SO ORDERED.

SIGNED this 09 day of September, 2010.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
MOHAMMAD ASIF	)	
UZMA SHAHZADI,	)	**Case No. 09-41026**
	)	**Chapter 7**
Debtors.	)	
	)	
HILDA SOLIS,	)	
Secretary of Labor,	)	
United States Department of Labor,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Adversary No. 09-7061**
	)	
MOHAMMAD ASIF,	)	
	)	
Defendant.	)	

ORDER GRANTING PLAINTIFF'S MOTION ALLOWING LEAVE TO FILE AMENDED RESPONSE IN OPPOSITION TO SUMMARY JUDGMENT MOTION AND FOR LEAVE TO AMEND PRETRIAL ORDER

On September 18, 2009, the Secretary of the Department of Labor ("DOL" or "Plaintiff") brought this Adversary Proceeding against Defendant (and Debtor), Mohammad Asif. The

Complaint arises out of Defendant's business dealings with Ghulam Hussain, who worked at a convenience store owned by Defendant after entering the United States as an H-1B non-immigrant professional worker. DOL asserts that Debtor, through the corporation, Mahaom, LLC, owned solely by Debtor and his wife, submitted a false Labor Condition Application to DOL and a false I-129 Petition to the Department of Homeland Security, under penalty of perjury, in an effort to obtain a visa application for Mr. Hussain so that he could work for Debtor or his LLC at substandard wages, in violation of the Fair Labor Standards Act. Plaintiff claims that Defendant owes $45,326.45 in back wages and overtime to Mr. Hussain, as determined by a judgment entered against him September 24, 2009, and that this debt was incurred by fraud and should be excepted from his discharge pursuant to 11 U.S.C. § 523(a)(2)(A).

Plaintiff's position on motion

After completion of discovery, the parties submitted an agreed Pretrial Order, which was entered June 7, 2010.[1] That Pretrial Order contained a rather lengthy list of stipulated facts. Defendant then timely filed a Motion for Summary Judgment,[2] Plaintiff timely responded to it,[3] and before Defendant could file his reply brief, Plaintiff filed a Motion for Order Allowing Leave to File Amended Response in Opposition to Defendant's Motion for Summary Judgment and for Leave to Amend the Pretrial Order.[4] The basis for this Motion is DOL's contention that it is now in possession of newly-discovered, material and relevant documents, which it had sought with due

[1]Doc. 42.

[2]Doc. 45.

[3]Doc. 51.

[4]Doc. 56.

diligence from another federal agency, the United States Customs and Immigration Service (USCIS), before the close of discovery and before its response to the summary judgment motion was due, but which had not been received until after its response was filed, and the Pretrial Order entered.

The new information is that Mahaom, LLC, Debtor's company, submitted an application for another H-1B worker (Mr. Latin) only a month after it submitted the application for Ghulam Hussain. DOL contends Debtor falsely testified during his 11 U.S.C. § 341 hearing that he had only submitted one such application during the summer of 2005. DOL further contends that during his deposition, Debtor testified regarding his need for an H-1B Financial Manager for a "gasoline wholesaler" business, and specifically denied making application for any other H-1B worker.

DOL contends that the documents it has now received, post-close of discovery, demonstrate that the testimony both of Debtor, and his accountant, Ajay Dave, both of whom are scheduled to be witnesses at trial, was at least incomplete, if not materially false. DOL contends it would be manifestly unjust, now that the information has come to light at a time when there is no trial setting, to deprive it of the ability to use these documents at trial, and to dispute material facts numbered 4, 5, 6, 7, 8, 12, 13, 14, 16 and 26 contained in Debtor's summary judgment motion. DOL further argues that because Debtor well knew about these documents, that DOL's use of them will not create any surprise or prejudice to him. It claims the only prejudice would be to DOL, caused by Debtor's failure to respond truthfully to discovery timely submitted to him.

DOL seeks to amend the Pretrial Order to supplement the witness and exhibit list, and to withdraw some stipulations of fact DOL agreed to only because they believed the information they had received under oath during discovery. DOL contends documents just received from another federal agency demonstrate the real facts are not as stipulated. DOL further asserts it does not seek

to add new claims or raise new legal arguments, but only to include the new facts in the framework already outlined in the Pretrial Order and "to correct misrepresentation made by Defendant under oath."

In addition, DOL claims it reasonably learned of the existence of these documents only on July 23, 2010, and the instant motion was then filed August 2, 2010. DOL further claims that the newly discovered documents not only go to the heart of the disputed material facts that are the subject of the Adversary Proceeding and the pending summary judgment motion—that the services of a foreign worker were obtained by fraud or false representations that Debtor made—but, as importantly, that Debtor knew of these material facts and purposely hid this information from DOL during the discovery phase of the case. DOL further alleged in its Complaint that Defendant's employment practices represented a pattern of deceptive conduct, which could also impact the information just discovered, and thus could theoretically be material to this Court's analysis of the § 523(a)(2) claim.

Debtor's position on motion

Debtor objects to the motion on these four bases: 1) that the discovery deadline expired May 24, 2010, some two and one-half months before the motion was filed, and DOL does not adequately demonstrate why it could not have obtained the new information from the other federal agency prior to that time; 2) that the Pretrial Order says it shall not be amended unless to prevent manifest injustice, and there would be no such injustice if the motion is denied; 3) that it would be unfair to not allow Defendant additional discovery based on the new evidence, assuming DOL does not want

to re-open discovery; and 4) that Defendant has incurred considerable expense filing his summary judgment motion and that expense "will have been for nothing" if DOL's motion is sustained.[5]

Court's request for additional information

Because motions such as this can unduly delay matters, the Court requested additional information from DOL concerning its contention that the new documents "contradict deposition testimony" and that Debtor failed to produce the pertinent documents during discovery, rather than setting this matter immediately to an evidentiary hearing. Specifically, the Court requested information "as to how these documents contradict the direct testimony of the Debtor in his deposition," and "specific discovery requests, if any, that should have resulted in the production of these documents, but did not....",[6] as DOL alleged.

In response, DOL filed a pleading, with exhibits, totaling 167 pages.[7] Essentially its response is that the newly found documents show Debtor, through his company, petitioned USCIS for two different workers to be employed for the same position, for the same time period, and for the same salary; these petitions were submitted one month apart in 2005. DOL submits that Debtor testified two separate times that he had only applied for one such H-1B worker,[8] and that the newly found documents contradict the entire fact pattern that Defendant, and his accountant, described during their respective depositions.

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[5]Defendant also asks DOL be assessed his attorney fees for drafting the summary judgment motion "and for such other relief as the Court may deem appropriate."

[6]*See* Court's email communication to both counsel dated August 18, 2010.

[7]Doc. 62.

[8]Transcript of 341 Meeting of Creditors, September 2, 2009, on Track 2 at 5:33-6:30, and Deposition taken May 10, 2010 at pp. 34, 42.

DOL further asserts that Debtor responded to certain Requests for Production and Interrogatories in a fashion that is now contradicted by the newly found documents. First, Debtor produced no documents, contending that any document within the scope of the requests had already been produced either to DOL during the wage investigation or to the Chapter 7 Trustee. DOL contends the 835 pages of documents that Defendant and his company provided to USCIS in support of both H-1B petitions were responsive to at least Request for Production No. 1 and No. 12. The first request sought all documents referenced in Plaintiff's interrogatories or Defendant's answers to those interrogatories. The second sought "all written communication between Defendant Asif and/or Mahaom, LLC and the federal government regarding the status of Ghulam Hussain and his position under the H-1B program."[9]

At first glance, the latter request does seem to be limited to documents concerning Hussain, but a close reading of that request does indicate the request relates to the "federal government" as a whole, and not just to DOL. DOL asserts that 835 pages of documents provided by Defendant and his company to USCIS was responsive to the request, but Defendant only effectively produced, during the administrative proceedings with DOL, upon which he relied in responding, the basic application and petition, plus one supporting letter.

DOL also identifies Debtor's response to Interrogatory 20 as an example of a response that is simply false, and that DOL can now demonstrate its falsity as a result of the newly found documents. In addition, the Court can certainly see how knowing the true answer to this

[9]Emphasis added.

interrogatory would have led DOL to these additional documents much earlier.[10] That interrogatory asked Defendant to identify and describe all corporate filings completed by Stasia Flynn during her employment at Mahaom, LLC. Debtor's answer identified only the H-1B application and I-129 Petition for Hussain, and significantly omitted a very similar application signed by Ms. Flynn for Mr. Latin only a month later. DOL asserts the letters signed by Flynn and submissions of additional documents for both Hussain and Latin's petitions in October and November 2005 would have been responsive to this request and Request No. 1.

Debtor never effectively denies the specific allegations by DOL that some of his answers were non-responsive, at best, and deceptive, at worst. In fact, his best response is that he "forgot" about these documents.[11] In addition, in the response to DOL's supplemental filing, Debtor's counsel admits that had he known these documents existed, he would have produced them. Notwithstanding this tacit admission that these documents are relevant, he then asks the Court to deny the motion. Debtor's only other argument is that "these documents add nothing to the case."[12]

Conclusions of Law

Federal Rule of Civil Procedure 16.2(c), which applies to adversary proceedings in this Court pursuant to Federal Rule of Bankruptcy Procedure 7016, states that a Pretrial Order may only be modified by consent of the parties or upon "order of the court to prevent manifest injustice." The

[10]Debtor suggests because the discovery deadline has expired, DOL's motion should be denied. But these written discovery answers were first due thirty days after service, which the Court file reflects occurred no later than December 11, 2009. *See* Docs. 15 and 16. Had they been correctly and accurately answered, DOL would have known about the other applicant and could have specifically pursued those documents from Debtor (or the other federal agency) months earlier, and would have been in a more informed position to question Debtor during his deposition. Accordingly, this basis for denial of the motion is not persuasive.

[11]In partial response to DOL's motion, Debtor submitted an affidavit saying that he had "forgotten" about these documents when he answered the interrogatories and gave deposition testimony under oath. *See* Doc. 63-1.

[12]Doc. 63.

burden of demonstrating manifest injustice falls upon the party moving for modification.[13] The decision to modify the pretrial order lies within the trial court's discretion.[14]

In exercising that discretion, the court should consider the following factors: (1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of the party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; (4) bad faith by the party seeking to modify the order,[15] and 5) whether movant formally and timely requested the amendment to the pretrial order.[16] In applying these factors, the court must assure "the full and fair litigation of claims."[17]

The Court cannot say that if DOL had possessed the information about the other H-1B application, or the entire 835 pages relevant to that application and Hussain's, at the time it participated in the § 341 hearing, or when it deposed Defendant and others, including the "extensive documentation about Mahaom, LLC's Business Plan and consulting contracts," that it would not have resulted in DOL learning information that could have proved helpful to its prosecution of this dischargeability proceeding. In addition, the Court also cannot say that had DOL received the correct information in a timely fashion from Debtor, directly, and as required by the rules of civil procedure, that it might have elected not to stipulate to certain matters in the Pretrial Order.

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[13] *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1222 (10th Cir. 2000).

[14] *Davey v. Lockheed Martin Corp.*, 301 F.3d 1204, 1208 (10th Cir. 2002) (quoting Fed.R.Civ.P. 16(e)). *See also Arias v. Pacheco*, 2010 WL 2171021 (10th Cir. 2010).

[15] *Id.*

[16] *Palace Explore. Co. v. Petroleum Dev. Co.*, 316 F.3d 1110, 1117 (10th Cir. 2003). *Also see Koch v. Koch Indus, Inc.*, 203 F.3d at 1222 (noting "the timing of the motion [to amend] in relation to commencement of trial is an important element in analyzing whether the amendment would cause prejudice or surprise").

[17] *Koch v. Koch Indus., Inc.*, 203 F.3d at 1222.

The Court does find that DOL could be significantly prejudiced by not granting this motion. Debtor clearly knew about all of this information, but elected not to disclose it. Accordingly, he will not be surprised or prejudiced at trial if the Court grants the motion. Second, the only way to cure the problem solely created by Debtor when he "forgot" about this information, or otherwise failed to testify accurately and respond appropriately to discovery, is to grant the motion. Third, granting this motion will not unduly disrupt these proceedings. No trial has been set. There is a pending summary judgment motion, but that motion is based on stipulations that DOL contends it would never have made had Debtor participated in the discovery process in good faith. Fourth, the Court can find no bad faith by DOL in seeking to modify the Pretrial Order, or to amend its response to the summary judgment motion, in light of this new information. Although it should not have had to go to another federal agency to get the information it now seeks to use, as Debtor should have provided it, it filed this motion just as soon as it obtained the relevant information. Finally, DOL timely brought this motion in advance of trial, and just as soon as it learned the content of the information Debtor should have disclosed. Accordingly, every factor upon which this Court should base its decision tips decidedly in favor of granting the motion.

Debtor's position that the motion should be denied because discovery has closed is unpersuasive, as noted above. Had he responded fully and forthrightly to discovery in January 2010, none of this would have been necessary. In fact, it is DOL who has been prejudiced by having to re-do a Pretrial Order now that it has all the facts, and by having to re-do its summary judgment response.

Similarly, had Debtor responded appropriately, DOL might not have agreed to the stipulated facts[18] in the Pretrial Order, which could well have resulted in Debtor not even being in a position to file the summary judgment motion. Accordingly, the fact that Debtor may have to pay his counsel for filing a summary judgment motion, and preparing a response, as a result of his having not responded accurately and fully to outstanding discovery, is a small price for him to pay at this point in these proceedings. The Court will, therefore, not reward Debtor by requiring DOL to pay his attorney fees.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion for Order Allowing Leave to File Amended Response in Opposition to Defendant's Motion for Summary Judgment and for Leave to Amend the Pretrial Order is granted. Plaintiff shall file its Amended Response in Opposition to Defendant's Motion for Summary Judgment by **September 30, 2010**, and any reply by Defendant shall be filed by **October 14, 2010.**

IT IS FURTHER ORDERED that the parties consult regarding an amended Pretrial Order, and submit an amended Pretrial Order to this Court no later than **September 23, 2010.**[19] If they are unable to agree upon such an agreed order, each party shall submit the version they seek the Court to adopt, specifically indicating the language in dispute, also by **September 23, 2010.**

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[18] *See Morrison Knudsen Corp. v. Ground Improvement Techniques, Inc.*, 532 F.3d 1063, 1075 (10th Cir. 2008) (holding that while stipulations cannot be disregarded or set aside at will, they are not absolute and will be set aside to prevent manifest injustice).

[19] Debtor suggests that perhaps he would want additional discovery if the Court granted this motion. The Court is hard-pressed to understand why he would be entitled to additional discovery when the information DOL complains it did not receive—and seeks to use now—is information he admits he already has, but just "forgot" to give DOL or his own counsel. If DOL consents to an additional period of discovery, however, for both parties, the Court would allow a delay in submission of an amended, and final, Pretrial Order. If that occurs, however, the Court requests the parties file an agreed motion and order to set aside the Pretrial Order now in place, setting forth the agreed additional discovery deadlines, and an agreed date for a new pretrial conference, which they can obtain by contacting the Clerk of the Court. If counsel mutually opt for that course, such motion and order should be filed by September 23, 2010.

IT IS SO ORDERED.

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