

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
RANDALL K. MINAS,) CASE NO. 11-34734 HCD
) CHAPTER 7
)
DEBTOR.)

Appearances:

Gordon E. Gouveia, Esq., counsel for debtor Randall K. Minas, Gouveia & Associates, 433 West 84th Drive, Merrillville, Indiana 46410; and

Paul B. Poracky, Esq., counsel for creditor Kenneth Matney, 425 Joliet Street, Suite 425, Dyer, Indiana 46311.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 17, 2013.

Before the court are the following motions recently filed by creditor Kenneth Matney (“Matney” or “creditor”) against the debtor Randall K. Minas (“Minas” or “debtor”): (1) Motion to Compel, Request for Sanctions and to Extend Deadlines; (2) Motion to Pay Attorney Fees; (3) Motion to Compel Debtor to Comply with Court’s July 19, 2012 Order; and (4) Motion Requesting Extension of Deadlines to File Objection to Discharge. *See* R. 177, 181, 182, 183. For the reasons given below, the court denies the motions.¹

BACKGROUND

Creditor Matney filed a claim against the debtor in this bankruptcy proceeding. His claim resulted from a settlement agreement or judgment and was listed in the amount of \$10,039,176.43. *See* Claim No. 13. On July 19, 2012, the court granted Matney’s second request for additional time to file a

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

complaint to determine dischargeability against the debtor.² *See* R. 95. The Order of July 19, 2012, required the debtor to respond to the creditor’s Request for Production of Documents by July 27, 2012, and to complete a 2004 examination on or before September 14, 2012. The creditor’s bar date for submitting a complaint for nondischargeability was extended until September 28, 2012. *See id.*

On July 31, 2012, the debtor appealed the court’s July 19th Order. However, he then sought to dismiss his own appeal as moot. Matney agreed. The district court held that, “consistent with the parties’ representations,” the appeal was moot. On September 4, 2013, therefore, it dismissed the appeal. *See* R. 188 at 3.

DISCUSSION

The movant, in his motions, asks this court to extend the discovery process and the time period in which he can file a nondischargeability complaint. Federal Rules of Bankruptcy Procedure 7026 through 7037 govern discovery proceedings, and they provide that Federal Rules of Civil Procedure 26 through 37 apply. The court is granted broad discretion to manage the discovery process. *See In re Salem*, 465 F.3d 767, 778 (7th Cir. 2006). In particular, when considering a motion to compel, a court should “independently determine the proper course of discovery based upon the arguments of the parties.” *Gile v. United Airlines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996) (*quoted in ChampionsWorld, LLC v. U.S. Soccer Fed’n*, 276 F.R.D. 577, 591 (N.D. Ill. 2011)). In light of the goal of the federal discovery rules “to encourage litigants to confer and agree upon the discovery related issues without involving the court,” *In re DFI Proceeds, Inc.*, 441 B.R. 914, 916 (Bankr. N.D. Ind. 2011), the court commends the parties on their attempts to mediate, settle, or

² Two creditors had requested the extension of time. The other creditor, Anthony Meyer, filed Claim Number 12 in Minas’ bankruptcy case, in the amount of \$1,850,000.00. In a Joint Stipulation with the debtor, however, Meyer withdrew the claim on July 9, 2013. He also waived his right to file a complaint for nondischargeability or objection to discharge. *See* R. 175. Although he was an appellee, along with Matney, in the appeal filed by the debtor and discussed below in this decision, his claim was resolved and withdrawn. Meyer therefore no longer had or has any interest in this bankruptcy case.

otherwise to resolve their differences concerning Matney's claim. The motions now before the court, however, reflect the lack of success of those settlement endeavors.

Matney originally filed a "Motion to Compel, Request for Sanctions and to Extend Deadlines" on August 2, 2013. Because the motion included multiple requests, the court directed the creditor to file his requests for relief separately. *See* R. 179. On September 3, 2013, Matney filed separate motions to compel, to pay attorney fees, and to extend time for filing a complaint. *See* R. 181, 182, 183. In each motion, the creditor stated that the relief being requested was directly related to the court's July 19, 2012 Order.

The court first notes that the debtor's appeal of the court's Order of July 19, 2012, still was pending in the district court on September 3, 2013, when the three motions were filed. "The general rule is that a pending appeal of a bankruptcy decision deprives the bankruptcy court of jurisdiction over issues involved in the appeal." *Matter of Penn*, 909 F.2d 1486 at *2 (7th Cir. Aug. 7, 1990), *cert. denied*, 500 U.S. 918 (1991). For that reason, this court lacked jurisdiction to consider the motions or to render decisions on matters concerning the court's July 19, 2012 Order when they were filed. However, the district court's dismissal of the appeal was issued on September 4, 2013, and this court's jurisdiction over the creditor's challenges to the Order of July 19, 2012, was restored.

The court also recognizes that its Order of July 19, 2012, was in no way altered by the debtor's appeal or by the district court's dismissal of the appeal, and its directives remained in effect. Neither party sought a stay of the Order by filing a motion with this court under Bankruptcy Rule 8005.³ *See Belda v. Marshall*, 416 F.3d 618, 620 (7th Cir. 2005) (concluding that, because no relief was sought under Rule 8005, court could dismiss case); *In re Olde Prairie Block Owner, LLC*, 447 B.R. 578, 579 (Bankr. N.D. Ill. 2011) (discussing criteria for granting or denying stay under Rule 8005). In that Order, the court granted an extension of the bar date for filing complaints determining dischargeability, but required the creditor to

³ In pertinent part, Federal Rule of Bankruptcy Procedure 8005 states:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, . . . for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance.

submit his complaint by September 28, 2012. When the notice of appeal was filed on July 31, 2012, no motion for a stay of the Order's deadlines was filed thereafter, and so the appeal did not stay the effect of the bankruptcy court order. Therefore, each party was required to meet the ordered deadlines and filings in order to protect his interests. Matney did not file a complaint or request to extend the filing time on or before September 28, 2012. He now seeks to extend that filing date until December 30, 2013.

A. *Motion Requesting Extension of Deadlines to File an Objection to Discharge*⁴

The court begins by reviewing Matney's Motion seeking an extension of the September 28, 2012, deadline. *See* R. 183. In the Motion the creditor asked for an extended bar date on the ground that the filing deadline set by Bankruptcy Rule 4007(c) could be equitably tolled. *See id.* at 2 (citing *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337, 343 (6th Cir. 2003)). In *Maughan*, the court extended the deadline by 20 days because of the debtor's failure to cooperate with prior 2004 examinations. Matney argued that his circumstances were similar to those in *Maughan*, and referred generally to documents requested but not produced by the debtor. He insisted that he could not complete his complaint for nondischargeability without the documents. *See id.*

Matney did not mention the § 523(a) subsection under which his complaint would be formulated, but he suggested that the basis for the complaint would be "the conspiracy to single out and financially destroy Matney."⁵ R. 182 at 5. In light of the fact that conspiracy allegations usually are brought under § 523(a)(2), (4), or (6), intentional tort sections which preclude the discharge of a debt arising from

⁴ Matney's Motion asks for more time to file "an objection to discharge," but throughout the filings in this case he has stated that he wants to file a "complaint to avoid discharge as to the obligations owed by Minas to Matney." R. 183 at 1-2; R. 182 at 7; R. 94 at 1, 6. It is clear that the creditor is seeking to file a § 523, not § 727, complaint. *See Irving Fed. Sav. & Loan Ass'n v. Billings (In re Billings)*, 146 B.R. 431, 435 (Bankr. N.D. Ill. 1992) ("[D]ischarge under § 727 and dischargeability under § 523 refer to distinct concepts and cannot be used interchangeably.").

⁵ The court notes that Documents 181, 182, and 183 were filed in this court's record on the same day, September 3, 2013, and in many ways rely on one another. The court found it helpful to view the creditor's arguments in the three record documents together.

fraudulent, deceitful, or willfully malicious conduct (*see, e.g., In re Liebl*, 434 B.R. 529 (Bankr. N.D. Ill. 2010); *In re Draiman*, 2006 WL 1876972 (Bankr. N.D. Ill. June 22, 2006)), the court considers Matney’s request to seek an extension of time for filing a complaint under § 523(c), which governs exceptions to discharge under § 523(a)(2), (4), and (6).⁶

Bankruptcy Rule 4007(c) establishes the time frame for filing complaints under § 523(c):

... [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). . . . 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.

Fed. R. Bankr. P. 4007(c) (emphasis added). A creditor with a § 523(c) claim must file a timely complaint or a timely motion to extend the deadline under Rule 4007(c) or the debt is discharged. *See In re Smith*, 582 F.3d 767, 771 (7th Cir. 2009); *In re Sasse*, 438 B.R. 631, 639 n.21 (Bankr. W.D. Wis. 2010). As the Seventh Circuit clearly stated, “[t]he bankruptcy court may grant extensions of time past 60 days, but only if a creditor so moves before the 60 days are up. Tardiness is otherwise fatal.” *In re Meyer*, 120 F.3d 66, 68 (7th Cir. 1997).

In this case, the court’s § 341 Notice set the meeting of creditors on January 24, 2012, and the deadline for objections to discharge or dischargeability of debts on March 26, 2012. On March 26, Matney timely sought an extension. The debtor objected, and the court held a hearing on April 24, 2012. Based on the arguments of counsel, the court granted the creditor an extension of time, until July 24, 2012. On July 18, 2012, Matney filed another timely request for an extension, and the court granted it the next day. It was that Order of July 19, 2012, that the debtor appealed.

⁶ Section 523(c) provides, in pertinent part:

(1) 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), or (6) of subsection (a) of [§ 523], 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) . . . of subsection (a) of this section.

11 U.S.C. § 523(c)(1).

The court finds that Matney properly filed two requests for an extension before the deadline, *see* R. 52, 94, but did not do so before the September 28, 2012 bar date. It is clear that the creditor's present motion for extension of time, filed almost a year after the deadline, was belatedly filed.

Matney admitted the untimeliness of his request, but asked for equitable relief because of the debtor's failure to cooperate with his discovery requests. He made reference to the equitable tolling of the deadline in *In re Maughan*, a Sixth Circuit case, and claimed that "similar facts have occurred in this case." R. 183 at 2. Without specifying the materials he sought, Matney simply asked for "documents previously requested," and told the court that they were "critical to Matney because they [would] likely form the basis for Matney's complaint to avoid discharge as to the obligations owed by Minas to Matney," and without which "Matney [was] not in a position to complete his complaint for nondischargeability." *Id.* at 1-2.

The Seventh Circuit Court of Appeals has held that the timeliness rules in Bankruptcy Rule 4004(b) (and in the closely related Rule 4007(c)) are not jurisdictional and are subject to such equitable defenses as waiver, estoppel, and equitable tolling. *See In re Kontrick*, 295 F.3d 724, 733 (7th Cir. 2002), *aff'd*, *Kontrick v. Ryan*, 540 U.S. 443 (2004). However, it cautioned that "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." *Id.*

Subsequent bankruptcy decisions emphasized that, although it is within the court's discretion to decide whether to excuse tardy complaints, they should be excused only in limited circumstances.⁷ *See, e.g., In re Martinsen*, 449 B.R. 917, 923 (Bankr. W.D. Wis. 2011) (allowing untimeliness defense "only in a manner consistent with the code's policy favoring the debtor's fresh start"). The defense of equitable tolling claimed by Matney should be allowed "only when 'despite all due diligence, a plaintiff cannot obtain the

⁷ Courts also hold that the "excusable neglect" standard of Rule 9006(b) does not apply to Rule 4007(c) motions. *See, e.g., Mirmingos v. Benjamin*, 288 B.R. 521, 523 (N.D. Ill. 2003) ("Rules 4004 and 4007 make no mention of 'excusable neglect.'"); *In re Johnson*, 2010 WL 2801878 at *2 (Bankr. S.D. Ind. July 14, 2010) (court lacks discretion to allow untimely § 523 complaint based on excusable neglect).

information necessary to realize that he may possibly have a claim.” *Id.* (quoting *Jones v. Res-Care, Inc.*, 613 F.3d 665, 670 (7th Cir. 2010)). The court must consider “whether a reasonable person in the plaintiff’s position would have been aware of the *possibility* that [a claim existed].” *Id.* (quoting *Beaumon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 860-61 (7th Cir. 2005) (emphasis in original)).

A creditor who simply does not act quickly enough to learn the facts is not entitled to a belated extension of the deadline, because such an exception would quickly consume the rule. The crucial concept here is whether the plaintiff is (or should be, as the test is that of a reasonable person) aware of the possibility or *potential* of a claim. Put another way, “If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run – for even after judgment, there is no certainty.”

Id. (quoting *Beaumon*, 411 F.3d at 861) (emphasis in original).

The case upon which Matney relies, *In re Maughan*, 340 F.3d 337 (6th Cir. 2003), agrees with and follows this circuit’s legal conclusion in *Kontrick* “that Rule 4007(c)’s time limits are not jurisdictional.” *Id.* at 343. However, the facts in *Maughan* are easily distinguished from this case. In *Maughan*, the bankruptcy court allowed one extension of only 20 days to the creditor after the 60-day bar date, despite his three-day-late filing of the motion for extension of time, based on the debtor’s failure to provide specific promised documents after the Rule 2004 examination. Moreover, the creditor actually filed the complaint within the 20-day time limit the court allowed by the extension. In this case, in contrast, Matney already has been granted two extensions, allowing him more than 6 months beyond the noticed bar date. Moreover, when the appeal time period is included, Matney has had almost 18 months in which to formulate and file a nondischargeability complaint. He now seeks an additional three months to file the complaint that originally was due in March 2012. He has not mentioned which documents are necessary to his decision-making or what type of complaint is under consideration. In addition, there have been a Rule 2004 examination, the production of more than 15,000 pages of documents, and the debtor’s Statements of Compliance insisting that all the documentation he had was produced. *See* R. 90, 98. This court finds, as Judge Utschig did in *Martinsen*, that the creditor simply has not acted quickly enough to find the facts he needed and to file a complaint, and he therefore is not entitled to equitable tolling of the deadline. *See In*

re Martinsen, 449 B.R. at 924; *see also In re Garner*, 339 B.R. 610, 613 (Bankr. W.D. Tex. 2006) (denying creditor “more time to fish around” when there was no showing why discovery time was not sufficient).

It is obvious that the deadline for filing a complaint or for requesting an extension has long since passed. This creditor already has received two extensions, two bites at the apple. He has not shown any “cause” to extend the time fixed by Rule 4007(c) or for equitably tolling the deadline to allow the very late filing of a complaint. *See Anwar v. Johnson*, 720 F.3d 1183, 1189 (9th Cir. 2013) (holding that federal bankruptcy rules allow a § 523 complaint to be filed “outside the sixty-day window of Rule 4007(c) if, and only if, she files a motion showing good cause for an extension *before* the sixty-day period lapses”); *In re Miles*, 453 B.R. 449, 451 (Bankr. N.D. Ga. 2011) (finding creditor failed to show compelling “cause” why he could not accomplish investigation during discovery time allotted). The creditor’s Motion Requesting Extension of Deadline is denied.

B. *Motion to Compel Debtor to Comply with Court’s July 19, 2012 Order*

In the second motion before the court, Matney’s Motion to Compel sought a court order that the debtor provide him with the documents originally referenced in the court’s Order of July 19, 2012. *See R. 182*. Matney’s second request for a time extension, filed July 18, 2012, described the documents he sought: “personal financial statements and trust agreements and histories for all years from 2007 through the present.” *R. 94* at 3. His Response to Matney’s Statement of Compliance listed the categories of documents and specific documents not produced: for example, all personal financial statements, liquidity statements, cash flow analyses, statements of assets, and electronic communications between the debtor and 15 named people – all documents in those categories from 2007 through 2011. *See R. 99*. The present motion provided no specificity or narrowing of Matney’s extremely broad document request. Matney admitted that he had received many of the requested documents and that the parties had submitted the matter to mediation and had held settlement discussions. He also stated that the parties had agreed to halt discovery and other

bankruptcy matters in the hope of resolving various claims, and for that reason he never filed a motion to compel production of documents or to continue the nondischargeability deadline. *See* R. 182 at 5-6.

The Order of July 19, 2012, had required the debtor to “respond to the remainder of . . . [the creditor’s] outstanding Requests for Production of Documents on or before July 27, 2012.” R. 95. As the court pointed out above, that Order remained in effect despite the appeal. However, Matney never moved to compel that discovery or advised the court that the debtor had not complied with the court’s Order. *See* N.D. Ind. L.B.R. B-7037-1 (upon written information from counsel “that opposing counsel has refused or delayed meeting and discussing” discovery issues, the court may act appropriately to avoid unreasonable delay). In addition, in this Motion Matney did not present specific requests or indicate what materials were deficient and why. *See* Fed. R. Bankr. P. 7037; Fed. R. Civ. P. 37(a)(3) (allowing a party to request a court order compelling disclosure when another party has failed to disclose properly); *see also In re Davis*, 2013 WL 425162 at *2 (Bankr. D.S.C. Feb. 1, 2013) (denying motion to compel as lacking specificity).

Finally, and importantly, Matney failed to file the certification required to verify that he had conferred or had attempted to confer with the debtor in good faith and had attempted to resolve the discovery dispute without court involvement.⁸ *See* Fed. R. Civ. P. 26(f); Fed. R. Civ. P. 37(a)(1); N.D. Ind. L.B.R. B-7037-1.⁹ A motion to compel that does not satisfy the certification requirement of the federal rules and the

⁸ Matney did attach one document to the Motion to Compel. It was a letter discussing the discovery dispute. However, it memorialized the disagreements between Matney and Fifth Third Bank, not those between Matney and the debtor. He did not attach or file the necessary certification of good faith.

⁹ The court’s local rule requiring certification states, in pertinent part:

The court may deny any discovery motion . . . unless the motion is accompanied by the certification required to be made under Rules 26(c)(1), 37(a)(1), and 37(d)(1)(B) of the Federal Rules of Civil Procedure. The certification shall be filed as a separate document and shall, in addition to the information required under the appropriate Federal Rule, also recite the date, time, and place of the conference or attempted conference and the names of all persons participating therein. If counsel for any party advises the court in writing that opposing counsel has refused or delayed meeting and discussing the problems covered in this Rule, the court may take such action as is appropriate to avoid unreasonable delay.

(continued...)

court's local rule must be denied. *See In re Johnson*, 408 B.R. 115, 122 (Bankr. S.D. Ohio 2009) (denying motion to compel for lack of certification).

The court determines, therefore, that the creditor's Motion to Compel must be denied for its failure to comply with federal civil and bankruptcy rules and for its untimeliness. When that denial is combined with the court's denial of the creditor's Motion for extension of time to file a complaint, those determinations perforce deny the creditor the opportunity to file a belated complaint. Without the possibility of the creditor's commencing an adversary proceeding to assert his claim that the debt owed to him by the debtor should be excepted from the debtor's discharge, the court finds no basis in the law to support the creditor's continuation of this discovery process.

C. Motion Requesting Debtor to Pay His Attorney Fees

Matney asks the court to award him reasonable attorney fees for having to bring a Motion to Compel. *See* R. 181. He seeks the court's order requiring the debtor to comply with its earlier July 19, 2012 Order on the grounds that the debtor failed to provide the requested documents and delayed discovery by using "mediation and settlement discussions as a foil to string matters along without right and in an inequitable manner." *Id.* at 1, ¶ 3.

Rule 37(a)(5)(A) provides for the payment of reasonable attorney's fees and expenses, and Federal Rule of Bankruptcy Procedure 7037 applies the federal civil rule in bankruptcy proceedings. The payment is made to the movant by the party whose conduct necessitated the motion to compel. *See In re Kids Creek Partners*, 200 F.3d 1070, 1075 (7th Cir. 2000). However, the Rule requires such payment only if the motion is granted. In this case, the motion to compel is denied, and the moving party cannot be awarded attorney fees. *See In re Johnson*, 408 B.R. 115, 122 (Bankr. S.D. Ohio 2009) (because motion to compel was denied for lack of certification, fees were denied); *see also Sanimax AGS, Inc. v. Gulf*

⁹(...continued)
N.D. Ind. L.B.R. B-7037-1.

Hydrocarbon, Inc., 2010 WL 2560032 at *6 (S.D. Ind. June 23, 2010) (denying fees under Rule 37(a)(5)).

Consequently, the creditor's Motion for Attorney Fees is denied.

CONCLUSION

For the reasons presented in this Memorandum of Decision, the court denies the three Motions of creditor Kenneth Matney now before the court: the Motion Requesting Extension of Deadlines to File Objection to Discharge; Motion to Compel Debtor to Comply with Court's July 19, 2012 Order; and Motion Requesting Debtor to Pay Attorney Fees.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE

UNITED STATES BANKRUPTCY COURT