IT IS ORDERED as set forth below:

Date: August 15, 2013

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CASE NO. 10-77907-WLH
DOUGLAS ANTHONY UNDERWOOD,	)	CHAPTER 7
Debtor.	)	JUDGE WENDY L. HAGENAU
DOUGLAS ANTHONY UNDERWOOD,	)	
Plaintiff,	)	
v.	)	ADV. PROC. NO. 13-5138
BRITT & SONS ELECTRICAL WHOLESALE, INC.	)	
Defendant.	)	

ORDER GRANTING MOTION TO DISMISS COUNTERCLAIM

This matter is before the Court on the Plaintiff's Motion to Dismiss the Counterclaim of Defendant seeking to revoke the Debtor's discharge under 11 U.S.C. § 727(d) and (e). Because Defendant's request to revoke the Debtor's discharge is time-barred by 11 U.S.C. § 727(e)(1),

the Court GRANTS the Motion to Dismiss. The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(J).

FACTUAL BACKGROUND

The Debtor filed a petition under Chapter 7 of the United States Bankruptcy Code on June 21, 2010. On July 23, 2010, the Trustee filed a Report of No Distribution. Finally, on December 16, 2010, the Debtor was granted a discharge. Almost two years later, the Defendant, Britt & Sons Electrical Wholesale, Inc. ("Britt"), made efforts to collect the debt owed by the Debtor. The Debtor informed Britt of his bankruptcy and discharge, and then moved to re-open the case to add a creditor. The Court granted the motion to re-open on December 14, 2013. Britt then objected to the re-opening of the case and filed a motion to set aside the Court's order re-opening the case. After hearing on the motion to set aside, the Court denied the motion by order dated February 11, 2013.

Debtor filed a complaint for declaratory judgment to determine the dischargeability of Britt's debt on April 12, 2013. In its answer, Britt included a counterclaim, seeking to deny the Debtor a discharge under 11 U.S.C. § 727(a)(2). The Motion to Dismiss, which is the subject of this Order, followed [Docket No. 8]. In it, the Debtor seeks to dismiss the counterclaim on the basis that it is barred by 11 U.S.C. § 727(e)(1) because more than a year has passed since the entry of the Debtor's discharge. In response, Britt argues the deadline set forth in Section 727(e)(1) is equitably tolled due to Debtor's failure to schedule Britt's debt and Britt's lack of notice of the bankruptcy case in time to object to discharge or to seek to revoke the discharge.

There is no dispute that Britt's counterclaim objecting to the Debtor's discharge under Section 727(a)(2) and seeking to revoke it under Section 727(d)(1) was brought beyond one year after the Debtor's discharge was granted on December 16, 2010. The question for the Court, then, is whether equitable tolling can be used to extend the deadline set out in Section 727(e)(1).

LEGAL ANALYSIS

Generally, a Chapter 7 debtor receives a discharge of all his pre-petition debts unless certain events have occurred. One of these is

> the debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed or has permitted to be transferred, removed, destroyed, mutilated or concealed –
>
> A. property of the debtor, within one year before the date of the filing of the petition; …

11 U.S.C. § 727(a)(2). The deadline for filing a complaint to object to the discharge of the debtor is established by Fed. R. Bankr. P. 4004(a) and is set at 60 days after the first date set for the first meeting of creditors pursuant to 11 U.S.C. § 341. An extension of this deadline to object to discharge may be obtained from the court before the discharge is granted under certain circumstances. Fed. R. Bankr. P. 4004(b). It is undisputed that Britt was not scheduled as a creditor in the bankruptcy case and, for purposes of this Motion and Order, it is assumed that Britt had no notice of the filing of the bankruptcy case. Consequently, Britt did not file an objection to the Debtor's discharge before it was granted.

In such circumstances, a creditor may seek to revoke the discharge. One ground for revocation of discharge is that "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." 11 U.S.C. § 727(d)(1). Britt alleges the Debtor fraudulently transferred property to his wife and to another creditor in the year prior to the filing of the bankruptcy petition. Britt appears then to pursue Section 727(d)(1) as the basis for revocation of discharge. The other grounds for revocation of discharge under Section 727(d) are inapplicable to Britt's allegations. The deadline for pursuing a revocation of discharge, though, is set forth in Section 727(e)(1), which provides that a request under subsection (d)(1) (the section applicable to Britt's complaint), must

be brought "within one year after such discharge is granted." Fed. R. Bankr. P. 9024, which incorporates Fed. R. Civ. P. 60, does not apply to revocation and therefore provides no basis for an extension of the time to pursue revocation. Section 727(e)(2) provides the deadline for seeking revocation of discharge under Section 727(d)(2) or (3), sections not pursued by Britt. The basis for revocation of discharge and the applicable time limitation must be kept in mind in analyzing Britt's argument for equitable tolling.

Revocation of discharge is an extraordinary remedy that directly rescinds the "fresh start" to debtors that bankruptcy is meant to provide. In re Andersen, 476 B.R. 668, 672 (1st Cir. BAP 2012). This remedy "should be construed liberally in favor of the debtor and strictly against those objecting to discharge." Yules v. Gillis (In re Gillis), 403 B.R. 137, 144 (1st Cir. BAP 2009).

Britt's argument is based on the Supreme Court's holding in Holmberg v. Armbrecht, 327 U.S. 392 (1946) where the court adopted the following rule: "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" Id. at 396-97. The court stated that, "this equitable doctrine is read into every federal statute of limitations." Id. at 397. This doctrine has been referred to as "equitable tolling". Equitable tolling, though, only applies to statutes of limitations and not to statutes of repose. It does not apply to time limitations which actually restrict the jurisdiction of the court. For example, in Lampf, Bleva, Lipkind, Prupis & Petigrow v. Gilberton, 501 U.S. 350 (1991), the Supreme Court heard arguments as to the availability of equitable tolling for a limitations period in a securities law statute. In that case, the court identified the period to be a statute of repose, as opposed to a statute of limitations, and therefore

not subject to equitable tolling. The court noted that Congress had specifically legislated this limitation period. Tolling would contradict the firm deadline Congress set even in the face of fraud. In yet another Supreme Court case, this time involving an objection to discharge, the Supreme Court distinguished between limitations enacted by Congress and limitations in rules that were court created. Court-created rules "do not create or withdraw federal jurisdiction" while Congress has authority to grant jurisdiction to federal courts or limit it with time limitations. Kontrick v. Ryan, 540 U.S. 443, 453 (2004).

The majority of courts addressing the issue of whether the time period of 11 U.S.C. § 727(e)(1) is subject to equitable tolling have found that it is not. In re Andersen, 476 B.R. 668 (1st Cir. BAP 2012); In re Belice, 2011 WL 4572003 (1st Cir. BAP, March 7, 2011); In re Fellheimer, 443 B.R. 355, 371 (Bankr. E.D. Pa. 2010); Murrietta v. Fehrs (In re Fehrs), 391 B.R. 53, 66-67 (Bankr. D. Ida. 2008); In re Fresquez, 167 B.R. 973, 975 (Bankr. D. N.M. 1994); In re Colton, 161 B.R. 76, 79 (Bankr. M.D. Fla. 1993); In re Bulbin, 122 B.R. 161 (Bankr. D. D.C. 1990); In re Schneider, 37 B.R. 115, 119 (Bankr. E.D. N.Y. 1984); In re Santos, 24 B.R. 688, 690 (Bankr. D.R.I. 1982).

The limitation which Britt challenges is in the text of the statute itself, not in a rule. Moreover, Britt's request for revocation is under Section 727(d)(1) which on its face contemplates that the debtor has committed fraud and that the requesting party did not know of the fraud. Congress had the opportunity to provide for further relief for such parties but instead made a conscious choice to limit the revocation to one year, presumably in favor of finality and the fresh start principle. See In re Bulbin, 122 B.R. at 162. Although Britt's opportunity to object to the Debtor's discharge has expired, Britt and other individual creditors without notice of the bankruptcy case have the opportunity to object to the dischargeability of their individual debt through the use of 11 U.S.C. § 523, which is the subject of the pending complaint.

Britt relies on the case of In re Peebles, 224 B.R. 519 (Bankr. D. Mass. 1998), which held that equitable tolling applied to Section 727(e)(2). This case is not binding on this Court and is not persuasive for several reasons. First, the section construed by Peebles is not the section at issue in this bankruptcy case. Peebles construed Section 727(e)(2) while this case is governed by Section 727(e)(1). Section 727(e)(2) is written differently from Section 727(e)(1) and serves a different purpose. The Peebles case has been subsequently distinguished by other decisions in the District of Massachusetts. Some have limited it to Section 727(e)(2), In re Fanaras, 334 B.R. 336 (Bankr. D. Mass. 2005). Others have simply refused to follow the Peebles analysis. Most recently, the bankruptcy court for the District of Massachusetts in In re Andersen, 2011 WL 5835099 (Bankr. D. Mass, Nov. 21, 2011) held that equitable tolling did not apply to Section 727(e)(1) or (2). This decision was affirmed by the First Circuit Bankruptcy Appellate Panel, which held that both Section 727(e)(1) and (2) are jurisdictional requirements and cannot be tolled. 476 B.R. 668. The Peebles case has therefore been discredited in its own jurisdiction.

The Eleventh Circuit Court of Appeals has not ruled directly on this issue. Nevertheless, the Eleventh Circuit has not embraced arguments for extensions of time to object to discharge. In Byrd v. Alton (In re Alton), 837 F.2d 457 (11th Cir. 1988), a creditor requested equitable relief in order to file his objection to the dischargeability of a debt outside the time limits set out in Fed. R. Bankr. P. 4007(c). Despite the creditor having been omitted from the debtor's schedules, the Court of Appeals found that the time limitations of Rule 4007(c) were absolute. "The dictates of the Code and Rules are clear. It is not our place to change them. Under Rule 4007(c), any motion to extend the time period for filing a dischargeability complaint must be made before the running of that period. There is 'almost universal agreement that the provisions of F.R.B.P. 4007(c) are mandatory and do not allow the Court any discretion to grant a late filed motion to extend time to file a dischargeability complaint.'" Id. at 459 (cites omitted). See also

In re Harper, 489 B.R. 251 (Bankr. N.D. Ga. 2013) (no equitable tolling of deadline to file complaint to determine dischargeability). Since time periods set forth in Rules are generally not jurisdictional in nature and the Eleventh Circuit has indicated equity does not provide a basis for extension of those time periods, it is unlikely the Eleventh Circuit would adopt a minority view that equitable tolling extends the time period in 11 U.S.C. § 727(e)(1).

CONCLUSION

The Court concludes that equitable tolling does not apply to 11 U.S.C. § 727(e)(1). Congress has chosen the fresh start policy. This choice is not unfair. Every creditor on the Debtor's mailing matrix and the Trustee have the opportunity to object to the Debtor's discharge under 11 U.S.C. § 727, so the fact that Britt did not have time to bring such an action does not mean the Debtor's actions were unexamined. Moreover, Congress has protected the claims of individual creditors who are omitted from schedules with 11 U.S.C. § 523, which is the subject of the complaint. For the foregoing reasons, the Plaintiff's Motion to Dismiss the Counterclaim is GRANTED.

END OF ORDER

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