

UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of :
CHARLES E. ERTZINGER, : Case No. 90-0403-D H
Debtor. : Chapter 7
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CHARLES E. ERTZINGER, :
Plaintiff, :
vs. : Adv. No. 90-222
NELLIE SWANSON, :
Defendant. :

ORDER--COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

A hearing was held on March 14, 1991 on a complaint to determine whether a debt was properly scheduled. Thomas J. Yeggy appeared on behalf of the Plaintiff, and Edward J. Kross appeared on behalf of Defendant. At the conclusion of the hearing, the Court took the matter under advisement. Briefs have been submitted on behalf of both parties and the Court considers the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. 11 U.S.C. § 157(b)(2)(I). The Court, upon review of the arguments of counsel and the briefs submitted now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACT

1. Plaintiff/Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on February 15, 1990. The U.S. Trustee convened a meeting of creditors under 11 U.S.C. § 341 for March 29, 1990 indicating that this was a no asset case. The U.S. Trustee did not set a bar date for claims. A discharge was entered in Debtor's bankruptcy on May 30, 1990.

2. Debtor failed to list the Defendant/Creditor, Nellie Swanson, on his bankruptcy schedules.

3. On August 21, 1990, the Chapter 7 Trustee filed a Report of Abandonment of Property, Report of Trustee in No-Asset Case. The Debtor's Chapter 7 case has not been closed.

4. On August 21, 1990 Creditor filed a petition in Iowa District Court to collect on promissory notes representing debts Debtor owed Creditor. Debtor was personally served notice of the original notice and petition on September 10, 1990.

5. On September 28, 1990, Debtor filed an amendment to his Schedule A-3 in order to add Nellie Swanson as Creditor.

6. On November 27, 1990, judgment was entered for Creditor and against Debtor in Iowa District Court for \$22,138.54 plus interest, fees, and costs.

7. Plaintiff/Debtor filed a complaint with this Court on November 7, 1990 to determine dischargeability of

Defendant/ Creditor's claim.

DISCUSSION

While the Debtor's complaint is captioned in terms of whether a debt was properly scheduled, the issue in this case is really the dischargeability of a debt scheduled by amendment after the Debtor's discharge but before the case is closed in a no asset Chapter 7 case. Both parties have framed the issue in those terms in their briefs and the Court will proceed on that issue.

Initially the Court finds that the debt at issue was properly scheduled by Debtor's amendment of 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 Jones, No. 87-2686-C, slip op. (Bankr. S.D. Iowa Jan. 10, 1989) (citing In re Jordan, 21 B.R. 318, 320 (Bankr. E.D.N.Y. 1982)). Debtor's case is still open; therefore, the Court concludes Debtor may amend Schedule A-3 to include Creditor's claim.

Even though Debtor can amend Schedule A-3, the amendment does not of itself work a discharge of the added debt. Id. The Editor's Comment to Rule 1009 states:

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 affect 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 nondischargeability of certain types of debts, unless the creditor had notice or actual knowledge of the pendency of the case. Thus, while a debtor may schedule a creditor who was 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.

Creditor alleges the debt is nondischargeable under § 523(a)(3), which provides:

- (a) A discharge under § 727...does not discharge an individual debtor from any debt--
 - (3) neither listed nor scheduled under § 521(a) 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 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). Creditor further argues that her claim should be nondischargeable because the ninety-day period for filing claims provided for by Bankruptcy Rule 3002(c) has expired.

The "timely filing" provisions for filing claims in 11 U.S.C. § 523(a)(3) are not triggered unless a claims bar date is set by the court. Thus, in the typical no asset Chapter 7 case, where a no dividend statement of B.R. 2002(e) is utilized and no claim bar date is set, the prepetition dischargeable claim of an omitted creditor, being otherwise unaffected by § 523, is discharged. In re Corgiat, 123 B.R. 388, 391 (Bankr. E.D. Cal. 1991). Here, the U.S. Trustee indicated in the notice of a § 341 meeting of creditors that this was a no asset case and did not set a bar date for claims. Thus, the timely filing provision for filing claims in § 523(a)(3) was not triggered. Since Creditor has not alleged some other ground under § 523 for nondischargeability of her debt, her debt is dischargeable.

In weighing the equities, the Court finds this holding will not prejudice the Creditor. Debtor's Chapter 7 case was a no asset case. Thus, Creditor was not excluded from sharing in any dividend. Creditor has not alleged any other basis under § 523(c) upon which to claim that her debt should be nondischargeable. Accordingly, the Court finds that the omitted creditor was properly added by amendment to the

Debtor's Schedule A-3 and the obligation is dischargeable because no bar date for claims was set in this no asset case.

ORDER

IT IS ACCORDINGLY ORDERED that the Debtor's amendment to his Schedule A-3 to include the debt owed the Creditor is proper and said debt is discharged under 11 U.S.C. § 727.

Dated this 29th day of July, 1991.

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE