UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

In re: CHRISTINE C. HUFFMAN, Debtor.	)	Case No. 09-60343-LYN
ANDREW S. GOLDSTEIN, Chapter 7 Trustee, Plaintiff, v. PHC-MARTINSVILLE, INC., Defendant,	)	Adv. No. 11-06095

MEMORANDUM

This matter comes before the court on a motion to reconsider this court's order denying a motion to dismiss this adversary proceeding filed by PHC-Martinsville, Inc., trading as Memorial Hospital of Martinsville & Henry County ("the Defendant "). The motion is brought under Fed.R.Bankr.P. 9023 and 9024. The Chapter 7 trustee, Andrew S. Goldstein ("the Plaintiff" or "the

Trustee") opposes the motion. The motion will be denied.

Jurisdiction

This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). This Court may enter a final order. This memorandum shall constitute the Court's findings of fact and conclusions of law as required by Fed. R. Civ. P. 52, which is made applicable in this proceeding by Fed. R. Bankr. P. 7052.

Facts

Ms. Christine C. Huffman ("the Debtor") was a patient in Memorial Hospital of Martinsville and Henry County ("the Hospital"), which is owned by the Defendant. On September 9, 2008, she fell in her hospital room but did not believe, at the time, that she was injured. She subsequently concluded that she did in fact sustain injuries from the fall. The Plaintiff alleges that the injuries that the Debtor sustained gave rise to a cause of action ("the Cause of Action").

On February 4, 2009, the Debtor filed a Chapter 7 petition with the Clerk of this Court. She did not schedule the Cause of Action against the Defendant as property of the estate because she did not believe that she was injured by the fall. She received a discharge and the case was closed in the normal course.

After the case was closed, the Debtor concluded that she had suffered what she describes as "severe and permanent" injury as a result of the fall in the Hospital. On September 7, 2010, she filed a medical malpractice complaint initiating a lawsuit ("the State Court Lawsuit") against the Defendant based on injuries allegedly incurred as result of the fall in the Hospital.

On May 18, 2011, the Hospital filed a motion to dismiss the State Court Lawsuit, arguing

that Ms. Huffman had no standing to bring the suit because the Trustee was the proper party in interest. The State Court Lawsuit was stayed to permit Ms. Huffman to consider her options in the bankruptcy court. On August 23, 2011, the bankruptcy case was reopened and on September 9, 2011, the Trustee filed a complaint initiating the above-styled adversary proceeding.

The Plaintiff demanded a jury trial and solicited the Defendant's consent, but that consent was not forthcoming. The Plaintiff filed motion to withdraw the reference with the United States District Court ("the District Court") based on Local Bankruptcy Rule 9015-1 which provides that a party shall file a motion to withdraw the reference if the opposing party does not agree to a trial by jury. The Defendant filed a motion for abstention and a motion to dismiss the complaint under Fed.R.Civ.P. 12(b)(6) which is made applicable by Fed.R.Bankr.P. 7012. The District Court let issue an order that delayed the decision to withdraw the reference until this court ruled on the motion to dismiss and the motion for abstention. This court denied both motions.

The motion to dismiss was denied because it was determined that the trustee had timely filed his complaint under the doctrine of equitable tolling as applied to 11 U.S.C. § 108(a). The Defendant filed a motion to reconsider the order denying the motion to dismiss the complaint. That motion is now before this court.

Discussion.

I.

The motion is brought under Fed. R. Bankr. P. 9023 and 9024. Rule 9023 makes Fed.

R.Civ. P. 59[1] applicable in contested matters in bankruptcy. Rule 9024 makes Fed. R. Civ. P. 60[2] applicable in contested matters in bankruptcy.

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[1] Fed. R. Civ. P. 59 provides:

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

[2] Rule 60 provides:

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

Rule 60 provides in relevant part that relief from a judgment may be granted on grounds of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

The Defendant does not distinguish between or discuss either of these rules in any detail. The motion to alter or amend does not appear to be brought under Rule 60. The arguments will, therefore, be considered under Rule 59.

Rule 59 provides, in relevant part that the court may, on motion, grant a new trial on all or some of the issues after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court. Rule 59 also provides that, after a nonjury trial, the court may open the judgment, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

A motion for a new trial in a nonjury case or a petition for rehearing should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons. 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2804

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(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(2nd Ed. 1995)(And cases cited therein.). The motion may not be used to re-litigate old matters or to raise arguments or present evidence that could have been presented at trial. Id. at § 2810.1. A principal that strikes very deep is that a new trial will not be granted on grounds not called to the court's attention during the trial unless the error was so fundamental that gross injustice would result. Id. at § 2805.

There are four basic grounds upon which a motion under Rule 59 may be granted: (1) to correct manifest errors of law or fact upon which the judgment is based (2) for the presentation of newly discovered or previously unavailable evidence, (3) to prevent manifest injustice, and (4) to recognize an intervening change in controlling law. Id. at § 2810.1.

Motions to alter or amend are granted only if there has been a mistake of law or fact or new material evidence has been discovered that was unavailable previously. See, e.g., Figgie International, Incorporated v. Miller, 966 F.2d 1178 (7th Cir.1992). ("If [the plaintiff's] Rule 59(e) motion is evaluated under traditional Rule 59(e) standards, then it may only be granted if there has been a mistake of law or fact or new evidence has been discovered that is material and could not have been discovered previously.") Newly discovered evidence must be of facts existing at the time of trial. The moving party must have been excusably ignorant of the facts despite using due diligence to learn about them. 11 Wright, Miller and Kane at § 2808

The Defendant's arguments will be considered notwithstanding its failure to assert a reason under Rule 59.

II.

The Defendant makes three arguments in support of the motion for reconsideration. First it argues that equitable tolling cannot be applied to 11 U.S.C. § 108(a). Second, the Defendant

argues that nothing prevented the trustee from discovering the cause of action. Third, the Defendant argues that discovery of the Cause of Action is immaterial.

A.

The Defendant first argues that equitable tolling cannot be applied to Subsection 108(a).[3] The Defendant cites three opinions in support of this assertion. The first opinion is *U.S. v. Beggerly*, 524 U.S. 38 (1998). The Defendant asserts that the United States Supreme Court ruled in that opinion that equitable tolling cannot be applied if "tolling would be inconsistent with the text of the relevant statute." *U.S. v. Beggerly*, 524 U.S. 38, 48 (1998). The Supreme Court in that opinion, however, continued by citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 457-458, 112 L.Ed.2d 435 (1990) in which the Supreme Court wrote "[w]e have allowed equitable tolling in situations where ....the complainant has been induced or

[3]Section 108 provides:

(a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) two years after the order for relief.

(b) Except as provided in subsection (a) of this section, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor or an individual protected under section 1201 or 1301 of this title may file any pleading, demand, notice, or proof of claim or loss, cure a default, or perform any other similar act, and such period has not expired before the date of the filing of the petition, the trustee may only file, cure, or perform, as the case may be, before the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 60 days after the order for relief.

(c) Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, or against an individual with respect to which such individual is protected under section 1201 or 1301 of this title, and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of--

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

tricked by his adversary's misconduct into allowing the filing deadline to pass." While the Trustee was not induced by the Defendant to allow the deadline to pass, the singular nexus of party relationships that occurs in bankruptcy aligned in this case to induce the Trustee to allow the limiting deadline imposed by Subsection 108(a) to pass. Although the Debtor is not the Defendant in this case, she was in an adversarial position with respect to the Trustee during the pendency of this bankruptcy case. He reasonably relied on her testimony at the first meeting of creditors. This court believes that this is just the kind of fact scenario that the Supreme Court was referring to in *Irwin.*

The second opinion cited by the Defendant in support of the argument that equitable tolling is not applicable to Section108(a) is *Tidewater Fin.Co. v. Williams*, 498 F.3d 249, 254 (4th Cir. 2007).[4] The Defendant asserts that *Williams* stands for the proposition that Subsection 108 "contains its own express provision for tolling."

In *Williams*, the debtor filed a chapter 7 petition in 1996 and received a discharge. In 2001, the creditor, Tidewater, obtained a judgment against the debtor. Tidewater did not attempt to collect the judgment at that time. In 2004, seven years and 139 days later, the debtor filed a second chapter 7 petition. In between the two chapter 7 cases, the debtor filed three chapter 13 petitions, all of which were dismissed. The three chapter 13 cases were open and pending for a total of two years and 234 days.

Tidewater argued that the debtor was not eligible for a discharge in the second chapter 7 case under 11 U.S.C. § 727(a)(8) which provides that a debtor may not receive a discharge in a

[4] The Defendant did not cite *Williams* in his original brief or at the original hearing on the motion to dismiss.

chapter 7 case if the debtor has received a discharge in a prior chapter 7 case that was initiated by the filing of a petition within six years of the date of the filing of the a petition initiating the second case. Tidewater argued that the six year "statute of limitation" was tolled during the time that the three chapter 13 cases were pending.

In *Williams*, the Court never reached the issue of whether equitable tolling was applicable to Section 727(a)(8), much less to Subsection 108(a). Rather, the Fourth Circuit Court of Appeals held that equitable tolling was not a consideration in that case because Section 727(a)(8) did not define a limitations period. The Court noted that section 727(a)(8) did not expressly provide for tolling and, in doing so, compared that section to Subsection 108(c) which extends non-bankruptcy statutes of limitations in a matter where the debtor, or a co-debtor is a defendant, if the automatic stay bars collection efforts. Subsection 108(a) is a statute that extends nonbankruptcy limitations periods under certain circumstances. Just because it extends, or tolls, other statutes does not mean that it is not subject to extension under the doctrine of equitable tolling.

The third opinion cited by the Defendant is *Laddin v. Powell Goldstein LLP*, 457 B.R. 832 (N.D. Ala. 2011)[5]. The Defendant quotes the following from the District Court opinion which was a quote from the Bankruptcy Court opinion.

> Turning to the plain statutory text of §108(a), the Court does not believe that equitable tolling would be consistent with the text of the statute... Further, the plaintiff's equitable tolling argument basically seeks an extension of an extension which must be denied.

Laddin, 457 B.R. at 836-837. The District summarily agreed, "[t]he court has carefully reviewed

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[5] The Defendant did not cite *Laddin* in his original brief or at the original hearing on the motion to dismiss.

the bankruptcy court's analysis and reasons for finding that equitable tolling does not apply to §108 in these circumstances . . . " and has "adopt[ed] the bankruptcy court's reasoning . . ."

This court declines to follow the lead of the Court(s) in *Laddin*. First, the facts in *Laddin* were somewhat different than those herein. In *Laddin* the state statute of limitations did not run until after two years after the debtor filed his petition. Consequently, Subsection 108(a)(2) (which provides that the nonbankruptcy statute of limitations is to be extended until the date that is two years after the filing of the petition) was not applicable in *Laddin,* whereas it is the focus of the issue in the case at bar.

Second, the District Court agreed with the reasoning of the Bankruptcy Court "in these circumstances". In *Laddin,* the plaintiff accused the defendant (a law firm) of concealing its role in the transaction (a corporate acquisition) that was the subject of the lawsuit. While it is not entirely clear, it appears that the Bankruptcy Court may have based its ruling on the fact that the defendant's role in the transaction would have been obvious upon cursory examination. To the extent that the court intended to espouse a blanket rule prohibiting equitable tolling for Subsection 108, this court disagrees.

The Plaintiff also asserts that "11 U.S.C. § 108(b) and (c) provide two instances in which the limitations period provided by that statute may be tolled." The Defendant is incorrect to the extent that it is arguing that Subsections 108(b) and (c) toll Subsection 108(a). Generally speaking, Subsection 108(a) tolls the time in which the trustee has to commence an action; Subsection 108(b) tolls the time in which a trustee has to file a responsive or other pleading in a pending action; and Subsection 108(c) tolls the time in which a creditor has to commence or continue a claim against the debtor. Subsection 108(a) is not modified by the other two

paragraphs in the section. Hence, the argument that equitable tolling is not available because the section provides internally for such tolling must fail.

B.

The Defendant also argues that the trustee should have discovered the cause of action. The Fourth Circuit has set out the standard for equitable tolling.

> Equitable tolling "is appropriate when, but only when, 'extraordinary circumstances beyond [the petitioner's] control prevented him from complying with the statutory time limit.' " *Spencer v. Sutton*, 239 F.3d 626, 630 (4th Cir.2001) (quoting Harris, 209 F.3d at 330). Accordingly, under our existing "extraordinary circumstances" test, [the plaintiff] is only entitled to equitable tolling if he presents (1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time.

Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003).

Applying the test to the case at bar, it may be asked if the Trustee's ignorance of the Cause of Action was caused by extraordinary circumstances beyond his control. As previously found by this court, it was. In this instance, no person, not the Debtor, not the Debtor's attorney, not the Defendant, not anyone on earth knew that the Debtor had the Cause of Action available to her when she attended the first meeting of creditors. The Trustee could have exhausted all questions, including those metaphysical, and the Debtor would not have disclosed the Cause of Action.

The Defendant argues that if the Trustee had asked the following questions, which are some of the suggested questions found Appendix A to the Trustee's Handbook, he could have ascertained the existence of the Cause of Action.

> Do you have a claim against anyone or any business? If there are large medical debts, are the medical bills from injury? Are you the plaintiff in any lawsuit? What is the status of each case and who is representing you?

The answer to the first three questions would have been "no". There would have been no reason to ask the fourth question. The Debtor was not aware of the existence of the Cause of Action. Accordingly, she could not have disclosed it to the Trustee.

C.

Finally, the Defendant argues that the application of equitable tolling in this instance would create a "discovery rule". The Defendant's argument proceeds thus.

> [The applicable Virginia] statute of limitations began to run at the time of injury in this case. The statute of limitations provided by Va. Code § 8.01-243[6] expired on September 9, 2010. The extension provided by 11 U.S.C. § 108 expired on February 4, 2011. The date that the Plaintiff (in this case, the Trustee) learned of the injury is of no consequence. *See* Va. Code § 8.01-243; *Van Dam v. Gay*, 280 Va. 457, 460 (2010) ("The Virginia General Assembly has consistently declined to adopt a 'discovery rule.'"); *Large v. Bucyrus-Eric Co.*, 707 F.2d 94, 95 (4th Cir. 1983) (holding that the "necessary determination" in a personal injury case in Virginia is "the date of injury."). Application of equitable tolling in this instance merely creates a discovery rule for trustees, inconsistent with Virginia law and the plain language and intent of 11 U.S.C. § 108.

In one sense the Defendant is correct. The *effect* of applying equitable tolling to Subsection 108(a) is the same as if Virginia had imposed a discovery rule in Section 8.01-243. Applying the doctrine of equitable tolling to Subsection 108(a), however, *is* consistent with the statutory scheme of the Bankruptcy Code. It is clear from this scheme that Congress intended that a trustee would have the opportunity to either administer or abandon property of the estate. The Bankruptcy Code provides that any asset that is not disclosed by a debtor remains property of the estate in perpetuity. *See* 11 U.S.C. § 554(c)-(d) (Providing that property that is scheduled and not administered is abandoned and that property that is not abandoned remains property of

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[6] Va. Code § 8.01-243 provides:

> Unless otherwise provided in this section or by other statute, every action for personal injuries, whatever the theory of recovery, and every action for damages resulting from fraud, shall be brought within two years after the cause of action accrues.

the estate, without limitation.) The automatic stay found at Section 362(a) remains effective with respect to property of the estate until that property is no longer property of the estate. 11 U.S.C. § 362(c). It is clear from these rules that the Congress intended that a trustee in bankruptcy be given an opportunity to administer all assets of the bankruptcy estate and that circumstances beyond his or her control should not be permitted to circumvent this intent. In this instance the intent of Congress can only be preserved by applying equitable tolling to Subsection 108(a). To the extent that equitable tolling effects a discovery rule in contradiction to state policy but preserves the intent of Congress under the Bankruptcy Code, the conflict is resolved, if indirectly, by the Supremacy clause of the Constitution which provides that federal law is the supreme law of the land.[7] It is proper to apply equitable tolling to Subsection 108(a).

Conclusion

The motion to alter or amend the court's order denying the Defendant's motion to dismiss will be denied.

ORDER

For the reasons stated herein, the Defendant's motion to alter or amend the order of this court denying the Defendant's motion to dismiss the above-styled adversary proceeding shall be, and hereby is, denied.

Upon entry of this memorandum and order, the Clerk shall forward copies of this memorandum to the Chapter 7 trustee, Kent P. Woods, Esq., and B. Webb King, Esq.

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[7] Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Entered on this 29th day of May, 2012.

William E. Anderson
United States Bankruptcy Judge