UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

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| In re: | ) | Bankr. No. 15-30018 |
| | ) | Chapter 7 |
| WARREN BOYD DOZIER | ) | |
| SSN/ITIN xxx-xx-2564 | ) | |
| | ) | |
| Debtor. | ) | |
| | ) | |
| FORREST C. ALLRED, IN HIS | ) | Adv. No. 20-3006 |
| CAPACITY AS CHAPTER 7 TRUSTEE | ) | |
| | ) | |
| Plaintiff | ) | |
| -vs- | ) | DECISION RE: DEFENDANT'S |
| | ) | MOTION TO DISMISS CERTAIN COUNTS |
| ALOYSIUS ARENDT | ) | |
| aka Al Arendt | ) | |
| | ) | |
| Defendant. | ) | |

The matter before the Court is Defendant Aloysius Arendt's Motion to Dismiss Counts I, II, III, V, VII, and VIII of the Adversary Complaint (doc. 27). For the reasons discussed below, the Court will grant Defendant's motion in part and dismiss counts I, II, V, VII, and VIII.

I.

Some time before April 5, 2015, Warren Boyd Dozier ("Debtor") retained Aloysius Arendt to serve as his bankruptcy attorney. Debtor's mother died on April 5, 2015. Attorney Arendt's records indicate Bonnie London, Debtor's friend, told Attorney Arendt about Debtor's mother's death on April 6, 2015, when she inquired how it would affect Debtor's bankruptcy case. Debtor filed his chapter 7 petition on May 21, 2015. At question 20 on his schedule of assets, Debtor did not disclose his mother had died and he was her sole heir. On his schedule of monthly expenses,

Debtor implied his mother was still living when he stated he

> resides in his mother's house in Pierre, SD, is fully disabled and pay's [sic] her rent and helps with the utilities as set forth on the Schedule J; in addition, he drives her 2001 Dodge Ram 1500 PU, pays for the insurance, gas and upkeep on the same.

Debtor and Attorney Arendt attended Debtor's meeting of creditors conducted by the case trustee, Forrest C. Allred, on July 1, 2015. During the meeting, Debtor affirmed under oath the truthfulness, accuracy, and completeness of his schedules and indicated no changes to them were needed. Debtor specifically testified he was not the beneficiary of any probate court proceedings.

Trustee Allred did not find any nonexempt assets to liquidate, and he filed a report to that effect on July 7, 2015. Debtor received a general discharge of debts on September 1, 2015.[1] Debtor's bankruptcy case was closed on October 5, 2015.

On Trustee Allred's motion, Debtor's bankruptcy case was reopened on March 10, 2020. In the motion to reopen, Trustee Allred said he had recently learned Debtor's mother had died, she had made Debtor her sole beneficiary, and Debtor had filed an application for the informal probate of his mother's estate on June 9, 2017. Trustee Allred also reported, in his motion to reopen, Debtor himself had died on October 27, 2017. Trustee Allred stated in the motion to reopen Debtor's mother's

[1] Debtor did not schedule any secured claims or priority unsecured claims. He scheduled general unsecured claims totaling $1,088,313.00, all held by medical care entities or their agents. He did not schedule any real property. He scheduled personal property with a total value of less than $1,000.00 and claimed it all exempt. He did not utilize $4,268.00 of his allowed personal property exemptions under S.D.C.L. § 43-45-4.

probate estate assets included a house and Debtor's children, through the probate of both Debtor's and his mother's estates, had ultimately received her assets. Trustee Allred filed suit against Debtor's two children on June 8, 2020 to recover Debtor's mother's house and other assets.[2]

Trustee Allred commenced this adversary proceeding against Attorney Arendt on December 28, 2020. In his amended complaint, Trustee Allred sought both damages from Attorney Arendt and sanctions against Attorney Arendt regarding Debtor's and Attorney Arendt's failure to disclose in Debtor's chapter 7 bankruptcy case Debtor's interest in his mother's probate estate. Trustee Allred alleged Attorney Arendt, in addition to being Debtor's bankruptcy attorney, had represented Debtor when Debtor was the personal representative of Debtor's mother's probate estate and had represented Bonnie London when she was the personal representative of Debtor's probate estate and the successor personal representative of Debtor's mother's probate estate.

Trustee Allred's amended complaint contains nine counts. Attorney Arendt has moved to dismiss counts I, II, III, V, VII, and VIII. Trustee Allred has responded.[3] Whether each count should be dismissed is discussed below in seriatim.

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[2] Trustee Allred's adversary proceeding against Debtor's children, Adv. No. 20-3005, is being held in abeyance pending the resolution of Trustee Allred's amended complaint against Attorney Arendt.

[3] Because it was not contemplated by the scheduling order (doc. 24), the Court did not consider Attorney Arendt's reply brief (doc. 34).

II.

Attorney Arendt did not cite in his motion or supporting brief the statute or federal rule of procedure under which he seeks dismissal of several of the counts in Trustee Allred's amended complaint. Such motions to dismiss are often brought under Fed.R.Bankr.P. 7012 and Fed.R.Civ.P. 12(b). However, since Attorney Arendt has answered the amended complaint, *see* Fed.R.Civ.P. 12(b), it appears his motion is better considered under Fed.R.Bankr.P. 7012(b) and Fed.R.Civ.P. 12(c) as a motion for partial judgment on the pleadings. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990), *cited in Gates v. Black Hills Health Care Systems*, 997 F.Supp.2d 1024, 1029 (D.S.D. 2014).

Under Fed.R.Civ.P. 12(c), as with a motion under Fed.R.Civ.P. 12(b)(6), *In re Pre-filled Propane Tank Antitrust Litigation*, 893 F.3d 1047, 1056 (8th Cir. 2018), the Court considers the nonmovant's factual allegations as true, drawing all reasonable inferences in the nonmovant's favor. *Country Preferred Ins. Co. v. Lee*, 918 F.3d 587, 588 (8th Cir. 2019).

> However, this tenet does not apply to legal conclusions, "formulaic recitation of the elements of a cause of action," or factual assertions which are so indeterminate as to require further factual enhancement. *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009).

*Union Ins. Co. v. Scholz*, 473 F.Supp.3d 978, 982 (D.S.D. 2020). A motion is properly granted under Rule 12(c) if no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Wishnatsky v. Rovner*, 433 F.3d 608, 610 (8th Cir. 2006), *quoted in Unions Ins. Co.*, 473 F.Supp.3d at 982. In

essence, a motion under Rule 12(c), as with a motion under Rule 12(b)(6), tests the legal sufficiency of the claim or claims stated in the complaint. *Waldner v. North American Truck & Trailer, Inc.*, 277 F.R.D. 401, 405-06 (D.S.D. 2011).

III.

Count I.

In count I, entitled PROFESSIONAL NEGLIGENCE–LEGAL MALPRACTICE, Trustee Allred contends Attorney Arendt had a duty, both as Debtor's attorney and independently, to report the assets of Debtor's mother's probate estate in Debtor's bankruptcy filings and that duty continued after Debtor's death, Attorney Arendt and Debtor actively concealed Debtor's interest in his mother's probate estate, Attorney Arendt and Debtor were negligent in failing to disclose that interest, Attorney Arendt's concealment of Debtor's interest in the probate estate continued after Debtor's bankruptcy was filed, and Attorney Arendt's negligence and "breaches" damaged the bankruptcy estate by approximately $225,000.00, which Trustee Allred identifies as the value of Debtor's mother's house and other assets in her probate estate. Alternatively, Trustee Allred alleges Attorney Arendt's actions jeopardized Debtor's discharge, "which proximately damaged [Debtor] and entitles the Trustee to damages in an amount to be determined by the Court."

Attorney Arendt asks the Court to dismiss count I because the three-year statute of repose on a legal malpractice claim in South Dakota has run and the trustee's claims under count I are time-barred. The Court agrees.

The time for seeking the relief described in count I is governed by S.D.C.L. § 15-2-14.2, which provides:

> An action against a licensed attorney, his agent or employee, for malpractice, error, mistake, or omission, whether based upon contract or tort, can be commenced only within three years after the alleged malpractice, error, mistake, or omission shall have occurred. This section shall be prospective in application.

As interpreted by the South Dakota Supreme Court,

> [t]here is no language in SDCL 15-2-14.2 which permits this Court to "toll" the repose period beyond three years after the last act or omission occurred." [T]he 'critical distinction is that a repose period is fixed and its expiration *will not be delayed by estoppel or tolling*[.]'" *Pitt-Hart*, 2016 S.D. 33, ¶ 20, 878 N.W.2d at 413 (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9, 134 S. Ct. at 2183, 189 L.Ed.2d 62).

*Robinson-Podoll v. Harmelink, Fox & Ravnsborg Law Office*, 939 N.W.2d 32, 41-42 (S.D. 2020) (emphasis in the original). Any wrongful conduct by Attorney Arendt *after* Debtor's initial failures to disclose the probate assets in his schedules and at the meeting of creditors was not the cause of any injury suffered by Debtor or the bankruptcy estate, *i.e.*, Trustee Allred has not alleged a harm to Debtor or the bankruptcy estate that was the cumulative effect of any continuing duty Attorney Arendt may have had after the meeting of creditors to disclose the probate estate assets to Trustee Allred. *Id*. at 47. The meeting of creditors was held on July 1, 2015; Trustee Allred commenced this adversary proceeding in December 2020, well outside the three years prescribed by § 15-2-14.2. "Thus, the continuing tort doctrine [does] not delay the occurrence of the three-year repose period on the malpractice claim[.]" *Id*.

It is important to note, for purposes of this motion, the Court is not holding Debtor did not have a continuing obligation to amend his schedules to disclose his interest in his mother's probate estate. *See, e.g., Ravasia v. United States Trustee* (*In re Ravasia*), BAP No. EW-20-1212-BTL, 2021 WL 1511940, at *6 (B.A.P. 9th Cir. April 16, 2021); *In re Lowery*, 398 B.R. 512, 515 (Bankr. E.D.N.Y. 2008). The Court only holds for the purpose of applying S.D.C.L. § 15-2-14.2, as interpreted by the South Dakota Supreme Court, Debtor's duty under 11 U.S.C. § 521(a)(1)(B)(i) to schedule all his assets did not extend the last date on which Attorney Arendt's alleged malpractice occurred.

Nothing in count I implicates any statute of limitation (or repose) other than S.D.C.L. § 15-2-14.2. Section 15-2-14.2 specifically states it applies to actions either sounding in tort or arising under contract. Trustee Allred alleges Attorney Arendt and Debtor had only an attorney-client relationship regarding the bankruptcy and Debtor's mother's probate estate, not a separate business relationship. Thus, the window to bring a malpractice action against Attorney Arendt remains three years under § 15-2-14.2, not any longer period governing general torts or breaches of contract. *See Slota v. Imhoff and Assocs., P.C.*, 949 N.W.2d 869, 873-78 (S.D. 2020).

In light of this conclusion, the Court does not need to reach the issue of whether Trustee Allred has sufficiently pled the elements of a legal malpractice claim, where "a plaintiff must prove: (1) the existence of an attorney-client relationship giving rise to a duty; (2) the attorney, either by an act or failure to act, breached that

duty; (3) the attorney's breach of duty proximately caused injury to the client; and (4) the client sustained actual damage." *Peterson v. Issenhuth*, 842 N.W.2d 351, 355-56 (S.D. 2014), *quoting Chem-Age Indus., Inc. v. Glover*, 652 N.W.2d 756, 767 (S.D. 2002). However, were it to do so, the Court would still dismiss this count. Trustee Allred has not alleged Debtor suffered actual damages, only that Attorney Arendt's actions "jeopardized" Debtor's discharge. While this may be true, Debtor in fact received a discharge. Consequently, Debtor suffered no damages as a result of Attorney Arendt's alleged malpractice, or at least none that Trustee Allred has identified. As for Trustee Allred's claim that the bankruptcy estate–separate and apart from Debtor–suffered damages, Trustee Allred did not allege facts that would demonstrate either he himself or the bankruptcy estate had an attorney-client relationship with Attorney Arendt or how the bankruptcy estate stands in Debtor's shoes regarding that relationship. *See Chem-Age Indus.*, 652 N.W.2d at 768 (an attorney-client relationship is created when: (1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the attorney's professional competence; and (3) the attorney expressly or impliedly agrees to give or indeed gives the advice or assistance).

Finally, the Court is unable to say the bankruptcy estate holds, as property of the estate, any cause of action against Attorney Arendt arising from malpractice related to his legal services regarding Debtor's mother's probate estate or Debtor's probate estate. Trustee Allred has not set forth factual allegations that identify what

those acts of malpractice were, separate from the allegations that Debtor and Attorney Arendt failed in Debtor's bankruptcy case to disclose Debtor's interest in his mother's probate estate.

Count II.

In count II, entitled BREACH OF FIDUCIARY DUTY, Trustee Allred alleges Attorney Arendt was in a fiduciary relationship with Debtor and, by proxy, with Trustee Allred. Trustee Allred alleges Attorney Arendt breached that duty by failing to disclose and actively hiding Debtor's mother's probate estate assets while Debtor was in bankruptcy and while Attorney Arendt represented Debtor in his mother's probate proceeding. Trustee Allred alleges this breach of fiduciary duty caused damages of approximately $225,000.00.

Attorney Arendt asks the Court to dismiss count II because it is time-barred under S.D.C.L. § 15-2-14.2 and because Attorney Arendt was not in a fiduciary relationship with Trustee Allred or the bankruptcy estate. The Court agrees with Attorney Arendt.

As discussed in *Slota*, § 15-2-14.2 is a statute of repose that applies to actions arising from the attorney-client relationship and "the same type of conduct and damages." *Slota*, 949 N.W.2d at 877. Because Trustee Allred's allegations regarding Attorney Arendt's alleged malpractice in Debtor's bankruptcy case are indistinguishable from his allegations regarding Attorney Arendt's alleged breach of

fiduciary duty,[4] § 15-2-14.2 applies and renders count II time-barred.

Trustee Allred spent much of his response to the motion to dismiss regarding count II arguing Attorney Arendt has a duty to the Court, and thus to him or the bankruptcy estate, as an officer of the Court. Trustee Allred's allegations in count II of the amended complaint are not so expansive, and so the Court limits its ruling to the actual allegations in the amended complaint.

Moreover, the Court is unable to discern, from his amended complaint or his response to the motion to dismiss, the factual basis for Trustee Allred's contention that Attorney Arendt "by proxy" or otherwise was Trustee Allred's or the bankruptcy estate's fiduciary. While Attorney Arendt served as Debtor's attorney in the chapter 7 proceeding, Trustee Allred has not alleged any facts that identify a fiduciary relationship between him and Attorney Arendt or the chapter 7 bankruptcy estate and Attorney Arendt. *See Chem-Age Indus.*, 652 N.W.2d at 772 ("To establish a fiduciary duty, three things must exist: 1) the plaintiff must repose faith, confidence, and trust in the defendant; 2) the plaintiff must be in a position of inequality, dependence, weakness, or lack of knowledge; and 3) the defendant must exercise dominion, control or influence over the plaintiff's affairs.") (internal quotations and citation omitted), *cited in Quest Aviation, Inc. v. Nationair Ins. Agencies, Inc.*, 1:14-CV-01025-RAL, 2017 WL 395107, at *7 (D.S.D. January 27, 2017) (state law determines whether

[4] In the opening paragraph of count II, Trustee Allred incorporates by reference "all preceding paragraphs," underscoring the congruity of the factual underpinnings for counts I and II.

a fiduciary duty exists). Thus, count II must be dismissed.

Count III.

In count III, entitled FRAUD, Trustee Allred alleges Attorney Arendt made numerous false representations of fact or material omissions to him, Attorney Arendt knew they were false or should have known they were false, the representations were made with the intention to induce Trustee Allred to rely upon such representations, and Trustee Allred was justified in relying upon such representations to the detriment of the creditors in Debtor's bankruptcy estate. As a result of this alleged fraud, Trustee Allred argues the bankruptcy estate suffered damages of approximately $225,000.00.

As with counts I and II, Attorney Arendt seeks dismissal of count III, arguing it is "inextricably linked to the legal malpractice claim alleged in Count I" and is thus time-barred. The Court disagrees. Trustee Allred's fraud allegations in count III do not specifically rely on Attorney Arendt's attorney-client relationship with Debtor. Trustee Allred alleges Attorney Arendt defrauded *him*. Accordingly, Attorney Arendt's motion to dismiss will be denied as to count III.

The Court is aware Trustee Allred concedes on page 16 of his response that count III should fail under S.D.C.L. § 15-2-14.2 if count I did. His statement is not consistent with the actual allegations in count III of the amended complaint. Thus, the Court's holding herein regarding count III is not altered by that concession.

Count V.

In count V, entitled NEGLIGENT MISREPRESENTATION, Trustee Allred alleges Attorney Arendt owed a duty to Debtor "to supply him with accurate information about the bankruptcy laws and his duty under those laws[,]" Attorney Arendt failed to exercise reasonable care and competence in communicating to Debtor that the assets in Debtor's mother's probate estate are an asset of Debtor's bankruptcy estate, and Debtor reasonably relied on the advice given to him by Attorney Arendt. Trustee Allred argues Attorney Arendt's duty to provide his client with accurate information regarding bankruptcy law was created in part to protect creditors of Debtor and the bankruptcy estate's creditors are the beneficiaries of that duty.

Attorney Arendt argues this count should be dismissed because, like count I, the statute of repose at S.D.C.L. § 15-2-14.2 renders the claim time-barred.[5] The Court agrees. Trustee Allred's legal malpractice allegations in count I cannot be separated from his breach of duty allegations in count V. *Slota*, 949 N.W.2d at 877.[6] Thus, count V must also be dismissed as untimely.

It is not, as Trustee Allred argues in his response, Attorney Arendt's burden to show he has no duty to Debtor's creditors. Moreover, any duty Attorney Arendt may

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[5] Attorney Arendt also sought dismissal of count V on the grounds he did not owe a separate duty to Debtor's creditors. As count V is being dismissed because it is time-barred, the Court does not reach this other issue.

[6] In the opening paragraph of count V, Trustee Allred incorporates by reference "all preceding paragraphs," underscoring the congruity of the factual underpinnings for counts I and V.

have to the Court, the bankruptcy estate, or Debtor's creditors may be more appropriately addressed through counts VI and IX of Trustee Allred's amended complaint, which were not included in Attorney Arendt's dismissal motion.

Count VII.

In count VII, entitled VIOLATION OF 11 [U.S.C.] § 521(a)(3), Trustee Allred alleges Attorney Arendt had a duty to cooperate with the trustee in the administration of the bankruptcy estate as provided by 11 U.S.C. § 521(a)(3), including advising Debtor to surrender all property of the bankruptcy estate. Section 521(a)(3) states:

> (a) The debtor shall—
>
> . . . .
>
> (3) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title[.]

Trustee Allred alleges Attorney Arendt's failure to advise Debtor to surrender the assets in Debtor's mother's probate estate damaged the bankruptcy estate by approximately $225,000.00.[7] He also alleges Attorney Arendt's violation of

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[7] Trustee Allred presumes § 521(a)(3) creates a private cause of action that would allow a trustee to recover damages for a violation of that section. The Court disagrees.

> [T]he [Supreme] Court clarified in a series of cases that, when deciding whether to recognize an implied cause of action, the "determinative" question is one of statutory intent. *Sandoval*, 532 U.S., at 286, 121 S.Ct. 1511. If the statute itself does not "displa[y] an intent" to create "a private remedy," then "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.*, at 286-287, 121 S.Ct. 1511; *see also Transamerica Mortgage Advisors, Inc. v. Lewis*,

§ 521(a)(3) entitles the trustee to an appropriate sanction.

Attorney Arendt argues count VII should be dismissed because § 521(a)(3) does not impose a duty on him personally. He seemingly acknowledges he had a duty to "advise [Debtor] of his duties under federal bankruptcy law, including his duty to accurately disclose all of his assets and interests in property." However, Attorney Arendt argues the "ultimate responsibility" under § 521(a)(3) rests on Debtor.

Obviously, § 521(a)(3) refers only to the debtor, not his or her attorney. Case law regarding a debtor's attorney's duty under § 521(a)(3) is not extensive and is mixed. *Compare, e.g., Houghton v. Morey* (*In re Morey*), 416 B.R. 364, 367 (Bankr. D. Mass. 2009) (a chapter 7 debtor's attorney's only duty is to the debtor), to *Agresti v. Rosenkranz* (*In re United Utensils Corp.*), 141 B.R. 306, 309 (Bankr. W.D. Pa. 1992) (a chapter 11 debtor in possession's attorney has a fiduciary obligation to act

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> 444 U.S. 11, 15-16, 23-24, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979); *Karahalios v. Federal Employees*, 489 U.S. 527, 536-537, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989). The Court held that the judicial task was instead "limited solely to determining whether Congress intended to create the private right of action asserted." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). If the statute does not itself so provide, a private cause of action will not be created through judicial mandate. *See Transamerica, supra*, at 24, 100 S.Ct. 242.

*Ziglar v. Abbasi*, 137 S.Ct. 1843, 1855-56 (2017). The bankruptcy code provides specific remedies for a violation of § 521(a)(3) in a chapter 7 case, including a denial of the debtor's discharge under 11 U.S.C. § 727 and a dismissal of the case under 11 U.S.C. § 707, but a private cause of action for damages does not appear to be one of those remedies. Were the Court not dismissing this count on other grounds, Trustee Allred would need to persuade the Court otherwise.

in the best interest of the entire bankruptcy estate, including creditors).

> In *United Utensils*, the issue presented, as stated by the court, was:
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> Under what circumstances does an attorney who represents a corporate debtor have an attorney-client relationship with the shareholders of the corporation and other third parties who have a business relationship with the corporate debtor such that a conflict of interest and breach of confidentiality arises when counsel for the debtor later represents the trustee in bankruptcy?

*Id*. at 308. As part of its discussion, the court held

> [a]n attorney for the debtor has a fiduciary duty not only to the debtor, but has a fiduciary obligation to act in the best interest of the entire estate, including creditors. *Wolf v. Weinstein*, 372 U.S. 633, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963); *In re Wilde Horse Enterprises*, 136 B.R. 830, 840 (Bankr. C.D. Cal. 1991); *In re Sky Valley, Inc*., 135 B.R. 925, 938-39 (Bankr. N.D. Ga. 1992). If the debtor is not fulfilling *its* fiduciary obligation to the estate, it is the responsibility and duty of Debtor's counsel to bring such matters to the attention of the court.

*Id*. at 309. As shown, the *United Utensils* court cited one Supreme Court opinion and two bankruptcy court decisions involving an attorney for a debtor in possession in reorganization cases. In opposing Attorney Arendt's motion to dismiss count VII, Trustee Allred cited *United Utensils*, but as noted, it is a chapter 11 case with a debtor in possession.

Trustee Allred also cited *Robb v. Sowers* (*In re Sowers*), 97 B.R. 480, 487 (Bankr. N.D. Ind. 1989), stating the court in *Sowers* sanctioned a chapter 7 debtors' attorney for counseling the debtors to ignore or affirmatively violate obligations imposed upon the debtors by § 521. While the trustee's summary is true, the court in *Sowers* relied on 28 U.S.C. § 1927 and Fed.R.Bankr.P. 9011 for imposing sanctions

on the debtors' attorney, not § 521(a)(3), and the court did not specifically hold the debtors' attorney had a duty under § 521(a)(3). *Id.* at 488-89.

In *In re Stinson*, 269 B.R. 172, 176-77 (Bankr. S.D. Ohio 2001), the third case cited by Trustee Allred in support of his allegations in count VII, the court held a chapter 7 debtor violated § 521(a)(3) and a local rule when she failed to turn over tax returns and tax refunds to the case trustee. The court jointly and severally entered a monetary judgment against the debtor and the debtor's attorney for the amount of the subject tax refunds. In entering the judgment against the debtor's attorney, the court said the attorney's lack of effective assistance to the debtor "contributed significantly to the errors of the [d]ebtor," noting the attorney had failed the debtor in three respects: (1) failing to appear at the meeting of creditors to counsel his client to comply with the trustee's request rather than spend the tax refunds; (2) failing to respond to two letters the trustee sent and failing to file any response to the trustee's subsequent motion for turnover; and (3) failing to provide adequate supervision of his legal associates. *Id*. The court in *Stinson* did not specifically hold the attorney himself had a duty under § 521(a)(3) or Fed.R.Bankr.P. 1007(h).

Trustee Allred next cited *Paloian v. Greenfield* (*In re Restaurant Dev. Group, Inc.*), 402 B.R. 282, 287 (Bankr. N.D. Ill. 2009), where, as noted by Trustee Allred, the court held "§ 521(a)(3) . . . sets forth a general open-ended duty of the [chapter 7] Debtor and, therefore, its officers to 'cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title.'" A

close reading of *Restaurant Development* and the cases cited therein, however, does not show the court imposed a duty on a *chapter 7* debtor's attorney under § 521(a)(3). The court in *Restaurant Development* held:

> "[A]n attorney for the debtor has a fiduciary duty not only to the debtor, but has a fiduciary obligation to act in the best interest of the entire estate, including creditors." *Agresti v. Rosenkranz* (*In re United Utensils Corp*.), 141 B.R. 306, 309 (Bankr. W.D. Pa. 1992) (citing *Wolf v. Weinstein*, 372 U.S. 633, 645-46, 83 S.Ct. 969, 10 L.Ed.2d 33 (1963) (additional internal citations omitted)). *See also In re Cochener*, 360 B.R. 542, 580 (Bankr. S.D. Tex. 2007) ("Not only does a debtor have a duty to cooperate with the Trustee, *see* 11 U.S.C. § 521(a)(3); counsel for the debtor, as an agent of the debtor, shares this duty to cooperate with the Trustee.") (citing *United Utensils*, 141 B.R. at 309). A debtor's counsel's duties under § 521 might include "the duty[ ] to inform the trustee if ... the debtor's agent refuses to follow the debtor's counsel's advice." *Parker v. Frazier* (*In re Freedom Solar Center, Inc*.), 776 F.2d 14, 17 (1st Cir. 1985). *See also United Utensils*, 141 B.R. at 309 ("If the debtor is not fulfilling *its* obligation to the estate, it is the responsibility and duty of Debtor's counsel to bring such matters to the attention of the court.").

*Restaurant Development*, 402 B.R. at 287-88 (emphasis in original). The Supreme Court opinion cited in *Restaurant Development* dealt with a reorganization case under the Bankruptcy Act. The *United Utensils* decision cited in *Restaurant Development* dealt with a chapter 11 case. In both these cases, the debtor was a debtor in possession. Consequently, these cases–and the bankruptcy cases citing *United Utensils* that were cited in *Restaurant Development*–offer limited support for Trustee Allred's contention that § 521(a)(3) imposed a duty on Attorney Arendt in this chapter 7 case, in which Debtor was not a debtor in possession.

The First Circuit Court of Appeals' opinion in *Freedom Solar Center*, which was cited in *Restaurant Development* and cited independently by Trustee Allred, also offers

limited support for Trustee Allred's allegations that § 521(a)(3) imposes a duty on Attorney Arendt. In *Freedom Solar Center*, the appellate court was presented with the issue of whether an attorney, under a particular conflict of interest rule from a state's code of professional responsibility, could represent both the corporate chapter 7 debtor and the corporate chapter 7 debtor's principal, who wanted to purchase the bankruptcy estate's assets. *Freedom Solar Center, Inc.*, 776 F.2d at 15-16. The court held the attorney could not represent both without violating the rule, noting an attorney for a chapter 7 corporate debtor may have "possibly the duty" to inform the trustee if the corporate debtor's principal refuses to follow the corporate debtor's counsel's advice. *Id*. at 17-18. Thus, *Freedom Solar Center* is not persuasive authority that an attorney for an *individual* chapter 7 debtor has an independent duty *under § 521(a)(3)* to cooperate with the case trustee. Accordingly, even when accepting all of Trustee Allred's allegations under count VII as true, count VII must be dismissed because the Court cannot conclude the allegations therein entitle Trustee Allred to the relief sought under § 521(a)(3) as a matter of law.

Count VIII.

In count VIII, entitled VIOLATION OF RULE 1007(h) OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE, Trustee Allred alleges Attorney Arendt had a duty under Fed.R.Bankr.P. 1007(h) to report the discovery of an asset of the bankruptcy estate within 14 days of discovery and this duty continued while Attorney Arendt represented Debtor in Debtor's bankruptcy case, while he represented Debtor in the

probate of his mother's estate, and while he represented Debtor's heirs in the probate of Debtor's probate estate. Trustee Allred further alleges Attorney Arendt's violation of this continuing duty under Rule 1007(h) damaged the bankruptcy estate by approximately $225,000.00[8] and also entitles him to appropriate sanctions.

Attorney Arendt asks the Court to dismiss this count because the rule does not impose a duty on a debtor's attorney to disclose newly acquired interests in property of the bankruptcy estate. He also argues any duty to disclose under § 541(a)(5) expires 180 days after the debtor's petition date. Attorney Arendt is partially correct.

Federal Rule of Bankruptcy Procedure 1007(h) provides:

> **Interests Acquired or Arising After Petition.** If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 14 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case, except that the schedule need not be filed in a chapter 11, chapter 12, or chapter 13 case with respect to property acquired after entry of the order confirming a chapter 11 plan or discharging the debtor in a chapter 12 or chapter 13 case.

Section 541(a)(5), which Rule 1007(h) references, provides:

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[8] Trustee Allred presumes Rule 1007(h) creates a private cause of action that would allow a trustee to recover damages for a violation of that rule. The Court disagrees, for the same reasons discussed in connection with § 521(a)(3). Were the Court not dismissing this count on other grounds, Trustee Allred would need to persuade the Court otherwise.

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> . . .
>
> > (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—
> >
> > > (A) by bequest, devise, or inheritance;
> > >
> > > (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or
> > >
> > > (C) as a beneficiary of a life insurance policy or of a death benefit plan.

Based on a plain reading of Rule 1007(h) and its statutory reference § 541(a)(5), they apply only to post-petition interests. Debtor's interest in his mother's probate estate arose pre-petition, when she died, S.D.C.L. § 29A-3-101.[9] Debtor did not acquire that interest post-petition or become entitled to acquire it post-petition, which is a prerequisite for the application of § 541(a)(5) or Rule 1007(h). *See, e.g., In re Haber*, 547 B.R. 252, 261 (Bankr. S.D. Ohio 2016). Further, Trustee Allred does not allege

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[9] Section 29A-3-101 of the South Dakota Codified Laws provides, in pertinent part:

> **Devolution of estate at death; restrictions.** . . . Upon the death of a person, that person's real and personal property devolves to the persons to whom it is devised by will . . . subject to homestead allowance, exempt property and family allowance, rights of creditors, elective share of the surviving spouse, and administration.

Debtor was unaware of this asset until after his bankruptcy case was filed. Thus, the Court is unable to conclude Rule 1007(h) imposes a duty on Debtor to report an asset that arose and was known to Debtor pre-petition.

The Court is unable to reach a different conclusion regarding Attorney Arendt. In count VIII, Trustee Allred has not alleged facts showing Attorney Arendt had a duty under Fed.R.Bankr.P. 1007(h). For purposes of this motion, the Court accepts as true Trustee Allred's allegation that Attorney Arendt was, through a telephone call from Bonnie London, made aware, more than a month before Debtor filed his petition, that Debtor's mother had died. Consequently, to the extent Attorney Arendt had any duty under Rule 1007(h), as Debtor's bankruptcy attorney, the rule does not apply to a pre-petition asset known to Attorney Arendt. Accordingly, since the trustee's allegations in count VIII are premised on an application of Rule 1007(h), that count must be dismissed.

Attorney Arendt's argument that the duty to disclose under § 541(a)(5) expires 180 days after the debtor's petition is filed is novel, to say the least. It is also incorrect.

In § 541(a)(5), the petition date and the 180th day thereafter are the beginning and ending points for bringing certain post-petition property into a chapter 7 bankruptcy estate; the statute does not cut off the debtor's duty to disclose a post-petition interest that arises within that 180 days. Attorney Arendt's argument finds no support in the language of either § 541(a)(5) or Rule 1007(h) or in case law. The

180-day reference in § 541(a)(5) governs only what interests must be disclosed, not when. Further, Rule 1007(h) clearly advises a chapter 7 debtor: "The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case[.]"

There is likewise little value to Attorney Arendt's argument that a reading of Rule 1007(h) other than his would require an attorney to follow a debtor for a lifetime to ensure necessary disclosures of certain post-petition property interests are made. Section 541(a)(5) establishes a finite period during which certain post-petition property is brought into a bankruptcy estate, and Rule 1007(h) directs a debtor to disclose that interest within 14 days of the debtor's gaining knowledge of it. A well-counseled chapter 7 debtor will not require his or her bankruptcy attorney's monitoring for a life-time.

IV.

An interim order will be entered granting Attorney Arendt's motion in part and denying it in part. The interim order will also schedule a second pre-trial conference to set, if needed, deadlines to complete discovery and file other dispositive motions and, if appropriate at this time, a trial date.

Dated: May 26, 2021.

BY THE COURT:

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. 15-30018 |
| | ) | Chapter 7 |
| WARREN BOYD DOZIER | ) | |
| SSN/ITIN xxx-xx-2564 | ) | |
| | ) | |
| Debtor. | ) | |
| | ) | |
| FORREST C. ALLRED, IN HIS | ) | Adv. No. 20-3006 |
| CAPACITY AS CHAPTER 7 TRUSTEE | ) | |
| | ) | |
| Plaintiff | ) | |
| -vs- | ) | INTERIM ORDER DISMISSING |
| | ) | CERTAIN COUNTS AND SETTING |
| ALOYSIUS ARENDT | ) | SECOND PRE-TRIAL CONFERENCE |
| aka Al Arendt | ) | |
| | ) | |
| Defendant. | ) | |

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

IT IS HEREBY ORDERED Defendant Aloysius Arendt's Motion to Dismiss Counts I, II, II, V, VII, and VIII of the Adversary Complaint (doc. 27) is granted in part and denied in part, and counts I, II, V, VII, and VIII of Trustee-Plaintiff Forrest C. Allred's First Amended Complaint (doc. 21) are dismissed.

IT IS FURTHER ORDERED a second pre-trial conference will be held June 10, 2021 at 11:45 a.m. (Central) with counsel for both parties. The Court will initiate the call. During the conference the Court will set, if needed, deadlines to complete discovery and file other dispositive motions and, if appropriate at this time, a trial date.

So ordered: May 26, 2021.

BY THE COURT:

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