

IN THE UNITED STATES BANKRUPTCY COURT  
 FOR THE  
 SOUTHERN DISTRICT OF GEORGIA  
 Augusta Division

IN RE:	)	
	)	Chapter 7 Case
JOHN THOMAS CLARK	)	Number <u>93-10397</u>
	)	
Debtor	)	Filed
<hr/>	)	At 9 O'clock & 05 A.M.
	)	Date 9-8-94
LOUISVILLE FERTILIZER,	)	
GIN HARDEMAN SEED CO. &	)	
JONES OIL CO.	)	
	)	
Plaintiffs	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>94-01001A</u>
JOHN THOMAS CLARK	)	
	)	
Defendant	)	
<hr/>	)	

**ORDER**

Louisville Fertilizer, Gin Hardeman Seed Co. & Jones Oil Co. seek to revoke the discharge granted to John Thomas Clark in his Chapter 7 bankruptcy case. Clark, the defendant-debtor, in his answer and brief seek dismissal of the complaint which response is treated as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) made applicable to adversary proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7012(b), failure to state a

claim upon which relief can be granted.

Plaintiffs' complaint makes two allegations as a basis for the complaint. Both allegations rely on a timeline set out in Paragraph 2 of the complaint.<sup>1</sup> Plaintiffs first charge that "[t]he proceeds of the sale were property of the estate but were not paid over to the estate," and next that the "transfer to the wife and subsequent sale constitutes a fraudulent transfer" under 11 U.S.C. § 548(a)(2)(A) and is therefore grounds for denial of discharge under In re: Davis, 911 F.2d 560 (11th Cir. 1990). The two allegations will be treated separately.

I.

---

<sup>1</sup>Paragraph 2 of plaintiffs' complaint alleges:

Upon information and belief, the following chronology describes the events giving rise to this Complaint:

07/02/92 John T. Clark filed a Chapter 12 Petition  
(Case No. 92-11197-JSD).  
09/17/92 John Clark signed Option to sell to Board of  
Education.  
10/01/92 John Wills filed Motion to Dismiss Chapter 12.  
10/05/93 Option Agreement filed of record with Clerk's  
Office.  
10/09/93 Chapter 12 Dismissed.  
02/04/93 Farmers Home Administration Release filed; Warranty  
Deed from John Clark to Ann Clark conveying property  
optioned to School Board, consideration \$98,700.00;  
Security Deed from Anne Clark to First State Bank  
for \$97,900.00, which was canceled on February 25,  
1993; and Warranty Deed from Ann Clarke to Jefferson  
County Board of Education conveying 180 acres plus  
50 acres for \$600.00 per acre for a total of  
\$136,000.00.  
03/12/93 John Clark filed this Chapter 7.  
04/03/93 § 341 Meeting of Creditors.

In the latter allegation, plaintiffs correctly reference In re: Davis, supra, for the proposition that a fraudulent transfer can be grounds for denial of discharge, but plaintiffs omit the other more relevant circumstances of Davis, namely that denial of discharge was granted under Bankruptcy Code § 727(a)(2)(A) via a timely-filed Objection to Discharge, while in the instant case I have a Complaint to Revoke Discharge. In the instant case, an objection to discharge would have to have been filed by the bar date, June 22, 1993. There being no objections filed at that time, debtor was granted a discharge on August 9, 1993. After a debtor receives a discharge, it may only be revoked for the grounds specified in 11 U.S.C. § 727(d) by a Complaint to Revoke Discharge. In as much as this paragraph of plaintiffs' complaint alleges the transfers in this case are grounds for objection to and denial of discharge, the complaint being filed January 3, 1994 -- five months after debtor was granted a discharge and over six months after the bar date -- it is time barred and fails to state a claim upon which relief may be granted.

## II.

Plaintiffs' second allegation, that "proceeds of the sale were property of the estate but were not paid over to the estate," may provide grounds for revocation of a discharge under 11 U.S.C. § 727(d)(2), providing:

"On request of the trustee, or a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if-- . . .

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of, or entitlement to, such property, or to deliver or surrender such property to the trustee; . . . .

The plaintiffs' allegations implicate the foregoing section even though they have failed to allege debtor's "knowing and fraudulent" failure to report or deliver or surrender such property to the trustee as § 727(d)(2) requires. For the purposes of this section the term "knowing and fraudulently" has been held to require that the debtor be guilty of such acts as would sustain a civil action for fraud or deceit. In re Puente, 49 B.R. 966 (Bkrtcy. W.D. N.Y. 1985). A complaint under § 727(d)(2) does not allege merely a failure to report, deliver, or surrender property of the estate to the trustee but rather alleges that a debtor has "knowingly and fraudulently" failed to so report, deliver or surrender; it is thus a complaint for fraud and must be pleaded with particularity under Federal Rule of Civil Procedure 9(b) made applicable to adversary proceedings in bankruptcy by Federal Rule of Bankruptcy Procedure 7009.

The only paragraph of plaintiffs' complaint directly pertinent to § 727(d)(2) is paragraph 3, one sentence alleging

simply "[t]he proceeds of the sale were property of the estate but were not paid over to the estate." This sentence read on its own fails to allege all the different elements of § 727(d)(2) and does not satisfy the particularity requirement for pleading fraud. Read in conjunction with the next paragraph, considered above in Part I, the complaint still fails to satisfy the particularity requirement as this paragraph adds only the bare allegation that the transfers were fraudulent. A conclusory allegation of fraud by itself is insufficient to satisfy the pleading requirements for fraud. See, e.g., Greenberg v. Howtek, Inc., 790 F.Supp. 1181 (D.N.H. 1992), Fairmont Homes, Inc. v. Shred Pax Corp., 754 F.Supp. 665 (N.D. Ind. 1990). Even reading paragraph 3 in conjunction with the timeline alleged in paragraph 2, the complaint still fails to address with any particularity how the debtor's failure to report, deliver or surrender property of the estate to the trustee might have been "knowing and fraudulent." Therefore it fails to plead fraud with particularity and fails to allege the elements required for revocation under 11 U.S.C. § 727(d)(2).

Defendant-debtor dismisses the possibility of an action by plaintiffs under Bankruptcy Code § 727(d)(2) due to plaintiffs' alleged failure to claim that the debtor acquired property which was not reported to the trustee. Defendant-debtor misreads this Code section which provides a cause of action for revocation of discharge

where debtor acquires or becomes entitled to acquire property of the estate and then knowingly and fraudulently fails to report, deliver or surrender such property or entitlement. Plaintiffs may have an action for failure to report OR failure to deliver OR failure to surrender if the other requirements are met. Simply because plaintiffs have not alleged a failure to report does not, as defendant suggests, mean that plaintiffs cannot otherwise satisfy the requirements of a § 727(d)(2) action.

Defendant-debtor also contends that plaintiffs' complaint does not allege fraud by the plaintiff in obtaining the discharge as required under Bankruptcy Code § 727(d)(1). While defendant is correct, plaintiffs are not pursuing their complaint under this Code section and therefore this contention is irrelevant.

Defendant-debtor further contends that plaintiffs' complaint is based on grounds appropriate only to an objection to discharge. In light of the foregoing, I find this contention to be incorrect. Plaintiffs' complaint alleges grounds which may support a revocation of discharge but admittedly is not specific enough. Under Federal Rule of Civil Procedure 15(a), applicable to this adversary proceeding in bankruptcy under Federal Rule of Bankruptcy Procedure 7015, leave to amend pleadings shall be granted freely when justice so requires. A bankruptcy court may exercise its discretion to permit repleading in order to meet particularity

requirements. In re Ratka, 133 B.R. 480 (N.D. Iowa 1991) (permitting amendment of an objection to discharge where debtor would not be prejudiced thereby as plaintiff could refile within statute of limitation even if objection were dismissed). In this circuit, the rule is well-established that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts to support his claims which would entitle him to relief. Friedlander v. Nimns, 755 F.2d 810, 813 (11th Cir. 1985), quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957). I find that the plaintiffs may be able to plead with a requisite degree of particularity a complaint establishing grounds for relief under Bankruptcy Code § 727(d)(2) and should be allowed to amend their complaint to meet such requirements.

It is therefore ORDERED that the plaintiff shall have thirty (30) days to amend their complaint and the motion to dismiss is denied without prejudice.

---

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this \_\_\_\_ day of September, 1994.