UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
RICHARD L. MULKEY, JR.,	)	
and LOUISE M. MULKEY,	)	CASE NO. BK82-1352
	)	
DEBTORS	)	Ch. 7

MEMORANDUM OPINION

This matter came on for hearing on the Motion to Determine Dischargeability of Debt filed by Richard L. Mulkey, Jr., Debtor. Appearing on behalf of the debtor, Richard L. Mulkey, Jr., was James Jansen of Stave, Coffey, Swenson, Jansen & Schatz, P.C., of Omaha, Nebraska. Appearing on behalf of George and Theodora Barelos was Frank Meares of Omaha, Nebraska.

Facts

Richard and Louise Mulkey, ("debtors"), filed a petition under Chapter 7 on July 30, 1982. Debtors failed to include George and Theodora Barelos, creditors in this action and the parents of Louise Mulkey, in their list of creditors. All creditors were required to file a proof of claim on or before March 11, 1983. A proof of claim was never filed by George and Theodora Barelos. The Bankruptcy Court discharged the debtors on October 19, 1983.

The alleged debt in question involved a transaction whereby Richard Mulkey used George and Theodora Barelos' certificate of deposit as collateral in order to secure a business loan from the United States National Bank of Omaha ("Bank"). This transaction took place on August 28, 1981, prior to debtors filing their petition for relief. Theodora Barelos and Louise Mulkey were never included in the transaction. George Barelos assigned the certificate of deposit over to the Bank in an agreement which stated, "It is understood that this savings assignment pertains to the borrowing of Richard L. Mulkey." The Bank viewed George Barelos not as a co-borrower but as a third party hypothecator. As a result of this transaction, the Bank advanced Richard Mulkey additional funds for his business. No agreement concerning the certificate of deposit was ever reduced to writing between Richard Mulkey and George Barelos. No stock was ever issued by Mulkey's business to George Barelos in exchange for the transaction.

Richard Mulkey subsequently fell behind in his payments to the Bank which eventually led to the loan being declared in default. The Bank applied George and Theodora Barelos' certificate of deposit to the unpaid balance of the loan sometime in the fall of 1982. By this time George Barelos' mental capacity had deteriorated due to Alzheimer's disease. Theodora Barelos became aware of the Bank's position when she received a statement of the transaction on November 9, 1982. Shortly after this, Theodora Barelos approached Richard Mulkey concerning the certificate of deposit. It was at this time Richard Mulkey told Theodora Barelos that he and his wife had filed bankruptcy. It was also around this time that Richard and Louise Mulkey had separated.

At this point the facts become unclear. Theodora Barelos discussed the repayment of the certificate of deposit on several occasions with Richard Mulkey, but the exact dates of these discussions are not known. It appears that the first conversation took place either in November, 1982, or January, 1983. The final discussion occurred in August, 1984, when Richard Mulkey gave Theodora Barelos an unsigned promissory note. In between these conversations, Richard Mulkey went over to Theodora Barelos' house in order to discuss the certificate of deposit. Theodora Barelos informed Richard Mulkey that she needed the money to take care of George's expenses. Richard Mulkey responded that he would see what he could do. Subsequent to the final conversation, Theodora Barelos made several attempts to contact Richard Mulkey. In response, Richard Mulkey wrote a letter to Theodora Barelos explaining his problems with the IRS and how he didn't have the "resources to complete those plans."

This matter comes before the Court on Richard Mulkey's motion to reopen his bankruptcy case in order to determine whether the alleged debt to George and Theodora Barelos had been discharged by operation of the Court's discharge order of October 19, 1983.

Debtor contends that: 1) the certificate of deposit was investment capital to be used in debtor's business; 2) creditors had actual knowledge of the bankruptcy proceedings on or before March 11, 1983; 3) the alleged debt was discharged at the conclusion of the bankruptcy proceedings.

Creditors claim: 1) the certificate of deposit was not investment capital; 2) the debt was not discharged because their name had been omitted from the list of creditors.

The issues before the Court are: 1) whether a debt ever existed between the parties; 2) whether failing to list a creditor on the schedules discharges the debtor from repaying the obligation once a discharge order has been entered from the Court; 3) whether creditor had timely notice or actual knowledge of the

bankruptcy proceedings; 4) whether debtor should be allowed to amend the schedules after the expiration of the claim period in order to discharge the omitted debt.

Issues, Conclusions of Law and Discussion

I

Whether a debt ever existed between the parties?

