IT IS ORDERED as set forth below:

Date: April 17, 2013

Mary Grace Diehl

Mary Grace Diehl
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

In Re:	:	Case No. 08-43724-MGD
Linda Coty Bullock,	:	Chapter 7
Debtor.	:	Judge Diehl
Kyle A. Cooper, Trustee,	:	
Plaintiff,	:	Adversary Proceeding
v.	:	No. 10-4111
Linda Coty Bullock,	:	
Defendant.	:	

ORDER

This case came before the Court for trial on the Chapter 7 Trustee, Plaintiff's ("Trustee") Amended Complaint ("Amended Complaint"). (Docket No. 3). The Amended Complaint includes six Counts. Counts I and1 II seek to avoid the alleged fraudulent transfer of the bankruptcy estate's

interest in the property at 411 Billy Bullock Road (the "411 Property") pursuant to 11 U.S.C. § 549(a) and O.C.G.A. § 18-2-74. Count III is for conversion of the 411 Property. Counts IV and V are for avoidance of the fraudulent transfer of the property located at 1919 Mulberry Rock Road (the "1919 Property") pursuant to 11 U.S.C. §§ 548(a), 549(a), and O.C.G.A. § 18-2-74. Count VI is to revoke Debtor-Defendant, Linda Coty Bullock's ("Debtor") discharge pursuant to 11 U.S.C. 727(d).[1] All Counts except for Count VI, relating to Debtor's discharge, have been resolved either by settlement, consent judgment, or Court Order.[2]

I. BACKGROUND

Debtor filed a Chapter 11 petition on November 3, 2008. (Case No. 08-43724). A Chapter 11 Trustee was appointed by Order entered July 21, 2009. (Docket No. 74). Debtor's case was converted to Chapter 7 on December 17, 2009. (Case No. 08-43724, Docket No. 115). Plaintiff was appointed interim trustee on December 24, 2009. (Docket No. 122). Debtor appealed the Order converting the case to the District Court. (Case No. 08-43724, Docket No. 123). That decision was affirmed on appeal. (Civil Action File No. 4:10-cv-14-HLM, Case No. 08-43724, Docket No. 175). Debtor did not attend the § 341 meeting of creditors originally scheduled for January 19, 2010. When she failed to appear, Trustee filed a Motion to Compel Debtor to appear. (Case No. 08-43724, Docket No. 178). That Motion was granted, but Debtor appealed the Order. (Case No. 08-43724,

[1] The original complaint included only Counts I-V. The Complaint was amended to include Count VI. (Docket Nos. 1 and 3).

[2] These Counts were resolved in the following ways: (1) Court's Order granting in part and denying in part summary judgment as to Defendant Lenox Financial Mortgage, LLC (Docket No. 44); (2) Consent Judgment for Plaintiff against Lenox Financial Mortgage, LLC (Docket No. 82); and (3) Order Granting Motion to Approve Settlement with Gina Paige Bullock (Case No. 08-43724, Docket No. 231).

Docket No. 188). While the appeal was pending, Debtor failed to appear at three more § 341 meetings. The appeal was dismissed on August 31, 2010. (Civil Action File No. 4:10-cv-96-HLM, Case No. 08-43724, Docket No. 201). Debtor failed to appear at one subsequent § 341 meeting and finally appeared on November 18, 2010. The § 341 meeting was concluded on December 30, 2010. No discharge has been entered in the case.

This case was initially set for trial on November 13-14, 2012. Trial was reset upon request of Debtor's counsel because he was newly employed to represent Debtor. (Docket Nos. 65-6). This was Debtor's third attorney of record in this proceeding and related bankruptcy case. Trial was reset for January 29-30, 2013. On January 29, the parties represented to the Court that they had agreed to settle. However, the settlement document contained ambiguities and had not yet been signed by Debtor. The parties advised the Court that the settlement document would be filed by the end of that week. Instead, the following week, Debtor filed a *pro se* Motion to Reconsider and for Extension of Time to find new counsel.[3] (Docket No. 85). Trustee filed a Motion in Opposition to the Motion to Reconsider and a Motion for the Court to Enforce the Settlement. (Docket No. 86). A hearing was set on Trustee's Motion to Enforce on an expedited basis for February 27, 2013. (Docket No. 95). Debtor did not appear personally at the hearing although her counsel did appear. Trustee's Motion was denied. Trial was again rescheduled, this time for March 8, 2013.

