

of \$1,385.00. On November 2, 1987, Debtors filed a joint Chapter 7 petition. Debtors failed to list the accounting debt owed to Creditor anywhere on their petition or schedules. Creditor did not receive notice of nor have actual or constructive knowledge of Debtors' bankruptcy proceeding.

3. The §341(a) first meeting of creditors was held November 24, 1987. The order for said meeting set February 24, 1988, as the bar date for filing claims.

4. On January 29, 1988, Debtors received a discharge.

5. On January 26, 1988, Creditor, completely unaware of Debtors' pending bankruptcy, filed a small claims action in the Iowa District Court for Linn County. In said action, Creditor claimed Debtor Donald Jones owed it \$1,385.00 plus accrued interest.

6. On February 26, 1988, a default judgment was entered against Debtor Donald Jones for \$1,450.58 plus interest and costs.

7. On July 22, 1988, approximately nine months after they filed their petition and nearly six months after they received their discharge, Debtors filed an amendment to schedule A-3. In said amendment, Debtors added Creditor to their schedule A-3 list of unsecured creditors.

8. On July 25, 1988, nearly five months after the default judgment was entered, Debtors filed a motion to set aside

judgment lien. In said motion, Debtors failed to set out any statutory authority or list any reasons why the judgment lien should be set aside.

9. On August 11, 1988, Creditor filed an objection to Debtors' amendment to schedule A-3. In said objection, Creditor alleged that it at no time had notice or knowledge, actual or constructive, of Debtor Donald Jones' bankruptcy petition. Creditor further alleged: 1) Debtors' attempt to amend schedule A-3 was an effort to circumvent the provisions of §523(a)(3); 2) it was not listed or scheduled as required under §521(1); and 3) the time for filing the proof of claim had passed.

10. On August 11, 1988, Creditor also filed a resistance to Debtors' motion to set aside judgment lien. In said resistance, Creditor argued it would be improper for the Court to set aside the judgment lien because the underlying debt had not been discharged and cannot be under §523(a)(3).

11. Debtors' case is still open.

DISCUSSION

Two issues are presented in this case. The first is whether Debtors can amend their schedule A-3 to include Creditor's \$1,450.58 default judgment lien. The second is whether Debtors can set aside the judgment lien.

A. AMENDMENT TO SCHEDULE A-3

Bankruptcy Rule 1009(a) addresses the general right to amend and states that "[a]...schedule may be amended by the

debtor as a matter of course at any time before the case is closed." Fed. R. Bankr. P. 1009(a). As a result, if a

debtor's case is not closed, the court has no authority to deny a debtor's application to amend. In re Jordan, 21 B.R. 318, 320 (Bankr. E.D. N.Y. 1982). In the case at bar, Debtors' case is still open. Therefore, the Court concludes Debtors may amend their schedule A-3 to include Creditor's judgment lien.

Even though Debtors can amend their schedule A-3, said amendment does not of itself work a discharge of the added obligation. Id. The Editors' Comment to Rule 1009 provides:

Although this Rule gives the debtor an unrestricted right to amend, the legal effect intended by the amendment may not be binding on the party who the debtor seeks to effect by the amendment. For instance, the Code excepts from general discharge debts which were not scheduled by the debtor in time to permit the creditor to timely file a proof of claim or to obtain a determination of non-dischargeability of certain types of debts, unless the creditor had actual notice or actual knowledge of the pendency of the case. Thus, while a debtor may schedule a creditor who is not included in the original schedule, the amendment would not necessarily bring that debt under the protection of the general discharge.

Norton Bankr Rules Pamphlet, 1988-1989 Ed, p.46. In the case at bar, Creditor alleges the debt is nondischargeable under §523(a)(3) which provides in relevant part:

(a) A discharge under §727...does not discharge an individual debtor from any debt--

(3) neither listed nor scheduled under §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[.]

11 U.S.C. §523(a)(3)(A) (emphasis added).

The plain meaning of §523(a)(3) stresses that a debtor is not discharged from an unlisted debt. In re Brown, 27 B.R. 151, 152 (Bankr. N.D. Ohio 1982). After a discharge is entered, an unsecured creditor had the burden of proving it was not duly scheduled. Id. at 153. If met, the burden then shifts to the debtor to prove the creditor had notice or actual knowledge of the bankruptcy. Id.

In the case at bar, it is clear that Creditor's \$1,450.58 judgment lien was not scheduled by Debtors. Further, Creditor did not have notice or actual knowledge of Debtors' bankruptcy in time to file a timely proof of claim before the filing deadline of February 24, 1988. As a result, the Court concludes Debtors' judgment lien debt owed to Creditor is nondischargeable under §523(a)(3). Therefore, even though Debtors may amend their schedule A-3 to include Creditor, their discharge does not cover the added debt.

B. MOTION TO SET ASIDE JUDGMENT LIEN

Section 522(f) deals with lien avoidance and provides in relevant part:

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled...if such lien is--

(1) a judicial lien[.]

11 U.S.C. §522(f)(1). A debtor has the burden of proof of demonstrating all the elements of lien avoidance are satisfied.

In re Shands, 57 B.R. 49, 50 (Bankr. D.S.C. 1985). Under §522(f)(1), three elements exist: 1) the lien must be a judicial lien; 2) the lien must be against an interest of the debtor in property; and 3) the debtor must be entitled to the exemption that the lien would impair. Id.

In the case at bar, the Court finds Debtors have not met their burden of proof because they failed to prove the second and third elements. As a result, the Court concludes Debtors are not entitled to set aside Creditor's judgment lien.

CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes that while Debtors may amend their schedule A-3 to include the debt owed to Creditor, said debt is non-dischargeable under §523(a)(3).

FURTHER, the Court concludes Debtors failed to meet their burden of proof in order to set aside Creditor's judgment lien.

IT IS ACCORDINGLY ORDERED that Debtors may amend their schedule A-3.

IT IS FURTHER ORDERED that Debtors' debt owed to Creditor is nondischargeable.

IT IS FURTHER ORDERED that Debtors' motion to set aside judgment lien is overruled.

Dated this 10th day of January, 1989

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE