:	
_____	:	ADVERSARY PROCEEDING
ATLANTA CONTRACT GLAZING, INC.,	:	NO. 08-2053
	:	
Plaintiff,	:	
	:	
v.	:	CHAPTER 7
	:	
ISAAC W. SWOFFORD,	:	
	:	
Defendant.	:	JUDGE BRIZENDINE
	:	

**ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF
FROM ORDER DISMISSING COMPLAINT
AND MOTION FOR LEAVE TO AMEND COMPLAINT**

Before the Court is the motion of Plaintiff filed on February 2, 2009 for relief from this Court's Order entered on December 29, 2008 granting the motion of Debtor-Defendant to dismiss Plaintiff's complaint. Plaintiff seeks to amend its complaint by adding a count for relief under 11 U.S.C. § 523(a)(2). In the original complaint, Plaintiff alleged that a certain obligation as owed by Debtor to Plaintiff in connection with services Plaintiff provided as a subcontractor, evidenced by a state court default judgment in the amount of \$142,247.50, should be excepted from discharge herein under 11 U.S.C. § 523(a)(6).¹ In its current motion, Plaintiff requests that the Court resume jurisdiction over this

¹ Following entry of the Order dismissing the complaint, Plaintiff filed a motion to reconsider on January 9, 2009 to which Debtor responded on January 22, 2009. On January 23, 2009, Plaintiff withdrew this motion and on February 2, 2009 filed the motion for relief now

matter and determine Plaintiff's claims on the merits. Specifically, Plaintiff seeks authority to amend its complaint to include a cause of action for fraud and attorney's fees under Section 523(a)(2) as relating back to the filing of its original complaint for determination of nondischargeability of debt.

Under Fed.R.Civ.P. 60(b), applicable herein through Fed.R.Bankr.P. 9024, a court in its discretion may grant relief from a final order in the interests of substantial justice. Under this standard, courts are guided by the need to balance the finality of their orders with the demand to do what is just in view of all the facts of record. *See Griffin v. Swim-Tech Corp.*, 722 F.2d 677, 679-80 (11th Cir. 1984). Rule 60(b) sets forth several grounds for allowing relief, but it appears Plaintiff is relying primarily on subpart (b)(6), which states that a party may be relieved from a final order for "any other reason justifying relief from the operation of the judgment." In its motion, Plaintiff contends such relief is warranted to "prevent Debtor from profiting by his deceit and perjury through the discharge of the Debt." Plaintiff's Motion at 7. Simply stated, Plaintiff asserts that as demonstrated through the merits of the case, "Debtor is not before the Court as an honest debtor entitled to a fresh start...." Motion at 8.

Plaintiff insists that it should be allowed to amend its complaint to include a new cause of action under Section 523(a)(2) as arising from the same basis of operative facts originally pled herein. Citing the case of *In re Lennard*, 245 B.R. 428, 434 (Bankr. M.D.Ga. 1999) as authority, Plaintiff asserts that Debtor's submission of a false affidavit to the underlying property owner for work Plaintiff did on the property for Debtor amounts to fraud against Plaintiff and renders nondischargeable the outstanding obligation Debtor owes to Plaintiff. In the affidavit, Debtor averred to the owner that Plaintiff had been paid by Debtor for its services as a subcontractor when in fact it had not. As previously mentioned, this obligation has been reduced to judgment by a state court.

pending before the Court.

Relief under Rule 60(b)(6) “is an extraordinary remedy” to be granted solely “upon a showing of exceptional circumstances.” *Swim-Tech*, 722 F.2d at 680. Although Plaintiff contends the injustice of the situation warrants relief, it still must present its claims within a legal theory to support such relief. The Court has reviewed the *Lennard* case as cited and after examining the merits of Plaintiff’s allegations, the Court concludes that Plaintiff still has not set forth a cause of action upon which relief can be granted. As clearly set forth in that case, the creditor-supplier offered evidence of its demonstrated reliance on lien rights as provided under Georgia state law. And, it was on that basis that the court determined the creditor was entitled to relief by virtue of debtor’s fraudulent deception upon which the creditor extended additional credit to the debtor while its lien rights were dissolved by debtor through the execution of a false affidavit. 245 B.R. at 432.

In the case herein, there are no allegations that Debtor obtained services from Plaintiff as a subcontractor based on Plaintiff’s reliance on such lien rights and that same would not be dissolved by Debtor through a false affidavit to the owner. Nothing is alleged regarding the steps taken by Plaintiff to preserve and assert such rights. Further, it is not clear how Debtor obtained money from Plaintiff based on fraud as argued in the motion unless Plaintiff is somehow maintaining that the money paid by the owner to the Debtor legally belonged to Plaintiff.² The debt that existed between Plaintiff and Debtor was created pursuant to *their* contract and arose when Plaintiff performed the work as agreed. Even though Debtor owed Plaintiff, this debt did *not* arise when the property owner paid Debtor. In addition, there is no allegation that *Plaintiff* relied on the affidavit in question. Debtor’s affidavit was presented to a third party - the property owner - and it paid Debtor based on same. While it may have

² The fact that Plaintiff claims an equitable right in said funds or that Debtor somehow held same in trust has previously been addressed in the Court’s prior Order.

been defrauded by Debtor, *Plaintiff* was not and it cannot now assume the position of the owner vis-à-vis this transaction. Compare *Cadlerock Joint Venture, L.P. v. Pittard (In re Pittard)*, 358 B.R. 457 (Bankr. N.D.Ga. 2006) (*assignee* cannot assert fraud as basis for excepting debt from discharge).

While the law generally favors allowing parties an opportunity to be heard on the merits of their claims or defenses, to establish grounds for granting relief from this Court's prior Order *Plaintiff* must show that it has a meritorious claim for relief. See *Local 59 v. Superline Transp. Co.*, 953 F.2d 17, 20-21 (1st Cir. 1992). Based on a review of the record, the Court concludes that even if proven as true at trial, *Plaintiff's* factual allegations are not suggestive of a basis for success on its claim under Section 523(a)(2).

While the Court is mindful of the predicament created for *Plaintiff* through Debtor's conduct, the Court concludes that *Plaintiff* has not set forth a sufficient basis of exceptional or extraordinary circumstances to support the relief requested herein. Debtor chose not to pay what he owed *Plaintiff*. *Plaintiff* has fully availed itself of its day in court through the presentation of its claim for relief against Debtor. Understandably, *Plaintiff* disagrees with this Court's prior Order dismissing its claim for recovery, but there are no allegations that the Order is an instrument of oppression or that it was otherwise obtained through fraud to support setting aside the Order or otherwise relieving *Plaintiff* from its operation under the legal standards of Rule 60(b)(6).

Accordingly, based on the foregoing reasoning, it is

ORDERED that *Plaintiff's* motion for relief from Order dismissing complaint and for leave to amend complaint be, and the same hereby is, **denied**.

The Clerk is directed to serve a copy of this Order upon counsel for *Plaintiff*, counsel for

Defendant-Debtor, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 18th day of May, 2009.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE