

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

IN RE:

PAUL HIGH,

Debtor.

NEBRASKA STATE BANK,

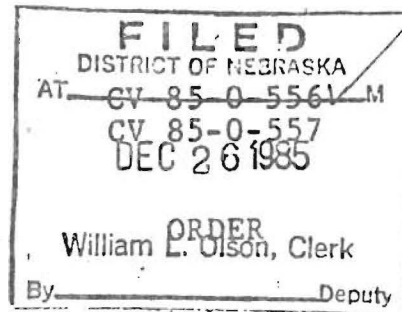
Plaintiff,

vs.

PAUL H. HIGH,

Defendant.

BK 84-02113



These matters are before the Court on appeal from a judgment of the United States Bankruptcy Court for the District of Nebraska entered May 17, 1985, wherein the Bankruptcy Court dismissed plaintiff's complaints to bar discharge. Jurisdiction is invoked pursuant to 28 U.S.C. § 158(a). Plaintiff appeals this dismissal. After carefully considering the record on appeal and the briefs submitted by the parties, the Court finds that the decision of the Bankruptcy Court should be reversed and remanded.

FACTS AND PROCEDURAL BACKGROUND

The facts are not in dispute. The defendant-debtor, Paul High, filed for bankruptcy relief under Chapter 11 on May 23, 1984 (B.R. No. 84-0091). The plaintiff-creditor, Nebraska State Bank (NSB) filed complaints to bar this discharge (A 84-176 and A 84-177). The complaints by NSB alleged that Paul High had removed or concealed or permitted to be removed or concealed certain

collateral which had been pledged by the creditor as security for loans extended to High. Trial for the NSB complaints was scheduled for November 7, 1984.

Judge Crawford, on his own motion, dismissed the Chapter 11 proceeding without prejudice on October 9, 1984. On October 25, 1984, High filed for relief under a Chapter 7.¹ Judge Crawford, in a journal entry dated November 7, 1984, dismissed NSB's complaint to bar discharge with prejudice in connection with the Chapter 11 case for failure to appear at the previously set November 7th hearing.

NSB then filed complaints to bar discharge (A 84-0349 and A 84-0350) in connection with the Chapter 7 proceeding. This second set of complaints alleged virtually the same facts as were contained in the Chapter 11 complaints. The Chapter 7 complaints were filed by NSB on December 12, 1984, but were not served on High or his counsel. In a February 4, 1985, order, Judge Crawford ordered dismissal of the second set of complaints unless NSB filed with the Court a certificate of service and a motion for default judgment on or before February 18, 1985. The alias summons was issued on February 8, 1985, and on February 11, 1985, NSB mailed this summons. On February 13, 1985, NSB filed with the Bankruptcy Clerk the certificates of services and motion for default judgment.

¹It appears from the record that the Chapter 11 was dismissed and then a chapter 7 was refiled. Consequently, the Chapter 7 is not the same case as the Chapter 11. Each chapter received different case numbers.

On March 8, 1985, High moved to dismiss the complaints to bar discharge. On May 17, 1985, Judge Crawford dismissed the complaints to bar discharge on the basis that they had been previously discharged with prejudice in the Chapter 11 proceeding.²

DISCUSSION

NSB contends that once the Chapter 11 was dismissed, there was no reason or incentive to pursue the Chapter 11 complaints to bar discharge. This Court agrees. Once the Bankruptcy Court dismissed the case, the previously pending adversary proceeding as a practical matter was also dismissed. See In re Pocklington, 21 B.R. 199, 202 (S.D. Cal. 1982). Consequently, the Court was without jurisdiction to review the matter. Additionally, even if

²Judge Crawford stated:

THE COURT: I have a prior order of dismissal in an adversary proceeding between these two parties. It is with prejudice. I do not know how it came about but it exists and it is final, and this case is dismissed because of it.

The Court further stated:

THE COURT: It doesn't seem to me that there is any difference because there are two separate bankruptcies. Once an order of dismissal with prejudice is entered, it seems to me that it ought to be binding on someone. It isn't just an order that we can choose to ignore or not ignore, depending on what we want, and so I think I'll not ignore it. The case is dismissed because of the separate prior order of dismissal with prejudice, and counsel are excused.

the Bankruptcy Court somehow retained jurisdiction, it erred in concluding that res judicata or collateral estoppel were applicable. See Lovell v. Nixon, 719 F.2d 1373 (8th Cir. 1983) (elements of res judicata and collateral estoppel). With regard to res judicata, the Chapter 11 suit did not result in a final judgment on the merits nor did it involve the same cause of action as did the Chapter 7 suit. With regard to collateral estoppel, the issue was never actually litigated.


For the reasons set forth this case must be remanded and NSB permitted to proceed with the merits of the complaints to bar discharge.

Accordingly,

IT IS ORDERED that this case should be and hereby is reversed and remanded for further proceedings consistent with this opinion.

DATED this 26th day of December, 1985.

BY THE COURT:


C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE