



Dated: March 28, 2019
The following is ORDERED:

A handwritten signature in cursive script that reads "Jennie D. Latta".

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
JOSPEH B. SHARP, II,
Debtor.

Case No. 12-26412-L
Chapter 13

Joseph B. Sharp, II,
Plaintiff/Counter-Defendant,
v.
Amy Sharp,
a/k/a Amy Deevers Long,
Defendant/Counter-Plaintiff.

Adv. Proc. No. 18-00193

**ORDER GRANTING COUNTER-DEFENDANT'S MOTION TO DISMISS
COUNTER-PLAINTIFF'S COUNTERCLAIM
AS TO FRAUD/MISREPRESENTATION ONLY**

BEFORE THE COURT is the motion of Plaintiff/Counter-Defendant Joseph B. Sharp, II, [Adv. Proc. Dkt. No. 16] to dismiss the Counterclaim [Adv. Proc. Dkt. No. 6, p. 3] raised by Defendant/Counter-Plaintiff Amy Deevers Long ("Long") pursuant to Federal Rule of Civil

Procedure 12(b)(6) for failure to state a claim upon which relief can be granted and Federal Rule of Civil Procedure 9(b) for failure to plead fraud or misrepresentation with particularity.

JURISDICTION

This adversary proceeding was commenced on August 15, 2018, with a Complaint to Determine Discharge of Marital Debt in which Sharp seeks a declaration that “certain debts” Sharp was compelled to pay pursuant to a Marital Dissolution Agreement and Final Decree of Divorce (the “MDA”) are dischargeable pursuant to 11 U.S.C. §§ 523(a)(15) and 1328(a). The Counterclaim filed by Long on December 3, 2018, asks, among other things, that the obligations of Sharp under the MDA be excepted from discharge pursuant 11 U.S.C. §§ 523(a)(2)(A) and 523(a)(6).¹ See Adv. Proc. Dkt. No. 6.

Jurisdiction over a contested matter 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). Determinations of the dischargeability of particular debts are core proceedings arising under the Bankruptcy Code. See 28 U.S.C. § 157(b)(2)(I). The bankruptcy court has authority to enter an order determining the dischargeability of particular debts subject only to appellate review. 28 U.S.C. § 157(b)(1).

¹ Although the Motion to Dismiss could have been clearer, it seems that it is aimed solely at this “count” of the Counterclaim and not at its remaining claims for relief.

FACTUAL AND PROCEDURAL BACKGROUND

Sharp and Long were married in 1990 and divorced in 2011. Pursuant to the MDA entered into between them, Sharp agreed to indemnify and hold Long harmless from certain debts including personal lines of credit and debts secured by assets retained by Sharp. In addition, the parties were partners in certain business ventures, and the MDA made provision for the division of those interests. The MDA made separate provision for child support and for a nominal amount of alimony in futuro until the earlier of Long's death, remarriage, or receipt of sale proceeds for her interest in Indigo, LLC, and Indigo LR, LLC, two of the parties' business ventures.

Sharp filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on June 19, 2012, a little more than a year after the divorce was final. His Chapter 13 plan was confirmed more than a year after that, on September 16, 2013. The confirmed plan provides for the priority claim of Long to be paid outside the plan. *See* Bankr. Dkt. No. 68. Long did not file a proof of claim. *See* Claims Register. Nearing the completion of his plan, Sharp filed this adversary complaint asking for a determination that debts created by the MDA that are not domestic support obligations ("DSO"s) are dischargeable pursuant to 11 U.S.C. § 1328(a).

Long filed her Answer and Counterclaim on December 3, 2018. Adv. Proc. Dkt. No. 6. The Counterclaim asks for (1) an accounting; (2) a declaratory judgment concerning continuing payments from Indigo, LLC; (3) a charging order, equitable lien, or constructive trust regarding 10% interest in Indigo, LLC; (4) a charging order, equitable lien, or constructive trust regarding Sharp's interest in various other assets; (5) a declaration of nondischargeability regarding Sharp's obligations under the MDA based on fraud, misrepresentation, and bad faith; and (6) a denial of exemptions for interests in Indigo, LLC, and Indigo LR, LLC, and denial of confirmation.

Sharp filed his Motion to Dismiss on February 6, 2019. Adv. Proc. Dkt. No. 16. It focuses solely on the allegations of paragraph 14 of the Counterclaim which is part of the fifth request for relief that asks for a declaration of nondischargeability as to the non-DSO marital debts. Paragraph 14 provides in its entirety:

14. [Sharp]'s promises and commitments to Long under the Marital Dissolution Agreement and the Final Decree of Divorce, including [Sharp]'s agreement to indemnify and hold Long harmless with respect to certain joint debts and to obtain Long's release from certain debts, were made fraudulently and with the intent and purpose of deceiving Long in violation of 11 U.S.C. § 523(a)(2)(A) in that [Sharp] never intended to pay such debts as promised, or indemnify or hold Long harmless, and/or in violation of 11 U.S.C. § 523(a)(6) in that Debtor caused willful and malicious injury to Long or Long's property by not performing as required, by never intending to perform as required, and by inducing Long to rely upon [Sharp]'s false promises and commitments with willful and malicious intent. Long reasonably relied upon [Sharp]'s misrepresentations that he intended to pay, and intended to secure Long's release from, certain obligations. But for such fraud and misrepresentations, Long would have gained more favorable terms than those agreed to in the Marital Dissolution Agreement and approved by the Circuit Court in the Final Decree of Divorce. Thus, [Sharp]'s obligations to Long pursuant to the Marital Dissolution Agreement and the Final Decree of Divorce are non-dischargeable.

Counterclaim, Adv. Proc. Dkt. No. 6.

Long filed a Response to the Motion to Dismiss on March 7, 2019. Adv. Proc. Dkt. No. 22. In support of her Response, Long attached a Federal Income Tax Summary for Sharp from 2012 and a financial statement provided by Sharp to Cadence Bank that is undated, but appears to provide financial information for the year 2010.

Sharp has not filed a reply.

ARGUMENT

Sharp argues that Long's claim that Sharp's non-DSO marital debts should be excepted from discharge must be dismissed under Federal Rule of Civil Procedure 12(b)(6) or Federal Rule of Civil Procedure 9(b). Each of his arguments will be considered in turn.

RULE 12(b)(6)

The Supreme Court has made clear that in order to survive a motion to dismiss under Rule 12(b)(6):

[A] complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 570, 127 S. Ct. 1955 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955. The plausibility standard is not akin to a “probability requirement,” but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are “merely consistent with” a defendant’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.*, at 557, 127 S. Ct. 1955 (brackets omitted).

Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). Long has stated two claims that Sharp challenges. The first is a claim under section 523(a)(2)(A) of the Bankruptcy Code, which provides an exception to discharge for any debt

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition.

In a Chapter 13 case, such debts are excepted from discharge pursuant to section 1328(a) but only if a complaint to determine the dischargeability of the debt is filed no later than 60 days after the first date set for the meeting of creditors under section 341(a). 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c). The court may extend this period for cause, but only upon motion of a party in interest filed *before* the time has expired. Fed. R. Bankr. P. 4007(c). Enlargement outside of that period is prohibited by rule (Fed. R. Bankr. P. 9006(b)(3)) but the court of appeals has determined that the deadline is not jurisdictional. Rather, it is subject to “generally accepted defenses of waiver, estoppel, and equitable tolling.” *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 344 (6th Cir. 2003).

Long did not timely file a complaint pursuant to section 523(c).² Long argues, however, that it “would have been premature for her to file a complaint to determine dischargeability under those sections [§§ 523(a)(2)(A) and (6)] until now because she had no prior notice [Sharp] would seek to discharge his obligations under the Marital Dissolution Agreement and the Final Decree of Divorce.” Counterclaim, ¶ 16, Adv. Proc. Dkt. No. 6. This argument appears to be one for equitable tolling. The court of appeals has directed that courts consider five factors in order to determine whether equitable tolling should apply: “(1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to defendant; and (5) plaintiff’s reasonableness in remaining ignorant of the notice requirement.” *Maughan*, 340 F. 3d at 344. Where there is no question of lack of notice or knowledge of the filing deadline, “[the court’s] inquiry must focus on the diligence used by the plaintiff in pursuing its rights and resulting prejudice, if any, to the defendant.” *Id.*

Long does not argue that she failed to receive notice of the deadline to file complaints. Rather, she says that she did not know that Sharp would seek to discharge his obligations under the MDA. This argument must fail because the filing of a petition in bankruptcy by an individual is, except in highly unusual circumstances, a request for discharge, and non-DSO marital debts are subject to discharge in Chapter 13. *See* 11 U.S.C. §§ 523(a)(15) and 1328(a). The first two of the *Maughan* factors weigh against equitable tolling.

The third *Maughan* factor is diligence. Long waited six years after the deadline to file a complaint to raise her request for relief and then only in response to Sharp’s Complaint. Long apparently argues that it was only the filing of the Complaint that informed her that Sharp would

² The deadline to file complaints was September 24, 2012. Bankr. Dkt. No. 8, Notice of Commencement of Case Under Chapter 13 of the Bankruptcy Code, Meeting of Creditors, and Fixing of Dates. Long was given notice of the deadline on June 21, 2012. *Id.*

seek to discharge his non-DSO marital debts, and by implication, that she responded diligently when she received the Complaint. Non-DSO marital debts have been subject to discharge in Chapter 13 since the 2005 amendments to the Bankruptcy Code. Long does not claim that she was ignorant of this fact. If she was confused about the meaning of the notice she received from the Bankruptcy Court Clerk, she should have consulted an attorney. If she had, she would have been informed of the dischargeability of non-DSO marital debts in Chapter 13 and of the need to file a timely complaint if she sought to prevent discharge of those debts under another theory. Long apparently did not do this, and the court can only conclude that Long did not diligently pursue her rights. The third *Maughan* factor weighs against equitable tolling.

The fourth *Maughan* factor is absence of prejudice to the defendant. Long did not address this factor, but Sharp is nearing completion of his Chapter 13 plan, which was proposed and confirmed under the premise that his non-DSO marital debts are subject to discharge. To permit Long to litigate the question of discharge under section 523(a)(2)(A) now, near the end of the plan, would be highly prejudicial to Sharp. The fourth *Maughan* factor weighs against equitable tolling.

The fifth *Maughan* factor is the plaintiff's reasonableness in remaining ignorant of the notice requirement. This last factor is a bit confusing insofar as it speaks of a "notice requirement." The *Maughan* court relied for its factors on *Andrews v. Orr*, 851 F.2d 146 (6th Cir. 1988), an employment discrimination case, which in turn looked to earlier cases for its factors. Those cases depended upon statutes or regulations that require notice to be given before a complaint is filed. In this context, the "notice requirement" makes sense. There is no similar notice requirement in section 523(c) of the Bankruptcy Code. For this reason, the court need not consider the fifth *Maughan* factor.

Having reviewed each of the *Maughan* factors, the court concludes that equitable tolling should not be applied in this case to permit Long to seek a declaration of nondischargeability as to the non-DSO marital debts under section 523(a)(2)(A). When no other exception applies, non-DSO marital debts are subject to discharge in Chapter 13. *See* 11 U.S.C. §§ 523(a)(15) and 1328(a). DSOs consisting of child support and alimony in futuro were specifically provided for in the parties' MDA. This does not, however, foreclose the possibility that other debts created by the MDA were in the nature of alimony, maintenance, or support, and thus DSOs excepted from discharge pursuant to section 523(a)(5) of the Bankruptcy Code. There is no time limit for filing complaints to determine the dischargeability of debts under section 523(a)(5). *See* 11 U.S.C. § 523(c)(1); Fed. R. Bankr. P. 4007(b) ("A complaint other than under § 523(c) may be filed at any time."). The court expresses no opinion about the outcome of such a claim should it be made in this case.

Long's second claim is made under section 523(a)(6) of the Bankruptcy Code. That section excepts from discharge debts "for willful and malicious injury by the debtor, to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). In Chapter 13, however, section 523(a)(6) debts are dischargeable. *See* 11 U.S.C. § 1328(a). In Chapter 13, in place of the section 523(a)(6) exception, a separate exception to discharge was created "for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual." 11 U.S.C. § 1328(a)(4). This exception does not apply to injuries to property, however. It only excepts debts for willful or malicious injuries to individuals. The only potential injuries complained about by Long are financial injuries. They are not excepted from discharge in Chapter 13.

Sharp's motion to dismiss for failure to state a claim under sections 523(a)(2)(A) and 523(a)(6) should be granted.

RULE 9(b)

Sharp's second argument for dismissal of Long's claim for nondischargeability based upon fraud, misrepresentation, and bad faith is that it was not pled with the particularity required by Federal Rule of Civil Procedure 9(b). That rule provides:

(b) Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, 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.

Because the court has determined that Long's claim for exception to discharge based on section 523(a)(2)(A) was not timely filed, it need not address this additional argument.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss is **GRANTED** as to the fifth claim of the Counterclaim which asks for a determination of nondischargeability based on sections 523(a)(2)(A) and 523(a)(6) of the Bankruptcy Code. The remaining claims of the Counterclaim stand pending trial or further order of the court.

cc: Debtor/Plaintiff/Counter-Defendant
Attorney for Debtor/Plaintiff/Counter-Defendant
Defendant/Counter-Plaintiff
Attorney for Defendant/Counter-Plaintiff
Chapter 13 Trustee