

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)	CASE NO.	10-33521 (LMW)
)		
JO-ANN STABLER,)	CHAPTER	7
)		
DEBTOR.)		
PATRICIA PASSARO,)	ADV. PRO. NO.	11-3011
)		
PLAINTIFF)	ECF NO.	1, 39
)		
vs.)		
)		
JO-ANN STABLER,)		
)		
DEFENDANT.)		

APPEARANCES

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BRIEF PARTIAL RULING AND SCHEDULING ORDER
RE: COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

Lorraine Murphy Weil, Chief United States Bankruptcy Judge

WHEREAS, this court has jurisdiction over this proceeding as a core proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b) and that certain Order dated September 21, 1984 of this District (Daly, C.J.).¹ This memorandum constitutes the findings of fact and conclusions of law to the extent mandated by Rule 52 of the Federal Rules of Civil Procedure (made applicable here by Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure);

BACKGROUND

WHEREAS, this chapter 7 case was commenced by the above-referenced debtor (the “Debtor”) by petition filed on November 24, 2010. (*See* Case ECF No. 1.)² The Debtor received her chapter 7 discharge on March 22, 2011. (*See* Case ECF No. 21.);

WHEREAS, Patricia Passaro (the “Plaintiff”) commenced this adversary proceeding by a complaint filed on February 15, 2011. (*See* ECF No. 1, the “Complaint.”);

WHEREAS, the Debtor filed her answer to the Complaint on March 21, 2011. (*See* ECF No. 8.);

WHEREAS, the Complaint seeks a declaration that a certain judgment debt (the “Debt”) owing by the Debtor to the Plaintiff was not discharged in this Chapter 7 case pursuant to 11 U.S.C. § 523(a)(6);³

¹ That order referred to the “Bankruptcy Judges for this District” *inter alia* “all proceedings arising under Title 11, U.S.C. , or arising in . . . a case under Title 11, U.S.C.”

² References to the docket of this chapter 7 case appear in the following form: “Case ECF No. __.” References to the docket of this adversary proceeding appear in the following form: “ECF No. __.”. References to the oral record of the Trial appear in the following form: “Oral Record of Trial at __:__:__.”

³ The Complaint also relies on its face on 11 U.S.C. § 523(a)(19)(B)(i). Section 523(a)(19) refers to securities fraud. The proceeding here refers to the Plaintiff’s purchase of a day care center business from the Debtor and did not refer to a securities transaction. Accordingly,

WHEREAS, a trial (the “Trial”) was had on the Complaint on January 17, 2012;

WHEREAS, at the conclusion of the Trial, the court ordered a post-trial briefing schedule;

WHEREAS, on January 18, 2012, the court issued that certain Order Suspending Briefing Schedule and Requiring Preliminary Briefing. (*See* ECF No. 39, the “Preliminary Briefing Order.”);

WHEREAS, the Preliminary Briefing Order provided in relevant part as follows:

ORDERED that the briefing schedule announced on the record at the January 17, 2012 trial in this adversary proceeding hereby is suspended pending further order of this court; and it is further

ORDERED that the parties shall submit briefs (“Briefs”) on the following issues [the “Issues”]:

- must a nondischargeability claim for fraud in obtaining money, property, services, or an extension, renewal, or refinancing of credit be brought under Section 523(a)(2)(A) or (B) (as the case may be), or may such claim also be brought under Section 523(a)(6)? *See Spencer v. Bogdanovich (In re Bogdanovich)*, 301 B.R. 129, 143 (Bankr. S.D.N.Y. 2003) (“[T]he Court agrees with those courts that have held that section 523(a)(6) cannot be used to sidestep section 523(a)(2)(A), and that the requirements Congress imposed in Section 523(a)(2)(A) for nondischargeability based on oral misrepresentations cannot be evaded by invocation of section 523(a)(6).”). *See also National Tour Assoc., Inc. v. Nordstrom (In re Nordstrom)*, No. 02-8167, 2004 WL 51284, at *7 n.11 (Bankr. C.D. Ill. Jan. 7, 2004) (“Generally, a claim under Section 523(a)(6) cannot be based upon a claim of fraud which falls short of meeting the test for nondischargeability under Section 523(a)(2).”); *Starkey v. Krueger (In re Krueger)*, No. 99-7079, 2000 WL 33792711, at *8 (Bankr. D.N.D. May 10, 2000) (“[N]ondischargeability claims based on fraud should be governed by section 523(a)(6) only if the debtor obtained something other than money, property, services or credit.”).
- if the answer to the previous question is “yes,” should the plaintiff be given the opportunity to amend the complaint to restate the claim for relief as a claim under Section 523(a)(2)?

; and it is further

Section 523(a)(19)(B)(i) is inapposite here. In fact, counsel for the Plaintiff admitted at the Trial that the Complaint’s reference thereto was a mistake. (*See* Oral Record at Trial at 2:16:32 *et seq.*)

ORDERED that the Briefs shall be filed no later than February 2, 2012 and shall be no more than ten (10) pages in length. Failure by a party to file a Brief may result in waiver of the [I]ssues; and it is further

ORDERED that the Clerk's Office shall serve this order by this court's CM/ECF system on counsel for each of the parties and by first-class mail upon the parties themselves.[⁴]

(ECF No. 39 at 1-2);

WHEREAS, on February 2, 2012, the Plaintiff filed that certain Plaintiff's Post-Trial Brief (ECF No. 41, the "Plaintiff's Brief"). The Plaintiff's Brief entirely ignored the Preliminary Briefing Order. Instead, the Plaintiff's Brief dealt solely with argument as to why the Debt should be found to be nondischargeable pursuant to Section 523(a)(6). (*See* ECF No. 41.) The Plaintiff's Brief did not contain any argument that the Debt was nondischargeable under Section 523(a)(2)(A). (*See id.*);

WHEREAS, on February 13, 2012, the Debtor filed that certain Defendant's Preliminary Brief purportedly in accordance with the Preliminary Briefing Order. (*See* ECF No. 42 (the "Debtor's Preliminary Brief").) The Debtor's Preliminary Brief argued that (a) the Plaintiff's case was a misrepresentation case which cannot be brought under Section 523(a)(6); and (b) the Plaintiff should not be allowed to amend the Complaint to allege a claim for nondischargeability under Section 523(a)(2). (*See id.*) However, the Debtor's Preliminary Brief did not comply with the Preliminary Briefing Order in that the Debtor's Preliminary Brief was filed materially after the February 2, 2012 due date;

⁴ Service of the Preliminary Briefing Order was made in accordance therewith. (*See* ECF No. 40 (BNC Certificate of Notice).)

WHEREAS, neither party has complied with the Preliminary Briefing Order. Accordingly, the court is left to deal with the Issues itself and neither party is entitled to rely on the “waiver” provisions in the Preliminary Briefing Order;

ANALYSIS

A. As a Matter of Law, the Plaintiff Cannot Prevail on the Complaint on a Section 523(a)(6) Theory

WHEREAS, Section 523(a) provides in relevant part:

A discharge under section 727 . . . 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—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor’s or an insider’s financial condition;

. . .

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity

11 U.S.C.A. § 523(a) (West 2012);

WHEREAS, a claim for nondischargeability on the theory that “money, property. . . [or] services” has been “obtained by . . . false representation,” 11 U.S.C. § 523(a)(2)(A), must be brought under that statutory provision and cannot be brought under 11 U.S.C. § 523(a)(6). *See Wachovia Securities, LLC v. Jahelka (In re Jahelka)*, 442 B.R. 663, 671-72 (Bankr. N.D. Ill. 2010) (“[S]ection 523(a)(6) does not apply to debts based on fraud.”); *National Tour Assoc. Inc. v. Nordstrom (In re Nordstrom)*, No. 02-8167, 2004 WL 51284, at *7 n. 11 (Bankr. C.D. Ill. Jan. 7, 2004 (“Generally, a claim under Section 523(a)(6) cannot be based upon a claim of fraud which falls short of meeting the test for nondischargeability under Section 523(a)(2).”); *Spencer v. Bogdanovich (In re*

Bogdanovich), 301 B.R. 129, 143 (Bankr. S.D.N.Y. 2003) (“[T]he Court agrees with those courts that have held that section 523(a)(2)(6) cannot be used to sidestep section 523(a)(2)(A), and that the requirements Congress imposed in Section 523(a)(2)(A) for nondischargeability based on oral misrepresentations cannot be evaded by invocation of section 523(a)(6).”); *Starkey v. Krueger (In re Krueger)*, No. 99-7079, 2000 WL 33792711, at *8 (Bankr. D.N.D. May 10, 2000) (“[N]ondischargeability claims based on fraud should be governed by section 523(a)(6) only if the debtor obtained something other than money, property, services or credit.”);

WHEREAS, the Complaint plainly attempts to set out a claim (the “Section 523(a)(2)(A) Claim”) for “misrepresent[ation]” (ECF No. 1 ¶ 9). (*See also id.* ¶¶ 10, 14 [sic].) Accordingly, the Plaintiff cannot prevail on the Complaint on a Section 523(a)(6) theory;

B. The Plaintiff Should Be Permitted To Argue Her Claim as a Section 523(a)(2)(A) Misrepresentation Claim on the Present Record⁵

WHEREAS, as noted above (and notwithstanding that Section 523(a)(2)(A) was not expressly cited), the Complaint clearly attempts to set out a claim for misrepresentation under Section 523(a)(2)(A). The Debtor hardly can claim surprise. Moreover, no relevant evidentiary objections were made at the Trial by the Debtor’s counsel. Accordingly, the court will deem the Complaint to conform to the proof at the Trial pursuant to Rule 15(b)(2) of the Federal Rules of Civil Procedure (made applicable to this proceeding pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure). *Accord Malicki v. Bernstein (In re Bernstein)*, 447 B.R. 684, 701 (Bankr.

⁵ To establish nondischargeability on the basis of “false representation” it must be proved that: (1) the debtor made representations; (2) knowing them to be false; (3) with the intent and purpose of deceiving the creditor; (4) upon which representations the creditor actually and justifiably relied; and (5) which proximately caused the alleged loss or damage sustained by the creditor. *American Express Centurion Bank v. Truong (In re Truong)*, 271 B.R. 738, 744 (Bankr. D. Conn. 2002).

D. Conn. 2011) (applying the foregoing analysis in an 11 U.S.C. § 727(a)(2) context). The same result also may be mandated by Rule 54(c) of the Federal Rules of Civil Procedure (made applicable to this proceeding pursuant to Rule 7054 of the Federal Rules of Bankruptcy Procedure) (“Every . . . final judgment [not granted on a default basis] should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”);

CONCLUSION

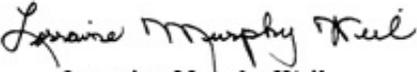
NOW, THEREFORE, for the reasons set forth above, on or before October 30, 2012 the Plaintiff shall file and serve a brief (the “Second Brief”) arguing (if she can) the merits of the Section 523(a)(2)(A) Claim. The Second Brief shall not exceed ten (10) pages in length and may not introduce facts not in the record in this court as such record now exists. Failure to file the Second Brief in accordance herewith may result in a dismissal of this adversary proceeding for failure to prosecute without further notice or a hearing; and it is further

ORDERED that a status conference with respect to this proceeding hereby is scheduled for October 31, 2012 at 11:30 a.m. at the United States Bankruptcy Court, Connecticut Financial Center, 157 Church Street, 18th floor, New Haven, Connecticut for the purpose of discussing a further briefing schedule and for other lawful purposes; and it is further

ORDERED that the Clerk's Office shall serve this ruling and order by this court's CM/ECF system (if applicable, otherwise by first-class mail) on: the Plaintiff and her counsel; and the Debtor and her counsel.

Dated: September 28, 2012

BY THE COURT


Lorraine Murphy Weil
Chief United States Bankruptcy Judge