

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

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BERT A. JOHNSON  
Debtor.

Bankruptcy No. 93-40123XM  
Chapter 7

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SUE JOHNSON  
Plaintiff

Adversary No. 93-4136XM

vs.

BERT A. JOHNSON  
Defendant.

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### **ORDER RE: PLAINTIFF'S MOTION TO CONTINUE TRIAL; DEFENDANT'S MOTION TO STRIKE AMENDMENT TO PRETRIAL STATEMENT**

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Two matters are presented to the court for resolution. Plaintiff Sue Johnson, by her counsel James Stanton, moves for a continuance of trial. Defendant resists the motion. Trial is now scheduled for 1:00 P.M., January 17, 1995, in Mason City. Defendant Bert Johnson, by his counsel Roger Sutton, moves to strike plaintiff's amendment to her portion of the joint Pretrial Statement and plaintiff's supplementation of her disclosures under Fed.R.Civ.P. 26(e)(1).

Hearing on the motions was held by telephone on Friday, January 6, 1995. Attorney Stanton appeared for plaintiff; attorney Sutton appeared for defendant.

#### I.

Sue Johnson filed her adversary complaint on August 3, 1993, while the debtor's case was pending under chapter 11. She complained of three actions or types of actions by Bert Johnson. None of her allegations included a statement of the Bankruptcy Code section under which it was brought. First, she alleged that Bert Johnson induced her to enter into a marriage dissolution stipulation in state court through fraud. Such a claim would appear to arise under 11 U.S.C. § 523(a)(2)(A), as no written statement was alleged.

Second, Sue Johnson claimed that Bert Johnson "caused his Cerro Gordo County, Iowa District Court Dissolution of Marriage estate to be diminished or artificially reduced in size by the concealment of assets which act constitutes the perpetration of an additional fraud upon [Sue Johnson]." Complaint, 5. This claim might arise under 11 U.S.C. § 523(a)(2)(A) or § 523(a)(2)(B) if a written representation was made as to the size of the estate. Also, the allegation can be construed as an objection to discharge claim under 11 U.S.C. § 727(a)(2).

Third, Sue Johnson alleged that Bert Johnson, "with the intent to hinder, delay or defraud [Sue Johnson], knowingly and fraudently (sic) transferred the operation of his farming business to his minor son, B. J. Johnson, for the purpose of placing assets, or income therefrom, beyond the reach of [Sue Johnson]. . . ." Complaint, 7. This claim arises under 11 U.S.C. § 727(a)(2), an objection to debtor's discharge.

Sue Johnson amended her complaint on January 12, 1994, to claim that a portion of Bert Johnson's debt to her was nondischargeable as support or maintenance. No supporting Code section was alleged, but the applicable Code section

for such a claim would be 11 U.S.C. § 523(a)(5).

Service of the initial complaint was by mail on September 7, 1993. When Bert Johnson failed to respond to the complaint, plaintiff filed a motion seeking default judgment (docket no. 8, filed December 13, 1993). Bert Johnson filed a resistance on December 27, 1993 (docket no. 10) objecting to the form and manner of service. The court denied the motion for default. Defendant's first answer to the complaint was filed March 30, 1993 (docket no. 19). Another answer was filed the same day. In addition to its admissions and denials, it raised statute of limitations and pleading defenses (docket no. 18).

The parties took part in a scheduling conference with the court on April 29, 1994. In a Scheduling Order entered thereafter, the court set August 1, 1994 as the discovery deadline. Pursuant to the Order, a joint document captioned "Pretrial Statement" would have been required to be filed by the parties by no later than September 6, 1994. Attorney Stanton filed Sue Johnson's portion of the Statement in advance of the deadline. The submission of plaintiff's portion of a Pretrial Statement did not satisfy the requirement of a joint document.

