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DO NOT PUBLISH

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:)	Bankruptcy Case
)	No. 98-3-0747-SCTC
MARK D. DAHLGREN,)	
a/k/a MARK D. DAHLGREN, M.D.,)	Chapter 11
a/k/a MARK DAHLGREN, M.D.,)	
)	
Debtor.)	
)	
_____)	
KIRSTEN DAHLGREN,)	Adv. Proc. No. 98-3-146-TC
)	
Plaintiff,)	
)	
vs.)	
)	
MARK D. DAHLGREN,)	MEMORANDUM RE
a/k/a MARK D. DAHLGREN, M.D.,)	<u>MOTION TO DISMISS</u>
a/k/a MARK DAHLGREN, M.D.,)	
)	
Defendant.)	
_____)	

The court held a hearing on March 1, 1999 on whether the above-entitled action should be dismissed because Plaintiff lacks standing. Richard M. Grant appeared for Plaintiff. James F. Beiden appeared for Defendant. Fred S. Hjelmeset appeared for Jeffry Locke, the chapter 7 trustee of Plaintiff's bankruptcy

1 estate. Upon due consideration, and for the reasons stated below,
2 Plaintiff's complaint is dismissed.

3

4 **FACTS**

5 Plaintiff is the former wife of Defendant. Plaintiff alleges
6 that during their marital dissolution proceedings, Defendant
7 violated a court order directing that he use his earnings to pay
8 the mortgage on the wife's residence. As a result, the house was
9 lost to foreclosure in January of 1977. In the present action,
10 Plaintiff seeks an award of damages and a determination that the
11 liability is not dischargeable in Defendant's chapter 7
12 bankruptcy.

13 The question of Plaintiff's standing arises because Plaintiff
14 filed a chapter 7 case on February 10, 1997, approximately one
15 month after the foreclosure. Plaintiff did not list the cause of
16 action as an asset in her bankruptcy schedules.

17 Defendant filed his chapter 7 case on February 23, 1998. As
18 of that time, Plaintiff had not filed suit against him. Defendant
19 listed Plaintiff as a creditor for notice purposes only. The
20 trustee of Plaintiff's bankruptcy estate was not listed as a
21 creditor and did not receive notice of the commencement of the
22 case.

23 Plaintiff filed the present action on May 26, 1998, within
24 the deadline for filing nondischargeability actions in Defendant's
25 chapter 7 case. Shortly before the scheduled trial date, the
26 parties advised the court of Plaintiff's chapter 7 case. The
27 court directed the parties to brief whether an amended complaint
28

1 substituting Plaintiff's trustee as plaintiff would relate back to
2 the original filing date pursuant to Fed. R. Civ. P. 17(a). At
3 the March 1, 1999 hearing, counsel for Plaintiff's trustee
4 appeared and stated that the trustee desired to prosecute the
5 action on behalf of Plaintiff's bankruptcy estate.

6

7 **DISCUSSION**

8 The present action can be brought only by Plaintiff's
9 trustee. The cause of action clearly arose before Plaintiff filed
10 her chapter 7 case. The action thus passed to the bankruptcy
11 estate pursuant to 11 U.S.C. § 541(a). The court has not issued
12 an order directing the trustee to abandon the action to Plaintiff.

13 If the trustee is substituted as Plaintiff, the amended
14 complaint would not relate back to the date of the original
15 complaint. Rule 17(a) of the Federal Rules of Civil Procedure,
16 applicable in bankruptcy proceedings under Fed. R. Bank. P. 7017,
17 provides in relevant part:

18 No action shall be dismissed on the ground that it is
19 not prosecuted in the name of the real party in interest
20 until a reasonable time has been allowed after objection
21 for ratification of commencement of the action by, or
22 joinder or substitution of, the real party in interest;
and such ratification, joinder, or substitution shall
have the same effect as if the action had been commenced
in the name of the real party in interest.

23 The Ninth Circuit has held that where the original complaint was
24 filed by a party that did not own the cause of action at the time
25 the action was filed, and that party acquired the cause of action
26 by assignment after the statute of limitations had run, the
27 relation-back provisions of Rule 17(a) did not apply and the
28 action was untimely.

1 Rule 17(a) does not apply to a situation where a party
2 with no cause of action files a lawsuit to toll the
3 statute of limitations and later obtains a cause of
4 action through assignment. Rule 17(a) is the
5 codification of the salutary principle that an action
6 should not be forfeited because of an honest mistake; it
is not a provision to be distorted by parties to
circumvent the limitations period. B & K's assignment
to the Wulffs of its claim against CMA cannot ratify the
Wulffs' commencement of suit on a claim which
theretofore did not exist.

7 United States v. CMA, Inc., 890 F.2d 1070, 1075 (9th Cir. 1989).

8 The decision of the Seventh Circuit in In Re Meyer, 120 F.3d 66
9 (7th Cir. 1997) is not to the contrary. In that case, the RTC
10 filed an action on behalf of the subsidiary of a bank that had
11 been placed in receivership. The cause of action actually
12 belonged to the parent bank. Noting that the RTC had at all
13 relevant times full authority to file suit under the name of the
14 parent bank, the court held that the amended complaint related
15 back. The present action is like CMA, because Plaintiff clearly
16 had no right to sue under any name at the time the original
17 complaint was filed.

18 The trustee may still not be time-barred from filing an
19 amended complaint. The trustee was not listed as a creditor in
20 Defendant's chapter 7 case, and was not served with notice of the
21 commencement of that case or the bar date for filing
22 nondischargeability actions. Thus, it appears that any debt to
23 Plaintiff's bankruptcy estate may be excepted from discharge under
24 11 U.S.C. § 523(a)(3). That section effectively eliminates the
25 bar date for actions to determine dischargeability under
26 paragraphs (2), (4), and (6) of subsection 523(a), where the
27 creditor does not receive notice or actual knowledge of the case

28
**MEMORANDUM RE MOTION
TO DISMISS**

1 in time to file a timely complaint. See In re Franklin, 179 B.R.
2 913 (Bankr. E.D. Cal. 1995). The trustee should be required to
3 file his own complaint, because the existing complaint does not
4 allege facts sufficient to invoke subsection 523(a)(3).

5 The complaint is dismissed. Dismissal is with prejudice
6 regarding Plaintiff, but is without prejudice regarding the
7 trustee.

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Dated: _____

Thomas E. Carlson
United States Bankruptcy Judge