



SO ORDERED.

SIGNED this 13 day of February, 2007.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

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

IN RE:)	
)	
LEO J. SCHWARTZ,)	Case No. 03-16197
SHARON J. SCHWARTZ,)	Chapter 11
Debtors.)	
_____)	
FRONTIER FARM CREDIT,)	
)	
)	
Plaintiff,)	
v.)	Adv. No. 06-5368
)	
LEO J. SCHWARTZ,)	
SHARON J. SCHWARTZ,)	
)	
Defendants.)	
_____)	

**ORDER GRANTING IN PART DEFENDANTS’
MOTION TO DISMISS COMPLAINT**

Plaintiff Frontier Farm Credit (“Frontier”) filed this adversary proceeding seeking revocation of Leo and Sharon Schwartz’ (“Defendants”) discharge for fraud pursuant to 11

U.S.C. § 727(d)(1) and (2). Defendants move to dismiss the adversary proceeding for failure to state a claim upon which relief may be granted under Fed. R. Bankr. P. 7012(b)(6) and Fed. R. Civ. P. 12(b)(6).

JURISDICTION

This adversary proceeding is a core proceeding over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 157(b) and 1334(b).

BACKGROUND

On April 18, 1992, Leo Schwartz' mother, Mary Kay Schwartz, made a warranty deed conveying certain real estate located in Washington County, Kansas ("the property") to Leo and his five siblings "in equal shares as tenants in common." The property consisted of two quarter sections with excepted tracts and two town lots in Hanover, Kansas.

On November 12, 2003, Defendants filed their Chapter 11 petition.¹ Defendants did not list Leo's one-sixth remainder interest in the property on their schedules. The Court confirmed Defendants' Joint Plan of Reorganization on August 15, 2005. Pursuant to §1141, the order of confirmation effectively granted Defendants a discharge. After their plan was confirmed, Leo's mother died and he succeeded to ownership of the property.

Frontier has been engaged in what can only be described as a dogged effort to either force Defendants to sell this real estate and distribute the proceeds to the creditors or to otherwise secure recompense for their alleged lapse in failing to disclose their interests in it. Frontier's first effort began on November 9, 2005 with the filing of its motion seeking an order

¹ The 1978 Bankruptcy Code, 11 U.S.C. § 101 et seq., and the 2005 Rules govern this case. All further statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise noted.

requiring the sale of Leo's undivided one-sixth fee interest in the property.² The factual basis for this motion was that this property was not disclosed during the disclosure and plan process and that, accordingly, the proceeds from the sale of Leo's one-sixth interest should be distributed among Defendants' unsecured creditors. Defendants deny any knowledge of the existence of Leo's remainder interest in the property when they filed bankruptcy.³

The Court conducted a hearing on June 14, 2006 at which time the parties were offered the opportunity to present evidence, but neither did. After the hearing, Frontier filed a supplemental brief which included a "request" to revoke confirmation for fraud. In its July 31, 2006 order, the Court denied Frontier's motion to require sale of assets and to revoke confirmation. This Court noted that in order to seek revocation of an order confirming a plan, Frontier was required to file an adversary proceeding to seek this remedy within 180 days of the entry of the confirmation order as required by §1144 and Fed. R. Bank. P. 7001(4). Because Frontier had failed to file an adversary proceeding, the Court concluded that it lacked jurisdiction. The Court also observed that even if Frontier had properly pleaded its allegation, the scant record in the case contained no evidence of fraudulent conduct on the part of Defendants.

On August 14, 2006, Frontier filed this adversary proceeding and sued for revocation of Defendants' discharge for fraud under § 727(d), adding to the mix a fresh allegation of fraud: that on or about August 17, 2004, Leo, along with his mother and siblings, signed a real estate contract and a deed conveying a part of the subject property, well before the confirmation order

² Dkt. 214 in the main case, 03-16197.

³ Dkt. 217 in the main case, 03-16197.

was entered and that neither the sale nor the deed was disclosed by Defendants in their bankruptcy filings.

DISCUSSION

Defendants move to dismiss Frontier's complaint alleging it fails to state a claim upon which relief may be granted. Defendants contend § 727, the statutory basis for Frontier's Complaint for Revocation of Discharge, is not applicable since this is a Chapter 11 case. Even had the Complaint been filed under § 1144, the Complaint was filed more than 180 days after confirmation of the plan and is statutorily barred. Frontier now concedes that it cannot seek revocation of Defendants' discharge but argues its Complaint should not be dismissed as it sets forth an action for fraud and any deficiency in its Complaint can be cured in the pretrial order.

Federal Rule of Bankruptcy Procedure 7012(b) incorporates Federal Rule of Civil Procedure 12(b) into all adversary proceedings. In determining a Rule 12(b)(6) motion, the court must presume all of plaintiff's factual allegations are true and construe them in the light most favorable to the plaintiff.⁴ All well-pleaded facts, as distinguished from conclusory allegations, must be considered true.⁵

Frontier's § 727(d) cause of action should be dismissed as it plainly fails to state a legal basis for the relief Frontier seeks. As for Frontier's lately-asserted independent action for fraud, the Court notes there is authority allowing creditors to assert an independent action for fraud committed in the confirmation process to seek money damages.⁶ Courts have allowed a cause of

⁴ *Riddle v. Mondragon*, 83 F.3d 1197, 1202 (10th Cir. 1996)(citations omitted).

⁵ *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984)(citation omitted).

⁶ *In re Circle K Corp.*, 181 B.R. 457 (Bankr. D. Ariz. 1995). But see *In re Genesis Health Ventures, Inc.*, 324 B.R. 510 (Bankr. D. Del. 2005).

action premised on fraud to proceed if a judgment awarding the plaintiff money damages would not ultimately effect the plan distributions made to the creditor body. In other words, if the entry of a fraud judgment would not upset the confirmed plan, the fraud claim may at least arguably go forward. If plaintiff, however, is seeking to revoke confirmation or to “redivide the pie,” the fraud claim must be held barred by the limitations period in § 1144.

Unfortunately, Frontier did not properly plead this cause of action. Defendants are correct that the Complaint as filed is facially insufficient to assert an independent action for fraud. Frontier’s only response to this is that its Complaint pleads facts sufficient to support a claim for fraud and merely omits an appropriate prayer for relief, a deficiency that can be cured in the pretrial order.

Accepting as true all of the allegations in the Complaint and drawing all reasonable inferences in Frontier’s favor, the Court concludes that Frontier has raised facts that might support a fraud claim. If indeed Defendants did convey part of the subject property in 2004, then they obviously knew of this property before the disclosure statement and plan process began, but failed to disclose it. This could conceivably amount to fraud if Frontier could demonstrate having somehow relied to its detriment on defendants’ representations in the disclosure statement. As the Court has previously suggested, the structure of the plan’s treatment of unsecured creditors makes it questionable whether Frontier can successfully bear this burden.⁷

Whether Frontier might win is, of course, not the test under Rule 12(b)(6). Rather, the Court must determine whether Frontier could conceivably prevail on this cause of action on the facts as pleaded. While Frontier may have specifically pleaded facts that would support a fraud

⁷ See this Court’s Order in the main case, dkt. 241, pp. 6-7.

claim, it did not pray for a common law fraud judgment, for money damages, or for injunctive relief. Failing to specifically pray for money damages, however, is not fatal to the claim. Rule 54(c) provides “every final judgment shall grant relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleading.”⁸ If a pleading provides a defendant notice of the plaintiff's claims and the grounds for the claims, omissions in a prayer for relief do not bar redress of meritorious claims.⁹ Defendants clearly have notice of Frontier's fraud claim and the grounds for that claim. Moreover, given the nature of the allegations, the procedural posture of this adversary proceeding (early stage), and the potential preclusive effect of dismissing Frontier's fraud claim due to the statute of limitations, the Court will grant Frontier leave to amend its Complaint to specifically set forth the relief it is now requesting and any factual allegations to support its fraud claim. Frontier shall file its Amended Complaint within 10 days of this Order.¹⁰

This is Frontier's last chance to get it right, both procedurally and on the merits. So far in this matter, Frontier has filed a legally meritless motion for sale, a procedurally flawed and untimely “motion” to revoke Defendants' discharge under § 1144, and an equally flawed complaint to revoke the discharge under the clearly inapplicable § 727(a). Each effort has resulted in expense to the debtor and inconvenience to the Court.¹¹ Even while this Court

⁸ Fed.R.Civ.P. 54(c).

⁹ See *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) and *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 66, 99 S.Ct. 383, 387, 58 L.Ed.2d 292 (1978).

¹⁰ The Court reminds Frontier's counsel to review the rules on pleading, see Fed. R. Civ. P. 8 and 9, before submitting the Amended Complaint.

¹¹ Expense to the debtors is important to the unsecured creditors because, under the confirmed plan, their return is based upon a percentage of the reorganized debtors' net income

considered this motion, Frontier could have amended its Complaint to plead the common law fraud claim it now asserts, but has failed to do so. Fairness dictates that this matter be properly pleaded, and expeditiously prosecuted to a prompt conclusion. If an amended Complaint is not filed within 10 days of the docketing of this order, the adversary proceeding will be dismissed. Nothing contained herein should be construed as precluding Defendants from filing a further motion to dismiss once the amended Complaint has been filed.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED as to Frontier's revocation of discharge claim, but DENIED WITHOUT PREJUDICE TO REFILING as to Frontier's fraud claim. Frontier shall file an Amended Complaint within 10 days of this Order or face dismissal of this proceeding, consistent with the Court's forgoing comments.

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after servicing secured debt.