To resolve the issues in this case, it is necessary to trace the history of the discharge claims made by Trustee – whether under § 727(a) or § 727(d), as the timing and nature of Trustee's claims

[3] It is unclear what Debtor wanted the Court to reconsider as the Court did not approve the settlement or issue any Orders on the January 29 scheduled trial date. The Court considered this portion of the Motion to indicate that Debtor did not agree to the settlement. This was confirmed by Trustee. It is also unclear what the extension was for – when this Motion was filed on February 4, 2013, there were no pending matters or scheduled proceedings.

impact the outcome of this case. The initial Complaint, filed on December 21, 2010, included no Count pursuant to § 727. However, the prayer for relief requested that the Court deny Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and (B). That initial Complaint was amended as of right on December 21, 2010 to add a Count pursuant to 11 U.S.C. § 727(d) for revocation of discharge. The prayer for relief was accordingly amended to seek revocation of discharge rather than denial. The Amended Complaint became the operative complaint in this case.

On September 24, 2012, the parties filed a Consolidated Pretrial Order, signed by Trustee's Counsel. (Docket No. 59). In the PreTrial Order, under "Plaintiff's statement of the legal issues to be tried," a § 727(d) revocation claim was listed but not a § 727(a) claim. (Docket No. 59). Attached to the PreTrial Order, under "Plaintiff's Outline of the Case," Trustee cited § 727(a) as authority on which it relied. On March 1, 2013, Trustee filed a Motion to Amend Pretrial Order ("Motion to Amend") to add to the statement of legal issues to be tried the issue of whether Debtor's discharge should be denied pursuant to § 727(a)(2)(A) and (B) (Docket No. 102). Debtor filed an Objection to the Motion to Amend based on it being untimely pursuant to FED. R. BANKR. P. 4004. (Docket No. 108). The Motion to Amend was granted at the trial without prejudice to Debtor to assert any defenses that arose from the amendment. At trial, Debtor's Counsel orally moved the Court to dismiss the case because the objection to discharge was not timely filed and Trustee had not sought an extension of time ("Motion to Dismiss"). The Court proceeded with trial but took the Motion to Dismiss under advisement and invited the parties to file a post-trial brief on the Rule 4004 issue.

Debtor did not appear personally at trial although her counsel did appear. At trial, Trustee introduced Debtor's testimony from the November 18, 2010 § 341 meeting. A transcript of that

testimony was admitted into evidence without objection. (Plaintiff's Exhibit 4). Trustee was called to the stand as Plaintiff's only witness. Debtor did not call any witnesses or offer any evidence to be admitted by the Court. Trustee's Exhibits five through nine and fifteen were also admitted into evidence without objection.

Of those Exhibits, only Exhibits 6, 7 and 15 are relevant to the analysis here. Exhibit 15 is the warranty deed conveying the 1919 Property from Debtor and James Bullock to Gina Paige Bullock. Exhibit 6 is the Closed-End Fixed Rate Note between Lenox Financial Mortgage, LLC ("Lenox") and Debtor.

Exhibit 7 is a Residential Loan Application for Reverse Mortgages ("Application") between Debtor and Lenox, signed by Debtor and Brian Brown, the Lenox loan officer. The Application was signed on June 7, 2010, while Debtor's bankruptcy case was pending. However, the Application shows only that there were two boxes from which Debtor should have checked one, indicating either "yes" or "no" to the question, "Have you filed for any bankruptcy that has not been resolved?" Neither box is checked.[4]

Debtor testified at the § 341 meeting that she conveyed a modular home on the 1919 Property

[4] Brian Brown's affidavit, which was filed with the Court as part of a Motion for Summary Judgment but was not admitted into evidence at trial, indicates that he went to Debtor's home to go over the application. (Docket No. 39). He specifically asked Debtor if she was a debtor in a pending bankruptcy case, to which Debtor indicated no. He states that he showed the "Bankruptcy Statement" from the application to Debtor and again asked if she was involved in a bankruptcy case. Again, Debtor said no and signed a certification to that effect. This Affidavit was not tendered at trial and is inadmissable hearsay in any event.

to her daughter, Gina Paige Bullock, the day[5] before filing her bankruptcy petition.[6] It was also disclosed at the § 341 meeting that the deed transferring the property was dated October 31, 2008. (*See also* Plaintiff's Exhibit 15). Debtor testified that she received $8000.00 in exchange for the property.[7] In its Motion to Approve Settlement, Trustee states that the consideration was $8500.00 and the 1919 Property was appraised at $7000.00. (Case No. 08-43724, Doc. 227). The Court approved this Settlement and will assume that these values are the correct ones. Debtor listed an October 31, 2008 transfer of a modular home to her daughter for $8500 on her amended Statement of Financial Affairs on January 6, 2009.[8] (Case No. 08-43724, Docket No. 36). Although the property transferred is not identified by address, because the Statement describes the transfer of a modular home to her daughter for $8500 on October 31, 2008, the listed transfer appears to be the 1919 Property.[9]

Debtor admitted at the § 341 meeting that she obtained a reverse mortgage without Court approval on the 411 Property, which was previously unencumbered. She stated that she disclosed her bankruptcy case to Brian Brown, but that he assured her that she did not need court approval to encumber her personal residence. She felt further assured that her actions were lawful because the

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[5] The warranty deed shows that this transfer took place three days before filing.

[6] The property was described, the Court believes inadvertently, as "1919 Billy Bullock Road" by a party other than Debtor at the § 341 meeting.

[7] The Warranty Deed effecting this transfer shows that the consideration was $10.00. (Plaintiff's Exhibit 15). In her Answer to the Amended Complaint, Plaintiff states that the transfer was for $8500.00. (Docket No. 6).

[8] Trustee argued at trial that Debtor did not disclose this transfer on her initial petition.

[9] This fact is not contested.

loan was approved by HUD[10], as they would not approve something in violation of federal law. As a result, Debtor believed that she did not need Court approval to take out the reverse mortgage. Debtor received approximately $160,000 in proceeds from the $430,500 maximum principal that Lenox could advance. (*See* Plaintiff's Exhibit 6). Despite Trustee's request for an accounting of the proceeds at the § 341 meeting, Debtor never provided an accounting. Debtor also testified that she called multiple creditors attempting to renegotiate her loans or to get new loans in order to pay off prior lenders.

Trustee testified that at some point early on in her Chapter 7 case, Debtor called Trustee and asked him what would happen if she did not appear at the § 341 meeting. Trustee stated that he told Debtor that her case would probably be continued and then dismissed but that Debtor could not intentionally skip the meeting in order to get a dismissal. Trustee acknowledged at the trial that Debtor had indicated that she was not insolvent and wanted to negotiate workouts on her loans. Trustee testified that Debtor did not appear at her scheduled deposition and that she only responded to requests for admissions but not to interrogatories or for the production of documents. With regards to the reverse mortgage, Trustee testified that he was not present at the closing and did not know whether it was Debtor or a loan officer who actually filled out the forms that were signed by Debtor.

Trustee asserted that despite the fact that the Amended Complaint is styled as a revocation of discharge, that the now-alleged objection to discharge was not timely filed, and that Trustee never sought a Rule 4004 motion to extend time, Debtor did not deserve a discharge based on her pattern of delaying the case, refusing to comply with Bankruptcy Code requirements and hindering creditors

[10] U.S. Department of Housing and Urban Development.

by unlawfully transferring property of the estate. Furthermore, a discharge would have been promptly entered in the main case, but for an error in the clerk's office.[11] For these reasons, his failure to timely file a § 727(a) complaint or to request an extension of time should be excused. Trustee submitted a post-trial brief regarding the issue of the timeliness of Trustee's Complaint objecting to Debtor's discharge under Rule 4004. (Docket No. 111).

II. ANALYSIS

A. Burden of Proof

"A party who objects to a discharge has the burden to prove the objection by a preponderance of the evidence." *In re Jennings*, 533 F.3d 1333, 1339 (11th Cir. 2008) (citing *Grogan v. Garner,* 498 U.S. 279, 289-91 (1991)). "Once the creditor has met this burden, the debtor must bring forward enough credible evidence to dissuade the court from exercising its jurisdiction to deny the debtor['s] discharge based on the evidence presented by the objecting party." *Id.* (quotation marks and alterations omitted). "The Bankruptcy Code favors discharge of an honest debtor's obligations. *Id.* at 1338.

B. Timeliness of the Complaint

Pursuant to 11 U.S.C. § 727(a)(2), a debtor is not entitled to a discharge if

> 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

[11] This is incorrect. Debtor could not be granted a discharge because she has not filed the certification required to show compliance with § 727(11) and Rule 4004(c)(1)(H).

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.

11 U.S.C. § 727(a)(2)(A)-(B).

Rule 4004(a) requires that in a Chapter 7 case, a complaint objecting to a debtor's discharge under § 727(a) must be filed no later than sixty days after the first date set for the § 341 meeting of creditors. F.R.B.P. 4004(a). Before the 2011 amendment to Rule 4004(b), an extension of time could be granted "on motion of any party in interest, after hearing on notice," "for cause," as long as the motion was filed before the sixty-day period to file a complaint expired. F.R.B.P. 4004(b)(1).

The Rule was amended in 2011 and subsection (b)(2) was added as an additional grounds for extension of time. Under 4004(b)(2), if the time for objection has expired and a discharge has not been granted, a motion to extend time may be filed if "the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d)" and "the movant did not have knowledge of those facts in time to permit an objection." F.R.B.P. 4004(b)(2). Rule 4004(b)(2) also requires that such a motion be "filed promptly" after the movant learns of the facts supporting the objection. *Id.* Under Rule 9006(b)(3), the Court may only enlarge the time to file a § 727(a) objection as provided in Rule 4004. F.R.B.P. 9006(b)(3).

1. Defendant Did Not Waive Defense

Trustee argues that a time bar defense must be raised in an answer or responsive pleading or it is lost. Therefore, Debtor waived a Rule 4004 defense because she did not assert it until trial. In

Kontrick v. Ryan, which interpreted Rule 4004 prior to the 2011 amendment, the Supreme Court held that "[a] debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge."540 U.S. 443, 443 (2004). The Court, citing Rule 7008(c), went on to explain that "time bars generally must be raised in an answer or responsive pleading." *Id.* at 445. However, the Court left open the possibility that a Rule 4004 defense could be equated to a "failure to state a claim upon which relief can be granted," for which F.R.B.P. 7012(h)(2) extends the life of the defense to trial. *Id.* at 459.

Kontrick, therefore, does not instruct that a Rule 4004 defense will be lost if raised for the first time at trial. Here, however, the Court need not decide that issue. The Amended Complaint, late-filed as it was, did not assert a § 727(a) claim for objection to discharge. Rather, Trustee asserted a § 727(d) claim for revocation of discharge.[12] Rule 4004 applies *only* to complaints brought under § 727(a) and not to those under § 727(d). F.R.B.P. 4004(a). How could Debtor waive a defense to a claim that was not yet made against her? It was not until March 1, 2013, when Trustee filed a Motion to Amend its Pretrial Order that Trustee actually asserted that it was seeking denial of Debtor's discharge under § 727(a).[13] Debtor responded seven days later with an Objection to that Motion on 4004 grounds. The trial was held the same day that the Objection was filed. Debtor clearly did not waive her Rule 4004 defense in the interim seven days since the § 727(a) claim was first asserted.

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[12] As discussed above, the original Complaint was amended and the prayer for relief reciting § 727(a) was removed from the Amended Complaint.

[13] The citation of § 727(a) as authority in the case in "Plaintiff's Outline of the Case" attached to the original Pretrial Order did not create a § 727(a) claim nor was it sufficient to put Plaintiff on notice of a § 727(a) claim against her.

2. Setting Objection Bar Date as Date of Discharge is Inappropriate

Trustee argues that his claim arose during the "gap period" and therefore the Court should treat the objection bar date as the date of discharge and allow Trustee to proceed on a revocation of discharge theory. The gap period refers to the time between the deadline for objecting to a debtor's discharge and entry of the discharge order. *In re Staub*, 208 B.R. 602, 606 (Bankr. S.D.Ga. 1997). Rule 4004(c) requires that a discharge be entered "forthwith" after the 4004(a) sixty-day deadline expires, subject to a dozen preconditions. Here, Debtor's discharge has not been issued because, as noted above, all of the preconditions have not been satisfied. The effect of a gap period on potentially untimely objections to discharge has been discussed by other courts prior to the 2011 amendment to Rule 4004(a). *Compare Zedan v. Habash*, 529 F.3d 398, 405-6 (7th Cir. 2008) (holding that complaint failed to state a claim for revocation of discharge where a discharge had not been entered in the case) *with In re Emery*, 132 F.3d 892, 896 (2d Cir. 1998)(holding that creditor could seek revocation of discharge where a discharge had been entered but discovery of debtor's alleged fraud occurred during gap period).

Even if this Court were to find that a gap period could provide a legitimate basis for allowing an untimely complaint, the application of amended Rule 4004 would moot any gap period argument. The 2011 Advisory Committee Notes to Rule 4004 provide:

> Subdivision (b) is amended to allow a party, under certain specified circumstances, to seek an extension of time to object to discharge after the time for filing has expired. This amendment addresses the situation in which there is a gap between the expiration of the time for objecting to discharge and the entry of the discharge order. If, during

> that period, a party discovers facts that would provide grounds for revocation of discharge, it may not be able to seek revocation under § 727(d) of the Code because the facts would have been known prior to the granting of the discharge. Furthermore, during that period the debtor may commit an act that provides a basis for both denial and revocation of the discharge. In those situations, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

F.R.B.P. 4004.

The 2011 amendment to Rule 4004 did not take effect until after the Amended Complaint was filed. However, the Supreme Court, in its April 26, 2011 Order adopting this amendment instructed that "insofar as just and practicable," the amendment would apply to proceedings pending at the time the new Rule took effect. Order of the Supreme Court Adopting Amendments to the Federal Rules of Bankruptcy Procedure (Apr. 26, 2011), *available at* www.supremecourt.gov/orders/courtorders/frbk11.pdf. This proceeding was pending at the time the amendment took effect on December 1, 2011, and neither party has put forth any reason as to why applying the amended Rule in this case is not "just and practicable." In *In re Lusane*, finding that it was "just and practicable," the Court applied the amended Rule to an adversary proceeding that was pending when the rule became effective although the case was filed before the amendment took effect. 2013 WL 662695, *1 (Bankr. D.D.C. Feb. 25, 2013). This Court's analysis could easily stop

here – there is no gap period, Rule 4004(b)(2) provides a procedural mechanism for parties who find themselves caught in what was formerly known as the gap period, and Trustee did not follow said procedure.

However, even if the amended Rule did not apply in this case, two alternative grounds exist for finding that a gap period argument will not save Trustee's objection. First, Trustee has, throughout this proceeding, asserted two separate incidents to support its objection to Debtor's discharge (whether asserting a § 727(a) or (d) claim). One of those incidents, the transfer of the 1919 Property, arose pre-petition and was disclosed on Debtor's amended Statement of Financial Affairs on January 6, 2009, prior to the date of the first scheduled § 341 meeting in the Chapter 7 case. To say that a gap period existed because one of two incidents giving rise to Trustee's claim arose after the deadline resonates as an insincere assertion. Based on the January 6, 2009 disclosure, Trustee could have timely filed an objection to discharge prior to the objection bar date.

Second, Trustee's gap period argument fails because Trustee did not timely move this Court to find that a gap period existed and to deem the objection bar date as the date of discharge. Debtor first disclosed the post-petition transfer at her § 341 meeting on November 18, 2010 – approximately two years and three months before Trustee first asserted its § 727(a) objection on March 1, 2013. The Court is not inclined to grant Trustee extraordinary relief when it has been so little inclined to timely protect its own rights.

3. Equitable Tolling is Inappropriate

The Eleventh Circuit noted in *Alabama v. Lett* that "the Supreme Court expressly left open [in *Kontrick*] whether equitable grounds ever may afford relief from the deadlines set out in Bankruptcy Rules 4004 and 4007. Because no sufficient case has been made for equitable tolling,

we need say nothing on this issue...."[14] *Alabama Dep't of Econ. and Cmty. Affairs v. Lett,* 2010 WL 960066, at *3 n. 3 (11th Cir. March 18, 2010). In *Choi v. Promax Investments, LLC*, the District Court likewise did not address this substantive issue because "it does not matter whether the Court can equitably toll the Rule 4004 and 4007 deadlines [if plaintiff's] equitable arguments fail." *Choi v. Promax Investments, LLC*, 486 B.R. 541, 546 (N.D.Ga. Oct. 26, 2012) at 546.

