United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re John P. Messina

Bankruptcy No. 99 B 29371

Adversary Caption: Lawrence Fisher, Trustee v. Arthur L. Berney, Alice M. Berney, John P. Messina and Beth A. Messina

Adversary No. 02 A 01041

Date of Issuance: September 29, 2003

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 7
JOHN P. MESSINA,	)	Bankruptcy No. 99 B 29371
	)	Judge John H. Squires
Debtor.	)	
	)	
	)	
LAWRENCE FISHER, as Chapter 7 Trustee for the Estate of John P Messina, and not individually,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 01041
	)	
ARTHUR L. BERNEY, ALICE M. BERNEY, JOHN P. MESSINA and BETH A. MESSINA,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

These matters come before the Court on the motion of Lawrence Fisher, the Chapter 7 trustee of the Debtor's estate (the "Trustee") for partial summary judgment pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 on Count III of the amended complaint filed by Trustee; on the Trustee's motion to dismiss the counterclaims of John P. Messina (the "Debtor") and to strike the Debtor's first counterclaim under Federal Rule of Civil Procedure 12(b)(1), (b)(6) and 12(f) and Federal Rule of Bankruptcy Procedure 7012; on the motion of the Debtor to dismiss Counts I, II and III of the amended complaint under Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Bankruptcy Procedure 7012;

and on the motion of Beth Messina ("Ms. Messina") for leave to deposit money into the Court toward the purchase of certain property under Federal Rule of Bankruptcy Procedure 7067 and Federal Rule of Civil Procedure 67.

For the reasons set forth herein, the Court grants the Debtor's motion to dismiss Counts I, II and III of the amended complaint. The Court denies the Trustee's partial motion for summary judgment under Count III of the amended complaint. Further, the Court grants the Trustee's motion to dismiss the Debtor's counterclaims and strikes the Debtor's first counterclaim. Finally, the Court denies the motion of Ms. Messina for leave to deposit money into the Court. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting the remaining counts of the amended complaint and counterclaims in this adversary proceeding for a pretrial conference on December 11, 2003 at 9:00 a.m.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain these matters 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. They are core proceedings under 28 U.S.C. § 157(b)(2)(A), (J) and (O).

II. FACTS AND BACKGROUND

Some of the facts and background are contained in an earlier Opinion of the Court and need not be repeated. John Labatt Ltd. v. Messina (In re Messina), Bankr. No. 99 B 29371, Adv. No. 99 A 01573, 2000 WL 311145 (Bankr. N.D. Ill. March 27, 2000). Therein, the

Court found a debt owed by the Debtor to certain creditors, not involved in this matter, non-dischargeable under 11 U.S.C. § 523(a)(6). The Debtor is a practicing Illinois attorney doing business as the Law Office of John P. Messina. On September 22, 1999, he filed a Chapter 11 bankruptcy petition. The attempted reorganization was unsuccessful. Subsequently, on February 6, 2001, the case was converted to Chapter 7. Thereafter, the Trustee was appointed. On February 6, 2001, the Debtor was ordered to turn over to the Trustee all records and property of estate by February 21, 2001. On February 14, 2001, after the case was converted to Chapter 7, the Bankruptcy Clerk's Office sent out a notice setting the first meeting of creditors under 11 U.S.C. § 341(a) for March 14, 2001. For reasons unknown to the Court, the notice did not specifically identify the deadline date for filing complaints objecting to the Debtor's discharge under 11 U.S.C. § 727(a) or objecting to the dischargeability of certain debts under 11 U.S.C. § 523(a). The parties do not dispute that by operation of Federal Rule of Bankruptcy Procedure 4004(a), the sixty-day deadline date for filing complaints objecting to the Debtor's discharge was May 14, 2001.[1] The certificate of service that accompanied the notice indicated that on February 14, 2001, the Trustee was served by first class mail with a copy of the notice. The Trustee does not dispute that he received the February 14, 2001 notice. To date, the Debtor has not received a discharge, which is normally administratively issued and sent out by the Clerk's Office.[2]

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[1] The sixtieth day was actually May 13, 2001, a Sunday. Pursuant to Federal Rule of Bankruptcy Procedure 9006(a), the sixty-day period expired the next day, May 14, 2001.

[2] The Clerk's Manual for the United States Bankruptcy Courts provides in pertinent part:

On July 29, 2002, the Trustee filed the original complaint in this adversary proceeding against Arthur L. Berney and Alice M. Berney (the "Berneys") seeking to marshal assets of the estate. On February 5, 2003, the Trustee filed an amended multi-count complaint against the Berneys, the Debtor, and the Debtor's spouse, Ms. Messina. The amended complaint sets forth the following causes of action: (1) Count I seeks denial of the Debtor's discharge under 11 U.S.C. § 727(a)(4)(A) or in the alternative, revocation of the Debtor's discharge under 11 U.S.C. § 727(d)(1) and (3) for an alleged false statement under oath regarding joint ownership with Ms. Messina in certain Microsoft stock listed in the Debtor's original Schedules; (2) Count II seeks denial of the Debtor's discharge under § 727(a)(4)(A) or in the alternative, revocation

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> The issuance of the discharge order is a fairly routine matter in most chapter 7 bankruptcy cases. The procedure begins with the notice given to all creditors and the trustee that a complaint objecting to discharge must be filed not later than 60 days following the first date set for the § 341 meeting of creditors. *Fed. R. Bankr. P. 4004(a)*. . . .
>
> At the expiration of the 60-day period following the date set for the § 341 meeting . . . the court must grant the debtor a discharge "forthwith". . . .

See 2 Clerks Manual United States Bankruptcy Courts § 10.01.c (2d ed. 1991).

The Court can only surmise that the Clerk's Office mistakenly treated the dischargeability complaint filed under § 523(a)(6) as an objection to discharge under § 727. To rectify the unexplained failure of the Clerk's Office to administratively issue a discharge order, which should have been issued and entered in mid-May 2001, the Court orders the Clerk's Office to forthwith issue the Debtor a discharge. After the Debtor's discharge is issued and entered, the Trustee may file a complaint seeking to revoke that discharge if he has evidence of the grounds therefor provided by § 727(d), subject to the time limits set forth in § 727(e).

of the Debtor's discharge under § 727(d)(1) and (3) for an alleged false statement under oath concerning the Microsoft stock listed in the Debtor's amended Schedules; (3) Count III seeks denial of the Debtor's discharge under § 727(a)(6) or in the alternative, revocation of the Debtor's discharge under § 727(d)(1) and (3) for the Debtor's alleged failure to comply with the Court's February 6, 2001 turnover order; (4) Count IV seeks a declaratory judgment finding that Ms. Messina does not have an interest in the Microsoft stock and that the Trustee is the sole owner of all the stock; (5) Count V seeks a determination under 11 U.S.C. § 549(a)(2)(B) that the liquidation of some of the Microsoft stock by the Berneys was unauthorized and an order requiring the Berneys to pay to the Trustee the value of the stock they caused to be sold; and (6) Count VI seeks to marshal assets held by the Berneys.

The Debtor filed an answer thereto and two counterclaims. Count I of the counterclaim seeks a declaratory judgment that Ms. Messina jointly owns 1600 shares of Microsoft common stock. Count II of the counterclaim seeks damages and a declaratory judgment against the Trustee for his alleged negligent failure to collect and reduce to money the Debtor's joint interest in the 1600 shares of Microsoft stock. On August 28, 2003, Ms. Messina filed amended counterclaims. Specifically, under Count I of the counterclaim, she seeks a declaratory judgment that she owns the Microsoft stock. This counterclaim mirrors Count I of the Debtor's counterclaims. Count II of Ms. Messina's counterclaim seeks a declaratory judgment similar to Count VI of the Debtor's amended complaint regarding the Trustee's request to marshal assets.

III. DISCUSSION

A. The Debtor's Motion to Dismiss Counts I, II and III of the Amended Complaint

The Court will initially address the Debtor's motion to dismiss Counts I, II and III of the amended complaint. The Debtor principally contends that these counts, which object to the Debtor's discharge, should be dismissed pursuant to Federal Rule of Bankruptcy Procedure 4004(a) because they were filed more than sixty days after the first date set for the meeting of creditors under § 341(a). The Trustee argues that the notice sent out by the Clerk's Office did not set forth the deadline date for filing complaints objecting to the Debtor's discharge. Thus, according to the Trustee, as a matter of due process, the time limits of Bankruptcy Rule 4004(a) do not apply. The Debtor retorts that the Trustee is an experienced bankruptcy attorney who should have known of the deadline imposed under Bankruptcy Rule 4004(a).

In order for the Debtor to prevail on his motion to dismiss Counts I, II and III of the amended complaint under Federal Rule of Civil Procedure 12(b)(6) and its bankruptcy analogue Rule 7012, it must clearly appear from the pleadings that the Trustee can prove no set of facts in support of his claims which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Colfax Corp. v. Illinois State Toll Highway Auth., 79 F.3d 631, 632 (7th Cir. 1996) (citation omitted); Meriwether v. Faulkner, 821 F.2d 408, 411 (7th Cir.), cert. denied, 484 U.S. 935 (1987). The Seventh Circuit has emphasized that "[d]espite their liberality on pleading matters . . . the federal rules still require that a complaint allege facts that, if proven, would provide an adequate basis for each claim." Gray v. Dane County, 854 F.2d 179, 182 (7th Cir. 1988) (citations omitted). It is well established that alleging mere legal

conclusions, without a factual predicate, is inadequate to state a claim for relief. Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983).

Moreover, the Court must take as true all well pleaded material facts in the amended complaint, and must view these facts and all reasonable inferences which may be drawn from them in a light most favorable to the Trustee. See Northern Trust Co. v. Peters, 69 F.3d 123, 129 (7th Cir. 1995); Infinity Broadcasting Corp. of Illinois v. Prudential Ins. Co. of America, 869 F.2d 1073, 1075 (7th Cir. 1989); Corcoran v. Chicago Park Dist., 875 F.2d 609, 611 (7th Cir. 1989); Marmon Group, Inc. v. Rexnord, Inc., 822 F.2d 31, 34 (7th Cir. 1987). The issue is not whether the Trustee will ultimately prevail, but whether he has pleaded causes of action sufficient to entitle him to offer evidence in support of his claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Demitropoulos v. Bank One Milwaukee, N.A., 915 F. Supp. 1399, 1406 (N.D. Ill. 1996) (citing Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)).

Generally, federal notice pleading standards require only that the plaintiff give the defendant fair notice of the claims and the grounds for those claims. Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993), Conley, 355 U.S. at 47. Rule 8(a) of the Federal Rules of Civil Procedure requires only that a complaint identify the basis for jurisdiction and contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). See also Bartholet v. Reishauer A.G., 952 F.2d 1073, 1078 (7th Cir. 1992). A complaint must, however, allege facts

sufficiently setting forth the essential elements of the cause of action. Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir.), cert. denied, 506 U.S. 893 (1992). Mere conclusory allegations unsupported by factual assertions will not withstand a motion to dismiss. Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983), cert. denied sub nom. Talley v. Crosson, 460 U.S. 1037 (1983).

Federal Rule of Bankruptcy Procedure 4004(a) governs the time period for filing a complaint objecting to discharge and provides that "[i]n a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Fed. R. Bankr. P. 4004(a). Further, Bankruptcy Rule 4004(a) prescribes that the Court shall give a minimum of twenty-five days notice of the deadline for complaints objecting to discharge to the United States Trustee, all creditors, the trustee and the trustee's attorney. The Court may for cause extend the time to file a complaint objecting to discharge, but the motion must be filed before the time has expired. See Fed. R. Bankr. P. 4004(b). Thus, Bankruptcy Rule 4004(a) sets fixed deadlines for filing a complaint objecting to the debtor's discharge under § 727(a). The Seventh Circuit Court of Appeals has held that Bankruptcy Rule 4004 is not jurisdictional, and therefore, is subject to equitable defenses. In re Kontrick, 295 F.3d 724, 733 (7th Cir. 2002), cert. granted, 123 S.Ct. 1899 (U.S. April 28, 2003) (No. 02-819). The Rule is a statute of limitations that the Debtor invokes as the principal basis of his motion to dismiss Counts I, II and III of the amended complaint. Because the Rule sets forth a statute of limitations, it must be strictly construed. See Canganelli v. Lake County Ind. Dept. of Pub. Welfare (In re

Canganelli), 132 B.R. 369, 383 (Bankr. N.D. Ind. 1991); Quaid v. Friedman (In re Friedman), 15 B.R. 493, 494 (Bankr. N.D. Ill. 1981).

It is undisputed that on February 14, 2001, the Clerk's Office sent out a notice setting the first meeting of creditors under § 341(a) for March 14, 2001. The certificate of service indicates that the notice was sent out on that same date to various creditors and interested parties, including the Trustee. It is further undisputed that the notice sent by the Clerk's Office did not specify the deadline date for filing complaints objecting to discharge. The Trustee filed his original complaint, which did not include any objections to the Debtor's discharge, on July 29, 2002, more than one year after the deadline date of May 14, 2001. Further, the Trustee did not request an extension of that date within the deadline period pursuant to Bankruptcy Rule 4004(b). The Trustee's amended complaint, which included the previously outlined objections to the Debtor's discharge, was filed on February 5, 2003, twenty-one months after the expiration of the sixty-day deadline.

The Trustee's reliance on the lack of a deadline date set forth in the Clerk's Office notice of the first meeting of creditors as a basis for not applying Bankruptcy Rule 4004 is seriously misplaced and unavailing. One leading treatise has noted that "the notice of the deadline for complaints objecting to discharge is normally made a part of the notice of the meeting of creditors." 9 L. King, Collier on Bankruptcy ¶ 4004.02[4] at 4004-10 (15th rev. ed. 2003) (footnote omitted). The text of Bankruptcy Rule 4004(a), however, does not require the notice sent by the Clerk's Office to specifically identify the deadline date for the filing of the complaint objecting to the discharge. Rather, the Rule simply states that the deadline for filing

such complaints is "60 days after the first date set for the meeting of creditors under § 341(a)." See Fed. R. Bankr. P. 4004(a).

Arguably, the notice sent by the Clerk's Office was defective in that it did not specify the deadline date for filing objections to discharge. However, the Trustee, who is an experienced attorney and former bankruptcy judge, certainly cannot convincingly plead ignorance of the Bankruptcy Rules. The Trustee received the Clerk's Office notice setting the first meeting of creditors. As an experienced bankruptcy practitioner, a member of the panel trustees for many years and a former member of this Court, the Trustee was certainly able to calculate the sixty-day deadline for filing a complaint objecting to the Debtor's discharge, regardless of the fact that the notice he received did not calculate that date for him. The fact that the notice did not identify the deadline date does not relieve the Trustee, or any other creditor for that matter, from the duty to file a complaint within the time period prescribed by Bankruptcy Rule 4004(a). The Court finds that the deficient notice sent by the Clerk's Office does not excuse the mandatory deadline date provided by Bankruptcy Rule 4004(a).

In an analogous situation involving the filing of dischargeability complaints under 11 U.S.C. § 523(a), which must also be filed within sixty days after the date of the meeting of creditors under Bankruptcy Rule 4007, the Fifth Circuit held that a creditor was on notice of the time limit even though the clerk's office left the space for the deadline to file dischargeability objections blank, and the clerk's office gave subsequent assurances that no deadline had yet been set. See Neeley v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987). This reasoning was adopted by the Eleventh Circuit. See In re Alton, 837 F.2d 457, 460 (11th Cir. 1988); In re

Williamson, 15 F.3d 1037, 1039 (11th Cir. 1994).

The Trustee's argument that due process has not be satisfied in this matter also fails. The Trustee had actual knowledge of the bankruptcy case, and thus is deemed to have been on notice of deadlines which are of record in the case. See Alton, 837 F.2d at 460-61; Neeley, 815 F.2d at 347; DeLesk v. Rhodes (In re Rhodes), 61 B.R. 626, 630 (B.A.P. 9th Cir. 1986) (all cases decided under similar wording in Bankruptcy Rule 4007(c)). The Court finds that under the circumstances, due process was satisfied because the Trustee received actual notice of the § 341 meeting, which was reasonably calculated under the circumstances, to apprise him of the pendency of the bankruptcy case. He had ample opportunity to calculate the deadline date and file a timely complaint objecting to the Debtor's discharge. Further, while the Kontrick case permits a party to assert equitable defenses in opposition to a motion to dismiss a complaint for untimely filing, the Court finds that no sufficient grounds, equitable or otherwise, exist for excusing the Trustee's late filing.

Next, the Trustee argues that Count III, which is based upon the Debtor's failure to obey a court order in violation of § 727(a)(6), should be allowed to proceed because there should be no time bar for filing complaints objecting to a debtor's discharge for the failure to obey a lawful court order. While the Trustee's policy argument is facially attractive, the Court rejects it as in derogation of the explicit language of Bankruptcy Rule 4004(a), which must be strictly construed. Bankruptcy Rule 4004(a) does not make an exception for debtors who fail to comply with court orders in violation of § 727(a)(6). Rather, the Rule provides for a blanket sixty-day deadline for any type of behavior that would be subject to the denial of a discharge,

including the failure to obey court orders as proscribed by § 727(a)(6). Accordingly, the Court rejects the Trustee's argument that Bankruptcy Rule 4004(a) does not apply to § 727(a)(6) objections to discharge as unsupported by any controlling authority and in complete disregard of the plain, unambiguous language of the Rule. Consequently, the Court grants the Debtor's motion to dismiss Counts I, II and III of the amended complaint as time barred under Bankruptcy Rule 4004(a).

Next, the Court grants the Debtor's motion to dismiss Count I, II and III of the amended complaint on the basis of the alternative relief requested by the Trustee under § 727(d) to revoke the Debtor's discharge. The Debtor has not yet received a discharge. Thus, to seek the revocation of a discharge that has not yet been issued is premature. That issue is not ripe for determination. Consequently, the Court dismisses the alternative grounds for relief pleaded under § 727(d) in Counts I, II and III on the basis that they fail to state claims for which relief can be granted.

B. The Trustee's Motion to Dismiss the Debtor's Counterclaims and Strike the Debtor's First Counterclaim

Next, the Trustee seeks to dismiss both of the Debtor's counterclaims and strike his first counterclaim pursuant to Bankruptcy Rule 7012. Count I of the counterclaims seeks a declaratory judgment that Ms. Messina jointly owns some 1600 share of Microsoft stock. Count II of the counterclaims seeks damages and declaratory relief for the Trustee's alleged negligent failure to collect and reduce to money the Debtor's joint interest in the Microsoft stock. Specifically, the Trustee contends that Counts I and II of the counterclaims should be

dismissed because the Debtor lacks standing to bring either claim. The Trustee argues that the Debtor has no personal stake in the outcome of these claims because Ms. Messina will benefit from the award of the declaratory judgment sought by the Debtor in Count I, and the Debtor has no pecuniary interest in the Microsoft stock that is the subject of Count II of the counterclaims for negligence. Further, the Trustee seeks to strike Count I of the counterclaims pursuant to Bankruptcy Rule 7012 and Federal Rule of Civil Procedure 12(f) because this claim depends on issues identical to the Trustee's claim for declaratory judgment against the Debtor and Ms. Messina and is redundant. Additionally, the Trustee seeks to dismiss Count II of the counterclaims for failure to state a claim because the Debtor has failed to adequately plead a declaratory judgment against the Trustee. Finally, the Trustee seeks to dismiss Count II of the counterclaims because the Debtor cannot obtain a personal judgment against the Trustee without first seeking leave of Court and then alleging a willful violation of the Trustee's duties under 11 U.S.C. § 704.

1. Count I of the Debtor's Counterclaims

First, the Court will address the Trustee's request to dismiss Count I of the Debtor's counterclaims. In Count I, the Debtor seeks a declaratory judgment that Ms. Messina jointly owns the Microsoft stock. This counterclaim mirrors Count I of Ms. Messina's amended counterclaims filed on August 28, 2003. The Trustee contends that the Debtor lacks standing to bring this counterclaim.

The requirement of standing is both a "constitutional limitation on federal-court jurisdiction and prudential limitations on its exercise." Warth v. Sedin, 422 U.S. 490, 498

(1975) (citation omitted). Standing requires a party to have a personal stake in the outcome of the controversy. Baker v. Carr, 369 U.S. 186, 204 (1962). To ensure a personal stake, a plaintiff seeking to invoke federal court jurisdiction must demonstrate: (1) an injury that is concrete, particularized, and actual or imminent rather than conjectural or hypothetical; (2) causal connection between the injury and the challenged conduct, such that the injury may be fairly traceable to the conduct; and (3) a likelihood that the injury will be redressed by a favorable decision. Perry v. Sheahan, 222 F.3d 309, 313 (7th Cir. 2000) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). An individual must assert his own legal rights and interests. Warth, 422 U.S. at 499. A party "cannot rest his claim to relief on the legal rights or interests of third parties." Id. (citations omitted). That a party may benefit collaterally is not sufficient to warrant invocation of the Court's jurisdiction.

The Court finds that the Debtor fails the above articulated test to demonstrate a personal stake in the outcome of this proceeding. The heart of this portion of the dispute centers around whether Ms. Messina jointly owns the shares of Microsoft common stock. The Debtor seeks a declaration from the Court that Ms. Messina is a joint owner of the stock. Thus, the real dispute here is between the Trustee on the one hand and Ms. Messina on the other. The Debtor cannot rest his claim on the legal rights or interests of Ms. Messina, who has brought her own counterclaim which seeks a declaration from the Court that she is a joint owner of the Microsoft stock. The Debtor attempts in Count I of his counterclaims to preserve half of the Microsoft stock, which the Trustee alleges in Count IV of the amended complaint constitutes property of the bankruptcy estate, for the benefit of Ms. Messina, not the Debtor or

the bankruptcy estate. The Debtor would be unaffected by the outcome of Count I of the counterclaims. Hence, the Court agrees with the Trustee that the Debtor lacks standing to pursue Count I of the counterclaims. Therefore, the Court grants the Trustee's motion to dismiss Count I of the Debtor's counterclaims.

In addition, the Trustee seeks to strike Count I of the counterclaims as redundant pursuant to Rule 12(f). Federal Rule of Bankruptcy Procedure 7012(b) provides that Federal Rule of Civil Procedure 12(b)-(h) applies in adversary proceedings. Rule 12(f) provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the leading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Fed. R. Civ. P. 12(f).

A motion to strike should be made by a party before responding to the pleading containing the challenged matter, or within twenty days after the pleading has been served if the pleading is one to which no responsive pleading is permitted. A court has authority to consider a motion to strike even though it was not made within the time limits established by Rule 12(f). Go-Tane Service Stations, Inc. v. Ashland Oil, Inc., 508 F.Supp. 200, 201-02 n.2 (N.D. Ill. 1981); Lunsford v. United States, 570 F.2d 221, 227 n.11 (8th Cir. 1977). The grounds contained in Rule 12(f) are not mutually exclusive and somewhat overlap. The criteria for Rule 12(f) motions are strikingly similar to those under Rule 12(b)(6). A motion under Rule 12(f) to strike portions of a responsive pleading serves the limited purpose of excluding irrelevant

material from pending litigation. Issues that are raised in a responsive pleading which are not, in fact, responsive to the plaintiff's cause of action need not be allowed to complicate and impede the progress of pretrial discovery.

Motions to strike are not favored, and are not ordinarily granted unless the language in the pleading at issue both has no possible relation to the controversy and is clearly prejudicial. Lirtzman v. Spiegel, Inc., 493 F.Supp. 1029, 1031 (N.D. Ill. 1980). Before a motion to strike can be granted, the Court must instead "be convinced that there are no questions of fact, that any questions of law are clear and not in dispute, and that under no set of circumstances could the defense succeed." Id. (quotation omitted). A motion to strike will ordinarily be denied where the allegations under attack are of such a character that their sufficiency should not be determined summarily, but should be decided only after a hearing or decision on the merits. Gibbs v. Buck, 307 U.S. 66 (1939).

The Trustee argues, and the Court agrees, that Count I of the Debtor's counterclaim for declaratory judgment is merely the opposite of the Trustee's action for declaratory judgment in Count IV of the amended complaint. Count IV of the amended complaint seeks a declaratory judgment against Ms. Messina declaring that she has no interest in the Microsoft stock, and further declaring that the Trustee is the sole owner of the stock. The Debtor's counterclaim seeks a declaratory judgment that Ms. Messina jointly owns the Microsoft stock.

A declaratory judgment may be refused where it does not serve a useful purpose or is being sought merely to determine issues involved in a case already pending. Yellow Cab Co. v. City of Chicago, 186 F.2d 946, 950-51 (7th Cir. 1951). In Green Bay Packaging, Inc. v.

Hoganson & Assocs., Inc., 362 F. Supp. 78 (N.D. Ill. 1973), the plaintiff sued for a declaratory judgment that it was not liable for commissions based upon sales the defendant made of the plaintiff's products. The defendant counterclaimed, asserting the opposite; that the plaintiff was liable for the commissions. The court granted the plaintiff's motion to strike portions of the defendant's counterclaim positing that it "merely restate[d] an issue already before this Court." Id. at 82. The court also noted that "[i]t is well settled that such repetitious and unnecessary pleadings should be stricken." Id. (citations omitted). Further, in Rayman v. Peoples Sav. Corp., 735 F. Supp. 842 (N.D. Ill. 1990), the court disregarded a counterclaim for declaratory judgment, noting that "[i]t adds nothing to the pleadings [the defendants] have already put before this Court. This Court will therefore simply disregard that duplicative count. . . ." Id. at 853.

The Court finds that the Debtor's counterclaim for declaratory judgment is merely the opposite or mirror image of the Trustee's claim for declaratory judgment in Count IV of the amended complaint and adds nothing to the pleadings. The issues are identical and the Debtor's counterclaim is redundant. "When the original complaint puts in play all of the factual and legal theories, it makes no difference whether another party calls its pleading counterclaims, affirmative defenses, or anything else." Tenneco Inc. v. Saxony Bar & Tube, Inc., 776 F.2d 1375, 1379 (7th Cir. 1985). Accordingly, in addition to dismissing Count I of the counterclaims pursuant to Rule 12(b)(6), the Court also strikes Count I of the Debtor's counterclaims pursuant to Rule 12(f) as repetitious and unnecessary.

