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OCT 04 2006

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 DISMISSING ADVERSARY PROCEEDING

Plaintiff Patricia A. McColm filed this adversary proceeding on March 14, 2006 and amended the complaint on March 17, 2006. She seeks a judgment denying the discharge of Defendants and Debtors David Ronald Michal and Christine Renee Michal under 11 U.S.C. § 727 on the ground that Debtors failed to list Plaintiff as a creditor in the above Chapter 7 case. Plaintiff further seeks a denial of Defendants' discharge based on her allegation that Defendants committed fraud by preventing Plaintiff from recovering her personal property that she says was wrongfully obtained by a partnership with which Mr. Michal is involved. Finally, Plaintiff seeks a turnover of personal property that she claims is in the possession of Defendants.

On March 17, 2006 Plaintiff filed a motion to proceed in forma pauperis.

In an Order entered on September 15, 2006, the Court denied Plaintiff's motion to proceed in forma pauperis on the ground that the Court lacked authority to waive the filing fee. In that Order, the Court gave Plaintiff until September 29, 2006 within which to pay the filing fee. Plaintiff has failed to pay the filing fee, although she did file a response on October 2, 2006, stating that any dismissal should be without prejudice.

Also on September 15, 2006, the Court entered an Order directing Plaintiff to show cause why this adversary proceeding should not be dismissed pursuant to Fed. R. Civ. P. 4(m), made applicable by Fed. R. Bank. P. 7004, for failure to file a certificate of service showing service of the summons and complaint within 120 days of the date on which this adversary proceeding was filed. In the October 3, 2006, response, Plaintiff claimed that she was ill and unable to prosecute the case, but she provided no proof of that claim. The Court notes that she was not too ill to file the response to the September 15, 2006 Order.

The Court concludes that Plaintiff has failed to show good cause for failing to serve the summons and complaint within the 120-day limit imposed by Civil Rule 4(m). For this reason for failing to pay the filing fee, the Court will dismiss this adversary proceeding.

The Court points out to Plaintiff that the complaint does not state a claim for relief with respect to a denial of Debtors' discharges but hastens to add that this is not the basis for dismissal. The Court points out the problems with the complaint merely to educate Plaintiff that the Court is not empowered to grant the relief she seeks under section 727.

Section 727(A) states:

- (a) The court shall grant the debtor a discharge, unless--
 - (1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case--

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(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;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least--

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that--

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

Plaintiff's allegations that Debtors left Plaintiff off the schedules and fraudulently prevented her from recovering her property in the possession of a partnership are not factual patterns covered by section 727.

The only remaining claim is for turnover of property allegedly in Debtors' possession. That portion of the complaint amounts to nothing more than a request that the automatic stay be lifted. The automatic stay will disappear shortly upon the closing of this case, although it will in effect be replaced by the discharge injunction imposed by 11 U.S.C. § 524. Plaintiff should take no further action against Defendants without consulting a competent bankruptcy attorney to avoid running afoul of the discharge injunction. In short, the complaint either states no claim for relief or is otherwise unnecessary, assuming any of the facts alleged are true.

For these reasons, it is

ORDERED that this adversary proceeding is DISMISSED.

Dated: October 3, 2006.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE