IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: SCOTT D'WAYNE SMITH, Debtor **No. 5:12-bk-70737**
Ch. 7

ORDER DENYING MOTION TO REOPEN

Before the Court is the debtor's *Motion to Reopen Case* that was filed on May 20, 2016. The stated purpose for reopening the case is to add an omitted creditor, Brandy Allen, to the debtor's schedules and file a complaint to determine the dischargeability of a debt. According to the creditor, she was not aware of the debtor's bankruptcy case until her attorney was served a copy of the debtor's motion to reopen in May 2016. For the reasons stated below, the Court denies the debtor's motion.

The debtor filed his voluntary chapter 7 bankruptcy petition on February 27, 2012. On that same day, the Clerk of the Court issued a *Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines*. Toward the bottom of page 1 of the notice, the notice stated in bold letters: "Please Do Not File a Proof of Claim Unless You Receive a Notice to Do So." It also stated that the meeting of creditors was first set for April 3, 2012. On April 3, 2012, the trustee requested the first of four continuances of the meeting of creditors, which was held and concluded on July 3, 2012. Two days later, on July 5, 2012, the Clerk of the Court issued a *Notice of Assets and Deadline to File Proof of Claim*, which established a date for the timely filing of a proof of claim: "Pursuant to Bankruptcy Rule 3002(c)(5), the last day for filing claims is fixed as: 10/5/12." The debtor received his discharge on January 25, 2013, and, despite the previous notice of assets, the trustee filed his no-asset report on January 28, 2013. The debtor's case was then closed on February 13, 2013.

Approximately ten months after the debtor received his discharge, the creditor, Brandy Allen, filed her *Complaint For Medical Negligence* against the debtor in the Circuit Court of Benton County, Arkansas, and served the debtor. The subject of her complaint was an injury that occurred on October 26, 2011, approximately four months prior to the debtor filing his petition. The debtor failed to answer the complaint and on March 20, 2014, the

Benton County court entered its *Journal Entry on Default Judgment* in the case. On July 8, 2014, the debtor, through counsel, entered an appearance and then, on July 18, 2014, filed a *Combined Motion to Dismiss and Brief in Support Thereof*. Although the court denied the debtor's motion to dismiss, it did allow the answers of the co-defendants in the suit to inure to the benefit of the debtor. On January 21, 2015, the debtor answered the creditor's complaint. The creditor's attorney who was involved in the state court complaint testified at trial that his firm expended approximately $30,000.00 to $35,000.00 preparing for trial. The court held a jury trial on the merits on April 11, 2016. Neither the debtor nor counsel for the debtor appeared at the trial and at the conclusion of the trial, the jury returned a verdict against the debtor in the amount of $1,775,000.00. The court entered its judgment in favor of the creditor on May 6, 2016. Two weeks later, the debtor filed his motion "to reopen this *no-asset* Chapter 7 case in order to file a complaint to determine dischargeability of a debt pursuant to 11 U.S.C. § 523(a)." (emphasis added by the Court).

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A). The following opinion constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

The relevant statute relating to the debtor's motion to reopen is 11 U.S.C. § 350(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." The decision to reopen a case is within the discretion of the bankruptcy court based on "the particular circumstances and equities of each particular case." *Apex Oil Co., Inc. v. Sparks* (*In re Apex Oil Co.*), 406 F.3d 538, 542 (8th Cir. 2005). Reopening a case "presents a limited range of issues, including whether further administration of the estate appears to be warranted." *Id*. Further administration could include, for instance, a motion to avoid a late-discovered lien not otherwise avoidable under non-bankruptcy law or the court's determination of whether repayment of a student loan presents an undue hardship on the debtor under § 523(a)(8). However, reopening a

case to add an omitted creditor would serve no purpose if the debt is non-dischargeable as a matter of law. *See, e.g., In re Hunter*, 283 B.R. 353, 356 (Bankr. M.D. Fla. 2002).

In this instance, the Court finds that the debtor's obligation to the creditor is non-dischargeable under § 523(a)(3) as a matter of law. Section 523(a)(3) states that a discharge under § 727 does not discharge an individual debtor from any debt–

> (3) neither listed nor scheduled under section 521(a)(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). This provision protects creditors who did not receive notice of the debtor's filing because they were not properly scheduled. *In re Everly*, 346 B.R. 791, 796 (B.A.P. 8th Cir. 2006). Although subparagraph (3)(B) references the so-called fraud debts that appear in § 523(a)–(a)(2), (a)(4), and (a)(6)–the Court is focusing its attention on the creditor's ability to timely file a proof of claim in the case and is not considering whether the debt at issue falls under subsections (a)(2), (4), or (6). Regardless of which subsection is implicated, both subsections require notice to the creditor such that a creditor may timely file a proof of claim.[1]

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[1] If the case remains a no-asset case, the date to file a proof of claim is never set by the court and there never would be a time when it is too late to permit the timely filing of a proof of claim. According to some courts, in those cases § 523(a)(3)(A)–and that part of subsection (a)(3)(B) that references the timely filing of a proof of claim–would not be implicated. *See Zirnhelt v. Madaj* (*In re Madaj*), 149 F.3d 467, 469 (6th Cir. 1998); *Judd v. Wolfe*, 78 F.3d 110, 114 (3rd Cir. 1996); *Beezley v. Cal. Land Title Co.* (*In re Beezley*), 994 F.2d 1433, 1436 (9th Cir. 1993). If assets are later discovered, all scheduled creditors would then have an opportunity to file a timely proof of claim. That is what occurred in

Under § 523(a)(3), the defining event that is relevant in the case before the Court is the creditor's ability to timely file a proof of claim. When the Clerk issued the notice of assets, a deadline for the timely filing of a proof of claim was fixed. If the deadline passes "without the omitted creditor having received notice or actual knowledge of the case, the statute on its face requires that the debt be excepted from discharge." *Hauge v. Skaar* (*In re Hauge*), 232 B.R. 141, 148 (Bankr. D. Minn. 1999) (citing cases in support). As explained by Judge Kishel, "[t]he use of the one word 'timely,' with its unmistakable meaning, unequivocally communicates one thing: the simple right to file a claim timely . . . is the creditor participation that is vindicated by the provision for nondischargeability under § 523(a)(3)(A)." *In re Mai Yer Moua*, 457 B.R. 755, 761 (Bankr. D. Minn. 2011). Without notice, a creditor is not able to participate meaningfully in the debtor's case. *Id.* at 760; *In re Mammola*, No. 90-12851-JNF, 2009 WL 4938202, at * (Bankr. D. Mass. Dec. 14, 2009) ("creditor might want notice precisely to argue that there are assets even though the debtor asserts otherwise").

The debtor identified his case as a "no-asset" case in his motion to reopen and argued that regardless of the initial notice of assets, the trustee's no-asset report issued on January 28, 2013, should determine whether the case is an asset case or a no-asset case. However, the trustee's no-asset report was issued more than three months after the deadline to file a proof of claim had expired. After the clerk fixes a deadline for the timely filing of a proof of

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this case. Two days after the trustee concluded the meeting of creditors, he filed his notice of assets, which stated:

> It appears from the schedules that when this case was instituted, there were no assets from which dividends could be paid to creditors, and the notice of initial meeting of creditors so indicated.
>
> It now appears that the payment of a dividend may be possible. Pursuant to Bankruptcy Rule 3002(c)(5), the last day for filing claims is fixed as:
>
> 10/5/12.

At this point, all of the scheduled creditors would have had 90 days within which to file a proof of claim, regardless of whether or not the underlying debt was otherwise dischargeable.

claim, the case is no longer a no-asset case. *In re Hauge*, 232 B.R. at 148. Section 523(a)(3) does "not distinguish between deadline-fixed cases in which estates ultimately bear assets, and those in which they do not." *Id*. at 149. The Court finds that the no-asset report that the trustee filed after the deadline for the timely filing of a proof of claim had passed is not relevant to the Court's determination of whether the creditor had the opportunity to *timely* file a proof of claim after the notice of assets was issued.

The injury for which the jury found in favor of the creditor occurred on October 27, 2011, four months prior to the debtor filing his bankruptcy petition. Even though the debtor may have not been aware of a potential claim against him at the time he filed his petition, when he was later served with the creditor's state court complaint he had ample opportunity to disclose his bankruptcy discharge during the following 30 months when the creditor was preparing her case and certainly before $35,000.00 had been expended by her counsel. Regardless, even if the debtor was able to cure the prejudice suffered by the creditor sufficiently to allow the Court to reopen his bankruptcy case, it would serve no purpose because the debtor's obligation to the creditor in this instance is non-dischargeable as a matter of law under § 523(a)(3). The debtor's case became an asset case on July 5, 2012, when the Clerk of the Court issued the notice of assets. The deadline to file a timely proof of claim was 90 days later, October 5, 2012. The creditor was not included on the debtor's bankruptcy petition and did not have notice of the filing until she was served with a copy of the debtor's motion to reopen more than four years after the notice of assets was filed. For these reasons, the Court finds the debt non-dischargeable under § 523(a)(3) and denies the debtor's motion to reopen his case to schedule the creditor. Listing the creditor in his petition now would not affect the dischargeability of this debt.

IT IS SO ORDERED.

cc: J. Christopher Harris
Scott D'Wayne Smith
Jay Williams