Sue Johnson's unilateral Pretrial Statement mentioned only her claim that Bert Johnson had fraudulently induced her into signing the dissolution stipulation. It mentioned nothing about the transfer or concealment of assets. On August 9, 1994, attorney Stanton amended the Pretrial Statement of plaintiff to add the nondischargeable support claim (docket no. 29). Attorney Stanton filed a motion to extend the time for disclosing expert witnesses. During a telephonic hearing on the motion on August 25, 1994, the court granted the motion, permitted defendant additional discovery, and ordered the parties to file a joint Pretrial Statement by October 14, 1994 (docket no. 31).

The parties filed a joint Pretrial Statement on October 14, 1994 (docket no 34). Plaintiff stated her theory of the case as the misrepresentation of Bert Johnson to Sue Johnson to induce her to sign a stipulation in their dissolution proceeding in state court. The misrepresentation involved the availability of loan proceeds to satisfy his obligations to her under the stipulation. Plaintiff's portion of the Statement mentioned nothing about the nondischargeable support, or the fraudulent transfer or concealment of assets. Defendant's counsel stated there were two contested legal issues: first, whether a portion of the debt was nondischargeable as support, and second, whether fraud existed under 11 U.S.C. § § 523(a)(2) (A) and (a)(2)(B).

At a telephone conference with counsel held November 12, 1994, the court set January 17, 1995, as the date of trial.

In late summer or early fall, but after the close of discovery, attorney Stanton learned of facts which he contends support plaintiff's theory that assets were fraudulently conveyed or concealed. He also learned of witnesses with knowledge of such facts. He neglected to include the theory, the witnesses or the facts in his portion of the joint Pretrial Statement. He also failed to supplement promptly his disclosures under Fed.R.Civ.P. 26(a)(1)(A).

On December 2, 1994, Stanton filed a supplementation of his Pretrial Statement, including, in very general terms, a fraudulent transfer theory, supporting facts and witnesses. Four witnesses were disclosed, including Larry Baker of Milan, Missouri (docket no. 37).

Stanton issued and, in some manner, served Baker with a trial subpoena. The court takes judicial notice that Milan, Missouri is more than 100 miles from Mason City, Iowa. No motion to quash the subpoena was filed. On December 15, 1994, Baker wrote to Stanton that he would not be able to attend the trial as he would be leaving Missouri. Stanton received the letter on December 19 and called Baker. He learned that Baker would be leaving Missouri on December 24 and would not be returning until after the trial. Part of the time he would be in Mexico.

On December 22, 1994, Stanton filed a motion to continue trial so that Baker would be available. Stanton says he did not try to arrange for a deposition of Baker because of the short time from December 19 to the 24th and the press of the holidays. The defendant resists the motion to continue. Attorney Sutton resisted the motion on December 29, 1994, and on the same date moved to strike the amendment and supplementation of disclosures.

On December 30, 1994, Sutton filed a "Response to Motion for Production of Documents." There was no motion by plaintiff on file, nor was there a motion to compel.

## II.

Prior to the deadline for filing the joint Pretrial Statement (October 14, 1994), plaintiff's counsel was aware of plaintiff's claims regarding transfer or concealment of assets with intent to hinder, delay or defraud. He was also aware of the four witnesses with knowledge of the facts relating to the claims. He neglected to include the facts, theory or identity of the witnesses in the Pretrial Statement. Moreover, plaintiff's counsel had a duty to supplement his initial disclosures made under Fed.R.Civ.P. 26(a)(1)(A) and his pretrial disclosures made under Fed.R.Civ.P. 26(a)(3)(A). The pretrial disclosures were originally due by the date of preparation of the Pretrial Statement. See Scheduling Order, section VI.

Plaintiff's counsel amended his disclosures and his Pretrial Statement on December 2, 1994, some 46 days prior to trial on issues pled generally in the complaint. There is no evidence that defendant conducted any discovery. There is no evidence that plaintiff's counsel has acted in bad faith. Although the amendment would require additional evidence at trial, defendant has had more than a month to prepare.

Had plaintiff's counsel, upon learning of the facts and witnesses relating to the grain transaction, immediately supplemented his disclosures of persons with information, defendant could have sought an extension of the discovery deadline and engaged in additional discovery. This may not have delayed trial. If the court permits the amendment to the Pretrial Statement, defendant's counsel states that he desires a continuance. Counsel state they are ready to proceed to trial on all other issues. Permitting amendment at this stage would delay trial. Such delay would not entirely be the fault of plaintiff's counsel. Defendant's counsel has known since the first week of December of the additional allegations and witnesses. He filed nothing seeking additional discovery. If the court permits the amendment, plaintiff asks for a continuance because of the lack of a critical witness. Plaintiff's counsel was diligent in serving a subpoena. Although he could have sought a deposition upon learning that the witness would not appear, that would have required agreement of defendant's counsel and arrangements for the deposition within a four-day period during the holidays. It does not show a lack of diligence that the deposition was not taken. It would appear that if the amendment is permitted, trial should be continued at the request of both parties.

If the court adopts a too-easy modification policy with regard to joint Pretrial Statements, it would encourage carelessness in the preparation of cases for trial. Counsel would come to believe that they may modify their issues and witness lists at any stage of the proceeding without adverse consequence.

In determining whether to allow an amendment so as to permit trial of issues initially omitted from the Statement, the court will consider five factors: (1) prejudice or surprise of the party against whom the amendment is sought and against whom the witnesses would testify; (2) the ability of that party to cure the prejudice; (3) the extent to which modification of the Pretrial Statement and witness list disrupts the timely, orderly and efficient trial of the case; (4) bad faith or willfulness in failing to comply with the rules of procedure or the orders of the court; and (5) whether there would be manifest injustice if the court did not permit the amendments. See Hardesty v. Goseland (In re Goseland), 114 B.R. 263, 269-71 (D. Kan. 1990).

This case has not been a model of steady attention and effort on either side. Defendant was late in filing his answer. Defendant has apparently delayed in responding to discovery right up until December 30, 1994, when counsel filed a response to a request for production by plaintiff (docket no. 42). Defendant's counsel knew as early as December 5 that plaintiff wanted to resurrect an issue and name four new witnesses. There is no evidence that defendant sought further discovery informally with plaintiff's consent. No motion to extend the discovery deadline was filed. Had it been, perhaps this matter could have been tried without delay. Plaintiff waited nearly a month to object to the amendment.

Plaintiff's counsel is not blameless. He knew of the theory and of the facts by late summer or early fall. He, through carelessness, neglected to include any of the information in the joint Pretrial Statement. He neglected to supplement his disclosures under the federal rules. But I find no bad faith or willfulness in his actions. Moreover, the theory was pled by plaintiff in the complaint. To prevent trial of it because of counsel's error would be unjust to the plaintiff. If the amendment is permitted, defendant may be protected by granting the continuance of trial. The trial docket is such that this matter may be continued without undue burden on the judicial calendar. Based upon the foregoing, I find that the plaintiff's amendments to the Pretrial Statement, which amendments were filed December 2, 1994, are permitted, and the motions to continue trial are granted. Defendant's motion to strike is denied.

**ORDER**

IT IS ORDERED that the plaintiff's December 2, 1994, amendments to the joint Pretrial Statement are permitted.

IT IS FURTHER ORDERED that the written motion to continue trial filed by plaintiff and the oral motion to continue made by defendant are granted. Trial date will be set by the court at a conference between the court and the attorneys.

IT IS FURTHER ORDERED that defendant's motion to strike is denied.

IT IS FURTHER ORDERED that attorneys Sutton and Stanton shall meet with the court in chambers at Mason City, Iowa at 3:30 P.M. on Wednesday, January 18, 1995, for the purposes of selecting a trial date and for discussing other matters relating to trial, including any need of defendant for further discovery.

SO ORDERED ON THIS 10th DAY OF JANUARY, 1995.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on \_\_\_\_\_ I mailed a copy of this order by U.S. mail to: U. S. Trustee, Robert Stanton and Roger Sutton (and by FAX to Roger Sutton and Robert Stanton).