

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 19-50075
	)	Chapter 7
ROBIN MICHELE BUSSIERE	)	
SSN/ITIN xxx-xx-1041	)	
	)	
Debtor.	)	
	)	
ROBIN MICHELE BUSSIERE	)	Adv. No. 19-5004
	)	
Plaintiff	)	
-vs-	)	
	)	DECISION RE: DEBTOR-PLAINTIFF'S
THE BOARD OF TRUSTEES OF	)	APPLICATION FOR DEFAULT JUDGMENT
NORTH KANSAS CITY HOSPITAL	)	
	)	
Defendant.	)	

The matter before the Court is Debtor-Plaintiff Robin Michele Bussiere's Application for Default Judgment (doc. 36). This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.R.Bankr.P. 7052. For the reasons discussed below, the Court will deny the application, dismiss Debtor-Plaintiff's amended complaint, and close this adversary proceeding.

I.  
Undisputed Facts.<sup>1</sup>

North Kansas City Hospital ("Hospital") holds a pre-petition judgment against Debtor-Plaintiff Robin Michele Bussiere ("Debtor"). Debtor commenced a chapter 7

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<sup>1</sup> The facts were gleaned from Debtor-Plaintiff Robin Michele Bussiere's Amended Complaint to Determine Dischargeability of a Debt (doc. 29) and the record in her chapter 7 bankruptcy case, Bankr. No. 19-50075 (D.S.D.).

bankruptcy proceeding. She did not include Hospital as a creditor on her original schedule of unsecured liabilities.

The trustee in Debtor's bankruptcy case found assets to pay creditors. The deadline in the bankruptcy case for a creditor to timely file a proof of claim was September 19, 2019. On October 15, 2019, Debtor commenced an adversary proceeding against Hospital's Board of Trustees seeking a determination under 11 U.S.C. § 523(a)(3) that Hospital's claim was not excepted from discharge. Hospital filed a proof of claim on November 13, 2019, stating it holds a general unsecured claim for \$16,192.72. Debtor amended her schedules on November 18, 2019 to add Hospital as a general unsecured creditor.

Hospital did not answer Debtor's adversary complaint, and Debtor filed an application for a default judgment. The Court denied Debtor's application because Debtor had not alleged, if she could, Hospital had actual knowledge of Debtor's bankruptcy case such that Hospital could have timely filed a proof of claim, one of the necessary elements for a claim to be excepted from discharge under § 523(a)(3).

Several weeks after Debtor's application for a default judgment was denied in the adversary proceeding, the case trustee in Debtor's bankruptcy case filed his final report and proposed distribution. He proposed to pay Hospital's untimely claim *pro rata* with two timely-filed claims. No one objected to the trustee's proposed distribution, and he subsequently made the distribution.

In the adversary proceeding, Debtor filed an amended complaint under § 523(a)(3). Therein, Debtor stated:

5. Asset[s] were recovered by the Standing Trustee. Debtor has amended her Schedule E/F to include the Creditor's debt so that Creditor could file a Proof of Claim ("POC"). The Creditor filed its POC. The Standing Trustee has not yet fully administered the monies that he recovered for the bankruptcy estate. The Trustee has given a preliminary approval of Creditor's POC.

6. The debt owed to Creditor is not a non-dischargeable debt under either 11 U.S.C. 523(2), 11 U.S.C. 523(4) or 11 U.S.C. 523(6), nor has Creditor alleged that its claim would not be dischargeable under either 11 U.S.C. 523(2), 11 U.S.C. 523(4) or 11 U.S.C. 523(6). Creditor's counsel has indicated that it would not object to the discharge of Creditor's debt if Creditor is allowed to file a POC. Creditor will then be in the same position as all of Debtor's other creditors who have filed a timely POC.

7. Discharging this debt is justified for the reason that the inadvertent omission of this debt was not done intentionally, but was merely an error or oversight.

Hospital did not timely answer Debtor's amended complaint. Debtor again seeks a default judgment.

## II. Applicable Law.

As this Court previously stated:

Section 727(b) of the Bankruptcy Code provides a chapter 7 debtor is discharged from all debts that arose before the debtor's bankruptcy petition was filed. Section 523(a) creates several exceptions. Some exceptions are automatic. For example, if a debtor is behind on child support payments when he files bankruptcy, that child support debt is automatically not discharged and the debtor must still pay the child support debt. 11 U.S.C. § 523(a)(5). The Court does not have to make

a specific determination that the child support debt is excepted from discharge.

Other exceptions to discharge under § 523(a) are not automatic. For those exceptions, the creditor is given a notice when the debtor's bankruptcy case is commenced. The notice contains a deadline for creditors to ask the Court to determine if the creditor's particular claim should be excepted from discharge. If the creditor does not seek a determination that his claim is excepted from discharge by that deadline or if he does seek such a determination but the Court concludes an exception in § 523(a) does not apply, the creditor's claim is discharged. The types of claims that may be excluded through this process include, for example, debts arising from particular types of fraud.

Occasionally, a debtor will fail to list a creditor on the case mailing list and the creditor will not receive notice of the case in time to file a proof of claim or seek a determination that his claim should be excepted from discharge. Section 523(a)(3) of the Bankruptcy Code addresses that situation. It provides that even if a debtor forgets to schedule a particular debt, the debt will be discharged unless: (1) the trustee found assets, creditors were directed to file proofs of claim, and the unscheduled creditor did not get an opportunity to file a proof of claim; and (2) the unscheduled creditor's claim should be excepted from discharge because it arose from the debtor's fraud, as further defined by § 523(a)(2), (4), or (6).

When a § 523(a)(3) determination is placed before the Court, the debtor bears the burden of demonstrating the creditor had actual notice of the case even though the creditor did not get served with the notice of commencement of case. *See IRS v. Haiopoulos (In re Haiopoulos)*, 118 F.3d 1240, 1244 (8th Cir. 1997). The creditor must demonstrate, by a preponderance of the evidence, that his claim arose from one of the fraud-related exceptions set forth in § 523(a)(2), (4), or (6). *Grogan v. Garner*, 498 U.S. 279 (1991); *Wright v. Gulf Insurance Co. (In re Wright)*, 266 B.R. 848, 850-51 (Bankr. E.D. Ark. 2001).

[E]vidence presented must be viewed consistent with the congressional intent that exceptions to discharge be narrowly construed against the creditor and liberally against the debtor, thus effectuating the fresh start policy of the

[Bankruptcy] Code. [Cite omitted.]

*Caspers v. Van Horne (In re Van Horne)*, 823 F.2d 1285, 1287 (8th Cir. 1987) (quoting *Jennen v. Hunter (In re Hunter)*, 771 F.2d 1126, 1130 (8th Cir. 1985)); see *The Merchants National Bank of Winona v. Moen (In re Moen)*, 238 B.R. 785, 790-91 (B.A.P. 8th Cir. 1999).

When all is said and done, § 523(a)(3) accomplishes two things. First, it protects the unscheduled creditor from having his claim discharged if he did not get notice of the case in time to file a proof of claim and file a nondischargeability complaint under § 523(a)(2), (4), or (6). *Mitchell v. Bigelow (In re Mitchell)*, 418 B.R. 282, 286 (B.A.P. 8th Cir. 2009). Second, § 523(a)(3) ensures an unscheduled creditor is treated the same as other similarly situated creditors that the debtor remembered to put on his schedules. *Stefani v. Hiltz (In re Stefani)*, Bankr. No. 05-40277, Adv. No. 07-4037, 2007 WL 1960591, \*1 (Bankr. D.S.D. July 2, 2007) (citing *Hauge v. Skaar (In re Hauge)*, 232 B.R. 141, 146-50 (Bankr. D. Minn. 1999)).

*Hadcock v. Myers (In re Hadcock)*, Bankr. No. 12-50034, Adv. No. 12-5008, 2012 WL 4959643, at \*2-3 (Bankr. D.S.D. Oct. 17, 2012).

When a § 523(a)(3) complaint is filed in a chapter 7 bankruptcy case in which no assets have been found, there is no proof of claim deadline. Thus, § 523(a)(3) only requires the Court to find the unscheduled creditor did not hold a fraud-based claim under 11 U.S.C. § 523(a)(2), (4), or (6). *Id.* at \*3. When assets are found and a deadline has been set for filing proofs of claim, a second question must be answered: Did the creditor have actual knowledge of the case in sufficient time to file a proof of claim before the deadline?

### III. Discussion.

In her amended complaint, Debtor did not allege Hospital had actual knowledge of her bankruptcy case such that Hospital could have filed a proof of claim before the

September 19, 2019 deadline.<sup>2</sup> Therefore, as a matter of law, Debtor is not entitled to a default judgment against Hospital because a necessary element of § 523(a)(3) for a claim to be excepted from discharge in an asset chapter 7 case—that Hospital had notice or actual knowledge of the bankruptcy case so as to permit it to timely file a claim—has not been shown. Fed.R.Bankr.P. 7055; Fed.R.Civ.P. 55; *Glick v. Western Power Sports, Inc.*, 944 F.3d 714, 718 (8th Cir. 2019) (a court may not enter a default judgment without determining the unchallenged facts constitute a legitimate cause of action) (quotations and citations omitted).

Some statements in paragraphs 5, 6, and 7 of Debtor's amended complaint merit further discussion. In paragraph 7, Debtor states:

Discharging this debt is justified for the reason that the inadvertent omission of this debt was not done intentionally, but was merely an error or oversight.

The elements of § 523(a)(3), however, do not include equitable considerations regarding *why* the debtor failed to timely schedule the subject claim. *See Hathorn v. Petty (In re Petty)*, 491 B.R. 554, 560 (B.A.P. 8th Cir. 2013).

In paragraph 5, Debtor says the trustee has given "preliminary approval" of Hospital's claim and in paragraph 6 Debtor states: "[Hospital]'s counsel has indicated that it would not object to the discharge of [its] debt if [Hospital] is allowed to file a POC." The claim allowance process in a chapter 7 case, however, is established by the Bankruptcy Code and the federal rules of bankruptcy procedure—not by an informal agreement of some parties to the case—and here certain special provisions applied because Hospital did not file its claim by the September 19, 2019 deadline.

A claim filed untimely is still an allowed claim, absent an objection. 11 U.S.C.

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<sup>2</sup> The record in this adversary proceeding and in Bankr. No. 19-50075 indicates, but does not establish, Hospital received actual notice of Debtor's bankruptcy case when Debtor commenced this adversary proceeding, which was after the proof of claim deadline.

§ 502(a); Fed.R.Bankr.P. 3007(a).<sup>3</sup> A claim may be disallowed if it is not timely filed. 11 U.S.C. § 502(b)(9). Section 502(b)(9) contains some exceptions. One such exception is an untimely-filed claim need not be disallowed if:

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim[.]

11 U.S.C. § 726(a)(2)(C). If an untimely-filed claim falls within that exception, it is paid with the timely-filed claims, not with the untimely-filed claims under 11 U.S.C. § 726(a)(3).

Effectively, § 726(a)(2)(C) places creditors who did not receive notice sufficient to allow the timely filing of a proof of claim on a par equal to that which they would have enjoyed had they received notice from the outset of the bankruptcy case, and filed a proof of claim by the bar date. In this respect, a tardily filed claim under § 726(a)(2)(C) becomes the functional equivalent of a timely[-]filed claim. The claim, though technically tardy, is allowed, and permitted status tantamount to that accorded timely[-]filed proofs of claim.

*Lott Furniture, Inc. v. Ricks (In re Ricks)*, 253 B.R. 734, 744 (Bankr. M.D. La. 2000).

Conversely, if a creditor had actual knowledge of a case in time to timely file a proof of claim, but did not, then that creditor's untimely claim is paid with all the other untimely claims, which is after the timely-filed claims are paid. 11 U.S.C. § 726(a)(3); *Ricks*, 253 B.R. at 743-44.

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<sup>3</sup> Federal Rule of Bankruptcy Procedure 3002(c) governs when a claim is timely filed in a chapter 7 case and provides only limited exceptions when a claim may be considered timely though it was filed after the deadline. Neither Debtor nor Hospital has suggested any of these exceptions applies to Hospital's claim.

The Court joins those courts that find the implications of § 726(a)(2)(C) do not alter the application of § 523(a)(3). *Croix Oil Co. v. Moua (In re Moua)*, 457 B.R. 755 (Bankr. D. Minn. 2011). *Contra Ricks*, 253 B.R. at 744 (allowed but tardily filed claim may not be excepted from discharge under § 523(a)(3)). Though § 726(a)(2)(C) allows certain untimely-filed claims to be paid as if they were timely filed, the claim is still untimely, and the timeliness of a claim's filing remains the crux of § 523(a)(3)'s exception to discharge. *Moua*, 457 B.R. at 760-61.

Here, the case trustee was authorized under § 726(a)(2)(C) to pay Hospital's allowed but untimely-filed unsecured claim with timely-filed unsecured claims because he was satisfied Hospital did not have actual knowledge of the bankruptcy case in time to file a proof of claim before the September 19, 2019 deadline. Nonetheless, Hospital's claim was still not timely filed for the purpose of applying § 523(a)(3), where Debtor did not allege Hospital had actual knowledge of her bankruptcy case in time to file a timely proof of claim. Accordingly, to the extent it was not paid through the case trustee's distribution, § 523(a)(3) excepts Hospital's claim from discharge.

The Court is cognizant Debtor, in her amended complaint, stated Hospital had earlier advised Debtor's counsel it was agreeable to having the unpaid balance of its claim discharged if it shared in the case trustee's distribution. Hospital's failure to answer Debtor's amended complaint is consistent with Debtor's statement. Hospital, of course, is free to waive the unpaid balance of its claim, but the plain language of



§ 523(a)(3) dictates this Court may not find the balance of Hospital's claim is discharged as a matter of law.

Because the time for Hospital to answer Debtor's amended complaint has passed and because Debtor has already been given an opportunity to plead Hospital had actual knowledge of her bankruptcy case in sufficient time to file a proof of claim before the September 19, 2019 deadline, the Court will dismiss Debtor's amended complaint *sua sponte* pursuant to Fed.R.Bankr.P. 7012 and Fed.R.Civ.P. 12(b)(6). *See, e.g., Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992) (a complaint may be dismissed *sua sponte* after service of process if the plaintiff cannot prove facts that would entitle him to the relief sought), *cited in Walker v. Shafer*, CIV. 16-5121-JLV, 2018 WL 813420, at \*2 (D.S.D. Feb. 9, 2018). The adversary proceeding may then be closed.

An appropriate order will be entered.

Dated: April 14, 2020.

BY THE COURT:

A handwritten signature in blue ink, appearing to read "Charles L. Nail, Jr.", is written over a horizontal line.

Charles L. Nail, Jr.  
Bankruptcy Judge

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

This order/judgment was entered  
on the date shown above.

Frederick M. Entwistle  
Clerk, U.S. Bankruptcy Court  
District of South Dakota

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA

In re:	)	Bankr. No. 19-50075
	)	Chapter 7
ROBIN MICHELE BUSSIERE	)	
SSN/ITIN xxx-xx-1041	)	
	)	
Debtor.	)	
	)	
ROBIN MICHELE BUSSIERE	)	Adv. No. 19-5004
	)	
Plaintiff	)	
-vs-	)	ORDER DENYING DEBTOR-PLAINTIFF'S
	)	APPLICATION FOR DEFAULT JUDGMENT,
THE BOARD OF TRUSTEES OF	)	DISMISSING AMENDED COMPLAINT,
NORTH KANSAS CITY HOSPITAL	)	AND CLOSING ADVERSARY PROCEEDING
	)	
Defendant.	)	

In recognition of and compliance with the decision entered this day; and for cause shown; now, therefore,

IT IS HEREBY ORDERED Debtor-Plaintiff Robin Michele Bussiere's Application for Default Judgment (doc. 36) is denied; Debtor-Plaintiff's Amended Complaint to Determine Dischargeability of a Debt (doc. 29) is dismissed; and this adversary proceeding shall be closed.

So ordered: April 14, 2020.

BY THE COURT:



Charles L. Nail, Jr.  
Bankruptcy Judge

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