

debtor failed to comply with Nebraska Statutes regarding pleading, and 2.) that the former attorney's Motion for Summary Judgment was granted because the debtor is not the real party in interest. In the opinion of the district court judge, due to the debtor's Motion to Reopen the bankruptcy case, the trustee, not the debtor, is the real party in interest and the trustee, therefore, must decide whether to administer the action or abandon the asset.

The debtor argues that, because the claim against his former attorney was not disclosed on the debtor's schedules as an asset, the bankruptcy case must be reopened in order for the trustee to abandon or administer the asset. This action by the trustee is necessary, argues the debtor, because until the trustee makes a decision, it is unclear whom the real party in interest is and the malpractice action cannot proceed.

In opposition, the former attorney resists reopening of the bankruptcy case alleging 1.) the debtor has failed to allege a compelling reason to reopen the case 2.) that the intervening rights of the former attorney render it inequitable to reopen the case, and 3.) that reopening of the case is barred by the doctrine of laches.

DECISION

The debtor's case shall be reopened in order for the trustee to investigate the debtor's cause of action and make a determination whether to abandon or administer the asset.

DISCUSSION

The Bankruptcy Code, at 11 U.S.C. § 350(b), provides that a court which closed a case may reopen it in order to "administer previously unadministered assets, to accord relief to the debtor, or for other cause." A court is under a duty to reopen an estate whenever prima facie proof can be shown that the estate has not been fully administered. *In re Mullendore*, 741 F.2d 306,308 (10th Cir. 1984); *Doyle v. Ponsford*, 136 F.2d 401, 403 (8th Cir. 1943); *Kozman v. Herzig*(*In re Herzig*), 96 B.R. 264, 266 (9th Cir. BAP 1989); *In re Atkinson*, 62 B.R. 678, 679 (Bankr. D. Nev. 1986); *Vining v. Ward* (*In re Ward*), 60 B.R. 660, 663 (Bankr. D. La. 1986); *In re Stanke*, 41 B.R. 379, 380 (Bankr. W.D. Mo. 1984).

In the present case, prima facie evidence has been presented that the bankruptcy estate has not been fully administered. The debtor asserts a prepetition claim which should have been listed on the schedules as an asset of the estate.

The trustee admittedly has not done a great deal of investigation regarding the lawsuit and, therefore, was unable to take a position at the hearing regarding the reopening of the bankruptcy case. The state district court dismissed the case, not because it was decided that the debtor did not state a claim but, rather, because the debtor, at that time, was not the real party in interest. The underlying claim of the debtor should be at least investigated by the trustee.

To prevail on a defense of laches, the moving party must show both a lack of diligence by the nonmoving party and prejudice to the movant. *Costello v. U.S.*, 365 U.S. 265, 81 S.Ct. 534, 5 L.Ed.2d 551(1961). There has been no showing of a lack of diligence on the part of the debtor. He filed his motion to reopen the case eight months after he filed the lawsuit in Dundy County Court, and, apparently, as soon as the issue of "real party in interest" was raised. This time frame does not indicate a lack of diligence by the debtor in pursuing his rights.

Additionally, the former attorney has not shown how he is in any way prejudiced by the reopening of the bankruptcy case. Although he received a dismissal order at the state district court level regarding the malpractice claim, such dismissal was not a determination on the merits. Rather, the district court dismissed the action *without prejudice* in order for the real party in interest to be determined. The issue of "real party in interest" was brought to the attention of the debtor and the state court judge by the former attorney. He can't be prejudiced by a reopening of the bankruptcy case to allow a determination of the "real party in interest."

The case will be reopened in order for the trustee to determine whether to administer or abandon the asset.

Separate journal entry shall be filed.

DATED: January 20, 2000

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

LEAHY, MICHAEL J.	930-1701
KELLY, PHILIP	51
BLACKWELL, BERT	82

Copies mailed by the Court to:

United States Trustee

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.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)
)
PAUL M. LORENZ,) CASE NO. BK98-82925
) A
DEBTOR(S))
) CH. 7
) Filing No. 5,7
Plaintiff(s))
vs.) JOURNAL ENTRY
)
) DATE: January 20, 2000
Defendant(s)) HEARING DATE: January 10, 2000

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion to Reopen filed by the Debtor and Resistance by debtor's former attorney.

APPEARANCES

Bert Blackwell, Attorney for movant
Michael Leahy, Attorney for objector
Philip Kelly, Trustee

IT IS ORDERED:

Case reopened to permit trustee to investigate the value of an "asset" of the estate. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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KELLY, PHILIP 51
BLACKWELL, BERT 82

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