UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	**Case No. 94 – 2046 – CH**
	:	
JOHN M. THORTON,	:	**Chapter 7**
	:	
	:	
Debtor.	:	
	:	

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ORDER – MOTION TO REOPEN CASE

On August 16, 1994, Debtor, John M. Thorton, filed a Voluntary Petition for Chapter 7 relief under the U.S. Bankruptcy Code. On April 6, 1998, hearing was held on the Debtor's Motion to Reopen Case and an Objection thereto. John M. Thornton was represented by attorney Robert C. Oberbillig; Creditor, Recovery Specialists, was represented by attorney John J. Scieszinski. At the conclusion of the hearing, the Court took the matter under advisement upon a briefing schedule. Post-trial briefs have been filed and the Court now considers the matter fully submitted.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 157(b)(1) and § 1334. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). The Court, upon review of the briefs, pleadings, evidence, and arguments of counsel, now enters its findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

FINDINGS OF FACT

1. In October 1993, John M. Thornton, wrote two checks to Fareway Food Store which were dishonored by his bank as NSF checks.

2. On January 21, 1994, Fareway assigned its claim to Recovery Specialists.

3. On January 24, 1994, Recovery Specialists sent a notice by certified mail of the assignment and demand for payment to John M. Thornton at 4290 NE 26th Street, Des Moines, Iowa 50317. The return shows that the mail was delivered to the addressee at that address.

4. John M. Thornton did not respond to the certified mail and did not pay the debt to Recovery Specialists.

5. On August 16, 1994, a petition for protection under Chapter 7 of the Bankruptcy Code was filed by John M. Thorton ("Debtor"). Debtor was represented by attorney John M. Miller.

6. Debtor was granted a discharge on November 9, 1994.

7. Debtor's bankruptcy case was closed November 16, 1994.

8. On May 2, 1997, Recovery Specialists filed a small claims action in the Iowa District Court against John M. Thornton, seeking to recover on the two dishonored checks.

9. An answer was filed in the small claims action and the matter was set for trial.

10. Before the small claims case went to trial, Thornton called Recovery Specialists and told them he had filed bankruptcy. He was asked for a list of creditors from his bankruptcy schedules. He did not provide the list. Recovery Specialists obtained Debtor's bankruptcy schedules and determined that they were not scheduled as a creditor.

11. On June 12, 1997, hearing on the small claims action was held. Outside the courtroom, an agreement was reached between the parties. Thornton was represented by attorney Robert C. Oberbillig. As a result of the agreement, a consensual judgment was entered against Thornton and in favor of Recovery Specialists in the amount of $391.93, plus interest. Thornton was ordered to make payments of $25 per month beginning on July 15, 1997 until the judgment was paid in full.

12. Thornton has made no payments on the judgment.

13. On December 9, 1997, John M. Thornton, by his attorney Robert C. Oberbillig, filed a Motion to Reopen Case, seeking to add seven creditors to the bankruptcy schedules, including Recovery Specialists.

14. Hearing on Debtor's Motion was held on April 6, 1998.

DISCUSSION

The Debtor in this case has an identity problem.

In 1993, John M. Thornton (T-h-o-r-*n*-t-o-n) wrote two bad checks to Fareway Food Stores. The debt was assigned to Recovery Specialists, and a demand for payment was made by certified mail. There was no response to the demand letter.

Several months later, a bankruptcy petition was filed for John M. Thorton (T-h-o-r-t-o-n). The Chapter 7 case was relatively uneventful. Debtor was represented by attorney John M. Miller throughout the case. The Trustee reported it was a no-asset case. A reaffirmation agreement between John M. Thornton and Chrysler Credit Corporation was filed. John M. Thorton was granted a discharge less than three months after the petition was filed; the bankruptcy case was closed.

After the Thorton bankruptcy case closed, the bad check matter involving Thornton made its way through a debt collection process. Proceeding under a ten year statute of limitations, Recovery Specialists filed a small claims action against Thornton in 1997. On June 12, 1997, the case culminated in entry of a judgment, consented to by all parties, in favor of Recovery Specialists and against Thornton. A payment plan was established. Thornton was represented by attorney Robert C. Oberbillig in the small claims action.

More than three years after this bankruptcy case was closed, Debtor seeks to have it reopened. One creditor, Recovery Specialists, resists the motion.

The pertinent portions of the Code and Rules that apply in this case state:

> 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).

> A case may be reopened on motion of the debtor or other party in in terest pursuant to § 350 (b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

Fed.R.Bankr.P. 5010.

The decision to reopen a case lies within the sound discretion of the bankruptcy judge. See Arleaux v. Arleaux, 210 B.R. 148 (BAP 8th Cir. 1997). The moving party has the burden of demonstrating sufficient cause for reopening the case. See In re Rivers, 89 B.R. 30, 31 (Bankr. E.D.Ark. 1988)(cites omitted).

Debtor seeks to have this case reopened so that he can add creditors that were previously unscheduled. There is a split in authority as to whether such a move would afford relief to the debtor in a no-asset Chapter 7 case. See i.e., In re Stone, 10 F.3d 285 (5th Cir. 1994)(reopen to add omitted creditor); In re Stark, 717 F.2d 322 (7th Cir. 1983)(debtors should be allowed to reopen to add omitted creditor); In re Soult, 894 F.2d 815 (6th Cir. 1990)(reopen to schedule debt inadvertantly omitted);cf. Judd v. Wolfe, 78 F.3d 110, 111 (3d Cir. 1996)(not necessary to reopen to discharge unscheduled debt if statutory exceptions to discharge do not apply); In re Beezley, 994 F.2d 1433, 1434 (9th Cir. 1993)("dischargeability is unaffected by scheduling;" in a no-asset case, it would be a pointless exercise to reopen case to schedule omitted creditors). Although the parties would like this Court to determine whether reopening a no-asset Chapter 7

case to add omitted creditors would be futile and/or the legal ramifications of 11 U.S.C. § 523 (a)(3) in such situations, the Court declines to do so on the facts of the case at bar.

The case at bar is decidedly distinct. Whether or not adding unscheduled creditors accords the debtor relief in most no-asset Chapter 7 cases, the Court finds other cause for reopening the case. Administration of the case and seeking a discharge under Debtor's correct name would undeniably be beneficial in this case.

Although the Court believes the person before the Court, John M. Thornton, is the same person who filed the bankruptcy petition on August 16, 1994, this person was not granted a discharge in the case. Granting a discharge to John Thorton was not a clerical error that could be remedied pursuant to Fed.R.Bankr.P. 9024.

Debtor signed the bankruptcy petition at five places; the name "John M. Thorton" was typed beneath each signature line. The debtor's name is shown to be "John M. Thorton" in 20 other places on the bankruptcy petition and attendant schedules. Although, on close inspection, two of the handwritten signatures appear to have an "n" in the last name, the Court recognizes the impact of the representations made by the filing of the signed and sworn bankruptcy petition in the name of John M. Thorton. See generally Fed.R.Bankr.P. 9011.

It is the decision of the Court that this bankruptcy case be reopened and that Debtor file amended petition and schedules reflecting his true and correct name.

The equitable doctrine of laches may bar the movant's action to reopen a case to add previously unscheduled debts and creditors where:

> (1) a debtor knew of the claim before his case was closed;
> (2) the debtor waited a substantial period of time after the case was closed to move to reopen and amend; and
> (3) the debtor has no valid justification for the original omission.

Rivers, 89 B.R. at 31-32.

The Eighth Circuit has stated that "while delay alone does not automatically constitute laches, if a plaintiff's delay (1) is unreasonably and unexplained and (2) has disadvantaged the defendant, laches may apply." Thornton v. First State Bank of Joplin, 4 F.3d 650 (8th Cir. 1993)(delay in bringing allegation of violation of automatic stay); see also Costello v. United States, 365 U.S. 265, 282 (1961). Because laches is a defense, the burden is upon the party objecting to reopening the case. See generally, In re Winburn, 196 B.R. 894, 897 (Bankr. N.D.Fla. 1996)(cites omitted).

Thornton knew of the debt to Fareway Food Stores and of its assignment to Recovery Specialists before he filed bankruptcy. He had received a demand letter a few months before he filed bankruptcy. Debtor waited more than three years to reopen his case. Debtor did not testify at the hearing and no valid justification was given for the original omission of creditors. After the small claims action was filed, Debtor could have moved to reopen his case to add creditors, but he did not. After Recovery Specialists reviewed the bankruptcy schedules and took the position that their debt was not discharged, Debtor could have moved to reopen his case, but he did not. At the small claims hearing, Debtor and the Creditor reached an agreement that the debt was owed. A consensual judgment was entered against Debtor. Almost six months after entry of the judgment, Debtor moved to reopen this bankruptcy case. The entire sequence shows a lack of diligence by Debtor and a delay that is both unreasonable and unexplained. Because of Debtor's delay, totaling more than three years, this creditor has expended time and resources pursuing this debt all the way to judgment. Recovery Specialists would be prejudiced by reopening the case to schedule this debt. This creditor has been diligent in pursuing debt collection within the parameters of the law. Even after obtaining judgment on its debt, Recovery Specialists has

incurred additional legal expenses resisting Debtor's motion to reopen. A creditor's attention to accounts receivable is desirable; there is a difference between debts that are uncollectable and those that are uncollected. It would be inequitable to permit Debtor to schedule this particular debt at this late date. The Court finds that all elements of laches have been shown and that the case should not be reopened as to Recovery Specialists.

Additionally, the doctrine of judicial estoppel prohibits Debtor from taking a position in this litigation that is inconsistent with that taken in the small claims action. See generally, Hossaini v. Western Missouri Medical Center, 140 F.3d 1140, 1142-43 (8th Cir. 1998). In the small claims action, Debtor agreed that he owed the debt to Recovery Specialists and consented to entry of judgment. Debtor was represented by counsel and Debtor and/or his counsel should know that the in personum debt survived Debtor's 1994 bankruptcy only if it were excepted from discharge. Thus, the Court concludes that it was the Debtor's position at the time of the consensual judgment entry that the debt to Recovery Specialists was not discharged in bankruptcy. Debtor is barred from now proceeding as though the debt were discharged. This case is not reopened as to this debt.

It is further the decision of the Court that a trustee be appointed to administer the case. Particular attention should be given to investigating whether a fraud has been committed upon the Court and whether John M. Thornton's discharge should be challenged pursuant to 11 U.S.C. § 727.

ORDER

IT IS THEREFORE ORDERED that Debtor's Motion to Reopen Case is SUSTAINED IN PART and DENIED IN PART;

IT IS FURTHER ORDERED that the bankruptcy case of John M. Thorton is reopened;

IT IS FURTHER ORDERED that under equitable principles of laches and judicial estoppel, the bankruptcy case is not reopened as to the debt to Recovery Specialists; said debt is nondischargeable;

IT IS FURTHER ORDERED that Debtor file an amended petition and schedules reflecting the true and correct spelling of his name;

IT IS FURTHER ORDERED that a trustee be appointed to administer the case, to investigate whether a fraud has been perpetrated upon the court, and to determine whether John M. Thornton's discharge should be challenged pursuant to 11 U.S.C. § 727.

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Dated this _____ day of July, 1998.

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RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT