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IT IS SO ORDERED.

Thomas F. Waldron
Thomas F. Waldron
United States Bankruptcy Judge

Dated: June 02, 2006

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

In re: TOMMY M. MOSLEY
SUSAN K. MOSLEY,
Debtors

Case No. 05-42014
Adv. No. 05-3480

BILLIE J. STURGILL,
Plaintiff

Judge Waldron
Chapter 7

v.

TOMMY M. MOSLEY,
Defendant

DECISION DENYING (1) MOTION TO JOIN RUTH SLONE, IN HER CAPACITY AS CHAPTER 7 TRUSTEE [BANKRUPTCY RULE 7019] AND (2) DENYING MOTION FOR JUDGMENT ON THE PLEADINGS [BANKRUPTCY RULE 7012(c)]

DATED AT DAYTON, OHIO this 2nd day of June, 2006:

Background

On October 6, 2005, Tommy M. Mosley and Susan K. Mosley filed a chapter 7 bankruptcy. On December 19, 2005, Billie J. Sturgill, Tommy M. Mosley's stepmother, (the "Plaintiff") filed a complaint (Doc.1) objecting to the dischargeability of certain debts, to the Debtors' discharge and requesting additional relief, including a money judgment (see related proof of claim (#19) for \$100,000).

Tommy Mosley filed an answer on January 12, 2006. (Doc. 7) After a series of initial filings not relevant to this decision (Docs. 5, 8, 19, 20), Susan K. Mosley was dismissed from this adversary proceeding by stipulation of the parties. (Doc. 24)

Separately, a *Motion for a More Definite Statement* (Doc. 6), was filed on behalf of Tommy Mosley. This motion was resolved by an amended complaint, which was filed on February 2, 2006. (Doc. 12) An amended answer was filed on March 2, 2006. (Doc. 21) See *Order Denying, Without Prejudice, Pending Motions, Authorizing Complaint and Fixing Response Time*. (Doc. 15 – February 3, 2006). For the balance of this opinion, the court will refer to the Debtor, Tommy Mosley, as the Defendant.

At a pretrial conference on April 5, 2006, the Defendant raised the issue of whether the Plaintiff failed to disclose assets in her own chapter 7 bankruptcy filed in 2001 [Case No. 01-32523] and, therefore, whether the claims asserted in the adversary proceeding, particularly any monetary relief, continue to belong to the chapter 7 Trustee, Ruth Slone, in that now closed chapter 7 case. Consistent with this argument, on May 3, 2006, the Defendant filed a *Motion To Join Ruth*

Slone, In Her Capacity As Chapter 7 Trustee of Billie J. Mosley, nka Billie J. Sturgill or Alternatively, to Dismiss/Sever All Allegations Pertaining to Defendant Tommy M. Mosley's Alleged Conduct Presented Preceding April 12, 2001, and Notice of Responsive Pleading Deadline in Connection Herewith (Doc. 29). On May 8, 2006, the Plaintiff filed a *Memorandum in Opposition to Join Ruth Slone or to Dismiss/Sever All Allegations Pertaining to Defendant Tommy M. Mosley's Alleged Conduct Preceding April 12, 2001*. (Doc 30) Significantly, Ruth Slone, the chapter 7 Trustee in that closed chapter 7 case [Case No. 01-32523] (the Former Trustee), has, despite being served, not filed anything in this case or this adversary proceeding.

Law and Analysis

The Plaintiff's amended complaint alleges that the debt owed to Billie Sturgill should be non-dischargeable under the fraud exception of §523(a)(2)(A) and the exception for breach of fiduciary duty, embezzlement and defalcation [§ 523(a)(4)]. The Plaintiff separately seeks to deny the Defendant's discharge pursuant to § 727(a)(4)(A), which addresses whether the Defendant knowingly and fraudulently made a false oath in or in connection with his bankruptcy case and § 727(a)(5), which addresses whether "the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities[.]"

The amended complaint details various allegations. They include, *inter alia*: the Defendant was the Plaintiff's step-son; upon the death of Roy Mosley,

the Defendant's father and Plaintiff's husband, the Defendant became the attorney in fact of the Plaintiff; a joint checking account was opened in the name of the Plaintiff; the Defendant fraudulently signed the Plaintiff's name on checks, the Defendant lied about creating an insurance policy on the Plaintiff's life, the Defendant coerced the Plaintiff into selling a vehicle and subsequently kept the proceeds, together with various other allegations of misappropriation of the Plaintiff's funds. In addition, the amended complaint alleges the Defendant kept a series of items and/or sold them and converted the proceeds. Further, the second count of the amended complaint alleges the Debtor has failed to disclose various assets and undervalued various other assets.

Consistent with the amended complaint, the Plaintiff on March 13, 2006, filed a proof of claim (#19) for \$100,000 as an unsecured, non-priority claim. The claim is based on "money obtained by fraud" and a series of items the Plaintiff alleges were converted from her. See Exhibit A of Proof of Claim #19.

The Defendant's *Motion* (Doc. 29) argues that many of the assets sought in the *Amended Complaint* (Doc. 12), and referred to in the related proof of claim, were not disclosed in the Plaintiff's separate bankruptcy in 2001 [Case No. 01-32523]. For purposes of this decision, the court assumes, without deciding, that the assets sought in the *Amended Complaint* (Doc. 12) were not disclosed in the Plaintiff's separate bankruptcy in 2001 [Case No. 01-32523].

The court recognizes the general principle that property which is not disclosed remains property of the estate and is not abandoned. See generally *Harker v. Troutman (In re Troutman)*, 244 B.R. 761, 768-69 (Bankr. S.D. Ohio

2000). This general principle, however, must always be measured against the facts of a specific case or proceeding. The uncontested facts in this case and adversary establish that the Former Trustee has not entered an appearance in this case or this related adversary proceeding. Additionally, the Former Trustee has not sought to re-open the closed 2001 bankruptcy [Case No. 01-32523]. Perhaps, more significantly, after being specifically served with the Defendant's *Motion To Join Ruth Slone, In Her Capacity As Chapter 7 Trustee of Billie J. Mosley, nka Billie J. Sturgill or Alternatively, to Dismiss/Sever All Allegations Pertaining to Defendant Tommy M. Mosley's Alleged Conduct Presented Preceding April 12, 2001, and Notice of Responsive Pleading Deadline in Connection Herewith* (Doc. 29) and the Plaintiff's *Memorandum in Opposition to Join Ruth Slone or to Dismiss/Sever All Allegations Pertaining to Defendant Tommy M. Mosley's Alleged Conduct Preceding April 12, 2001* (Doc. 30), the Former Trustee, again, did not complete any filings in the closed case [Case No. 01-32523], this case or this adversary. The Court does not suggest that the Former Trustee was obligated to file anything in connection with any of these cases or this adversary. To the contrary, it is within the specific purview of a Trustee to exercise independent judgment with regard to the Trustee's choices to take or decline to take certain actions. The Trustee in the exercise of such responsibilities is not a representative of any specific creditor's concerns.

Against these facts, and in the specific circumstances of this adversary, the court concludes that, to the extent the Plaintiff failed to initially disclose any of the property alleged by the Defendant to have been property of the estate and, to

the extent any of the assets sought in the Amended Complaint and referred to in the related proof of claim could be determined to continue to be property of the estate in the closed 2001 case [Case No. 01-32523], all such property is determined to be abandoned. This conclusion is compelled by the facts in this case and adversary proceeding and is consistent with the Court's permissible discretion pursuant to applicable Code provisions. See 11 U.S.C. § 554(d) ("Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in this case remains property of the estate"; underlining added) and 11 U.S.C. § 554(c) ("Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title."; underlining added).

Additionally, it is necessary to recall that this adversary concerns dischargeability and discharge issues, and, only peripherally, the determination of a monetary amount in connection with a proof of claim. Accordingly, based on the general procedural standards determined by the Sixth Circuit, the court finds that Ruth Slone is not an indispensable party pursuant to Federal Rule of Civil Procedure 19(a), applicable by Bankruptcy Rule 7019, nor is it appropriate to dismiss this adversary pursuant to Federal Rule of Civil Procedure 19(b). See generally *Hooper v. Wolfe*, 396 F.3d 744, 747-51 (6th Cir. 2005).

Further, as previously discussed, accepting the allegations in the Plaintiff's complaint as true, the court finds no basis to dismiss this adversary based on the pleadings, since the Plaintiff could obtain relief based on the Amended

Complaint. See Federal Rule of Civil Procedure 12(c), made applicable by Bankruptcy Rule 7012; *Kottmyer v. Mass*, 436 F.3d 684, 689 (6th Cir. 2006) (The court noting the standard for Rule 12(c) is “nearly identical” to a Rule 12(b)(6) motion to dismiss.).

The Court, however, notes the denial of the Defendant’s motion should not be construed as an expression by the Court concerning whether the Plaintiff’s amended complaint (Doc. 12) will ultimately be successful in a trial of this adversary.

Conclusion

The Defendant’s *Motion* (Doc. 29) is **DENIED**.

SO ORDERED.

c:

Mary K. C. Soter, 5518 North Main Street, Dayton, Ohio 45415-3455 (Atty. for Plaintiff)

Arthur R. Hollencamp, 130 West Second Street, Suite 2107, Dayton, Ohio 45402-1502 (Atty. for Defendant)

Ruth A. Slone, P.O. Box 3340, Dayton, Ohio 45401

John Paul Rieser, Esq., 1520 First National Plaza, 130 West Second Street, Dayton, Ohio 45402 (Trustee)

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