UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
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In re: Case No.: 1-96-21661-dem

VINCENT COPPOLA Chapter 13
and LETIZIA COPPOLA,

Debtors.
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DECISION AND ORDER DENYING APPLICATION TO REOPEN CHAPTER 7 CASE

Appearances:

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DENNIS E. MILTON
UNITED STATES BANKRUPTCY JUDGE

INTRODUCTION

The matter is before the Court on the application of Vicenzo Coppola (the "debtor") for an order pursuant to 11 U.S. Code § 350 permitting him to reopen his Chapter 7

case to amend the list of creditors and discharge his debt to judgment creditor Vincent Innarella, Sr. (the "Application"). On June 16, 2008, counsel for Vincent Innarella, Sr. ("Innarella") filed papers in opposition to the Application. On November 24, 2008, the Court held a hearing at which the debtor testified. Based upon the testimony at trial, the documentary evidence and the arguments of counsel, the Court finds that the debtor had knowledge of the creditor's debt and his failure to disclose the debt was the result of either recklessness or intentional design. The Court also finds that the significant delay of the debtor in seeking the relief sought in the Application has prejudiced the creditor. Accordingly, the Court denies the Application.

JURISDICTION

This Court has jurisdiction over this core proceeding under 28 U.S.C. §§1334(b) and 157(b)(2)(c) and the Eastern District of New York standing order of reference dated August 28, 1986. This Memorandum Decision and Order constitutes the Court's findings of fact and conclusions of law to the extent required by Fed. R. Bankr. P. 7052.

FACTUAL BACKGROUND

A. Pre-Petition

On July 27, 1992, the debtor and his son, Anthony Coppola, doing business as "Mr. Dino's Pizza," executed the assignment of a lease of the premises located at 26 Main Beach Road, Erskine Lakes, New Jersey ("First Lease") from Innarella, the owner and landlord of the property. See Certification of Counsel in Opposition to the Notice of Motion to Re-Open Chapter 7 Case, Amend List of Creditors and Discharge Debt of Vincent Innarella ("Creditor's Certification"): Exhibit Z. The First Lease is an assignment of a five year lease on the property beginning in June 1990. Id. At the hearing, the debtor acknowledged his signature on the First Lease. See Transcript of July 17, 2008 Hearing ("Tr.") at 6:24-25; see also Affirmation in

Support of Motion to Re-open Case ("Debtor's Affirmation") at ¶ 5.

On April 26, 1996, the debtor and Anthony Coppola assigned the First Lease to Antonio Scortino and Rose Scortino ("Second Lease). See Creditor's Certification: Exhibit AA. The Second Lease is an assignment of a five year lease on the property beginning on June 27, 1995. Id.[1] The Scortinos defaulted in the payments under the Second Lease. On April 6, 1998, Innarella filed suit in the Superior Court of New Jersey against the debtor and Anthony Coppola on April 6, 1998 for payment of the rent under the Second Lease ("state court action"). See Creditor's Certification: Exhibit F. On January 22, 2002, the state court issued a final judgment by default against the debtor, finding that he was liable to Innarella for the payment of rent and costs in the total amount of $110,104.12. See Creditor's Certification: Exhibit B.

B. Post Petition

On December 4, 1996, the debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code (Case No. 1-96-21661). The debtor received a discharge on May 11, 1997, and the case was closed on December 11, 1997.

C. The Application

On May 15, 2008, the debtor filed the Application. On June 16, 2008, counsel for judgment creditor Innarella filed papers in opposition to the Application. On November 24, 2008, the Court held a hearing at which the debtor testified. At the conclusion of the hearing, the Court took the matter under advisement. This decision follows.

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[1] The debtor has maintained that he was not present at the execution of the Second Lease and did not sign it. See Debtor's Affidavit at ¶ 4; Tr. at 27:21 -28:23.

DISCUSSION

The Application to Reopen This Chapter 7 Case Should Be Denied

1. The Standard

Section 350 of the Bankruptcy Code governs the application for an order reopening a Chapter 7 case. The statute provides that "[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). The statute is phrased in permissive language and therefore leaves the decision to reopen a bankruptcy case at the discretion of the court. See Apex Oil Co. v. Sparks (In re Apex Oil Co.), 406 F. 3d 538, 541-42 (8th Cir. 2005); State Bank of India v. Chalsani (In re Chalsani), 92 F. 3d 1300, 1307 (2d Cir. 192); Rosinki v. Boyd (In re Rosinski), 759 F.2d 539, 540-541 (6th Cir. 1985); Hawkins v. Landmark Finance Co. (In re Hawkins), 727 F. 2d. 324, 326 (4th Cir. 1984).

In deciding motions to reopen bankruptcy cases where the debtor has failed to disclose a creditor on his schedules, courts have developed two approaches. Under a "mechanical approach" courts have denied motions to reopen no asset cases, finding that the debt owed to an omitted creditor may be discharged "as a matter of law" under 11 U.S.C. § 727(b). In re Cruz, 254 B.R. 801, 805 (Bankr. S.D.N.Y. 2000); see also Zirnhelt v. Madaj (In re Madaj), 149 F. 3d 467 (6th Cir. 1998); Judd v. Wolfe, 78 F. 3d 110 (3d Cir. 1996); Beezley v. California Land Title Co. (In re Beezley), 994 F.2d 1443 (9th Cir. 1993). Pursuant to § 727(b), a discharge in a Chapter 7 case discharges a debtor from all debts arising before the filing of the bankruptcy petition, except those that are an exception from discharge as provided in § 523. See 11 U.S.C. § 727(b). Under the mechanical approach, the reopening of a bankruptcy case does

not impact dischargeability of a debt in a no asset case where the debt is not otherwise excepted from discharge. See In re Cruz, 254 B.R. at 809. The Court in In re Cruz found that the debtor's omitted pre-petition debt was discharged pursuant to § 727(b) upon the granting of the discharge. Id.

Under the "equitable approach," prior to the reopening of a no asset case to add an omitted creditor, courts have considered whether (a) the debtor's omission was the result of fraud, recklessness or intentional design, or (b) reopening of the case would prejudice the creditor's rights. In re Cruz, 254 B.R. at 805; see also In re Candelaria, 121 B.R. 140, 142 (E.D.N.Y. 1990). While some courts have stated that the re-opening of a no bar date case to add an omitted creditor is a futile act, imposing an administrative burden on the bankruptcy court, American Credit Services, Inc. v. Tucker, 143 B.R. 330 (Bankr. W.D.N.Y. 1992), others have justified the reopening of a no asset Chapter 7 case for "cause." In re Moyette, 231 B.R. 494, 497 (stating that a court may consider numerous factors in the decision to reopen a case including "equitable concerns").

An important factor to consider in authorizing the reopening of a bankruptcy case to afford relief to the debtor is the element of good faith. See In re Lowery, 398 B.R. 512, 515 (Bankr. E.D.N.Y. 2008). A debtor who has failed to establish good faith in omitting the debt from debtor's schedules is not entitled to reopen their case and obtain a determination of dischargeability. See In re Garrett, 266 B.R. 910, 916 (Bankr.S.D.Ga. 2001) (citing Matter of Baitcher, 781 F.2d 1529, 1535 (11th Cir. 1986)).

In In re Candelaria, the district court outlined two important considerations when evaluating sufficient cause to reopen a bankruptcy case to add an omitted creditor. The

Court held that "motions to reopen no asset cases to list omitted creditors should be liberally granted unless: (1) the omission was the result of fraud, recklessness or intentional design on the part of the Debtors, or (2) reopening would prejudice the creditor..." 121 B.R. 140 (citing Baitcher, 781 F.2d 1529, 1534 [11th Cir. 1986]; In re Rosinski, 759 F.2d 539, 541 [6th Cir. 1985]; Matter of Stark, 717 F.2d 322, 323 [7th Cir. 1983] [per curiam]; In re DeMare, 74 B.R. 604, 605 [Bankr.N.D.N.Y. 1987]; In re Maddox, 62 B.R. 510, 514 [Bankr.E.D.N.Y. 1986]; In re Godley, 62 B.R. 258, 261 [Bankr. E.D.Va. 1986]; In re Tinnenberg, 57 B.R. 430, 432 [Bankr.E.D.N.Y. 1985]; In re Daniels, 51 B.R. 142,143 [Bankr. S.D. Ohio 1985]; Matter of Zablocki, 36 B.R. 779, 783 [Bankr.D.Conn. 1984]; Matter of Davidson, 36 B.R. 539, 543 [Bankr. D.N.J. 1983]). See also Tucker, 143 B.R. 330, 334 (Bankr. W.D.N.Y. 1992) (holding that "if there is a closed no asset case... all that is required for the claim of an unscheduled creditor to be discharged is that... there has been no intentional or reckless failure to schedule the creditor, fraudulent scheme, intentional laches or prejudice to the creditor").

In some instances, courts, having found that the debtor's omission of a creditor was intentional or reckless, have declined to reopen a closed case. See e.g. In re Clapp, 103 B.R. 126 (Bankr. E.D.Mich. 1989) (declining to reopen the debtor's case to add an omitted creditor because the court could not give credence to the debtor's assertion that he had not understood his liability over corporate debt); see also Garrett, 266 B.R. at 916 (Bankr.S.D.Ga. 2001) (finding that the debtor's omission of a creditor was intentional where the debtor had prior knowledge of claim from creditor's judgment two years prior to filing for bankruptcy).

Courts have also declined to reopen a debtor's bankruptcy case to add an omitted creditor when they have found that creditors have suffered prejudice from delay and/or costs

incurred in pursuit of the underlying debt. See In re Guzman, 130 B.R. 489, 491-92 (Bankr.W.D. Tex. 1991) (finding that the creditor had been prejudiced by lack of notice of the original bankruptcy case as well as the time and expenses incurred in order to collect the debt owed); Taylor, 237 B.R. at 203 (denying the reopening of a case to add a debtor in part because of the expenses the debtor had incurred in pursuing an omitted debt).

2. Application of the Standard

On May 15, 2008, approximately 11 years after receiving his discharge, the debtor requested that the Court reopen his Chapter 7 case to amend the schedule of creditors to include Innarella and discharge the debt to him. The debtor asserted that he did not know of the Second Lease or the state court action until he received a letter from Mr. Shapiro, counsel for the creditor, on April 13, 2008[2], and contacted Mr. Shapiro. See Debtor's Affirmation at ¶ 4. The debtor also claimed that he did not know about the state court action against his son, Anthony Coppola, prior to April 2008. See Debtor's Affidavit at ¶ 10.

The debtor's claims are refuted by the efforts of counsel for the creditor as well as the implausibility of his own testimony. Counsel for the creditor attempted to contact the debtor numerous times. As early as April 2, 1998, creditor's counsel sent a letter to the law firm of Maesessa and Cluff, then counsel for the debtor, regarding the default payments due under the Second Lease. See Creditor's Certification: Exhibit C. A copy of the letter was sent to the debtor at Italy Restaurant and Pizzeria, 306 Rosebury Street, Phillipsburg, New Jersey ("Italy Restaurant"). Id. On April 3, 1998, creditor's counsel sent a letter to the law firm of Frieri and Conroy, as counsel for the debtor, with a copy to the debtor at Italy Restaurant. See Creditor's

[2] In the debtor's testimony, he stated that he received the letter on May 13, 2008. Tr. 13:5-9.

Certification: Exhibit D. On April 13, 1999, counsel sent a letter to the debtor and Anthony Coppola at Pizza Town, U.S.A., Center Aisle, U.S. Highway 22, Springfield, New Jersey ("Pizza Town") regarding the default payments due on the Second Lease and a previous telephone conversation. See Creditor's Certification: Exhibit G. Counsel for the creditor submitted proof of service confirming that the debtor and his son Anthony Coppola were served with the Summons and Complaint in the state court action on May 6, 1999 at the Pizza Town location. See Creditor's Certification: Exhibit L. On June 8, 1999 and June 11, 1999 letters were sent to the debtor and Anthony Coppola at Pizza Town regarding a default judgment hearing. See Creditor's Certification: Exhibit I; Creditor's Certification: Exhibit K. On March 2, 2001, counsel sent a letter to the state court regarding a proof hearing, which noted that a copy was sent to the debtor at the Pizza Town address. Creditor's Certification: Exhibit N.

On March 8, 2001, counsel sent a letter to Bart Lombardi of Frieri and Conroy, as counsel for the debtor, regarding a proof hearing, which letter also noting that a copy was sent to the debtor at the Pizza Town address. Creditor's Certification: Exhibit O. On December 21, 2001, a letter was sent to Bart Lombardi regarding a proof hearing and was copied to the debtor at Pizza Town. Creditor's Certication: Exhibit R. On January 27, 2002, a letter regarding a default judgment was sent to the debtor at Pizza Town. Creditor's Certification: Exhibit S. On August 18, 2003, a letter was sent to Bart Lombardi and copied to the debtor at Pizza Town. Creditor's Certification: Exhibit T. On October 1, 2004, a letter was sent to the debtor at Italy Restaurant and Pizza Town. Creditor's Certification: Exhibit V.

At the hearing before this Court, the debtor was the only witness. He testified that he was not present at the signing of the Second Lease and that he was not aware of any

obligation to Innarella at the time of his filing. He also testified that he did not have any knowledge of the state court action filed in April 6, 1998 or the final judgment issued on January 22, 2002. For those reasons, the debtor stated that he failed to list Innarella as a creditor in his schedules or ask this Court to reopen his bankruptcy case prior to April 2008.

Full and honest disclosure in a bankruptcy case is crucial to the effective functioning of the bankruptcy system. See In re Lowery, 398 B.R. 512, 515(Bankr. E.D.N.Y. 2008); see also In re Garrett, 266 B.R. 910, 915-916 (Bankr.S.D.Ga. 2001) ("The *sine qua non* of bankruptcy is full disclosure and the granting of relief to honest but unfortunate debtors"). The Court found the debtor's testimony to be confusing, inconsistent, and dishonest. The debtor could not recall many dates, conversations, or documents; his testimony was also unclear regarding the details of his own bankruptcy case. In particular, the Court found the debtor's statement that had never discussed the state court action with either of his sons to be incredible. The debtor testified that he had a good relationship with his two sons, Anthony and Sal Coppola, and that he talked to them "once a week, two times a week" and at holidays. Tr. at 23: 7-11. Anthony Coppola had co-signed the First Lease and the Second Lease, and was a named party in the state court action. In addition, Anthony Coppola listed Innarella as a creditor on his petition when he filed for bankruptcy in 1996. The debtor also testified that his son Sal Coppola ran the Mr. Dino's Pizza business at Innarella's property. See Tr. at 15:14-21.

The Court also does not accept as true the debtor's statement that he had no notice of the state court action prior to receipt of the creditor's April 13, 2008 letter. As shown above, counsel for the creditor has submitted documentation that fifteen letters were sent to the debtor between 1998 and October 2004 at Italy Restaurant and Pizza Town. At the hearing, the Court

learned that the debtor did have a connection to Pizza Town, having worked there from 1988 until December 28, 1995. Tr. at 9:6-12. Further, this Court finds it incredible that the debtor, having a previous relationship with Innarella as a partner with Anthony Coppola in Mr. Dino's Pizza, and having knowledge of Anthony Coppola's bankruptcy, would not be aware of his potential liability to Innarella as a creditor. The Court finds that the debtor's omission of Innarella's debt was at the very least a reckless attempt, if not an intentional design, to avoid the debt and frustrate the creditor.

The Court also finds that the length of time elapsed between debtor's filing and debtor's request to reopen his bankruptcy case suggests bad faith on the part of the debtor and an abuse of the bankruptcy system. It has been held that the longer the time between the closing of a bankruptcy case and the motion to reopen, the more compelling the reasons should be for reopening the matter. See Citizens Bank & Trust Co. v. Case (In re Case), 937 F. 2d. 1014, 1018 (5th Cir. 1999). In this matter, the debtor filed for relief under Chapter 7 of the Bankruptcy Code on December 4, 1996, and received his discharge on May 11, 1997. The debtor now seeks to reopen his bankruptcy case more than eleven years after the discharge, and more than six years after a final judgment was issued in the state court action on January 22, 2002. The debtor claimed that he did not have any knowledge of the state court action prior to creditor's April 13, 2008 letter. The debtor failed to provide any compelling reason for his lack of knowledge or his failure to seek this relief at an earlier point in time.

As set forth above, based on the entire record before the Court, the Court finds this statement both implausible and unbelievable. As noted, counsel for the creditor attempted to contact the debtor to collect on the debt numerous times and as early as 1998. The creditor has

incurred significant delay and expense in attempting to collect the debt from 1998 to 2008. The Court finds that the prejudice which the creditor has suffered by reason of this delay is sufficient to warrant denial of this Application.

The Court concludes that the debtor had prior knowledge of the creditor's debt and that his failure to schedule the debt was a reckless attempt or intentional action to avoid the debt. The Court also finds that the debtor's significant delay in applying to the Court for an order

reopening his bankruptcy case prejudiced the creditor. The debtor's Application is denied.

CONCLUSION

For all of the above reasons, the debtor's Application to reopen his bankruptcy case is denied in all respects.

IT IS SO ORDERED.

Dated: Brooklyn, New York
April 20, 2009

S/Dennis E. Milton
DENNIS E. MILTON
United States Bankruptcy Judge