

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN RE:)
)
JAMES WILLIAM BARRS,) CHAPTER 13 BANKRUPTCY
) CASE NO. 94-52331
)
)
DEBTOR)

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For the Debtor:

ROBERT O. HOUSE
544 Mulberry Street
Suite 816
Macon, GA 31201

Chapter 7 Trustee:

WILLIAM M. FLATAU
355 Cotton Avenue
Macon, GA 31201

MEMORANDUM OPINION

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

FINDINGS OF FACT

Debtor filed his petition for relief under the Bankruptcy Code on August 24, 1994. The section 341 meeting of creditors was held on September 21, 1994. Debtor obtained his discharge under Chapter 7 of the Bankruptcy Code on November 28, 1994, and his case was closed pursuant to a final decree entered on that date. Debtor's case was administered as a "no asset" Chapter 7. This means that there were no nonexempt assets available for distribution to creditors.

On November 29, 1994, unaware that the case had been closed, Debtor filed an amendment to his schedules to list First Franklin as an unsecured creditor. Debtor now seeks to reopen

his case to schedule this unsecured claim of Nine Hundred Sixty-seven Dollars (\$967.00). A hearing on Debtor's request was held on April 24, 1995. No party appeared to object or contest the relief.

CONCLUSIONS OF LAW

The fact pattern before this Court has generated a wide variety of case law.¹ The issue is whether a debtor may reopen a Chapter 7 case pursuant to section 350(b)² of the Bankruptcy Code in order to schedule a previously omitted creditor. Some courts hold that the act of reopening a no asset Chapter 7 case is an exercise in futility because section 727 discharges all debt, whether or not the creditor is listed on the debtor's schedules. See e.g. In re Mendiola, 99 B.R. 864 (Bankr. N.D. Ill. 1989). These courts reason that section 727 discharges all debt except those falling under one of the exceptions to

¹ For general discussions regarding this issue, see Wayne Johnson, Discharging Unsecured Debts: Creating Equal Justice For Creditors By Restoring Integrity To Section 523(a)(3), 10 Bankr. Dev. J. 571 (1994); J. Neal Prevost, Comment, We Left Them Off The List--Now What? Unsecured Creditors In Chapter 7 Bankruptcies, 54 La. L. Rev. 389 (1993); Susan Ann Slates, The Unsecured Creditor In A Chapter 7 No-Asset Case, 64 Am. Bankr. L.J. 281 (1990).

² Section 350(b) provides:

(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) (West 1994).

discharge contained in section 523. Id. at 865-866. Although section 523(a) (3) excepts unscheduled debts from discharge, the unlisted creditor must have been prevented from filing a timely proof of claim in order to take advantage of the provisions of section 523(a) (3). Id. at 866. Since the Bankruptcy Rules make it unnecessary to file a proof of claim in a no asset Chapter 7 case, and since there is no deadline for filing a proof of claim in such a case, those courts find that no creditor is prevented from filing a timely proof of claim. Id. at 866-867. Hence, section 523(a) (3) does not apply to no asset Chapter 7 cases, and the debt is discharged.

Other courts find prejudice where unscheduled creditors are unable to participate in the bankruptcy case due to the debtor's failure to list the debt. See e.g. Reese v. NCNB National Bank Of Florida (In re Reese), 133 B.R. 254 (Bankr. M.D. Fla. 1991). All equitable notions aside, neither the Bankruptcy Rules nor the Bankruptcy Code permit a debtor to reopen a case to allow a creditor to file a claim and litigate dischargeability. Id. at 247. The remedy Congress created for such a situation is section 523(a) (3), which renders unscheduled debts nondischargeable. Id. at 247. These courts reject the idea that no prejudice occurs when an unscheduled creditor is denied the right to participate in a no asset case. As the court in Reese stated:

The unscheduled creditor was denied the right to file a claim in a no-asset case, a right which is clearly illusory. Additionally, the unscheduled creditor lost valuable rights because the creditor is no longer in a position to file a Complaint under § 523(c). An unscheduled creditor lost the right to participate in the administration of the estate. The creditor also lost the right to examine the Debtor at the meeting of creditors scheduled pursuant to § 341; the right to conduct in-depth investigation of the affairs of the Debtor; the right to challenge the Debtor's claims of exemption; and most importantly, the creditor lost the right to challenge the Debtor's right to a general bankruptcy discharge by filing a Complaint pursuant to § 727(b) of the Bankruptcy Code. An unscheduled creditor like NCNB in this instance has been effectively deprived of various rights, and to conclude that the creditor suffered no prejudice because the Debtor's case was noticed as a no-asset case is sheer sophistry.

Id. at 247.

The Reese rationale is not viable in this district due to the Eleventh Circuit Court of Appeals decision in the case of Samuel v. Baitcher (In re Baitcher), 781 F.2d 1529 (11th Cir. 1986). In that case our Circuit Court held that a no asset Chapter 7 case may be reopened to add an unlisted creditor where the debtor is able to show that the failure to list the creditor was unintentional and not the result of fraud. Id. at 1534. The court reasoned that in a no-asset Chapter 7 case "a notice is as a matter of law never untimely unless and until assets are discovered." Id. at 1533. In doing so, the Eleventh Circuit rejected the notion that failing to list a creditor automatically renders a debt nondischargeable under 11 U.S.C. §

523(a)(3).³ Id. at 1534. The court stated:

We accept, as the Seventh Circuit does, that under the new law the old prophylactic rule does not in a no-asset case any more deny a discharge to one who has failed to schedule for reasons of honest mistake, not "fraud or intentional design." This would be an inequitable result, in the absence of prejudice. Hence, if [the debtor] can show absence of fraud or intentional design, she should have her discharge....

³ Section 523(a)(3) provides as follows:

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

(3) 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 --

(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) (West 1994).

Baitcher, 781 F.2d at 1534.⁴

Hence, the court in Baitcher finds the necessary cause⁵ to reopen the case in the debtor's unintentional failure to list a creditor. This Court is bound by the rationale of the Baitcher court. Accordingly, the Court must analyze the equities of the case and determine whether Debtor failed to schedule First Franklin intentionally or as part of a scheme to defraud this creditor. In re Long, 93 B.R. 791 (Bankr. M.D. Ga. 1988).

This Court finds no evidence of bad faith conduct or fraud on Debtor's part in failing to schedule First Franklin's debt. First Franklin did not respond to Debtor's motion or appear at the hearing. Significantly, Debtor attempted to amend his schedules to add First Franklin, but was unable to effectuate the modification prior to discharge. Debtor's actions do not portray a bad faith attempt to deny First Franklin participation in this case. Therefore, Debtor will be permitted to reopen his case to add First Franklin as a creditor. First Franklin will be allowed sixty days from the date of the entry of the order in this case to file a complaint objecting to the discharge under section 523 and section 727. In re Shipman, 137 B.R. 524

⁴ The Seventh Circuit case referred to in Baitcher is Matter of Stark, 717 F.2d 322 (7th Cir. 1983), which relied upon equity as grounds to allow the reopening of the case and listing of the omitted creditor.

⁵ 11 U.S.C. § 350(b).

(Bankr. N.D. Fla. 1991).

An order in accordance with the memorandum opinion will be entered on this date.

Dated this _____ day of July, 1995.

JAMES D. WALKER, JR.
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I, Cheryl L. Spilman, certify that a copy of the attached and foregoing was mailed to the following:

Robert O. House
Attorney At Law
544 Mulberry Street
Suite 816
Macon, GA 31201

William M. Flatau
Chapter 7 Trustee
355 Cotton Avenue
Macon, GA 31201

First Franklin
139 Second Street
Cochran, GA 31014

This _____ day of July, 1995.

Cheryl L. Spilman
Deputy Clerk
United States Bankruptcy Court

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DEBTOR)

ORDER

The Debtor, James William Barrs, has filed a Motion to Reopen his Chapter 7 case. This order is entered in conjunction with the memorandum opinion published pursuant to Fed.R.Bankr.P. 7052.

The Debtor's motion is GRANTED. The Debtor may proceed to schedule First Franklin as a creditor in his no asset case. It is hereby

ORDERED that the Debtor's Chapter 7 case be reopened to administer the claim of First Franklin; it is hereby further

ORDERED that the Debtor's counsel shall provide notice to First Franklin of this reopened case. First Franklin shall have sixty (60) days from the entry of this order to file any complaints objecting to the discharge of its debt under section 523, or the debtor's general discharge under section 727.

SO ORDERED this _____ day of July, 1995.

JAMES D. WALKER, JR.
United States Bankruptcy Judge

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