2. Count II of the Debtor's Counterclaims

Next, the Trustee seeks to dismiss Count II of the Debtor's counterclaims on the following bases: (1) the Debtor lacks standing to assert his claim for negligence against the Trustee; (2) the Debtor has not alleged the required elements of a declaratory judgment action; and (3) the Debtor has not obtained the requisite leave of the Court to seek personal recovery against the Trustee.

In Count II of the counterclaims, the Debtor alleges that the Trustee's failure to collect and reduce to money the Debtor's joint interest in 1600 share of Microsoft common stock has resulted in a pecuniary damage to the Debtor, the bankruptcy estate and the Debtor's creditors in the sum of $10,016.00, which represents the difference between the value of the Debtor's 800 shares of the stock on the date of the Trustee's appointment and the value of that stock on the date the Berneys liquidated those shares.

The Court finds that the allegations in Count II of the counterclaims demonstrate that the Debtor claims a personal stake in the outcome of the matter. The Debtor has asserted his own legal right and interest in the shares of the Microsoft stock and seeks an award for himself and the bankruptcy estate in the sum of $10,016.00 plus attorneys' fees and costs. Thus, the Court rejects the Trustee's contention that the Debtor lacks standing to assert a claim for negligence against the Trustee.

As an additional ground to dismiss Count II of the counterclaims, the Trustee argues that the Debtor has not alleged the requisite elements of a declaratory judgment action. Federal courts are empowered to give declaratory judgments by the Declaratory Judgment Act. See 28 U.S.C. § 2201. The Declaratory Judgment Act provides in pertinent part:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201. The Act does not enlarge the jurisdiction of federal courts nor does it expand substantive rights. Deveraux v. City of Chicago, 14 F.3d 328, 330 (7th Cir. 1994). A court's subject matter jurisdiction must be independent of the declaratory judgment action, and such actions are discretionary even where a court has jurisdiction. Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 494 (1942). In order to support a declaratory judgment action, there must be a substantial controversy that is real and immediate between parties with adverse legal interests. Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). There is no precise definition of "case or controversy." Id. However, a court cannot enter a declaratory judgment unless its ruling will provide specific relief that binds the parties or alters the legal relationship between them. Deveraux, 14 F.3d at 331 (citation omitted).

The Court finds that there is an actual case or controversy between the Debtor and the Trustee in light of the Debtor's allegations that the Trustee was negligent in failing to collect and reduce to money the Debtor's joint interest in the Microsoft stock. Hence, the Court, pursuant to 28 U.S.C. § 151, as a unit of the district court, which is a court of the United States, has the authority under § 2201 to issue a declaratory judgment. Accordingly, the Court declines to dismiss Count II of the counterclaims because the Debtor has alleged the required elements of a declaratory judgment action.

Finally, the Trustee seeks to dismiss Count II of the counterclaims because the Debtor

has not obtained the requisite leave of Court to seek a personal recovery against the Trustee. Pursuant to the Barton doctrine,[3] as applied by the Seventh Circuit, a party must obtain leave of the bankruptcy court before suit can be brought against a bankruptcy trustee or his counsel seeking personal recovery. See In re Linton, 136 F.3d 544, 545 (7th Cir. 1998). Before leave is given by the bankruptcy court, the claimant must demonstrate that he has a prima facie case against the trustee. In re Kids Creek Partners, L.P., 248 B.R. 554, 558 (Bankr. N.D. Ill.) (citations omitted), aff'd, No. 00 C 4076, 2000 WL 1761020 (N.D. Ill. Nov. 30, 2000); In re Berry Pub. Servs., Inc., 231 B.R. 676, 679 (Bankr. N.D. Ill. 1999) (citation omitted). The purpose of the Barton doctrine, as noted by the Seventh Circuit in Linton, is to protect the integrity of the bankruptcy process:

> If debtors, creditors, defendants in adversary proceedings, and other parties to a bankruptcy proceeding could sue the trustee in state court for damages arising out of the conduct of the proceeding, that court would have the practical power to turn bankruptcy losers into bankruptcy winners, and vice versa. A creditor who had gotten nothing in the bankruptcy proceeding might sue the trustee for negligence in failing to maximize the assets available to creditors, or to the particular creditor. A debtor who had failed to obtain a discharge might through a suit against the trustee obtain the funds necessary to pay the debt that had not been discharged.
>
> Of course principles of res judicata and the good faith of state courts would head off the worst consequences of the kind of divided jurisdiction over bankruptcy matters that we have just described. But a simpler and more secure protection is to require the person wanting to bring a suit in state court

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[3] The doctrine, which originated in Barton v. Barbour, 104 U.S. 126 (1881), required a party to obtain permission of the appointing court before bringing suit against a receiver.

> against a trustee in bankruptcy to obtain leave to do so from the bankruptcy court.

136 F.3d at 546.

As an officer of the court, a trustee's exposure to personal liability is limited. Kids Creek, 248 B.R. at 558. "A trustee 'cannot be held personally liable unless he acted outside the scope of his authority as trustee. . . .'" Id. (quoting State of Ill., Dept. of Revenue v. Schechter, 195 B.R. 380, 384 (N.D. Ill. 1996)). A trustee's personal liability for a breach of fiduciary duty extends only to "a willful and deliberate violation of his fiduciary duties." In re Chicago Pacific Corp., 773 F.2d 909, 915 (7th Cir. 1985) (citations omitted).

Count II of the Debtor's counterclaims "prays for a judgment . . . [a]warding Debtor and the estate damages in the amount of $10,016 plus attorneys [sic] fees and costs" and "[d]eclaring that Trustee and his attorneys shall not recover from the Chapter 7 estate any fees or costs for prosecuting the wrongful conversion claim against the Berneys." Clearly, based upon this language, the Debtor seeks a personal judgment against the Trustee. It is undisputed, however, that the Debtor failed to seek leave of the Court to file suit against the Trustee, in blatant violation of the Barton doctrine. Accordingly, because the Debtor did not seek or obtain leave of this Court to bring suit against the Trustee, the Court dismisses Count II of the Debtor's counterclaims.

C. Ms. Messina's Motion for Leave to Deposit Money into the Court

Ms. Messina seeks an order pursuant to Federal Rule of Bankruptcy Procedure 7067, which incorporates by reference Federal Rule of Civil Procedure 67, granting her leave to

deposit a sum of money with the Clerk of the Court toward the purchase of the personal property listed on the Debtor's Schedule B, which is the subject of Count III of the amended complaint. Specifically, Ms. Messina contends that as of January 2000, and after deducting exemptions, the net listed value of the remaining personal property on Schedule B is approximately $9,100.00. Included with the $9,100.00 figure is $2,500.00 for the Debtor's interest in a 1993 Eagle Vision automobile. On September 15, 2003, Ms. Messina alleges that she tendered to the Trustee a check in the amount of $2,500.00 in payment for the Debtor's interest in the automobile, which was traded in for another vehicle in 2001. Ms. Messina seeks to purchase from the bankruptcy estate the personal property listed on Schedule B for the sum of $9,100.00.

The Trustee objects to Ms. Messina's motion on several grounds: (1) Ms. Messina is not a party to Count III of the amended complaint and therefore cannot make a deposit of money pursuant to Bankruptcy Rule 7067; (2) Ms. Messina, who is not a creditor of the Debtor's estate, has no standing to force the Trustee to make a sale of the estate's assets; and (3) the Debtor has a preexisting duty to turn over his assets to the Trustee and if the Debtor, through his spouse, Ms. Messina, wants to pay for those assets, he should tender a check to the Trustee, not make a deposit with the Clerk of the Court.

Bankruptcy Rule 7067 incorporates Rule 67 of the Federal Rules of Civil Procedure, which states in relevant part:

> In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon

> notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing, whether or not that party claims all or any part of the sum or thing. The party making the deposit shall serve the order permitting deposit on the clerk of the court....

Fed. R. Civ. P. 67.

The Court finds that Rule 67 does not apply to Count III of the amended complaint. Count III of the amended complaint does not seek relief in the form of "a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery." Id. Rather, the Trustee objects to the Debtor's discharge under § 727(a)(6) for his alleged failure to obey a lawful order of the Court. In addition, Ms. Messina is not a party to Count III of the amended complaint. Thus, Ms. Messina's reliance on Rule 67 is misplaced. Moreover, the Court has granted the Debtor's motion to dismiss Count III of the amended complaint because it is time barred under Bankruptcy Rule 4004(a). Accordingly, the Court denies Ms. Messina's motion for leave to deposit money with the Clerk of the Court for property that is the subject of Count III of the amended complaint.

D. The Trustee's Motion for Partial Summary Judgment on Count III of the Amended Complaint

In order to prevail on a motion for summary judgment, the movant must meet the statutory criteria set forth in Rule 56 of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Federal Rule of Bankruptcy Procedure 7056. Rule 56(c) reads in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and

> admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact *and that the moving party is entitled to a judgment as a matter of law*.

Fed. R. Civ. P. 56(c) (emphasis supplied). See also Dugan v. Smerwick Sewerage Co., 142 F.3d 398, 402 (7th Cir. 1998). The Court set forth the applicable standards for summary judgment motions in a companion Opinion. See Messina v. American Citrus Prods. Corp. (In re Messina), Bankr. No. 99 B 29371, Adv. No. 03 A 01803, slip op. at 2-8 (Bankr. N.D. Ill. Sept. 29, 2003). Those standards are incorporated by reference.

On August 26, 2003, the Debtor filed a motion to extend the time to respond to the Trustee's motion at bar. Prior to that date, the Court set a briefing schedule in this and other matters, which required the Debtor to file a response, inter alia, to the instant motion for summary judgment by or before August 9, 2003. On August 28, 2003, the Court denied the Debtor's motion for an extension to respond to the summary judgment motion and told that parties that a draft Opinion was currently in working progress. The day after the Court denied the Debtor's motion, and in complete disregard for the Court's order and oral explanation denying his request for an extension, the Debtor sent the Court a copy of a letter he mailed to the Trustee's counsel wherein he states in pertinent part: "I am writing to confirm our agreement regarding the due date for my responses to all pending motions. You have agreed to extend the due date to Wednesday, September 3, 2002." Moreover, in disregard of his side agreement with the Trustee's counsel, on September 10, 2003, the Debtor belatedly filed a memorandum in opposition to the Trustee's motion for summary judgment, a Rule 7056-2 statement and an appendix of exhibits thereto.

The Court will not tolerate the Debtor's blatant defiance and disregard of its order and oral ruling. When this Court denies a motion to extend the date to file a pleading, the parties may not, in complete disregard for the Court's ruling, later agree amongst themselves to extend the filing date. Even though the parties may have agreed to the extension of the Debtor's response date to the motion for summary judgment, the Court did not. It denied the extension and will adhere to its ruling. That the parties may agree to an extension of a deadline imposed by the Court does not mean, ipso facto, that the Court also acquiesces. "Adherence to established deadlines is essential if all parties are to have a fair opportunity to present their positions." Hill v. Porter Memorial Hosp., 90 F.3d 220, 224 (7th Cir. 1996). "Deadlines, in the law business, serve a useful purpose and reasonable adherence to them is to be encouraged." Spears v. City of Indianapolis, 74 F.3d 153, 157 (7th Cir. 1996). As the Seventh Circuit has warned:

> Ignoring deadlines is the surest way to lose a case. Time limits coordinate and expedite a complex process; they pervade the legal system, starting with the statute of limitations. Extended disregard of time limits (even the non-jurisdictional kind) is ruinous. 'Lawyers and litigants who decide that they will play by rules of their own invention will find that the game cannot be won.'

United States v. Golden Elev., Inc., 27 F.3d 301, 302 (7th Cir. 1994) (quoting Northwestern Nat. Ins. Co. v. Baltes, 15 F.3d 660, 663 (7th Cir. 1994)). Accordingly, the Court will not consider the Debtor's belated filings and hereby strikes those pleadings from the record.

The Trustee seeks summary judgment under Count III of the amended complaint. Pursuant to this count, the Trustee alleges that despite repeated demands, the Debtor has failed

to turn over all estate property. The Trustee objects to the Debtor's discharge under § 727(a)(6) because he allegedly failed to obey a lawful order of the Court. Alternatively, the Trustee argues that if the Debtor has been discharged, the foregoing represents grounds to revoke his discharge under § 727(d)(1) and (3).

The Debtor, in his answer to the amended complaint, denies that he has failed to turn over all estate property to the Trustee. See Trustee's Exhibit A to Motion for Summary Judgment. In fact, the Debtor contends that he has paid $10,567.53 to the Trustee representing the full value of the following cash assets: (1) First National Bank checking account–$3,995.53; (2) First National bank saving account–$834.40; (3) Fidelity Services money market account–$4,152.10; (4) LaSalle Bank NOW account–$829.00; (5) refund from the Internal Revenue Service–$656.50; and (6) refund from the Illinois Department of Revenue–$100.00. Id. The Debtor further avers that he and the Trustee disagree over the liquidation value of the Debtor's non-cash assets, but the value claimed by the Trustee–$9,100.00–is offset by the amount the estate allegedly owes the Debtor under 11 U.S.C. § 503(b)(1)(B) for the capital gains taxes he incurred when the Berneys liquidated 1200 shares of Microsoft stock. Id. The Debtor contends that if the Trustee prevails on his claim that the estate owns all of the Microsoft stock, then the estate owes the Debtor $12,127.00 in capital gains taxes incurred at liquidation. Id. The Debtor maintains that if the Trustee prevails in his valuation claim and his claim regarding ownership of the Microsoft stock, he will owe the Debtor a balance of $3,127.00. Id.

The Court finds that the Trustee is not entitled to summary judgment as a matter of law

because Count III of the amended complaint is time barred under Bankruptcy Rule 4004(a) as previously discussed. Consequently, the Court denies the Trustee's motion for partial summary judgment under Count III of the amended complaint.

IV. CONCLUSION

For the foregoing reasons, the Court grants the Debtor's motion to dismiss Counts I, II and III of the amended complaint. Further, the Court denies the Trustee's partial motion for summary judgment under Count III of the amended complaint. Additionally, the Court grants the Trustee's motion to dismiss the Debtor's counterclaims and strikes the Debtor's first counterclaim. Finally, the Court denies the motion of Ms. Messina for leave to deposit money into the Court. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting the remaining counts of the amended complaint and the counterclaims in this adversary proceeding for pretrial conference on December 11, 2003 at 9:00 a.m.

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:	)	Chapter 7
JOHN P. MESSINA,	)	Bankruptcy No. 99 B 29371
	)	Judge John H. Squires
Debtor.	)	
	)	
	)	
LAWRENCE FISHER, as Chapter 7 Trustee for the Estate of John P Messina, and not individually,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Adversary No. 02 A 01041
	)	
ARTHUR L. BERNEY, ALICE M. BERNEY, JOHN P. MESSINA and BETH A. MESSINA,	)	
	)	
Defendants.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 29th day of September 2003, the Court grants John P. Messina's motion to dismiss Counts I, II and III of the amended complaint. The Court denies the motion of Lawrence Fisher for partial summary judgment under Count III of the amended complaint. Further, the Court grants the motion of Lawrence Fisher to dismiss John P. Messina's counterclaims and strikes his first counterclaim. Finally, the Court denies the motion of Beth A. Messina for leave to deposit

money into the Court. Concurrently entered herewith is the Court's Preliminary Pretrial Order setting the remaining counts of the amended complaint and counterclaims in this adversary proceeding for a pretrial conference on December 11, 2003 at 9:00 a.m.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List