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

In the matter of:)
)
GEORGE A. GRADY) Chapter 7 Case
ANTHA P. GRADY)
) Number 88-41071
)
)
Debtors)

ORDER ON DEBTORS' MOTION TO REOPEN

On June 22, 1993, a hearing was held upon the Debtors' Motion to Reopen their case and Objections filed by Phoenix Micro-Systems Leasing, Inc. Upon consideration of the evidence adduced at the hearing, the briefs and other documentation submitted by the parties and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtors' case was filed as a Chapter 13 on October 4, 1988, and subsequently converted to a Chapter 7 case. Debtors received a discharge on August 11, 1989, without incident. In July 1992, Phoenix Micro-Systems Leasing, Inc. (hereinafter "Phoenix") filed a civil action against Debtor George Grady seeking the recovery of a pre-

petition obligation arising out of an equipment lease agreement entered on September 26, 1986.

The parties to the lease agreement were Phoenix, as lessor and W. G. Shuckers, located in Savannah, Georgia, as lessee. Debtor George Grady signed the lease agreement as a corporate officer of W. G. Shuckers and executed a separate guarantee of the lease obligations in his individual capacity. The lease does not indicate whether W. G. Shuckers is a corporation, but does list a street address at 225 West River Street, Savannah, Georgia. Debtor indicated in his Affidavit accompanying his Motion to Reopen Case that the W. G. Shuckers named as lessee on the lease "was a corporate entity, more completely known as W. G. Shuckers, Inc., of Hilton Head." See Debtor's Affidavit attached to Brief of Debtors' in Support of Motion, at 1.

Debtor's obligation as guarantor of the lease and the identity of Phoenix as a creditor in his case were not revealed in the schedules filed in this proceeding. Nevertheless, because the guarantee is a pre-petition obligation, the Debtors seek to reopen this case in order to add this creditor by amendment and have the guarantee obligation included in their discharge.

Phoenix succeeded in obtaining a default judgment in California which it seeks to domesticate in Georgia. It was the domestication action which apparently led to the filing of this Motion to Reopen.

Debtor's testimony is that the equipment was leased in the name of W. G. Shuckers of Savannah, but that the equipment was subsequently transferred to a Shuckers restaurant on Palmetto Bay Road in Hilton Head Island, South Carolina. He further testified that W. G. Shuckers in South Carolina had itself filed for bankruptcy and he believed that the obligation to Phoenix had been listed and "taken care of" in that proceeding. As a result, Debtor testified that he did not list Phoenix as a creditor in this case.

Debtor argues that the omission of the obligation from the schedules in this case resulted from oversight and not through any fraudulent intent. The creditor contends that the case should not be reopened under applicable authorities or that if it is reopened the reopening should be conditional upon Debtor's payment of the fees which it has expended in pursuing this obligation at a time when it had no knowledge of the previous filing. Because of the contentions concerning the South Carolina bankruptcy filing, the Court left the record open for Debtors' counsel to supplement the record and illustrate the nature of the South Carolina bankruptcy filing and whether this claim was scheduled by the South Carolina corporate debtor.

Debtors' counsel did provide information to the effect that bankruptcy case number 87-00117 in the name of W. G. Shuckers of Hilton Head, Inc. was filed in 1987, but was unable to obtain any information regarding the case. Consequently, this Court intervened and has since received the entire case file of W. G. Shuckers of Hilton Head, Inc.

Upon review of the file, the following facts are apparent. Debtor was a

twenty-five percent owner, President and CEO of W.G. Shuckers of Hilton Head, Inc., and was primarily responsible for the day to day operations of the restaurant. Debtor managed the restaurant through the auspices of W. G. Shuckers Management Corporation, a Georgia Corporation owned by Debtor and H. Wade Beam. W.G. Shuckers of Hilton Head, Inc. filed its petition in bankruptcy on January 13, 1987, and Debtor was actively involved in the operation and management of the restaurant until sometime in October of 1988 when Debtor, under threat of sanctions or being held in contempt of court, executed a number of documents placing various licenses and privileges with the successor corporation under the plan of reorganization.

The bankruptcy petition filed by W.G. Shuckers of Hilton Head, Inc., as well as its Statement of Financial Affairs, Schedule of Assets and Liabilities, and Revised List of Twenty Largest Unsecured Creditors, were all signed by Debtor in his capacity as President and CEO of the corporation. Nowhere within any of these documents is there any reference to Phoenix Micro-Systems Leasing, Inc., the equipment lease, or the computer equipment which is the subject of the lease. Furthermore, W.G. Shuckers of Hilton Head, Inc.'s Statement of Executory Contracts states unequivocally that the corporation had no executory contracts. Finally, the neither the Amended Disclosure Statement or Plan of Reorganization make any mention or provision for the Phoenix lease or the subject computer equipment.

CONCLUSIONS OF LAW

11 U.S.C. Section 350(b) provides that "[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." The language of Section 350(b) is permissive, and the reopening of a case rests within the sound discretion of the court based upon all the facts and circumstances of a particular case. Hawkins v. Landmark Finance Co., 727 F.2d 324, 326 (4th Cir. 1984); In re Rediker, 25 B.R. 71 (Bankr. M.D.Tenn. 1982).

One possible limitation placed upon a court's discretion in reopening a case is 11 U.S.C. Section 523(a)(3)(A), which provides in relevant part:

A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing.

