



The relief described hereinbelow is **SO ORDERED**.

SIGNED this 10th day of March, 2021.


Robert D. Berger
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

Andrew Gerard Downey,

Case No. 20-21269-7

Debtor.

**Suzanne Downey,
Plaintiff,**

v.

Adv. No. 20-6035

**Andrew Gerard Downey
Defendant.**

Order Denying Motion to Dismiss

Debtor Andrew Gerard Downey filed a Chapter 7 bankruptcy petition and therein scheduled domestic support obligations to his former spouse, Plaintiff Suzanne Downey. Plaintiff filed an adversary proceeding objecting to the dischargeability of that debt under [11](#)

U.S.C. §§ 523(a)(5) and (a)(15)¹ and alleging fraud by Debtor.

Debtor did not file an answer to the complaint but instead filed a motion to dismiss, arguing that Plaintiff's complaint was time barred under the deadlines established by Federal Rule of Bankruptcy Procedure 4007(c). Because those time limits apply to claims made only under subsections (a)(2), (a)(4), and (a)(6) of § 523, Debtor's motion is not well founded and must be denied.

I. Procedural and Factual Background

Debtor's Chapter 7 petition was filed September 16, 2020.² Plaintiff was listed in Debtor's list of creditors at filing,³ and in his Schedules filed on September 29, 2020, Debtor scheduled domestic support obligations to Plaintiff as well.⁴ Specifically, Debtor stated that he owed Plaintiff \$2015 for "maintenance,"⁵ a \$309,000 "equalization payment" and a \$15,000 attorney fee award.⁶

On September 17, 2020, the Court mailed notice to all creditors in Debtor's case, and informed creditors that the "deadline to object to discharge or to challenge whether certain debts are dischargeable" was set for December 7, 2020.⁷ The notice stated, in pertinent part:

File by the deadline to object to discharge or to challenge whether certain debts are dischargeable:

Filing deadline: 12/7/20

You must file a complaint:

- if you assert that the debtor is not entitled to receive a discharge of any debts under any of the subdivisions of 11 U.S.C. § 727(a)(2) through (7), or
- if you want to have a debt excepted from discharge under 11 U.S.C §

¹ All future statutory references in this order are to Title 11, United States Code (the Bankruptcy Code) unless otherwise indicated.

² Case No. 20-21269, Doc. 1.

³ *Id.* p. 12.

⁴ *Id.* Doc. 12.

⁵ *Id.* p. 9.

⁶ *Id.* p. 22-23.

⁷ *Id.* Doc. 6 p. 2.

523(a)(2), (4), or (6).

On October 12, 2020, the Chapter 7 Trustee filed a notice of report of no distribution, and Debtor received a discharge on December 14, 2020.⁸

On December 11, 2020, Plaintiff filed her adversary complaint.⁹ The complaint is not well-organized or particularly easy to decipher. As titled, the complaint seeks a ruling of nondischargeability and makes allegations of fraud.¹⁰ The introduction of the complaint states that the debts owed by Debtor to Plaintiff “should be excluded from any discharge pursuant to 11 U.S.C. § 523(a)(5) and (15)” and that Debtor has “Understated his income; Overstated his monthly expenses; Failed to disclose significant assets; and misrepresented his interest in the real property located at 7919 Antioch Road, Overland Park, Kansas 66204.”¹¹ Plaintiff alleges Debtor owed, at the time of filing of the complaint, fifty payments of past-due spousal support of \$5000 each, \$309,179 as reimbursement awarded to Plaintiff for excess marital property, and \$15,000 for attorney’s fees awarded for “undo litigation costs,” and the interest on those amounts.¹² The actual request for judgment is as follows:

Plaintiff Suzanne Downey is entitled to, and requests, a judgment and a specific ruling in her favor that none of the debts owed to her, as listed by Defendant Andrew Downey at Schedule E/F 2.1, 4.39, and/or 4.40, all of which arose as a result of the DECREE OF DIVORCE, may be discharged by this Court and are, in fact, precluded from discharge pursuant to 11 U.S.C. § 523(a)(5) and (15).¹³

After this request for judgment, however, Plaintiff then states: “Though not necessary for the Court to enter a ruling in favor of Plaintiff Suzanne Downey, as requested above, Plaintiff

⁸ *Id.* Doc. 15.

⁹ Adv. No. 20-6035, Doc. 1.

¹⁰ *Id.* p.1 (titled “Complaint Objecting to Dischargeability of Debt and Alleging Fraud by Debtor”).

¹¹ *Id.* p. 1-2.

¹² *Id.* p. 4-5 ¶¶ 17-18.

¹³ *Id.* p. 5 ¶ 23.

Suzanne Downey makes the following allegations and claims[.]”¹⁴ Plaintiff then states nine additional paragraphs, wherein she outlines allegations of fraudulent behavior against Debtor, many of which are generally unrelated to the parties’ divorce and separation of assets.¹⁵ For example, Plaintiff alleges Debtor manipulated the recording of income and expenses in his personal business,¹⁶ significantly understated his income in a prior Chapter 13 case and in his current Chapter 7 case,¹⁷ and failed to disclose an inheritance.¹⁸ Plaintiff does not request any relief with respect to these allegations.

Debtor was served with Plaintiff’s complaint.¹⁹ Debtor did not answer, but instead filed a motion to dismiss alleging that Plaintiff’s complaint failed to meet the time requirements of Rule 4007(c) and should, therefore, be dismissed.²⁰

II. Analysis

The Court has jurisdiction of this contested matter under [28 U.S.C. §§ 1334\(a\) and \(b\)](#) and [28 U.S.C. §§ 157\(a\) and \(b\)\(1\)](#). Because this matter concerns “determinations as to the dischargeability of particular debt,” it is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(D\)](#).

