

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Brunswick Division

In the matter of:	)	
	)	Chapter 7 Case
JIMMIE FRANKLIN ROLLINS, JR.	)	
KATHY DAWN ROLLINS	)	Number <u>92-20321</u>
	)	
<i>Debtors</i>	)	

**MEMORANDUM AND ORDER**  
**ON DEBTORS' MOTION TO REOPEN**

This matter comes before the Court on Jimmie Franklin Rollins' Motion to Reopen his Chapter 7 case. This proceeding is a core matter under 28 U.S.C. § 157(b)(2)(A). For the reasons stated in this memorandum opinion, the Court will deny Debtor's motion. These findings of fact and conclusions of law are entered pursuant to Fed.R.Bankr.P. 7052.

**FINDINGS OF FACT**

\_\_\_\_\_ Debtors' Motion to Reopen this Chapter 7 case was filed on May 8, 1995, and the Court entered an Order on September 15, 1995, granting said Motion. Thereafter, on September 27, 1995, that Order was vacated and the matter was set for a continued hearing which was held in Brunswick, Georgia, on December 5, 1995. At that time the evidence revealed the following.

Debtors' case was filed May 2, 1992. Debtors' petition and schedules failed to reveal any indebtedness owed to Mark Bishop. As a result, Mr. Bishop never received notice of the filing of Debtors' Chapter 7 case. On August 10, 1992, a general discharge was entered in Debtors' case. During the Summer of 1993, Mr. Bishop hired an attorney to bring legal action to recover on the indebtedness owed him by the Debtors and the attorney mailed a demand letter to the Debtors in August 1993. When there was no meaningful response to that demand, Mr. Bishop filed a civil lawsuit in the State of South Carolina in January 1994. Ultimately the case was set for trial in May 1995 which apparently prompted the filing of Debtors' Motion to Reopen to effectively prevent any trial on the merits in South Carolina. At no time prior to May 1995 did the Debtors make known to Mr. Bishop that they had filed a Chapter 7 bankruptcy nor had they made any effort to reopen their case. The facts further reveal that the indebtedness originated in 1989 when Bishop loaned the Debtor between \$5,000.00 and \$10,000.00 for a business and agreed to receive as payoff of that indebtedness a fixed percentage of the profits from a barber shop which the Debtor operated.<sup>1</sup>

Sometime in 1991 and prior to the filing of Debtor's petition, Mr. Bishop was convicted of a federal crime. Debtor's testimony reveals that he ceased making payments to Bishop in October 1991 about the time of the conviction. According to Bishop's testimony the last payment he received was in 1990, but I find the discrepancy to

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<sup>1</sup> Mr. Rollins disputes the amount of the debt, if any; however, South Carolina State Court is a more appropriate forum to dispute the validity of their contract.

be immaterial. What is critical is that Bishop testified that he continued to make collection efforts to recover the money long after the date of the final payment, including a telephone conversation on January 15, 1992, when he told the Debtor that he needed the funds that were owed because he "was about to go away," an apparent reference to his entering a period of incarceration. Apparently, Mr. Bishop wanted the Debtor to send money owed on the indebtedness to Bishop's wife to assist her while Bishop was incarcerated. Debtors' case was filed only a few months later that year.

At a previous hearing on this Motion to Reopen, Debtor testified that he omitted Mr. Bishop's claim because he no longer believed he owed Mr. Bishop any money, that he had not made a payment to Mr. Bishop in more than two years prior to the filing of his case and that Bishop had made no efforts to collect it. It was on that basis that I concluded previously that the case should be reopened. Now having heard additional evidence on the Motion to Reconsider I find that in fact Debtor had ceased making payments to Bishop sometime in 1990 or 1991, but contrary to Debtor's previous testimony, that Mr. Bishop had not ceased to make demand upon the Debtor for payments and indeed on the very day that he was to report for incarceration, made a final call to the Debtor advising him that payments needed to be made to Mr. Bishop's wife during the period of his incarceration. Such telephone call occurred on January 15, 1992. Since Debtors' case was filed in May of that year, I conclude that he could not have been unaware of the fact that Mr. Bishop continued to claim an indebtedness and that his failure to schedule the debt, notwithstanding his counsel's admonition that all debts were required to be scheduled, was intentional. I

further find that as early as August 1993 Debtor was made aware that the claim was still pending and failed to make any effort until May 1995 to reopen this case and place Mr. Bishop on notice of the fact that a bankruptcy had been filed. Bishop's counsel contends that both because of his intentional omission of Bishop's claim and because of the equitable doctrine of laches in delaying to bring this matter to the Court or to Bishop's attention that the Motion to Reopen should be denied and I agree.

### CONCLUSIONS OF LAW

11 U.S.C. § 350(b) governs the reopening of bankruptcy cases. Section 350(b) of the Code provides as follows:

(b) A 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.

Additionally, the Bankruptcy Rules require that motions to reopen must be made within a reasonable time. *See* Fed. Bankr. P. 9024; In re Dill, 62 F.3d 1441 (1st Cir.1995). The decision to reopen a case is within the broad discretion of the bankruptcy court. *See In re Phillips*, 16 F.3d 417 (10th Cir. 1995) (motion to reopen "no-asset" bankruptcy is matter committed to the sound discretion of the bankruptcy court); Matter of Bianucci, 4 F.3d 526 (7th Cir.1993) (delay in bringing motion coupled with expenses creditor incurred to enforce lien precluded reopening of the case). Although the Section 350(b) does not set a time limit within which to bring a motion to reopen, courts will consider prejudice to creditors. *See Id.* ("The leading approach is permissive but incorporates an equitable defense akin to laches . . . "). Further, passage of time in itself does not constitute prejudice, but the delay may be

prejudicial when combined with other factors. *See Hawkins v. Landmark Fin. Co.*, 727 F.2d 324 (4th Cir.1984) (Fourth Circuit upheld a bankruptcy court's refusal to reopen a case because eight months had passed since it was closed and the creditor incurred court costs and counsel fees in commencing foreclosure proceedings on its lien).

Although Mr. Bishop has not yet procured a judgment, he has commenced proceedings to reduce the alleged indebtedness to judgment. Here, Debtor waited until almost two years after the initial demand letter before initiating this motion to reopen. In the process, Mr. Bishop incurred attorneys' fees and other transactional costs while preparing for trial in South Carolina. I hold that equity requires this case to remain closed so that this indebtedness may properly be adjudicated in state court.

Moreover, the Eleventh Circuit has held in a dischargeability action following a motion to reopen that if a debtor can show "absence of fraud or intentional design," a discharge will be granted. *See In re Baitcher*, 781 F.2d 1529 (11th Cir.1986). I also find that the Debtor intentionally omitted Mr. Bishop and, therefore, hold that Debtor has not carried its burden under 350(b). *See In re Martinez*, 112 B.R. 46 (Bankr.M.D.Ga. 1990) (debtor not entitled to reopen proceeding, absent showing of lack of any fraud or intentional design in connection with omission from schedules). Thus, Debtor's failure to carry his burden also precipitates the denial of this motion to reopen.

#### ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS  
THE ORDER OF THIS COURT that Debtor's Motion to Reopen is hereby DENIED.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of December, 1995.