

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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September 13, 2000

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Subject: *Cleo C. Havlovic v. Michael R. Havlovic*
(*In re Michael R. Havlovic*),
Adversary No. 00-4019;
Chapter 7; Bankr. No. 98-40602

Dear Counsel:

The matter before the Court is Plaintiff-Debtor's complaint under 11 U.S.C. § 523(a)(5) and Defendant's counter-claim under 11 U.S.C. § 523(a)(15). The issue presented is the timeliness of Defendant's counterclaim under 11 U.S.C. § 523(a)(15). This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision, accompanying order, and subsequent judgment shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As discussed below, the Court concludes that Defendant's counterclaim under § 523(a)(15) is untimely and that judgment must be entered for Plaintiff-Debtor.

SUMMARY OF MATERIAL FACTS. Cleo C. Havlovic and Michael R. Havlovic were divorced in July 1997. Under an agreement incorporated into the decree, Cleo Havlovic obtained sole title to the family home in Renner and assumed the debt on it. The debt included two mortgages and the underlying notes. Under the agreement, Cleo Havlovic agreed to hold Michael Havlovic harmless on the notes and mortgages. Cleo Havlovic continued to reside in the Renner home. Michael Havlovic gave Cleo Havlovic a quit claim deed on July 15, 1997. The deed was recorded July 24, 1997.

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A year later, Cleo Havlovic ("Debtor") filed a Chapter 7 petition in bankruptcy. The petition stayed a foreclosure action by Mercantile Bank, the primary mortgage holder on her home, and a small claims action against her arising from a car accident. The petition also stayed a state court enforcement action by Michael Havlovic against her. Debtor did not list Michael Havlovic as a creditor or include him on the case mailing list, but he had notice of the bankruptcy filing. The deadline to file a dischargeability complaint under § 523(c) was set for November 3, 1998.

In her schedule of real property, Debtor listed the home in Renner and said she was a co-owner. She failed, however, to identify that co-owner on her schedules or statement of financial affairs. She valued the home at \$55,000 and stated there was a secured claim of \$22,443 against it. She declared a \$30,000 homestead exemption. On her schedule of secured creditors, she listed Mercantile Bank and Norwest Mortgage together as holding a mortgage for \$22,443. She also listed Universal Assurors as holding a mortgage for \$9,800. Each was considered fully secured. She listed "Mike" Havlovic as a co-debtor on these two claims.

On September 3, 1998, Mercantile Bank sought relief from the automatic stay to continue the foreclosure action. It also sought abandonment of the bankruptcy estate's interest in the home. An agreed order was entered December 2, 1998. Under the order, Mercantile Bank agreed to give Debtor 60 days to cure the mortgage arrearage. Debtor failed to do so. On April 12, 1999, Mercantile Bank was granted relief from the automatic stay and the bankruptcy estate abandoned its interest in the home.

On July 9, 1999, Debtor sold the Renner home to a realtor for \$40,000, which was less than the appraised value. The sale resulted in a release of both mortgages, but Universal Assuror's underlying note was not extinguished. The realtor leased the home back to Debtor with an option to buy. Universal Assurors then looked to Michael Havlovic to pay the balance of \$5,402.01 due on the note.

Debtor received her discharge of debts on November 4, 1998. The trustee did not find any non exempt assets to liquidate to pay creditors. The case was closed on May 24, 1999.

On May 11, 2000, Michael Havlovic renewed his efforts in state court to make Debtor pay the balance due on the Universal Assuror's note. He claimed her actions in selling the home for less than fair market value and leaving him "holding the bag" on the balance of the Universal Assurors' note was

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willful and contumacious in disregard of her obligation under the divorce decree. [Debtor] could have paid this debt in full when she sold the house but negotiated a deal to stick [Michael Havlovic] with the debt by releasing the mortgage without releasing the note. All of this was made possible by the fact that [Michael Havlovic] was ordered to quit claim the property to Defendant in the Divorce Decree, which allowed [Debtor] to alienate the property by satisfying the mortgages without discharging the underlying debt instruments. [Debtor] has thus willfully and maliciously perpetrated a fraud upon the Court at [Michael Havlovic]'s expense.

Michael Havlovic asked the state court to find Debtor in contempt and jail her. He also asked the state court to order her to pay the debt and hold him harmless or, in the alternative, he asked to be given a judgment against Debtor for \$5,500 plus attorneys' fees and costs.

On June 19, 2000, Debtor commenced an adversary proceeding before this Court under 28 U.S.C. § 523(a)(5). She wanted a declaration that her obligation to hold Michael Havlovic harmless on the home mortgages was discharged in her bankruptcy and that the debts to him were not excepted from her general discharge under § 523(a)(5). In his answer, Michael Havlovic agreed that the debts were not excepted from discharge under § 523(a)(5). He counterclaimed, however, that the debts were excepted from discharge under § 523(a)(15). He restated much of the argument set forth earlier in his state court action.

A pre-trial conference was held September 5, 2000 with counsel for both parties. The issue discussed was the timeliness of Michael Havlovic's counterclaim.

DISCUSSION. Under F.R.Bankr.P. 4007(c), the deadline for filing a complaint objecting to the dischargeability of a particular debt under §§ 523(a)(2), (4), (6), or (15) is "no later than sixty days after the first date set for the meeting of creditors under § 341(a)." In this Circuit, this deadline is akin to a statute of limitations and must be strictly enforced unless a timely extension is obtained under Rule 4007(c). *KBHS Broadcasting Co. v. Sanders (In re Bozeman)*, 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998); *In re Walgamuth*, 144 B.R. 465, 467-68 (Bankr. D.S.D. 1992) (citing several cases therein). The deadline can be extended only through the procedure established in Rule 4007(c). Fed.R.Bankr.P. 9006(b)(3).

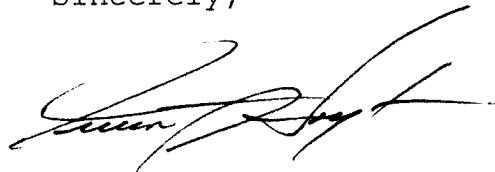
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In this bankruptcy case, the deadline to file a complaint under § 523(a)(2), (4), (6), or (15) was November 3, 1998. Michael Havlovic did not timely seek an extension of that deadline and he did not file his counterclaim under § 523(a)(15) before that deadline. Thus, his counterclaim must be dismissed. Further, since Michael Havlovic has conceded that the subject debts are not excepted from discharge under § 523(a)(5), judgment must be entered for Debtor in this adversary.

The Court brings to the parties' attention one caveat. The acts of which Michael Havlovic complains - - Debtor's sale of the home for less than fair market value and her deal with the Universal Assurors that left a balance due on the note - - occurred post-petition. If those actions created a new, post-petition cause of action, then it is possible that this new cause of action was not discharged. To prevail, Michael Havlovic would have to identify that post-petition cause of action and its source in law. He would also have to demonstrate how that post-petition cause of action was not a contingent claim subsumed by Debtor's pre-petition hold-harmless obligation that has been discharged. This adversary complaint under § 523(a)(5) and counterclaim under § 523(a)(15) do not address these issues and the Court gives no opinion on them.

Attorney Cummings shall prepare an appropriate judgment in compliance with this letter decision and order.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; serve copies on parties in interest)

Case: 00-04019 Form id: 122 Mtc Date: 09/13/2000 Off: 4 Page : 1
Total notices mailed: 3

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