United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Dennis Coates

Bankruptcy No. 96 B 32947

Adversary Caption: Henry L. Rogers v. Dennis Coates

Adversary No. 01 A 00765

Date of Issuance: December 17, 2001

Judge: John H. Squires

Appearance of Counsel:

Attorney for Plaintiff: Jody Ann Lowenthal, Esq., 208 Racquet Club Court, Hinsdale, IL 60521

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE: DENNIS COATES, Debtor.	)	Chapter 7 Bankruptcy No. 96 B 32947 Judge John H. Squires
HENRY L. ROGERS, Plaintiff, v.	)	Adversary No. 01 A 00765
DENNIS COATES, Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on the motion of Henry L. Rogers (the "Plaintiff") for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) and Federal Rule of Bankruptcy Procedure 7012. For the reasons set forth herein, the Court denies the motion. Concurrently entered herewith is a Preliminary Pretrial Order which sets this adversary proceeding for a pretrial conference on February 15, 2002.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. It is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

On February 10, 1995, the Plaintiff lent the sum of $6,000.00 to the Debtor. See Exhibit A to the Complaint and Debtor's Answer to the Complaint at ¶ 1(a). Thereafter, on December 9, 1996, the Debtor filed a Chapter 7 bankruptcy petition. He received a discharge on April 12, 1997. The Debtor made the following post-discharge payments to the Plaintiff on the debt: $500.00 on August 7, 1997; $2,000.00 on November 9, 1998; and $1,000.00 on October 23, 1999. See Exhibit A to the Complaint and Debtor's Answer to the Complaint at ¶ 1(d).

The Plaintiff was not listed on the Debtor's Schedules as a creditor. The Plaintiff contends that he did not receive notice of the bankruptcy filing until April 11, 2001, when the Debtor's attorney sent his attorney a letter informing him of the bankruptcy filing. That letter requested that the Plaintiff dismiss a lawsuit that he had filed in the Circuit Court of Lake County, Illinois. See Exhibit C to Debtor's Answer to Complaint and Exhibit A to Complaint. Pursuant to the April letter, the Debtor's attorney informed the Plaintiff's attorney that the Plaintiff was inadvertently omitted from the Schedules as a creditor, but that the debt was discharged. Id. The letter further stated that the state court lawsuit was believed to be a violation of the automatic stay, and requested that the lawsuit be immediately dismissed. Id. On March 19, 2001, the Plaintiff obtained a judgment against the Debtor in the sum of $14,920.00.

On July 25, 2001, the Plaintiff filed the instant adversary proceeding seeking to revoke the Debtor's discharge under 11 U.S.C. § 727(d). The Plaintiff contends that the Debtor intentionally concealed the existence of the bankruptcy case from him. Moreover,

the Plaintiff states that the Debtor knowingly and fraudulently failed to list the debt owed to him. The Plaintiff further contends that the Debtor made a false oath in the bankruptcy case when he failed to reveal that he quit claimed fifty percent of his interest in certain property located in West Chicago, Illinois to his son, David Ablin, on May 5, 1996. See Exhibit B to Complaint. Additionally, the Plaintiff maintains that the Debtor made a false oath when he listed Dominick Furio as a secured creditor in the amount of $50,000.00 because there was no evidence of any mortgage or trust deed recorded in favor of him on the West Chicago property. Furthermore, the Plaintiff contends that the Debtor knowingly and fraudulently made a false oath when he listed his employer as American Independent. Finally, the Plaintiff argues that the Debtor knowingly made a false oath when he failed to list the following assets: (1) $70,000.00 in equity in the West Chicago property; (2) tools used in his heating and air conditioning business; (3) accounts receivable and mechanic's liens of his heating and air conditioning business; (4) shares of stock in American Independent; and (5) homestead rights in property located in Hoffman Estates, Illinois. Based upon these acts, the Plaintiff requests that the Court revoke the Debtor's discharge.

On September 28, 2001, the Debtor filed an answer to the complaint. He admits that the Plaintiff was a creditor, but states that the debt was discharged on April 12, 1997. Moreover, the Debtor denies that he knowingly and fraudulent made any of the above-described false oaths. In addition, the Debtor asserts, by way of an affirmative defense, that the Plaintiff's complaint to revoke his discharge is barred by the one-year statute of limitations contained in 11 U.S.C. § 727(e). Furthermore, by way of a counterclaim

against the Plaintiff, the Debtor contends that even though the Plaintiff was notified that the debt owed to him had been discharged, the Plaintiff obtained a judgment against him in willful violation of the permanent injunction under 11 U.S.C. § 524. The Debtor seeks an award of compensatory damages, punitive damages and attorney's fees for the Plaintiff's alleged violation of the discharge.

On October 18, 2001, the Plaintiff filed an answer to the affirmative defense, an answer to the counterclaim and an amendment to paragraph four of the complaint. With respect to the affirmative defense, the Plaintiff alleges that the doctrine of equitable tolling applies and tolled the applicable statute of limitations because the Debtor took affirmative acts to conceal the fraud. Specifically, he made payments to the Plaintiff under the debt in 1997, 1998 and 1999. The Plaintiff asks the Court to dismiss the counterclaim against him because he obtained the state court judgment against the Debtor on March 19, 2001 and did not learn of the bankruptcy case until after that date on April 11, 2001. Finally, the Plaintiff amended paragraph four of the complaint. The Plaintiff maintains that when the Debtor stated in his bankruptcy petition and Schedules that the debt to Dominick Furio was incurred in 1991, and failed to disclose that a trust deed was not executed until 1995, he violated his duty under 11 U.S.C. § 521(3) to cooperate with the Chapter 7 case trustee.

On October 30, 2001, the Plaintiff filed the instant motion for judgment on the pleadings. He contends that there are no genuine issues of material fact as to the affirmative defense and the counterclaim of the Debtor, and that he is entitled to judgment as a matter of law. Specifically with respect to the affirmative defense, the

Plaintiff maintains that the post-discharge payments he received from the Debtor were affirmative acts which tolled the statute of limitations pursuant to Steege v. Lyons (In re Lyons), 130 B.R. 272 (Bankr. N.D. Ill. 1991). Moreover, the Plaintiff argues that he is entitled to judgment in his favor on the counterclaim because neither he nor his attorney had any knowledge of the bankruptcy case on the date that the judgment was entered.

The Debtor, in his response in opposition to the motion at bar, contends that even if the doctrine of equitable tolling applies to this matter, the Plaintiff fails to properly allege or establish the requisite facts showing that the Debtors's conduct was in fact fraudulent, or that the Plaintiff exercised reasonable care and diligence to learn the facts which would have disclosed the Debtor's fraud. Moreover, the Debtor contends the Plaintiff has failed to show how the payments made to him by the Debtor defeated his ability to learn of the claimed cause of action. Rather, he asserts that the voluntary payments by the Debtor are not affirmative acts tolling the time bar of § 727(e)(1). The Debtor further asserts that a factual issue exits which precludes judgment on the counterclaim because of the Plaintiff's failure to vacate the state court judgment, pending the outcome of this adversary proceeding. The Debtor has supported his response with a Local Bankruptcy Rule 402.N statement and his affidavit which assert that the failure to schedule the Plaintiff's claim and give him notice was inadvertent and not fraudulent. The Debtor's affidavit further avers that he took no steps to conceal his bankruptcy petition.

III. APPLICABLE STANDARDS

Federal Rule of Civil Procedure 12(c), which is incorporated by reference in Federal Rule of Bankruptcy Procedure 7012, provides as follows:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed.R.Civ.P. 12(c). Rule 12(c) permits a party to move for judgment after the parties have filed the complaint and answer. Northern Indiana Gun & Outdoor Shows, Inc. v. City of South Bend, 163 F.3d 449, 452 (7th Cir. 1998). A motion for judgment on the pleadings is determined by the same standard applied to a motion to dismiss for failure to state a claim. United States v. Wood, 925 F.2d 1580, 1581 (7th Cir. 1991). When deciding a motion for judgment on the pleadings, the Court may consider only the contents of the pleadings. Alexander v. City of Chicago, 994 F.2d 333, 336 (7th Cir. 1993); Union Carbide Corp. v. Viskase Corp. (In re Envirodyne Indus., Inc.), 183 B.R. 812, 817 (Bankr. N.D. Ill. 1995). However, the Court may consider documents incorporated by reference in the pleadings. Wood, 925 F.2d at 1582. The Court may also take judicial notice of matters of public record. Id.

Federal Rule of Civil Procedure 7, which defines the term "pleadings," and is made applicable to bankruptcy matters pursuant to Federal Rule of Bankruptcy Procedure 7007(a), provides:

> There shall be a complaint and an answer; a reply to a

> counterclaim denominated as such; an answer to a cross-claim if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Fed.R.Civ.P. 7. The pleadings include the complaint, the answer, and any written instruments attached as exhibits. Northern Indiana Gun, 163 F.3d at 452.

Pursuant to Rule 12(c), a motion for judgment on the pleadings is properly granted if the undisputed facts appearing in the pleadings, supplemented by any facts of which the Court should take proper judicial notice, clearly entitle the moving party to judgment as a matter of law. National Fidelity Life Ins. Co. v. Karaganis, 811 F.2d 357, 358 (7th Cir. 1987); Flora v. Home Federal Sav. & Loan Ass'n, 685 F.2d 209, 211 (7th Cir. 1982); In re Amica, Inc., 130 B.R. 792, 795 (Bankr. N.D. Ill. 1991). A motion for judgment on the pleadings is only appropriate when there are no material allegations of fact in dispute and only questions of law remain. Flora, 685 F.2d at 211; National Fidelity, 811 F.2d at 358; Cagan v. Intervest Midwest Real Estate Corp., 774 F.Supp. 1089, 1091 n.2 (N.D. Ill. 1991). A moving party must clearly establish that no material issue of fact exists and that judgment on the pleadings is warranted by law. Flora, 685 F.2d at 211; National Fidelity Life, 811 F.2d at 358; A.D.E. Inc. v. Louis Joliet Bank & Trust Co., 742 F.2d 395, 396 (7th Cir. 1984) (judgment on the pleadings is appropriate only if it is a "certainty" that the defendant is liable).

For purposes of considering Rule 12(c) motions, all well-pleaded allegations contained in the nonmoving party's pleadings are to be taken as true. Gillman v.

Burlington N. R. Co., 878 F.2d 1020, 1022 (7th Cir. 1989); Republic Steel Corp. v. Pennsylvania Eng'g Corp., 785 F.2d 174, 177 n. 2 (7th Cir. 1986); National Union Fire Ins. Co. v. Continental Illinois Corp., 666 F.Supp. 1180, 1183 (N.D. Ill. 1987). In ruling on a motion for judgment on the pleadings, the Court must view the facts in pleadings and all inferences drawn therefrom in the light most favorable to the nonmovant. Flenner v. Sheahan, 107 F.3d 459, 461 (7th Cir. 1997); Republic Steel, 785 F.2d at 177 n.2; National Fidelity, 811 F.2d at 358. Courts are not bound, however, by the legal characterizations contained in the pleadings. Republic Steel, 785 F.2d at 177 n. 2, 182-83; National Fidelity, 811 F.2d at 358. When a written instrument incorporated in the pleadings contradicts allegations in the complaint, the exhibit "trumps the allegations." Northern Indiana Gun, 163 F.3d at 454 (citation omitted). The motion may be granted only if it appears that under no set of circumstances can the plaintiff be granted relief. Frey v. Bank One, 91 F.3d 45, 46 (7th Cir. 1996), cert. denied, 519 U.S. 1113.

Under the second sentence of Rule 12(c), the Court may, if it chooses, consider matters outside the pleadings as if the motion were one for summary judgment. This alternative use of the Rule, however, provides that the motion cannot be granted if a genuine issue of material fact is presented under the summary judgment standards employed under Rule 56 and its bankruptcy analogue, Bankruptcy Rule 7056.

IV. DISCUSSION

The Court denies the Plaintiff's motion for judgment on the pleadings because genuine issues of fact exist, namely whether the Debtor's admitted failure to schedule the

Plaintiff's claim was inadvertent; whether that claim was fraudulently omitted or concealed; and whether the doctrine of equitable tolling should apply and toll the statute of limitations under § 727(e). Whether the Debtor has perpetrated any fraud or concealment, and whether the doctrine of equitable tolling should apply are disputed factual issues which cannot be resolved at this stage of the proceedings based on the papers filed. Fraud is rarely presumed and usually must be proven with the requisite scienter, which can be a difficult burden of proof to factually establish. This is especially true in the context of voluntary post-petition repayments by debtors of pre-petition debts. This is because 11 U.S.C.§ 524(f) expressly contemplates that nothing in 11 U.S.C. § 524(c) or (d) prevents a debtor from voluntarily repaying any Chapter 7 debt. Debtors may dispose of their post-petition earning as they choose, including voluntary repayment of dischargeable debts. See , e.g., In re Hellums, 772 F.2d 379, 380 (7th Cir. 1985).

The statements made by affiants in their sworn affidavits cannot be cross-examined via other affidavits by opposing parties or counsel. The Court cannot make credibility determinations by merely reviewing the affidavits and other papers in the absence of live testimony from the affiants. It simply begs the question of whether the equitable tolling doctrine should be applied to toll the statute of limitations by conclusively arguing it applies, without first establishing through competent proof that equity compels its application. That is what trials are for – presentation of admissible testimonial and documentary evidence on disputed issues of material facts, which are present here. Accordingly, the Plaintiff is not entitled to judgment as a matter of law and the motion is denied.

V. CONCLUSION

For the foregoing reasons, the Court denies the Plaintiff's motion for judgment on the pleadings. Concurrently entered herewith is a Preliminary Pretrial Order which sets this adversary proceeding for a pretrial conference on February 15, 2002.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	
DENNIS COATES,	)	
	)	Chapter 7
Debtor.	)	Bankruptcy No. 96 B 32947
	)	Judge John H. Squires
	)	
HENRY L. ROGERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 01 A 00765
	)	
DENNIS COATES,	)	
	)	
Defendant.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 17th day of December, 2001, the Court hereby denies the motion of Henry L. Rogers for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) and Federal Rule of Bankruptcy Procedure 7012. Concurrently entered herewith is a Preliminary Pretrial Order which sets this adversary proceeding for a pretrial conference on February 15, 2002.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List