

Not Intended for Publication or Citation

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

IN RE: CASE NO. 10-13875)	
)	
THREE AMIGOS BROADCASTING, INC.)	
)	
Debtor)	
)	
)	
PETERS BROADCAST ENGINEERING, INC.))	
)	
Plaintiff)	
)	
vs.)	PROC. NO. 10-1212
)	
THREE AMIGOS BROADCASTING, INC.)	
)	
Defendant)	

DECISION

At Fort Wayne, Indiana, on January 24, 2011

By its complaint in this adversary proceeding the plaintiff has asked the court to declare that the debtor's obligation to it is non-dischargeable, as a debt for fraud; fraud or defalcation in a fiduciary capacity, embezzlement or larceny; and/or a willful and malicious injury. See, 11 U.S.C. § 523(a)(2), (4), (6). Yet, the debtor is a corporation and its bankruptcy is pending under Chapter 11; so, with one narrow exception, see, 11 U.S.C. § 1141(d)(6), the provisions of § 523(a) which make certain debts non-dischargeable do not apply. See e.g., In re Push & Pull Enterprises, Inc., 84 B.R. 546 (Bankr. N.D. Ind. 1988) (Conrad, J). As a result, the debtor/defendant has filed a motion to dismiss, arguing the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. Rule 12(b)(6). The matter is before the court to consider the issues raised by that motion and the plaintiff's response thereto.

To survive a motion to dismiss, a complaint must do two things:

First, the complaint must describe the claim in sufficient detail to give the defendant “fair notice of what the . . . claim is and the grounds upon which it rests” . . . Second, its allegations must plausibly suggest that the plaintiff has a right to relief raising the possibility above a “speculative level”; if they do not, the plaintiff pleads itself out of court. E.E.O.C. v. Concentra Health Services, Inc., 496 F. 3d 773, 776 (7th Cir. 2007) (quoting Bell Atlantic v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 1964)(internal citations omitted). See also, In re Eisaman, 387 B.R. 219, 222 (Bankr. N.D. Ind. 2008); In re Schmucker, 376 B.R. 256, 258 (Bankr. N.D. Ind. 2007).

When measured by this standard, the plaintiff’s complaint fails, just as a similar complaint considered by Judge Conrad in Push & Pull failed to satisfy the more liberal standard that pre-dated the Supreme Court’s decision in Twombly.

In a Chapter 11 case, confirmation (and performance) of a proposed plan is the goal of the proceeding. Section 1141 of the Bankruptcy Code specifies the effect of confirmation. A confirmed plan binds both the debtor and its creditors. 11 U.S.C. § 1141(a). Where the debtor is a corporation, confirmation also discharges the debtor from its debts, unless the plan is a liquidating one and the debtor does not engage in business following its consummation (in which event the issue of discharge does not matter). 11 U.S.C. § 1141(d)(1), (3). For a corporate debtor, the only non-dischargeable debts are those owed to “a domestic governmental unit” that arise out of fraud or a false financial statement (§ 523(a)(2)(A) and (B)), certain tax or customs duties (which would also be owed to a governmental unit) and debts “owed to a person as the result of an action filed under subchapter III of Chapter 37 of title 31 or any similar state statute.” 11 U.S.C. § 1141(d)(6). The latter group of debts would be based upon a successful qui tam action brought under state or federal law. See, 8 Collier on Bankruptcy, ¶ 1141.05[1][b][ii]. The obligations described in the plaintiff’s complaint do not fall into any of these categories. Plaintiff is not a governmental unit, the debts in

question are not tax or customs duties and are not the result of a qui tam type action. Consequently, there is no basis for claiming that the debtor's obligation is non-dischargeable.

In response to the motion to dismiss, Plaintiff grudgingly acknowledges that there is no provision in the Bankruptcy Code that would exclude its debt from the scope of any discharge in this case. It argues, however, that the court should use its equitable powers and, via § 1141(d), condition any discharge the debtor might receive upon excluding its debt from that discharge. This is the same argument that was rejected by the court in Push & Pull, and it is based upon the same authority that decision declined to endorse, Matter of C & P Gray Farms, Inc., 70 B.R. 704 (Bankr. W.D. Mo. 1987). Push & Pull, 84 B.R. at 549 (“If . . . as [the plaintiff] would prefer Gray Farms stands for the proposition that § 1141(d)(1)(A) bars a corporate debtor's discharge for claims under § 523, we strongly disagree.”). Indeed, issues of dischargeability were not even litigated in Gray Farms. Instead, that decision dealt with objections to confirmation and the court conditioned confirmation and discharge upon, inter alia, full performance of the plan and the application of § 523 to the corporate debtor. Gray Farms, 70 B.R. at 711. It did so not because of any unique aspects of the case or the arguments the parties presented to it, but because “[it] refused as a matter of course” to allow a compromise of debt to be effected without performance, and it “uniformly provided against” the discharge of debts described in § 523 “in corporate chapter 11 case[s].” Id. In other words, it seems the court may have disagreed with the effect Congress gave to confirmation of a plan and routinely used § 1141(d) as the vehicle to achieve a result more to its liking. If so, such a blanket approach to altering the effect of confirmation would be improper. Cf., United States v. Noland, 517 U.S. 535, 543, 116 S.Ct. 1524, 1528 (1996) (“the circumstances that prompt a court to order equitable subordination must not occur at the level of policy choice at which Congress itself operated

in drafting the Code.”).

Without regard to what may or may not be appropriate under § 1141(d)(1), it is not an economical use of resources to consider the issue at this time. No plan has been proposed in this case and until one is submitted for confirmation it is premature to talk about what the effect of confirming it should be. The case could fail and be converted or dismissed, in which event there would be no confirmed plan. Even if a plan is confirmed, it might pay all creditors in full or call for the debtor’s liquidation, in which event conditioning discharge hardly seems to matter.

To the extent Plaintiff is asking the court to use some broad equitable power to declare the debtor’s obligation non-dischargeable, that is something it cannot do. Whatever equitable powers the bankruptcy court may have can only be exercised within the confines of the Bankruptcy Code and the applicable rules of procedure. Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206, 1089 S.Ct. 963, 968-69 (1988); Lerch v. Federal Land Bank, 94 B.R. 998 (Bankr. N.D. Ill. 1989). They cannot be used to override what the law otherwise provides. See, In re WAPI, Inc., 171 B.R. 130, 133 (Bankr. N.D. Ala. 1994); Johnson v. First Natl. Bank of Montevideo, 719 F.2d 270, 273 (8th Cir. 1983). Rather than resort to equitable power, it is far more appropriate to look to the plain language of the statute to determine the fate of Plaintiff’s complaint. The Bankruptcy Code recognizes only one exception to the rule that the dischargeability provisions of § 523 do not apply to Chapter 11 corporate debtors – § 1141(d)(6) – and it is not an exception that applies to Plaintiff’s claims.

Plaintiff’s complaint fails to state a claim upon which relief can be granted and is dismissed. Accord, Push & Pull, 84 B.R. 546. Furthermore, given the arguments that have been made in response to Defendant’s motion, it is clear that any opportunity to file an amended complaint would

be futile, see, Barry Aviation v Land O'Lakes Municipal Airport, 377 F.3d 682 , 687 (7th Cir. 2004); Garcia v City of Chicago, 24 F. 3d 966, 970 (7th Cir. 1994); so there is no point in dismissing the complaint with the usual leave to replead. The case should be dismissed, as well. An order doing so will be entered.

/s/ Robert E. Grant
Chief Judge, United States Bankruptcy Court