

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

In re:

Case No. 09-28576-BKC-AJC

DANIEL FOX and STACY FOX,

Chapter 7

Debtors.

ALFRED CHOUINARD,

Adv. Proc. No.: 10-02602-BKC-AJC

Plaintiff,

v.

DANIEL FOX and STACY FOX,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
COUNTS 5, 6, 8, 9, 10, AND 11 OF THE COMPLAINT**

THIS CAUSE came before the Court for hearing on April 27, 2010 at 2:30 p.m., upon the Defendants' Motion to Dismiss Certain Counts in the Complaint (DE #8) (the "Motion"), and the

Plaintiff's Response to the Motion to Dismiss (DE #17) (the "Response"). The Court has already entered a partial order on the Defendant's Motion dismissing Counts 12, 13, and 14 of the Complaint (DE #22). The Court has reviewed the pleadings, heard the argument of counsel, and dismisses Counts 5, 6, 8, 9, 10, and 11 (the "Challenged Counts") for the reasons stated below.

The Plaintiff seeks this Court to declare as non-dischargeable pursuant to 11 U.S.C. §§ 523(a)(2)(A), (a)(4), and (a)(6) certain debts that relate to loans made by the Plaintiff to David Miller ("Miller") and Michael Zuckerman ("Zuckerman" and collectively with Miller the "Borrowers").

As to Zuckerman, the Plaintiff alleges in the Complaint the following:

55. Fox was charged with disbursing the proceeds of such loan transaction.

56. Chouinard funded the loan transaction in the amount of \$65,000.

57. In response to Chouinard's efforts to collect the debt in connection with such loan, Michael Zuckerman has asserted that Fox failed to fully fund the loan transactions.

[Complaint (DE #1), p. 7]. As to Miller, Plaintiff alleges the following:

61. Fox was charged with the duty of disbursing the proceeds of such loan transaction.

62. Chouinard funded the loan transaction in the full amount of \$115,000.

63. Fox initially maintained the proceeds of the loan due to Miller in escrow in a Trust Account.

64. Fox failed to fund the proceeds of the loan transaction to Miller.

[Complaint (DE #1), p. 8].

The Defendants argue that the Plaintiff lacks standing to bring the Challenged Counts and is not the real party in interest. Instead, the Defendants assert that only the Borrowers may prosecute the non-dischargeability action as to their claims. The Borrowers, however, are time

barred from bringing a non-dischargeability action. Thus, Defendants argue, the action cannot be prosecuted by the Plaintiff on their behalf either. The Court agrees.

A. Plaintiff Lacks Standing and is Not the Real Party In Interest.

Section 523(c)(1) specifies that only “the creditor to whom such debt is owed” may request a determination that the debt is non-dischargeable under §§ 523(a)(2), (a)(4), or (a)(6). Indeed, Rule 17(a)(1) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Bankruptcy Procedure Rule 7017, provides that “[a]n action must be prosecuted in the name of the real party in interest.” Further, “[t]he real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.” *Reynolds v. Feldman (In re Unger & Assoc., Inc.)*, 292 B.R. 545, (Bankr. E.D. Tex. 2003), *citing Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 139-140 (5th Cir. 1990).

The facts, as alleged by the Plaintiff in the Complaint, and necessarily taken as true for the purposes of a motion to dismiss, state that the Plaintiff made loans to the Borrowers, that the Defendant Daniel Fox (“Fox”) was charged with disbursing the loan funds to the Borrowers, and that Fox failed to disburse at least a portion of those funds (the “Lost Funds”). The Plaintiff now asserts that the debt that arose from the Lost Funds is his to collect; whereas, the Defendants argue that if Fox owes a debt related to the Lost Funds, the debt is to the Borrowers, not to the Plaintiff. The Defendants further argue that the Borrowers are the real parties in interest and only they may seek a non-dischargeability determination.

The question of to whom the debt is owed rests upon when the alleged default by Fox occurred.

Under the normal escrow situation where the escrow agent defaults prior to performance of the escrow condition, the loss falls upon the

depositor, for he is deemed to have retained legal title to the subject matter of the escrow, and is deemed to be entitled to the return of such subject matter, should the other parties fail to perform.

Cradock v. Cooper, 123 So.2d 256, 258 (Fla. 2nd DCA 1960). However, when the title to receive the funds in escrow passes to the non-depositor party, so does the risk of loss. *Id.* See also, *Stuart v. Clarke*, 619 A.2d 1199, 1203 (D.C. App. 1993).

As to Zuckerman, the Complaint alleges that the Plaintiff funded the loan and that Fox was charged with disbursing the proceeds of the loan. [Complaint, ¶ 55-56]. The Plaintiff concedes in his Response that the funds held by Fox were “held in trust for Zuckerman and Miller.” [Response, p. 8]. Moreover, the Plaintiff, himself, does not allege that Fox failed to fund the loan to Zuckerman; the Plaintiff only alleges that “**Zuckerman has asserted** that Fox failed to fully fund...” [Complaint, ¶ 57 (*emphasis added*)].

As to Miller, the Plaintiff alleges in the Complaint that he fully funded the loan. [Complaint ¶ 62]. The Plaintiff further alleges that “Fox initially maintained the funds of the loan *due to Miller*...” [Complaint ¶ 63 (*emphasis added*)]. Indeed, the Plaintiff concedes in his Response that the funds held by Fox were “held in trust for Zuckerman and Miller.” [Response, p. 8].

The Plaintiff’s allegations, taken as true, admit that the risk of loss had transferred to the Borrowers, as the Borrowers had fulfilled the conditions precedent to receiving the funds. See *Cradock v. Cooper*, 123 So.2d at 258; *Stuart v. Clarke*, 619 A.2d at 1203. Here, upon the funding of the loan and the execution and delivery of notes and mortgages, the risk of loss of the loaned funds had passed from the Plaintiff to the Borrowers. *Id.* In fact, if the Lost Funds were still held by Fox today, it is the *Borrowers* who could seek to recover them; the Plaintiff would only have a claim to repayment under the notes from the Borrowers. Indeed, based on the face

of the allegations, at the time the funds were lost the Plaintiff had no expectation to the return of the funds from Fox. The Plaintiff's recourse for payment is from the Borrowers under the notes and mortgages executed between them, not Fox.

By the Challenged Counts, the Plaintiff seeks to enforce the Borrowers' rights against Fox. The Plaintiff's claims rest on the notes and mortgages he received from the Borrowers, not the funds held in escrow. Although the Plaintiff may ultimately benefit from recovery of any funds, the Borrowers, not the Plaintiff, have standing to pursue potential claims against Fox. Similarly, the Borrowers, not the Plaintiff, are the real parties in interest in an action to except the claims from discharge. Therefore, the Plaintiff does not allege sufficient facts to support his own standing to object to the dischargeability of the debts pursuant to 11 U.S.C. §523(c)(1).

B. The Borrowers Non-Dischargeability Claims are Time Barred.

As stated above, the Plaintiff cannot assert the claims in his own right. Similarly, the Plaintiff cannot assert the claims on behalf of the Borrowers, the real parties in interest who have standing to bring the claims, because the Borrowers' claims are time barred.

Rule 4007(c) of the Bankruptcy Rules of Procedure, provides that any complaint objecting to the non-dischargeability of a debt under § 523(c) must be brought within 60 days after the first date set for the meeting of creditors, except that "[o]n motion of a party in interest ... the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired." Under this rule all parties in interest must either file a complaint or request an extension prior to the deadline provided. *See, e.g., In re Williamson*, 15 F.3d 1037 (11th Cir. 1994) (equity did not warrant allowing untimely dischargeability complaint even though notice from court stated deadline for filing complaint was "to be set" and no further notice was sent); *Acuff-Rose Music, Inc., v. May (In re May)*, Adv. Case No. 04-9177, 2006 WL

5940803 (Bankr. N.D. Ga. Sept. 29, 2006); *Nova Information Sys. v. Stone (In re Stone)*, Adv. Case No. 06-01117-BKC-LMI, 2006 WL 2683116 (Bank. S.D. Fla. May 31, 2006) (“Where no motion to extend the filing deadline has been filed [pursuant to Rule 4007(c)], a bankruptcy court is without power to extend the deadline.”).

In this case, the original meeting of creditors was set for October 1, 2009. Therefore, the deadline to file a complaint or request an extension expired on November 30, 2009. Prior to that date the only parties that sought an extension of the § 523 deadline were the Plaintiff (DE #66) and the Florida Bar (DE #81). Although the Borrowers were both noticed of the bankruptcy, neither filed a complaint or a request for extension of the § 523 deadline. Because the time has run for either of the Borrowers to file complaints for non-dischargability under § 523(c), they cannot be substituted as party plaintiffs into this proceeding, nor can Plaintiff bring claims on their behalf as the claims are time-barred.

Therefore, for the reasons stated herein, it is

ORDERED AND ADJUDGED that the Motion to Dismiss Counts 5, 6, 8, 9, 10, and 11 is GRANTED; Counts 5, 6, 8, 9, 10, and 11 of the Complaint are DISMISSED with prejudice.

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Submitted by:

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Attorney Bast is directed to serve a copy of this order on all interested parties and to file a certificate of service reflecting same.