The *Alabama v. Lett* opinion was issued before the 2011 amendment to Rule 4004 took effect, on December 1, 2011. The gap period problem is addressed by the amendment. Beyond the exceptional case of a court or clerk's office error, as in *In re Ray*, discussed below, given that this additional grounds for an extension of time is now provided for, it is less likely that equitable tolling is a legitimate remedy to a missed Rule 4004 deadline.

Although the Eleventh Circuit has not determined whether equitable tolling is a viable defense to a Rule 4004 defense, even if this Court were to conclude that it was viable, Plaintiff has not satisfied the Court that the equities are in its favor. Some courts in this Circuit have considered the Sixth Circuit's five factors in determining whether equitable tolling should be allowed to extend the F.R.B.P. 4007(c) deadline.[15] *In re Bryan*, 448 B.R. 866, 868 (Bankr. M.D.Ga. 2011) (citing *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)); *In re Donnan*, 465 B.R. 340, 343 (Bankr. M.D.Ga. 2012). Those factors are: "(1) the lack of actual notice of filing requirements; (2) lack of

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[14] In *Byrd v. Alton (In re Alton)*, the Eleventh Circuit held that an equitable remedy was not available to the plaintiff in the face of a Rule 4007 defense. 837 F.2d 457 (11th Cir. 1988). Some courts have held that *In re Alton* was overruled by *Kontrick*, while others have maintained that *In re Alton* remains good law. *Compare In re Harper*, 2013 WL 1204641, *3 (Bankr. N.D.Ga. Jan. 29, 2013) *with In re Rychalsky*, 318 B.R. 61, 63 (Bankr. D. Del. 2004).

[15] Rule 4004 was not at issue in these cases. Rule 4007(c) applies to § 523(c) complaints objecting to dischargeability of a debt. Prior to the 2011 amendment, Rule 4004(b) and 4007(c) contained almost identical language and were therefore frequently analyzed together.

constructive knowledge of filing requirement; (3) diligence in purs[u]ing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement." *Id.* One Court, in the context of a Rule 4007 objection, identified four situations in which courts in the Eleventh Circuit have granted equitable relief. *In re Harper*, 2013 WL 1204641, *6 (Bankr. N.D.Ga. Jan. 29, 2013). Those are where the plaintiff missed the deadline because it: (1) did not have notice of the deadline; (2) the defendant made affirmative misrepresentations; (3) the clerk's office made an irreparable error; or (4) as a result of extraordinary circumstances. *Id.*

In *In re Ray,* the Court found that equitable tolling of the Rule 4004 deadline was appropriate. 2012 WL 6110198 (Bankr. M.D.Ga. Dec. 10, 2012). In that case, the clerk's office issued a notice stating an erroneous deadline for objecting to discharge. The plaintiff filed a motion to extend the deadline prior to the expiration of the erroneous bar date but after the expiration of the correct bar date. *Id. at *2.* Based on the clerk's office's mistake, which was out of plaintiff's control, the Court invoked its § 105 equitable authority to accept the late-filed motion. *Id. at *6.*

In this case, equity does not require tolling of the deadline. There was no clerk's office error. Debtor made no affirmative misrepresentations regarding the deadline itself. Trustee has not alleged that it did not have notice of the deadline. Trustee alleges no extraordinary circumstances causing it to miss the deadline. Not only has Trustee not been diligent in pursuing his own rights, but to this day, Trustee still has not filed a motion to extend time. Debtor would be prejudiced by allowing Trustee to effectively amend his Amended Complaint over two years after the Amended Complaint was filed. Finally, Trustee is a Chapter 7 Trustee who regularly conducts § 341 meetings, as he did in this case, and who also regularly participates in Chapter 7 cases and related proceedings. There is no reasonable explanation for Trustee's ignorance of a deadline which is applicable in every

Chapter 7 case.

