

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

In the matter of:)	
)	Adversary Proceeding
BETTY YOUNG JOHNSON)	
(Chapter 7 Case <u>92-41263</u>))	Number <u>96-4111</u>
)	
<i>Debtor</i>)	
)	
)	
BETTY YOUNG JOHNSON)	
)	
<i>Plaintiff</i>)	
)	
)	
v.)	
)	
EADY CONSTRUCTION CO.)	
)	
<i>Defendant</i>)	

MEMORANDUM AND ORDER

Debtor, Betty Young Johnson (hereinafter "Debtor"), brings this Complaint to Determine Dischargeability of a debt owed to Eady Construction Company (hereinafter "Eady"). Debtor requests permission to add the omitted claim of Eady to her schedules and a declaration that any debt owed to Eady is discharged pursuant to the general Chapter 7 discharge that Debtor received on May 15, 1995. Eady refutes this contention and asserts

that because Debtor failed to schedule Eady's claim this debt should be excepted from discharge pursuant to 11 U.S.C. Section 523(a)(3)(B). This proceeding is a core matter under 28 U.S.C. Section 157(b)(2)(I). These findings of fact and conclusions of law are entered pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

On or about December 4, 1990, Debtors, George M. and Betty Y. Johnson, contracted with Eady Construction Co., to perform certain renovations to Debtors' residence, including the addition of a family room, air conditioner, vinyl siding, bathroom fixtures, ceiling fans, sky lights, carpeting, and a bookcase. The cost of the renovations was approximately \$20,000 which Debtors borrowed from a lender in exchange for a security deed on Debtors' residence. Initially, contractor, Roosevelt Eady, manager of Eady Construction Co., carried out most if not all of the renovations. As the project progressed, Debtors apparently became unsatisfied with his performance and, as a result, withheld the \$8,000 final draw. Debtors already had paid Eady Construction Co. approximately \$12,000 of the \$20,000 contract price. In response, John Eady, father of Roosevelt Eady and employee of Eady Construction Co., undertook to complete the renovations commenced by his son. Apparently, Debtors were still not satisfied with the work because they hired other contractors to finish the project. Sometime thereafter Debtors sent the remaining draw balance of \$1600 to Eady Construction Co. Eady returned the check and, instead, elected to file a materialman's lien.

In an attempt to collect this debt, Eady Construction Co. filed suit during

the beginning of 1992. After a pre-trial demand letter, service by the sheriff, and a subsequent hearing, the Superior Court of Chatham County entered a default judgment on November 12, 1992, in the amount of \$8,000.00 for damages and \$2,664.00 for attorney's fees, although Eady Construction Co. elected not to enforce its default judgment.

At about the same time, after the date of service and prior to entry of default, Debtors, George M. and Betty Y. Johnson, filed for Chapter 13 bankruptcy protection; however, Debtors did not list the disputed debt to Eady Construction. Mrs. Johnson testified that it was her belief that she and her husband did not owe anything to Eady. Over the next two years, Debtors made regular payments to their Chapter 13 plan until George M. Johnson died at the end of 1994. As a consequence, on January 10, 1995, Debtors' counsel filed a motion to have George M. Johnson dismissed from the case. Two days later Betty Y. Johnson converted her case to a Chapter 7 proceeding and again failed to list the matured debt to Eady Construction. Debtor testified at trial that she did not have knowledge of the state court proceeding although service was perfected on her adult son who at the time was living at her residence. Debtor received a Chapter 7 discharge on May 15, 1995 although an objection by the Chapter 7 trustee to Debtor's claimed exemptions caused the case to remain open.

During August of 1995, Equity Lending Associates, the first mortgage holder on Debtor's residence, instituted foreclosure proceedings. According to Debtor, this action caused her to become aware of Eady Construction's claim for the first time. Soon thereafter, Debtor, Betty Y. Johnson, filed a motion to amend her petition in an attempt to

include the claim of Eady Construction of the Chapter 7 petition. This Court denied the Motion on a procedural basis and instructed the Debtor to file this Complaint to Determine Dischargeability.

Debtor contends that because this case is a "no-asset" Chapter 7 she should be permitted to amend her schedules and discharge this debt. She asserts that in Chapter 7 "no-asset" cases only unscheduled debts arising from fraud may be excepted from discharge which according to Debtor is not the present situation because this debt arises out of a contract dispute. Eady's counsel disputes Debtor's contention. Counsel claims that Eady's employees were fraudulently induced to complete the work when the Debtors never had any intention of remitting the final draw. Thus, Eady requests that this obligation be excepted from discharge pursuant to 523(a)(3)(B).

CONCLUSIONS OF LAW

Section 523(a) sets forth a list of certain debts which are excepted from the overall discharge granted by other Code provisions. In instances such as the present one where a debtor fails to schedule a creditor's claim, Sections 523(a)(3)(A) and (B) provide that,

(a) A discharge under section 727, 1141, 1228[a] 1228(b), or 1328(b) of this title does not discharge an individual from any debt--

(3) neither listed nor scheduled under section 521(a) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

11 U.S.C. §§ 523(a)(3)(A) and (B). Essentially, this section excepts from general discharge two types of debts: (1) Section 523(a)(3)(A) "non-fraud" debts which were not scheduled by the debtor in time to permit the creditor to file a proof of claim and (2) Section 523(a)(3)(B) "fraud" debts which were not scheduled by the debtor in time to permit the creditor to file a determination of nondischargeability, unless in either case the creditor had notice or actual knowledge of the pendency of the case. Because the present matter is a "no-asset" proceeding, the time for filing claims has not expired and, therefore, this debt may not be excepted from discharge pursuant to Section 523(a)(3)(A). *See* Fed.R.Bank.P. 2007(e). Thus, this inquiry concerns whether the debt in issue may be excepted from discharge pursuant to Section 523(a)(3)(B).

For a creditor of a "no-asset" Chapter 7 debtor to except a late claim from discharge pursuant to Section 523(a)(3)(B), it must prove that its claim is "of a kind specified in" Sections 523(a)(2), (4) or (6). *See In re Haga*, 131 B.R. 320, 327 (Bankr.W.D.Tex. 1991) (Debtor must only assert discharge and creditor has the burden of showing that the debt comes within the exception); However, when proving its claim, the

creditor is only required to demonstrate a "colorable" claim under 523(a)(3)(B). That is, due to the delay in scheduling the creditor does not have to prove that the debt is nondischargeable under the Section 523(a)(2) standards, but rather that the debt which was arguably nondischargeable under that section was not scheduled in time to require the timely filing of a complaint. See Matter of Johnson, Ch. 7 Case No. 92-41263, slip op. at 8-9 (Bankr.S.D.Ga., May 22, 1996) (Davis, J.) The burden then shifts to the debtor who may either refute the creditor's evidence or prove that the creditor had knowledge of the bankruptcy's pendency. See In re Haga, 131 B.R. at 327.

Sections 523(a)(2), (4) and (6) except from discharge obligations generally referred to as "fraud" debts. These obligations include debts arising from fraud, false pretenses, embezzlement, larceny, or willful and malicious injury. See 11 U.S.C. §§ 523(a)(2), (4) and (6). Considering the evidence and testimony proffered at trial, I hold that this debt is not dischargeable. While the evidence is susceptible of more than one conclusion, Defendant has made a "colorable" case that had the debt been timely scheduled it could have proven a case under 11 U.S.C. § 523(a)(2). Debtors had due and legal service of Defendants lawsuit immediately prior to the filing of this case. Debtors induced Defendant to complete repairs, the repairs were substantially completed, and Debtors remit a small portion of the balance due which tender was rejected. The evidence might not have fully established a successful Section 523(a)(2) attack in 1992. However, it supports a *prima facie* case of actual fraud, which is all that is required under Section 523(a)(3), due to the omission of the debt from Debtors schedules.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the judgment of Eady Construction Company rendered by the Superior Court of Chatham County is non-dischargeable.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of November, 1996.