



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

**Date: May 1, 2012**

**Paul W. Bonapfel  
U.S. Bankruptcy Court Judge**

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

<b>IN RE:</b>	:	<b>Chapter 7</b>
	:	
<b>MICHAEL EUGENE CLONINGER,</b>	:	<b>11-83163-pwb</b>
	:	
<b>Debtor.</b>	:	
_____	:	
	:	
<b>WILLIAM E. CLONINGER,</b>	:	
	:	
<b>Movant,</b>	:	
<b>vs.</b>	:	
	:	
<b>MICHAEL EUGENE CLONINGER,</b>	:	
	:	
<b>Respondent.</b>	:	
_____	:	

**ORDER AMENDING MARCH 1, 2012 ORDER [23] WITH REGARD  
TO OBJECTION FILED BY WILLIAM E. CLONINGER [22] ON  
MOTION FOR REHEARING OF WILLIAM E. CLONINGER [27]  
AND  
ORDER REOPENING CASE**

On February 23, 2012, the Clerk received and docketed the "Objection to Debtor's

Dischargeability, Motion Requesting the Debtor Supply Further Information Listing All Creditors, and Motion Requesting a Second Meeting of Creditors to be scheduled Telephonically” (the “Motion”), filed by William E. Cloninger (the “Creditor”). [Docket No. 22]. On March 1, 2012, the Court entered an Order that dismissed the Motion (the “March 1 Order”). [Docket No. 23].

In the March 1 Order, the Court construed the Motion as requesting, among other things, that the Debtor’s discharge be denied and that the Court determine that the debt the Creditor claims is excepted from discharge under 11 U.S.C. § 523(a)(2), (4), or (6). The Court ruled that the Court could not grant either of these requests for relief because they were not timely filed under Fed. R. Bankr. P. 4004(a) and 4007(c).

The deadline for the filing of a complaint objecting to denial of the debtor’s discharge or seeking a determination of the dischargeability of a debt under § 523(a)(2), (4), or (6) expired on February 21, 2012 [Docket No. 5], two days prior to the Clerk’s receipt of the Creditor’s Motion. The Creditor, a prisoner in Florida, asserted that the “mailbox rule” applicable to incarcerated persons required that the Motion be deemed to be filed at the time he delivered it to prison authorities for mailing, which was February 17, 2012, according to a notation stamped and dated on the Motion. The Court declined to apply the mailbox rule because Rules 4004(a) and 4007(c) expressly require the filing of a complaint prior to the deadline they impose.

On March 23, 2012, the Clerk received and docketed the Creditor’s “Motion for Rehearing/Motion to Recall” the Court’s February 21 Order (the “Rehearing Motion”). [Docket No. 27]. The Rehearing Motion asks the Court to review its ruling with regard to applicability of the mailbox rule in light of the Supreme Court’s ruling in *Houston v. Lack*, 487 U.S. 266

(1988), and its progeny.

The Court construes the Rehearing Motion as a motion to amend or make additional findings of fact under Fed. R. Civ. P. 52(a), *applicable under* Fed. R. Bankr. P. 7052 and 9014(c) or as a motion to alter or amend the order under Fed. R. Civ. P. 59(e), *applicable under* Fed. R. Bankr. P. 9023. A motion under these Rules must be filed within 14 days after entry of the Order. A notation on the Rehearing Motion shows that the Creditor delivered it to prison authorities for mailing on March 12, 2012. Consequently, the Rehearing Motion is timely if the mailbox rule applies and untimely if it does not.

As set forth in *Houston v. Lack*, 487 U.S. 266 (1988), and other cases,<sup>1</sup> the mailbox rule is that a paper that a prisoner files in a federal court is deemed to be filed when he delivers it to prison authorities responsible for mailing it to the court. Courts have ruled that the mailbox rule applies to papers that a prisoner files in a bankruptcy court. *See In re Luedtke*, 337 B.R. 918 (Bankr. E.D. Wis. 2006); *In re Looper*, 334 B.R. 596 (Bankr. E.D. Tenn. 2005).

The record here reflects that the Creditor is a prisoner and that he delivered the Motion to prison authorities for mailing on February 17, 2012, and the Rehearing Motion on March 12. Under the mailbox rule, these dates are the filing dates for purposes of applying the deadlines for the filing of a complaint objecting to discharge or to determine the dischargeability of a debt under § 523(a)(2), (4), or (6). Accordingly, if the mailbox rule applies, the Motion contained timely requests for denial of the Debtor's discharge and for determination of the dischargeability of the debt, and the Rehearing Motion was filed prior to the deadline for the filing of a motion

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<sup>1</sup>*See, e.g., In re Looper*, 334 B.R. 596, 599-601 (Bankr. E.D. Tenn. 2005) (discussing and collecting cases applying *Houston v. Lack* to determine timeliness of filing of papers in federal courts); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1153.

to alter or amend the March 1 Order.

The Court dismissed the Motion without requiring a response from the Debtor and without a hearing because the Court concluded that it could not grant any of the relief that the Motion requested. The Court will not revisit the March 21 Order with regard to any matters other than the requests for denial of discharge and determination of dischargeability of the debt.

With regard to the discharge and dischargeability issues, the Court dismissed the Motion because the Court determined that it was not timely filed; the Court's further review of the authorities cited herein indicates that this conclusion may be erroneous. Therefore, the Court will consider the Motion with the assumptions that the mailbox rule applies and that the Creditor meets its requirements. The Debtor will have the opportunity to challenge these assumptions at a later date if necessary, as set forth below.

A *pro se* litigant is entitled to some leeway in the filing and prosecution of a proceeding in federal court, although the courts expect general compliance with procedural rules. This Court generally permits a *pro se* creditor to amend a timely-filed, but procedurally defective, paper to comply with procedural requirements when the paper asserts apparently plausible grounds for denial of a debtor's discharge or the determination of dischargeability of a debt when the debt will be discharged under 11 U.S.C. § 523(c) in the absence of a timely request for determination of the debt.

The Creditor's motion states an apparently plausible ground for a determination that its debt is excepted from discharge. The Motion states in pertinent part, "[T]he Debtor stole \$12,750 from the Creditor while the Debtor was acting in his fiduciary duty, which under Florida law constitutes civil theft." It requests that the Court "enter the appropriate order or orders

dismissing the [Creditor], finding that the [Debtor] should not have listed the [Creditor] as a creditor in the matter at hand, or any other relief the Court deems just and proper in the interest of justice.”

These allegations state several possible grounds for determination that the debt should be excepted from discharge. The allegation that the Debtor committed theft in violation of a fiduciary duty asserts a claim that the debt should be excepted from discharge under § 523(a)(4) as a debt “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny.” The allegation of civil theft under Florida law states a plausible claim that the debt should be excepted under § 523(a)(6) as a debt for “willful and malicious injury by the debtor to another entity or to the property of another entity.” These allegations also state a plausible claim that the debt should be excepted under § 523(a)(2)(A) as a debt for money obtained “by false pretenses, a false representation, or actual fraud.”

The Court, therefore, construes the Motion as stating a claim that a debt owed by the Debtor to the Creditor is excepted from discharge under § 523(a)(2), (4), or (6). At this stage of this dispute, the Court has construed the Motion somewhat liberally in accordance with the directives of Fed. R. Bankr. P. 1001 that the Federal Rules of Bankruptcy Procedure be construed “to secure the just, speedy, and inexpensive determination of every case and proceeding” and of Fed. R. Civ. P. 8(e), *applicable under* Fed. R. Bankr. P. 7008, that pleadings “be construed so as to do justice.”

The Motion is, however, procedurally deficient for several reasons. First, a request for determination that a debt is excepted from discharge must be asserted in a complaint that initiates an adversary proceeding. Fed. R. Bankr. P. 7001(6). This requires the filing of a complaint,

Fed. R. Bankr. P. 7003 (incorporating Fed. R. Civ. P. 3) and issuance of summons. Fed. R. Bankr. P. 7004(a)(1) (incorporating Fed. R. Civ. P. 4(a) and (b)). The Creditor has not filed an adversary proceeding.

Second, summons and a copy of the complaint must be served on the debtor and the debtor's attorney. Fed. R. Bankr. P. 7004(a)(1) (incorporating Fed. R. Civ. P. 4(a), (b), (c)(1), (d)(1), (e)-(j), (l) and (m)). Fed. R. Bankr. P. 7004(b) permits service upon the debtor by mailing a copy of the summons and complaint to the address shown in the debtor's petition for bankruptcy relief. Service must also be made on the debtor's attorney, which may be by mailing it to the attorney. Fed. R. Bankr. P. 7004(g) and Fed. R. Civ. P. 5(b). The Creditor did not obtain issuance of summons and it does not appear that the Motion was served on the Debtor.

Third, the Motion states only conclusory allegations with regard to the debt and the grounds that it should be excepted from discharge. When a creditor asserts that a debt is excepted from discharge, it must state the factual circumstances under which the debt arose and the factual reasons that support the claim that it is excepted from discharge. Fed. R. Civ. P. 8(a), *applicable under* Fed. R. Bankr. P. 7008. For example, if fraud or defalcation in a fiduciary capacity is alleged, the complaint must state the facts establishing that the debtor was acting in a fiduciary capacity. Furthermore, in alleging fraud a party "must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b), *applicable under* Fed. R. Bankr. P. 7009.

Finally, the Motion does not contain an allegation as to whether the proceeding is core or non-core and, if non-core, whether the Creditor consents to entry of final orders or judgment

by the bankruptcy judge, as Fed. R. 7008(a) requires. (A complaint to determine dischargeability of a debt is defined as a core proceeding in 28 U.S.C. § 157(b)(2)(I).)

The Court has discretion to convert a contested matter initiated by the filing of a motion to an adversary proceeding. The Court will exercise this discretion by permitting the Creditor to initiate an adversary proceeding by filing a complaint and prosecuting it in compliance with the applicable Federal Rules of Bankruptcy Procedure within 30 days from the date of entry of this Order.<sup>2</sup> The Court will consider such complaint as an amendment to the Motion. The entry of this Order is without prejudice to any rights of the Debtor to object to the exercise of the Court's discretion in this regard, to assert that the mailbox rule does not apply or that the requirements for its application have not been met, or to present any defense based on the timeliness of the filing of the complaint.

Liberalized construed, the Motion also states a request for denial of the Debtor's discharge and a request for dismissal for "abuse" under 11 U.S.C. § 707(b). The Court in the March 1 Order dismissed the request for denial of the discharge because it was untimely and any request for dismissal under § 707(b) because it did not state any plausible grounds for dismissal.

The Court now considers the dismissal of the request for denial of discharge as if it were timely filed. The Motion is procedurally defective because the Creditor did not make the request for denial of the discharge in an adversary proceeding as Fed. R. Bankr. P. 7001(4) requires. As stated above, the court has discretion to permit a creditor to cure procedural defects when a procedurally defective paper states a plausible ground for relief. The Motion does not meet that

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<sup>2</sup>The fee for a creditor to file a complaint to determine the dischargeability of a debt is \$ 293.

standard with regard to denial of the Debtor's discharge because it states no plausible ground for denial of the discharge under 11 U.S.C. § 727.

The Rehearing Motion does not contest the Court's conclusion in the March 1 Order that the Motion does not state any plausible grounds for dismissal under 11 U.S.C. § 707(b). The Court, therefore, will not revisit the dismissal of any request for dismissal under § 707(b). As an additional reason for dismissal of any request for relief under § 707(b), the Court notes that it does not appear that the Creditor is entitled to seek dismissal under § 707(b) in this case. Because the Debtor's current monthly income is below-median, a creditor is not entitled to seek dismissal under § 707(b) under the provisions of 11 U.S.C. § 707(b)(6).<sup>3</sup>

For the foregoing reasons, the Court will not amend its March 1 Order with regard to dismissal of the Motion to the extent it seeks denial of the Debtor's discharge under 11 U.S.C. § 727 or dismissal of the case under 11 U.S.C. § 707(b).

