

In the United States Bankruptcy Court

for the Northern District of Iowa

SHERMAN PAUL HOGREFE
Debtor.

Bankruptcy No. 92-41695XM
Chapter 7

NORTH IOWA COOPERATIVE ELEVATOR
Plaintiff

Adversary No.92-4266XM

vs.

SHERMAN PAUL HOGREFE
Defendant.

ORDER RE: DEFENDANT'S MOTION TO DISMISS COMPLAINT; DEFENDANT'S MOTION TO QUASH SUBPOENA; PLAINTIFF'S MOTION TO AMEND COMPLAINT; and PLAINTIFF'S MOTION TO COMPEL

Plaintiff North Iowa Cooperative Elevator (Co-op) and defendant Sherman Paul Hogrefe (DEBTOR or HOGREFE) present four matters to the court. Hearing was held by telephone on January 29, 1993. John L. Duffy represented the plaintiff; David M. Nelsen represented the defendant.

Hogrefe filed his chapter 7 petition on September 14, 1992. The schedules and statement of affairs were filed September 29, 1992, pursuant to Fed.R.Bankr.P. § 1007(c). The clerk issued and served notice of the meeting of creditors and of deadlines on September 17, 1992. The meeting of creditors was scheduled for October 19, 1992. The deadline for filing complaints objecting to discharge or to determine dischargeability was December 18, 1992.

On December 14, 1992, Co-op filed a motion in the case file which sought to extend the time for filing complaint objecting to discharge or to determine dischargeability of debt. (Case docket no. 30). The motion alleged that counsel for Co-op had been unable to schedule an examination of the debtor prior to the running of the deadline for objection. The court, without notice or hearing, granted the motion on the basis of its contents. Co-op's deadline was extended to and including December 30, 1992, a period of 12 days. (Order, case docket no. 31). On December 21, Hogrefe objected to the extension (case docket no. 33), contending that cause had not been shown inasmuch as Co-op had timely notice of the deadline for objection and had made no effort to examine debtor on the issue of dischargeability. Hogrefe conceded that Co-op had attempted to examine the debtor on the propriety of his claim of exemption in homestead property. (Case docket no. 33). The order extending time having entered, the court considered Hogrefe's resistance as a motion for reconsideration. The matter was set for hearing for January 20, 1993.

In the meantime, on December 17, 1992, within the original time period for objection, Co-op filed a complaint objecting to Hogrefe's discharge and asking that Hogrefe's debt to it be determined to be nondischargeable. (Adversary docket no. 1). On December 21, 1992, Co-op filed, in the case file, a

motion seeking to extend the time for amending the complaint. (Case docket no. 35). It asked for an extension on the ground that it was still trying to schedule a Rule 2004 examination of the debtor and that it had filed an application with the court to obtain the exam. Hogrefe resisted the motion (case docket no. 36) on the ground that the Rule 4004(b) did not provide authority for amending already-filed complaints. At the same time, Hogrefe filed a resistance to Co-op's application for the exam. (Case docket no. 37). Hearing on the application to extend the time to amend the complaint and on the application for the Rule 2004 exam was held by telephone on December 30, 1992. The court denied the application for the exam for the reason that Co-op had already filed a complaint and that discovery was the appropriate method for obtaining information from the debtor on the issues of discharge and dischargeability.

On the matter of the extension, the court heard the representations of counsel and issued its oral and then written ruling (case docket no. 40) permitting Co-op to and including January 22, 1993, to object to discharge or to file a dischargeability complaint. It was the court's orally stated intention in granting the motion to permit Co-op to raise any issue relating to discharge or to dischargeability and not be relegated merely to amending its previously filed complaint. In the court's view, the ruling obviated the need for the hearing on the motion to reconsider its prior order extending the deadlines to December 30, 1992, as denial of the motion to reconsider was implicit in the court's ruling issued December 30, 1992. To the extent a written order should have been issued denying the motion to reconsider, it will be issued hereafter in the case file.

On January 7, 1993, debtor filed a motion to quash. Debtor sought to prevent Co-op's taking of his deposition for two reasons: (1) that plaintiff sought to take his deposition prior to the expiration of the 30-day period after the service of the summons and complaint without obtaining court permission under Fed.R.Bankr.P. 7030(a), and (2) that debtor had moved to dismiss the complaint because it failed to plead with particularity the circumstances constituting fraud, and therefore it would be inequitable to permit deposition absent a satisfactory pleading--it would, in effect, permit a fishing expedition for the grounds of fraud.

On the same date, debtor also filed a motion to dismiss the complaint in which he argued that plaintiff had failed to plead the circumstances of fraud with the particularity required by Fed.R.Bankr.P. 7009. Debtor also moved to dismiss on the ground that on the face of the pleading, plaintiff's allegation (in paragraph 14 of the complaint) that debtor was acting in a fiduciary capacity was not sustainable as a matter of law.

Co-op resisted the motion to dismiss and the motion to quash. In its resistance to the motion to quash, Co-op argued that it had considered the court's order of December 30, 1992 extending the time for filing a complaint to be the necessary leave of court to take debtor's deposition prior to the expiration of the 30-day period provided under Rule 7030(a). Also in its resistance to the motion to quash, Co-op alleged that its deposition subpoena was served on Hogrefe on January 6, 1993, and that on January 7, the day of the deposition, Hogrefe refused to testify in connection with the adversary proceeding because he had moved to quash. Co-op asks that he be compelled to testify. Co-op also asks for an extension of time to amend its complaint.

On January 20, 1993, Co-op filed a separate motion seeking to amend its complaint. This motion was quite unnecessary as no responsive pleading to its original complaint had been filed. Therefore, no leave of court was required. Fed.R.Civ.P. 15(a). Furthermore, since the deadline for filing complaints had not arrived, Co-op could raise any grounds in its amended complaint.

On January 20, 1993, Co-op filed an "Amended and Substituted Complaint" containing three divisions. Division I alleges jurisdiction and venue; Division II makes common allegations applicable in all Counts of Division III. The latter contains six Counts--Count I objects to discharge of Co-op's debt under 11 U.S.C. § 523(a)(2)(A); Count II objects to discharge of the debt to Co-op under § 523(a)(4); Count III objects to discharge of debt to Co-op under § 523(a)(6); Count IV objects to discharge under § 727(a)(2)(A); Count V objects to discharge under § 727(a)(3); and Count VI objects to discharge under § 727(a)(5).

MOTION TO DISMISS

Hogrefe's motion to dismiss appears directed at both Co-op's original Complaint and the Amended and Substituted Complaint. The initial complaint has been replaced by the amended one. The latter was filed within the time for filing a complaint by Co-op which could raise any issue relating to discharge or dischargeability. There, the court need not consider any alleged deficiencies in Co-op's original complaint and further, the court need not consider whether issues raised in the amendment can relate back to the date of the filing of the original complaint. Rule 15(c) is not relevant as at the time the amended complaint was filed, no limitation for filing had expired.

Co-op has alleged fraud in Count I of Division III and has pled fraudulent intent relating to the disposition of assets in Count IV of Division III. Hogrefe argues that even as to the amended complaint, the allegations are not specific enough to satisfy Fed.R.Bankr.P. 7009 (Fed.R.Civ.P. 9(b)). The Rule requires plaintiff to allege the "circumstances" constituting fraud. Such circumstances include "matters such as the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." 5 Wright & Miller, Federal Practice & Procedure: Civil 2d § 1297 at 590. An examination of Count I and the common allegations leads this court to the conclusion and finding that fraud has been pleaded so as to satisfy the requirements of Rule 9(b). It is obvious that Co-op complains about the use of specific checks executed by Hogrefe and presented to Co-op for the purpose of obtaining a check and 500 gallons of Pursuit. The dates are shown on the checks; the representations were allegedly made by Hogrefe. The contents involve representations of ability to pay the various amounts shown, and the fruits of the alleged misrepresentations are identified. There is no basis for dismissing Count I of Division III.

When applied to § 727(a)(2)(A) of the Bankruptcy Code, Rule 9(b) of the Civil Rules of Procedure cannot be applied in the same way as Rule 9(b) might be applied in matters of common law fraud. Section 727(a)(2)(A) involves transfers or other prohibited actions regarding debtor's property within one year prior to bankruptcy. If made with intent to hinder, delay or defraud a creditor, the debtor can be denied a discharge. Thus, fraudulent intent is one aspect of a larger activity. Fraudulent intent involves the mindset of the debtor when he does other acts described under § 727(a)(2)(A). Such intent involves the desire to keep the debtor's property out of the reach of creditors. Circumstances surrounding the debtor's activity may be used to show the prohibited intent, but the intent itself may not be composed of circumstances. The court concludes, therefore, that in pleading the elements of § 727(a)(2)(A) of the Code, it is necessary only to plead fraudulent intent, not the common law elements of fraud. The court finds and concludes that Co-op's Count IV of Division III satisfies the requirements of Rule 9(b).

Because Counts I and IV of Division III of the Complaint are sufficient under Fed.R.Civ.P. 9(b), the motion to dismiss will be denied.

MOTION TO QUASH/MOTION TO COMPEL

Although the plaintiff has taken part of the deposition of the debtor, and although the passage of the 30-day period since service of the summons should render this issue moot, the debtor asserts that until Co-op's complaint complies with Rule 9(b), he should not be subjected to a deposition which, he asserts, is being used by plaintiff as a fishing expedition to find the basis for a complaint.

The court now rules that the amended complaint is sufficient under Rule 9(b) and 30 days having passed, the motion to quash will be denied. At this time, the court will also deny the motion to compel filed by plaintiff. Plaintiff can proceed with any discovery it wants under the Rules of Procedure. To depose a defendant and to obtain documents from him, a subpoena should not be necessary. A notice of deposition and request for production are sufficient. If the debtor/defendant fails to comply, Co-op may move at that time to compel.

MOTION TO AMEND

Prior to the defendant's filing an answer, while the motion to dismiss was pending and before plaintiff had filed his amended complaint, plaintiff had filed a motion to amend the initial complaint. No motion to amend at that time was necessary because no responsive pleading had been filed. Plaintiff could have amended as a matter of right under Rule 15(a). The plaintiff has since amended. The matter appears moot, but the motion will be granted so there is no misunderstanding about the plaintiff's right to file the amended complaint.

ORDER

IT IS ORDERED that defendant's motion to dismiss is DENIED.

IT IS FURTHER ORDERED that defendant's motion to quash is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion to compel is DENIED without prejudice.

IT IS FURTHER ORDERED that plaintiff's motion to amend its complaint is GRANTED.

SO ORDERED ON THIS 30th DAY OF MARCH, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order by U. S. mail to: John L. Duffy, David M. Nelsen and U. S. Trustee.