

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
ROBERT A. CARTER and)	CASE NO. 99-31182 HCD
REBECCA S. CARTER,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
VICKIE WOMACK,)	
PLAINTIFF,)	
vs.)	PROC. NO. 02-3104
)	
ROBERT A. CARTER,)	
DEFENDANT.)	

Appearances:

David W. Stewart, Esq., attorney for plaintiff, 931 Rangeline Road, Carmel, Indiana 46032;

Edward W. Hearn, Esq., attorney for defendant, Spangler, Jennings & Dougherty, P.C., 8396 Mississippi Street, Merrillville, Indiana 46410; and

Gary D. Boyn, Trustee, Warrick & Boyn, LLP, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on February 27, 2004.

Before the court are the Complaint for Determination Excepting Debt from Discharge filed by Vickie Womack (“Womack” or “plaintiff”), an unsecured claimant, against the debtor Robert A. Carter (“Carter” or “defendant”), and the Motion for Summary Judgment filed by the defendant. The plaintiff alleged in her complaint that the debt at issue is not dischargeable in Carter’s bankruptcy pursuant to 11 U.S.C. § 523(a)(6) and (a)(9). The defendant’s ground for his summary judgment motion is the untimely filing of the complaint. After delays

caused by expectations of a stipulated settlement between the parties, the court took the summary judgment motion under advisement on November 20, 2003.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

Six months before the debtors filed bankruptcy, on September 25, 1998, an accident occurred between two motor vehicles in Wabash County, Indiana. The plaintiff was a passenger in one vehicle, and the defendant Carter was driving his vehicle behind it.¹ The plaintiff asserted in her Complaint that Carter collided into the back of the vehicle in which she was a passenger, injuring her. After the accident, she stated, Carter was tested and found to have a blood alcohol level of .259. The plaintiff asserted that she is pursuing a claim for bodily injury and damages in the Wabash County Superior Court and seeks a determination of nondischargeability in this court. The defendant admitted the accident and the blood alcohol test but disputed the results of the test. He responded that he was charged with, but was never convicted of, driving while intoxicated and that the criminal charge of driving while intoxicated was dismissed.

¹ Co-debtor Rebecca S. Carter is not named as a defendant in this adversary proceeding.

The defendant and his wife filed a voluntary chapter 7 petition on March 30, 1999. Womack was not listed as a creditor on Schedule F and did not receive notice of the bankruptcy. The Trustee submitted a no-asset report. The debtors' discharge was entered on July 7, 1999, and the case was closed on September 2, 1999.

Two years later, on September 10, 2001, Womack filed a Motion for Relief from Stay in the main bankruptcy case. Because the debtors had failed to include Womack on the original list of creditors, they sought to reopen the bankruptcy case to add the plaintiff. The court granted the Motion to Reopen on September 28, 2001. Schedule F was amended to include Womack, and notice of the amendment was sent on February 25, 2002, to Womack. The case again was closed on May 28, 2002. Plaintiff's complaint was filed on September 12, 2002.

In her Complaint, the plaintiff asserted that the defendant "willfully and maliciously caused personal injury to the plaintiff as a result of the defendant's operation of a motor vehicle while under the influence and while being intoxicated by drugs and/or alcohol." R.1 at 1-2. The defendant answered the complaint, denying all essential allegations. He asserted the general affirmative defenses of failure to state a claim and failure to file timely under Federal Bankruptcy Rule 4007; he also raised defenses specific to the plaintiff's § 523(a)(6) and (a)(9) claims. Trial was set for May 5, 2003. However, on April 4, 2003, the defendant filed a Motion for Summary Judgment and Memorandum in Support of Motion for Summary Judgment.

The defendant asserted in his memorandum that the plaintiff was prohibited from bringing her § 523(a)(6) claim by § 523(c)(1) and by Federal Rule of Bankruptcy Procedure 4007. He urged the court to deny the plaintiff the right to bring her § 523(a)(9) claim, as well, for reasons of late filing: "If Womack is permitted to assert her claim at this time, after sitting idly by for over one year, there can be no sense of finality for any debtor who seeks a discharge through the Bankruptcy Code." R. 16 at 7.

The plaintiff did not respond to the defendant's summary judgment motion.²

² On September 19, 2003, the court issued to the plaintiff an Order To Show Cause why the adversary (continued...)

Discussion

The issue raised for summary judgment is whether the plaintiff's complaint, which alleges the nondischargeability of the defendant's debt to the plaintiff under 11 U.S.C. § 523(a)(6) and (a)(9), is time-barred.³ The defendant properly asserted the untimeliness of the complaint in his answer to the complaint. *See Kontrick v. Ryan*, ___ U. S. ___, 124 S. Ct. 906, 917, 72 U.S.L.W. 4126 (2004) ("Ordinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if it is not included in the answer or amended answer."). He based his Motion for Summary Judgment on the lack of timely filing, as well.

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable in this court by Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

²(...continued)

proceeding should not be dismissed due to lack of prosecution. On October 8, 2003, the plaintiff responded by filing a Plaintiff's Motion to Remove from Call of the Docket. In it, she stated that the parties had reached a Stipulation Regarding Liability and Satisfaction of any Judgment and that the plaintiff was awaiting the signature of the defendant and his counsel. However, no stipulation was filed with the court.

³ The two exceptions to discharge on which the plaintiff's complaint is based are these:

§ 523(a). A discharge . . . does not discharge an individual debtor from any debt —

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity; . . .

(9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance.

247 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). In order to avoid trial, the moving party bears the burden of showing that no genuine issue of material fact is in dispute. See *Anderson*, 477 U.S. at 248. “To avoid summary judgment . . . the nonmoving party [is] required to set forth ‘specific facts showing that there is a genuine issue for trial,’ Fed. R. Civ P. 56(e), and, further [has] to produce more than a scintilla of evidence in support of his position.” *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir.

1999). In order to demonstrate that real factual disputes exist, the nonmovant must produce evidence of the disputes rather than relying solely on the allegations or denials in its pleadings. See *Barber v. United States (In re Barber)*, 236 B.R. 655, 659 (Bankr. N.D. Ind. 1998); N.D. Ind. L. B. R. B-7056-1. Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

Taking into account the fact that the plaintiff did not respond to the defendant’s summary judgment motion, the court turns to the defendant’s contention that the plaintiff’s § 523(a)(6) and § 523(a)(9) claims are untimely under § 523(c)(1)⁴ and Federal Rule of Bankruptcy Procedure 4007.⁵

⁴ 11 U.S.C. § 523(c)(1) provides:

Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) 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), (6), or (15), as the case may be, of subsection (a) of this section.

⁵ Federal Rule of Bankruptcy Procedure 4007(c) states:

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, OR CHAPTER 12 FAMILY FARMER’S DEBT ADJUSTMENT CASE; NOTICE OF TIME FIXED. 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. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

A creditor like Womack who seeks to have her malicious injury claim excepted from a debtor's discharge under § 523(a)(6) is required to commence an adversary proceeding in the bankruptcy court, for it has exclusive jurisdiction over nondischargeability claims based upon fraud, embezzlement, malicious injury, and certain divorce issues (often called "fraud debts"). See 11 U.S.C. § 523(c)(1); *In re Kontrick*, 295 F.3d 724, 733 (7th Cir. 2002) (quoting Advisory Committee notes concerning exclusive jurisdiction of bankruptcy courts over certain nondischargeability proceedings), *aff'd*, ___ U.S. ___, 124 S. Ct. 906, 72 U.S.L.W. 4126 (Jan. 14, 2004). A creditor intending to establish that her personal injury claim is excepted from a debtor's discharge under § 523(a)(9), however, may seek a determination of nondischargeability in bankruptcy and nonbankruptcy courts alike, for they are vested with concurrent jurisdiction. See *Whitehouse v. LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002); *Mitchell v. Mitchell-Long (In re Mitchell)*, 132 B.R. 585, 588 (S.D. Ind. 1991).

To have her claim excepted from discharge in the bankruptcy court, Womack initiated an adversary proceeding by filing a dischargeability complaint. However, she was required to abide by the timing requirements of Bankruptcy Rule 4007(c) when filing the complaint. See § 523(c); Fed. R. Bankr. P. 4007(c). The rule requires a creditor to commence a timely adversary proceeding "not later than 60 days following the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr. P. 4007(c). The court may extend that period "for cause" if a party in interest files a motion "before the time has expired." *Id.* If the creditor could not timely file a complaint, however, because she was omitted from the debtors' schedules (as was the case here), an exception to these rules applies. See *Wilborn v. Gallagher (In re Wilborn)*, 205 B.R. 202, 207 (9th Cir. B.A.P. 1996) (citing cases).

The plaintiff in this case was an unsecured creditor whose name was added to the debtors' schedules after the court reopened the debtors' bankruptcy case on September 28, 2001. The Order and Notice to Additional Creditors, issued February 25, 2002, had notified the plaintiff that:

The last day for filing a complaint to determine dischargeability of debts pursuant to 11 U.S.C. § 523(c) was July 6, 1999. *If this date passed before the date of this Order, your right to have a debt excepted from discharge may be preserved under 11 U.S.C. § 523(a)(3).*

R. 16, Ex. C. The plaintiff filed her nondischargeability complaint on September 12, 2002.

Section 523(a)(3) addresses the dischargeability of debts that a debtor failed to schedule:

§ 523(a). A discharge . . . does not discharge an individual debtor from any debt —

. . .

(3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit —

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

11 U.S.C. § 523(a)(3).⁶ The section “is designed to remedy the harm to creditors that results from not being able to participate in the bankruptcy case.” *Peterson v. Anderson (In re Anderson)*, 72 B.R. 783, 786 (Bankr. D. Minn. 1987) (citing *Stark v. St. Mary’s Hosp.*, 717 F.2d 322, 324 (7th Cir. 1983) (per curiam)).

Both subsections of § 523(a)(3) declare that a debt was not discharged, when the debtor received his discharge in bankruptcy, if it was not listed in the debtor’s schedule of debts – unless the creditor “had notice or actual knowledge” of the bankruptcy proceeding in time to make a timely filing in that proceeding. *See In re Barnes*, 969 F.2d 526, 528 (7th Cir. 1992). The record in this case indicates that Womack had knowledge of this bankruptcy proceeding sometime before September 10, 2001, when she filed a Motion for Relief from Stay in the

⁶ The Bankruptcy Reform Act of 1994 added § 523(a)(15) to the list of § 523 exceptions to discharge, to include certain divorce obligations as nondischargeable debts. It also added § 523(a)(15) as another category of debt which must be determined exclusively in the bankruptcy court under § 523(c)(1). However, Congress did not amend § 523(a)(3) to include paragraph (15). The authoritative bankruptcy treatise Collier opined that “this omission appears inadvertent.” 4 *Collier on Bankruptcy* ¶ 523.09[1] at 523-61 n.2 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev’d, 2003).

debtors' main chapter 7 case. However, the defendant stated that Womack was not listed as a creditor and did not receive notice of the bankruptcy, and there is no evidence that she had actual knowledge of the case during its pendency.

The § 523(a)(3) subsections list two categories of unsecured debts: those that are “of a kind specified in paragraph (2), (4) or (6)” of § 523, and those that are not of that kind. *See Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996). Subsection (A) governs the latter category of debts, and subsection (B) governs the former “fraud debts” group. The timeliness of filing a proof of claim is addressed in both subsections. That timing depends on whether the chapter 7 bankruptcy case is an “asset” or “no-asset” case. In an asset case, the unsecured creditors must file proofs of claim within 90 days after the first date set for the § 341 meeting of creditors in order to share in the distribution. *See Fed. R. Bankr. P. 3002(c)*. However, in a no-asset chapter 7 case such as the one now before this court, creditors are told that there appear to be no assets in the case and that they should not file a claim unless they are notified that assets have been found with which to pay creditors. No bar date is set. Claimants do not file proofs of claim. *See In re Mendiola*, 99 B.R. 864, 867 (Bankr. N.D. Ill. 1989) (“In a case without assets to distribute the right to file a proof of claim is meaningless and worthless.”). Moreover, unless assets are found and notice is given, the time for filing a proof of claim never expires. There is no deadline for the filing of claims and thus no “untimely” filing. Section 523(a)(3)(A) simply does not apply in no-asset cases. As the *Collier* treatise succinctly concludes:

In a no-asset chapter 7 case, no deadline is set for the filing of claims. Therefore, the lack of notice to the creditor does not deprive the creditor of the opportunity to file a timely proof of claim. In such circumstances, unless the debt falls within section 523(a)(2), (a)(4), (a)(6) or possibly (a)(15), it is discharged. If the debt does fall within those subsections, since the deadline for filing a dischargeability complaint will have passed before the case is closed, reopening the case will not alter the fact that the debt is nondischargeable. Nevertheless, the bankruptcy court has the discretion to reopen a case to permit a debtor to amend the schedules to add a creditor so that the debtor may have an accurate list of the discharged debts, thereby assisting, in a practical manner, in the implementation of the debtor's fresh start.

4 *Collier on Bankruptcy* ¶ 523.09[5] at 523-69 to -70 (citing *Judd v. Wolfe*, 78 F.3d 110 (3d Cir. 1996); *In re Beezley*, 994 F.2d 1433 (9th Cir. 1993)).

Because § 523(a)(3)(A) is not applicable in no-asset cases, any prepetition debts that did not arise from fraud or intentional torts (*i.e.*, § 523(a)(2), (4), or (6)) were discharged when the debtors received their discharge, whether or not they were listed on the debtors' schedules. *See, e.g., Judd*, 78 F.3d at 114 (concluding that the debtor's debt to the creditor "was discharged by operation of law at the time of her discharge" unless the debt fell under § 523(a)(2), (4), or (6)); *In re Garrett*, 266 B.R. 910, 914 (Bankr. S.D. Ga. 2001) (concluding that, "in a 'no-asset' case, non-fraud claims are still discharged, even if they are never added to the schedules"); *In re Johnson*, 208 B.R. 746, 749 (Bankr. S.D. Ga. 1996) (finding that, in a no-asset proceeding, § 523(a)(3)(A) "is unavailable to except the debt from discharge"). *But see In re Walker*, 195 B.R. 187, 195 (Bankr. D.N.H. 1996) (stating, in clarification, that "there is no *general* bar to discharge under 11 U.S.C. § 727 but whether a particular debt is or is not subject to a 'non-mandatory' ground of nondischargeability under 11 U.S.C. § 523 is *not* finally resolved by the entry of the general discharge order").

However, § 523(a)(3)(B) does apply in no-asset cases. Subsection (B) is triggered when a fraud or intentional tort debt was not listed or scheduled in time to permit a timely filing of a proof of claim or a dischargeability complaint and the creditor did not know about the bankruptcy. If those conditions are met, the debt was not discharged and the creditor may file a complaint even though the 60-day time period had run. "Since section 523(c) provides that the dischargeability of these debts must be determined by the bankruptcy court and Bankruptcy Rule 4007(c) requires a complaint to be filed before the discharge is entered, section 523(a)(3)(B) preserves the right of these creditors to litigate the dischargeability of their debts." *Judd*, 78 F.3d at 114.

Under a literal reading of section 523(a)(3), if a debt arose from . . . willful and malicious injury . . . , and the debtor failed to schedule the claim, the failure to list the debt is itself grounds for nondischargeability. However, a precondition for nondischargeability of such debts under section 523(a)(3) is that the debts also be nondischargeable under subsection . . . (a)(6). . . . Thus, in such cases, section 523(a)(3) does not provide an independent basis for a nondischargeability determination. In effect, the penalty for failure to schedule such a debt is not nondischargeability but

is the loss of the 60-day limitations period applicable in such dischargeability determination actions and possibly the loss of the debtor's right to exclusive federal jurisdiction of dischargeability determinations under section 523 (a)(2), (a)(4), (a)(6), and (a)(15).

4 *Collier on Bankruptcy* ¶ 523.09[1] at 523-62; *see also* Helbling and Klein, *The Emerging Harmless Innocent Omission Defense to Nondischargeability Under Bankruptcy Code § 523(a)(3)(A): Making Sense of the Confusion Over Reopening of Cases and Amending Schedules to Add Omitted Debts*, 69 Am. Bankr. L. J. 33, 44 (Winter, 1995) (“Since the creditor still must prove all the essential elements of the underlying § 523(a)(2), (4) or (6) action, the primary effect of § 523(a)(3)(B) is to eliminate the limitations period for bringing the action.”).

The court finds, therefore, that § 523(a)(3)(B) permits complaints by a creditor such as this plaintiff, whose claim for willful and malicious injury was omitted from the debtors' schedules and therefore could not be timely filed. Section 523(a)(3) removes the timeliness requirement and provides the opportunity for a creditor to file a complaint, but requires the creditor to demonstrate the merits of her nondischargeability claim. *See, e.g., Eldridge v. Waugh*, 198 B.R. 545, 548 (E.D. Ark. 1995) (affirming that the appropriate burden of proof required creditor to prove the merits of its claim), *aff'd*, 95 F.3d 706 (8th Cir. 1996); *In re Candelaria*, 121 B.R. 140, 144 (E.D.N.Y. 1990) (“Unless a creditor can show that his debt actually comes within the exceptions provided for in paragraphs (2), (4) and (6), there is no reason to deny a debtor the benefit of a full discharge in a no asset case simply because he inadvertently omitted a debt.”); *In re Hicks*, 184 B.R. 954, 959 (Bankr. C.D. Cal. 1995) (finding that, under § 523(a)(2), (4), or (6), the burden of proof “remains on the creditor regardless of whether dischargeability is being litigated pursuant to a timely complaint under § 523(c), or pursuant to an action under § 523(a)(3) due to lack of timely notice for filing such complaints”); *but see Haga v. Nat'l Union Fire Ins. Co. (In re Haga)*, 131 B.R. 320, 327 (Bankr. W.D. Tex. 1991) (concluding that § 523(a)(3)(B) requires a “creditor only to show that it has a viable or colorable claim that its debt is non-dischargeable under subsections (a)(2), (4), or (6) of § 523 and not to prove its claim on the merits”).

This conclusion simply explains what the court's Order and Notice To Additional Creditors, sent to the plaintiff on February 25, 2002, declared:

The last day for filing a complaint to determine dischargeability of debts pursuant to 11 U.S.C. § 523(c) was July 6, 1999. *If this date passed before the date of this Order, your right to have a debt excepted from discharge may be preserved under 11 U.S.C. § 523(a)(3).*

R. 16, Ex. C. This court, by reopening the case, recognized the plaintiff's right to litigate the dischargeability issue and gave her the opportunity to file her complaint in this court.⁷ It notified her that there no longer was a limitations period on an omitted intentional tort-based debt that might have been excepted from discharge. The court, in its discretion, reopened the debtors' bankruptcy case on September 28, 2001, and closed it again eight months later, on May 28, 2002. The issue before this court is not the appropriateness of the reopening but the timeliness of the filing of the plaintiff's complaint – more than a year after the plaintiff demonstrated actual knowledge of the bankruptcy by filing a motion for relief from the stay, more than a year after the debtors sought to reopen the case, and more than three months after it was closed.⁸

⁷ Actions under § 523(a)(3)(B) can be brought in either bankruptcy or state court. *See, e.g., In re Strano*, 248 B.R. 493, 495-96 (Bankr. D.N.J. 2000).

⁸ The court granted the debtors' unopposed motion to reopen the case in order to list the inadvertently omitted plaintiff as a creditor. It is clear under § 523(a)(3) and related case law that reopening a case to add an omitted creditor does not extend the time to file nondischargeability complaints or to render a nondischargeable claim dischargeable. *See Judd*, 78 F.3d at 115; *In re Serge*, 285 B.R. 632, 634 (Bankr. M.D.N.C. 2002); *In re Cheely*, 280 B.R. 763, 765 (Bankr. M.D. Ga. 2002). Nor does a reopening of a no-asset case to add creditors accomplish a *nunc pro tunc* discharge of those debts. *See In re Humar*, 163 B.R. 296, 299 (Bankr. N.D. Ohio 1993). The reopening serves the purpose of listing a creditor who then will be notified if assets are found and a payment of dividend appears possible. *See Stark v. St. Mary's Hosp. (In re Stark)*, 717 F.2d 322, 324 (7th Cir. 1983) (per curiam) (concluding that the added creditor's right to timely file a proof of claim is protected under § 523(a)(3)). It also provides to the parties a reopened forum in which further relief may be administered. *See Horizon Aviation of Va., Inc., v. Alexander*, 296 B.R. 380, 382 (E.D. Va. 2003) ("Merely granting a motion to reopen does not afford the parties any substantive relief, but rather provides the opportunity to request further relief."). The question of nondischargeability is altogether separate from the reopening issue.

The time limitations of Bankruptcy Rules 4007(c) and 4004 (a) are held to be nonjurisdictional deadlines or statutes of limitations that are generally subject to equitable defenses.⁹ Once the limitations period has been lifted, courts declare, a creditor may file a dischargeability complaint at any time. See Fed. R. Bankr. P. 4007(b); see also, e.g., *Staffer v. Predovich (In re Staffer)*, 306 F.3d 967, 972 (9th Cir. 2002) (affirming that there was no rule imposing a time limitation on the action); *In re Haga*, 131 B.R. at 326 (finding that there is no indication that Congress intended § 523(a)(3)(B) to have an exception to or extension of the limitations period of Rule 4007(c)). However, the Ninth Circuit Court of Appeals has examined the “at any time” language and, after a thorough analysis, has concluded that “[t]here is . . . nothing inherently contradictory about saying that an action that may be brought ‘at any time’ is nonetheless subject to an equitable limitation based on prejudicial delay.” *Beaty v. Selinger (In re Beaty)*, 306 F.3d 914, 924 (9th Cir. 2002).¹⁰ Other courts have expressed concern about the concept of an unlimited filing period, particularly in light of the Bankruptcy Code’s primary purpose of affording Chapter 7 debtors a fresh start “without the worries that at some indefinite time in the future the omitted prepetition creditor will ‘come out of the woodwork’ to bedevil him in another judicial arena.” *In re Walker*, 195 B.R. 187,

⁹ The recent Supreme Court decision, *Kontrick v. Ryan*, 124 S. Ct. 906 (Jan. 14, 2004), reviewed the time prescription of Rule 4004, which gives a creditor “60 days after the first date set for the meeting of creditors” to file a complaint objecting to discharge. The Court recognized the “practical identity of the time prescriptions” of 4004(a) and (b) and 4007(c). *Id.* at 911 n.3. It held that Rule 4004 is “not ‘jurisdictional,’” *id.* at 910, and explained that “the filing deadlines prescribed in Bankruptcy Rules 4004 and 9006(b)(3) are claim-processing rules.” *Id.* at 914. It then concluded that the rules can be “forfeited if the party asserting the rule waits too long to raise the point.” *Id.* at 916. The Seventh Circuit decision affirmed by the Supreme Court expressly held that Rules 4004(a) and (b) and 9006(b)(3) were “subject to equitable defenses, although those defenses must be applied in a manner consistent with the manifest goals of Congress to resolve the matter of dischargeability promptly and definitively in order to ensure that the debtor receives a fresh start unobstructed by lingering doubts about the finality of the bankruptcy decree.” *In re Kontrick*, 295 F.3d 724, 733 (7th Cir. 2002); see also *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 344 (6th Cir. 2003); *European American Bank v. Benedict (In re Benedict)*, 90 F.3d 50, 54 (2d Cir. 1996). The two *Kontrick* decisions and other appellate court rulings compel a finding that Rule 4007(c), like Rule 4004(a) and (b), is not jurisdictional but rather is like a statute of limitations that may be subject to equitable defenses.

¹⁰ *But see In re Beaty*, 306 F.3d at 928-30 (Fernandez, J., concurring) (asserting that the phrase “‘at any time’ means just that”).

201 (Bankr. D.N.H. 1996) (in context of reopening cases). This court finds the reasoning of *In re Beaty* and of *In re Walker* fully applicable to this case.

First, the court agrees with, and follows, the sensible practice of the New Hampshire bankruptcy court, as set forth in *Walker*, to “provide some procedure for the determination of the dischargeability of the omitted debts” that were scheduled after reopening the case, 195 B.R. at 203, and to give an added creditor a reasonable period of time in which to file a dischargeability complaint based on a fraud or intentional tort debt. *See id.* at 205. This court gave notice to the newly listed creditors of their rights under § 523(a)(3) and left the case open for 90 days after the notice was issued.¹¹ The court believes, as well, that it proceeded in the manner recommended by Judge Klein and Ms. Helbling in their comprehensive, thoughtful law journal article concerning § 523(a)(3), *The Emerging Harmless Innocent Omission Defense.*, 69 Am. Bankr. L. J. 33 (1995). In discussing the alternatives before a bankruptcy court when a creditor was omitted, the article stated that a court’s only real option is whether or not to reopen the case. It recommended reopening if, in the view of the court, “it is the better forum for resolving the controversy over the omitted debt.” *Id.* When the case was reopened, it stated, the court should initiate “a formal proceeding within a fixed time to test the dischargeability of the omitted debt.” *Id.* at 62. It further urged that the court “order that the case be closed without further order if such a proceeding is not

¹¹ The *Walker* bankruptcy court used its equitable powers to fashion a post-reopening remedy:

[T]he Court deems it an appropriate exercise of its equitable powers under section 105 to extend to the newly-listed creditors, as far as possible, the same rights that they would have had if they had been listed in the debtors’ original schedules, and the Court accordingly should give such creditors 90 days to file any request for a determination of the dischargeability of any mandatory-ground debts [under § 523(a)(2), (4), or (6)].

Id. at 208 (citing cases).*see also Manufacturers Hanover, FKA v. Dewalt (In re Dewalt)*, 961 F.2d 848, 851 (9th Cir. 1992) (finding that 30 days is a minimum reasonable notice period); *In re Candelaria*, 121 B.R. at 145 (citing cases); *In re Padilla*, 84 B.R. 194, 197 (Bankr. D. Colo. 1987) (approving 60 days as a reasonable time).

pending as of a specific date.” *Id.* This court is confident that the procedure it followed in this case accorded to the creditor clear notice of the bankruptcy and of her right to file a complaint.

The court now finds that the plaintiff’s complaint, filed more than 100 days after the debtors’ case was closed, is barred by laches. “The defense of laches bars an action when the plaintiff’s delay in filing the claim (1) is unreasonable and inexcusable, and (2) materially prejudices the defendant.” *Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733 (7th Cir. 2003). “Essentially the equitable substitute for a statute of limitations, laches serves to protect defendants from prejudice caused by stale evidence, prolonged uncertainty about legal rights and status, and unlimited exposure to liability damages.” *Id.* The court is persuaded by the Ninth Circuit’s extensive analysis of laches in relation to the pertinent bankruptcy provisions and rules that “laches is available as a defense in a § 523(a)(3)(B) action.” *Beaty*, 306 F.3d at 923. Recognizing that creditors already were disadvantaged by the debtor’s failure to list them on the schedules, the *Beaty* court directed bankruptcy courts “to be especially solicitous to § 523(a)(3)(B) claimants when laches is invoked, and to refuse to bar an action without a particularized showing of demonstrable prejudicial delay.” *Id.* at 926. This court, in consideration of that admonition, examined the record before it to determine whether there were compelling reasons for concluding that the complaint should be barred by laches.

Although the record does not reveal when the plaintiff received actual notice of the bankruptcy, the parties agree that the evidence of Womack’s actual knowledge, a Motion for Relief from Stay, was filed on September 10, 2001, in the defendant’s bankruptcy case. She filed her dischargeability complaint a year later. The debtors promptly had reopened their case and the court had notified the plaintiff of the availability of her potential § 523(a)(3)(B) action. She filed her complaint more than six months after she was given notice and more than three months after the case had been closed again.

The defendant argued, in his summary judgment motion, that the plaintiff’s delay of over a year between the filing of her motion for relief from stay and the filing of her complaint was proof of her lack of

diligence. The defendant also asserted that he was prejudiced by this delay: Womack's belated filing of the complaint created a hardship for him, took away the bankruptcy policy of affording honest debtors a fresh start, and left him with no sense of finality. Although these reasons were not detailed or expansive, they stand without contradiction and are taken by the court as true. Critical to this court's decision is the plaintiff's lack of response to the summary judgment motion. Because of her failure to respond to the defendant's motion, the court has before it no "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P 56(e). Moreover, the non-responding plaintiff has admitted all the factual allegations made by the defendant, including the fact that the state case against the defendant, based on allegations of driving while intoxicated, was dismissed. Without some evidence of the disputes between the parties, the court must grant summary judgment "against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also* N.D. Ind. L.B.R. B-7056-1 (if no "Statement of General Issues" controverting the movant's facts is filed, the court assumes that the movant's facts "are admitted to exist without controversy"). On the basis of the unchallenged record before it, the court finds that the plaintiff inexcusably delayed her filing of the dischargeability complaint and that the defendant was prejudiced by that delay. The court grants summary judgment to the defendant on the ground of laches.

Conclusion

For the reasons set forth above, the court finds that the plaintiff Vickie Womack, who filed a Complaint for Determination Excepting Debt from Discharge against the defendant Robert A. Carter, failed to respond to the defendant's Motion for Summary Judgment. Accordingly, it finds that she has made no showing to establish that there is a genuine issue of material fact and thus has conceded that the facts presented by the defendant are uncontroverted. The court determines that it is appropriate to enter summary judgment against the

non-responding plaintiff. Accordingly, the court grants the defendant's Motion for Summary Judgment on the ground of laches and dismisses the plaintiff's Complaint for Determination Excepting Debt From Discharge.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT