

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 13
)	
PATT DEE LINN,)	CASE NO. 08-77998 - MHM
)	
Debtor.)	
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PATT DEE LINN,)	
)	
Plaintiff,)	ADVERSARY PROCEEDING
v.)	NO. 14-5222
)	
UNITED STATES OF AMERICA)	
INTERNAL REVENUE SERVICE,)	
)	
Defendant.)	

ORDER ON MOTION TO DISMISS

This adversary proceeding is before the Court on the United States' *Motion for Summary Judgment*, filed February 6, 2015 (Doc. No. 16) (the "Motion"). Debtor initiated this proceeding by filing a complaint July 16, 2014 (the "Complaint"), seeking a determination that Debtor's taxes, penalties, interest, and other debts owed to Defendant for tax years 2005 and earlier were discharged in her Chapter 13 case, No. 08-77998, underlying this proceeding (the "Main Case"). Defendant argues that it is entitled to judgment as a matter of law, because Debtor's tax liabilities for 2003 through 2005 are non-dischargeable pursuant to 11 U.S.C. § 523(a)(1)(B)(ii).

Background

Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, initiating the Main Case September 12, 2008 (the “Petition Date”). Concurrently, Debtor filed a Chapter 13 Plan, which was most recently amended March 11, 2009 (Doc. No. 32 of the Main Case) (as amended, the “Plan”) and was confirmed by order entered March 26, 2009 (Doc. No. 36 of the Main Case). Defendant filed a proof of claim October 6, 2008, seeking payment of \$255,949.61 in tax debt, including a \$28,240.00 secured claim, \$149,639.57 of unsecured priority claims, and \$78,070.04 in general unsecured claims. The Plan provided for full payment of Defendant’s secured and priority claims, but provided no distribution to unsecured claims. Defendant did not file an objection to the terms of the Plan. The Chapter 13 Trustee filed a *Notice of Plan Completion* November 14, 2013 (Doc. No. 64), and an order entered November 21, 2013 granted Debtor’s discharge pursuant to 11 U.S.C. § 1328(a).

Debtor complains, and Defendant admits, that Defendant sent post-discharge dunning correspondence to Debtor, seeking payment of approximately \$20,000 regarding tax debts from 2003 and 2004. Debtor asserts this correspondence constitutes a violation of the discharge injunction, because “all income taxes, penalties, interest and other debts owed by Plaintiff to Defendant for all tax years prior to and including 2005 were discharged[.]” In the Motion, Defendant asserts that, because Debtor failed to timely file federal income tax returns in 2003, 2004, and 2005, and filed them late less than two years prior to the Petition Date, tax liabilities for those years are

nondischargeable under § 523(a)(1)(B)(ii). In his *Response* to the Motion, Debtor “concedes ... that the tax debt for the years 2003, 2004, and 2005 would be nondischargeable debt,” but argues that Defendant has failed to show that the amounts identified in the post-discharge dunning correspondence are properly calculated amounts still due after application of the payments made in the Main Case (Doc. No. 17) (the “Response”). Asserting that Defendant miscalculated the amount owed, Debtor argues that Defendant’s attempt to collect an *incorrect* amount is an alternative violation of the discharge injunction. Defendant’s *Reply to Plaintiff’s Response* argues that controlling law bars Debtor from raising an entirely new theory of recovery in his Response (Doc. No. 18) (the “Reply”).

Summary Judgment Standard

Pursuant to FRCP 56(c), incorporated in Bankruptcy Rule 7056, a party moving for summary judgment is entitled to prevail if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Only disputes of fact which might affect the outcome of the proceeding will preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Facts should be viewed, and inferences made, in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962).

Discussion

A. Dischargeability

In relevant part, Section 1328(a) of the Bankruptcy Code provides, upon completion of the Plan, “the court shall grant the debtor a discharge of all debts provided for by the Plan or disallowed under section 502 of this title, except any debt ... of the kind specified in ... paragraph (1)(B) ... of section 523(a)[.]” In turn, § 523(a)(1)(B) describes tax debts

“with respect to which a return ... if required –

- (i) was not filed or given; or
- (ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition.”

Thus, for the purposes of the Main Case, § 523(a)(1)(B)(ii) describes tax debts with respect to which Debtor filed a late return after September 12, 2006.

Defendant asserts Debtor filed the tax returns for 2003 and 2004 April 3, 2007, and that those returns were due April 15, 2004 and April 15, 2005,¹ respectively. Defendant also asserts that Plaintiff filed the tax return for 2005 July 20, 2007, although that return was due October 15, 2006. Thus, Defendant argues, and Debtor now concedes, that Debtor’s tax debts for 2003, 2004, and 2005 are excepted from the discharge of § 1328(a).

¹ See 26 U.S.C. § 6072(a).

B. Raising Additional Arguments in a Brief

Although Debtor concedes that his tax obligations for the 2003, 2004, and 2005 tax years are nondischargeable under § 1328(a) and § 523(a)(1)(B), Debtor argues in his Response that the amounts sought to be collected were miscalculated, so Defendant is attempting to collect a debt not due. Defendant argues that Debtor cannot raise a new claim in response to a Motion for Summary Judgment.

The Complaint never suggests that Defendant has miscalculated the amounts due. Instead, Debtor asserts “Defendant sent dunning correspondence ... seeking payment of almost \$20,000 in tax debt it claims were (*sic*) not discharged. Plaintiff submits that all income taxes, penalties, interest and other debts owed by Plaintiff to Defendant for all tax years prior to and including 2005 were discharged and that Defendant’s actions violate the discharge injunction” Debtor’s prayer for relief asks only for an order declaring all debts owed by Plaintiff to Defendant dischargeable and “such further relief as [the Court] may deem just and proper.” Debtor apparently now seeks to raise an entirely new claim² for Defendant’s attempt to collect sums which, allegedly, are not owed.

Plaintiffs may not raise new claims in response to a motion for summary judgment. *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1314-15 (11th Cir. 2004).

Defendants are not required at the summary judgment stage to “infer all possible claims that could arise out of facts set forth in the complaint.” *Id.* at 1315. Debtor might have

² Debtor argues that Defendant’s attempt to collect debt not due “would in fact be a violation of the discharge injunction.” The discharge injunction of § 524 prohibits any act to collect or recover a *discharged* debt; if, as Debtor contends, the debt Defendant seeks to collect was never due, it could not have been discharged.

sought leave to amend the complaint, *Id.*, but would have then been tasked with the burden of demonstrating that this court could and should properly exercise jurisdiction over what appears to be, at its core, a tax dispute. *See, In re Diez*, 45 B.R. 137 (Bankr. Fla. 1984) (“The court may and should abstain from hearing the [tax] controversy where no bankruptcy purpose is served... .”) Debtor has not sought to amend the complaint, and has conceded that the only relief affirmatively sought by the complaint is inappropriate. Accordingly, it is hereby

ORDERED that the Motion is *granted* and this proceeding is *dismissed*.

IT IS SO ORDERED, this the 29th day of April, 2015.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE