

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____ M
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William L. Olson, Clerk
By _____ Deputy
CV 84-0-396

IN RE:)
)
DAVID & DELLA MILLICAN,)
)
Debtors.)
)
DAVID & DELLA MILLICAN,)
)
Appellants,)
)
vs.)
)
JONES OIL COMPANY, INC.,)
)
Appellee.)

BK 83-385
CV 84-0-396

MEMORANDUM AND ORDER

This matter is before the Court on appeal from a final order of the United States Bankruptcy Court for the District of Nebraska,¹ dated June 1, 1984, overruling appellants' "Motion to Reopen Case, for Leave to Amend Schedules, and Other Relief."

The sole question raised on appeal is whether David and Della Millican, debtors, should be allowed under 11 U.S.C. §§ 350(b) and 523(a)(3) of the Bankruptcy Code, to reopen their bankruptcy estate for the purpose of listing an additional creditor, Jones Oil Company, Inc., (Jones Oil Company) appellee, on their schedule of creditors.

I.

On March 10, 1983, debtors filed a joint Chapter 7 petition. On March 15, 1983, the Bankruptcy Court sent notice of the Section 341 creditors' meeting, set for April 13, 1983, to the scheduled creditors. On April 18, 1983, the trustee filed his report of no assets. Later, on June 17, 1983, the Bankruptcy

Court entered orders approving the trustee's report of no assets, closing the estate, and releasing the debtors from all dischargeable debts.

Several months after the debtors' discharge, Jones Oil Company, appellee, notified debtors that it had or intended to assert a claim against them. The claim related to the lease, executed on or about December 31, 1978, of a service station in Lexington, Nebraska, owned by Jones Oil Company. Approximately one year after entering the lease, David Millican, debtor, discontinued his business at that site, gave notice of abandonment and surrendered the premises to Jones Oil Company.

On January 9, 1984, Jones Oil Company filed an adversary complaint in Bankruptcy Court, seeking a determination that its claim against debtors had not been discharged. Thereafter, on April 23, 1984, the debtors filed a "Motion to Reopen Case, for Leave to Amend Schedules, and Other Relief," seeking to have the court reopen their bankruptcy case, grant them leave to amend their schedules by adding an omitted creditor (Jones Oil Company), and requesting the court to find the claim of Jones Oil Company discharged. In support of their motion, the debtors stated that they failed to schedule Jones Oil Company as a creditor merely because they were unaware that Jones Oil Company had or intended to assert a claim against them. The debtors claimed that after the lease was abandoned in December of 1979, they received no communication from Jones Oil Company regarding any outstanding debt or claim until September of 1983, after their discharge in bankruptcy.

On June 1, 1984, a hearing was held before the Bankruptcy Court, concerning debtors' motion to reopen. Debtors made clear that their motion to reopen included a prayer that the attached amended schedule be deemed filed and that the claim of Jones Oil Company be discharged. Jones Oil Company agreed that the case should be reopened, but only for the purpose of having the court determine the issue of dischargeability under the pending adversary proceeding. Despite the parties agreement to reopen, the Bankruptcy Court overruled debtors' motion and this appeal followed.

The issue raised on appeal is whether the Bankruptcy Court abused its discretion or otherwise erred in overruling debtors' motion to reopen, to amend their schedules, and to discharge the claim of Jones Oil Company. Because the issue of dischargeability of the debt is, in the first instance, for the Bankruptcy Court's determination, and such determination has not yet been made, this Court entertains only the matter of whether debtors should be allowed to reopen and to amend their creditor schedules.

II.

11 U.S.C. §§ 350(b) and 523(a)(3) of the Bankruptcy Code are relevant to the present issue. Section 350(b) of the Bankruptcy Code, which governs the reopening of bankruptcy estates, provides: "[A] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b).²

Section 523(a)(3) of the Bankruptcy Code provides that a discharge is not granted for any debt that was,

(3) [N]either listed nor scheduled under section 521(1) of this title, . . . in time to permit --

(A) . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing.

11 U.S.C. § 523(a)(3).

In the present case, debtors argue that, pursuant to section 350(b), the Bankruptcy Court should have exercised its power to reopen their closed case to accord relief where no prejudice would result to the creditor. It is evident from the transcript of the June 1, 1984, hearing on the debtors' motion, however, that the Bankruptcy Court believed the law, pursuant to section 523(a)(3), to be that "if you don't schedule a debt in time for filing, it isn't discharged, period, unless the creditor had notice of the bankruptcy." (Transcript at 5).

The Seventh Circuit has recently rejected the mechanical application of section 523(a)(3) in no-asset cases. In In re Stark, 26 Bankr. 178 (C.D. Ill. 1982), aff'd, 717 F.2d 322 (7th Cir. 1983), debtors failed to schedule a hospital as a creditor because they believed the entire indebtedness would be paid by their insurance carrier. After debtors were granted a discharge in bankruptcy, the hospital filed suit and obtained a judgment against debtors. Seeking relief, debtors filed a motion to reopen their bankruptcy estate for the purpose of adding the hospital to their schedule of creditors. The bankruptcy court denied debtors' motion to reopen, pursuant to section 523(a)(3), because debtors had failed to list the hospital as a creditor and the hospital had no notice or actual

knowledge of debtors' bankruptcy. In reversing the decision of the bankruptcy court, the district court held:

Section 523(a) should not be mechanically applied to deprive a debtor of a discharge in a no asset case where there is no showing of fraud or genuine harm to the creditors. In re Callaham, [1977-78] Bankr. L. Rep. (CCH) ¶66, 465 (E.D. Ore. May 5, 1977).

Here, in a no asset case where a creditor can be restored to the same status he would have occupied if he had been listed, the debtor should be allowed to amend the petition. Id.

In re Stark, 26 Bankr. at 180.

On appeal, the Seventh Circuit affirmed. The court concluded that the right protected by section 523(a)(3) is the creditor's right to timely file a proof of claim. The court reasoned that the hospital's right to file a timely proof of claim under section 523(a)(3) would not be jeopardized if debtors were allowed to reopen their case, because (1) "notice of no dividend" had been given to scheduled creditors, pursuant to Bankruptcy Rule 203(b),³ and (2) the hospital would still have an opportunity to file a claim, pursuant to Bankruptcy Rule 302(e)(4),⁴ should subsequent assets be found. The court succinctly concluded that:

In a no-asset bankruptcy where notice has been given pursuant to Rule 203(b), a debtor may reopen the estate to add an omitted creditor where there is no evidence of fraud or intentional design.

In re Stark, 717 F.2d at 324. Accord In re Meile, 36 Bankr. 719, 720 (Bankr. S.D. Ill. 1984); Matter of Zablocki, 36 Bankr. 779, 782 (Bankr. D. Conn. 1984); In re Ratliff, 27 Bankr. 465, 467

(Bankr. E.D. Va. 1983); Matter of Davids, 36 Bankr. 539, 543-44 (Bankr. D.N.J. 1983). But see In re Laczko, 37 Bankr. 677, 679 (Bankr. 9th Cir. 1984); In re Gilbert, 38 Bankr. 948, 950-51 (Bankr. N.D. Ohio 1984).

In further support of their position, debtors cite In re Benak, 374 F. Supp. 499 (D. Neb. 1974), arguing that Benak remains the law in this district. In In re Benak, this Court considered whether a debtor may reopen a no-asset bankruptcy case to add a creditor to his schedules. In reversing the Bankruptcy Court, this court stated:

[C]ases, such as Robinson v. Mann, 339 F.2d 547 [5th Cir. 1964] . . . hold that the amendment may be allowed after the [period in which claims must be filed] if exceptional circumstances exist, appealing to the equitable discretion of the bankruptcy court. The exceptional circumstances usually require that the case be a no-asset one; that there be no fraud or intentional laches; and that the creditor was omitted through mistake or inadvertence. 1A Collier on Bankruptcy ¶7.12.

In re Benak, 374 F. Supp. at 500.

Although Benak was decided under the former Bankruptcy Act, this Court finds that the substance of the relevant sections under the Act at that time is essentially the same as in the relevant provisions under the current Bankruptcy Code. Therefore, the Court concludes that the equitable principles set forth in Benak remain sound and are applicable under the new Code to facts of the present case.

It is undisputed that debtors' estate contained no assets from which dividends could be paid. It is also undisputed that the appellee, Jones Oil Company, was omitted from the debtors'

schedule of creditors as a result of debtors' belief that their obligation to the appellee had been satisfied or eliminated approximately three years prior to their filing of bankruptcy. Appellee asserts no allegation of fraud or intentional laches. The Court also notes that the notice of the section 341 creditors' meeting, sent by the Bankruptcy Court to the scheduled creditors, provided that:

It appears from the schedules of the debtor that there are no assets from which any dividend can be paid to creditors. It is unnecessary for any creditor to file his claim at this time in order to share in any distribution from the estate. If it subsequently appears that there are assets from which a dividend may be paid, creditors will be so notified and given an opportunity to file their claims. (Emphasis original).

Such notice conforms with the provisions of Bankruptcy Rule 2002(e),⁵ and preserves an omitted creditor's section 523(a)(3) right to file a timely proof of claim. See In re Stark, 717 F.2d at 324.

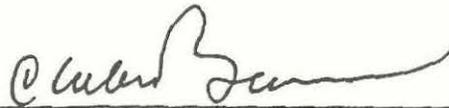
Applying the equitable principles of Benak and Stark to the facts of the present case, this Court finds that the Bankruptcy Court erred in overruling debtors' motion to reopen their bankruptcy estate for the purpose of adding the appellee's name to their schedule of creditors. In so finding, however, this Court expresses no opinion as to the issue of whether the claim asserted by Jones Oil Company is dischargeable. That matter is for the Bankruptcy Court to decide on remand.

Accordingly,

IT IS HEREBY ORDERED that the Bankruptcy Court's order of June 1, 1984, overruling appellants' motion to reopen their bankruptcy estate for the purpose of adding appellee's name to the schedule of creditors, is reversed and the case is hereby remanded to the Bankruptcy Court in accordance with this Memorandum.

DATED this 29th day of November, 1984.

BY THE COURT:



C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE

FOOTNOTES

¹The Honorable David L. Crawford, United States Bankruptcy Judge for the District of Nebraska, presiding.

²Related to section 350(b) is Bankruptcy Rule 5010, which provides: "A case may be reopened on motion of the debtor or other party in interest pursuant to §350(b) of the Code." Bankr. Rule 5010, 11 U.S.C.A.

³Bankruptcy Rule 203(b) provides:

(b) Notice of No Dividend. If it appears from the schedules that there are no assets from which a dividend can be paid, the court may include in the notice of the first meeting a statement to that effect, that it is unnecessary to file claims, and that if sufficient assets become available for the payment of a dividend, the court will give further notice of the opportunity to file claims and the time allowed therefor.

The Court notes that on April 25, 1983, new Bankruptcy Rules were adopted by the Supreme Court. While the wording of Rule 203(b) has been changed in small part, the substance of the Rule has been retained and can be found in New Bankruptcy Rule 2002(e).

⁴Bankruptcy Rule 302(e)(4) provides:

(e) Time for Filing. A claim must be filed within 6 months after the first date set for the first meeting of creditors, except as follows:

(4) If notice of no dividend was given to creditors pursuant to Rule 203(b), and subsequently the payment of a dividend appears possible, the court shall notify the creditors of that fact and shall grant them a reasonable, fixed time for filing their claims of not less than 60 days after the mailing of the notice or 6 months after the first date set for the first meeting of creditors, whichever is the later.

As noted in footnote 3, supra, new Bankruptcy Rules have been adopted by the Supreme Court. The basic substance of Rule 302(e)(4) has been retained and can be found in new Bankruptcy Rule 3002(c)(5), however, the time for filing of claims has been extended from 60 days after mailing of the notice to 90 days under the new Rule.

⁵Bankruptcy Rule 2002(e) (formerly Bankruptcy Rule 203(b), see n.3, supra) provides:

(e) Notice of No Dividend. In a chapter 7 liquidation case, if it appears from the schedules that there are no assets from which a dividend can be paid, the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims.

Correlated with Rule 2002(e) is Bankruptcy Rule 3002(c)(5) (formerly Bankruptcy Rule 302(e), see n.4, supra), which provides:

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.