The Court notes that, prior to the Clerk's receipt of the Creditor's Rehearing Motion but after it was filed, determined in accordance with the mailbox rule, the Court discharged the Debtor and closed this estate. [Docket No. 25]. In view of the Court's ruling as set forth herein, it is appropriate to reopen this case pursuant to 11 U.S.C. § 350(b) to permit the Creditor to timely file an adversary proceeding.

Based on, and in accordance with, the foregoing, it is hereby **ORDERED and ADJUDGED** as follows:

1. The Creditor's Rehearing Motion is **GRANTED in part** as set forth herein. Except

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<sup>3</sup>The Court notes that the Motion asserts that the Debtor filed this case solely to avoid the Creditor's enforcement of its debt. The Debtor's schedule F reflects ten other creditors whose debts total \$27,840.



to the extent that the Rehearing Motion is granted, it is otherwise **DENIED**. In particular, the Creditor's requests for denial of the Debtor's discharge under 11 U.S.C. § 727 and for dismissal of this case under 11 U.S.C. § 707(b) are **DENIED**.

2. The Creditor may, within 30 days of the date of entry of this Order, convert its Motion into an adversary proceeding by commencing an adversary proceeding, in compliance with applicable Federal Rules of Bankruptcy Procedure, against the Debtor seeking a determination that its debt is excepted from discharge under 11 U.S.C. § 523(a)(2), (4), and/or (6), and paying the required fee. The Court will consider such complaint as an amendment to the Motion. The entry of this Order is without prejudice to any rights of the Debtor to object to the exercise of the Court's discretion in this regard, to assert that the mailbox rule does not apply or that the requirements for its application have not been met, or to present any defense based on the timeliness of the filing of the complaint.

3. This case is hereby reopened pursuant to 11 U.S.C. § 350(b), without the necessity of the payment of any additional filing fee, solely for the purpose of permitting the Creditor to commence an adversary proceeding as set forth above. The reopening of the case shall not affect the Debtor's discharge, the discharge of the Chapter 7 Trustee, the operation of the discharge injunction under 11 U.S.C. § 524, the termination of the automatic stay pursuant to 11 U.S.C. § 362(c), or the administration of property of the estate and abandonment of it to the debtor under 11 U.S.C. § 550(c). Notwithstanding the foregoing, the Court will, pursuant to 11 U.S.C. § 105(a), stay the Creditor from taking any act to enforce its debt pending determination of whether it is excepted from discharge, subject to the Creditor's right to seek relief from such

stay.<sup>4</sup>

4. If the Creditor does not timely commence such an adversary proceeding, the Motion will stand dismissed, without further notice and without further Order. If the Creditor does not timely commence an adversary proceeding, the Clerk is authorized and directed to close this case without further notice and without further order.<sup>5</sup>

6. The provisions of the March 1 Order are hereby amended in accordance with the foregoing. Except as amended herein, the provisions of the March 1 Order remain in effect.

**[END OF ORDER]**

**THIS ORDER HAS NOT BEEN PREPARED FOR PUBLICATION AND IS NOT INTENDED FOR PUBLICATION.**

**DISTRIBUTION LIST**

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**ALL OTHER PARTIES IN INTEREST**

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<sup>4</sup>The effect of this stay is that the Creditor and the Debtor are in the same position they would have been in if this case had not been closed, *i.e.*, the automatic stay of 11 U.S.C. § 362 would still be in effect.

<sup>5</sup>The operation of the mailbox rule may result in the Creditor's timely filing of an adversary proceeding that the Clerk does not receive until after expiration of the deadline. To take account of this possibility, the Court directs that the Clerk allow 60 days before closing the case because of the absence of the filing of an adversary proceeding.