# In the United States Bankruptcy Court

## for the Northern District of Iowa

WILLIAM P. KRAPFL
*Debtor(s).*

Bankruptcy No. 94-11535KC
Chapter 7

## ORDER RE MOTION TO CLOSE AND MOTION FOR EXAMINATION UNDER RULE 2004

On July 6, 1995, the above-captioned matter came on for hearing pursuant to assignment. Debtor appeared with Attorneys Joe Peiffer and Linda Merritt. Creditor Security State Bank appeared by Attorney Jeffrey Taylor. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A, J).

### STATEMENT OF THE CASE

Debtor William Krapfl filed a Chapter 7 Petition on September 23, 1994. On November 16, 1994, a Report was filed by the Trustee in this case that no assets existed to administer. Thereafter, no objections to discharge were filed. A discharge was entered on December 29, 1994 with the case being formally closed on January 13, 1995. Security State Bank was listed as a creditor in Debtor's original schedules.

On April 21, 1995, the Bank filed a Motion to Reopen stating as its justification for reopening that it now sought to pursue revocation of Debtor's discharge. Simultaneously, the Bank filed a Motion for Examination of Debtor under Rule 2004. An order was automatically entered reopening the case pursuant to local practice.

Debtor filed a formal resistance to the 2004 Examination and filed a Motion to Close Case. Debtor asserts that no cause exists under 11 U.S.C. § 350(b) to reopen this case. Debtor asserts that the Bank was listed as a creditor and had formal notice of the bankruptcy case. Debtor asserts that the Bank failed to pursue a 2004 Examination or file a dischargeability action within the time set for filing objections to discharge under the Bankruptcy Code and Rules. Debtor, therefore, asserts that the Bank is not entitled to any relief since it failed to timely pursue its remedies prior to discharge.

The parties made oral arguments at the time of the hearing on these motions. Additionally, a limited amount of evidence was elicited by both Debtor and Creditor Security State Bank. The evidence establishes that Security State Bank, through its loan officer Aaron Zumbach, was aware of Debtor's filing of the Chapter 7 Petition. Mr. Zumbach has been a loan officer at the Bank for three years. It appears uncontested that the Bank had loaned approximately $18,000 to Debtor over a period of time. At the time of the filing of the Bankruptcy, the Bank had a security interest in 56 head of cattle reflected in appropriate security agreements and three separate promissory notes. Mr. Zumbach did attend the § 341 Meeting and made inquiry concerning the disposition of the secured cattle.

After the § 341 Meeting, no further action was taken by the Bank and no extension of time to file a discharge complaint was sought. The record reflects that three days after discharge the Bank held a board meeting and determined to object to Debtor's discharge. However, the time to challenge the discharge for fraud under § 523(a)(2) by filing an adversary complaint had expired.

At the hearing, Debtor questioned Mr. Zumbach concerning facts which he now possessed concerning this Debtor and the secured collateral of which he was not cognizant at the time of the filing of the Bankruptcy, the § 341 Meeting, and the period of time up to the discharge. From the testimony, the Court concludes that no facts exist, at the present time, which were not known to the Bank at the time of the discharge. It appears that the only differing factor is that the Bank

has switched counsel and, on the basis of new advice, has determined to object to Debtor's discharge.

## CONCLUSIONS OF LAW

Initially, the Bank asserts that Debtor's motion to close must fail because this District's long-standing policy requires the Clerk's office to reopen a closed Chapter 7 case if a motion to reopen is filed. This policy, however, does not relieve the Bank from establishing that it has grounds to have the case reopened under § 350(b). That section states 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." The Bank is requesting reopening "for other cause".

The burden of establishing cause is on the moving party. In re Daniels, 163 B.R. 893, 895 (Bankr. S.D. Ga. 1994). As cause is not defined in the statute, the court must weigh all equitable factors in the case to determine if reopening is appropriate. Id. Allowing a party the opportunity to revoke the discharge may be cause for reopening under § 350(b). In re Savage, 167 B.R. 22, 28 (Bankr. S.D.N.Y. 1994).

