

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	
)	
Michael Leary,)	Chapter 7 Case
)	Number <u>02-14048</u>
Debtor.)	
_____)	
)	
Michael Leary)	
)	
Plaintiff)	
)	
v.)	Adversary Proceeding
)	Number <u>04-01080A</u>
American Education Services)	
)	
Defendant)	
_____)	

ORDER

By motion the Defendant, American Education Services seeks to dismiss this complaint to determine dischargeability of debt and violation of automatic stay. At hearing I determined there was no violation of the automatic stay of §362(a) and took the issue of Defendant's motion to dismiss the remaining count to determine dischargeability of debt under advisement. Based on the record of the hearing and relevant legal authorities, I make the following findings denying the Defendant's motion to dismiss.

FINDINGS OF FACT

Plaintiff filed a voluntary petition under chapter 7 on November 15, 2002, case number 02-14048. On March 7, 2003 Plaintiff received a discharge under section 727 of title 11 United States Code and the case was closed on June 4, 2003. Prior to filing Plaintiff's bankruptcy case he consolidated his student loans with his wife, Wilda Leary. The balance of the debt listed in the bankruptcy case schedules is \$145,000.00. On November 18, 2002, the Bankruptcy Court Clerk's office gave notice to all parties that "the deadline to file a complaint objecting to discharge of a debtor or to determine dischargeability of certain debts is February 18, 2003." No one filed a complaint to determine dischargeability of the student loan debt within the time proscribed. Subsequent to the discharge Defendant attempted to collect the student loan debt from Plaintiff and on July 8, 2004, Plaintiff filed this complaint asserting that Defendant violated the automatic stay of section 362 and sought determination that the student loan debt was discharged on March 7, 2003.

The Defendant asserts that the statute of limitations has run and Plaintiff cannot now seek to determine the dischargeability of the student loan debt. Defendant prays that this Court dismiss the complaint as outside the statute of limitations, for laches, and because of the expiration of the deadline set in the initial notice

of case filing.¹

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334(b) and §157(b)(1). This is a core proceeding in accordance with 28 U.S.C. §157(b)(2)(B), (I). The issue before me is whether the notice provided by the Clerk's office on November 18, 2002 affects the Plaintiff's ability to now file this complaint. It does not.

Student loan debt is addressed in 11 U.S.C. §523(a)(8). In relevant part, this section provides:

a discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship, or stipend, unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents. 11 U.S.C. §523(a)(8).

The timing of a complaint to determine dischargeability is governed by Federal Rule of Bankruptcy Procedure (FRBP) 4007 specifically 4007(b) which provides:

¹At hearing Plaintiff conceded that all the alleged stay violations occurred post discharge and case closing and therefore after the expiration of the stay pursuant to 11 U.S.C. §362(c)(2). I granted the motion to dismiss the counts of the complaint alleging a stay violation.

(b) **Time for commencing a proceeding other than under §523(c) of the code.** A complaint other than under §523(c) may be filed *at any time*. A case may be reopened without payment of an additional filing fee for the purpose of filing a complaint to obtain a determination under this rule. (Emphasis added.)

From the plain language of FRBP 4007(b), any party may seek at anytime a determination of dischargeability of a 523(a)(8) debt.

At a hearing Defendant asserted that this Bankruptcy Court set a deadline of February 18, 2003 to determine whether any debt was dischargeable in the underlying case. The deadline Defendant references is provided in the notice of chapter 7 bankruptcy case filing, 341 meeting of creditors and deadlines issued by the Bankruptcy Clerk on November 18, 2002 in the underlying case. In specific part, the notice states, "the deadline to file a complaint objecting to discharge of a debtor *or* to determine dischargeability of certain debts is February 18, 2003." (Emphasis added.) The certain debts referred in this deadline provision are debts covered in 11 U.S.C. §523(c)². The notice referred by Defendant sets a

²11 U.S.C. §523(c) provides in relevant part:

(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), (6), or (15) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), (6), or (15), as the case may be, of subsection (a) of this section.

deadline date in compliance with FRBP 4007(c)³. Plaintiff's student loan debt, a section 523(a)(8) debt, is not covered by section 523(c) or the FRBP 4007(c) deadline.

FRBP 4007(b) is clear. The rule permits any party to bring such a dischargeability action at any time.

It is therefore ORDERED that the counts of Plaintiff's complaint alleging a violation of the automatic stay are dismissed for failure to state a claim upon which relief may be granted; and

Further ORDERED that the motion to dismiss the remaining counts of the complaint seeking a determination of dischargeability of student loans are denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 19th Day of September, 2005.

³Federal Rule of Bankruptcy Procedure 4007(c) provides:

Time for filing complaint under §523(c) in a chapter 7 liquidation, chapter 11 reorganization, or chapter 12 family farmer's debt adjustment case; Notice of time fixed. A complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of the party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.