Debtor states his motion to dismiss is made under [Federal Rule of Civil Procedure 12\(b\)\(4\) and \(b\)\(6\)](#).²¹ Rule 12(b)(4) permits motions to dismiss based on “insufficient process,” and Rule 12(b)(6) permits motions to dismiss for “failure to state a claim upon which relief can be granted.” Debtor makes no argument at all about insufficiency of process, and argues only

¹⁴ *Id.* p. 5 ¶ 24.

¹⁵ *Id.* p. 6-7 ¶¶ 24A through 24J.

¹⁶ *Id.* p. 6 ¶ 24B.

¹⁷ *Id.* p. 7 ¶¶ 24G and 24H.

¹⁸ *Id.* p.7 ¶ 24I.

¹⁹ [Doc. 10](#).

²⁰ [Doc. 11](#).

²¹ This Rule is applicable to adversary proceedings via Federal Rule of Bankruptcy Procedure 7012.

that Plaintiff's complaint is time-barred by Federal Rule of Bankruptcy Procedure 4007(c), so the Court presumes Debtor is basing his motion on an alleged failure to state a legally cognizable claim.

Debtor's motion is entirely without foundation, however. Rule 4007(c) states, as pertinent here:

(c) Time for filing complaint under § 523(c) in a chapter 7 liquidation . . . ; notice of time fixed

Except as otherwise provided in subdivision (d) [relating to complaints under § 523(a)(6) on motions for discharge under § 1328(b)], a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002.

Therefore, by its express terms, Rule 4007(c) places a time limit *only* on complaints brought under § 523(c). Section 523(c) then states, in pertinent part:

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 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), as the case may be, of subsection (a) of this section.

Section 523(c) only applies to nondischargeability complaints based on claims made under subsection (a)(2) ("false pretenses, a false representation, or actual fraud," or materially false statements respecting financial condition), (a)(4) ("fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny"), and (a)(6) ("willful and malicious injury by the debtor"). Reading Rule 4007(c) and § 523(c) together, there is a time limit for complaints objecting to the dischargeability of a debt only as to claims made under §§ 523(a)(2), (a)(4), or (a)(6). The notice given by the Court to all creditors reflects this directive of the Code and Bankruptcy Rule.

Here, Plaintiff's complaint seeks a judgment that the debts owed to her from Debtor are nondischargeable under §§ 523(a)(5) and (a)(15). Section 523(a)(5) is an exception to the § 727 discharge "for a domestic support obligation." Section 523(a)(15) is an exception to the § 727 discharge for debts "to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record." Simply put, Plaintiff has not made a claim under §§ 523(a)(2), (a)(4), or (a)(6), and therefore, the time limit of Rule 4007(c) does not apply. Rather, the time here is governed by subsection (b) of Rule 4007. Under Rule 4007(b), a "complaint other than under § 523(c) may be filed at any time."²²

Plaintiff's complaint does have the feel of an airing of grievances, wherein she makes general allegations of fraudulent behavior by Debtor. But Plaintiff's only request for judgment is under §§ 523(a)(5) and (a)(15). Both counsel for Debtor and Plaintiff should have realized the limited reach of Rule 4007(c), and the applicability of Rule 4007(b). Nowhere in Debtor's motion to dismiss, Plaintiff's opposition thereto, or Debtor's reply do the parties realize or give effect to the portion of Rule 4007(c) limiting its impact only to complaints under § 523(c). Subsection (b) of Rule 4007 is never mentioned.

Parties filing pleadings in this Court—in any federal court—are reminded of the requirement of [Federal Rule of Civil Procedure 11\(b\)\(2\)](#). Under that Rule, all legal contentions must be "warranted by existing law or by a nonfrivolous argument for extending, modifying, or

²² 9 *Collier on Bankruptcy* ¶ 4007.03 (Richard Levin & Henry J. Sommer eds., 16th ed.) ("Dischargeability or nondischargeability proceedings regarding most types of debts may be initiated, either by the debtor or a creditor, at any time. They are not subject to the time limitations for filing complaints that apply to nondischargeability proceedings seeking determinations under paragraphs (2), (4) and (6) of section 523(a) of the Code, which are governed by subdivisions (c) and (d) of Bankruptcy Rule 4007.")

reversing existing law or for establishing new law.” Future pleadings filed with this Court must comply with the standards of Rule 11, or this Court will require counsel to show cause why their conduct has not violated Rule 11(b).²³

III. Conclusion

The Court denies Debtor’s motion to dismiss, as it is unfounded under the law.

Debtor should file his answer to Plaintiff’s complaint within fourteen days of the date of this Order, as required by [Federal Rule of Civil Procedure 12\(a\)\(4\)\(A\)](#). The Court sets this proceeding for a pretrial scheduling conference on April 6, 2021, at 2:30 p.m. Counsel for both parties shall comply with [Federal Rule of Civil Procedure 26\(f\)](#) by conferring in person or by telephone prior to this date, and not less than four business days prior to the scheduling conference, counsel for Plaintiff shall file a report of the conference in substantial compliance with the Court’s report of parties’ planning meeting. If the report of parties’ planning meeting is approved by the Court, unless the parties specifically request that the conference be held, the Court will likely cancel the scheduling conference and issue a Scheduling Order.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE

²³ An attorney’s actions must be “objectively reasonable in order to avoid Rule 11 sanctions.” *White v. Gen. Motors Corp., Inc.*, [908 F.2d 675, 680](#) (10th Cir. 1990). “A good faith belief in the merit of an argument is not sufficient; the attorney’s belief must also be in accord with what a reasonable, competent attorney would believe under the circumstances.” *Id.*