In order to prevail in a request to reopen, the creditor must establish that if the case is reopened, the court has authority to grant the underlying relief. In re Pratt, 165 B.R. 759, 760 (Bankr. D. Conn. 1994); In re Primmer, Adv. No. L90-0035C, slip op. at 2 (Bankr. N.D. Iowa Nov. 2, 1994). If it is established that no relief can be afforded to the moving party, the court may refuse to reopen the case. Primmer, slip op. at 2. The decision whether or not to reopen a case lies within the sound discretion of the bankruptcy court. In re Coppi, 75 B.R. 81, 82 (Bankr. S.D. Iowa 1987).

The Bank states that the sole issue at this point is its request to conduct a Rule 2004 examination of Debtor in order to investigate fraud in the disposition of its collateral cattle. The scope of a 2004 exam is broad and has been compared to a "fishing expedition." In re Hammond, 140 B.R. 197, 201 (S.D. Ohio 1992). If a debtor challenges a 2004 request, the creditor has the burden to establish good cause for the exam. Id. . Good cause exists where the exam is reasonably necessary for the protection of legitimate interests. Id.

It is not clear whether Rule 2004 allows the Bank to conduct a 2004 exam after discharge is entered and the case is closed. In In re Gross, 121 B.R. 587, 593 (Bankr. D.S.D. 1990), the Chapter 12 Trustee sought a 2004 exam of the debtors to ferret out possible fraud. At the time of the Trustee's request, the case was administratively closed and the debtors had been successfully operating under their confirmed plan for more than two years. Id. at 590. The court required that a significant quantum of evidence, i.e. more than a mere suspicion, be shown before a 2004 exam post-confirmation would be permitted. Id. at 594. In Savage, a creditor wanted permission for a broad examination into the debtors' affairs in order to investigate grounds for vacating the discharge. 167 B.R. at 23. The court stated that the creditor had squandered its opportunity to conduct the free ranging "fishing expedition" it now seeks when it failed to request a 2004 exam prior to discharge. Id. at 28.

The Court must also consider whether it is possible for the Bank to obtain the underlying relief it is requesting as grounds for a 2004 exam and for reopening, i.e. revocation of discharge under § 727(d)(1). If the court has no authority to vacate the discharge, there is no "cause" for reopening of the case. In re Cisneros, 994 F.2d 1462, 1465 (9th Cir. 1993). In order to revoke a discharge under § 727(d)(1), the creditor must prove that (1) the debtor procured the discharge through fraud and (2) the creditor did not know of the fraud until after the discharge was granted. In re Emery, 170 B.R. 777, 782 (Bankr. E.D.N.Y. 1994). If the creditor was aware of the alleged fraud prior to entry of the discharge order, the creditor is barred from seeking to revoke the discharge and no cause exists to reopen the case. Savage, 167 B.R. at 28; In re Kirschner, 46 B.R. 583, 586 (Bankr. E.D.N.Y. 1985) (stating that it is essential that the creditor must not have known of fraud until after the discharge).

Applying the foregoing to this case, the Court concludes that no cause exists to reopen the case or to allow a 2004 examination of Debtor. Parties in bankruptcy court are required to avail themselves of available procedures to protect their interests. In re Zimmerman, 869 F.2d 1126, 1128 (8th Cir. 1989) (denying Rule 60(b) relief after discharge). The Bank failed to utilize Rule 2004 prior to discharge to investigate Debtor's alleged fraud. It has not produced a significant quantum of evidence of fraud which would justify a broad ranging examination of Debtor at this stage when the discharge has already been entered and the case closed.

Mr. Zumbach attended the § 341 meeting on behalf of the Bank and questioned Debtor at that time regarding the disappearance of the collateral cattle. This indicates that the Bank had knowledge of the alleged fraud prior to discharge which is fatal to seeking revocation of discharge under 727(d)(1). No cause is shown to reopen the case. Debtor's motion to close the case should be granted.

**WHEREFORE**, Security State Bank's Motion for Examination Under Rule 2004 is DENIED.

**FURTHER**, Debtor's Motion to Close Case is GRANTED.

**SO ORDERED** this 4th day of August, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge