

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT
CHIEF BANKRUPTCY JUDGE

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March 17, 1997

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Subject: **First Bank of South Dakota v. Green Tree Financial Corp. (In re E. John and Eileen Bruner)**,
Adversary No. 96-4049;
Chapter 12; Bankr. No. 96-40381

Dear Counsel:

The matter before the Court is the Motion to Dismiss Third Party Complaint filed by Third Party Defendants-Debtors and the response and briefs related thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtors' Motion must be granted.

SUMMARY OF FACTS. First Bank of South Dakota holds a mortgage on John and Eileen Bruner's real property. The mortgage was recorded on September 6, 1994. Green Tree Financial Corporation lent the Bruners funds to purchase a modular home in December 1994. The modular home was placed on a foundation on the real property mortgaged to First Bank. Green Tree is listed as the first lien holder on the modular home's certificate of title that was issued January 17, 1995.

On May 20, 1996, the Bruners (Debtors) filed a Chapter 12 petition. First Bank commenced this adversary proceeding against Green Tree on November 1, 1996 seeking a determination that it holds a superior security interest in the modular home because Green Tree did not perfect its interest in the modular home as a fixture. Green Tree answered the complaint and also filed a third party complaint against Debtors on November 25, 1996 arguing its claim against Debtors should be declared non dischargeable for fraud if First Bank prevails on its complaint. Green Tree theorizes that Debtors misled it by not complying with the installment sales contract and security agreement, which provides

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that the modular home shall remain personalty rather than a fixture to any real property. Debtors answered Green Tree's complaint with a Motion to Dismiss on the grounds that the time for filing a non dischargeability complaint expired August 20, 1996, long before Green Tree filed its third party complaint.

A hearing on Debtors' Motion was held January 22, 1997. Appearances included Cecelia A. Grunewaldt for Debtors, James A. Craig for Green Tree, Roger W. Damgaard for First Bank, and Trustee Rick A. Yarnall. The matter was taken under advisement upon receipt of Green Tree's and Debtors' post-hearing briefs.

The issue presented is whether Green Tree's third party complaint is time barred because it was filed after the deadline for filing non dischargeability complaints as provided by F.R.Bankr.P. 4007(c). Green Tree argues that the deadline should be equitably extended because Debtors misled Green Tree post-petition that its claim would be treated as fully secured.

DISCUSSION. As the Court advised counsel for Green Tree at the hearing, Green Tree has a difficult task in showing that the dischargeability deadline should be extended or waived in this case. Previously, this Court adopted that line of cases that the dischargeability complaint deadline must be strictly enforced. *Estate of Oliver Hanson v. Walgamuth (In re Walgamuth)*, 144 B.R. 465, 467-68 (Bankr. D.S.D. 1992). In *Walgamuth*, however, this Court was not specifically presented with the question of whether the deadline may be extended in equity due to either acts of Green Tree or its counsel or acts of Debtors or their counsel.

Acts by Green Tree or Its Counsel. In *Pioneer Investment Services v. Brunswick Associates, Ltd. Partnership*, 113 S.Ct. 1489 (1993), the Supreme Court provided guidance on what constitutes "excusable neglect" under F.R.Bankr.P. 9006(b)(1). One Court of Appeals, however, has concluded that excusable neglect under Rule 9006(b)(1) does not apply to the dischargeability complaint deadline under F.R.Bankr.P. 4007(c). *Jones v. Hill (In re Hill)*, 811 F.2d 484, 486 (9th Cir. 1987). The court's conclusion was based on the self-limiting provision in Rule 9006(b)(3) that states the time for taking action under Rule 4007(c) can be enlarged "only to the extent and under the conditions stated in [that] rule." The analysis is completed by considering Rule 4007(c) which states that an extension may be granted only by motion filed before the original time expires. *Hill*, 811 F.2d at 486; see also *Kelly v. Gordon (In re Gordon)*, 988 F.2d 1000, 1001 (9th Cir. 1993) (post-Pioneer decision that follows rationale of *Hill*), and *Herndon v. De La Cruz (In re De La Cruz)*, 176 B.R. 19, 24 (9th Cir. BAP 1994). Other lower courts have adopted this rationale. *Silver City v.*

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Forte (In re Forte), 146 B.R. 592, (Bankr. D.R.I. 1992).

This Court likewise concludes that Rule 9006(b)(1) does not apply to the extension of the deadline under Rule 4007(c). The plain language of these Rules does not lend itself to an interpretation different from that explained in *Hill*. Accordingly, the Court cannot equitably extend the deadline based on any excusable neglect by Green Tree's counsel arising from Debtors' representations to them.

Acts by Debtors or their Counsel. The Second Circuit Court of Appeals has concluded that the deadline imposed by Rule 4007(c) is not jurisdictional and is subject to the defenses of waiver, estoppel, and equitable tolling. *European American Bank v. Benedict (In re Benedict)*, 90 F.3d 50, 54 (2d Cir. 1996). In *Benedict*, the court allowed a late-filed dischargeability complaint to stand where the debtor had affirmatively waived her right to object to the expiration of the deadline. *Id.* The court concluded that the debtor's waiver was based on a reaffirmation agreement and stipulation that allowed the creditor to file a late complaint and on the debtor's failure to complain earlier of the bankruptcy court's extension of the deadline. *Id.* at 55.

Assuming only for the purpose of discussion that the defenses of waiver, estoppel, and equitable tolling may be raised against the dischargeability complaint deadline, the Court can find no intentional or affirmative act by Debtors post-petition that would warrant an extension of time for Green Tree to file a non dischargeability complaint. See *Garfield v. J.C. Nichols Real Estate*, 57 F.3d 662, (8th Cir. 1995) (there is an implied waiver of a defense or right only where a party's conduct is so consistent with and indicative of an intention to relinquish the right and so clear and unequivocal that no other reasonable explanation of the conduct is possible) (cites therein); *Anderson v. Unisys Corp.*, 47 F.3d 302, 306 (8th Cir. 1995) (equitable tolling is appropriate where the plaintiff received inadequate notice, the court misled the plaintiff, or where affirmative misconduct by the defendant lulled the plaintiff into inaction) (citing *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984)); and *Maitland v. University of Minnesota*, 43 F.3d 357, 364 (8th Cir. 1994) (equitable estoppel applies only when a party who is to be estopped asserted a fact or claim or made a promise on which the other party or the court relied). Debtors scheduled Green Tree as a secured creditor and treated it as such in their first plan. It is now First Bank that is testing Green Tree's secured status. Debtors' action of placing a modular home on their mortgaged real property occurred *pre-petition* — a fact apparently known to Green Tree for some time

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pre-petition. Therefore, Green Tree had sufficient facts before it to permit it to timely file a dischargeability complaint or ask for an extension of time to do so. Most important, there is essentially no evidence that Debtors affirmatively did anything post-petition to foster Green Tree's belief that its secured claim would never be subject to a lien challenge.¹

This conclusion is in accord with those decisions that limit equitable relief from the dischargeability deadline to unique or extraordinary circumstances, such as where the Court explicitly misleads a party about the deadline or the notice of the deadline is too short. See, e.g., *Classic Auto Refinishing, Inc. v. Marino (In re Marino)*, 37 F.3d 1354, 1358 (9th Cir. 1994).² This case appears to be a fairly typical bankruptcy case where lien perfection issues surface post-petition. Such circumstances do not warrant equitable relief. In *Hartje Lumber, Inc. v. Brach (In re Brach)*, 195 B.R. 897, 904 n.7 (Bankr. W.D. Wis. 1995) (citing *Allred v. Kennerley (In re Kennerley)*, 995 F.2d 145 (9th Cir. 1993)) (neither excusable neglect by the creditor's attorney nor affirmative representations by the debtors will justify an untimely complaint; the "unique circumstances" doctrine is limited to situations where the court explicitly misleads a party). See also *In re James*, 187 B.R. 395, (Bankr. N.D. Ga. 1995) (while special circumstances may justify an extension of time to file a dischargeability complaint, the mere fact that the contemplated complaint grounds itself in a fraud theory does not justify an extension of time under Rule 4007(c)); *Caffal Bros. Forest Products, Inc. v. Braun (In re Braun)*, 84 B.R. 192, 193-94 (Bankr. D. Ore. 1986) (untimely complaint not allowed where claim was listed, although not accurately, and where creditor received notice

¹ Debtors also contend that Green Tree knew about the potential lien dispute with First Bank as early as August 1996. If true, that fact would weigh against an equitable extension of the dischargeability complaint deadline for Green Tree. However, the record is insufficient for the Court to presume Green Tree had such specific knowledge before the August 20, 1996 deadline, so that allegation is not considered in the Court's decision herein.

² Several courts have equitably tolled the deadline when the Clerk of Court notified creditors of the wrong date, see, e.g., *Sam Michael Schreiber, MD, Inc., v. Halstead (In re Halstead)*, 158 B.R. 485 (BAP 9th Cir. 1993), *aff'd*, 53 F.3d 253 (9th Cir. 1995), or where the notice was late. See *Manufacturers Hanover, FKA v. DeWalt (In re Dewalt)*, 961 F.2d 848, (9th Cir. 1992). Those issues are not presented here.

