**Dated: June 26, 2013**
**The following is ORDERED:**


**Jennie D. Latta**
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

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| In re<br>JOSEPH KELLY JONES and<br>MICHELLE D. JONES,<br>Debtors. | Case No. 02-38185-L<br>Chapter 7 |
| Joseph Kelly Jones,<br>Plaintiff,<br>v.<br>Memphis Wrecking Company, Inc.<br>Defendant. | Adv. Proc. No. 12-00638 |

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**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT**

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BEFORE THE COURT is a Motion for Summary Judgment filed April 19, 2013, by the Plaintiff, Joseph Kelly Jones d/b/a Builders Choice.[1] Defendant, Memphis Wrecking Company, Inc.

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[1] Although the style of the Complaint to Determine Dischargeability of Debt names only Joseph Kelly Jones as Plaintiff, the body of the Complaint treats both of the Debtors as Plaintiffs. The parties agree that it was Joseph Kelly Jones who did business as Builders Choice and that the agreements that are in dispute were made by Joseph Kelly Jones and Memphis Wrecking Company, Inc. Therefore, I have treated Joseph Kelly Jones as the sole Plaintiff in this order.

("MWC"), has failed to file a response to the motion even though the time for its response was extended by agreement to June 7, 2013. In support of the motion, the Plaintiff has submitted a Statement of Undisputed Facts, together with excerpts and certain exhibits from the deposition of Kelly Jones (collective Exhibit A), and excerpts and certain exhibits from the deposition of Steven Williamson (collective Exhibit B). The Plaintiff has also filed a Memorandum of Law in support of the motion. Having carefully considered the testimony and exhibits, I find that the motion should be granted for the following reasons.

**FACTS**

The Plaintiff asserts that the following facts are undisputed:

1. Builders Choice ("BC") was a sole proprietorship owned by Kelly Jones and thus BC was the business name used by Kelly Jones (Kelly Jones Deposition of January 24, 2008, p. 12).

2. In February 2000, MWC contacted Kelly Jones in efforts to find out whether he could secure dumping rights from Kelly Jones for a lump sum amount on the landfill that Kelly Jones was working to open. (Williamson Deposition, pp. 14, 17-18, Exhibit 31).

3. MWC and Kelly Jones entered into an Easement Agreement on February 18, 2000 (the "Easement Agreement"), drafted by MWC, whereby MWC was granted a contingent easement for dumping rights for 10,000 loads contingent upon Kelly Jones acquiring the real property described therein. (Kelly Jones Deposition of January 24, 2008, Exhibit 4).

4. The Easement Agreement stated, "The parties agree that Jones is in the process of acquiring real property described in Exhibit "A" from the current owners." (*See* Kelly Jones Deposition of January 24, 2008, Exhibit 4; *see also* Williamson Deposition pp. 28-29). The Easement Agreement also stated that Kelly Jones had to obtain certain governmental approvals

before the easement would go into effect. *(Id.)*. The Easement Agreement provided MWC the right to demand reimbursement of the money it paid Kelly Jones in the event that said landfills did not come about. *(Id.)*.

5. In exchange for the contingent dumping rights in the Easement Agreement, MWC paid Kelly Jones $100,000 for dumping rights on 10,000 loads. *(Id.)*. The price per load on this deal was $10 per load. *(Id.)* Had MWC purchased the same easement for dumping rights from another dumping site, the rate for 10,000 loads would have run MWC somewhere between $100-$200 per load or between $1,000,000 (one million dollars) and $2,000,000 (two million dollars). (Williamson Deposition, p. 16.).

6. MWC and Kelly Jones entered into a second Easement Agreement on or about June 9, 2000, whereby MWC was granted a contingent easement for dumping rights for an additional 5,000 loads contingent upon Kelly Jones acquiring the real property described in the 2000 Easement Agreement. (*See* Kelly Jones Deposition of January 24, 2008, pp. 41-42).

7. MWC and Kelly Jones entered into the Amendment to Easement Agreement, drafted by MWC, on February 26, 2002, whereby MWC was granted a contingent easement for dumping rights for 5,000 additional loads contingent upon Kelly Jones acquiring the real property described therein. (Kelly Jones Deposition of January 24, 2008, Exhibit 9). The parties acknowledged in this agreement that Jones still did not have the proper approvals and had not yet acquired the property at that time and provided MWC with the remedy to revoke the agreement and demand the total paid to Jones at that time of $200,000 for the dumping rights totaling 20,000 loads. *(Id.)*.

8. On October 29, 2002, Kelly Jones and his wife, Michelle D. Jones, filed for protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the

Western District of Tennessee, No. 02-38185. MWC was not scheduled as a creditor in connection with this filing, nor was the debt owed from Jones to MWC scheduled. (*See* Kelly Jones Deposition of January 24, 2008, p. 81).

9. On December 5, 2003, Kelly Jones [and Michelle D. Jones] converted [their] case from a Chapter 11 case to a Chapter 7 case pursuant to 11 U.S.C. § 1112. MWC was not scheduled as a creditor in connection with the conversion of the case, nor was the debt owed from Jones to MWC scheduled. (Doc. 8, Joint Pretrial Statement, p. 7).

10. On February 16, 2004, Stephanie Cole, the Chapter 7 Bankruptcy Court Trustee determined the matter to be a no-asset bankruptcy. *(Id.)*.

