UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

IN RE: DWAYNE MILLER JIMENEZ	)	
DIANE KELLEY JIMENEZ	)	**Case No. 07-50745**
	)	**Chapter 7**
Debtors.	)	
	)	
FIA CARD SERVICES,	)	
	)	**Adversary No. 08-05003**
Plaintiff	)	
	)	
v.	)	
	)	
DWAYNE MILLER JIMENEZ	)	
	)	
Defendant	)	

DECISION AND ORDER

The matters before the court for decision are a motion to dismiss the above-captioned adversary proceeding for failure to state a claim upon which relief can be granted filed by the Defendant and a motion to amend complaint filed by the Plaintiff. Specifically, the named Defendant in this adversary proceeding argues that he is not liable on the debt for which the Plaintiff is seeking a determination of dischargeability under 11 U.S.C. § 523(a)(2)(A) and (C). The Plaintiff argues that it should be allowed to amend the misnomer in the complaint. The court has reviewed all arguments and authorities submitted by the parties and for the reasons stated below, the Defendant's motion to dismiss is preliminarily DENIED and the Plaintiff's motion to amend complaint is GRANTED.

BACKGROUND

On October 26, 2007, Douglas W. Harold Jr., Esquire, filed a petition for relief under Chapter 7 of the United States Bankruptcy Code in this court on behalf of Dwayne Miller and Diane Kelley Jimenez ("Debtors"). On February 2, 2008, FIA Card Services filed this adversary proceeding to determine dischargeability, pursuant to 11 U.S.C. § 523(a)(2)(A) and (C), of a credit card debt incurred by the female Debtor, Diane Kelley Jimenez. The Plaintiff listed the male Debtor, Dwayne Miller Jimenez ("Defendant"), as sole defendant in the adversary proceeding and filed a certificate of service with this court listing the male Debtor as the sole party served with the summons and complaint. The certificate of service lists the male Debtor as having been served at 205 Nixon Drive, Gore, VA 22637.

The Plaintiff attached to its complaint a copy of the October, 2007 statement for the credit card giving rise to the debt at issue in this adversary proceeding. (Pl.'s Ex. A.) In its pleadings, the Plaintiff states that it is the successor in interest to Bank of America, the issuer of the credit card. (Compl. ¶ 3.) The attached statement lists the female Debtor as the sole card holder and only lists the female Debtor in the mailing address. (Pl.'s Ex. A.) The mailing address listed on the statement for the female Debtor is the same address to which the summons and complaint in this adversary proceeding were mailed. The Debtors are both represented by Mr. Harold in their bankruptcy proceedings.

The Defendant filed a motion to dismiss for failure to state a claim upon which relief can be granted on February 19, 2008, arguing that the named defendant in the adversary proceeding is not liable on the debt identified in the complaint. On March 4, 2008, the Plaintiff filed a motion to amend complaint along with a response to the Defendant's motion to dismiss.

DISCUSSION

Rule 15 of the Federal Rules of Civil Procedure, which is applied in adversary proceedings pursuant to Rule 7015 of the Federal Rules of Bankruptcy Procedure, provides that if a responsive pleading has been served, "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The United States Supreme Court has clarified that

> In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). There appears to be no such "apparent or declared reason" to deny the Plaintiff's motion to amend.

Bankruptcy Rule 4007 requires that a complaint to determine the dischargeability of a debt under 11 U.S.C. § 523(a)(2)(A) and (C) be filed no later than sixty days after the first date set for the meeting of creditors under section 341(a).[1] Since an amended complaint was not filed within the Rule 4007 sixty day period, any such amended complaint must relate back to the

[1] Bankruptcy Rule 4007(c) states that a request for a determination of dischargeability under 11 U.S.C. § 523(c) must be filed within sixty days of the first date set for the section 341 meeting of creditors. Although the Plaintiff requests relief pursuant to section 523(a)(2)(A) and (C), section 523(c) is the relevant section that requires a party pursuing a finding of non-dischargeability under section 523(a)(2) to file a complaint to obtain a determination of dischargeability.

original complaint to enable the Plaintiff to go forward against the intended defendant. Relation back of a complaint amended for purposes of changing a party to the action is governed by Fed. R. Civ. P. 15(c)(1)(C), which provides that an amendment to a pleading relates back to the date of the original pleading when:

> [T]he amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: (i) received such notice of the action that it will not be prejudiced in defending on the merits; and (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C). In order to satisfy Rule 15(c)(1)(B), an amendment to the pleading must assert "a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Because no amended complaint has been filed, the court cannot determine whether Rule 15(c)(1)(B) has been satisfied.

CONCLUSION

"[J]ustice so requires" that the Plaintiff be allowed to amend its complaint pursuant to Rule 15(a)(2). Although the Plaintiff provided a Rule 15(c)(1)(C) relation back analysis in its motion to amend, such relief cannot be granted without an actual amended complaint having been filed with the court and properly served thereby giving the named Defendant opportunity to file a responsive pleading and be heard. Accordingly, it is

ORDERED

That the Plaintiff's motion to amend is GRANTED and the Plaintiff shall have thirty (30) days to file and serve its amended complaint; otherwise, this proceeding shall be dismissed with prejudice.

Copies of this decision and order are directed to be sent to counsel for the Plaintiff, Melvin R. Zimm, Esquire; and to counsel for the Defendant, Douglas W. Harold, Jr., Esquire.

Date: July 28, 2008

Ross W. Krumm
U.S. Bankruptcy Judge