Trustee argues that the deadline should be tolled because "it did not learn of the conduct giving rise to Plaintiff's objection [sic] until November 2010, when Defendant Bullock finally appeared at her 341 meeting." (Docket No. 111). However, the conduct on which Trustee's objection to discharge is based is not only the post-petition transfer to Lenox, but also on the pre-petition transfer of the 1919 Property. This pre-petition transfer was disclosed on January 6, 2009, in Debtor's amended Statement of Financial Affairs. Trustee was therefore made aware of this transfer prior to the Rule 4004 deadline. To say that the deadline should toll because one of two grounds for objection did not arise until after the deadline is not a valid argument – it simply is not supported by the facts of this case and by Trustee's own asserted grounds for relief.

Lastly, had Trustee filed a motion to extend time pursuant to amended Rule 4004, the Court would have entertained whether it was "just and practicable" to allow the Rule to apply to this proceeding and presuming that it did, would have proceeded to determine whether the requirements of 4004(b)(2) were met. *See In re Lusane*, 2013 WL 662695 at *2. The Court will not supply an equitable remedy when Trustee did not avail itself of a potential legal one.

C. Intent under § 727(a)(2)

In addition to the untimeliness of the Amended Complaint, dismissal is warranted because Trustee has failed to show that Debtor acted with the requisite intent. Trustee's Amended Pretrial Order would have the Court deny Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2)(A) and (B).

Germane to both sections (A) and (B) is whether debtor acted with the requisite intent. The objecting party has the burden to prove the objection by a preponderance of the evidence. *In re Jennings*, 533 F.3d at 1339. Actual intent is required but can be established by circumstantial

evidence or inferred from debtor's conduct. *Id.* The Eleventh Circuit has identified indicia of fraud that tend to show actual intent. These are:

> (1) the lack or inadequacy of consideration for the property received; (2) the nature of the relationship between the transferor and the transferee; (3) whether the transferor retains possession, control, benefits, or use of the property in question; (4) whether the transfer resulted in insolvency; (5) the cumulative effect of the debtor's transactions and course of conduct after the onset of financial difficulties or threat of suit by creditors; and (6) the general chronology and timing of the transfer in question.

Id.

In *In re Jennings*, the Court found that there was ample evidence of intent to "hinder, delay, or defraud a creditor" resulting from the debtor's pre-petition advance $130,000 payment on a contract for improvements on his property. The debtor in that case made the unilateral decision to make a payment in excess of what was due, he received no additional benefit from the early payment, and the trier of fact, the bankruptcy court, found the debtor was not credible in his assertion of an innocuous, non-fraudulent explanation for the payment. *Id.* at 1341-2.

Here, there are not sufficient indicia of fraud to show by a preponderance of the evidence that Debtor acted with the requisite intent with regards to either the pre-petition or post-petition transfer. Related to the pre-petition transfer of the 1919 Property, Trustee asserts that his position is supported by the fact that Debtor transferred the Property three days before filing and that Debtor did not disclose this transfer on her Petition. As evidence of fraudulent intent with regards to the post-

petition unauthorized reverse mortgage, Trustee argues that Debtor did not get Court approval for the transfer, never gave an accounting for the loan to Trustee, never amended her Schedules to reflect this transfer, and that she did not disclose on the reverse mortgage Application that she was in bankruptcy. Trustee asserts that Debtor's failure to appear at numerous § 341 meetings (which necessitated Trustee's filing of a Motion to Compel which was followed by Debtor's "groundless" Appeal) and to comply with Trustee's directives and discovery requests are further evidence of Debtor's intent to delay this proceeding.

Debtor's testimony at the § 341 meeting, which was played at trial, paints a different picture. At the § 341 meeting, Debtor freely admitted that she made both transfers. The parties agree that $8500.00 was the consideration for the pre-petition transfer and Trustee's appraisal of the property showed a $7000.00 value. Debtor testified that she verbally disclosed her bankruptcy case to the loan officer from Lenox[16] and that she believed that she did not need Court approval to take out a reverse mortgage on her home as a personal residence received special status in bankruptcy. Furthermore, according to Debtor, the lenders should have had her credit report, disclosing the bankruptcy case. Additionally, Debtor believed that HUD, a federal agency, would not approve a loan where such approval would violate federal law.[17]

Debtor maintained that she was attempting to renegotiate her debts with various lenders presumably outside of bankruptcy if she could get her case dismissed. Trustee told Debtor during

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[16] This fact is disputed by Brian Brown's affidavit filed in connection with the earlier Motion for Summary Judgment, but no evidence other than Debtor's testimony at the § 341 meeting was offered at trial by Trustee.

[17] Trustee also failed to file a copy or notice of Debtor's Petition in the real estate records so as to protect the avoidability of the post-petition transfer. 11 U.S.C. § 549(c).

a telephone conversation that her case would be "dismissed" if she did not show for the § 341 meeting. Although not excusing Debtor's failure to appear at the meeting so many times, this interchange backs up Debtor's continual assertion – she was not avoiding the § 341 meeting to hinder her creditors; rather, she wanted her case dismissed so that she could workout her debts with her creditors outside of bankruptcy. This belies any intent to "hinder, defraud, or delay."

Applying the *In re Jennings* factors also shows that Debtor did not act with the requisite intent. Plaintiff is not asserting that Debtor received inadequate consideration in connection with the transfer of the 1919 Property. Plaintiff asserts that the reverse mortgage was not for reasonably equivalent value but offers no evidence to support this assertion. The maximum value of the reverse mortgage to Debtor is $430,500.00 of which Debtor has received approximately $160,000.00. Since the lien on the property is limited to the amount advanced, plus interest, the values are reasonably equivalent almost by definition.

The 1919 Property transfer was to an insider, however, Debtor received more than fair value for the property. Debtor did not retain possession or control of the 1919 Property. She did retain control of the 411 Property but Debtor lived in that property so there is nothing ominous or exceptional about that fact. Trustee could have sought a motion to compel Debtor to turn over the proceeds of the reverse mortgage but did not. Trustee asserts that Debtor was insolvent both before and after the transfers but offers no specific evidence as proof. Debtor's course of conduct indicates her desire to work with her creditors rather than hinder them, albeit through ill-advised means. The timing of the pre-petition transfer three days before bankruptcy is suspicious. However, as stated, the transfer was for more than fair value and Debtor disclosed the transfer on her amended Statement of Financial Affairs and at the § 341 meeting. Plaintiff has not provided sufficient evidence of

indicia of fraud to show that Debtor acted with the requisite intent by a preponderance of the evidence.

III. Debtor's Motion for Reconsideration and for Extension of Time

On February 4, 2013, after the failed settlement associated with the January 29, 2013 trial date, Debtor filed a *pro se* Motion for Reconsideration and for Extension of Time in order to find new counsel ("Reconsideration Motion). (Docket No. 85). Trustee responded in opposition to the Reconsideration Motion. (Docket No. 86). Debtor asserted that she had been denied effective assistance of counsel at trial but did not, however, state any facts to support her assertion nor did she allege any legal basis for the requested relief other than her "civil, human, constitutional, and substantial rights." Debtor did not state which deadline she wanted extended and until what time. At the time the Reconsideration Motion was filed no deadlines were pending.

It is unclear what Debtor wanted the Court to reconsider as the Court did not approve the settlement or issue any orders on the January 29 scheduled trial date. To the extent that Debtor sought the Court to reconsider approval of the settlement, the motion is moot because the Court never approved the settlement. Because of the lack of factual and legal support, Debtor's Reconsideration Motion will be denied.

IV. CONCLUSION

Trustee has not asserted a timely § 727(a) objection to Debtor's discharge. This untimeliness is fatal to the objection. Moreover, the objection fails because Trustee has not proven by a preponderance of the evidence that Debtor acted with the requisite fraudulent intent under § 727(a)(2).

Accordingly, it is

ORDERED that the Motion to Dismiss the unresolved portion of Plaintiff's Amended Complaint, Count VI, is **GRANTED** and the Objection to Debtor's discharge is **OVERRULED**.

IT IS FURTHER **ORDERED** that Debtor's Motion for Reconsideration and for Extension of Time is **DENIED**.

The Clerk's Office is directed to serve a copy of this Order upon Debtor, Plaintiff, Plaintiff's counsel, the United States Trustee, and all creditors and parties in interest. Debtor's discharge shall be issued when she complies with the requirements of § 727(a)(11).

END OF DOCUMENT