11. On December 17, 2003, a Notice of Meeting of Creditors under Chapter 7 Bankruptcy was issued by the Court. The Notice stated that the case was converted to a Chapter 7 Bankruptcy and that the deadline to file a Proof of Claim was April 13, 2004, and that the final date to file a complaint objecting to discharge of the debtor [or] to determine dischargeability of [certain] types of debts was March 15, 2004. (Doc. 8, Joint Pretrial Statement, pp. 7-8).

12. In February of 2004, MWC had actual knowledge that Kelly Jones had filed for bankruptcy protection. (Williamson Deposition, pp. 49 and 62).

13. On June 21, 2004, the Bankruptcy Court granted Jones a discharge pursuant to 11 U.S.C. § 727 (Doc. 8, Joint Pretrial Statement, p. 8).

14. MWC did not avail itself of any remedies that may have been available to it in the bankruptcy proceeding (Williamson Deposition, p. 65).

15. MWC did not file a proof of claim or complaint objecting to discharge. (Doc. 8, Joint Pretrial Statement, p. 8).

16. MWC filed a complaint to enforce its rights under the Easement Agreements on February 23, 2007, alleging claims of Intentional Misrepresentation and Breach of Contract against Plaintiff Kelly Jones. *(Id.)*.

The Plaintiff filed his Complaint to Determine Dischargeability of Debt on October 15, 2012. MWC filed its answer on November 14, 2012. The Plaintiff filed his Motion for Summary Judgment on April 19, 2013. (Dkt. Nos. 18-19). The Defendant has failed to respond. The factual statements made by the Plaintiff are supported by the written record. There are no genuine issues of material fact in dispute.

**JURISDICTION**

Jurisdiction over a contested matter or adversary proceeding arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The complaint seeks a declaration that the debt owed by Kelly Jones to MWC, if any, was discharged by operation of law when the Debtors' discharge was granted on June 21, 2004, as the result of the failure of MWC to timely file a complaint to determine dischargeability. The determination of the dischargeability of a particular debt is a core proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(I). The bankruptcy court has authority to enter an order determining whether a debt is dischargeable subject only to appellate review. 28 U.S.C. § 157(b)(1).

## SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056. "'Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, __ F.3d. __, 2013 WL 2460415, at *3 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir. 2007).

## ANALYSIS

The outcome in this case turns upon the application of Bankruptcy Code section 523(a)(3), which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> > (3) neither listed nor scheduled under section 521(a)(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.

11 U.S.C. § 523(a)(3). In a no-asset chapter 7 case, unscheduled debts not of a kind specified in paragraph (2), (4), or (6) of section 523(a) are discharged by operation of law because there is no

deadline for timely filing a proof of claim. *Zirnhelt v. Madaj (In re Madaj)*, 149 F.3d 467, 470 (6th Cir. 1998); *In re Rosinski*, 759 F.2d 539, 541-42 (6th Cir. 1985). In a no-asset case, there simply are no assets to distribute to creditors; therefore, there is no reason for creditors to file claims. As a result, creditors who do not receive notice of the bankruptcy filing suffer no harm when their claims are discharged.

An exception to this general rule is made for certain types of claims that may be excepted from discharge if and only if a timely complaint is filed to determine their dischargeability. These are so-called "fraud claims" excepted from discharge under paragraph (2), (4), or (6) of section 523(a). Section 523(c)(1) specifies that, "Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section." 11 U.S.C. § 523(c)(1). This exception within the exceptions to discharge prevents unscheduled debts from being discharged if the creditor has notice or actual knowledge of the filing of a bankruptcy case in time to file a timely request for determination of dischargeability. *United States v. Westley*, 7 Fed. Appx. 393, 2001 WL 302068, at *12 (6th Cir. 2001). Complaints to determine the dischargeability of a particular debt under section 523(c) must be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). Fed. R. Bankr. P. 4007(c). The time for filing a dischargeablity complaint cannot be enlarged after that period has expired. Fed. R. Bankr. P. 4007(c). The application of these Code sections and rules to the present case means that if MWC received notice or had actual knowledge of the filing of the Debtors' bankruptcy petition in time to timely file a complaint to

determine dischargeability, but failed to file such a complaint, Kelly Jones' obligation to MWC, if any, was discharged together with all of the Debtors' other debts on June 21, 2004.

The Plaintiff asserts that MWC did receive notice of the filing of the Debtors' bankruptcy petition. He relies upon the deposition testimony of Steven Williamson, the President of MWC, who testified that he knew of the filing of the bankruptcy case in February 2004. (Deposition of Steven Williamson, p. 62). Mr. Williamson further testified that he "turned it over to Joe Getz," indicating that he turned over the information about the bankruptcy filing to his attorney. (Deposition of Steven Williamson, p. 65). The deadline for filing complaints to determine the dischargeability of a particular debt was March 15, 2004. (Dkt. No. 8, Joint Pretrial Statement, p. 8). MWC has offered no explanation for its failure to take action based upon Mr. Williamson's receipt of knowledge of the bankruptcy filing. When Mr. Williams received knowledge of the filing in February as he testified, MWC had at least fifteen days to file a complaint or ask for additional time to do so. Fifteen days was more than adequate time for MWC to protect its rights. By operation of section 523(a)(3), the debt owed to MWC, if any, was discharged together with the Debtors' other debts on June 21, 2004.

**CONCLUSION**

For the foregoing reasons, the Motion for Summary Judgment is **GRANTED.** The debt owed by Kelly Jones to MWC, if any, was discharged on June 21, 2004.

cc: Debtors/Plaintiff
Attorney for Debtors/Plaintiff
Defendant
Attorney for Defendant