

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
HAMMOND DIVISION

IN RE: )  
 )  
CHARLES HALL, ) CASE NO. 01-63624 JPK  
 ) Chapter 7  
 Debtor. )

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RAKESH K. GUPTA d/b/a )  
SPECIAL MEDICINE CLINIC, )  
Plaintiff, )  
v. ) ADVERSARY NO. 01-6255  
CHARLES HALL, )  
Defendant. )

ORDER DENYING FILING OF SECOND AMENDED COMPLAINT

This adversary proceeding was initiated on October 26, 2001 by a complaint filed by the plaintiff Rakesh K. Gupta d/b/a Special Medicine Clinic ("Gupta") against the debtor/defendant Charles Hall ("Hall"). That complaint alleged that certain actions undertaken by Hall caused an indebtedness to Gupta to be nondischargeable pursuant to 11 U.S.C. § 523(a). The complaint did not designate the specific section of 11 U.S.C. § 523(a) upon which Gupta based his assertion that Hall's indebtedness to him was excepted from discharge. An answer to the complaint was filed on November 27, 2001, and an order for a pre-trial conference, set for January 10, 2002, was entered on November 30, 2001. On December 6, 2001, Gupta filed his first amended complaint, to which Hall filed his answer on December 19, 2001. The reason for the filing of the amended complaint on December 6, 2001 is somewhat a mystery to the Court: that complaint and the original complaint filed on October 26, 2001 are identical. As was true with the original complaint, the amended complaint did not specify the section of 11 U.S.C. § 523(a) upon which its contentions were based. On January 11, 2002, the Court entered an order following a preliminary pre-trial conference. In attendance at that conference on January 10, 2002 were Timothy M. Mikula, the then-attorney for Gupta, and Mitchell A. Peters, counsel for Hall. Paragraph 3 of the order entered on January 11, 2002 states the following:

3. LEGAL ISSUES ONLY TO BE CONSIDERED AT TRIAL: The legal issues to be tried shall be controlled by this Pretrial Order, rather than by the Pleadings. Only the following legal issues shall be tried: whether debt is nondischargeable pursuant to §523(a)(2).

By order entered on July 24, 2002, the Court granted the motion of Attorney Timothy M. Mikula to withdraw as counsel of record for Gupta. On July 29, 2002, the Court entered a scheduling order which provided that any motion by the defendant to seek to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or for a judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, or for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, was required to be filed by September 16, 2002. Hall filed a motion for summary judgment and materials in support of that motion on September 13, 2002. On October 16, 2002, Gupta's present counsel, John M. Espar, filed an appearance in the case, and on November 15, 2002 Attorney Espar filed a response to Hall's motion for summary judgment. Hall filed a reply to Gupta's response on December 16, 2002.

On April 23, 2003, the Court entered its order denying Hall's motion for summary judgment.

Footnote 1 on page 2 of that order states:

Pursuant to Pretrial Order dated January 11, 2002, it was ordered that the only legal issue to be considered was whether the alleged debt by the Defendant to the Plaintiff is nondischargeable pursuant to §523(a)(2), as opposed to §523(a)(6) based upon willful and malicious conversion.

On June 13, 2003, the Court entered an order following a pre-trial conference on June 11, 2003. Paragraph 3 of this order stated the following:

3. The Plaintiff shall file any Amended or Supplemental Complaint or motion for leave to file the same, if applicable, pursuant to Fed.R.Civ.P. 15, as made applicable by Fed.R.Bk.P. 7015, on or before July 7, 2003, or may thereafter be barred from so filing. N.D.Ind.L.B.R. B-7015-1 must be complied with in filing any Motion to Amend.

On July 3, 2003, Gupta filed his Motion for Leave to File Amended Complaint, and a copy of

the proposed Second Amended Complaint. On August 5, 2003, Hall filed an objection to that motion. The Court held a hearing on September 10, 2003, and on September 18, 2003 entered an order which provided that Gupta would have until November 7, 2003 to file a reply brief to the brief filed by Hall on August 5, 2003, and that Hall could then reply by December 8, 2003. Gupta filed his response on November 10, 2003 and Hall filed his reply on December 18, 2003.

The foregoing is the status of the record before the Court.

The parties have focused their attention on whether or not Gupta may file a second amended complaint pursuant to the provisions of Rule 15(a) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by B.R. 7015. This focus misses the mark. Whether or not Gupta may amend his complaint a second time is subject to Rule 16(e) of the Federal Rules of Civil Procedure, made applicable to this adversary proceeding by B.R. 7016.

The order entered by the Court on January 11, 2002 constituted an order within the purview of Rule 16(e). That rule provides:

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

As stated in the rule, the January 11, 2002 order controlled the subsequent course of the adversary proceeding unless it was subsequently modified by a subsequent order. By the January 11, 2002 order, Gupta, through his then-attorney Timothy M. Mikula, limited the theory of his case to a proceeding under 11 U.S.C. § 523(a)(2). This limitation is made amply clear by the above-designated citation of footnote 1 from the Court's order of April 23, 2003. The Court, by the judge then assigned to this case, provided in the order of June 13, 2003 that Gupta could file a motion for leave to file an amended complaint. This Judge construes the June 13, 2003 order to constitute only an invitation to request modification of the January 11, 2002 order pursuant to Rule 16(e), to add a theory not before the Court under the January 11, 2002 order. The June 13, 2003 order did not *ipso*

*facto* constitute a modification of the January 11, 2002 order pursuant to the second sentence of Rule 16(e), such that the issue now before the Court is defined by the complaint amendment rules of B.R. 7015/Rule 15 of the Federal Rules of Civil Procedure.

The standards for whether or not a pre-trial order other than a final pre-trial order may be modified are not clearly enunciated in Rule 16(e). Case law provides some guidance. As stated in *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608 (9<sup>th</sup> Cir. 1992), modification of a preliminary pre-trial order reflexes back to Rule 16(b):

Thus, Johnson's ability to amend his complaint was governed by Rule 16(b), not Rule 15(a). See *Forstmann v. Culp*, 114 F.R.D. 83, 85 (M.D.N.C.1987) (party seeking to amend pleading after date specified in scheduling order must first show "good cause" for amendment under Rule 16(b), then, if "good cause" be shown, the party must demonstrate that amendment was proper under Rule 15); see also *Financial Holding Corp. v. Garnac Grain Co.*, 127 F.R.D. 165, 166 (W.D.Mo.1989) (same).

...

The scheduling order "control[s] the subsequent course of the action" unless modified by the court. Fed.R.Civ.P. 16(e). Orders entered before the final pretrial conference may be modified upon a showing of "good cause," Fed.R.Civ.P. 16(b), but orders "following a final pretrial conference shall be modified only to prevent manifest injustice." Fed.R.Civ.P. 16(e). (footnotes omitted)

The lack of a specific guideline in Rule 16(e)/16(b) was noted, and a standard for review developed, in *Dickerson v. Central United Life Insurance Co.*, 932 F.Supp. 1471, 1474 (M.D.Ga. 1996), as follows:

Pretrial orders are governed by Federal Rule of Civil Procedure 16(e). That paragraph does not impose any limitation on the court's power to amend a pretrial order, unless the order follows a final pretrial conference, in which case the order "shall be modified only to prevent a manifest injustice." Fed.R.Civ.P. 16(e). Thus, where the order does not follow a final pretrial conference, the court may permit the pretrial order to be amended "when the danger of surprise or prejudice to the opposing party is small and a failure to amend might result in an injustice to the moving party." *Computer Associates Int'l v. American Fundware*, 831 F.Supp. 1516, 1526 (D.Colo.1993) (quoting 6A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1527 at 287 (1990)). The decision whether to

amend is solely within the discretion of the court. *Id.*

The issue thus becomes whether or not Gupta has established "good cause" to amend the January 11, 2002 order in this action to add a theory of recovery under 11 U.S.C. § 523(a)(6), when this action had proceeded prior to that attempt to amend solely under 11 U.S.C. § 523(a)(2). In determining whether "good cause" exists, the Court is to consider the extent to which the proposed amendment results in prejudice or surprise to the defendant, and might result in an injustice to the plaintiff. It must be borne in mind that the attempted amendment follows a motion for summary judgment filed by Hall.

Although dealing with a circumstance involving a final pre-trial order governed by the "manifest injustice" standard of Rule 16(e), the comments of the United States Court of Appeals for the Seventh Circuit are instructive in the circumstances of this case. As stated in *Erff v. Markhon Industries, Inc.*, 781 F.2d 613, 617 (7<sup>th</sup> Cir. 1986):

A district court judge may schedule a pre-trial conference for the parties to "consider and take action with respect to (1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses; [and] (2) the necessity or desirability of amendments to the pleadings." Fed.R.Civ.P. 16(c). Attendance at the pre-trial conference by the party or his attorney is mandatory. *Id.* at 16(f). Attorneys at a pre-trial conference must make a full and fair disclosure of their views as to what the real issues of the trial will be. *Payne v. S.S. Nabob*, 302 F.2d 803 (3rd Cir.), *cert. denied*, 371 U.S. 870, 83 S.Ct. 136, 9 L.Ed.2d 107 (1962); *Cherney v. Holmes*, 185 F.2d 718 (7th Cir. 1950). After the final pre-trial conference, the district court judge enters a pre-trial order "reciting the action taken." *Id.* at 16(e). "This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pre-trial conference shall be modified only to prevent manifest injustice." *Id.* Because the parties rely on the pre-trial conference to inform them precisely what is in controversy, the pre-trial order is treated as superseding the pleadings and establishes the issues to be considered at trial. *In-Sink-Erator Mfg. Co. v. Waste King Corp.*, 346 F.2d 248, 251 (7th Cir.), *cert. denied*, 382 U.S. 835, 86 S.Ct. 80, 15 L.Ed.2d 78 (1965).

Perhaps even more to the point are the following comments in *Talano v. Northwestern Medical Faculty Foundation, Inc.*, 1999 WL 1080416 (N.D.Ill. 1999):

When plaintiff seeks to amend a complaint after a defendant files a motion for summary judgment, plaintiff has to show that the proposed amendment has substantial merit. *Verhein v. So. Bend Lathe, Inc.*, 598 F.2d 1061, 1063 (7<sup>th</sup> Cir., 1979). The courts apply a heightened standard in cases involving pending summary judgment because a "critical factor in deciding whether to allow a party to amend his complaint is the degree of prejudice to the defendant, and a defendant would be seriously prejudiced if the plaintiff had the unfettered right to alter his cause of action every time it appeared that the defendant might be able to defeat it ." *Cowen v. Bank United of Texas*, 1995 U.S. Dist. LEXIS 1087, 26. Thus, in order to grant plaintiff's motion, the court must be shown a significant reason for plaintiff's failure to assert the new claims earlier. It will not be enough that plaintiff merely desires to oppose summary judgment with new legal theories.

Reading between the lines of Gupta's submissions, the essential assertion is that Gupta's initial counsel erroneously limited the theory of his case to 11 U.S.C. § 523(a)(2), while Gupta's second counsel would not have chosen to do so. That may well be, but the issue is whether or not that assertion establishes "good cause" pursuant to Rule 16(e)/16(b) to allow for the alteration of the theory of the case at this point. The facts were the facts at the time the original complaint was filed on October 26, 2001, and as far as this record indicates, those facts were known entirely and completely to Gupta at that time. The same facts were still the same facts nearly two years later when Gupta sought leave to file a second amended complaint based on a theory under 11 U.S.C. § 523(a)(6). Because the record discloses nothing to the contrary, the Court must assume that the same factual bases for action were disclosed by Gupta to Attorney Mikula as was the case with disclosure to Attorney Espar. There is nothing in this record that indicates that any new facts have been uncovered since the filing of the original complaint in this action, or that any action or inaction by Hall caused either of Gupta's attorneys to not be fully cognizant of the factual basis for the claims which either might have sought to assert. This is a case in which the following commentary from *Bobilya Chrysler, Plymouth, Dodge, Inc. v. Gross*, 175 B.R. 277, 283 (Bankr. N.D.Ind. 1994) is instructive:

After careful consideration of this issue, the court denies Bobilya Chrysler's Motion to amend its Complaint. First, the court notes that

the purpose behind permitting amendments to pleadings is to "enable a party to assert matters that were overlooked or were unknown to him at the time he interposed his original complaint and answer." *Stavriotis*, 977 F.2d at 1206, *quoting* Wright, Miller and Kane, Federal Practice and Procedure, § 1473 (1971). In the court's opinion, this is not a simple case of a party overlooking a particular claim. During the course of discovery in this proceeding, Bobilya Chrysler's attorney could have determined the effectiveness of a claim for "false representations" against Gross. Apparently, both at the time of the Complaint and the Pre-Trial Order, Bobilya Chrysler determined that its best course of action was a claim for only "false pretenses" against Gross. It was not until right at the time of the trial that Bobilya Chrysler determined that it would be better situated by adding the claim of "false representation" to its original Complaint.

For whatever reason, Gupta's initial counsel consciously chose to limit the theory of his case to 11 U.S.C. § 523(a)(2). Whatever "injustice" may result from the denial of the proposed amendment resulted from a litigation decision made by the plaintiff's attorney, a decision which had consequences in this case with respect to the defendant's approach to defending the case. Hall filed a motion for summary judgment based upon that limitation. While Gupta is correct in pointing out that no order determining the parameters of discovery has yet been entered in this case, had the grounds for exception to discharge not been so limited, it is certainly not unforeseeable that Hall would have either conducted limited discovery on the theory of 11 U.S.C. § 523(a)(6), or targeted that theory of recovery in his motion for summary judgment. This is the element of surprise/prejudice to the defendant.

This case was filed on October 26, 2001. The initial complaint and the first amended complaint did not assert a specific statutory basis for exception of Hall's debt from discharge. A preliminary pre-trial order entered in this case specifically, by the designation of Gupta's initial counsel, limited the theory of the case to 11 U.S.C. § 523(a)(2). Hall filed a motion for summary judgment based upon the premise that the case was limited to that theory. Despite the facts being "set in stone" from the outset as far as the premise for the litigation known to Gupta's counsel is concerned, nearly two years after the filing of the complaint, Gupta now seeks to change the theory

of recovery, thereby opening up not only the potential for additional discovery, but the potential for the filing of an additional dispositive motion which will further delay the conclusion of this case. The only "cause" advanced in this record is that Gupta's initial counsel limited his theory of recovery to a specific section of 11 U.S.C. § 523(a), which is really no "cause" at all in that the Court has previously ruled that the theory advanced by the initial counsel survived a motion for summary judgment.

Because the issue actually before the Court is controlled by Rule 16 of the Federal Rules of Civil Procedure, discussion of the arguments and case law submitted by the parties under Rule 15 of the Federal Rules of Civil Procedure is unnecessary.

IT IS ORDERED that the motion of the plaintiff Rakesh K. Gupta d/b/a Special Medicine Clinic to file a second amended complaint is denied.

IT IS FURTHER ORDERED that a status conference will be held on **July 8, 2004, at 10:30 o'clock A.M.** to determine further proceedings in this case under the plaintiff's complaint advancing solely a ground for exception to discharge under 11 U.S.C. § 523(a)(2).

Dated at Hammond, Indiana on April 26, 2004.



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J. Philip Klingeberger, Judge  
United States Bankruptcy Court

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