

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION

IN RE:)	
)	
NANCY C. SMITH,)	CASE NO. 05-69043 JPK
)	Chapter 7
Debtor.)	

LAKESIDE SURGERY CENTER, LLC,)	
Plaintiff,)	
v.)	ADVERSARY NO. 05-6280
NANCY C. SMITH,)	
Defendant.)	

ORDER DETERMINING DEFENDANT'S MOTION TO
 DISMISS AND MOTION FOR MORE DEFINITE STATEMENT/
 ORDER CONCERNING FURTHER PROCEEDINGS

This adversary proceeding came before the Court for hearing on July 26, 2006, pursuant to the Court's order of May 5, 2006 and order of June 23, 2006, which scheduled hearings on the defendant's Motion to Dismiss and Motion for More Definite Statement, each filed on March 13, 2006, and the plaintiff's responses thereto. The plaintiff appears by counsel David Westland; the defendant appears by counsel Alan D. Naggatz.

The first paragraph of the motion to dismiss asserts that the plaintiff has failed to properly effect service of process upon the defendant. The record establishes that defendant's attorney was not served with a summons and copy of the complaint as required by Fed.R.Bankr.P. 7004(b)(9). At the hearing, Attorney Naggatz raised the time limitation for service of process stated in Fed.R.Bankr.P. 7004(a)(1)/Fed.R.Civ.P. 4(m). This rule states:

Rule 4. Summons

m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply

to service in a foreign country pursuant to subdivision (f) or (j)(1).

The time limitations of Rule 4(m) may be excused if the plaintiff establishes "good cause" for delay in service; *Coleman v. Milwaukee Board of School Directors*, 290 F.3d 932, 933-934 (7th Cir. 2002). It should also be noted that the rule itself provides the Court with the discretion to direct that service be effected within a specified time, rather than merely dismissing the complaint without prejudice. The Court finds that rather than dismissing the complaint, the plaintiff should be directed to effect service of process upon the debtor's attorney within 20 days.

Paragraphs 2 and 3 of the motion to dismiss essentially assert that the complaint fails to provide allegations of fraud with the specificity required by Fed.R.Bankr.P. 7009/Fed.R.Civ.P. 9(b). The Court first notes that the complaint does not designate the specific section of 11 U.S.C. § 523(a) under which it proceeds. As a result, in that actions under 11 U.S.C. § 523(a)(4) and 11 U.S.C. § 523(a)(6) are not premised upon fraud, the complaint is sufficient to assert grounds under those statutory provisions. Additionally, the Court finds that the basic allegations of the complaint are sufficient to state a claim under 11 U.S.C. § 523(a)(2)(A) with sufficient particularity to survive a motion to dismiss.

Paragraph 4 of the motion to dismiss asserts that the complaint lacks the jurisdictional averments required by Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(a). The defendant is correct, and the Court will order the plaintiff to amend the complaint under the defendant's Motion for More Definite Statement. At this stage of the case, the failure to plead the jurisdictional allegations is not grounds to dismiss the complaint.

Finally, paragraph 5 of the motion to dismiss asserts that the plaintiff should be required to specifically designate the section or sections of 11 U.S.C. § 523(a) upon which the complaint is premised. The Court agrees with the defendant; however, the Court will order the complaint amended under the defendant's Motion for More Definite Statement, and will not dismiss the

complaint based upon this ground.

The Court finds that the Motion for More Definite Statement should be granted, and that the plaintiff should be required to file an amended complaint which complies with Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(a), and which in addition designates, as separate counts, the sections of 11 U.S.C. § 523(a) upon which exceptions from discharge are premised. Any factual allegations of the amended complaint should reflect the foundational facts necessary to provide notice of claims under the specific sections of 11 U.S.C. § 523(a) upon which the action is premised.

The Court thus finds that the defendant's motion to dismiss should be denied, and that the defendant's Motion for More Definite Statement should be granted.

At the hearing, the Court took the opportunity to discuss the legal principles deemed applicable by the Court to actions under 11 U.S.C. § 523(a)(2)(A), 11 U.S.C. § 523(a)(4), and 11 U.S.C. § 523(a)(6). Major principles deemed applicable by the Court to § 523(a)(2)(A) issues are stated in *In re Whifers*, 337 B.R. 326 (Bankr. N.D.Ind. 2005); major issues concerning the concept of a "fiduciary" under § 523(a)(4) are discussed in *In re Tsikouris*, 340 B.R. 604 (Bankr. N.D.Ind. 2006); major principles under § 523(a)(6) are discussed in *In re Hostetter*, 320 B.R. 674 (Bankr. N.D.Ind. 2005).

The parties discuss the period of time necessary for discovery following the filing and service of an amended complaint by the plaintiff. The Court deems a 120-day period for discovery to be appropriate.

IT IS ORDERED that the defendant's motion to dismiss is denied.

IT IS FURTHER ORDERED that the defendant's Motion for More Definite Statement is granted: the plaintiff shall file an amended complaint by **August 15, 2006** which conforms to the jurisdictional pleading requirements of Fed.R.Bankr.P. 7008(a)/Fed.R.Civ.P. 8(a), and which specifically designates by separate counts the sections of 11 U.S.C. § 523(a) upon which the

complaint is premised.

IT IS FURTHER ORDERED that the plaintiff shall cause a copy of the amended complaint, together with an alias summons, to be served upon counsel for the defendant by no later than **August 25, 2006**, as required by Fed.R.Bankr.P. 7004(b)(8). In view of the requirement to file an amended complaint, the filing of a copy of the original complaint and summons upon the defendant's counsel is excused by the Court.

IT IS FURTHER ORDERED as follows:

1. All discovery shall be completed by **December 22, 2006**. The parties are advised that the Court will not enforce any request for discovery, or impose any sanctions with respect to any request for discovery, with respect to any discovery having a deadline for response, as that deadline is established by applicable Rules of Procedure or otherwise by Court order, which is after the discovery deadline heretofore stated. The parties may informally agree to any extension of the discovery deadline without order of the Court, but if problems then ensue with respect to the informal extension, the Court will not enforce or impose sanctions with respect to any such discovery so extended. If discovery cannot be completed within the deadline hereby established, a party may by motion request an extension of the discovery deadline.

2. A status conference to determine the course of further proceedings in this case will be held on **January 18, 2007, at 9:30 o'clock A.M.**

Dated at Hammond, Indiana on July 28, 2006.

/s/ J. Philip Klingeberger
J. Philip Klingeberger
United States Bankruptcy Court

Distribution:
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