This provision protects the right of a creditor to timely file a proof of claim by making an unscheduled debt nondischargeable when the debtor's failure to schedule the debt results in the creditor not getting notice of the case and consequently being unable to timely file a proof of claim. In a Chapter 7 case in which there are no assets from which to pay a dividend to creditors (a so-called "zero-asset" case), however, the notice sent to creditors does not specify a bar date for filing claims. Rather, the notice provides that if assets are found and payment of a dividend is possible, the creditors will be notified and granted a reasonable time to file their claims. *See* Bankr. Rule 2002(e), 3002(c)(5). As a result, courts

generally hold that section 523(a)(3)(A) does not prevent a court from reopening a zero-asset case to allow a debtor to schedule a previously unscheduled debt and receive a discharge therefrom as long as the rights of the creditor are not prejudiced and the debtor was not guilty of fraud or intentional design in omitting the debt from his schedules. *See e.g., Matter of Baitcher*, 781 F.2d 1529, 1533 (11th Cir. 1986); *Matter of Stark*, 717 F.2d at 324.

This court has previously held that, when faced with the issue of whether to reopen a zero-asset Chapter 7 case to allow a debtor to schedule a debt, a court should consider the following two factors:

- (1) Whether the debtor's failure to schedule a debt was because of an unintentional and honest mistake, due to inadvertence, and not fraud or intentional design; and
- (2) Whether reopening the case would result in an inequitable result which would irreparably prejudice the objecting creditor.

Matter of Stuart M. Altman, Ch. 7 Case No. 89-80442, Slip. Op. at 3 (Bankr. S.D.Ga. March 24, 1991). "This approach assures that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done." *Matter of Brenda Paulette Davis White*, Ch.7 case No. 587-00156, Slip Op. at 10 (Bankr. S.D.Ga. March 16, 1989) (*quoting Matter of Baitcher*, 781 F.2d 1529, 1533 (11th Cir. 1986)).

The case sub judice is a zero-asset Chapter 7 case. Accordingly, the notice

sent out to creditors did not set a bar date for creditors to file claims. Thus, section 523(a)(3)(A) does not present an obstacle to Debtors re-opening this case as Phoenix has not been deprived of the opportunity to timely file a proof of claim.

The critical inquiry in this case is whether Debtor's failure to schedule the Phoenix debt was the result of fraud or intentional design. Since Debtors seek to reopen their case to schedule a debt which they had duty to schedule when the case was originally filed, Debtors bear the burden of proving by a preponderance of the evidence that the omission of the debt was not due to fraud or intentional design. Matter of Baitcher, 781 F.2d at 1534; Grogan v. Garner, 112 L. Ed.2d 755, 111 S. Ct. 654 (1991).

Debtor testified that the computer equipment was leased in the name of W. G. Shuckers of Savannah and was subsequently transferred to the restaurant on Hilton Head Island. Debtor indicated in his Affidavit, however, that the W. G. Shuckers named as lessee on the lease "was a corporate entity, more completely known as W. G. Shuckers, Inc., of Hilton Head." Debtor further testified that it was his belief and understanding that the obligation to Phoenix had been listed and taken care of in W. G. Shuckers of Hilton Head, Inc. bankruptcy proceeding.

First, Debtor has failed to clarify exactly which entity, W. G. Shuckers of Georgia or W. G. Shuckers of Hilton Head, is the lessee in the Phoenix lease. The lease does not specify, and Debtor has offered contradictory testimony. Second, and most important, his assertions that the lease and equipment were transferred to W. G. Shuckers

of Hilton Head, Inc. and that the obligation arising therefrom was being handled in its bankruptcy proceeding in South Carolina are not corroborated by the documents contained in the corporation's bankruptcy file.

Specifically, the file indicates that Debtor continued in the management of the restaurant, as owner, President and CEO of W. G. Shuckers of Hilton Head, Inc. and as an owner of W. G. Shuckers Management Corporation, until sometime in or around November of 1988, almost two years after W. G. Shuckers of Hilton Head, Inc. filed its bankruptcy petition. Debtor's signature appears on the corporation's bankruptcy petition and all schedules initially filed with the Bankruptcy Court in South Carolina. Nowhere within any of these schedules is the Phoenix lease revealed. In fact, there is a complete absence of any reference to Phoenix, the lease, or the computer equipment in any of the schedules filed with the Court in South Carolina. The lease was not listed as a business lease, an unsecured claim or as a secured claim, and the computer equipment was not listed as an asset or as personal property of the corporation.

It bears repeating that every one of the schedules initially filed with the Court in South Carolina were signed by the Debtor in his capacity as President and CEO of the W. G. Shuckers of Hilton Head, Inc. It is axiomatic that a party is presumed to have read and understood the contents of a document which bears his signature. This is especially true of documents filed with the bankruptcy court. Moreover, the President and CEO of a company who is actively managing the company's business should be intimately familiar with that company's assets and liabilities.

Finally, the corporation's Statement of Executory Contracts indicates that the corporation had no executory contracts, and neither its Amended Disclosure Statement or the Plan of Reorganization make any mention or provision for the Phoenix lease or the computer equipment which is the subject of the lease.

From these facts only two conclusions are possible. One is that W. G. Shuckers of Hilton Head, Inc. never assumed responsibility for the lease, and that Debtor was aware of this fact, and gave conflicting testimony in this case. The other is that Shuckers of Hilton Head assumed the lease, but failed to reveal the asset or the liability in its Chapter 11 case, contrary to Mr. Grady's testimony before me. Under either scenario Mr. Grady has failed to carry his burden of showing that the failure to schedule Phoenix in this case was not due to fraud or intentional design.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Debtors' Motion to Reopen Case to add the claim of Phoenix Micro-Systems Leasing, Inc. is hereby DENIED.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of August, 1993.