Not For Publication

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	CASE NO.	03-35050 (LMW)
BRIAN T. MACDOUGALL,	CHAPTER	7
DEBTOR.		
ELECTRICAL & SECURITIES TECHNOLOGIES, LLC and SEAN DICKERSON,	ADV. PRO. NO.	04-3072
	DOC. I.D. NO.	10
PLAINTIFFS		
vs.		
MICHAEL J. DALEY, Trustee, and BRIAN T. MACDOUGALL,		
DEFENDANTS.		

APPEARANCES

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MEMORANDUM OF DECISION

Lorraine Murphy Weil, United States Bankruptcy Judge

This matter raises the issue of, among other things, the above-referenced plaintiffs' (collectively, the "Plaintiffs") alleged right to injunctive relief in respect of a certain non-compete clause in a prepetition agreement between the above-referenced debtor (the "Debtor") and plaintiff Sean Dickerson ("Mr. Dickerson"). The court has jurisdiction over this adversary proceeding as a core proceeding under 28 U.S.C. §§ 157 and 1334 and that certain Order dated September 21, 1984 of the District Court (Daly, C.J.).[1] This memorandum constitutes the findings of fact and conclusions of law required by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

I. PROCEDURAL BACKGROUND

This chapter 7 case was commenced by the Debtor's filing of a voluntary petition on October 10, 2003 (the "Petition Date"). On October 15, 2003, the Clerk's Office issued a certain Notice of First Meeting of Creditors (Case Doc. I.D. No. 2)[2] which notice established January 6, 2004 (the "Bar Date") as the last date for filing complaints seeking a determination of nondischargeability under Bankruptcy Code §§ 523(a)(2), 523(a)(4) and 523(a)(6).[3] On January 7, 2004, the chapter 7 trustee (the "Trustee") filed a report (Case Doc. I.D. No. 11) certifying that he had concluded that there were no assets to administer for the benefit of the creditors of this estate. The Debtor received his chapter 7 discharge on February 11, 2004. (*See* Case Doc. I.D. No. 14, the "Discharge.")

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[1] That order referred to the "Bankruptcy Judges for this District" "all cases under Title 11, U.S.C., and all proceedings arising under Title 11, U.S.C., or arising in or related to a case under Title 11 U.S.C. . . . ."

[2] References to the docket of this Chapter 7 case appear in the following form: "Case Doc. I.D. No. ___." References herein to the docket of Adversary Proceeding No. 04-3004 (the "First Proceeding") appear in the following form: "First A.P. Doc. I.D. No. ___." References herein to the above-captioned adversary proceeding (the "Second Proceeding") appear in the following form: "Second A.P. Doc. I.D. No. ___."

[3] *See* 11 U.S.C. § 523(c); Fed. R. Bankr. P. 4007(c).

The First Proceeding was commenced by the Plaintiffs by a complaint (First A.P. Doc. I.D. No. 1, the "First Complaint") filed on the Bar Date. The First Complaint alleged that prepetition the Debtor had converted "approximately $3,800.00 from a customer of the [P]laintiffs . . . [paid] as a payment for services rendered by [Electrical & Securities Technologies LLC ("ESTEC")]. . . ." (First Complaint ¶ 4.a.) The First Complaint sought a declaration that such conversion debt was nondischargeable under Bankruptcy Code § 523(a) and further sought a money judgment. (First Complaint at 2.) A court's motion to dismiss the First Proceeding for failure to file a pre-trial order was issued on March 30, 2004. (*See* First A.P. Doc. I.D. No. 6.) The Plaintiffs filed a motion (First A.P. Doc. I.D. No. 9) to extend the time to file a pretrial order, but that motion was denied for failure to prosecute by order (First A.P. Doc. I.D. No. 12) dated April 29, 2004. An order dismissing the First Proceeding was entered that same day. (*See* First A.P. Doc. I.D. No. 13.)

On October 30, 2003, the Plaintiffs filed a Motion for Relief from Stay (*See* Case Doc. I.D. No. 5, the "R/S Motion.") The R/S Motion alleged in relevant part as follows:

> 4. On the date of the filing of the petition the debtor was the defendant in a case pending in the Superior Court for the State of Connecticut, Judicial District of New London, at New London, Electrical & Securities Technologies, LLC, et al. v. Brian T. MacDougall, Docket Number: CV-03-0567127 [the "State Court Action"].
>
> 5. Such action sought in addition to money damages, an injunction, both temporary and permanent, as to certain acts by the petitioner, Brian T. MacDougall.
>
> 6. A hearing on a motion for a temporary injunction was scheduled to be heard on October 14, 2003.
>
> 7. Pursuant to 11 U.S.C. Section 362(a) a stay was ordered by the Bankruptcy Court as to the commencement or continuation of certain acts and proceedings against the Debtor.
>
> 8. The movants intend, subject to the permission of the Bankruptcy Court, and Superior Court, to amend their complaint to add a count alleging that the

defendant willfully and maliciously converted assets belonging to them. Please see attached proposed amended complaint [the "Proposed Amended Complaint"] [for the pending State Court Action].

9. Such additional count, if proved, would not be dischargeable under Section 523.

10. The movants file this motion so that they might continue the action for a permanent and temporary injunction, and/or to commence an action against the defendant for willful and malicious conversion, and if not permitted to do so will not be adequately protected and will suffer irreparable injury, loss and damage.

The Proposed Amended Complaint was organized in six counts as follows:

- First Count: (Injunction)
- Second Count: (Conversion) with respect to the same events as alleged in the First Proceeding
- Third Count: (Interference with Business Expectations)
- Fourth Count: (Breach of Contract)
- Fifth Count: (CUTPA)
- Sixth Count: (Willful and Malicious Conversion) with respect to the same events as alleged in the First Proceeding

The Proposed Amended Complaint sought injunctive relief and compensatory and punitive damages.

A hearing (the "R/S Hearing") on the R/S Motion was held on January 7, 2004. At the R/S Hearing, counsel for the Plaintiffs stated that they sought relief from stay only with respect to the First and Sixth Counts of the Proposed Amended Complaint. (Audio Record at 2:06:34 - 2:06:55.)[4] The court orally ruled at the R/S Hearing that the R/S Motion was denied as to the Sixth Count of the Proposed Amended Complaint but took under advisement the issue with respect to the "First

[4] References to the audio record of the R/S Hearing appear in the following form: "Audio Record at ____."

Count: (Injunction)." (Audio Record at 2:11:00 - 2:11:52.) That matter was taken under advisement subject to post-hearing briefing by the parties. The Discharge was issued while the R/S Motion was *sub judice.* That event rendered the R/S Motion technically moot because the automatic stay then ceased to exist in relevant part. *See* 11 U.S.C. § 362(c). The court noted the foregoing in that certain Sua Sponte Order Setting Deadline for Commencement of Adversary Proceeding (Case Doc. I.D. No. 19, the "Sua Sponte Order") issued on March 30, 2004. The Sua Sponte Order also noted that a status conference had been convened on March 29, 2004 at which the court advised the parties that the court would deny the R/S Motion as moot unless all the parties waived the right to have the Non-Compete Issue[5] resolved in the context of an adversary proceeding and consented to adjudication of the Non-Compete Issue in the context of the R/S Motion. The Sua Sponte Order further noted that the Debtor had declined so to waive. Because the chapter 7 case might have closed before the parties had an opportunity to adjudicate the Non-Compete Issue in an adversary proceeding in this court, the Sua Sponte Order ordered the Clerk's Office to keep the case open through May 3, 2004 in order to afford any party an opportunity to "commence an adversary proceeding in this court for a declaration in respect of the Non-Compete Issue on or before April 30, 2004 [the "Deadline"]." (Sua Sponte Order at 2.)[6]

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[5] The Non-Compete Issue is defined as the issue of whether the Non-Compete Clause "if otherwise extant and enforceable" remained enforceable [by injunction] notwithstanding the Discharge. (Sua Sponte Order at 2.)

[6] The Sua Sponte Order further provided that:

> nothing in this order is intended to waive, prejudice or impair the right of either party to seek an adjudication of the Non-Compete Issue from another court under applicable concurrent jurisdiction (if any) . . . .

(Sua Sponte Order at 2.)

The Second Proceeding was commenced by the filing of a complaint (Second A.P. Doc. I.D. No. 1) on April 28, 2004. That complaint was amended to its final form (Second A.P. Doc. I.D. No. 10, the "Second Complaint") on June 16, 2004. The Second Complaint named both the Debtor and the Trustee as defendants.[7] The Second Complaint alleged in relevant part as follows:

> 3. This is an adversary proceeding to determine the dischargeability of a debt and contract between the parties.
>
> 6. The defendant, debtor, Brian T. MacDougall [hereafter "MacDougall"], is a former owner of a minority interest of ESTEC.
>
> 7. On or about October 9, 2001 Dickerson and MacDougall entered into an agreement forming ESTEC. . . . .
>
> 8. On or about August 14, 2003, MacDougall voluntarily withdrew as a member of ESTEC.
>
> 9. In addition to the voluntary withdrawal by MacDougall, ESTEC has severed MacDougall's relationship with ESTEC.
>
> 10. As MacDougall has voluntarily withdrawn from ESTEC, and as any other relationship he might have with ESTEC has been terminated, he is prohibited for a period of two years from "engaging in a similar business or activity within sixty (60) miles of the Company's Principal Office." See paragraph 5.4.3. of the Operating Agreement.
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> 11. In fact, MacDougall is engaged in similar business or activity within 60 miles of the Company's Principal Office in Waterford, in that he is engaged as an electrician, and/or electrical contractor or similar activity in Norwich, Connecticut.
>
> 12. MacDougall is presently working as an electrician and electrical contractor within 60 miles of Waterford.
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> 13. Upon information and belief MacDougall has contacted clients of ESTEC and/or parties who contacted ESTEC about electrical work/electrical contracting before his withdrawal from ESTEC, and offered them his services as an

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[7] On July 19, 2005, an order (Second A.P. Doc. I.D. No. 31) was entered dismissing the Second Complaint as against the Trustee.

electrician and electrical contractor, and in fact is doing work for some of them, either individually or in association with a presently unidentified business entity.

14. As a result of the actions of MacDougall, as aforesaid, the plaintiffs have suffered and will suffer money damages in the future.

15. If MacDougall is not restrained from acting in violation of the Operating Agreement the plaintiffs will suffer from additional money damage.

16. The plaintiffs have no adequate remedy at law.

17. The contract as [to] the non-compete . . . [clause] is non-dischargeable under Section 523(a)(2) or some other section of the Bankruptcy Code.

WHEREFORE, the plaintiffs pray that the court determine that the contract is not dischargeable, and that a temporary injunction and a permanent injunction issue.

On September 20, 2004, the Debtor filed his answer (Second A.P. Doc. I.D. No. 12) to the Second Complaint. That answer also alleged certain affirmative defenses. On September 23, 2004, the Plaintiffs filed an answer (Second A.P. Doc. I.D. No. 16) to those affirmative Defenses.[8]

The trial (the "Trial") in this adversary proceeding was held on July l8, 2005. Mr. Dickerson testified for the Plaintiffs and the Debtor for himself. A copy of the Operating Agreement (as defined below) was the sole document introduced into evidence. At the conclusion of the Trial, the court took the matter under advisement subject to post-trial briefing which now is complete. The matter now is ripe for decision.

[8] Court approval was not secured for the filing of the Second Complaint. That issue (as well as alleged technical and service deficiencies) was raised by the Debtor in a Motion To Dismiss (Second A.P. Doc. I.D. No. 13) filed on September 20, 2004. At a hearing on October 20, 2004, that motion was marked "off" by the Plaintiffs with right of reclaim.

II. FACTS

ESTEC was a limited liability company formed in or around the fall of 2001 by Mr. Dickerson and the Debtor. (Second Complaint ¶ 7.)[9] ESTEC was a full service electrical contractor. (Tr. at 4 (testimony of Mr. Dickerson).) Until some time in 2003, Mr. Dickerson and the Debtor operated ESTEC pursuant to an oral understanding. (Tr. at 22 (testimony of Mr. Dickerson); Tr. at 38 (testimony of the Debtor).) In or around the Spring of 2003, Mr. Dickerson and the Debtor entered into that certain Operating Agreement (the "Operating Agreement") a copy of which is in the record of the Trial as Plaintiffs' Exhibit 1. (Tr. at 21-22 (testimony of Mr. Dickerson).)[10] The Operating Agreement was drafted by Mr. Dickerson's attorney. (Tr. at 20 (testimony of Mr. Dickerson).) The Operating Agreement provides in relevant part as follows:

> This Operating Agreement (this "Agreement") is entered into this 9th day of October 2001, by and among Sean D. Dickerson and Brian T. MacDougall.
>
> . . .
>
> **Section I**
> **Defined Terms**
>
> The following capitalized terms shall have the meanings specified in this Section I. Other terms are defined in the text of this Agreement; and throughout this Agreement, those terms shall have the meanings respectively ascribed to them.
>
> . . .
>
> "**Company**" means the limited liability company organized in accordance with this Agreement [*i.e.*, ESTEC].

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[9] References to the transcript of the Trial appear in the following form: "Tr. at [page]: [line]." Mr. Dickerson testified at the Trial that ESTEC was formed "in the fall of 2003" (Tr. at 4:6). Mr. Dickerson apparently mispoke and probably meant to say the fall of 2001.

[10] The Operating Agreement is backdated to October 9, 2001. (*See* Plaintiffs' Exhibit 1.)

. . .

"**Involuntary Withdrawal**" means, with respect to any Member, the occurrence of any of the following events:

(i) the Member makes an assignment for the benefit of creditors;

(ii) the Member files a voluntary petition of bankruptcy;

(iii) the Member is adjudicated a bankrupt or insolvent;

(iv) the Member files a petition or answer seeking for the Member any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any . . . [statute], law or regulation;

(v) the Member seeks, consents to or acquiesces in the appointment of a trustee, receiver, or liquidator of the Member or of all or any substantial part of the Member's properties;

(vi) the Member files an answer or other pleading admitting or failing to contest the material allegations of petition filed against the Member in any proceeding described in Subsections (i) through (v);

(vii) any proceeding against the Member seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law or regulation, [which] continues for one hundred twenty (120) days after the commencement thereof, or the appointment of a trustee, receiver, or liquidator for the Member or all or any substantial part of the Member's properties without the Member's agreement . . . [or] acquiescence, which appointment is not vacated or stayed for ninety (90) days or, if the appointment is stayed, for ninety (90) days after the expiration of the stay during which period the appointment is not vacated;

(viii) if the member is an individual, the Member's death or the entry of an order by a court of competent jurisdiction as incompetent to manage the Member's person or his estate;

(ix) if the Member is acting as a Member by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(x) if the Member is a partnership or limited liability company, the dissolution and commencement of winding up of the partnership or limited liability company;

(xi) if the Member is a corporation, the filing of a certificate of dissolution or the equivalent for the corporation or the revocation of its charter and the lapse of ninety (90) days after notice to the corporation of revocation without reinstatement of its charter;

(xii) if the Member is an estate, the distribution by the fiduciary of the estate's entire interest in the Company; or

(xiii) if the Member is expelled (if permitted in the operating agreement).

"**Member**" means each Person signing this Agreement and any Person who subsequently is admitted as a member of the Company.

. . .

"**Transfer**"means, when used as a noun, any voluntary sale, hypothecation, pledge, assignment, attachment, or other transfer, and when used as a verb, means voluntarily to sell, hypothecation, pledge, assign, or otherwise transfer.

"**Voluntary [W]ithdrawal**" means a Member's disassociation with the Company by means other than a Transfer or an Involuntary Withdrawal.

. . .

Section V
Management: Rights, Powers, Duties

. . .

5.4.3 It is agreed and understood that no Member may engage directly or indirectly in any business or activity, which would compete with, or is similar to, the business of the Company. This prohibition against competing with the Company shall apply to any member on his own behalf or as an employee of any individual, partnership, corporation or limited liability company and continue for a period of two (2) years after Involuntary or Voluntary Withdrawal from the Company and shall be limited to engaging in a similar business or activity within sixty (60) miles of the Company's Principal Office [the "Non-Compete Clause"]

. . .

Section IX
General Provisions

. . .

9.7 **Binding Provisions.** This Agreement is binding upon, and inures to the benefit of, the parties hereto and their respective heirs, executors, administrators, personal and legal representatives, successors, an[d] permitted assigns.[11]

In or around August of 2003 the Debtor either voluntarily or involuntarily withdrew from ESTEC. (Tr. at 7 (testimony of Mr. Dickerson).) Mr. Dickerson testified that shortly thereafter he saw the Debtor at sites belonging to ESTEC's current or prospective customers, that ESTEC lost certain business opportunities to the Debtor and that Mr. Dickerson and ESTEC suffered at least $30,000.00 in damage as a result. (Tr. at 7-10.)[12] Mr. Dickerson further testified that the Debtor's alleged competition with ESTEC was a substantial factor in the demise of ESTEC's business. (Tr. at 10-15.) In or around June of 2004 ESTEC transferred all of its assets to Integrated Security Solutions ("Integrated"). (Tr. at 19 (testimony of Mr. Dickerson).) Integrated became Mr. Dickerson's employer at around the same time. (Tr. at 19 (testimony of Mr. Dickerson).) ESTEC was dissolved formally at around the same time or some time thereafter. (Tr. at 24 (testimony of Mr. Dickerson).) As noted above, the State Court Action was pending as of the Petition Date. In the State Court Action the Plaintiffs sought injunctive relief and damages for, among other things, breach of the Non-Compete Clause (*i.e.*, Operating Agreement ¶ 5.4.3).

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[11] Formatted as in original.

[12] The Debtor objected to Mr. Dickerson's testimony as to monetary damages as irrelevant on the grounds that the only issue before the court was injunctive relief. (Tr. at 13:25 to 15:1.) The court allowed Mr. Dickerson's testimony to come in conditionally subject to a determination of relevance. (Tr. at 15.) For reasons which appear at section III.B, below, the Debtor's objection now is sustained.

III. ANALYSIS

The Plaintiffs argue in their post-trial brief that they are entitled to both injunctive relief and money damages in respect of the Non-Compete Clause and that both alleged rights/debts are unaffected by the Discharge. The court will consider each element of the Plaintiffs' argument in turn.

A. Injunctive Relief

It is unnecessary for the court to determine whether the Plaintiffs' alleged right to injunctive relief survived the Discharge because the court has concluded that the Plaintiffs could not obtain injunctive relief because ESTEC is no longer in business and has been dissolved. *See Finelli v. Sica*, 319 N.Y.S. 2d 913, 914 (Sup. Ct. 1971) ("[The business] . . . was dissolved and no longer exists. That being the case, the granting of the injunction would not serve any useful purpose. It would drive the defendant out of business without corresponding benefit to the now defunct corporation . . . ."); *Greenbaum v. Ripley*, 22 N.Y.S. 2d 385, 386-87 (Sup. Ct. 1940) ("[The plaintiff] . . . is out of business and the World's Fair show is alone in the field. Under the circumstances, the granting of the injunction would not serve any useful purpose; it would drive the World's Fair show out of business . . . without corresponding benefit to the plaintiff and the other stockholders of . . . International Oddities, Inc.").[13]

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[13] The Non-Compete Clause forbids "compet[ing]" (Operating Agreement ¶ 5.4.3 (second sentence)) with the Company which the Operating Agreement defines as ESTEC. The court is inclined to believe that the Connecticut courts would construe the Non-Compete Clause narrowly. (*See Ranciato v. Nolan*, No. CV970401729S, 2002 WL 313892 *3 (Conn. Super. Ct. Feb. 7, 2002) (covenant not to compete "construed narrowly and against the drafter . . . ."). However, even if the Connecticut courts would construe the Non-Compete Clause broadly to make relevant injury to a "permitted assignee" of either of the Plaintiffs (*see* Operating Agreement ¶ 9.7), there was no proof at the Trial that either Integrated or any other person is a "permitted assignee" of either of the Plaintiffs. Moreover, while Mr. Dickerson was a principal of ESTEC, he is a mere employee of

B. Damages

There is no doubt that the Plaintiffs' alleged prepetition conversion claim is subject to the Discharge unless this court concludes that the claim is within the purview of Bankruptcy Code § 523(a). Moreover, even if the Plaintiffs are entitled to an injunction to prevent further postpetition breaches of the Non-Compete Clause (which, as explained above, Plaintiffs are not), claims by the Plaintiffs for monetary damages arising out of alleged prepetition and postpetition breaches of the Non-Compete Clause are dischargeable absent an applicable Section 523(a) exception. *See In re May*, 141 B.R. 940, 944 (Bankr. S.D. Ohio 1992). Accordingly, all the Plaintiffs' alleged claims for monetary damages are discharged unless the court concludes that those claims are within the purview of Sections 523(a)(2), 523(a)(4) and/or 523(a)(6) (the "Damages Issue").[14] The Debtor argues that the Second Complaint did not give the Debtor sufficient notice that it was seeking adjudication of the Damages Issue and that complaint cannot be amended now to do so. The court agrees for the reasons which follow.

It is true that the Second Complaint refers to "a debt" (Second Complaint ¶ 3), "damages" (Second Complaint ¶¶ 14, 15), and refers to Section 523(a)(2) (Second Complaint ¶ 17). Even if the foregoing by itself were sufficient to put a debtor on notice in another case that a nondischargeable claim for money damages was being asserted, as explained below it is not sufficient here given the procedural history set forth above.

Integrated and the court is not persuaded that Mr. Dickerson will sustain ongoing injury in his employee status.

[14] Those subsections of Section 523(a) are the only subsections even arguably relevant here.

As noted above, the Plaintiffs made it clear at the R/S Hearing that they intended to pursue only their damage claim for the alleged conversion and their right to injunctive relief. (Audio Record at 2:06:34 - 2:06:55.) Also as noted above, at the R/S Hearing the court denied the R/S Motion as to the alleged conversion and took under advisement only the issue of whether relief from stay should be granted with respect to the Plaintiffs' alleged right to injunctive relief. (Audio Record at 2:11:00 - 2:11:52.) Thus, when the R/S Motion was mooted by issuance of the Discharge, denial of the R/S Motion on those grounds (and dismissal of the First Complaint) would have closed this chapter 7 case. Pursuant to the Sua Sponte Order, the court gave the parties the opportunity (*i.e.*, the Deadline) to commence an adversary proceeding to adjudicate the Non-Compete Issue in this court before the case closed; otherwise that issue could have been adjudicated in another court. Filing of a timely complaint would (and did) keep this case open until adjudication of such complaint even after dismissal of the First Complaint.

Adjudication of the Non-Compete Issue presents the issue of whether the right to postdischarge injunctive relief was not impaired by the Discharge because such right was neither a "debt" nor a "claim"[15] within the purview of Bankruptcy Code § 101. *Cf. In re May*, 141 B.R. at 943-44. Adjudication of that issue in the Plaintiffs' favor (*i.e.*, a determination that any right to injunctive relief was not a "debt" or "claim") would not implicate Section 523 which, on its face, applies *only* to "debt[s]" (*see* 11 U.S.C. §§ 523(a), (c)). Accordingly, the Bar Date (which is applicable only to "debt[s]") applied to the Damages Issue (*see* Fed. R. Bankr. P. 4007(c) (bar date for filing complaints seeking a Section 523(a)(2), (a)(4) or (a)(6) determination of the non-

[15] "Claim" is defined in Bankruptcy Code § 101(5). A "debt" is defined as a "liability on a claim . . . ." 11 U.S.C. § 101(12).

dischargeability of "debt[s]")) and the Deadline applied only to the Non-Compete Issue. If the Second Complaint had sought adjudication of the Damages Issue it would have been untimely to that extent because the Second Complaint was filed after the Bar Date. Nor was the Deadline an extension of the Bar Date. Even if the court had wanted to extend the Bar Date when it issued the Sua Sponte Order, to have done so here other than pursuant to a motion for an extension filed prior to expiration of the Bar Date would have been an abuse of this court's discretion. *Cf. In re Bachman*, 296 B.R. 596 (Bankr. D. Conn. 2003).[16] Given the totality of all of the foregoing, the Debtor reasonably could have believed (and apparently did believe (*see* Tr. at 13-14 (objection of the Debtor's counsel))) that the references to "a debt" and Section 523(a)(2) in the Second Complaint were merely an inartful way of seeking a determination that the Plaintiffs' alleged right to injunctive relief was not a "debt" or "claim" subject to the Discharge, and that the references in the Second Complaint to "damages" were intended only to bolster the Plaintiffs' claim of irreparable injury necessary to support injunctive relief.

If the damage issue had been tried by the "express or implied consent of the parties" it might be treated as if it had been adequately pleaded in the Second Complaint. *See* Fed. R. Civ. P. 15(b) (made applicable here by Rule 7015 of the Federal Rules of Bankruptcy Procedure).[17] However,

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[16] In some cases, a court might deem a denied motion for relief from stay filed before the relevant bar date as a timely filed motion for an extension of that bar date with respect to nondischargeability complaints. *See In re Tepfer*, 280 B.R. 628, 630-31 (N.D. Ill. 2002). However, that was inappropriate here because the R/S Motion sought relief to pursue only the alleged conversion count and the "claim" for injunctive relief. As discussed above, the Bar Date did not apply to injunctive relief if such constituted neither a "claim" nor a "debt," and a complaint (*i.e.*, the First Complaint) seeking a determination of nondischargeability with respect to the alleged conversion claim had been timely filed and still was pending at the time the R/S Motion was denied.

[17] The Bar Date could have been waived by the Debtor under certain circumstances. *See In re Benedict*, 90 F.3d 50, 53-55 (2d Cir. 1996). If the Rule 15(b) standard had been satisfied,

here the Debtor neither expressly not impliedly consented to trial of the damage issue. Rather, the Debtor promptly objected to the Plaintiffs' attempt to introduce evidence arguably relating to the damage issue into the record at the Trial. (*See* Tr. at 13:25 to 14:8) ("Objection, Your Honor . . . [W]hether or not . . . Mr. Dickerson would have sustained loss is irrelevant since any loss he sustained would have been discharged as . . . monetary damage, since, as I understand it, the only issue before this court is whether or not this court could or would impose an injunction for violation of this non compete clause . . . .") (objection of the Debtor's counsel). That objection precludes a finding that the damage issue was tried with the "express or implied consent" of the Debtor.

IV. CONCLUSION

For the reasons set forth above, judgment will enter in favor of the Debtor to the effect that all the Debtor's debts owing to the Plaintiffs are discharged and the Plaintiffs have no right to injunctive relief against the Debtor with respect to the Non-Compete Clause.

Dated: December 16, 2005 BY THE COURT

Lorraine Murphy Weil
United States Bankruptcy Judge

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that also might have constituted a waiver within the purview of *Benedict.*