UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
SAMANTHA DEANE WIER,	)	CASE NO. **09-83879** - MHM
	)	
Debtor.	)	
	)	
D.A.N. JOINT VENTURE III, L.P.,	)	
	)	
Plaintiff,	)	
v.	)	ADVERSARY PROCEEDING NO. 10-6076
	)	
SAMANTHA DEANE WIER,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Plaintiff's *Motion for Summary Judgment* (Doc. No. 29, 30, 31) (the "Motion"). Defendant ("Debtor") filed a response opposing the Motion.

The facts are undisputed: In 1998, Paul Isbell ("Isbell") obtained a line of credit in the amount of $85,000 and signed a promissory note in favor of Merrill Lynch Business Financial Services, Inc., which was later assigned to Plaintiff (the "Note"). On June 29, 2004, Isbell gratuitously transferred to Debtor by quitclaim deed a one-half interest in Isbell's real estate located at 39 Conifer Lane, Atlanta, Fulton County, Georgia (the "Property"). At the time of the transfer, Debtor and Isbell were cohabiting at the Property; they later married in 2009. On November 2, 2004, as a result of Isbell's default

under the Note, Plaintiff sued Isbell in Fulton County State Court. While that lawsuit was pending, on January 3, 2005, Isbell transferred the remaining one-half interest in the Property to Debtor. On June 21, 2005, judgment was entered against Isbell and in favor of Plaintiff in the amount of $45,561.50, plus interest, attorneys fees, late charges and costs, for a total of $56,624.28. On July 11, 2006, Plaintiff sued Isbell and Debtor, *inter alia*, to recover the fraudulent transfer of the Property. On November 1, 2007, Plaintiff, Isbell and Debtor executed a settlement agreement, pursuant to which Debtor executed a promissory note to Plaintiff for $72,271.46 (the "Second Note"), and a second priority deed to secure debt on the Property to secure the Second Note. On August 5, 2008, SunTrust Mortgage, Inc., foreclosed on the Property.[1]

On September 11, 2009, Debtor filed a Chapter 7 bankruptcy petition. Debtor failed to list Plaintiff as a creditor. The bar date for filing complaints objecting to discharge or to determine dischargeability was December 14, 2009. Plaintiff received actual notice of Debtor's bankruptcy case February 1, 2010.

Section §727(b) provides that, unless a claim is nondischargeable under §523, a discharge discharges a debtor "from all debts that arose before the date of the order for relief...." The only grounds under which an omitted debt is nondischargeable *because* it was omitted are set forth in §523(a)(3).[2] Although Plaintiff's complaint sets forth claims under §523(a)(2) and (6), because the complaint was filed after the Bankruptcy Rule 2007

[1] Apparently, the foreclosure sale of the Property did not result in any proceeds in excess of SunTrust's lawful debt.

[2] Other subsections of §523(a), except §523(a)(2), (4), or (6), may be applicable to render a debt nondischargeable, without regard to whether the debt had been listed in the debtor's bankruptcy schedules.

bar date, those claims were not timely filed. In the Motion, however, Plaintiff is proceeding under §523(a)(3), which provides that a claim against a debtor is not discharged if it is:

> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
>
> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request[.]

Debtor's Chapter 7 case was filed as a no-asset case; therefore, even though the Chapter 7 Trustee is investigating the possibility of assets, no deadline for filing a proof of claims has been set.[3] Because Plaintiff will be able to file a timely proof of claim if a deadline is set, §523(a)(3)(A) appears to be inapplicable in Debtor's Chapter 7 case. If Plaintiff's claim, however, is of a kind specified in subparagraphs (2), (4), or (6) of §523(a), Plaintiff may proceed to seek a determination of nondischargeability under §523(a)(3)(B).

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[3] In a no-asset case, pursuant to Bankruptcy Rules 2002(e) and 3002(c)(5), no time limit for filing proofs of claim is set unless assets become available for distribution to creditors, in which case, all creditors are notified and accorded an opportunity to file proofs of claim. On February 14, 2010, the Chapter 7 Trustee entered on the docket a notice that he is investigating the possibility of assets.

In the case of *Keenom v. All American Marketing,* 231 B.R. 116, 121 fn 5 (Bankr. M.D. Ga. 1999) (J. Walker), the court describes three ways to obtain a determination regarding the dischargeability of an omitted debt: (1) a state court can decide the dischargeability issue when the debtor interposes in a state court collection action the defense of discharge in bankruptcy;[4] (2) the bankruptcy court can determine dischargeability following a motion by the debtor or the omitted creditor to reopen the case and file a complaint under Bankruptcy Rule 7001 to obtain a declaratory judgment regarding dischargeability; and (3) the bankruptcy court can determine dischargeability when the debtor moves to enforce the discharge injunction. Under none of these three options is the creditor required to prove the merits of a claim under §523(a)(2), (4) or (6); instead the creditor must prove only a colorable or viable claim under one of those subsections.

Proof under §523(a)(3)(B) is a two-part endeavor: first, the creditor must show it lacked notice of the bankruptcy case before expiration of the §523(c) bar date. The undisputed facts establish that lack of notice. Second, the creditor must show that its claim is "of a kind specified in paragraph (2), (4), or (6)." Congress' use of the term "of a kind" evidences its intent that a trial of the merits is unnecessary. In the case of *Haga v. National Union Fire Insurance Co. of Pittsburgh, Pa.,* 131 B.R. 320 (Bankr. W.D. Tex. 1991), the court explained that Congress determined that denial to creditor of the right to file a proof of claim (and share in distribution of estate assets, if any) and the right to

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[4] Under §523(c), the bankruptcy court has the exclusive jurisdiction to determine dischargeability only under §523(a)(2), (4) or (6). For all other subsections of §523(a), including §523(a)(3), the bankruptcy court has concurrent jurisdiction with state courts.

obtain a determination of nondischargeability of the creditor's debt are the only material harms to an omitted creditor. Accordingly, those are the logical (and only) grounds for penalizing a debtor with denial of dischargeability of creditor's debt. Because the remedy for the omitted creditor is punitive to the debtor, such creditor should not be required to prove the merits of its claim but held to a lower standard of proof: the existence of a colorable claim only. Additionally, trying the claim on its merits would run afoul of the time bar described in §523(c) and Bankruptcy Rule 4007. The burden of proof to show a colorable claim remains with the creditor.

Georgia law, throught the Uniform Fraudulent Transfer Act, O.C.G.A. §18-2-70, provides:

§ 18-2-74. Transfer made or obligation incurred by debtor that is fraudulent as to creditor; determination of intent

> (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the

business or transaction; or

(B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(b) In determining actual intent under paragraph (1) of subsection (a) of this Code section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;

(2) The debtor retained possession or control of the property transferred after the transfer;

(3) The transfer or obligation was disclosed or concealed;

(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) The transfer was of substantially all the debtor's assets;

(6) The debtor absconded;

(7) The debtor removed or concealed assets;

(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The undisputed facts support a conclusion that the transfer of the Property to Debtor was made with actual intent to hinder, delay, or defraud any creditor and, given the close personal relationship between Isbell and Debtor, the transfer was made with her knowledge and acquiescence of Isbell's fraudulent intent. Therefore, under the case of *Maxfield v. Jennings*, 670 F. 3d 1329 (11th Cir. 2012), Plaintiff has shown a colorable claim that its claim is non-dischargeable under §523(a)(6). As a result, Plaintiff's claim is non-dischargeable under §523(a)(3).

Additionally, Plaintiff has shown that the amount due under the Second Note as of September 30, 2012, is $98,003.12, plus attorneys fees under O.C.G.A. §13-1-11. Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is ***granted:*** Judgment will be entered in accordance with this order.

IT IS SO ORDERED this the 30th day of September, 2012.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE