

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

MICHAEL S. MARLIN,

Debtor.

CASE NO. 03-23073

DECISION & ORDER

UNITED STATES TRUSTEE,

Plaintiff,

v.

AP NO. 04-2168

MICHAEL S. MARLIN,

Defendant.

BACKGROUND

On July 23, 2003, Michael S. Marlin (the "Debtor") filed a petition initiating a Chapter 7 case.

On or about August 11, 2003, a Notice of Chapter 7 Bankruptcy Case Meeting of Creditors & Deadlines Notice (the "Deadlines Notice") was sent to all of the Debtor's creditors and other parties in interest, including the Office of the United States Trustee (the "UST"). The Deadlines Notice advised the recipients that November 3, 2003 was the deadline (the "Discharge Complaint Bar Date") to file a complaint objecting to the discharge of the

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Debtor or a complaint to determine the dischargeability of any particular debt.

On November 10, 2003, the Court signed and entered an Order (the "Discharge Order") which stated that, "The debtor is granted a discharge under Section 727 of title 11, United States Code, (the Bankruptcy Code)."

On November 9, 2004, the UST filed a Complaint (the "Revocation Complaint") seeking the revocation of the Debtor's discharge. The Complaint, filed pursuant to Section 727(d)(1),¹ asserted that: (1) the Debtor's discharge should be revoked because he had concealed and failed to include on his schedules a number of material assets and earned income, and he had also undervalued a number of scheduled assets; and (2) the UST did not become aware of the Debtor's fraud until September 2004, after the Discharge Order was entered on November 10, 2003.

¹ Section 727(d)(1) provides that:

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if-

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge[.]

11 U.S.C. § 727 (2005).

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On January 25, 2005, the Debtor filed a Motion (the "Dismissal Motion"), which asserted that the Court should dismiss the Revocation Complaint because: (1) the Debtor's right to a discharge became final on November 3, 2003, the Discharge Complaint Bar Date, since no creditor or party in interest had filed a discharge complaint by that date; (2) Rule 4004(c)(1)² provides that once the Discharge Complaint Bar Date has passed, "The court shall forthwith grant the discharge . . . "; (3) in this case, the Court failed to comply with Rule 4004(c)(1) when it entered the Discharge Order on November 10, 2003, seven days after the Discharge Complaint Bar Date; (4) in accordance with the holding of the United States Court of Appeals, Ninth Circuit, in *In re Dietz*, 914 F.2d 161, 163-164 (9th Cir. 1990) ("*Dietz*"), the Court should find that the Debtor's discharge was effective and deemed granted for purposes of Section 727(e)(1)³ on November 3, 2003 (the "Discharge Deemed Granted

² Rule 4004(c)(1) provides, in part, that:

(c) Grant of discharge.

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss that case under Rule 1017(e), the court shall forthwith grant the discharge unless:

Fed. R. Bankr. P. Rule 4004 (2005).

³ Section 727(e)(1) provides that:

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

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Date”), after no complaints were filed to object to the Debtor’s discharge or the dischargeability of any of his debts; and (5) the Revocation Complaint filed on November 9, 2004, was not filed within the year required by Section 727(e)(1) because it was not filed within a year of the November 3, 2003 Discharge Deemed Granted Date.

The Motion to Dismiss further set forth a number of arguments designed to persuade the Court that it should not follow the decision of the United States Court of Appeals, Second Circuit (the “Second Circuit”), in *In re Emery*, 132 F.3d 892, 897 (2nd Cir. 1997) (“*Emery*”), which held that in future cases involving a gap period between the Discharge Complaint Bar Date and the actual entry of a Discharge Order, the 727(e)(1) statute of limitations would run from the actual date of discharge.

On February 9, 2005, the UST interposed a Response to the Motion to Dismiss which asserted that: (1) *Emery* clearly held that the one-year period under Section 727(e)(1) ran from the date that the Bankruptcy Court entered an order granting the debtor a discharge, not from the Discharge Complaint Bar Date; and (2)

(1) under subsection (d)(1) of this section within one year after such discharge is granted[.]

11 U.S.C. § 727 (2005).

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Collier on Bankruptcy, agreed with the holding of the Second Circuit in *Emery*, stating that the one-year statute of limitations "begins to run from the date of the entry of the order of discharge" L. King, 6 Collier on Bankruptcy, § 727.16[1] at 727-78 (15th ed. 1998)

DISCUSSION

The Court finds that the Revocation Complaint was timely filed for the following reasons:

1. Section 727(a)⁴ provides that unless certain facts or circumstances exist, the Court shall "grant" the debtor a discharge. This clearly requires an affirmative act on the part of the Bankruptcy Court.
2. Even Rule 4001(c)(1), which the Debtor so heavily relies upon, does not provide that a discharge shall automatically come into existence upon the expiration of the Discharge Complaint Bar Date. Rather, the Rule requires the Court to take an affirmative act to grant the debtor a discharge forthwith.

⁴ Section 727(a) provides, in part, that:

(a) The court shall grant the debtor a discharge, unless—

11 U.S.C. § 727 (2005).

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3. Taken together then, Section 727(a) and Bankruptcy Rule 4001(c)(1) clearly require an affirmative act on the part of the Bankruptcy Court for the Debtor to be "granted" a discharge.
4. If Congress or the United States Supreme Court had wished a debtor's discharge to be automatic upon the expiration of the Discharge Complaint Bar Date, Congress could have easily enacted Section 727(a) to specifically provide that, and the Supreme Court could have enacted Rule 4001(c)(1) to provide the same.
5. Section 727(e)(1) was also enacted by Congress to provide for a one-year statute of limitations period that specifically runs from the time a discharge is "granted." This was yet another opportunity for Congress to make a debtor's discharge automatic upon the expiration of the Discharge Complaint Bar Date, as urged by the Debtor, or to specifically make the statute of limitations period for the filing of a Section 727(d)(1) Discharge Revocation Complaint began to run from that date. However, Congress chose not to, and clearly and unambiguously provided that the one-year statute of limitations period runs from the date that the Court "granted" a debtor a discharge.

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6. The one-year statute of limitations period that runs from the date that the Bankruptcy Court "granted" a debtor a discharge, as set forth in Section 727(e)(1), is clear and unambiguous. As a result, in this Court's view, it would be the only date that a party which believed that it had grounds to file a Discharge Revocation Complaint would or should have to look to for purposes of determining when the complaint must be filed. This is especially true when: (a) that statutory provision is read together with Section 727(a), Section 727(d)(1) and Rule 4001(c)(1), all of which specifically contemplate that the Court will take an affirmative act to "grant" a debtor a discharge; and (b) in this Debtor's case, the Discharge Order specifically "granted" the Debtor a discharge.
7. In this case, unlike the Bankruptcy Court in *Dietz* which never entered a Discharge Order, the Court granted the Debtor a discharge "forthwith" and within seven days after the expiration of the Discharge Complaint Bar Date.
8. The Second Circuit in *Emery* clearly held that the one-year statute of limitations period provided for by Section 727(e)(1) would begin to run from the date that the Bankruptcy Court actually granted the debtor a discharge, and this Court

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does not have the authority to enter a decision or order inconsistent with that holding.

9. Notwithstanding that policy concerns are not relevant when there is a clear and unambiguous statute like Section 727(e)(1), to the extent that: (a) there is a gap period between the expiration of the Discharge Complaint Bar Date and the actual date that a Bankruptcy Court grants a debtor a discharge; and (b) should a Court believe that when the provisions of Section 727 and Rule 4004(c)(1) are read together it results in ambiguity, as discussed by the Second Circuit in *Emery*, there is no reason why that Statute and Rule should be interpreted to afford any immunity to a possibly dishonest debtor, one who may have defrauded the very Bankruptcy Court that entered an order granting a discharge by failing to schedule and otherwise concealing assets.
10. Notwithstanding the Debtor's creative policy, statutory and decisional law interpretations and arguments, neither the United States Supreme Court nor the Second Circuit has ever held that the one-year statute of limitations period provided for by Section 727(e)(1) runs from the Discharge Complaint Bar Date.

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CONCLUSION

The Motion to Dismiss is in all respects denied. The parties shall engage in voluntary discovery and an adjourned pretrial shall be held on May 19, 2005 at 10:00 a.m., or an adjourned date convenient for the parties and the Court.

IT IS SO ORDERED.

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

Dated: March 16, 2005