NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 10-030

Bankruptcy Case No. 08-11927-WCH
Adversary Proceeding No. 09-01241-WCH

ABEL BELICE,
a/k/a Belice Abel,
Debtor.

SANDON GONSALVES,
Plaintiff-Appellant,

v.

ABEL BELICE,
Defendant-Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman)

Before
Haines, Lamoutte, and Deasy,
United States Bankruptcy Appellate Panel Judges.

Sandon Gonsalves, pro se, on brief for Plaintiff-Appellant.
Abel Belice, pro se, on brief for Defendant-Appellee.

March 7, 2011

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

Sandon Gonsalves ("Gonsalves") appeals from the order granting the motion of Abel Belice (the "Debtor") to dismiss Gonsalves' adversary proceeding by which he sought an order revoking the Debtor's discharge or denying the dischargeability of his debt for failure to notify Gonsalves of the bankruptcy. On appeal, Gonsalves argues that the bankruptcy judge erred in dismissing the adversary proceeding on the grounds he failed to state a claim upon which relief could be granted. For the reasons set forth below, the Panel **AFFIRMS**, in part, and **REVERSES** and **REMANDS,** in part.

BACKGROUND

In August 2006, Gonsalves and Keivonna Briggs ("Briggs") obtained a judgment in the amount of $13,851.88 for their counterclaims in the Debtor's summary process action in the Southeast Housing Court, New Bedford, Massachusetts, No. 06-SP-02859. Gonsalves and Briggs had been tenants of the Debtor on 26 George Street in New Bedford, Massachusetts ("George Street"). Shortly after the judgment issued, Gonsalves and Briggs obtained a lien on real estate of the Debtor located in Brockton, Massachusetts (the "Brockton Property") and Gonsalves was incarcerated.

On March 19, 2008, the Debtor filed for relief under chapter 7 and listed George Street as his residence. He listed Gonsalves and Briggs as creditors and gave as their addresses George Street. Belice misspelled the first and last names of Gonsalves.[1]

[1] There is no information in the record indicating whether the Debtor listed Gonsalves as a secured or unsecured creditor or the status of the Brockton Property.

The deadline for filing complaints objecting to discharge/dischargeability was set for June 16, 2008. The bar date for filing claims was set for October 7, 2008. The Debtor received his discharge on June 27, 2008.[2] The bankruptcy court sent notice of the bar date to file claims and discharge order to Gonsalves' address at George Street.

Gonsalves filed his adversary proceeding on July 30, 2009. In the complaint, he alleged that the bankruptcy court had jurisdiction under §§ 727(c), (d), and (e), and 523(a)(2).[3] He briefly recounted the history of the state court action and explained that he first received notice of the bankruptcy on May 18, 2009, in response to steps he had taken to collect his state court judgment. Gonsalves argued that the Debtor knew that he was incarcerated because the Debtor had tried to contact him in the fall of 2006 to negotiate a settlement and obtain a release of the lien.[4] He further explained that he would have participated in the bankruptcy had he received notice and that he believed that the Debtor was hiding assets.

In his answer, the Debtor claimed that the bankruptcy court lacked jurisdiction and venue was improper[5] under Bankruptcy Rule 7012(b). He offered that both Gonsalves and Briggs knew of the bankruptcy. He argued that the complaint failed to state a claim for which relief

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[2] The discharge order and the notice of the bar date to file claims were not included in the appendix but are on the bankruptcy court docket and the Panel can take judicial notice of these facts. Hamilton v. Appolon (In re Hamilton), 399 B.R. 717, 719 n.1 (B.A.P. 1st Cir. 2009).

[3] Unless otherwise indicated, the terms "Bankruptcy Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure, and all references to "Rule" are to the Federal Rules of Civil Procedure.

[4] Gonsalves filed an affidavit of his state court trial counsel. In the affidavit, counsel describes the conversations he had with representatives of the Debtor at that time.

[5] The venue issue was not briefed or prosecuted on appeal. However, venue is proper under 28 U.S.C.A. § 1409.

could be granted, was filed beyond the dischargeability deadline,[6] and that Gonsalves was barred from proceeding as he must have known of the bankruptcy.

On January 25, 2010, Gonsalves filed a motion for a default judgment based upon the Debtor's failure to respond to discovery. On February 12, 2010, the court entered a default judgment in favor of Gonsalves.

Also on February 12, 2010, the Debtor filed a motion seeking dismissal pursuant to Rule 12(b)(6). In his motion and memorandum in support, he explained that he was required to serve Gonsalves pursuant to Rule 5(E)(B) and that he had complied with the rule because he had listed Gonsalves as a creditor and notice was sent to his last known address. He argued that there must be a presumption of notice because the Debtor served Briggs at the same address. The Debtor also argued that the complaint was untimely and in any event that Gonsalves had not demonstrated that he had a nondischargeable claim.

Gonsalves moved to strike the motion to dismiss on the grounds that the Debtor had failed to respond to discovery resulting in Gonsalves' request for default judgment and had failed to notify Gonsalves of his bankruptcy filing. He explained that had not had any contact with Briggs since 2006.

On April 21, 2010, the bankruptcy court held a hearing on the motion to dismiss and the motion to strike, treating the latter as an objection to the motion to dismiss. Gonsalves appeared telephonically. In response to the bankruptcy court's question about service, Gonsalves represented that he was first notified of the Debtor's bankruptcy on May 18, 2009. The

[6] The Debtor did not argue that the action was time-barred under § 727(e).

bankruptcy court ruled that Gonsalves had failed to state a claim, overruled the objection, and granted the motion to dismiss.[7]

This appeal followed.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An order granting a motion to dismiss an adversary proceeding is a final order. Burrell-Richardson v. Mass. Board of Higher Ed. (In re Burrell-Richardson), 356 B.R. 797, 799 (B.A.P. 1st Cir. 2006).

STANDARD OF REVIEW

The Panel reviews the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). As this Panel has explained:

> A bankruptcy court's determination that a proceeding should be dismissed is a legal conclusion subject to *de novo* review. See In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 15 (1st Cir. 2003). Upon review of a dismissal order, the appellate court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the appellant. Aybar [v. Crispin-Reyes, 118 F.3d 10, 13 (1st Cir. 1997)]. The appellate court can affirm the allowance of a motion to dismiss only if the

[7] The bankruptcy court did not explain whether this ruling applied to one or both counts and did not address the default judgment which it had previously entered. In their briefs, the parties addressed the default judgment but that issue is not before the Panel.

> factual averments in the complaint hold out no hope of recovery under any theory set forth in the complaint. Colonial Mortgage, 324 F.3d at 15.

In re Burrell-Richardson, 356 B.R. at 800.

As the First Circuit has explained, the "make-or-break standard . . . is that the combined allegations, taken as true, must state a plausible, not a merely conceivable case for relief." Sepulveda-Villarini v. Dep't of Educ. of Puerto Rico, 628 F.3d 25, 29 (1st Cir. 2010) (citing Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950-51 (2009)). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." S.E.C. v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010).

DISCUSSION

On appeal, Gonsalves argues that the bankruptcy court erred in dismissing the complaint for failure to state a claim because the Debtor committed fraud on the court by listing him at an address he knew to be incorrect. This was evident, he contends, based upon: (1) the Debtor's knowledge of his incarceration as evidenced by his counsel's affidavit; and (2) the Debtor's petition wherein he lists both his address and Gonsalves' as the same. He also contends that under § 523(a)(3), his debt could not be subject to the discharge.

The Debtor counters that service was proper because he complied with his burden as a debtor, to send it to a creditor's last known address. He disputes the facts set forth in the affidavit Gonsalves filed and argues that Gonsalves failed to demonstrate that he had actual knowledge that Gonsalves was not living at George Street on the petition date.

The Panel is mindful that "*[p]ro se* filings are held to a less stringent procedural standard than others." Nunnally v. MacCausland, 996 F.2d 1, 6 n.8 (1st Cir. 1993); see also Estelle v.

Gamble, 429 U.S. 97, 106 (1976) (". . . [A] pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"). Gonsalves' complaint alleges that the jurisdictional bases are §§ 727(c), (d), and (e), and 523(a)(2).

The Debtor obtained his discharge on June 27, 2008, and Gonsalves filed his complaint on July 30, 2009. As such, Gonsalves could not have been objecting to the grant of a discharge under § 727(c) but rather was seeking a revocation of the discharge under § 727(d).[8] Further, given the allegations of fraud in the complaint, Gonsalves was seeking revocation under subsection (1) of § 727(d). Under subsection § 727(e)(1),[9] however, Gonsalves had one year

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[8] That subsection provides:

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if--

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily–

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

11 U.S.C. § 727(d).

[9] Section 727(e) provides:

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge--

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of--

after the grant of discharge to file the complaint. He filed it 13 months after the grant of discharge.

The commencement of an action seeking the revocation of a discharge is subject to strict time limitations. As this Panel has previously explained, § 727(e)(1) is not "a mere statute of limitations, but an essential prerequisite to the proceeding." Pelletier v. Donald (In re Donald), 240 B.R. 141, 146 (B.A.P. 1st Cir. 1999) (citing 6 Lawrence P. King, et al., Collier on Bankruptcy ¶ 727.16 at p. 727-72 (15th ed. rev. 1999)). As such, a majority of courts have refused to apply the doctrine of equitable tolling to the deadline set forth in the statute. See, e.g., Dery v. Rosenberg, Case No. 02-73274, 2003 WL 21919267 (E.D. Mich. Jan. 13, 2003); (Gargula v. Lombard (In re Lombard), Case No. 10-3008, 2010 WL 3504130 (Bankr. W.D. Mo. Sept. 7, 2010); Murrietta v. Fehrs (In re Fehrs), 391 B.R. 53, 66-67 (Bankr. D. Idaho 2008); Hadlock v. Dolliver (In re Dolliver), 255 B.R. 251, 254 (Bankr. D. Me. 2000); Bevis v. Bevis (In re Bevis), 242 B.R. 805, 812 (Bankr. D.N.H. 1999).[10]

This Panel adopts the comprehensive analysis provided in the foregoing opinions and agrees that because the deadline in § 727(e)(1) is firm and not subject to equitable tolling,[11]

> (A) one year after the granting of such discharge; and
> (B) the date the case is closed.

11 U.S.C. § 727(e).

[10] Courts have ruled otherwise with respect to the doctrine's application to § 727(d)(2). See, e.g., Dwyer v. Peebles (In re Peebles), 224 B.R. 519 (Bankr. D. Mass. 1998).

[11] This statutory deadline to seek revocation of a discharge is in contrast to the deadline to object to discharge set forth in Bankruptcy Rule 4004(a). The Supreme Court has ruled that the latter deadline is not "jurisdictional" and could be forfeited if a debtor fails to raise it in a pleading responsive to the complaint. Kontrick v. Ryan, 540 U.S. 443 (2004). Bankruptcy courts continue to agree, post-Kontrick, that § 727(e) is jurisdictional. See, e.g., In re Fellheimer, Case No. 03-33298, 2010 WL 4008461 (Bankr. E.D. Pa. Oct. 13, 2010); In re Fehrs, 391 B.R. at 66-67.

Gonsalves' request for relief under § 727(d) was time-barred. Accordingly, the bankruptcy court's dismissal of the request for revocation of discharge for failure to state a claim was harmless error and the Panel will affirm the bankruptcy court, albeit on separate grounds.

Gonsalves, however, also sought relief under § 523(a)(2), which provides that a discharge does not discharge a debtor from any debt "for money, property, services . . . to the extent obtained by" certain types of fraudulent actions or writings. The facts in the complaint do not address § 523(a)(2), rather they are replete with facts pertaining § 523(a)(3).[12] That section provides:

> (a) A discharge . . . does not discharge an individual debtor from any debt –
> . . .
> (3) neither listed nor scheduled under section 521(a) 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).

As part of our *de novo* review, we can "consider not only the complaint but also matters fairly incorporated within it and matters susceptible to judicial notice." In re Colonial Mortgage, 324 F.3d at 15. We must accept all well-pleaded facts as true, draw reasonable inferences in favor of Gonsalves, and affirm only if the averments in the complaint augur no hope of recovery under any theory set forth therein.

[12] The Debtor's answer and motion to dismiss likewise address matters related to § 523(a)(3).

In his complaint and related pleadings, Gonsalves explains that given the misspelling of his first and last names and the erroneous address, effectively, the Debtor did not list him as a creditor. He explained that the address was erroneous as he had been incarcerated well before the petition date.[13] He sets forth the nature of his claim and the facts related to how and when he received his belated notice of the Debtor's petition.

When he filed for relief, the Debtor was required to file a list of creditors with their names and addresses. See 11 U.S.C. § 521(a)(1)(A) and Fed. R. Bankr. P. 1007(a)(1). The bankruptcy clerk uses this list to provide notice to all creditors and parties in interest of, *inter alia*, the order for relief, meeting of creditors, the bar date to file claims, and the deadlines for objecting to a discharge. See Fed. R. Bankr. P. 2002(f). As we have previously explained, the list of creditors "submitted by the debtor must therefore contain information reasonably calculated to provide notice to the creditor." Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 507 (B.A.P. 1st Cir. 2005); see also Anderson v. Richards (In re Anderson), Case No. 07-1328, 2009 WL 4840871 (Bankr. D. Mass. Dec. 10, 2009) (explaining debtor obligated to provide proper deliverable address if debtor knows it); Oxford Video, Inc. v. Walker (In re Walker), 125 B.R. 177, 180 (Bankr. E.D. Mich. 1990) ("We conclude that a creditor has been duly scheduled and listed if the address provided by the debtor is sufficiently

[13] In his memorandum in support of dismissal, the Debtor argued that Gonsalves received timely notice of the petition because the Debtor served notice pursuant to Rule 5(E)(B). Pursuant to Bankruptcy Rule 7005, Rule 5, Serving and Filing Pleadings and Other Papers, applies in adversary proceedings. Although Rule 5 contains no subsection 5(E), the language to which the Debtor cited ("at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there . . ."), is located at Rule 5(b)(2)(B). He also indicated in the same pleading that service of the petition was proper because it was sent to Gonsalves' last known address thereby complying with Rule 5(b)(2)(C). As explained below, however, the Debtor misapprehends the mechanics of how a creditor is served with notice of a petition.

accurate to permit delivery the United States Postal Service to the appropriate party."); In re Gray, 57 B.R. 927, 931 (Bankr. D.R.I. 1986) ("Case law is clear and consistent; the debtor is held to a standard of reasonable diligence in ascertaining and listing all creditors.").

"The burden is on the debtors to use reasonable diligence in completing their schedules and lists. . . . If a creditor proves that an address is incorrect, the debtor must justify the inaccuracy in preparing his schedules." Lubeck v. Littlefield's Restaurant Corp. (In re Fauchier), 71 B.R. 212, 215 (B.A.P. 9th Cir. 1987) (ruling "[a]ddresses that are two years old do not constitute reasonable diligence."); see also Hill v. Smith, 260 U.S. 592, 595 (1923) (". . . [I]f the debtor would avoid the effect of his omission of a creditor's name from his schedules he must prove the facts on which he relies."); In re Walker, 125 B.R. at 180 ("If the creditor is able to show that the address was inadequate for the purpose intended, the burden then shifts to the debtor to show that, notwithstanding the incorrect address, the 'creditor had [timely] notice or actual knowledge of the case.'").

On his petition, the Debtor used George Street both as his mailing address and the mailing address for Gonsalves. As Gonsalves' on-site landlord, it is likely that he knew Gonsalves had vacated the apartment. Claiming that George Street was valid because it was a "last known address" does not satisfy the Debtor's burden of reasonable diligence under the present factual scenario.

Accepting the facts Gonsalves set forth in his complaint and further pleadings as true, the address the Debtor used for Gonsalves was not reasonably calculated to provide notice. As such, we conclude that Gonsalves' complaint presented a plausible case for relief under § 523(a)(3).

Therefore, it was error to dismiss this claim on the grounds that he failed to state a claim upon which relief can be granted.

CONCLUSION

Based upon the forgoing, the Panel **AFFIRMS** the bankruptcy court's dismissal of the request for relief under § 727(d), and **REVERSES** and **REMANDS** for consideration of the request for relief under § 523(a)(3).