

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

John C. Kimbrough,

Debtor.

Case No. 99-13027

Chapter 7

James Alexander,

Plaintiff,

v.

Adv. Pro. No. 01-5173

John C. Kimbrough,

Defendant.

**MEMORANDUM OPINION AND ORDER RE
PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**

The Court conducted a hearing on this matter on December 11, 2001. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

The original complaint in this adversary proceeding was filed on May 31, 2001. In the complaint, the plaintiff set forth that he and the debtor had entered into a settlement agreement on December 29, 1989, in resolution of the United States District Court case of *J. Alexander, et. al. V. Development Equities Co., Inc., et. al.*. This agreement required the debtor to pay the plaintiff \$100,000 on December 31, 1989, and \$50,000 by March 31, 1990.

"Memorandum Opinion and Order re Plaintiff's Motion for Leave to Amend Complaint"

In the original complaint in the instant adversary proceeding, the plaintiff alleged that the debtor "intentionally, fraudulently and deliberately listed an unknown address for James Alexander." The complaint further asked the Court to set aside the discharge of the debtor and "allow the Plaintiff to proceed to collect the debt owed to him by Mr. Kimbrough."

On October 26, 2001, the plaintiff filed a "Motion for Leave to Amend Complaint" to comply with § 523 of the Bankruptcy Code. Specifically, the plaintiff asked the Court for permission to amend his complaint to adequately plead fraud as the grounds for non-dischargeability. The Defendant objected to this motion on October 26, 2001.

Federal Rule of Civil Procedure 15 allows a party to "amend the party's pleading only by leave of court . . . ; and leave shall be freely given when justice so requires." FED. R. CIV. P.

15(a). In the case of *Foman v. Davis*, the United States Supreme Court held that:

Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires'; this mandate is to be heeded. *See generally*, 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be 'freely given.'

Foman, 371 U.S. 178, 182 (1962). Subsection (c) of Rule 15 provides that "an amendment of a pleading relates back to the date of the original pleading when . . . (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, . . ." FED. R. CIV. P. 15(c).

"Memorandum Opinion and Order re Plaintiff's Motion for Leave to Amend Complaint"

In the case at bar, the Plaintiff is asking this Court to allow him to amend his complaint to plead fraud in accordance with 11 U.S.C. § 523. In his original complaint, the Plaintiff refers to the district court judgment which gave rise to his claim. It also asks the Court to set aside the debtor's discharge so that the plaintiff can "proceed to collect the debt owed to him by Mr. Kimbrough." The Court does not find any reason to deny the plaintiff's motion for leave to amend the complaint. There is reference to the court judgment and a request for a determination of dischargeability. Subsection (c) of rule 15 allows the amendment to relate back to the date of the original pleading so that the plaintiff's amendment will not be time-barred. In addition to granting the plaintiff's motion for leave to amend, the Court also reserves the right for opposing counsel to raise any defenses to the amended complaint which they are entitled to raise under federal law.

ORDER

It is therefore **ORDERED** that the Plaintiff's Motion for Leave to Amend Complaint is **GRANTED**.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: January 10, 2002