In the United States Bankruptcy Court

for the Northern District of Iowa

LARRY DEAN BEARD and
ALMA ELAINE BEARD
Debtor(s).

Bankruptcy No. X92-01033M

Chapter 7

CHARLES CITY COMMUNITY
SCHOOL DISTRICT
Plaintiff(s)

vs.

LARRY DEAN BEARD
Defendant(s)

Adversary No. 92-4173XM

ORDER RE: MOTION TO AMEND COMPLAINT

The matter before the court is the motion of Charles City Community School District (SCHOOL DISTRICT) to amend its dischargeability complaint against debtor Larry Dean Beard. The matter was heard by telephonic hearing on November 19, 1993.

Beard is a former superintendent of the School District. On May 26, 1992, Beard filed a chapter 7 bankruptcy petition. The School District was listed on Schedule F, the schedule of general unsecured claims. (A typographical error on the printed form identifies the claims as priority claims.) The schedule gave the School District's name and address and indicated that its debt was "contingent" and "disputed" in an amount "unknown." The schedule did not provide the other information requested on the form, including the date the claim was incurred or the consideration for the claim. The School District's name and address were not included on the matrix, so the School District did not receive notice of the commencement of the case or notice of the deadline for filing dischargeability complaints in the ordinary course from the clerk of court. Case file docket no. 4.

The School District was able to learn of the bankruptcy filing through other means and was able to file a timely complaint to determine the dischargeability of debt relating to two automobile leases. The complaint was filed August 26, 1992. The deadline for filing dischargeability complaints was August 28, 1992.

On October 20, 1993, the School District filed the present motion to amend the complaint. The School District seeks to add allegations that Beard made unauthorized charges for gasoline, meals and lodging and submitted fraudulent requests for reimbursement of expenses. The School District's motion to amend alleges that the School District became aware of these claims against Beard after a Floyd County grand jury investigation and indictment in October, 1992 and an audit of the School District's records in January, 1993.

Discussion

The School District argues that its motion to amend should be granted because the amendment relates back to the claim in the original complaint and is timely pursuant to Fed.R.Civ.P. 15(c). The School District argues alternatively that it may join the claim, notwithstanding the deadline for filing complaints, because the debt was not listed and is nondischargeable pursuant to 11 U.S.C. § 523(a)(3)(B). Beard resists and states that § 523(a)(3) is not available to the School District because it had actual knowledge of the bankruptcy case in time to file a dischargeability complaint.

Beard argues the School District's claim is barred by the August 28, 1992 deadline for filing complaints.

Initially, the court finds that the School District's allegations state a prepetition "claim" under bankruptcy law. Assuming the discovery rule would apply, the School District's cause of action accrued under state law at the time when the School District discovered, or by the exercise of reasonable diligence should have discovered, the alleged harm. Bennett v. Johnson, 485 N.W.2d 481, 483 (Iowa App. 1992). The School District alleges that discovery of the harm occurred post-petition. However, a "claim" under bankruptcy law means:

> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

11 U.S.C. § 101(5)(A). Cases distinguish the existence of an accrued claim under state law from the existence of a claim under bankruptcy law. Roach v. Edge (In re Edge), 60 B.R. 690, 696, 699 (Bankr. M.D. Tenn. 1986) (victim of prepetition negligence had a bankruptcy claim even though discovery occurred post-petition); L. F. Rothschild & Co., Inc. v. Angier, 84 B.R. 274, 276 (D. Mass. 1988). The 1978 Bankruptcy Code abandoned the notion of "provable" claims under prior law. Edge, 60 B.R. at 694. The concept of a bankruptcy claim under the Code is far broader and includes contingent and unmatured claims. Edge, 60 B.R. at 692-95. The majority view is that a claim under bankruptcy law arises out of the pre-petition conduct of the debtor regardless of whether the claim is a matured cause of action under state law. See Wisconsin Barge Lines, Inc. v. United States (In re Wisconsin Barge Lines, Inc.), 91 B.R. 65, 67-68 (Bankr. E.D. Mo. 1988); Edge, 60 B.R. at 705; United States v. Chateaugay Corp. (In re Chateaugay Corp.), 112 B.R. 513, 520 (S.D. N.Y. 1990) aff'd 944 F.2d 997 (2d Cir. 1991) (claim arises at time acts giving rise to alleged liability were performed. Cf. California Dept. of Health Services v. Jensen (In re Jensen), 995 F.2d 925, 930-31 (9th Cir. 1993) (CERCLA claim may arise after known release of dangerous substance is linked to debtor). The School District alleges its claim is based on prepetition conduct. Therefore, the court finds that the School District has a prepetition claim even though discovery of the claim may have occurred postpetition.

An amendment relates back to the date of the original complaint if the claim asserted in the amended complaint arose out of the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Fed.R.Civ.P. 15(c). The original complaint alleges that Beard entered into two automobile leases and named the School District as a co-lessee without the authorization of the School District. The proposed amended claim alleges that Beard charged unauthorized expenses to the School District and submitted fraudulent expense reimbursement requests. The court finds that the proposed amendment does not allege a claim arising out of the same conduct, transaction, or occurrence set forth in the original complaint. Therefore, the proposed amendment could not be a timely claim through the relation back rule of Fed.R.Civ.P. 15(c).

The School District argues alternatively that its claim falls within § 523(a)(4), but is not barred by the deadline for filing dischargeability complaints because the claim is an unscheduled debt. The School District argues, therefore, its right to object to the dischargeability of the claim is preserved by § 523(a)(3)(B). Under this theory, the School District's motion is to amend to permissively join a claim pursuant to Fed.R.Civ.P. 18(a), made applicable in adversary proceedings in bankruptcy by Fed.R.Bankr.P. 7018.

Debt of a kind specified in § 523(a)(2), (4) or (6) is discharged unless a creditor brings a complaint to determine such debt as nondischargeable. 11 U.S.C. § 523(c)(1). Such a complaint must be filed not later than 60 days following the first date set for the § 341 meeting. Fed.R.Bankr.P. 4007(c). In Beard's case, that date was August 28, 1992. The court has no authority to extend the deadline for filing a complaint unless a request for additional time is made before the deadline expires. Fed.R.Bankr.P. 9006(b)(3), 4007(c).

Debts which would be excepted from discharge pursuant to § 523(a)(3)(B) are excepted from the rule of § 523(c)(1) and the usual deadline for filing such complaints. 11 U.S.C. § 523(c)(1). A complaint other than under § 523(c) may be filed at any time. Fed.R.Bankr.P. 4007(b); Haga v. Nat'l. Union Fire Ins. Co. of Pittsburgh (In re Haga), 131 B.R. 320, 326 (Bankr. W.D. Tex. 1991). Therefore, if the School District's claim falls within the terms of 11 U.S.C. § 523(a)(3)(B), the claim is not barred by the August 28, 1992 deadline.

Section 523(a)(3)(B) provides that a discharge under § 727 does not discharge a debtor from debt:

(3) neither listed nor scheduled under section 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--

* * *

(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)(B).

The purpose of § 523(a)(3)(B) is to protect a creditor's right to timely file a proof of claim or dischargeability complaint. Robert S. C. Peterson, Inc. v. Anderson (In re Anderson), 72 B.R. 783, 786 (Bankr. D. Minn. 1987). A creditor may not object to the dischargeability of a debt on the ground that the debt was not scheduled in time, for example, for the creditor to participate in the meeting of creditors. Id.; see also In re Barrett, 24 B.R. 682, 684 (Bankr. M.D. Tenn. 1982), explaining that § 523(a)(3) was enacted to overrule Birkett v. Columbia Bank, 195 U.S. 345, 25 S.Ct. 38 (1904), which had held that a creditor has the right to participate in all aspects of the bankruptcy case. However, the debtor must schedule debts in time to permit the creditor to timely file a dischargeability complaint.

Beard argues that, even if the debt was not timely listed or scheduled, § 523(a)(3)(B) is inapplicable because of the exception in the last phrase, "unless such creditor had notice or actual knowledge of the case in time for" timely filing of a dischargeability complaint. Beard argues the School District had actual knowledge of the case and did in fact file a timely dischargeability complaint. Case authority is split on the interpretation of this phrase.

In Caffal Bros. Forest Products, Inc. v. Braun (In re Braun), 84 B.R. 192 (Bankr. D. Ore. 1986), the court dismissed the complaint of a creditor that learned of a check forgery, and thus its claim against the debtor, several months after the dischargeability complaint deadline had expired. The debtor had listed the creditor's name in his schedules. The court held that listing of the creditor's name and the creditor's knowledge of the bankruptcy kept the creditor from coming within the § 523(a)(3)(B) exception "notwithstanding the fact that the nature of [its] debt fails to appear on the debtor's schedules." Id. at 194.

The reasoning in Braun was followed in Dole v. Grant (In re Summit Corp.), 109 B.R. 534, 538 (D. Mass. 1990). In Summit Corp., the court found § 523(a)(3)(B) inapplicable to an unscheduled debt regardless of whether the creditor knew of the debt in time to file a timely dischargeability complaint. The court concluded that the creditor's knowledge of the bankruptcy case prior to the deadline was sufficient to require the creditor to file its complaint before the 60-day deadline under Rule 4007(c). Id. at 537. See also Reich v. Davidson Lumber Sales, Inc. Employees Retirement Plan, 154 B.R. 324, 329-31 (D. Utah 1993).

However, in Pension Benefit Guaranty Corp. v. Eckert, 156 B.R. 656 (C.D. Cal. 1993), the court declined to follow the reasoning in Braun. The PBGC brought a complaint to hold a claim for restitution nondischargeable under § 523(a)(4) for breach of the fiduciary duty under ERISA. The PBGC alleged that it could not have known it had a claim against the debtor-defendants in time to file a timely dischargeability complaint because of the defendants' own misrepresentations. On the defendants' motion to dismiss, the court held that the PBGC's action was not barred by the defendants' prior bankruptcy discharge and the fact that the PBGC was listed in the schedules and mailing matrix. Assuming for the motion that the PBGC's allegations were true, the court concluded that the PBGC's untimely filing was the result of the defendants' own misconduct. Id. at 658-59.

The court in PBGC v. Eckert followed the rationale of Manufacturers Hanover v. Dewalt (In re Dewalt), 961 F.2d 848 (9th Cir. 1992). In Dewalt, the creditor was not listed in the schedules and did not learn of the bankruptcy case until seven days before the deadline for filing dischargeability complaints expired. The court examined what it means for a creditor to have knowledge of a bankruptcy case "in time" for timely filing of a dischargeability complaint. The court concluded that a creditor should have sufficient time to review the merits of a dischargeability claim. Guided by Fed.R.Bankr.P. 4007(c), the court held that in the usual case a creditor must have notice of the case 30 days prior to the dischargeability complaint deadline in order to satisfy the exception in § 523(a)(3)(B). The Dewalt court reasoned that §

523(a)(3)(B) should not be interpreted to punish the most diligent of creditors while rewarding debtors for negligent filing. Dewalt, 961 F.2d at 850-51.

The court finds that the record is not sufficiently developed for the court to determine whether to follow either line of cases interpreting § 523(a)(3)(B). Generally, notice of the bankruptcy case puts a creditor on inquiry notice to discover its claims and applicable bankruptcy deadlines. A creditor must take prompt action to protect its right to file a proof of claim or dischargeability complaint. See Neeley v. Murchison, 815 F.2d 345, 347 (5th Cir. 1987) (§ 523(a)(3)(B) places creditor on inquiry notice to discover deadlines); In re Mandukich, 87 B.R. 296, 300 (Bankr. S.D. N.Y. 1988) (listed creditor must ascertain specific debts for which it is owed). On the other hand, a debtor has a duty to complete the schedules accurately. 11 U.S.C. § 521(1); Matter of Springer, 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991). The court is unable to determine the effect of § 523(a)(3)(B) on the School District's claim without facts regarding the actions of Beard in disclosing or concealing the claim and the actions of the School District in attempting to discover the claim. It would be helpful for the court to know, among other things, when the School District learned of the bankruptcy filing, whether it was able to attend the § 341 meeting or to schedule a 2004 exam, and how it discovered the claim regarding the automobile leases.

The School District's amendment should be granted to allow joinder of the claim. The Federal Rules of Civil Procedure promote the liberal joinder of claims. Fed.R.Civ.P. 18(a); Tullos v. Parks, 915 F.2d 1192, 1195 (8th Cir. 1990) ("joinder of claims is strongly encouraged"). The parties will not be prejudiced by joinder of this claim because if the School District's motion were denied, it could refile the claim separately. It would likely be more efficient to try all of the School District's claims together. Beard can then raise his objections regarding the application of § 523(a)(3)(B) to the claim, and the issues can be decided after the parties have had an opportunity to develop the law and facts.

ORDER

IT IS ORDERED that Charles City Community School District's Motion to Amend is granted. Plaintiff shall have 14 days from the date of this order to amend its complaint to state its additional claims under 11 U.S.C. § 523.

SO ORDERED ON THIS DAY OF DECEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: Judith O'Donohoe, John Titler and U. S. Trustee.

In the United States Bankruptcy Court

for the Northern District of Iowa

LARRY DEAN BEARD and ALMA ELAINE BEARD *Debtor(s).*	Bankruptcy No. X92-01033M Chapter 7
CHARLES CITY COMMUNITY SCHOOL DISTRICT *Plaintiff(s)* vs. LARRY DEAN BEARD	Adversary No. 92-4173XM

Larry Beard

Defendant(s)

ORDER RE: DATE OF FINAL TRIAL

In consideration of the court's ruling this date on plaintiff's Motion to Amend Complaint,

IT IS ORDERED that final trial of this adversary proceeding shall be continued pending amendment of the complaint and additional scheduling conference.

The clerk is to set further scheduling conference on this adversary proceeding by telephone for January, 1994.

SO ORDERED ON THIS 20th DAY OF DECEMBER, 1993.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: Judith O'Donohoe, John Titler and U. S. Trustee.