

**United States Bankruptcy Court
District of New Mexico**

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Filer Information

Submitted By: James E Burke
Comments: Memorandum Opinion on Defendant's Motion to Dismiss Complaint and Order Granting Motion to Dismiss in Part and Denying Motion to Dismiss in Part

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

FRED W. RICHARDSON and
EILEEN M. RICHARDSON,
Debtors.

No. 7-04-12085 SS

MARTHA T. FOLTYN, et al.
Plaintiffs,
v.

Adv. No. 04-1179 S

FRED W. RICHARDSON,
Defendant.

**MEMORANDUM OPINION ON DEFENDANT'S
MOTION TO DISMISS COMPLAINT AND
ORDER GRANTING MOTION TO DISMISS IN PART
AND DENYING MOTION TO DISMISS IN PART**

This matter is before the Court on Defendant's Motion to Dismiss and Plaintiffs' Response and Supplemental Authority. Plaintiffs appear through their attorney Rodey, Dickason, Sloan, Akin & Robb, PA (William J. Arland, III and Michelle Henrie). Defendant appears through his attorney Clifford C. Gramer, Jr. This is a core proceeding. 28 U.S.C. § 157(b)(2)(I).

Under Bankruptcy Rule 7012(b)(6), which incorporates Fed.R.Civ.P. 12(b)(6), a motion to dismiss for failure to state a claim upon which relief can be granted should be granted only if it appears beyond doubt that plaintiff can prove no set of facts in support of plaintiff's claim which would entitle plaintiff to relief. Swanson v. Bixler, 750

F.2d 810, 813 (10th Cir. 1984). In considering a motion to dismiss, all well pleaded facts, as opposed to conclusory allegations, are presumed true and all reasonable inferences are to be drawn in favor of the plaintiff. Id. The pleadings must be liberally construed. Id. A dismissal under Rule 12(b)(6) is a "harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1127 (10th Cir. 1998)(quoting Cayman Exploration Corp. v. United Gas Pipe Line Co., 873 F.2d 1357, 1359 (10th Cir. 1989).)

Defendant's Motion has both procedural and substantive aspects. To place the procedural aspect in context, the Court will briefly review Debtor's Chapter 7 case. Debtor and his spouse filed for Chapter 7 relief on March 23, 2004. The first meeting of creditors was set for May 12, 2004, and the Notice of Chapter 7 Bankruptcy Case set deadlines for complaints to determine dischargeability of debts as July 12, 2004. On July 12, 2004 Martha T. Foltyn filed an unopposed motion to extend time in which to object to discharge to August 26, 2004. On August 6, 2004, the Court entered an order granting Martha T. Foltyn's motion for extension. On August 26, 2004, "Martha T. Foltyn, Individually, and Martha

T. Foltyn on behalf of Navstor, Inc., and creditors of NavStor, Inc., that are similarly situated" filed the current adversary proceeding to determine dischargeability of debt under 11 U.S.C. §§ 523(a)(2), (a)(4), and (a)(6). Defendant's procedural motion to dismiss asserts that only Martha T. Foltyn obtained an extension of time to object to dischargeability and the other parties are time barred under Fed.R.Bankr.P. 4007(c). Defendant's substantive motion to dismiss is that his debt to Ms. Foltyn is based on a settlement agreement for prior activities and the complaint fails to allege the settlement agreement was fraudulently obtained or his subsequent breach of the settlement agreement was willful and malicious.

The Court finds that Defendant's Motion should be granted in part. If Ms. Foltyn is attempting to establish a class action dischargeability complaint, which she denies in her response, she has not met the requirements. Santa v. Lebner (In re Lebner), 197 B.R. 180, 189 (Bankr. D. Mass. 1996). If she is attempting to add additional creditors to her dischargeability complaint, she is too late. State of Minnesota v. Pierson (In re Pierson), 17 B.R. 822, 823 (Bankr. D. Minn. 1982). Therefore, Defendant's motion to dismiss "Martha T. Foltyn on behalf of Navstor, Inc., and creditors of

NavStor, Inc., that are similarly situated" on procedural grounds should be granted.

As to Defendant's substantive motion, under Archer v. Warner, 538 U.S. 314 (2003)¹ and Brown v. Felsen, 442 U.S. 127 (1979), it does not matter if a state court lawsuit fails to allege the elements of a dischargeability complaint. Instead, after settlement or judgment, if a bankruptcy is filed, the bankruptcy court is free to look behind the settlement or judgment to see if the underlying debt was one that would be nondischargeable. Therefore, Defendant is not correct in stating that Ms. Folstyn needed to allege that the settlement was obtained by fraud or breached willfully and maliciously. Rather, she had to allege that the initial debt was one that was nondischargeable. This portion of Defendant's Motion will be denied.

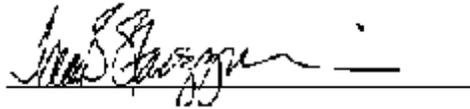
ORDER

IT IS ORDERED that Defendant's Motion to Dismiss Complaint is granted in part, and that plaintiffs "Martha T. Foltyn on

¹ The Archer court specifically rejected the "novation theory" applied by the Fourth Circuit below. 538 U.S. at 320. Under this theory, a settlement converts a potentially nondischargeable tort claim into a dischargeable contract claim. Archer v. Warner (In re Warner), 283 F.3d 230, 236 (4th Cir. 2002).

behalf of Navstor, Inc., and creditors of NavStor, Inc., that are similarly situated" claims are dismissed with prejudice.

IT IS ORDERED that Defendant's Motion to Dismiss Complaint on other grounds is denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on April 8, 2005, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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