

Dated: February 18, 2005
The following is ORDERED:





Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
GERALD F. EASTER,
Debtor.

Case No. 03-24008-L
Chapter 7

Holcomb Healthcare Services, L.L.C.,
Plaintiff,

v.

Adv. Proc. No. 03-01167

Gerald F. Easter,
Defendant.

ORDER ON MOTION TO DISMISS

BEFORE THE COURT is the Defendant Gerald F. Easter's motion to dismiss. The motion alleges that the complaint fails to state a claim for relief and is barred by the applicable statute of limitations. On May 27, 2004, the court ordered the parties to submit additional briefs and or affidavits. The parties have complied with the court's order, and the court has reviewed the supplemental briefs supplied by the parties, the Affidavit of Gerald F. Easter, and the pleadings. The

complaint seeks a money judgment and a declaration that any obligation owed by the Defendant to the Plaintiff is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and/or 523(a)(2)(A). For the following reasons, the court will grant in part and deny in part the motion to dismiss. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

FACTS

The Defendant filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code on March 10, 2003. The Plaintiff, Holcomb Healthcare Services, L.L.C. (“HHCS”), is a debtor in a Chapter 11 bankruptcy case pending in the United States Bankruptcy Court for the Middle District of Tennessee. That case was filed April 13, 2001. In connection with that bankruptcy case, on October 18, 2002, HHCS filed a complaint against the Defendant (the “Middle District Complaint”). A copy of that complaint was attached to the proof of claim filed by HHCS in connection with the bankruptcy case of the Defendant. The Middle District Complaint makes claims of legal malpractice and breach of fiduciary duty, as well as claims of preference and fraudulent transfer.

This adversary proceeding was commenced by the filing of a Nondischargeability Complaint on November 26, 2003. The complaint seeks the recovery of attorney fees paid to the Defendant by HHCS and a declaration that the obligation owed by the Defendant to HHCS arises from fraud and defalcation while acting in a fiduciary capacity, and thus is nondischargeable. The complaint alleges that at relevant times, the Defendant served as legal counsel, equity holder, and board member of HHCS; and that during Defendant’s engagement as counsel, he and Robert Holcomb, M.D. (“Holcomb”), chairman, chief scientific officer, and equity holder in HHCS, engaged in conduct that benefitted themselves while depleting the assets of HHCS. Specifically, the complaint

alleges that on September 29, 1997, the Defendant resigned from the board of HHCS for the purpose of reducing the equity ownership by the board members and thus causing the board to become “not qualified” for board functions. The complaint seeks a declaration that any judgment rendered for HHCS is nondischargeable pursuant to 11 U.S.C. §§ 523(a)(4) and/or 523(a)(2)(A).

In response to the complaint, on December 19, 2003, the Defendant filed an Amended Answer and Motion to Dismiss. On May 27, 2004, the court directed the parties to file supplemental briefs. In its order, the court found that the complaint is not time-barred by either the deadline to file complaints to determine dischargeability of particular debts, nor by the deadline to file proofs of claim, but that the parties had failed to address the timeliness of the underlying allegations. The complaint does not simply seek a declaration that a pre-existing obligation is nondischargeable, but also asks this court to establish the existence of the obligation itself. This is the same obligation that HHCS seeks to establish in the Middle District Complaint. No judgment has been rendered in that case.

In response to the order directing the filing of supplemental briefs, the Defendant filed a memorandum and affidavit. The affidavit states that the Defendant was hired as legal counsel for HHCS in 1996; was elected to the board of governors of HHCS on March 22, 1997; acquired a 2% equity ownership in HHCS when it was founded in 1996; resigned from the board on September 29, 1997; was terminated as legal counsel for HHCS on August 27, 2001; and received the last payment for services as legal counsel from HHCS on April 2, 2001.

ANALYSIS

A motion under 12(b)(6) of the Federal Rules of Civil Procedure (made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012) tests the legal sufficiency

of the pleading under Rule 8(a) (incorporated at Federal Rule of Bankruptcy Procedure 7008). In considering a motion to dismiss for failure to state a claim, the court construes all of the allegations of the pleading in the light most favorable to the pleader. *See* 5C Wright & Miller, Federal Practice and Procedure: Civil 3d § 1363 (2004). The Rule 12(b)(6) motion is directed to the sufficiency of the claim, not to mere vagueness or lack of detail in the pleading, which is properly the subject of a motion under Rule 12(e) for a more definite statement. Rule 8 sets forth general rules of pleading:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.

Fed. R. Bankr. P. 7008. Certain matters, however, must be pled with more specificity. Rule 9(b) (Fed. R. Bankr. P. 1009(b)) requires that averments of fraud or mistake include a particular statement of the circumstances constituting fraud or mistake. For purposes of testing the sufficiency of a pleading, averments of time and place are material.

A.

The only acts of the Defendant complained of by the Plaintiff in the present complaint are his resignation from the board of governors of HHCS on September 29, 1997, and his receipt of payments for services for some unspecified period of time. The resignation of the Defendant from the board is alleged to have permitted Holcomb to act unilaterally for his own behalf and the behalf of the Defendant. The complaint makes no allegation concerning additional acts of Easter, the Defendant. The complaint alleges that the acts of the Defendant constitute fraud and defalcation while acting in a fiduciary capacity. Fraud must be pled with specificity. The complaint alleges that

the Defendant resigned from the board on September 29, 1997, and that this resulted in Holcomb being able to undertake certain acts in his own interest to the detriment of HHCS. The complaint in effect alleges that the Defendant's act of resignation was part of a fraudulent conspiracy intended to harm HHCS. The complaint also alleges that the Defendant "benefitted by the transfer of escrow funds held for HHCS's benefit and the transfer of equity interests owned by HHCS." As an example, the complaint states that the Defendant was paid monthly for services which benefitted entities other than HHCS. The complaint does not specify which entity made these payments or when they were made. The complaint does not specify that receipt of these payments was part of an ongoing conspiracy.

Among the documents attached to the complaint is a memorandum from Holcomb to James Morton and Julie Hubbard dated May 23, 2000, that directs that the Defendant be paid \$35,000 from the account of Holcomb International, not HHCS. The complaint does not explain the relation between Holcomb International and HHCS, nor does it explain how HHCS was damaged as the result of payments made by Holcomb International. In one of his memorandums, the Defendant states that Holcomb International was the parent of HHCS. The Middle District Complaint indicates that Holcomb International, LLC, was a New York limited liability company, which was a holding company for a number of entities formed by Holcomb. That complaint indicates that membership interests in Holcomb International were exchanged for shares in Quart Limited, an Isle of Man limited company, on September 22, 2000.

The payment to the Defendant for legal services provided by the Defendant to Holcomb individually and other related entities by Holcomb International, the holding company, does not give rise to a cause of action on behalf of HHCS. The complaint does not state a cause of action with

respect to these payments.

The complaint also states that the Defendant “benefitted by the transfer of escrow funds held for HHCS’s benefit and the transfer of equity interests owned by HHCS.” This allegation, without more, does not give rise to a cause of action. It does not indicate what was transferred, or to whom, or what sort of benefit was bestowed upon the Defendant, or how these transfers harmed HHCS. Likewise, it does not relate these transfers to any acts of the Defendant other than, perhaps, the act of resigning from the board of governors of HHCS.

Another document attached to the complaint is a letter from the Defendant to the HHCS board dated August 10, 2000. That letter outlines the steps required by the HHCS operating agreement to elect a new board member. The board did not call a meeting to elect a new member to replace the Defendant until May 12, 2000. The complaint contains no allegation that the remaining board members were prevented in some way from exercising the remedy provided by the operating agreement, or that the Defendant interfered in any way in their doing so.

At times in its legal memoranda, it appears that the Plaintiff views its proof of claim, which incorporates the Middle District Complaint, as forming a part of its adversary complaint. The court declines to view these as one document. HHCS should have taken appropriate steps to incorporate the allegations set forth in the Middle District Complaint if its intent was for this court to consider them.

B.

The court now turns to issues concerning the timeliness of the complaint. As stated previously, the complaint seeking a declaration of non-dischargeability as to any obligation owed by the Defendant to HHCS was timely filed. Likewise, the proof of claim filed by HHCS was timely

filed as no deadline for filing proofs of claim has been established in this case. This does not end the matter, however, as the court must also consider the timeliness of the substantive, non-bankruptcy allegations.

The complaint alleges that the actions of the Defendant constitute fraud and defalcation while acting in a fiduciary capacity. The proof of claim filed by HHCS makes a claim for legal malpractice and breach of fiduciary duty, and attached to it is the Middle District Complaint, which states a number of causes of action including these. In its Response to Defendant's Supplemental Brief on Motion to Dismiss, HHCS argues that the statute of limitations for the underlying claims was tolled by the filing of the Middle District Complaint. As stated previously, the Court declines to view the adversary complaint and the proof of claim as one document. Further, the court declines to render an advisory opinion on the timeliness of the Middle District Complaint. The Court notes, however, that the attorney-client relationship, without more, is insufficient to establish the necessary fiduciary relationship to except debt from discharge pursuant to § 523(a)(4). The term "fiduciary capacity" as used in the Bankruptcy Code is more narrowly construed by the Sixth Circuit than the term "fiduciary relationship" as used in the legal profession generally. *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176 (6th Cir. 1997); *In re Interstate Agency*, 760 F.2d 121 (6th Cir.1985). Pursuant to Sixth Circuit precedent, therefore, absent an express or technical trust relationship, debt resulting from an attorney's legal malpractice remains dischargeable under § 523(a)(4).

The only act complained of in the adversary complaint with any specificity is the resignation of the Defendant from the board of governors of HHCS on September 29, 1997. This occurred more than five years before the filing of the Defendant's bankruptcy petition on March 10, 2003, and more than six years before the filing of the Plaintiff's complaint on November 26, 2003. The

Plaintiff suggests four possible statutes of limitation that may apply to its case:

- Tenn. Code Ann. § 28-3-104 (one year, legal malpractice);
- Tenn. Code Ann. § 28-3-105 (three years, injury to property);
- Tenn. Code Ann. § 28-3-109 (six years, breach of contract);
- Tenn. Code Ann. § 48-18-601 (one year, breach of fiduciary duty of officer or director; three year statute of repose).

Under any of these statutes, except the six year statute for breach of contract, the underlying causes of action asserted by HHCS are time-barred. If the complaint sounded in contract, it would still be late-filed if the court looked only to the date of the filing of the complaint, but would be saved by the tolling of the period of limitations provided at 11 U.S.C. § 108(c).¹ If the gravamen of the complaint were breach of contract, any resulting obligation would be dischargeable. The gravamen of the complaint filed by HHCS is not breach of contract, however. There is no allegation of breach of contract. Rather, the complaint clearly alleges a breach of professional and/or fiduciary duty. Tennessee Code Annotated §§ 28-3-104 and 48-18-601, both of which specify a one year limitation, are the more specific statutes of limitation which apply in this case.

Conceding as much, HHCS argues that the court should look to the filing of the Middle District Complaint to toll the statute of limitations. The court declines to make a determination concerning the timeliness of the Middle District Complaint. The timeliness of the filing of that

¹ 11 U.S.C. § 108(c) provides:

Except as provided in section 524 of this title, if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of - (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case

complaint is an issue for the presiding bankruptcy judge in that case, and timeliness is a defense that may be waived. *Heller v. Smither*, 437 F. Supp. 1, 2 (D.C. Tenn. 1977) (citing 5 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1278 (2004)). Further, the court declines to decide whether the filing of one complaint tolls the statute of limitations for all subsequent complaints arising out of the same occurrences.

The court believes that the most prudent course of action is to dismiss the present adversary complaint to the extent that it seeks a money judgment against the Defendant because that claim is already pending in the Bankruptcy Court for the Middle District of Tennessee, and retain the complaint to the extent that it seeks a declaration that any judgment rendered in that action is nondischargeable. As stated previously, the underlying substantive claims are not well-pled in the present adversary complaint. They may be better set forth in the Middle District Complaint. The allegations of nondischargeability, however, are well-pled and timely. HHCS should seek relief from the automatic stay to proceed with the establishment of its claim against the Defendant pursuant to the Middle District Complaint. HHCS and the Defendant may avoid duplicate trials by seeking the transfer of the venue of either of the pending complaints to the other judicial district and reference to the appropriate bankruptcy court. The complaints then may be consolidated for trial by one bankruptcy judge.

CONCLUSION

Based on the foregoing, the motion to dismiss is **GRANTED** to the extent that it seeks a money judgment against the Defendant, and is **DENIED** to the extent that it seeks a declaration that any amounts owed by the Defendant to HHCS resulted from fraud or defalcation while acting in a fiduciary capacity, and thus are nondischargeable.