



This court will exercise its discretion to reopen this bankruptcy case. The equities in this case favor the debtor because the debtor omitted the judgment through inadvertence and mistake, not for fraud; because the state court judgment, appears on its face to be a dischargeable debt under the Bankruptcy Act; because the case was a no-asset case; and because scheduled creditors were not required to file claims in this case. However, since the judgment was not previously scheduled, the judgment is a non-dischargeable debt under Section 17a(3) until such time as the debtor schedules the debt, brings an adversary proceeding, and proves that it is dischargeable. In such an adversary proceeding, the issue of fraud may be raised and litigated as a defense to dischargeability by the creditors.

### Discussion

#### 1. Statutory Authority

The Bankruptcy Code became effective on November 1, 1979. See BANKRUPTCY CODE AND RULES, at 1 (1996 Norton Quick-Reference Pamphlet). For cases filed before November 1, 1979, such as this case, the prior Bankruptcy Act of 1898 applied. Under Section 2a(8) of the former Bankruptcy Act, courts could "reopen estates for cause shown." 1 LAWRENCE P. KING ET AL., COLLIER ON BANKRUPTCY ¶ 2.49, at 287 (14th ed. 1974) [hereinafter this volume shall cited as 1 COLLIER (14th ed. 1974)].

"[F]or cause shown" was not defined in the prior Act, and therefore, what constituted grounds for reopening an estate fell within the sound discretion of the court. In re Johnson, 291 F.2d 910, 911 (8th Cir. 1961), cert. denied, 368 U.S. 971, 82 S. Ct. 447, 7 L. Ed. 2d 399 (1962); 1 COLLIER ¶ 2.49, at 287 n. 2 (14th ed. 1974). In 1973, former Bankruptcy Rule 515 was enacted to clarify the breadth of the "for cause shown" language: "A case may be reopened on application by the bankrupt or other person to administer assets, to accord relief to the bankrupt, or for other good cause." 2 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 350.01, at 350-3 to 350-4 (15th ed. 1996). This portion of former Bankruptcy Rule 515 continued to apply under the new Bankruptcy Code until the current version of the Bankruptcy Rules were promulgated in 1983. Id. at 350-4 (15th ed. 1996); see also 11 U.S.C. § 350(b) (1994) (adopting language of former Bankruptcy Rule 515 as statutory language for reopening cases under Bankruptcy Code).

The Advisory Committee Note accompanying former Bankruptcy Rule 515 provided that courts which had previously restricted reopening closed bankruptcy cases under Section 2a(8) of the Act for the administration of newly discovered assets and which had refused to reopen to accord the debtor relief through a discharge had reached this conclusion because of the rule under the former Bankruptcy Act "that the closing of the estate without the grant of

a discharge is the legal equivalent of a denial of discharge." 12 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶ 151.1, at 5-114 (14th ed. 1978). Thus, the Note continued, former Bankruptcy Rule 515 intended to clarify that it was permissible to reopen a bankruptcy case to provide relief to the debtor in the form of a discharge and that the decision to reopen in such an instance was a matter of discretion for the bankruptcy court. Id. (14th ed. 1978); accord Mullendore v. United States (In re Mullendore), 741 F.2d 306, 308 (10th Cir. 1984); In re Souras, 19 B.R. 798, 800 (Bankr. E.D. Va. 1982) (reopening a case under the former Bankruptcy Act to permit the debtor to reschedule an omitted creditor and to receive relief from that debt).

Despite the language which permits a court to reopen a case to accord relief to a debtor, a split of authority developed under the Bankruptcy Act regarding whether a debtor could reopen a case for the specific purpose of scheduling a creditor omitted from the debtor's bankruptcy schedules and of having the debt declared dischargeable after the period of time to file a proof of claim had expired. The split in authority occurred over Sections 17a(3) and 57n of the Bankruptcy Act.

Section 17a(3) denied a discharge to debts which were not scheduled:

A discharge in Bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as ... (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor has notice or actual knowledge of the proceedings in bankruptcy.

Bankruptcy Act §17a(3), 11 U.S.C. § 36(a)(3) (1976).

The reference in Section 17a(3) to filing a proof of claim "in time for proof and allowance" was governed by Section 57n, which provided a six month limitation for filing claims after the first meeting of creditors:

Except as otherwise provided in this title all claims provable under this title, ..., shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: .... When in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the court may fix or

for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case.

Bankruptcy Act § 57n, 11 U.S.C. § 93(n) (1976).

The leading case for refusing to reopen a case to reschedule omitted creditors was Milando v. Perrone, 157 F.2d 1002 (2d Cir. 1946). In Milando, the debtor inadvertently omitted a creditor from his bankruptcy schedules in a no-asset case and moved to reopen the case in order to reschedule the creditor and to receive a discharge. 157 F.2d at 1003. The Second Circuit decided that Section 2a(8) permitted a debtor to reopen to amend schedules for good cause at any time, but that a debtor could not reopen to amend the schedules if the omitted debt was barred from discharge under Section 17a(3) of the Bankruptcy Act. Id.

In support of this holding, the Milando panel noted that Section 57n of the Bankruptcy Act limited the time allowed for creditors to file a proof of claim to six months from the first meeting of creditors and that a bankruptcy court could not extend the statutory time period, "except perhaps 'in order to prevent a fraud or an injustice.'" 157 F.2d at 1004 (quoting dictum in Pepper v. Litton, 308 U.S. 295, 305 n. 11, 60 S. Ct. 238, 244 n. 11, 84 L. Ed. 2d 281 (1939)). The panel concluded that the plain language of Section 17a(3) created a statutory exception to Section 2a(8). Milando, 157 F.2d at 1004; accord In re Swain, 21 B.R. 594 (Bankr. D. Conn. 1982) (ruling that Milando continued to apply in Second Circuit under the Bankruptcy Code).

The Fifth Circuit Court of Appeals in Robinson v. Mann, reached a contrary result by concluding that Section 57n was not an absolute bar to amending schedules to add omitted debts. 339 F.2d 547 (1964). In Robinson, the debtor's attorney omitted a creditor from the bankruptcy schedules, and a subsequent attorney for the debtor moved to amend the bankrupt's schedules after the six month bar date for amending schedules had expired under Section 57n. Id. at 549.

The Fifth Circuit panel acknowledged that Section 57n had been held in other jurisdictions to be an absolute bar to amendments by the bankrupt and to the presentation of claims by creditors, Robinson, 339 F.2d at 549 (citing In re Hawk, 114 F. 916 (8th Cir. 1902)), but declined to follow those jurisdictions. Robinson, 339 F.2d at 550. The court found that Section 57n was promulgated to address the expediency with which creditors file their claims, not debtor's amendments to schedules, but that the Bankruptcy Act also evidenced a statutory purpose for speed and efficiency, and therefore, the court concluded that amendments to schedules should be permitted after six months in "exceptional circumstances appealing to the equitable discretion of the bankruptcy court."

Id. Factors to consider when determining whether exceptional circumstances were present included:

- (1) the circumstances attendant to the failure of counsel to have originally listed the creditor,
- (2) the degree of disruption which would result from allowing the amendment, and
- (3) whether any creditor including the unlisted creditor would be prejudiced thereby.

Id.

The United States District Court for the District of Nebraska followed the Fifth Circuit Robinson decision by holding that a debtor could amend his schedules after a case had been closed to schedule a claim which had been omitted from the original schedules. In re Benak, 374 F. Supp. 499, 500 (D. Neb. 1974) (distinguishing the facts of the Eighth Circuit case In re Hawk, supra, at 4. In Benak, the court concluded that the decision to permit an amendment after six months from the first meeting of creditors was subject to the equitable discretion of the court and that such factors were relevant: the case is a no-asset case; the creditor was omitted through inadvertence or mistake; no fraud or intentional laches caused the delay; and the length of delay after six months. 374 F. Supp. at 500.

The bankruptcy court in Souras applied the "exceptional circumstances" test in Benak to permit a case to be reopened under the former Bankruptcy Act in order to reschedule an omitted claim. 19 B.R. at 801; accord In re Holloway, 10 B.R. 744, 745-46 (Bankr. D.R.I. 1981) (using "exceptional circumstances" test to reopen case to schedule debt omitted from case under Bankruptcy Act); In re Mitchell, 47 B.R. 209, 211-12 (Bankr. N.D. Tex. 1985) (following analysis of Souras and Benak under Bankruptcy Code). The Souras court opted to omit consideration of the length of the delay beyond six months since Section 57n was only extended to Section 2a(8) by a minority of courts, and held that a debtor may be entitled to reopen a bankruptcy case to amend the schedules if the case is a no-asset case, if there is no fraud or intentional laches, and if the creditor was omitted through mistake or inadvertence. Souras, 19 B.R. at 801, 802. The court added:

Absent the showing of any real harm to the creditor or design on the bankrupt's part to defraud or cause delay, courts should not deny bankrupts the opportunity to amend their schedules solely because of a speculative procedural harm to the creditor.

Id. at 801 (citing Callaham v. Snider (In re Callaham), 3 B.C.D. 501, 502 (Bankr. Or. 1977)). Finally, the court concluded that permitting debtors to reopen their previously closed bankruptcy cases to schedule claims omitted from the bankruptcy case furthers the "fresh start" purpose of bankruptcy law and policy. Id. (citing Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934)).

The factors enumerated in Benak, as applied in Souras, will determine whether the debtor may reopen his bankruptcy case to amend his bankruptcy schedules. While Benak did not address Section 17a(3), the court notes that the bar against dischargeability under Section 17a(3) for not scheduling a debt, did not prohibit a debtor under the Bankruptcy Act from having that debt discharged in a subsequent bankruptcy. Bankruptcy Act § 17b, 11 U.S.C. § 35(b) (1976). In addition, Section 17c(6), which was the subdivision governing procedure for filing a complaint to determine the dischargeability of a debt, stated: "If a bankruptcy case is reopened for the purpose of obtaining the orders and judgments authorized by this subdivision, no additional filing fee shall be required." Bankruptcy Act § 17c(6), 11 U.S.C. § 35(c)(6) (1976). Since the subdivision dealt with how to bring a lawsuit over the dischargeability of a debt, it appears that the Bankruptcy Act authorized debtors to reopen their bankruptcy cases to obtain a determination of whether a debt is dischargeable or not.

Former Bankruptcy Rules 203(b) and 302(e)(4) also support the conclusion that it was permissible to reopen a no-asset case to schedule an omitted creditor after the six month period for filing a claim expired under the Bankruptcy Act. B ANKR. R. 203(b), 11 U.S.C. Title 11 App. (1976); BANKR. R. 302(e)(4), 11 U.S.C. Title 11, App. (1976). Former Rule 203(b) provided that in a no-asset case, the notice of the first meeting of creditors could include notice to the creditors that it was not necessary to file a proof of claim and that if assets were discovered later, the court would provide further notice of the opportunity to file a proof of claim and set the time therefor. Former Rule 302(e)(4) provided that the time to file a proof of claim under former Rule 203(b) would be sixty (60) days from the notification of additional assets. In the notice of the first meeting of creditors in this bankruptcy case, the creditors were in fact notified that it was not necessary to file a proof of claim in the debtor's bankruptcy case because the case was a no-asset case. Filing no. 9. Therefore, in this case, ruling that the case cannot be reopened because the six month bar to filing a claim has expired would not be equitable since the scheduled creditors of the debtor were not required to file their claims. Accord La Bate & Conti, Inc. v. Davidson (In re Davidson), 36 B.R. 539, 542 (Bankr. D.N.J. 1983) (holding that Milando rule did not apply where creditors were not required to file claims under former Rule 203(b) and where case was a no-asset case).

There is no limitation of time under the Bankruptcy Act to bar the reopening of a bankruptcy case because Federal Rule of Civil Procedure 60(b) is inapplicable to non-final orders, such as an order to reopen a bankruptcy case. Mullendore, 741 F.2d at 308 n. 1 (citing 1 COLLIER ¶ 2.12[2.1] (14th ed. 1976); Grand Union Equip. Co., Inc. v. Lippner, 167 F.2d 958, 961 (2d Cir. 1948) (citing Tuffy v. Nichols, 120 F.2d 906 (2d Cir.), cert. denied Nichols v. Tuffy, 314 U.S. 660, 62 S. Ct. 113, 86 L. Ed. 528 (1941); Gerber v. Fruchter, 147 F.2d 120 (2d Cir. 1945); Traub v. Marshall Field & Co., 182 F. 622, 624-25 (5th Cir. 1910)). However, the court may consider the reasonableness of the time that has passed since the estate was closed when determining whether to reopen a case. See Mullendore, 741 F.2d at 308.

## 2. Findings of Fact

There is no evidence that the debtor omitted the judgment from his bankruptcy schedules in bad faith. The debtor contends that the contract with the creditors, which was the basis of the creditors' state court lawsuit, was with his construction company, not with him individually. Therefore, the debtor takes the position that he was erroneously under the assumption at the time that his bankruptcy case was pending that the judgment was against the construction company and not against him personally.

The creditors have suggested that the omission was intentional, but there is no reason given for the debtor to have knowingly omitted the creditors. If the debt was dischargeable, the omission prevented the debtor from receiving a discharge. If the debtor knew that the debt was non-dischargeable for fraud, the debtor had nothing to gain by omitting the creditors. The bankruptcy case was initiated by another creditor of the debtor, and since the debtor did not initiate these proceedings, the debtor obviously did not file bankruptcy to escape creditors through fraud. The bankruptcy case was a no-asset case, and therefore, there is no reason to suspect the debtor wanted to deny the creditors their pro rata share of the distribution of his assets.

There is also a lack of prejudice to the creditors as a result of reopening this case. Sometime after the bankruptcy case was closed, the debtor moved to another jurisdiction, and the creditors apparently took no action to collect the judgment. The debtor recently returned to the Omaha, Nebraska area, and the state court revived the judgment on January 24, 1996, on the creditors' motion. The present motion to reopen was triggered by the revival of the judgment and the attempt to enforce it. There is no evidence that the creditors have expended significant sums of money to pursue the debtor or his assets in the years since the bankruptcy case was closed. Therefore, the creditors are essentially in the same position as they were in 1979, when the bankruptcy case was filed. The bankruptcy court in Mitchell concluded that consideration of whether the parties were returned "to their original position,

assuming the debt had not been omitted, to determine prejudice to the creditor" was appropriate under the Bankruptcy Act. 47 B.R. at 212 (citing Souras and In re Castleberry, 3 Bankr. Ct. Dec. 6 (N.D. Ga. 1977)). Since the creditors have not provided evidence that they are in a different position from the period that the bankruptcy case was pending, the creditors are not prejudiced. See Mitchell, 47 B.R. at 212-13 (using Bankruptcy Act case law to conclude that appropriate standard was to consider whether creditor's collection efforts resulted in sufficient expenditures to show that the creditor would be prejudiced by reopening the case).

In addition, since this case was a no-asset case and since claims were not required to be filed by scheduled creditors, no actual harm has occurred to the creditors. See Souras, 19 B.R. at 801; Mitchell, 47 at 211-12 (quoting Souras). The creditors in this case were not denied a distribution from the bankruptcy estate and did not miss a deadline to file a claim, since none was required in this case.

The creditors contend that the judgment is non-dischargeable because the judgment is for fraud, and the case, as a result, should not be reopened. Non-dischargeability for fraud is a question of fact under Section 17a(4) (false representation and pretenses) and Section 17a(4) (fraud committed in fiduciary capacity) of the Bankruptcy Act. Under the Bankruptcy Act, state courts originally determined the dischargeability of a debt, usually through collection proceedings, but in 1970, Section 17 was amended to provide that creditors had to apply to the bankruptcy court to determine certain dischargeability questions, including issues arising under Section 17a(2) and Section 17a(4) of the Bankruptcy Act. Brown v. Felsen, 442 U.S. 127, 129-30, 136-36, 99 S. Ct. 2205, 2208, 2211-12, 60 L. Ed. 2d 767 (1979). While bankruptcy courts should give collateral-estoppel effect to pre-bankruptcy state court judgments, the issue of dischargeability is not res judicata, and state court judgments are not final for Section 17a purposes, so the creditors are not precluded from raising fraud in an adversary proceeding. Id. at 135-38, at 2211-13.

One pre-Bankruptcy Code case denied a motion to reopen a case to schedule an omitted creditor where the debtor argued that the case should be reopened so the debtor could litigate the issue of dischargeability of the debt through an adversary proceeding. In re McNeil, 13 B.R. 743 (Bankr. S.D.N.Y. 1981). The McNeil court logically concluded that a debtor should be prevented from reopening a case to schedule an omitted creditor in an instance where the evidence presented at the hearing on the motion to reopen *overwhelmingly* supports a finding of non-dischargeability and where there is evidence of bad faith on the part of the debtor.

Similar facts do not exist in the present case. The evidence does not indicate that the judgment is non-dischargeable for fraud. The state court judgment, which was entered on the docket sheet on February 21, 1978, and was not issued as a separate order, remarks that the judgment was entered after the debtor failed to appear personally or with counsel, and as a result: "Judgment is hereby entered for the plaintiffs and against the defendant, James M. Logeman in the sum of \$2,936.07, together with interest accumulated on the special assessments and costs." The state court judgment does not mention fraud, and therefore, only grants the relief prayed for in the petition.

The petition filed by the creditors in the state court lawsuit did not allege fraud. The petition alleged that the debtor's construction company and the debtor agreed to pay special assessments on a residence purchased by the creditors from the debtor's construction company and that the debtor's construction company and the debtor failed to pay the assessments. There is no allegation of fraud or of intentional misrepresentation by the debtor. Therefore, the petition was for a breach of the agreement between the creditors and the debtor's construction company and the debtor.

The creditors have also alleged that an order entered by the Nebraska Real Estate Commission, which caused the real estate license of the debtor to be revoked because of the incident underlying the judgment, is conclusive evidence of fraud. However, this order only indicates that the debtor was obligated to escrow or pay special assessments and failed to do so, and that such a failure indicated the debtor's and his company's "unworthiness and incompetence to act as real estate brokers." The terms "unworthiness and incompetence" are not equivalent terms for a finding of actual fraud. To make such a finding, the court must determine the debtor had an intent to deceive. 3 LAWRENCE P. KING, ET AL., COLLIER ON BANKRUPTCY ¶¶ 5.23.08[5], 523.14 [1][a], at 2523-52, 523-87 (15th ed. 1996) (defining false representations and pretenses as fraud under both sections of Bankruptcy Act as involving "moral turpitude or intentional wrong").

Although the factors considered above favor the debtor's position, one reason exists to deny the debtor's Motion to Reopen. Fifteen (15) years have passed between the date the first bankruptcy case was closed and the Motion to Reopen was filed. Since the judgment was entered approximately eighteen (18) years ago, the creditors may have greater difficulty in proving fraud than they would have had during the original pendency of this bankruptcy case, because of unavailability of witnesses or documents. In addition, since the debtor is the party who initially erred by misunderstanding the judgment and by not scheduling the creditors, equity favors the innocence of the creditors over the inadvertence of the debtor.

Despite this argument in favor of the creditors, the balance of the equities favors the debtor. Although the creditors may be able to present evidence of fraud in any adversary proceeding brought by the debtor, the state court judgment is not based on allegations of or evidence of fraud. It would not be equitable to permit the creditors to be granted the benefit of a denial of discharge when the debt is dischargeable, but for the debtor's inadvertence in scheduling the debt. The petition and judgment from the state court action still exist, as well as the primary parties who could be witnesses, and therefore, any estimation as to what documentary evidence has been destroyed or what fraud may have occurred is pure speculation. As quoted in Souras, supra at 5, the harm to the creditors must be actual, and the debtors should not be denied the opportunity to amend their schedules because of "speculative procedural harm to the creditor."

The case is reopened. Debtor shall bring adversary proceeding concerning dischargeability of this debt by July 15, 1996, or case will once again be closed.

Separate journal entry to be entered.

DATED: May 29, 1996

BY THE COURT:

Timothy J. Mahoney  
Timothy J. Mahoney  
Chief Judge

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Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

