

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 10 O'clock & 10 min. A.M.

Date 9/30/98

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia JB

In the matter of:)

CAROL S. KICKLIGHTER)

Debtor)

Chapter 7 Case

Number 96-42016

MEMORANDUM AND ORDER
ON DEBTOR'S MOTION TO REOPEN

Pending before the Court is Carol Kicklighter's Motion to Reopen her Chapter 7 bankruptcy case. This Court has jurisdiction over this core proceeding pursuant to Section 157(b)(2)(A) of Title 28 of the United States Code. For the reasons articulated in this memorandum opinion, the Court will deny the Debtor's motion. These findings of fact and conclusions of law are entered pursuant to Rules 9014 and 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

Sometime in 1994, Carol Kicklighter and Nancy Sikes leased a house located at 30 Van Horne Street, Tybee Island, Georgia. For reasons unimportant to the resolution of this Order, the two women vacated the premises in May 1995, prior to the August 31, 1995, termination date on the lease. A volley of letters between the women and the owners of the house, Julian and Jacqueline Toporek, was exchanged. The last such letter,

to this Court's knowledge, was dated August 7, 1995, and signed by Mr. Toporek. It informed both women that the rent for August 1995 was due under the lease and that a penalty had been added.

Accordingly, there is now due seven hundred fifty (\$750) dollars rent and seventy five (\$75) dollar penalty for a total of eight hundred and twenty five (\$825) dollars. You have five additional days to pay this sum to me at my office before I initiate proceedings for collection. I really would hate to have us all go through that aggravation.

Letter to Carol Kicklighter and Nancy Sikes, August 7, 1995.

One year later, on August 15, 1996, Ms. Kicklighter filed a petition for relief under Chapter 7 of the Bankruptcy Code. She failed to schedule the outstanding rent obligations to the Toporeks. Further, Debtor's Statement of Financial Affairs indicates "None" when asked for all prior addresses of the debtor within the two years immediately preceding the commencement of the bankruptcy case. (Doc. 1). Her Chapter 7 was administered as a "no-asset" case, because no assets appeared from the schedules from which a dividend could be paid to unsecured creditors. Debtor was granted her discharge and her case was closed on September 9, 1997.

In April 1998, the Toporeks filed suit against Ms. Kicklighter in state court

to collect the rent due them under the lease on 30 Van Horne Street. In response, Ms. Kicklighter filed this Motion to Reopen on May 26, 1998, to add the claim of Mr. and Mrs. Toporek and ultimately in order to obtain a discharge of that claim. The Toporeks oppose the motion to reopen. A hearing was held on June 17, 1998, in Savannah, Georgia, at which time this Court admitted into evidence the letters between the parties and heard testimony from Ms. Kicklighter.

CONCLUSIONS OF LAW

The Bankruptcy Code provides as follows for the reopening of cases:

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 term "cause" in this section "casts a broad net, and a decision in this respect thus necessarily falls within the 'sound discretion of a bankruptcy court.'" In re McDaniel, 217 B.R. 348, 352 (Bankr. N.D.Ga. 1998) (internal citations omitted). In this circuit, motions to reopen a "no-asset" case are governed by the Eleventh Circuit's opinion in Samuel v. Baitcher, 781 F.2d 1529 (11th Cir. 1986). In a no-asset case, the debtor must show that the creditor was not scheduled for reasons of honest mistake in order for the Court to grant a motion to reopen. Baitcher, 781 F.2d at 1534. If the reason for not scheduling the creditor was fraud or intentional design, the motion should not be granted. Whether the case

is reopened or not, the ultimate issue in these cases is whether the debt is discharged. If the case is reopened (or if the claim is added before the case is closed), dischargeability is determined under 11 U.S.C. § 523(a)(3).¹ If the debt is of a type specified in 523(a)(2), (4), or (6), the debt is expressly excepted from discharge by Section 523(a)(3)(B). In re Johnson, 208 B.R. 746, 749 (Bankr. S.D.Ga. 1996).² First, however, Debtor must carry the burden of showing that the case should be reopened. If the case is not reopened, then the dischargeability issue will not be decided in a federal forum. In the absence of reopening, Debtor's only possible remedy is to assert her discharge in state court as an affirmative defense.

¹ 11 U.S.C. § 523(a)(3) provides:

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 -

(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.

² *But see In re Berry*, 190 B.R. 486, 493 (Bankr. S.D.Ga. 1995). In Berry, Judge Walker has held that the Eleventh Circuit's decision in Baitcher prevents a creditor from bringing an action even under § 523(a)(3) in a reopened no-asset Chapter 7 case. He reasons that in order to be excepted from discharge under Section 523(a)(3)(B), the creditor must have been prevented from both timely filing a claim *and* from timely filing a complaint. I disagree. The text of Section 523 excepts a discharge if it was not scheduled in time to permit both timely filing of a claim and timely filing of a complaint. In a "no asset" case omission from the schedules has no bearing on ability to timely file a claim since there is no claims bar date. However, when omitted, the creditor is not permitted to timely file an action under Section 523(a)(2), (4), or (6). Since the creditor in these cases was not permitted both timely filing of a claim and timely filing of a complaint, the omitted fraud-type claim remains the proper subject of a complaint to determine dischargeability under § 523(a)(3)(B).

In order to have this case reopened Ms. Kicklighter, as movant, bears the burden of affirmatively proving "honest mistake" or an "absence of fraud or intentional design" by a preponderance of the evidence. Baitcher, 781 F.2d at 1534. Where such an honest mistake cannot be shown, a court should not allow the case to be reopened.

The bankruptcy courts generally reserve its [*sic*] broad equitable powers to relieve a honest debtor from the financial hardship imposed by unscheduled debts. To grant a motion to reopen [without showing honest mistake] would be at odds with the requirements imposed by the Bankruptcy Code that all debtors file their schedules honestly and in good faith.

In re Collis, 223 B.R. 814, 816 (Bankr. M.D.Fla. 1997). Based upon the evidence presented to the Court at the June 17, 1998, hearing, I find that the motion should be denied.

In light of the extended and rather acrimonious dealings Debtor and Ms. Sikes had with the Toporeks, I hold that she knew the debt was outstanding when she filed her petition. Further, when she filled out her statement of financial affairs, she failed to disclose her former residence at Tybee. These omissions, in the context of the clear assertion of a claim for unpaid rent by the Toporeks, negate her contention that she simply forgot to schedule the claim. I therefore hold that she failed to prove "absence of fraud or intentional design," or "honest mistake." The parties' dealings were extended, not too distant, and unresolved at the time she filed her case. Whatever her motive may have been in failing to

schedule Mrs. Toporek, her mere assertion that she forgot, or believed the debt was forgiven, is insufficient to carry her burden.

ORDER

In consideration of the foregoing IT IS HEREBY ORDERED that the Motion to Reopen is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 21st day of September, 1998.