UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF CAROL ANN KING, BANKRUPT CAROL ANN KING, Bankrupt vs. KATHY A. PFEIFER PETERSON and ROTERT BROS., a partnership, composed of William D. Rotert, Morris J. Rotert and Jerome C. Rotert, Creditors	)	CASE NO. BK77-0-1037

MEMORANDUM OPINION

Carol Ann King, the bankrupt, (now Carol Ann Price but referred to herein as Carol Ann King) moved to reopen this bankruptcy proceeding and then moved to amend her schedules to add two creditors and for a discharge of the indebtedness due those two creditors. Hearing has now been held upon notice to the creditors. The two creditors are Kathy A. Pfeifer Peterson and Rotert Bros., a partnership, composed of William D. Rotert, Morris J. Rotert and Jerome C. Rotert.

Carol Ann King filed her voluntary petition herein on October 3, 1977. The schedules filed by the bankrupt omitted any reference to Mrs. Peterson and to Rotert Bros., a partnership. The first meeting of creditors was held October 18, 1977. The bankrupt was granted a discharge by an order dated December 21, 1977, and this bankruptcy proceeding was closed on May 11, 1978, as a no-asset case, there having been no assets available to unsecured creditors because of the bankrupt's exemptions and because of encumbrances on the bankrupt's property.

On October 23, 1978, this Court received the bankrupt's petition to amend bankruptcy petition. This Court advised the attorney for the bankrupt that it would be necessary to reopen the case and, on November 7, 1978, the appropriate motion and filing fee were received. By an order filed November 7, 1978, this bankruptcy estate was reopened and the petition to amend bankruptcy petition was scheduled for hearing. Both creditors appeared at the hearing and resisted the bankrupt's petition.

The dispute between the bankrupt and Mrs. Peterson is easily resolved. The undisputed evidence before me is that the bankrupt telephoned Mrs. Peterson two days after the voluntary petition was filed and advised Mrs. Peterson that the bankruptcy had been filed. Section 17a(3) [11 U.S.C. §35a(3)] provides that a discharge shall release a bankrupt from all debts except those that:

> ". . .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 had notice or actual knowledge of the proceedings in bankruptcy. . ."

The result of the foregoing statutory language is that actual knowledge is the equivalent of proper scheduling and results in a discharge of the indebtedness due the creditor. 1A Collier on Bankruptcy Section 17.23(5). The result is that Mrs. Peterson is discharged in this bankruptcy proceeding by reason of the original discharge.

The bankrupt's application with regard to Rotert Bros., a partnership, is different. There is no evidence before me to disclose that Rotert Bros. received actual knowledge of the filing of the bankruptcy petition until June 5, 1978, at which time a suggestion in bankruptcy was filed in an action instituted by Rotert Bros. against the bankrupt in the District Court of Platte County, Nebraska. That action had been instituted February 2, 1977, prior to the filing of the voluntary petition. This state court action was brought alleging a breach of a lease agreement by the bankrupt and her business partner, Mrs. Peterson. The evidence before me discloses that from February, 1977, through August of 1977, the bankrupt was an alcoholic and was drinking during that period of time. The evidence further discloses that from April, 1977, to the date that she filed bankruptcy, the bankrupt did not hear anything regarding the Rotert Bros. lawsuit and apparently forgot about its existence. The bankrupt describes her condition during this period of time as one of high anxiety.

In this district, In Re Benak, 374 F.Supp. 499 (D. Neb., 1974) controls with regard to the question of amendment of the schedules. Specifically, Benak dealt with the question of the propriety of the amendment of the schedules after the six months' period from the first meeting of creditors had elapsed pursuant to §57n of the Act [11 U.S.C. §93n]. Benak concludes that it is not improper to allow an amendment after the six months' period had elapsed if exceptional circumstances exist. In general, those exceptional circumstances require a no-asset case, no fraud or intentional laches and omission through mistake or inadvertence. Consideration should be given to the time of the running of the six months' period and the application to amend.

However, since October 1, 1973, another consideration has become important. On that date, the Bankruptcy Rules became effective. Bankruptcy Rule 203(b) provides:

> "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."

Thus, between subsections a and b of Rule 203, the court is given the option to advise creditors of the necessity of filing claims at that time or of the right to wait to file a claim until notified by the court that there are assets. See the option provided in Official Form No. 12.

In the present case, the notice of first meeting which was sent to creditors provided the following language:

> "It appears from the schedules of the bankrupt 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."

At no time during this bankruptcy proceeding was any notice given to creditors that there were assets available and that creditors must file their claims. As noted above, the case was a no-asset case. The result is that there never was a deadline for filing of proofs of claim and the creditor Rotert Bros. was not prejudiced thereby.

In Re Benak, supra, relies on cases such as Robinson v. Mann, 339 F.2d 547 (5th Cir. 1964). In that case, Judge Bell (now Attorney General Bell) suggested that relevant considerations were the circumstances attendant to the failure to have originally listed the creditor, the degree of disruption to the estate and whether any creditor including the omitted creditor would be prejudiced.

Combining the teachings of Benak with Robinson, I conclude that this case was a no-asset case, there was no fraud or intentional laches on behalf of the bankrupt, the omission was due to inadvertence, there will be no disruption to the estate by the amendment and that no creditor will be prejudiced by the amendment. Rotert Bros. itself, of course, will be prejudiced but to no more degree than any other creditor who is confronted with the discharge in this bankruptcy proceeding. In addition, the application to amend was filed reasonably promptly and without undue delay.

The conclusion resulting from the foregoing is that the facts appeal to the equitable discretion of this court and the amendment will be allowed.

Upon the filing of the amendment and the payment of the filing fee of $10.00, the separate order which will be entered will constitute a discharge of the indebtedness of the bankrupt to Rotert Bros., a partnership.

DATED: January 9, 1979

BY THE COURT:

Bankruptcy Judge