


**SO ORDERED.**

**SIGNED this 13th day of February, 2017.**



  
Janice Miller Karlin  
United States Chief Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF KANSAS**

**In re:**

**Edward Joseph Smith,  
Ly Uyen Smith,**

**Case No. 16-21802  
Chapter 7**

**Debtors.**

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**Order Granting, in part, Creditor's Motion for Relief from the Automatic Stay and Granting, in part, Creditor's Motion for Extension of Time to Object to Discharge of Debtors**

The creditor in this case, Chingiz Agayev (hereinafter "Creditor"), filed a motion for relief from stay to pursue an ongoing personal injury cause of action in state court, expressly laying out the facts surrounding that cause of action therein. At the same time, Creditor filed a motion for an extension of the time to file a complaint objecting to Debtor Edward Smith's discharge. The Court is thus faced with the question: when a creditor timely files a motion to extend the time to file a complaint objecting to a debtor's discharge, but the motion contains no reference to a dischargeability complaint

or mention of 11 U.S.C. § 523,<sup>1</sup> despite the simultaneous filing of a motion for relief from stay intimating a potential § 523 action, should the Court only grant the extension of time for the § 727 complaint? In other words, should the creditor be denied the opportunity to file a complaint objecting to the discharge of a debt under § 523 within the additional time granted?

Because the affected Debtor in this case had ample notice of the potential cause of action under both §§ 727 and 523, Creditor has been reasonably diligent in pursuing his claims against Debtor, and Creditor, therefore, showed cause for extending the deadline under both Federal Rules of Evidence 4004 and 4007, the Court will grant, in part, Creditor's motion to extend the deadline for filing such a complaint. The Court will also grant Creditor limited relief from stay to pursue his cause of action at the state court in the first instance.

### **I. Undisputed Facts<sup>2</sup>**

Creditor was injured after Debtor Edward Smith crashed into the back of his car in August 2015. Creditor sued Debtor in state court in January 2016, alleging he had been seriously injured as a result of Debtor's gross negligence. Creditor claims Debtor was speeding, was driving while distracted, and was operating his vehicle without the required motor vehicle insurance coverage.

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<sup>1</sup> Unless otherwise stated, all future citations are to Title 11 of the United States Code (the Bankruptcy Code, 11 U.S.C. 101, et seq.).

<sup>2</sup> Unless otherwise stated, the facts below are drawn from the parties' briefs and are not disputed by either Debtor or Creditor.

Debtor filed his Chapter 7 petition five days before trial was to commence on the negligence action. At that time, discovery had been conducted and concluded, all witnesses identified, and exhibit lists and jury instructions prepared. Debtor listed Creditor on Schedule E/F of his petition with a \$100,000 “Auto Accident Claim.”

The assigned Trustee conducted Debtors’ § 341 meeting of creditors on October 13, 2016, the first date it was scheduled, and the deadline for filing a complaint under pertinent subsections of § 523 and § 727 was thus fixed as December 12, 2016, by operation of Federal Rule of Bankruptcy Procedure 4004(a) and 4007(c).<sup>3</sup> At Debtors’ § 341 meeting, Creditor’s counsel asked several questions regarding the causation of the accident, but Debtors’ counsel objected to those questions. Thereafter, Creditor neither sought discovery from Debtor nor requested further examination of him pursuant to Fed. R. Bankr. P. 2004(a), deciding instead he would simply proceed to trial in state court.

Creditor thus, on the December 12, 2016 deadline, filed two motions—a motion for relief from stay to allow him to proceed with his negligence action in state court and a motion seeking an additional 60 days to file an adversary complaint.<sup>4</sup> Because Debtor objected to both motions,<sup>5</sup> the Court heard oral argument a few weeks later. The Creditor’s stated “cause” for seeking an additional 60 days included his counsel’s need

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<sup>3</sup> Rules 4004(a) and 4007(c) set the deadline for filing such complaints as “no later than 60 days after the first date set for the meeting of creditors under § 341(a).”

<sup>4</sup> Docs. 15 and 18.

<sup>5</sup> Docs. 21 and 22.

for additional time to fully research the legal issues involved in filing such a complaint, the fact his lawyer was engaged in other legal matters that were consuming and would continue to consume his time, and the uncertainty of how the Court would rule on his stay motion.

