

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 9 O'clock & 48 min AM

Date 11/23/04

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia RB

In the matter of:)
)
LEROY YOUNG, JR.)
)
Debtor)

Chapter 13 Case

Number 98-41950

MEMORANDUM AND ORDER
ON MOTION TO REOPEN CHAPTER 13 CASE

Debtor filed for Chapter 13 bankruptcy protection on July 2, 1998. Debtor's plan was confirmed on November 24, 1998, and he received a discharge on August 8, 2003. On August 30, 2004, Debtor filed a Motion to Reopen his Chapter 13 case. R.K. Construction and Development Company ("R.K. Construction") filed an objection to Debtor's Motion to Reopen. A hearing was held on the matter on September 21, 2004. This Court has jurisdiction over this proceeding under 28 U.S.C. § 157.

FINDINGS OF FACT

On December 23, 2002, four years after confirmation, Debtor was injured in an automobile collision with an employee-driver of R.K. Construction. Although Debtor was in bankruptcy at the time of the accident, Debtor did not amend his schedules to include a cause of action against R.K. Construction. Debtor received his discharge eight months later.

On May 4, 2004, nine months after his Chapter 13 discharge, Debtor filed suit on the post-petition cause of action against R.K. Construction in the State Court of Chatham County.



On August 2, 2004, R.K. Construction filed a Motion for Summary Judgment in the state court action arguing that Debtor's claims are barred by the doctrine of judicial estoppel. Within thirty days, Debtor moved to reopen his Chapter 13 case to amend Schedules B and C to include his cause of action against R.K. Construction.

R.K. Construction contends that the Court should not reopen Debtor's Chapter 13 case because Debtor did not amend his bankruptcy schedules to include the potential cause of action during the pendency of the bankruptcy and did not seek to reopen the case until R.K. Construction moved for summary judgment in the state court action.

CONCLUSIONS OF LAW

Debtor is seeking to reopen his bankruptcy case so that he may amend his schedules to include the cause of action against R.K. Construction. A court may reopen a bankruptcy case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The decision to reopen a case is within the discretion of the bankruptcy court. See Nintendo Co. v. Patten (In re Alpex Computer Corp.), 71 F.3d 353, 356 (10th Cir. 1995).

Determining whether or not the cause of action against R.K. Construction was property of the estate is a threshold matter in determining whether the bankruptcy case needs to be reopened to allow the amendment. If the cause of action was not property of the estate, then it is unnecessary to reopen the case to allow the amendment. See In re Carter, 258 B.R. 526, 528 (Bankr. S.D. Ga. 2001)(Dalis, J.).

When read together, 11 U.S.C. § 1306 and 11 U.S.C. § 1327 create a tension as to what property remains part of the bankruptcy estate and what property is returned to the debtor after confirmation. *See Telfair v. First Union Mortg. Corp.*, 216 F.3d 1333, 1340 (11th Cir. 2000). In *Telfair*, the Eleventh Circuit adopted the “estate transformation” approach which vests any property not necessary to the fulfillment of the plan in the debtor upon confirmation. The court held that the bankruptcy estate in that case consisted solely of the post-petition earnings that the debtor devoted to the plan payments. *Id.*

In this district, Judge Dalis had occasion to interpret *Telfair* under circumstances similar to the case before the Court today. In *Carter*, the debtors were involved in an auto accident almost three years after confirmation, and they did not amend their schedules to include a cause of action against the driver of the other vehicle. 258 B.R. at 526-27. After receiving a discharge, the debtors sought to reopen the case in order to amend their schedules to include the cause of action. Relying on *Telfair*, Judge Dalis held that the debtors had no duty to disclose the cause of action because the claim arose after confirmation and belonged to the debtors as opposed to the bankruptcy estate. *See also Wakefield v. Southwest Sec., Inc. (In re Wakefield)*, 312 B.R. 333, 338 (Bankr. N.D. Tex. 2004)(holding in context of a Chapter 7 case that if asset is not property of the estate then there is no duty to disclose). Because there was no duty to disclose the action, he denied the motion to reopen the case as unnecessary. Judge Dalis also held that judicial estoppel did not apply because the debtors did not assert a position in the state court that was inconsistent with their position in the bankruptcy proceeding. *Id.* at 527-28. *See also In re Ross*, 278 B.R. 269, 274 (Bankr. M.D. Ga. 2001)(Walker, J.) (“When dealing with a claim arising post-confirmation in a Chapter 13 case, the Court has not, by having previously confirmed the Chapter 13 plan, adopted a position taken by the

debtor that contradicts a position the debtor takes in state court by asserting that claim.”).

After examining Telfair, this Court held that to determine what should be included in the post-confirmation estate the Court must “examine the individual debtor to determine what is necessary, under the particular facts and circumstances, to complete a successful plan.” McGlockling v. Chrysler Fin. Co. (In re McGlockling), 296 B.R. 884, 887 (Bankr. S.D. Ga. 2003)(Davis, J.)(holding that a car was property of the estate after confirmation as it was necessary to complete the plan). With the benefit of hindsight, it is clear that the cause of action against R.K. Construction was not necessary to the fulfillment of the plan. Debtor completed the plan and received a discharge more than eight months prior to filing the action against R.K. Construction. Thus under Telfair, the claim vested in the debtor and was not property of the bankruptcy estate.

R.K. Construction asserts that Debtor had a duty to amend his bankruptcy schedules to include this potential cause of action. The Court recognizes that in Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002), the Eleventh Circuit noted that debtors have a continuing duty to amend their financial statements. For this proposition, the court relied on In re Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999). However, in Coastal Plains, the court wrote, “if the debtor has enough information . . . *prior to confirmation* to suggest that it may have a possible cause of action, then it is a ‘known’ cause of action such that it must be disclosed.” Id. at 208 (citing Youngblood Group v. Lufkin Fed. Sav. & Loan Ass’n, 932 F. Supp 859, 867 (E.D. Tex. 1996))(emphasis added). Furthermore, in Burnes, the Eleventh Circuit explained that the importance of full disclosure is the effective functioning of the bankruptcy system. For example, creditors rely on disclosure statements to determine whether to contest a discharge and courts rely on the

disclosure statements to determine if a discharge should be granted. Burnes, 291 F.3d at 1286. Because this cause of action accrued after confirmation and nondisclosure would not have impeded the effective functioning of the bankruptcy system, the Eleventh Circuit holding does not require an amendment to the Schedules in this case.

In addition, Federal Rule of Bankruptcy Procedure 1007(h) specifically addresses the supplemental disclosure of interests acquired after the petition is filed. The Bankruptcy Rules require a debtor supplement his schedules only in limited circumstances.¹ Rule 1007(h) provides in pertinent part:

If, as provided by § 541(a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 10 days after the information comes to the debtor's knowledge . . . file a supplemental schedule in the . . . chapter 13 individual debt adjustment case.

Section 541(a)(5) provides for specific interests in property - none of which are applicable in this case- that become property of the estate if the debtor acquires them within 180 days of the filing of the petition.² Rule 1007(h) "does not require scheduling of property acquired postpetition that becomes property of the estate only due to the operation of . . . section 1306(a)." Collier on Bankruptcy ¶ 1007.09 (15th ed. rev. 2004). If Congress intended to impose a broader duty of ongoing disclosure, it would have expressly provided. Vasquez v. Adair (In re Adair), 253 B.R. 85,

¹Federal Rule of Bankruptcy Procedure 1009 allows the debtor to amend a petition, list, schedule or statement as a matter of course; however, Rule 1009 is permissive as opposed to Rule 1007(h) which is mandatory.

²Section 541(a)(5) provides for interests in property received by bequest, devise, inheritance, property settlement, divorce, or as a beneficiary of a life insurance policy or death plan.

90 (B.A.P. 9th Cir. 2000).

This holding does not mean that a debtor never has a duty to disclose a cause of action that accrues after confirmation. As Judge Walker noted in In re Brown, 260 B.R. 311, 314 n.3 (Bankr. M.D. Ga. 2001), there are situations in which property acquired after confirmation may trigger a disposable income review. Further, a debtor may modify a plan under 11 U.S.C. § 1329 or be forced to defend a motion to dismiss due to a default in plan payments and post-confirmation events would need to be disclosed. Other post-confirmation changes may also require a review of a debtor's post-confirmation circumstances; however, that is not the case here. Because the cause of action was not part of the estate and, without more, could not have become part of the estate, no bankruptcy purpose would have been served had Debtor amended his schedules during his case.

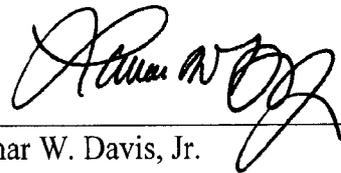
R.K. Construction relies on Scoggins v. Arrow Trucking Co, 92 F.Supp. 2d 1372 (S.D. Ga. 2000)(Edenfield, J.), for the proposition that a debtor who fails to disclose a post-petition tort claim during the bankruptcy proceeding is judicially estopped from asserting that claim elsewhere. However, the Scoggins case is distinguishable from the case at bar. Primarily, the claim in Scoggins was a pre-petition tort claim as opposed to the Debtor's post-confirmation claim in this case; therefore, the Scoggins claim was clearly part of the bankruptcy estate. Additionally, any conclusions the Scoggins court reached about post-petition claims were made without the benefit of the subsequently decided Telfair decision. Finally, the court in Scoggins was ruling on a motion for summary judgment based on judicial estoppel; however, judicial estoppel is not before the Court today. See In re Dewberry, 266 B.R. 916, 920 (Bankr. S.D. Ga. 2001)(Davis, J.)("It seems self-evident that if the principle is invoked to protect the integrity of the judiciary, then it must be

invoked in the Court in which the apparent self-serving contradiction occurred and in which the defense is first asserted.”).

Because the claim against R.K. Construction was not property of the bankruptcy estate, Debtor had no duty to amend the schedules. As Judge Dalis has ruled on this issue in Carter and his decision has not been expressly reversed or superceded, in keeping with the law in this district, I hold it is unnecessary to reopen Debtor’s bankruptcy estate.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Debtor’s Motion to Reopen is DENIED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 22nd day of November, 2004.

cc: Debtor - Young
Debtor's Atty. - Watts
~~Creditor~~
11/23/04 Creditor's Atty. Worsham, Jr.
PB Trustee - Brown
U.S. Trustee
Savage, Juner