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

In the matter of:)
)
ROCKY VINCENT RAY) Chapter 7 Case
)
) Number 94-20217
Debtor)

MEMORANDUM AND ORDER
ON MOTION TO REOPEN

FINDINGS OF FACT

Debtor filed for Chapter 7 bankruptcy on April 15, 1994. In his schedules, he neglected to list Reva White, an acquaintance of his, as an individual to whom he owed money. Because Ms. White was not scheduled as a creditor she received no notice from this Court of the pendency of Mr. Ray's case. The evidence was uncontradicted, however, that he informed her at the time he filed this case that he was filing bankruptcy and she assured him that she would not assert a claim for funds which she had advanced. As a result, Mr. Ray did not advise his attorney of the possibility that she might assert a claim against him.

Debtor's case proceeded without incident and a discharge was entered on

August 16, 1994. Sometime after the entry of the Debtor's discharge, he and Ms. White ceased cohabitating and when Ms. White left him she made a claim for the \$3,100.00 in funds which she had advanced to him.

Debtor admits that he borrowed \$3,100.00 from her but contends that she had never made demand for repayment until she moved out in the summer of 1995. Mr. Ray contends that her claim is offset by the value of rent which he provided for her and for repairs which he performed on her car during the time that they were romantically involved. Despite these contentions, Ms. White filed a civil action in the Magistrate's Court of Glynn County, Georgia, on July 21, 1995. The Debtor timely filed an Answer on September 8, 1995, which reads as follows:

I/We deny being indebted to the Plaintiff in any sum whatsoever, because: Reva White kept her mobile home on my property for 2 years or better, and has not payed [sic] her lot rent, and I also repaired one 1986 thunderbird . . . I also filed chapter 7 August of 1994.

Notwithstanding the assertion of these defenses, the Magistrate for Glynn County entered final judgment on November 13, 1995, which reads:

The Plaintiff shall have judgment in the amount of \$3,100.00 principal, \$0 attorney's fees, together with all

costs and interests as allowed by law.

Debtor filed this Motion to Reopen his case on November 30, 1995, seeking the opportunity to schedule this debt and have it included within his discharge.

CONCLUSIONS OF LAW

11 U.S.C. Section 350(b) governs the reopening of bankruptcy cases and 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.

11 U.S.C. §350(b). 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 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). 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); 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).

Weighing all of the evidence before me I conclude that the Debtor intentionally omitted listing Ms. White as a creditor in his case and that such intentional omission prohibits him from obtaining the relief he seeks herein. While there is clearly evidence which supports his contention that he might be entitled to set off some of the obligations he owed, this would only affect the amount of her claim and not the existence of a claim. The schedules clearly call for the listing of "all entities holding unsecured claims . . . against the debtor or property of the debtor as of the date of filing the petition," and provide space to indicate whether a claim is contingent, unliquidated or disputed. The appropriate action by the Debtor would have been to list Ms. White and to list her claim as

disputed or contingent which he failed to do.

Alternatively, I find that the Debtor is barred from litigating the efficacy of his discharge in this Court as against the claim of Ms. White as a result of the fact that he raised that issue in a Court of competent jurisdiction and that Court thereafter entered judgment for the full amount sought by Ms. White. Under the doctrines of *res judicata* and collateral estoppel Debtor cannot be permitted to attempt to relitigate this issue in another forum. See Pelletier v. Zweifel, 921 F.2d 1465, 1501 (11th Cir.1991)(issue preclusion bars the relitigation of matters that were actually litigated and decided in a prior suit); Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 83, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984) (issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal suit); see also Grogan v. Garner, 498 U.S. 279, 285, n. 11, 111 S.Ct. 654, 658, 112 L.Ed.2d 755 (1991)(collateral estoppel principles apply in nondischargeability proceedings under the Bankruptcy Code).

For the foregoing reasons I conclude that the Debtor's Motion should be denied.

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.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of February, 1996.