While Creditor's motion cited to neither § 523 nor § 727, and used somewhat vague language regarding the type of complaint he planned to file, it did cite to one (and only one) rule: Federal Rule of Bankruptcy Procedure 4004(b). That subsection, of course, deals exclusively with when a court may extend the deadline to file a complaint objecting to a debtor's entire discharge under § 727. Further, the motion repeatedly referred to "objecting to the discharge of the Debtors"<sup>6</sup>—not to the dischargeability of Creditor's own claim.

Debtor's objection to Creditor's stay relief motion essentially argued that he shouldn't be subject to the costs of litigation in state court because the debt at issue there would ultimately be discharged. Creditor responded that because he intended to seek punitive damages, the debt would not be discharged. As to the extension of time, Debtor claimed Creditor had not stated cause because there had been adequate time to investigate whether to assert a § 727 claim; he also claimed that because Creditor had not conducted discovery in the 60 days after the § 341 meeting, he did not meet the

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<sup>6</sup> Doc. 22. Since Creditor's state court petition did not name co-Debtor Ly Uyen Smith as a party, and since the proposed adversary complaint this Court required Creditor to file as an exhibit to his motion for extension of time (filed as Doc. 26) also does not join the co-Debtor as a defendant, the Court denies that part of Creditor's motion seeking an extension of time to file a complaint against her.

requirements of Rule 4004(b). Debtor alternatively asked the Court to only grant an extension for a § 727 complaint, if any extension was to be granted, and not a § 523 complaint because the first (oral) suggestion that Creditor might wish to file a § 523 complaint came at the January 2017 hearing—well after the deadline for filing such a complaint.

At the January 2017 hearing, the Court conditionally granted Creditor’s motion to lift the automatic stay to allow the Creditor to seek a state court trial date, as Debtor complained his discharge was being unfairly delayed. The Court reasoned that **if** it was going to allow the extension of time to file the complaint—which would only be decided after full consideration of the briefs the parties asked to file, the trial to establish if there was even a debt to potentially discharge would be held in state court for many reasons. Obtaining a trial setting could allow that first stage to be concluded more quickly.

The Court also required Creditor to submit, as an exhibit to his motion to extend time to file a complaint, his proposed adversary complaint. It asserts claims under §§ 727(a)(3) (concealing, destroying, mutilating, falsifying, or failing to keep or preserve records, unless justified) and (a)(4) (knowingly and fraudulently making a false oath, presenting a false claim, giving or receiving money for acting or forbearing to act, or withholding recorded information) and §§ 523(a)(6) (willful and malicious injury) and (a)(9) (personal injury caused by operation of a motor vehicle while intoxicated).<sup>7</sup>

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<sup>7</sup> Doc. 26.

## II. Law and Analysis

### A. Creditor's Motion for Relief from the Automatic Stay

The Court may grant relief from the automatic stay under § 362(d)(1) “[o]n request of a party in interest and after notice and a hearing . . . for cause.” In a factually similar case involving a state court personal injury matter—*In re Hughes*<sup>8</sup>—my colleague Judge Somers addressed this issue. In granting relief to return to state court to liquidate claims against that debtor (including claims for punitive damages), Judge Somers reasoned that while “Congress did not specify when ‘cause’ would exist for purposes of subsection (d)(1),” it did “intend for relief to be granted in such circumstances when appropriate.”<sup>9</sup> He further noted that “[m]inimizing the duplication of litigation in separate forums and promoting the efficient administration of the bankruptcy estate are proper concerns in deciding stay relief questions.”<sup>10</sup>

Judge Somers considered the following factors in ultimately agreeing stay relief should be granted: “judicial economy, trial readiness, the resolution of primary bankruptcy issues, the movant’s chance of success on the merits, the costs of defense or other potential burdens to the estate, and the impact of the litigation on other creditors.”<sup>11</sup> This Court, reviewing the same factors, similarly finds that judicial economy is best served by having the state court try the personal injury case, both

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<sup>8</sup> No. 08-11096-7, 2008 WL 4596638 (Bankr. D. Kan. Oct. 14, 2008).

<sup>9</sup> *Id.* at \*2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (internal quotation marks omitted)

because it has more experience dealing with such actions and because the parties have a right to jury trial (that can be more easily afforded there), but also because the state trial judge has already managed the litigation to within five days of trial.

This Court also disagrees with Debtor's argument that allowing the state court action to proceed would create unreasonable delay and prejudice to him because he would be required to expend postpetition funds to defend against a dischargeable debt in state court. As a preliminary matter, this Court cannot simply accept as true Debtor's contention this debt will ultimately be discharged. If there is a debt established in state court, this Creditor is entitled to his day in court to determine its dischargeability notwithstanding Debtor's hope that the debt will ultimately be discharged. Further, at a minimum, findings of fact will be required to determine whether Creditor's claim is dischargeable in Debtors' bankruptcy. Thus, assuming Creditor is granted an extension of time to file an adversary complaint, a trial over the merits of Creditor's claim is inevitable, whether here or in state court. Unnecessary duplication of discovery and pretrial proceedings in this court would simply increase Debtor's costs and the length of time before he would know whether the debt was dischargeable.

Accordingly, the Court finds that cause exists under § 362(d)(1) to grant Creditor relief from the automatic stay in order to proceed with his state court action against Debtor to the point of final judgment. The Court presently contemplates the parties would then return to this Court for further proceedings to determine whether—if judgment is granted for Creditor in the state court proceeding—that judgment is

dischargeable in Debtor's bankruptcy.

**B. Creditor's Motion to Extend Time to File an Adversary Complaint**

Rules 4004(b) and 4007(c) control when a court may extend the deadline to file a complaint under §§ 727 and 523, respectively. Both Rules set an initial deadline to file such complaints at 60 days after the first date set for the meeting of creditors under § 341(a). There is no dispute that Creditor sought an extension of the deadline to file a § 727 complaint under Rule 4004(b). Despite his motion for an extension of time seeking an extension only under Rule 4004, however, Creditor argues he should be permitted to file a complaint seeking relief under both §§ 727 and 523.

Creditor first seeks to excuse his failure to seek an extension also under Rule 4007 by arguing that he did not even need to seek an extension of time here because, so he claims, "there is no time bar on filing of a complaint to determine . . . dischargeability of a debt"<sup>12</sup> under § 523. Creditor's proposed complaint seeks relief under both §§ 523(a)(6) and (a)(9), and Creditor argues that because he does not seek relief under § 523(c), there is no deadline to file a complaint, relying on that part of Rule 4007(b) that states "[a] complaint other than under § 523(c) may be filed at any time."<sup>13</sup> But Creditor fails to read § 523(c) in context with the pertinent Rule 4007(c). Section 523(c) provides that "the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request

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<sup>12</sup> Doc. 27, p.2.

<sup>13</sup> Fed. R. Bankr. P. 4007(b).



of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6) . . . of subsection (a) of this section.” And Rule 4007’s Advisory Committee Notes makes it abundantly clear that “[s]ubdivision (c) differs from subdivision (b) by imposing a deadline for filing complaints to determine the issue of dischargeability of debts set out in § 523(a)(2), (4), and (6) of the Code. . . . *If a complaint is not timely filed, the debt is discharged.*”<sup>14</sup>

Because Creditor argues that his claim should be excepted from discharge under both §§ 523(a)(6) and (a)(9), the 60 day deadline would bar at least any portion of his complaint brought under § 523(a)(6) if the Court did not grant his extension motion.<sup>15</sup> Therefore, at least as to Creditor’s argument for nondischargeability under §§ 727 and 523(a)(6), the Court must analyze the standard under which it can grant an extension of the deadline to file a complaint.<sup>16</sup>

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<sup>14</sup> Fed. R. Bankr. P. 4007 advisory committee’s note (emphasis added).

<sup>15</sup> This is why the Court required Creditor to upload a draft copy of his complaint. Paragraphs 25, 27, 37, 41, and almost the entirety of Count II of that draft complaint, by the inclusion of “malicious and willful” language, implicate § 523(a)(6). Section 523(a)(9) is referenced in substantive paragraphs only once—almost an afterthought inserted to escape the problem created by the imprecise word choice used in Creditor’s motion to extend time.

<sup>16</sup> None of the cases Creditor cites to support his contention that there is no time limit for creditors to file a § 523(a)(6) complaint actually stand for that proposition. *See Kan. Dep’t of Labor v. Hunter (In re Hunter)*, 552 B.R. 864, 869 (Bankr. D. Kan. 2016) (stating that there is a strict deadline for § 523(c) complaints and employing that deadline to dismiss a § 523(a)(2) complaint); *Katz v. Miles (In re Miles)*, 453 B.R. 449, 451 (Bankr. N.D. Ga. 2011) (denying reconsideration of a motion to extend the time for filing a complaint to determine dischargeability under § 523(a) and Bankruptcy Rule 4007 and to object to the discharge under § 727(a) and Bankruptcy Rule 4004; implying that there was a deadline for those complaints); *In re McCormack*, 244 B.R. 203, 207 (Bankr. D. Conn. 2000) (stating that the 60 day deadline for filing a complaint under Rule 4007 applies to §§

Both Rule 4004(b) and 4007(c) allow for an extension of the 60 day deadline “[o]n motion of any party in interest, after notice and hearing . . . for cause,” and require “the motion shall be filed before the time has expired.”<sup>17</sup> The Court notes that these phrases have been interpreted to require the same standard be shown by a party seeking an extension under either Rule, and therefore “cause” justifying an extension of time under Rule 4004(b) will also justify an extension of time under Rule 4007(c).

Cause is not defined by the Bankruptcy Code and the Tenth Circuit has not, as yet, interpreted these Rules to create a standard for extending the deadline for §§ 727 or 523 complaints. Our sister court in Colorado has addressed this issue most recently<sup>18</sup> and determined that the decision to extend the 60 day deadline “is committed to the Court’s discretion.”<sup>19</sup> To guide that discretion, the District of Colorado has adopted the requirement that “the creditor . . . establish at least a reasonable degree of due diligence to be accorded the requested extension.”<sup>20</sup> This standard has been adopted by

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523(a)(2), (4), (6), and (15), but not stating under which subsection the creditor requested relief); *Travelers Indem. Co. v. Rose (In re Rose)*, 139 B.R. 878, 879 (Bankr. W.D. Tenn. 1992) (stating only that there is no time bar to filing a § 523(a)(1) complaint).

<sup>17</sup> Fed. R. Bankr. P. 4004(b)(1) and 4007(c).

<sup>18</sup> See *Animal Hosp. of Colo. v. Maxey (In re Maxey)*, No. 11-12297 MER, 2012 WL 115566, at \*3 (Bankr. D. Colo. Jan. 13, 2012) (concluding that “the Movants . . . acted diligently and have requested a reasonable extension” and thereby granting the requested extension); *In re Stonham*, 317 B.R. 544, 547 (Bankr. D. Colo. 2004) (granting the creditor’s request for an extension under Rule 4007 because the creditor had been diligent in trying to find counsel in Colorado, in researching the legal basis for its claims, and in determining the desirability of its claims).

<sup>19</sup> *Stonham*, 317 B.R. at 547.

<sup>20</sup> *Id.*

several other courts.<sup>21</sup>

Debtor argues that Creditor did not act diligently prior to requesting an extension, relying on the decision in *In re Leary*,<sup>22</sup> where the court rejected the creditor's request for an extension of time in part because the creditor's motion, on its face, gave "no indication of any reason to suspect there exist[ed] grounds to object to the debtor's discharge."<sup>23</sup> Indeed, as the court noted, the creditor only sought the extension so it could conduct a Rule 2004 exam to determine, in the first instance, if grounds existed to file a complaint.<sup>24</sup> The court also noted that the creditor gave no reason why it waited several weeks after the § 341 meeting of creditors to pursue the

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<sup>21</sup> See, e.g., *Legg v. Ballas (In re Ballas)*, 212 F. App'x 867, 868 (11th Cir. 2006) (upholding the bankruptcy court's finding that the creditor "had not exercised sufficient due diligence to demonstrate cause for the requested extension"); *In re Ford*, No. 16-10011, 2016 WL 4257898, at \*1 (Bankr. N.D. Ind. July 14, 2016) (denying a motion to reconsider the court's order denying the creditor's motion for an extension of time because the creditor failed to provide information to the court regarding the interaction between the creditor and the debtor prior to the request and thereby failed to show a reasonable degree of diligence); *In re Hentz*, No. 12-30114, 2012 WL 2263121, at \*1 (Bankr. D.N.D. June 18, 2012) (finding that "the Trustee demonstrated diligence [when seeking an extension under Rule 4004] by reviewing Debtor's financial information and requesting certain documentation from Debtor"); *In re Berger*, No. 12-30132, 2012 WL 2254324, \*2 (Bankr. D.N.D. June 15, 2012) ("The Trustee demonstrated diligence by reviewing Debtor's financial information and requesting certain documentation from Debtor, but had not received the documentation (by the deadline)."); *In re Bates*, No. 7-07-11966 ML, 2008 WL 118002, at \*1 (Bankr. D.N.M. Jan. 11, 2008) (finding that the creditor "exercised a reasonable degree of due diligence in investigating his potential claim" and therefore showed cause to extend the deadline under Rule 4007).

<sup>22</sup> 185 B.R. 405 (Bankr. D. Mass. 1995).

<sup>23</sup> *Id.* at 406.

<sup>24</sup> *Id.*

requested 2004 exam.<sup>25</sup> Thus, the court rejected the creditor's motion to extend time because the creditor had not been diligent in pursuing its claim and did not show any reason to suspect that a Rule 2004 examination would bring to light any more evidence supporting a § 727 complaint than had already been discovered.<sup>26</sup>

Our facts are much different. Here, Creditor's draft complaint asserts at least a facially colorable claim for nondischargeability under § 523, and Creditor has been reasonably diligent in pursuing his claim against Debtor. Creditor's stay relief motion shows grounds to object to the dischargeability of its claimed debt—namely that a state court case is pending wherein Creditor has expressly claimed that his significant injuries and monetary damages were caused by Debtor's grossly negligent actions.

Also contrary to *Leary*, Creditor's counsel here explained that he waited until the last day to request an extension not because he needed to conduct further discovery, but because he is not a bankruptcy law specialist and needed additional time to investigate whether his client had an actionable claim for nondischarge under bankruptcy law. The case law upon which Debtor relies is therefore unhelpful here.

First, the purpose of a § 341 meeting is to allow creditors and the trustee to examine the debtor.<sup>27</sup> And as Creditor notes here, the purpose of his questions—all apparently objected to—were to find answers to causation questions debtor had

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Fed. R. Bankr. P. 2003(b)(1) (“The business of the meeting shall include the examination of the debtor under oath.”).

refused to answer during discovery in the state court case. Secondly, a creditor is not required to request a Rule 2004 examination in order to ask a debtor questions, especially when it may be cheaper and more efficient to examine the debtor at the § 341 meeting.<sup>28</sup> The Court obviously does not wish to reward Debtor's refusal to answer questions by holding that even if Creditor is willing to go to trial without the requested information, he should not be allowed to do so. This Court declines to eliminate Creditor's right to pursue his claim under these circumstances.

Thus, the Court finds that because Creditor was sufficiently diligent prior to requesting an extension, and because the request came within the limitations period, cause exists to grant a short extension to file the complaint objecting to Debtor Edward Smith's discharge or the dischargeability of a particular debt under either or both Rules 4004(b) and 4007(c).<sup>29</sup>

The Court rejects Debtor's request for the Court to restrict the relief granted to only allow a complaint based solely on § 727 because of the inartful language Creditor used in his motion to extend the time to file the complaint. Admittedly, the Tenth

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<sup>28</sup> See 3 Collier on Bankruptcy ¶ 341.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) ("The section 341 meeting represents a unique opportunity for a creditor, particularly one with a significant claim, to conduct a wide-ranging examination.").

<sup>29</sup> The Court notes for clarity that it is **not** granting Creditor's motion for time based on its inherent authority to "issue any order . . . that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. 105(a). Creditor inappropriately characterizes the Court's authority under § 105(a) as "sweeping," and therefore argues that the Court may grant his motion under its "equitable authority," implying that is so even if a statute or rule expressly states otherwise, as is the case here. Doc. 27, pp. 4-5. As the Supreme Court holds, a bankruptcy court's equitable authority under § 105(a) is constrained to the extent that the Court cannot grant relief in direct contradiction of the language of the Code. *Law v. Siegel*, 134 S. Ct. 1188, 1198 (2014).

Circuit has been clear that the deadline to file a motion to extend the time to file a § 523(c) complaint under Rule 4007(c) is “strictly construed.”<sup>30</sup> Thus, unless a motion is timely filed to extend the 60 day deadline, the Court must deny any extension. However, many courts have found that so long as a creditor filed a timely motion that put debtor on notice that the creditor intended to assert that the creditor’s debt was nondischargeable, the deadline to file a complaint under § 523 could be extended.<sup>31</sup>

An example of that proposition is seen in *In re Tribble*,<sup>32</sup> a case with very similar facts to those here. The debtor was a defendant in a pending state court action, with a trial scheduled prior to the filing of the bankruptcy petition. The creditor moved for relief from the automatic stay shortly after debtor filed his bankruptcy petition, asserting “that since the state court lawsuit was for willful and malicious injury, the

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<sup>30</sup> *Themy v. Yu (In re Themy)*, 6 F.3d 688, 689 (10th Cir. 1993).

<sup>31</sup> See, e.g., *In re Weinstein*, 234 B.R. 862, 865 (Bankr. E.D.N.Y. 1999) (allowing a motion to lift the automatic stay, which also internally requested an extension of time “for filing complaint to object to discharge petition,” to operate as a separate timely filed motion to extend the deadline to file a complaint under § 523); *In re Tribble*, 205 B.R. 405, 406-07 (Bankr. E.D. Ark. 1997) (construing a motion for relief from the automatic stay as a motion to extend the deadline for a § 523 complaint, even though the creditor “incorrectly characterize[d] his cause of action as an exception to discharge under section 727(a)"); *In re Sherf*, 135 B.R. 810, 815 (Bankr. S.D. Tex. 1991) (holding that “a pleading that is filed before the bar date, which puts the debtor on notice as to the creditors’ objections, may be treated as a motion to extend the time for filing a complaint,” though the creditor’s pleading in the debtor’s main case was labeled an ‘objection’ to discharge); *In re Lambert*, 76 B.R. 131, 132 (E.D. Wisc. 1985) (finding no abuse of discretion where the bankruptcy court construed a motion for termination of the stay as a motion to extend time to determine dischargeability); but see *In re McConkey*, No. 08-25164-JS, 2011 WL 1436431, at \*9 (Bankr. D. Md. Apr. 14, 2011) (denying creditor’s request to construe her motion for relief from stay as a motion to extend time to file a complaint under § 523 and distinguishing the *Lambert* line of cases (above) because the creditor’s motion did not include the word ‘discharge’ or ‘dischargeability’).

<sup>32</sup> 205 B.R. 405.

debt was nondischargeable, and the state court trial should proceed.”<sup>33</sup> The creditor did not, however, also file a complaint or motion to extend the deadline to file a complaint under either Rule 4004 or 4007. Instead, the creditor was left to argue that his motion for relief from the automatic stay should be construed as a timely § 523 complaint objecting to the dischargeability of his debt under Rule 4007. The court noted that although the creditor had incorrectly characterized his cause of action as an exception to discharge under § 727(a), as opposed to an objection to dischargeability for willful and malicious injury under § 523(a)(6), the content of the stay relief motion had clearly raised issues under § 523(a)(6), thereby putting the debtor on notice of that cause of action.

Thus the facts for the *Tribble* creditor were far worse than the facts here—at least here Creditor filed both a timely motion to extend the time to file a complaint and a stay relief motion—yet *Tribble* nevertheless held that creditor’s failure to explicitly cite to the correct section was not fatal. A review of the Creditor’s stay relief motion here, which included a lengthy description of the facts surrounding the state court action and why Creditor was claiming Debtor’s acts were grossly negligent, also demonstrates that Creditor timely put Debtor on notice that he intended to pursue a claim that could result in his debt not being discharged.

Similarly, in *In re Lambert*,<sup>34</sup> an appellate decision on which the *Tribble* court

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<sup>33</sup> *Id.*

<sup>34</sup> 76 B.R. 131.

relied, the court construed a motion for termination of the automatic stay (to continue a state court fraud action) as a motion to extend time to determine dischargeability. The *Lambert* decision noted that the bankruptcy judge's order extending the deadline to file a complaint was consistent with the principles behind the bankruptcy law, which preclude a debtor from escaping liability for fraudulent actions.<sup>35</sup>

Debtor relies on *Noll v. Noll (In re Noll)*,<sup>36</sup> to support his argument that Creditor's motion to extend time should not be construed as a motion to extend time to file a § 523 complaint. In *Noll*, at a hearing on the creditors' motion to extend time, the bankruptcy court granted two creditors' oral amendment to their motion to allow them to file a complaint under Rule 4007, though their written motion cited to Rule 4004. After the creditors filed their complaint, the debtor filed a motion to dismiss alleging that, among other things, the creditors had failed to meet the 60 day deadline to file a complaint under § 523. The bankruptcy court denied the debtor's motion to dismiss and eventually entered a default judgment against the debtor for his nonparticipation and failure to cooperate.

On appeal, the district court reversed the bankruptcy court's entry of default judgment, distinguishing the analysis in *Tribble* and *Lambert*.<sup>37</sup> The district court held that there was no notice of a possible Rule 4007 motion supplied to the debtor prior to the hearing on the creditors' Rule 4004 motion. Thus, in *Noll*, the debtor did not have

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<sup>35</sup> *Id.* at 132.

<sup>36</sup> 249 B.R. 568 (M.D. Fla. 2000).

<sup>37</sup> *Id.* at 571.



notice of a possible § 523 action until the very same hearing wherein the bankruptcy court granted the creditors' motion to extend time to file a complaint.

The Court finds the *Lambert* and *Tribble* analyses more persuasive. Debtor has not argued that he would be prejudiced should the Court allow Creditor to file a § 523 complaint—other than that he obviously would like to avoid defending against such a claim or potentially losing out on the discharge of what might be a substantial debt. The Court finds Debtor would not be unfairly prejudiced. Unlike in *Noll*, Debtor has been on notice of Creditor's claim since the outset of his bankruptcy given that Creditor was explicitly listed on Debtors' schedules and a state court trial was set to begin only five days before Debtor filed his bankruptcy. In fact, it seems likely that Creditor's claim was the catalyst for the bankruptcy filing.

More importantly, this Creditor appeared at the § 341 meeting and attempted to ask Debtor what he had been doing right before he crashed into Creditor—the very questions Debtor had apparently refused to answer during state court discovery. Creditor thus clearly signaled his intent to try to preserve his ability to collect from Debtor, post-bankruptcy, and Debtor cannot be held to say he was surprised or prejudiced by the filing of these motions. Further, the substance of Creditor's motion for relief from stay, which was filed within the allowed 60 days for dischargeability complaints, raises issues under § 523(a). For these reasons, the Court construes Creditor's motion to extend time to file a complaint as a request to extend the deadlines under both Rules 4004 and 4007.

As Creditor's motion to extend the deadline to file a complaint was filed before

the initial 60 day deadline expired and cause exists under Rules 4004(b) and 4007(c) to grant a short extension, the Court grants the motion, in part, and extends the deadline for filing a complaint under either or both §§ 523 and 727 to seven (7) days after entry of this order. If Debtor contests the complaint, he should timely answer it.<sup>38</sup>

### **III. Conclusion**

The Court grants, in part, Creditor's motion for relief from the automatic stay,<sup>39</sup> to enable Creditor to proceed with his state court action against Debtor Edward Smith to the point of final judgment. The Court also grants, in part, Creditor's motion to extend the deadline to file an adversary complaint,<sup>40</sup> granting Creditor seven (7) days after the entry of this order to file a complaint against Debtor Edward Smith under either or both §§ 523 and 727.

**It is so ordered.**

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<sup>38</sup> If requested, the Court will entertain the parties' motion to stay the outcome of any complaint filed until completion of the state court action. Obviously, if a jury determines there is no debt, then there would be no debt to except from discharge. Thus, a stay would serve judicial economy. Any stay, however, would require the filing of timely status reports after 180 days, and every 90 days thereafter, outlining the status of the state court proceeding.

<sup>39</sup> Doc. 15.

<sup>40</sup> Doc. 18.