

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

EOD
10/28/2021

IN RE:	§	
	§	
BASHAR RADWAN ALHUNEIDI	§	Case No. 21-40334
	§	
	§	
Debtor	§	Chapter 7
<hr/>		
ASHBURN HUNTER BYWATERS III	§	
ADAM ALEKSANDER FASHION	§	
HOUSE, LLC, AND WOLF FRIDGE	§	
INVESTMENTS, LLC	§	
	§	
Plaintiffs	§	
	§	
v.	§	Adversary No. 21-04098
	§	
BASHAR RADWAN ALHUNEIDI	§	
	§	
Defendant	§	

**MEMORANDUM OF DECISION AND ORDER
GRANTING IN PART AND DENYING IN PART DEFENDANT’S
EXPEDITED MOTION TO DISMISS ADVERSARY PROCEEDING**

Before the Court for consideration is the “Expedited Motion to Dismiss Adversary Proceeding” (the “Motion”) filed by the Defendant, Bashar Radwan Alhuneidi (the “Defendant” or “Debtor”) on August 2, 2021. Defendant seeks dismissal of the complaint filed in this adversary proceeding, and sanctions against the Plaintiffs, Ashburn Hunter Bywaters III, Adam Aleksander Fashion House, LLC, and Wolf Ridge

Investments, LLC (the “Plaintiffs”).¹ The Court finds that the Motion was properly served pursuant to the Federal and Local Rules of Bankruptcy Procedure. Although it did not contain the requisite negative notice language, the Court suspended the Motion for the appropriate fourteen (14) day period pursuant to LBR 7007, during which Plaintiffs timely filed the “Plaintiff’s Answering Brief in Opposition to Defendant’s Expedited Motion to Dismiss” (the “Answer Brief”). Plaintiffs allege in the “Complaint to Object to Discharge and to Determine Dischargeability of Indebtedness Pursuant to Section 727 and 523 of the Bankruptcy Code” (the “Complaint”) that Defendant’s discharge should be denied pursuant to 11 U.S.C. §§ 727(a)(2), (a)(3), and/or (a)(4), and that approximately \$2,000,000.00 allegedly owed to the Plaintiffs should be excepted from discharge pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and/or (a)(6). Upon due consideration of the pleadings and the relevant legal authorities, the Court agrees that the Complaint was untimely filed and must be dismissed. For the reasons stated in this Memorandum of Decision and Order, the Defendant’s Motion should be GRANTED in part and DENIED in part.

I. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(a) and 157(a). The Court has the authority to enter a final judgment in this adversary proceeding

¹ The Defendant does not cite any particular provision of Fed. R. Civ. P. 12(b) as basis for the Motion. It appears to the Court that the Defendant’s Motion is most reasonably understood as one filed under Fed. R. Civ. P. 12(b)(6), made applicable to this proceeding by Fed. R. Bankr. P. 7012.

because it constitutes a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(I\)](#), [\(b\)\(2\)\(J\)](#), and [\(b\)\(2\)\(A\)](#).

II. Factual and Procedural Background

Plaintiffs commenced state court litigation (the “State Court Action”) against the Defendant in Dallas County, Texas on December 9, 2019.² Defendant initiated the main bankruptcy case (the “Main Case”) associated with this adversary proceeding by filing his voluntary petition for Chapter 7 relief under Title 11 of the United States Code (the “Bankruptcy Code”) on March 10, 2021.³ The § 341 meeting in the Main Case was originally scheduled for April 16, 2021, and was first continued to May 7, 2021.⁴ Based on the April 16, 2021 setting for the § 341 meeting, the deadline to object to discharge was automatically set for June 15, 2021.⁵ The § 341 meeting ultimately concluded on June 4, 2021.⁶ Plaintiffs’ counsel questioned the Defendant at both settings.⁷ Plaintiffs filed a “Motion for an Order Authorizing Discovery of Documents and Examination under Bankruptcy Rule 2004” (the “2004 Motion”) on July 13, 2021, and subsequently

² The case was later transferred to Collin County, Texas. Pls.’ Compl., 13 ¶ 39, [ECF No. 1](#).

³ In consideration of the Motion, the Plaintiffs’ factual allegations will be accepted as pled and will be viewed in the light most favorable to the Plaintiffs (the non-moving party to the Defendant’s Motion).

⁴ See Main Case, No. 21-40334, [ECF No. 5](#).

⁵ *Id.*

⁶ Def.’s Expedited Motion to Dismiss, 3 ¶ 7, [ECF No. 4](#).

⁷ See Pls.’ Answer Brief, 10 ¶ 9, [ECF No. 13](#); see also Def.’s Expedited Motion to Dismiss, 3-4 ¶¶ 5-7, [ECF No. 4](#).

filed the “Motion to Extend Time to File Complaint Objecting to Discharge” (the “Extension Motion”) on June 14, 2021, one day before the June 15, 2021 deadline. By filing the Extension Motion, Plaintiffs sought to extend the deadline to file a complaint to September 2, 2021.⁸ After several filings by both parties, the Court orally denied the Extension Motion at a hearing on July 27, 2021, and entered a written order on July 28, 2021.⁹ Plaintiffs filed the Complaint on July 28, 2021, more than one (1) month after the June 15, 2021 deadline to object to discharge and/or seek a determination of dischargeability. Defendant filed the Motion on August 2, 2021, simultaneously filing a “Request for Expedited Hearing” (the “Expedited Hearing Request”). The Court initially granted the Expedited Hearing Request on August 2, 2021, but later denied it on August 4, 2021.¹⁰

III. Analysis

A. Defendant’s Failure to Comply with Local Rules

Plaintiffs argue that the Motion should be denied for failure to comply with LBR 7007-1 and LBR 9007-1. While Defendant failed to include proper negative notice language, the Court has “broad discretion in interpreting and applying [its] own local

⁸ See Main Case, No. 21-40334, [ECF No. 25](#).

⁹ The Hon. Brenda T. Rhoades has presided and continues to preside over the Main Case. The Hon. Joshua P. Searcy presides over this adversary proceeding. It is this Court which now renders a decision on the Motion.

¹⁰ Order Granting Motion to Expedite Hearing, [ECF No. 6](#); Order Denying Request for Expedited Hearing on Motion to Dismiss Adversary with Prejudice, [ECF No. 9](#).

rules adopted to promote efficiency in the court.” *Bonner v. Adams (In the Matter of Adams)*, [734 F.2d 1094, 1102](#) (5th Cir. 1984). The Court used such discretion to place the Motion in suspense for the requisite fourteen (14) days, thereby giving Plaintiffs the proper opportunity to respond to the Motion. Defendant timely filed the Motion, and granting Defendant time to amend it to include the negative notice language would further delay this proceeding just to reach the same place. *See cf. Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, [549 U.S. 365, 375](#) (2007) (approving bankruptcy court’s use of equitable powers to deny a conversion to avoid administrative process which would end up in the same place)).

B. Deadlines Under Federal Bankruptcy Rules of Procedure 4004 and 4007

Defendant correctly cites [Fed. R. Bankr. P. 4007\(c\)](#) as a basis for his argument that Plaintiffs’ Complaint is untimely. [Fed. R. Bankr. P. 4004](#), however, is also relevant. In a Chapter 7 case, [Fed. R. Bankr. P. 4004\(a\)](#) dictates that any objection to discharge filed pursuant to [11 U.S.C. § 727\(a\)](#) must be filed no later than sixty (60) days after the first date set for the § 341 meeting of creditors. [Fed. R. Bankr. P. 4007\(c\)](#) similarly requires that a complaint to determine the dischargeability of a debt pursuant to [11 U.S.C. § 523\(a\)](#) shall be filed within the same time frame.

Generally, these time limits are strictly applied, but a court may grant a motion extending the deadline before it expires. [Fed. R. Bankr. P. 4004\(b\)](#). The “underlying purpose” of the rule “is to provide the debtor with a definite date after which no party

may object to discharge.” *In re Gallagher*, [70 B.R. 288, 290](#) (Bankr. S.D. Tex. 1987) (citing *United States v. Ortman (In re Ortman)*, [51 B.R. 7, 8](#) (Bankr. S.D. Indiana 1984)).

A court may grant an extension under [Fed. R. Bankr. P. 4004\(a\)](#) “only to the extent and under the conditions stated” in that rule.¹¹ [Fed. R. Bankr. P. 9006\(b\)\(3\)](#). The objecting creditor must demonstrate “cause” for an extension. [Fed. R. Bankr. P. 4004\(b\)\(1\)](#). The meaning of “cause” is not defined by [Fed. R. Bankr. P. 4004](#), and is therefore subject to a court’s discretion.¹² The United States Supreme Court has outlined three purposes for the discharge rules: “First they inform the pleader, i.e. the objecting creditor, of the time he has to file the complaint. Second they instruct the court on the limits of its discretion to grant motions for complaint-filing-time enlargements. Third, they afford the debtor an affirmative defense to a complaint filed outside the Rules 4004(a) and (b) limits.”

Kontrick v. Ryan, [540 U.S. 443, 456](#) (2004). The Fifth Circuit has held that [Fed. R. Bankr. P. 4004](#) and [Fed. R. Bankr. P. 4007](#) should be “strictly construed” because the procedural rules “reflect[] the overall goal of the bankruptcy process to provide individual debtors a fresh start.” *Yaquinto v. Ward (Matter of Ward)*, [978 F.3d 298, 302](#) (5th Cir. 2020) (quoting *Ichinose v. Homer Nat’l Bank (In re Ichinose)*, [946 F.2d 1169, 1172](#) (5th

¹¹ [Fed. R. Bankr. P. 9006\(b\)](#) mirrors and applies the same procedures as [Fed. R. Civ. P. 6\(b\)](#) for a party seeking an extension. Although the motion should be *filed* prior to the expiry date, a court does not need to rule on the extension motion prior to the expiration of the time period.

¹² While courts have discretion, an extension under [Fed. R. Bankr. P. 4004](#) cannot be granted for excusable neglect. Rule 9006(b)(3) excepts [Fed. R. Bankr. P. 4004](#) from the “excusable neglect standard,” because it is not allowed under the “extent” and “conditions” stated in [Fed. R. Bankr. P. 4004](#). *Neeley v. Murchison*, [815 F.2d 345, 346](#) (5th Cir. 1987).

Cir. 1991)).

The deadline to file a complaint objecting to discharge and/or to determine dischargeability in this case was June 15, 2021. Plaintiffs filed the Extension Motion on June 14, 2021. Judge Rhoades held a hearing and rendered an oral decision denying the Extension Motion on July 27, 2021. Thus, when Plaintiffs filed the Complaint on July 28, 2021, it was untimely.

Plaintiffs contend that the untimely filing may be excused because the “actual notice/relation-back” principle applies.¹³ Plaintiffs further argue that the Motion should be denied because “Defendant was on notice of the fraud-based allegations in the Adversary Complaint as early as November 30, 2020 (the date of the operative complaint in State Court Action, and no later than June 14, 2021 (the date on which Bywaters filed the Motion to Extend).”¹⁴ None of Plaintiffs’ alleged notices to Defendant, however, are sufficient to satisfy the actual notice/relation-back principle.¹⁵

First, Plaintiffs contend that the Complaint relates back to the “operative complaint

¹³ Pls.’ Compl., 2 ¶ 4, [ECF No. 1](#).

¹⁴ Pls.’ Answer Brief, 11 ¶ 27, [ECF No. 13](#).

¹⁵ Under the “relation back” theory, “a pleading may not be amended to allege a new or different claim unless it arose out of, or is based on or related to, a claim, transaction or occurrence originally set forth in the original pleading.” *In re Sherf*, [135 B.R. 810, 812](#) (Bankr. S.D. Tex. 1991) (citing *Fed. Deposit Ins. Corp. v. Bennett*, [898 F.2d 477, 479](#) (5th Cir. 1990)). The Fifth Circuit has not made a decision whether the “relation back” doctrine exists with respect to late-filed complaints objecting to discharge. See *Matter of McGuirt*, [879 F.2d 182, 183](#) (5th Cir. 1989) (determining that motion for relief from stay did not provide debtor with actual notice of creditor’s objection to discharge to support his contention that his late-filed objection to discharge related back to the stay motion).

in the State Court Action.”¹⁶ It would be nonsensical to allow the Motion to relate back to a state court pleading filed *prior* to the filing of the Chapter 7 petition in the Main Case. Plaintiffs cite several cases as bases for their actual notice/relation-back argument.¹⁷ See *Kuenstler v. Half Price Books, Records, Magazines, Inc.*, 538 B.R. 138, 143 (E.D. Tex. 2018); see also *Louviere v. Thompson (In re Thompson)*, 572 B.R. 638, 654 (Bankr. S.D. Tex. 2017); see also *In re Tribble*, 205 B.R. 405, 497 (Bankr. E.D. Ark. 1997). None of these decisions allowed a late-filed complaint objecting to discharge to relate back to a state court case or pleading.¹⁸

Second, Plaintiffs allege that the Extension Motion serves as sufficient notice of an objection to discharge to which the Complaint appropriately relates back.¹⁹ Because the Extension Motion was denied and the Complaint subsequently filed *after* that denial, it is

¹⁶ Pls.’ Answer Brief, 11 ¶ 27, ECF No. 13.

¹⁷ *Id.* at 17 ¶ 28.

¹⁸ In *Kuenstler*, the debtor had actually hired an attorney to specifically defend against objections to discharge and/or dischargeability determinations. *Kuenstler*, 538 B.R. at 143-146. Furthermore, the complaint related back to a “Motion for Determination of Dischargeability.” *Id.* The bankruptcy court also found that service on the debtor’s attorney aligned with Fifth Circuit precedent of avoiding dismissal with prejudice. *Id.* at 146 (citing *Millan v. USAA Gen. Indem. Co.*, 546 F.3d 321, 326 (5th Cir. 2008)). The court in *Thompson* allowed a creditor to pursue an untimely complaint on relation back theory when the creditor filed a motion to lift stay to allow him to collect debt *on the basis that the debt was nondischargeable* because of the debtor’s alleged fraud when the motion was filed before the bar date on complaints, and gave clear, specific notice of the creditor’s intent to question the debtor’s right to discharge *before* the expiration of the objection date. *Thompson*, 572 B.R. at 655. Furthermore, the creditor actually filed a complaint in the main bankruptcy case challenging the debtor’s right to a discharge on the deadline. *Id.* The mistake was solely on the part of the attorney for incorrectly filing the complaint on the main case docket rather than in a separate adversary proceeding. *Id.*

¹⁹ *Id.* at 11 ¶ 27.

not an acceptable basis for the actual notice/relation-back theory. The Extension Motion does not provide clear or actual notice to the Defendant of Plaintiffs' claims against him. *See Thompson*, 572 B.R. at 655. Rather, it insinuates that based upon further discovery and investigation, Plaintiffs *may* decide to file a complaint.²⁰ By allowing the Complaint to relate back to the Extension Motion, the Court would essentially render its own order denying that Extension Motion moot. Plaintiffs did not present a sufficient reason for the Court to grant their Extension Motion at the hearing on the matter, and do not provide one now.²¹

Plaintiffs further aver that the Complaint relates back to the 2004 Motion.²² A motion seeking to conduct an examination under Fed. R. Bankr. P. 2004 simply serves as a request to conduct further discovery or questioning of a debtor or third party to garner more information. Unlike the mis-filed complaint in *Thompson*, or the motion concerning a dischargeability determination in *Kuenstler*, neither the Extension Motion nor the 2004 Motion provide clear, actual notice of Plaintiffs' claims to which Defendant may properly respond.²³ *See Louviere v. Thompson (In re Thompson)*, 572 B.R. 638, 655 (Bankr. S.D. Tex. 2017); *see also Kuenstler*, 589 B.R. 138, 140. Furthermore, Plaintiffs withdrew the 2004

²⁰ Main Case, No. 21-40334, 2-3 ¶ 2, ECF No. 25.

²¹ Main Case, No. 21-40334, ECF No. 37.

²² Pls.' Answer Brief, 6 ¶ 1, ECF No. 13.

²³ Main Case, No. 21-40334, ECF No. 25, 29.

Motion after they filed the Complaint.²⁴ Withdrawal of the 2004 Motion makes it moot, and thus it is impossible for the Complaint to relate back to that particular filing. *See Berry Contracting LP v. Schmidt (In re Schmidt)*, [618 B.R. 813, 818](#) (Bankr. W.D. Tex. 2020) (holding when a timely filed motion to extend was mooted at moving party's request, court was unable to make a finding because there was no motion for the complaint to relate back to, making the complaint untimely). Notwithstanding these reasons, allowing the Complaint to move forward would directly contravene Fifth Circuit precedent instructing strict construction of [Fed. R. Bankr. P. 4004](#) and [Fed. R. Bankr. P. 4007](#). *See Yaquinto v. Ward (Matter of Ward)*, [978 F.3d 298, 302](#) (5th Cir. 2020).

C. Dismissal on the Merits

Fifth Circuit precedent dictates that courts should avoid dismissal with prejudice without consideration on the merits unless: “(1) the delay has been caused by the plaintiff himself, not by his attorney; (2) there is actual prejudice to the defendant; and (3) the delay has been caused by intentional conduct.” *Kuenstler v. Half Price Books, Inc.*, [589 B.R. 138, 146](#) (E.D. Tex. 2018) (citing *Millan v. USAA Gen. Indem. Co.*, [546 F.3d 321, 326](#) (5th Cir. 2008)). First, Plaintiffs have suspected possible fraud since the commencement of Defendant's Chapter 7 petition.²⁵ Plaintiffs do not contend that

²⁴ Main Case, No. 21-40334, EF No. 45.

²⁵ By arguing that the Complaint relates back to the State Court Action, Plaintiffs implicitly acknowledge that they suspected the Defendant of possible fraud and/or other wrongdoing long before the June 15, 2021 deadline to object to discharge. *See* Answer Brief, 11 ¶ 27, [ECF No. 13](#). This is not a case in which a creditor or trustee has discovered fraud in the “gap period,” and a complaint objecting to

Plaintiffs' counsel caused filing delay. Based on the representations made in the Extension Motion, a lack of information and/or the pendency of the decision to file an objection caused the delay.²⁶ That decision to file rests with the Plaintiffs, not Plaintiffs' counsel.

Second, there is actual prejudice to Defendant in allowing the Complaint to proceed. Debtors should have a "definite date" for discharge.²⁷ Creditors and trustees have a designated time frame in which they may raise objections to discharge or issues concerning dischargeability. *See* [Fed. R. Bankr. P. 4004, 4007](#). They are entitled to file extension motions, but do so with the risk that the motion may be granted or denied after the deadline has passed, as was the case here. *See* [Fed. R. Bankr. P. 4004\(a\)](#).

Third, the delay in filing appears to be attributed solely to Plaintiffs. Plaintiffs had time to file a complaint, or even an earlier extension motion if they were truly considering whether filing a complaint objecting to discharge and/or determining dischargeability was feasible.²⁸ Even if Defendant suspected or knew that Plaintiffs were considering filing an

discharge was late-filed because a creditor or trustee discovered fraud after the deadline, regardless of timely attempts to conduct formal discovery. *See Weisbart v. Pettit (In re Pettit)*, Adv. No. 21-04011, 2021 LEXIS 2676, at *6-8 (Bankr. E.D. Tex. Sep. 9, 2021) (allowing opportunity to amend late-filed dischargeability complaint when potential fraud discovered after deadline to object but before discharge).

²⁶ Main Case, No. 21-40334, 2-3 ¶ 2, [ECF No. 25](#).

²⁷ *In re Gallagher*, 70 B.R. 288, 290 (Bankr. S.D. Tex. 1987) (citing *United States v. Ortman (In re Ortman)*, 51 B.R. 7, 8 (Bankr. S.D. Indiana 1984))

²⁸ "Bywaters is entitled to sufficient time to review the Debtor's schedules and information gleaned from the 341 meeting so he can appropriately evaluate next potential steps, including bringing an

adversary proceeding, Plaintiffs were not delayed in doing so by anyone other than themselves.²⁹ Plaintiffs extensively explain their attempts to conduct discovery in the State Court Action.³⁰ While they seemingly include this information in order to exhibit the Defendant's obstruction of those efforts, the Plaintiffs inexplicably still chose not to conduct formal discovery at the earliest opportunity in the Main Case.³¹ Defendant's lack of cooperation in the State Court Action is irrelevant to the outcome of this Motion. Notably, Plaintiffs have not produced evidence which shows that Defendant obstructed their attempts in *this* proceeding to conduct formal discovery in order to file the Complaint. While Defendant may have failed to cooperate with informal discovery in this proceeding, Plaintiffs also failed to utilize the formal processes available to them in the litigation of this case.

Plaintiffs have failed to provide an appropriate document or filing to which the Complaint relates back. Furthermore, it is clear that allowing Plaintiffs' Complaint to relate back to the State Court Action, the denied Extension Motion, or the withdrawn

action to determine that his claim is excepted from any discharge the Debtor may receive..." Main Case, No. 21-40334, 2-3 ¶ 2, [ECF No. 25](#). If Plaintiffs needed more information or time to conduct discovery before choosing to file a complaint, they had the opportunity to file a motion to extend either when the § 341 meeting was first continued, or right after it concluded. The § 341 meeting concluded on June 4, 2021, eleven (11) days before the June 15, 2021 deadline. Rather, Plaintiffs chose to file the Extension Motion on June 14, 2021.

²⁹ See Pls.' Answer Brief, [ECF No. 13](#).

³⁰ Pls.' Compl., 12-14, ¶¶ 40-42, [ECF No. 1](#).

³¹ Pls.' Answer Brief, 11 ¶ 24, [ECF No. 13](#).

2004 Motion would render the deadlines set by [Fed. R. Bankr. P. 4004](#) and [4007](#) meaningless. The Court is not inclined to make such a decision which would frustrate the bankruptcy process. *See* [11 U.S.C. § 105](#).

D. Sanctions

Defendant also seeks at least \$25,000.00 in sanctions “based on the clear disregard for the rules and orders of this Court,” and to “discourage similar frivolous filings and compensate Defendant for the time wasted responding to this frivolous filing.”³² The Court has broad discretion in considering sanctions under [Fed. R. Civ. P. 11](#) and [Fed. R. Bankr. P. 9011](#). *See Thomas v. Capital Sec. Services, Inc.*, [836 F.2d 866, 877-78](#) (reaffirming review of sanctions award for abuse of discretion). Considering the facts as alleged in the light most favorable to the non-moving Plaintiffs, the substantive legal arguments made in the Complaint were reasonable. *See* [Fed. R. Bankr. P. 9011](#). The Court finds that Plaintiffs’ filing was not “frivolous” and does not merit sanctions.

IV. Conclusion

IT IS THEREFORE ORDERED that the “Expedited Motion to Dismiss Adversary Proceeding” filed on August 2, 2021 by the Defendant, Bashar Radwan Alhuneidi, is hereby **GRANTED** so as to dismiss the Plaintiffs’, Ashburn Hunter Bywaters III, Adam Aleksander Fashion House, LLC, and Wolf Ridge Investments, LLC, “Complaint to Object to Discharge and to Determine Dischargeability of Indebtedness

³² Def.’s Expedited Motion to Dismiss, 2 ¶ 4, [ECF No. 4](#).

Pursuant to Section 727 and 523 of the Bankruptcy Code.”

IT IS FURTHER ORDERED that the Defendant’s request to impose sanctions upon Plaintiffs is hereby **DENIED**.

Signed on 10/28/2021

A handwritten signature in black ink, appearing to read 'J. P. Searcy', written in a cursive style.

THE HONORABLE JOSHUA P. SEARCY
UNITED STATES BANKRUPTCY JUDGE