IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	CASE NO. BK03-83695
CHRISTOPHER S. JOHNSON and	)	
KIMBERLY S. JOHNSON,	)	CHAPTER 7
	)	
Debtor(s).	)	

ORDER

This matter is before the court on the debtor Kimberly Johnson's[1] motion to reopen the case (Fil. No. 62) and objection by the State of Nebraska (Fil. No. 64). Albert P. Burnes represents the debtor, and Abigail M. Stempson represents the State of Nebraska.

The motion is denied.

In the early 2000s, Christopher Johnson and his brother formed a company called Consumer's Choice Foods, Inc., through which they offered a food delivery service for customers who signed contracts with them. One type of contractual arrangement was for a food purchasing program whereby Consumer's Choice would deliver six months' worth of groceries (primarily dry goods and frozen products) to the customer. A second type of contractual arrangement was called a "premium 48-month program" and marketed as an enhanced package that, for a monthly membership fee, provided a six-month food delivery contract at a reduced price along with other benefits, such as a "free" freezer with a lifetime warranty in which to store the food deliveries, a warranty to cover food spoilage, and nationwide "relocation assistance" if the customer moved during the course of the contract. Kimberly Johnson, who was married to Christopher Johnson at the time, was not an owner of the business, but she participated by training the sales representatives who sold the contracts. Consumer's Choice ceased operations in the latter part of 2002 and sold the contracts to a financing company.

After receiving approximately 125 consumer complaints about Consumer's Choice and its business practices, the Attorney General of the State of Nebraska filed a lawsuit in the District Court of Lancaster County, Nebraska, against the Johnsons, Consumer's Choice, and the financing company on August 9, 2002, alleging violations of the Nebraska Deceptive Trade Practices Act and the Nebraska Consumer Protection Act.

Christopher and Kimberly Johnson filed a Chapter 13 bankruptcy petition on August 27, 2003. The state court initially stayed the lawsuit as a result of the bankruptcy filing. The State of Nebraska then filed a motion in the Lancaster County District Court "to determine exemption from

[1]Christopher Johnson and Kimberly Johnson are now divorced and Kimberly is known as Kimberly Brown. To avoid confusion in the record, this order will continue to refer to her as Kimberly Johnson.

automatic bankruptcy stay." The state court ruled that the pending lawsuit was an exercise of the state's police power and therefore not subject to the automatic stay pursuant to 11 U.S.C. § 362(b)(4). That order was appealed on November 17, 2003, but the appeal was dismissed on December 9, 2003, for lack of jurisdiction, evidently because it was not a final and appealable order. In the meantime, the Johnsons' bankruptcy case was dismissed on October 28, 2003, for failure to file schedules and a plan. They filed another Chapter 13 case on November 19, 2003, with the appropriate documents.

In the second (present) Chapter 13 case, the Chapter 13 trustee moved to dismiss the case because the amount of unsecured debt exceeded the statutory limit and because the debtors lived in Florida at the time of filing and for at least two years prior to filing. That motion was mooted when the case was dismissed for failure to attend a continued § 341 meeting. The debtors were then allowed to reinstate the case and convert it to one under Chapter 7. The debtors received a discharge on July 21, 2004, and the case was closed.

The state court lawsuit went to trial in late September and early October 2006. Christopher Johnson appeared pro se at trial; Kimberly Johnson did not appear and was not represented. The court found that Kimberly Johnson "actively participated in the deceptive practices [of the company] and trained other sales representatives to do the same. She is liable for the deceptive practices engaged in by [Consumer's Choice] through its sales representatives." Judgment and Order of Nov. 16, 2006, at 21 (Ex. 3 to Fil. No. 64). Christopher Johnson and his brother were found liable in their individual capacities for the deceptive practices of Consumer's Choice because "where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible for the fraud in their individual capacities." *Id.* at 21-22 (quoting *Nelson v. Lusterstone Surfacing Co.*, 605 N.W.2d 136, 145 (Neb. 2000)). Judgment was entered against the Johnsons and Consumer's Choice jointly and severally for $103,208.21, plus post-judgment interest, as well as costs of $10,457.14 and attorneys' fees of $115,480.50. The Johnsons and Consumer's Choice were each ordered to pay statutory civil penalties of $10,000.00, and the Johnsons were enjoined from engaging in certain types of installment sales in Nebraska. *Id.* at 31-33; Order of Jan. 31, 2007, at 8-12 (Ex. 4 to Fil. No. 64). The judgment was affirmed by the Nebraska Supreme Court.

In October 2013, the State began garnishment proceedings against Kimberly Johnson. She objected, asserting that as head of household she is entitled to retain a greater percentage of her wages, and that she does not owe the judgment and should not be subject to garnishment. The Lancaster County District Court heard arguments and accepted evidence and ruled on January 21, 2014. It first addressed the issue of whether she owes the debt, finding that $6,900.00 of the judgment, the $115,480.50 in attorneys' fees, and the individual civil penalty of $10,000.00 remain unpaid. The court noted the bankruptcy filing, but was unable to tell from the evidence presented to it whether the debt was discharged. For that reason, the court overruled the objection to the garnishment on the basis of discharge, but the court did find that she was head of household and reduced the amount subject to garnishment. Ex. 6 to Fil. No. 64. Thereafter, Kimberly Johnson moved to reopen this bankruptcy case to file an adversary proceeding against the State of Nebraska to determine the dischargeability of the debt.

The debtor asserts that the State's collection efforts, coming nearly a decade after the bankruptcy discharge, interferes with her right to a fresh start. She asks this court to clarify that the debt was discharged and to enforce that discharge against the State.

A discharged and closed bankruptcy 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). "The act of reopening a closed bankruptcy case is typically ministerial and presents a limited range of issues, including whether further administration of the estate appears to be warranted." *Apex Oil Co., Inc. v. Sparks (In re Apex Oil Co., Inc.)*, 406 F.3d 538, 543 (8th Cir. 2005) (citing *Lopez v. Specialty Restaurants Corp. (In re Lopez)*, 283 B.R. 22, 26 (B.A.P. 9th Cir. 2002)). It is within the bankruptcy court's discretion to base its decision to reopen on the particular circumstances and equities of each particular case. *Id.* at 542. The litigants' ability to seek relief from the state court is one reason approved by the Eighth Circuit for exercising the discretion to deny the motion:

> The availability of relief in an alternative forum is a permissible factor on which to base a decision not to reopen a closed bankruptcy case. Although the bankruptcy court is in the best position to interpret its own orders, *see In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 6 F.3d 1184, 1194 (7th Cir. 1993), Congress granted state courts concurrent jurisdiction to consider bankruptcy issues arising from Chapter 11 proceedings. 28 U.S.C. § 1334(b). In addition, although the bankruptcy court in this case may have been more familiar with the prior circumstances of Apex's bankruptcy, it had no familiarity with the appellees or their claims because those claims were not asserted against Apex in the 1990 bankruptcy case. The appellees' claims are already being adjudicated in state court, and the related dischargeability issue could be ruled upon in that forum in light of Apex's assertion of a dischargeability defense in the state court action. . . . In addition, Apex has provided no evidence to support its assertion that adjudication in the state court, which is already acquainted with the appellees' underlying claims, would somehow be less efficient than adjudication in the bankruptcy court, which would be facing such claims for the first time.

Id.

When the issue is dischargeability of a debt, "[t]he bankruptcy court has concurrent jurisdiction with other courts to decide if particular debts were discharged in a bankruptcy case, other than debts alleged to be nondischargeable under subsection § 523(a)(2), (4) or (6) which can be found nondischargeable only by the bankruptcy court." *Collier on Bankruptcy* ¶ 350.03[4].

In the present case, the judgment giving rise to the debt owed to the State arose after the debtors received a discharge of their existing debts and the bankruptcy case was closed. Although the state court litigation was ongoing during the bankruptcy, neither party timely filed a complaint with the bankruptcy court to determine the dischargeability of the debt and this court has not had the opportunity to become familiar with the circumstances and details of the state court lawsuit. The

debtor is now arguing that the debt was discharged, while the State is arguing that the debt is excepted from discharge as a fine, penalty or forfeiture under 11 U.S.C. § 523(a)(7). The application of this section of the Bankruptcy Code is not limited to the purview of the bankruptcy court; it falls within the concurrent jurisdiction of non-bankruptcy courts. In this instance, the Lancaster County District Court is fully capable of adjudicating the nature and dischargeability of the debt.

Moreover, one of the factors for reopening a case under § 350(b) is to administer assets. Here, the bankruptcy estate has been fully administered and the dispute over the dischargeability of this debt will not change anything in that regard. "Given the bankruptcy court's undisputed findings that the estate had been fully administered and that the outcome of the class action would have no adverse affect on the estate or any of Apex's former creditors, no further administration of the estate appears to be necessary." *Apex Oil* at 543.

Accordingly, as the debtor's desire to determine the dischargeability of this debt will not affect the administration of the bankruptcy estate and can be resolved by a state court judge, there is no reason to reopen the case.

IT IS ORDERED: Debtor Kimberly Johnson's motion to reopen the case (Fil. No. 62) is denied.

DATED: July 3, 2014.

BY THE COURT:

/s/ Thomas L. Saladino
Chief Judge

Notice given by the Court to:
*Albert P. Burnes
Abigail M. Stempson
United States Trustee

Movant (*) is responsible for giving notice to other parties if required by rule or statute.