IN THE UTAH COURT OF APPEALS

----ooOoo----

Derek Sell, Plaintiff and Appellant, v. MBNA America Bank, N.A.; and Law Firm of R. Bradley Neff, P.C., Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20070200-CA F I L E D (September 27, 2007) 2007 UT App 316

Fourth District, Provo Department, 060403253
The Honorable Fred D. Howard

Attorneys: Derek Sell, Appellant Pro Se
R. Bradley Neff, Edward J. McCaffrey, and Grady R. McNett, Sandy, for Appellees

---

Before Judges Greenwood, Billings, and Davis.

PER CURIAM:

Derek Sell appeals the district court's order granting MBNA America Bank, N.A. and Law Firm of R. Bradley Neff, P.C.'s (collectively referred to as MBNA America) motion to dismiss.

Sell argues that the district court erred when it refused to consider certain requests for admissions and interrogatories that Sell served upon MBNA America prior to the court issuing its order to dismiss the case. Specifically, Sell argues that because he served the requests for admissions upon MBNA America and they were not responded to within thirty days, the requests should have been deemed admitted, and those admissions should have been considered by the court in its analysis of the motion to dismiss.

Rule 26(d) of the Utah Rules of Civil Procedure states that unless otherwise agreed to by the parties or ordered by the court, "a party may not seek discovery from any source before the parties have met and conferred as required by Subdivision (f)." Utah R. Civ. P. 26(d). Rule 26(f) requires the parties to meet and confer to discuss the nature of their claims and defenses and

to agree upon a discovery plan. See Utah R. Civ. P. 26(f). Rules 33 (Interrogatories) and 36 (Requests for Admissions), in turn, expressly state that requests under these rules "may not be served before the time specified in rule 26(d)." Utah R. Civ. P. 33(a), 36(a)(1). Sell served his interrogatories approximately one month after he filed his complaint. However, at the time, no rule 26 meeting had been conducted because MBNA America elected to file a motion to dismiss rather than answer the complaint. Thus, Sell's interrogatories and requests for admissions were premature, and MBNA America's obligation to respond to such discovery was tolled until such meeting was conducted. As such, the district court properly refused to deem Sell's requests for admissions as admitted.[1]

Sell also argues that he was denied a right to a trial by jury. However, Sell does not adequately brief this issue, especially in light of the fact that such argument goes against years of jurisprudence, and the entire structure of both the federal and state jurisprudence systems, which allow dismissal of causes of action that state claims for which the law cannot grant relief. Accordingly, we decline to address it. See Utah County v. Ivie, 2006 UT 33,¶20, 137 P.3d 797.

Finally, Sell argues that the district court improperly granted the motion to dismiss based upon a false assumption. Specifically, Sell asserts that the court based its decision on the incorrect belief that Sell was arguing that the debt in the case no longer existed, when, in fact, Sell was merely contesting the amount of the debt owed. However, such a fact is irrelevant. Sell's argument is premised on his belief that because MBNA America charged off the debt to take a tax deduction, he no longer owes the debt or only owes a part of the debt. The fact that a creditor charges off a debt for tax purposes has no effect on a debtor's liability. See In re Crabtree, 32 B.R. 837, 839 n.7 (Bankr. D. Tenn. 1983); Federal Deposit Ins. Corp. Liquidators of Ne. Bank v. Manning, 608 S.W.2d 270, 271 (Tex. Civ. App. 1980). If after taking the tax deduction, the creditor subsequently recovers the debt from the debtor, it is simply treated as new taxable income in the year it is collected. See Merchants Nat'l Bank of Mobile v. Commissioner, 199 F.2d 657, 659

---

1. Even if the court did deem the requests for admissions to be admitted, that information is irrelevant for purposes of a motion to dismiss. A court may only grant a motion to dismiss, filed under rule 12 of the Rules of Civil Procedure, if after assuming all facts in the complaint to be true, the court determines that the plaintiff may still not recover as a matter of law. See Russell v. Standard Corp., 898 P.2d 263, 264 (Utah 1995). Thus, the only relevant information is that contained in the complaint.

(5th Cir. 1952); Helvering v. State-Planters Bank & Trust Co., 130 F.2d 44, 46 (4th Cir. 1942). Thus, Sell's argument fails regardless of whether he was arguing that the entire debt no longer existed or that only part of the debt still existed.

Affirmed.

_____
Pamela T. Greenwood,
Associate Presiding Judge

_____
Judith M. Billings, Judge

_____
James Z. Davis, Judge