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of the petition). Compare *Pension Benefit Guaranty Corp. v. Eckert*, 156 B.R. 656, 657-58 (C.D. Ca. 1993) (untimely complaint allowed where delay in filing complaint was the direct result of the debtor's fraudulent misrepresentations about the status of an ERISA plan); and *In re Halliwell*, 130 B.R. 508, 509 (Bankr. S.D. Ohio 1991) (extension of time to file dischargeability granted where the debtors had not timely complied with discovery requests). See generally *Gebhardt v. Thomas (In re Thomas)*, 203 B.R. 64 (Bankr. E.D. Texas 1996) (summary of dischargeability complaint deadline cases).

Efficacy of Amending the Third Party Complaint. In addition to concluding that the circumstances presented do not warrant an equitable extension of the deadline to file a dischargeability complaint, the Court also finds that Green Tree's allegations of fraud are too tenuous to survive dismissal. The requisite pleading of fraud with particularity under F.R.Bankr.P. 7009 and F.R.Civ.P. 9(b) is absent and the record does not indicate that an amendment to Green Tree's complaint will solve the problem.

While a complaint must be read liberally, *Flowers v. Continental Grain Co.*, 775 F.2d 1051, 1053 (8th Cir. 1985), under F.R.Bankr.P. 7009 and F.R.Civ.P. 9(b), "all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity." Only the element of intent may be averred generally. F.R.Civ.P. 9(b). The main purpose of Rule 9(b) is to facilitate the defendant's ability to respond and prepare a defense. *Commercial Property Investments, Inc. v. Quality Inns International, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995). A fraud-based complaint should set forth the time, place, and contents of the false representation, as well as the identity of the person who made the representation and what was obtained or given up because of it. *Id.* (cites therein). Conclusory allegations that a defendant's conduct was fraudulent or deceptive do not satisfy the rule. *Id.*

The liberal rules of pleading dictate that leave of court be freely given to amend a complaint when justice so requires. F.R.Civ.P. 15(a); *Hannah v. City of Overland, Mo.*, 795 F.2d 1385, 1392 (8th Cir. 1986); *Dorn v. State Bank of Stella*, 767 F.2d 442, 443 (8th Cir. 1985). There is, however, no absolute or automatic right to amend. *Williams v. Little Rock Municipal Water Works*, 21 F.3d 218, 224 (8th Cir. 1994). Reasons for denying an opportunity to amend include undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the defendant, or futility of an amendment. *Id.* (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

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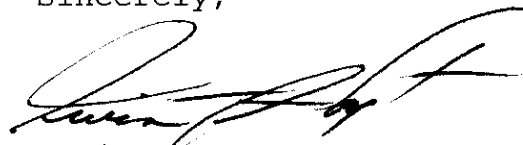
In this early state of the adversary proceeding with First Bank, it is clear that Green Tree has not filed its third party complaint against Debtors in bad faith or to cause delay. There have been no repeated failures to amend deficiencies. However, the Court finds that an amendment to the third party complaint would be futile.

A complaint should be dismissed only if it is clear that no relief can be granted under any set of facts that could be provided consistent with the allegations. *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995). (citing *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984))). In this case, there is simply insufficient evidence that the debt is non dischargeable under § 523(a)(4). Further, discovery after the filing of the third party complaint cannot be used to justify its initial filing. Rule 9011 requires a reasonable pre-filing inquiry and Rule 2004 provides the means for doing so. *In re Handy Andy Home Improvement Centers, Inc.*, 199 B.R. 376, 380 (Bankr. N.D. Ill. 1996) (Rule 2004 is a pre-litigation device that allows a broad "fishing expedition" to obtain information relevant to the administration of the case); *In re French*, 145 B.R. 991, 992 (Bankr. D.S.D. 1992) (Ecker, J.) (Rule 2004 allows a debtor to be examined without the requisite of any pending adversary proceeding or contested matter).

If Green Tree discovers fraud by Debtors in the course of the case, it may still seek dismissal of the case for cause under 11 U.S.C. § 1307(c) and it may object to Debtors' plan on grounds of lack of good faith under 11 U.S.C. § 1325(a)(3). Green Tree is foreclosed here only from a dischargeability complaint under § 523(c).

An Order dismissing Green Tree's third party complaint against Debtors will be entered.

Sincerely,



Irvin N. Hoyt
Chief Bankruptcy Judge

INH:sh
CC: adversary file (docket original; copies to parties in interest)

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

MAR 18 1997

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 96-04049 Form id: 122 Ntc Date: 03/18/97 Off: 4 Page : 1
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