**UNITED STATES BANKRUPTCY COURT**
**WESTERN DISTRICT OF NEW YORK**

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**In re:**

**HECTOR RODRIGUEZ,** **BK. NO. 92-23388**

**Debtor.**

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**MICHAEL CLARY, Individually and d/b/a MCS REPRESENTATIVES,**

**Plaintiff,**

**vs.** **AP NO. 93-2076**

**HECTOR RODRIGUEZ,**

**Defendant.**

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## BACKGROUND

On December 12, 1992, the debtor, Hector Rodriguez, (the "Debtor") filed a voluntary petition initiating a Chapter 7 case, and on February 12, 1993, a Section 341 meeting of creditors was held. On April 13, 1993, the last date set by the Court for filing complaints to determine the dischargeability of debts pursuant to Section 523(c), the plaintiff, Michael Clary, ("Clary") by his attorney filed a complaint (the "Complaint") seeking a determination by the Court that, pursuant to Sections 523(a)(2)(A), 523(a)(4) and 523(a)(6) of the Bankruptcy Code, the indebtedness owed to him by the Debtor was not dischargeable.

The Complaint alleged that from February 20, 1989 through October, 1990 Clary had made $409,500 in loans to the Debtor and Rochester Business Development Corporation ("Rochester

Development") and Alexis Bradford Corporation ("Alexis Bradford")[1], corporations solely owned and operated by the Debtor, with the understanding that the loan proceeds would be used only in furtherance of the business pursuits of those corporations. Clary further alleged that the Debtor advised him that he was continuously receiving funds from Europe as a result of his arbitraging of bank instruments through Rochester Development. The Complaint also alleged that notwithstanding the understanding as to how the loan proceeds were to be used, much of the money loaned to the Debtor's corporations was transferred to his personal accounts and used for his personal expenses and obligations, and that the Debtor never received any funds from Europe through his alleged arbitraging of bank instruments or any other activities. Clary asserted that these statements were known by the Debtor to be false when made, were made with the intent to deceive and defraud him and to induce him to rely on them so that the loans would be made, and they were in fact relied on by him.

A summons was issued on April 14, 1993, and on April 16, 1993, service was made upon the Debtor, Alexis Bradford, Rochester Development, the United States Trustee, and the attorney for the Debtor.

On April 28, 1993, the attorney for the Debtor filed a motion (the "Motion to Dismiss") returnable May 12, 1993 pursuant to: Bankruptcy Rule 7009 for a more definite statement of the alleged fraud, false representations, defalcation, embezzlement, larceny, and willful and malicious injury averred to in the Complaint; Bankruptcy Rule 7012 to dismiss the Complaint as against any corporate defendants for lack of jurisdiction and insufficiency of process; and Bankruptcy Rule 7056 to dismiss the Complaint for failure to state a claim upon which relief can be granted. The Debtor

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[1] However, in a February 12, 1993 Amendment to his schedules, the Debtor appears to have acknowledged this indebtedness to be a personal loan.

alleged that Clary did not state facts supporting his claim of fraud with particularity nor did he state facts sufficient for the claimed causes of action under Sections 523(a)(4) and 523(a)(6). The Debtor further alleged that Clary served him individually and as an officer of Rochester Development, Baybreeze Center Corporation, Coron Inc., and Alexis Bradford, but did not name any of the corporations as defendants in the Complaint. The Debtor argued that the Court lacked jurisdiction over the corporate defendants and that process and service of process were insufficient because no summons had been issued in the name of the corporate defendants on whose behalf service had been attempted.

On May 10, 1993, Clary filed a response and a cross-motion to be permitted to amend his Complaint and add a cause of action under Section 523(a)(2)(B).

At the hearing on May 12, 1993, the Court heard both the motion and cross-motion, granted the motion for a more definite statement and allowed Clary twenty days to amend the Complaint to plead with particularity the alleged causes of action pursuant to Sections 523(a)(2)(A), 523(a)(4) and 523(a)(6) and to specify in the amended complaint that the causes of action alleged were only against the Debtor and not his related corporations (this relief was later set forth in an Interim Order). The Court also requested that the parties file memorandums of law prior to a June 9, 1993 adjourned hearing on the issue of whether Clary should be allowed to amend the Complaint to add a cause of action under Section 523(a)(2)(B).[2] The attorney for the Debtor made a motion returnable on the

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[2] Section 523(a)(2) of the Bankruptcy Code provides:

(a) A discharge under Section 727, 1141, 1228(b), or 1328 of this title does not discharge an individual debtor from any debt --

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by --

June 9, 1993 adjourned date to reargue the relief granted in the Interim Order, and Clary filed opposition to the motion. However, at the June 9, 1993 adjourned hearing, the parties agreed on the record in open court that Clary would withdraw the cause of action pursuant to Section 523(a)(6) and could replead with particularity his causes of action pursuant to Sections 523(a)(2)(A) and 523(a)(4). The court then reserved on whether Clary could amend his Complaint to add the cause of action pursuant to Section 523(a)(2)(B) and have it relate back to the date of the filing of the Complaint. A stipulation incorporating this relief was entered into by the parties and signed by the Court on July 6, 1993.

The proposed amended complaint (the "Amended Complaint"), filed on behalf of Clary on June 4, 1993, states specific documents[3] that Clary allegedly received from the Debtor to demonstrate that Rochester Development and Alexis Bradford had been and were involved in substantial commercial

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> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;
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> (B) use of a statement in writing --
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> (i) that is materially false;
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> (ii) respecting the debtor's or an insider's financial condition;
> (iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and
> (iv) that the debtor caused to be made or published with intent to deceive.

[3] "The Companies of Hector Rodriguez," "Rochester Business Development Corporation Overview," "Rochester Business Development Corporation Development Proposal," and "Coron, Inc., A Proposal for Funding."

and residential construction projects which formed the basis for much of what Clary relied on in making loans to the Debtor and these corporations. Clary states more specifically in the Amended Complaint that the Debtor in connection with the loan transactions advised him that he owned several corporations, that these corporations were involved in development and construction contracts and then bolstered this through the documents which he provided. However, Clary further alleges that these statements were false representations since the projects were owned by others, did not involve Rochester Development, did not exist, or were owned by the Debtor personally.

**DISCUSSION**

The issue before the Court is whether Clary may amend the Complaint to include an additional cause of action pursuant to Section 523(a)(2)(B) and have it relate back to the date of the filing of the Complaint which was timely filed pursuant to Rule 4007.

Bankruptcy Rule 7015 incorporates Rule 15 of the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 15(a) provides:

> Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

The allowance or denial of amendments to pleadings under Bankruptcy Rule 7015 and by incorporation Federal Rule of Civil Procedure 15 is within the discretion of the trial court. Zenith

Radio Corp. V. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971). The Federal Rules of Civil Procedure provide that amendments to pleadings be liberally granted. In re Tester, 56 B.R. 208, 210 (W.D.Va. 1985). In the absence of undue delay, bad faith, dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment or futility of the amendment, the leave to amend should be "freely given" by the court. Foman v. Davis, 371 U.S. 178, 181-182 (1962).

Even if Clary is allowed to amend his Complaint, however, it is necessary for the amendment to be allowed to relate back to the original filing since the time for filing nondischargeability complaints under Sections 523(a)(2) and 523(c) expired on April 13, 1993, before the request for the amendment.

The deadline for filing complaints to determine dischargeability of a debt under Section 523(c) is governed by Bankruptcy Rule 4007. This rule provides,

> a complaint to determine the dischargeability of any debt pursuant to §523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to §341(a). . . On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

The 60-day period following the first date set for the meeting of creditors is not phrased as a statute of limitations but functions as such. In re Barnes, 96 B.R. 833, 836 (Bankr. N.D.Ill. 1989). The deadline protects debts from post-discharge harassment by creditors claiming that their debts are not dischargeable on grounds of fraud. Id. at 837; In re Figueroa, 33 B.R. 298, 300 (Bankr. S.D.N.Y. 1983). Because of this, for creditors who have missed the deadline and seek untimely extension of their time to object to discharge, the deadline has been described as being "set in stone." Barnes, 96 B.R. at 837. Despite the harsh results, the court has no discretion to extend the deadline. Id. The rigid adherence to the deadline is based on the fact that Bankruptcy Rules 4007(c) and 9006(b)(3) reflect a considered determination that a final cut off date insuring debtors will be free

after a date certain outweighs the individual hardship to creditors. In re Klein, 64 B.R. 372, 375 (Bankr. E.D.N.Y. 1986).

In this case, the Complaint was filed the day of the deadline, and no motion for an extension of time to file a complaint was made before the April 13, 1993 deadline. Therefore, if the amendment to add a cause of action pursuant to Section 523(a)(2)(B) is to be considered timely, the amendment must be allowed to relate back to the filing of the Complaint.

Federal Rule of Civil Procedure 15(c) provides:

> An amendment of a pleading relates back to the date of the original pleading when
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> > (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
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> > (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . .

Since in this case the relation back is not provided for by law, the amendment must fall under Rule 15(c)(2) to be allowed to relate back, and therefore, the cause of action must be found to arise out of the conduct, transaction or occurrence set forth in the original pleading. "The inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading." Rosenberg v. Martin, 478 F.2d 520, 526 (2d Cir. 1973), cert. denied, 414 U.S. 872 (1973).[4] As the Bankruptcy Appellate Panel for the Ninth Circuit has said

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[4] The Memorandum of Law filed on behalf of the Debtor states, "The real test to be applied is whether the original pleading gives notice to the defendant of the facts and cause of action to be enunciated in the amendment."

In this regard the April 27, 1993 Motion to Dismiss on behalf of the Debtor at paragraph 1 states:

> The complaint in this matter alleges that Defendant has committed

in the case of In re Dean,

> The basic test is whether the evidence with respect to the second set of allegations could have been introduced under the original complaint, liberally construed; or as a corollary, that in terms of notice, one may fairly perceive some identification or relationship between what was pleaded in the original and amended complaints.

11 B.R. 542, 545 (9th Cir. BAP 1981), aff'd, 687 F.2d 307 (9th Cir. 1982). While it is still the rule that an amendment which states an entirely new claim for relief based on different facts will not relate back, if a pleading indicates sufficiently the transaction or occurrence on which the claim is based, the amendments which correct the specific factual details will relate back. 3 Moore's Federal Practice ¶15.15[3], pp. 15-198 to -208. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957).

In this case there is no indication of bad faith, undue delay or dilatory motive on the part of Clary. His request to amend his Complaint has been made in the early stages of this adversary proceeding (there has not been a pretrial, an answer by the defendant,[5] or the opportunity for discovery). These factors, as well as a lack of undue prejudice to the Debtor, indicate that leave to amend should be freely given in this case in the interests of justice.

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> fraud in that he obtained money, extensions, renewals or refinancing credit by false pretenses, false representation, or actual fraud or by use of a statement in writing which was materially false respecting the Debtor or an insider's financial condition upon which Plaintiff relied made with the intent to deceive, that he committed fraud or defalcation while acting in a fiduciary capacity or committed embezzlement or larceny and that he caused willful and malicious injury to Plaintiff pursuant to 11 U.S.C. §523(a)(2), (4) & (6). (Debtor's Motion to Dismiss at 1) (emphasis added).

[5] An answer was filed by the defendant after the Court reserved on this matter on July 16, 1993.

As to whether the new cause of action pursuant to Section 523(a)(2)(B), which is based on certain written documents (*See infra* Footnote 2), arises out of the same conduct, transactions or occurrences as set forth in the Complaint, it appears that these documents were given to Clary as part of the negotiations for the loans alleged in the Complaint. The Complaint alleges that these loans were made based on false representations, false pretenses and actual fraud by the Debtor. Clary is simply asserting that the false representations and fraud in connection with the loans fit under Section 523(a)(2)(B) as well as under Section 523(a)(2)(A) since some of the representations were written and involved financial matters.

The Complaint and the proposed Amended Complaint involve the same loan transactions and alleged false representations and fraud which the Debtor was put on notice of by the Complaint. Clearly the Debtor was fully aware by the Complaint (and perhaps otherwise)[6] of the transactions in issue, and he knew that he provided the documents described in the Amended Complaint in connection with those loan transactions. It appears that Clary is merely asking to include a cause of action under a different subsection of Section 523(a)(2) which deals with the Debtor's alleged obtaining of money from Clary by false representations and fraud, rather than attempting to include an unrelated cause of action under another subsection of Section 523(a).[7]

In this case, the Court will allow the requested amendment since it has been made in the early stages of the adversary proceeding, there is no showing of bad faith, undue delay or dilatory motive

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[6] The Cross-Motion on behalf of Clary also alleges postpetition discussions with the Debtor about the repayment of these loans.

[7] The Court is not making a finding, however, that the documents involved or that the facts alleged by Clary in the Amended Complaint do state a cause of action under Section 523(a)(2)(B). Debtor argues that the documents in question were mere projections and thus not statements respecting the Debtor's financial condition. However, at least one court has held that statements respecting financial condition denote a person's overall ability to generate income. *In re Mercado*, 144 B.R. 879, 885 (Bankr. C.D.Cal. 1992).

on the part of Clary in not originally including the cause of action under Section 523(a)(2)(B), and since there is no undue prejudice to the Debtor because he had sufficient notice of the transactions and occurrences involved from the Complaint, the amendment will relate back to the date of the filing of the Complaint on April 13, 1993.

**CONCLUSION**

The court in its discretion will allow the plaintiff, Michael Clary, to amend his Complaint to add a cause of action under Section 523(a)(2)(B), and the amendment in accordance with the provisions of Rule 7015 of the Rules of Bankruptcy Procedure and Rule 15 of the Federal Rules of Civil Procedure will relate back to the filing of the original Complaint on April 13, 1993.

**IT IS SO ORDERED.**

**/s/**
**HON. JOHN C. NINFO, II**
**U.S. BANKRUPTCY COURT JUDGE**

**DATED: September 30, 1993**