The term debt and claim coexist together under the Code. Debt means "liability on a claim." 11 U.S.C. § 101(11). Claim is defined as a "right to payment, whether or not such right is reduced to a judgment, liquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured, or unsecured." 11 U S.C. § 101(4)(A). "The definition of a claim has been broadly expanded to include all legal obligations of the debtor, no matter how remote or contingent." 3 Collier on Bankruptcy ¶ 523.04, at 523-11 (15th ed. 1986).

In the present case, Richard Mulkey sought additional funding for a business loan from the Bank. The loan would not be approved by the Bank unless debtor provided additional collateral. George Barelos assigned the certificate of deposit over to the Bank as security for Richard Mulkey's business loan. Mulkey claimed that the certificate of deposit was investment capital. If this were so, the Bank would have to turn the certificate of deposit over to Mulkey's business at the completion of the loan agreement. Since the certificate of deposit was still in George and Theodora Barelos' name, the Bank had to return it to them instead of Richard Mulkey or his business. Further, if the certificate of deposit was indeed investment capital to be used in Mulkey's business, stock from the business would have been issued to George and Theodora Barelos. None was ever issued. Additionally, if Mulkey treated the certificate of deposit as investment capital, there would be no need for him to prepare and deliver to Theodora Barelos the unsigned promissory note in August of 1984. For these reasons, the Court concludes that the certificate of deposit was not investment capital, and as long as Richard Mulkey remained current on his loan, George and Theodora Barelos held a contingent claim. This contingent claim ripened into a debt once debtor defaulted on the loan and the Bank applied George and Theodora Barelos' certificate of deposit to the balance of debtor's loan. 11 U.S.C. Section 509(a) provides: "An entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment." Under this section, George and Theodora Barelos, who had supplied the necessary collateral for the loan made by the Bank to Richard Mulkey, became creditors of the debtors to the extent of the amount of the certificate of deposit. As creditors, George and Theodora Barelos should have been listed on debtor's schedule pursuant to 11 U.S.C. § 521(1).

II

Whether failing to list a creditor on the schedules discharges the debtor from repaying the obligation once a discharge order has been entered from the Court?

The applicable section of the Bankruptcy Code is 523(a)(3). This section provides that debtor is not discharged from a debt in Chapter 7 when the creditor is not listed on the schedules, unless creditor has notice or actual knowledge of the proceedings in time to file a proof of claim. This section is designed to remedy the harm caused to a creditor as a result of not being able to participate in the proceedings. The right being protected by this section is creditor's right to timely file a proof of claim. The burden of proving notice or actual knowledge, under this section, is placed on the debtor. 3 Collier on Bankruptcy ¶ 523.13, at 523-85 (15th ed. 1986).

Richard and Louise Mulkey, who were represented by counsel when they filed their original petition, did not list George and Theodora Barelos as creditors on their schedules. Therefore, the debt was not discharged unless the Mulkeys can establish that George and Theodora Barelos had notice or actual knowledge of the bankruptcy proceedings.

III

What constitutes notice or actual knowledge under Section 523(a)(3)?

"The notice contemplated by this section of the Act is a written or printed notice to the creditor." Central Credit Corp. Mid-City Branch v. Raven Craft, 258 So.2d 560, 561 (La. Ct. App. 1972). "[Written] notice, from whatever source, is sufficient to meet the requirements [under the statute]." Matter of Derrico Const. Corp., 10 B.R. 553, 555 (Bankr. M.D. Fla. 1981). "The notice contemplated by the statute is the formal written or printed notice sent to the creditor by the Bankruptcy Court." Lashover v. Audler, 171 So.2d 834, 835 (La. Ct. App. 1965). Notice, from whatever source, appears to be satisfied when creditor has been sent written notice that debtor has filed bankruptcy. Although these state court decisions were interpreting the predecessor to Section 523(a)(3),[1] they still

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[1] "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 had notice or actual knowledge of the proceedings in bankruptcy." Bankr. Act, § 17, U.S.C.A. § 35.

represent the law because the policies and purposes behind Section 523(a)(3) have not been significantly changed with the adoption of the present Code.

In this case, George and Theodora Barelos received the bank statement, the unsigned promissory note, and the letter subsequent to the unsigned promissory note. None of these documents informed George and Theodora Barelos, in a timely fashion, that the Mulkeys had filed bankruptcy. Therefore, George and Theodora Barelos were not notified in writing of the bankruptcy proceedings.

However, written notice need not be served upon the creditor if creditor obtains timely actual knowledge of the bankruptcy proceedings. "Actual knowledge must be more than casual information and should include knowledge of where and when the bankruptcy has been filed." In re Robinson, 2 B.R. 127, 129 (Bankr. D. Or. 1979). "Actual knowledge of the proceedings in bankruptcy ... consists of more than the knowledge which might result from a casual reference to a bankruptcy in an offhand manner during a conversation attendant upon a chance meeting. It means knowledge of facts at least sufficient to apprise the creditor that a proceeding is actually commenced and where that proceeding is pending." In re Stratton, 29 B.R. 93, 95 (Bankr. W.D. Ky. 1983) (quoting Lashover v. Audler, 171 So.2d 834, 836 (La. Ct. App. 1965)). "Actual knowledge as contemplated by 11 U.S.C. § 523(a)(3)(A) is information generally equivalent to legal notice. The unsubstantiated rumor relating to the debtors' financial condition is insufficient to permit the creditor to be apprised as to the time and place of the bankruptcy filing and to participate in its administration." Id., at 29 B.R. 93, 95 (Bankr. W.D. Ky. 1983). As derived from the above cases, actual knowledge should alert the creditor as to the time and place of the bankruptcy proceedings.

In the instant case, Theodora Barelos wanted to know why the Bank had taken the certificate of deposit. Richard Mulkey informed her that he and Louise had filed bankruptcy. This discussion appears to have taken place before the deadline of March 11, 1983, for creditors to file a proof of claim. However, Richard Mulkey never mentioned the time or place of the bankruptcy proceedings to Theodora Barelos during the course of their discussion. "[A] creditor's knowledge that the debtor has gone into bankruptcy is not such knowledge of the proceedings in bankruptcy as will discharge a debt not duly scheduled." Lashover v. Audler, 171 So.2d 834, 836 (La. Ct. App. 1965). Richard Mulkey has failed to satisfy his burden. He has not shown that Theodora Barelos knew of the time and place of the bankruptcy proceedings; consequently, the debt was never discharged.

Alternatively, Richard Mulkey claimed that Theodora Barelos knew of the bankruptcy proceedings through conversations she had with his wife. It appears from the evidence that these

conversations pertained to the repayment of the certificate of deposit and not to the time and place of bankruptcy proceedings. Again, debtor has not met his burden of showing that Theodora Barelos knew of the time and place of the proceedings and the debt should not be discharged.

IV

Whether debtor should be allowed to amend the schedules after the expiration of the claim period in order to discharge the omitted debt.

"Amendment by the bankrupt may be allowed ... but only in exceptional circumstances appealing to the equitable discretion of the Bankruptcy Court." Robinson v. Mann, 339 F.2d 547, 550 (5th Cir. 1964). "[E]xceptional circumstances usually require that the case be a no-asset one; that there be no fraud or intentional laches; and that the creditor was omitted through mistake or inadvertence." In re Benak, 374 F.Supp. 499, 500 (D. Neb. 1974). Exceptional circumstances have also been described by a "finding that ... there would be no undue disruption to the proceedings, and that the prejudice arising from the failure to schedule can be corrected." In re Robinson, 2 B.R. 127, 129 (Bankr. D. Or. 1979).

The circumstances surrounding this case are not sufficiently extraordinary to warrant the amending of the schedules. To allow the amendment at this time would unduly disrupt the proceedings. The estate has been closed and the trustee relieved of his duties. Further, assets from the estate were distributed to unsecured creditors. The distributed monies would have to be collected from the unsecured creditors and distributed to George and Theodora Barelos. The effect of this would result in many of the previously paid unsecured creditors receiving nothing at all.

Conclusion

The Court finds that George and Theodora Barelos held a contingent debt which should have been listed on the schedules. An unlisted debt is not discharged unless the facts and the surrounding circumstances from the case indicates that George and Theodora Barelos had timely notice or actual knowledge of the bankruptcy proceedings. Richard Mulkey has not come forward with the necessary evidence which shows that George and Theodora Barelos were informed of the time and location of the proceedings. Therefore, the debt is not discharged. Further, since assets were distributed to unsecured creditors, the Court feels the schedules should not be amended at this time in order to avoid undue disruption of the proceedings.

The debt to Barelos is not discharged. The state court action may proceed. Separate Journal Entry shall be entered. This case shall be closed when time for appeal expires.

DATED: March 15, 1988.

BY THE COURT:

Chief Judge