In the United States Bankruptcy Court

for the Northern District of Iowa

STEPHAN LEE COCHRAN *Debtor(s).*	Bankruptcy No. 94-61243-W Chapter 7
STEPHAN LEE COCHRAN *Plaintiff(s)* vs. TONI BENDER *Defendant(s)*	Adversary No. 97-9052-W

RULING RE: MOTION FOR SUMMARY JUDGMENT

This matter came on for telephonic hearing before the undersigned on August 8, 1997 on Debtor's Motion for Summary Judgment. Attorney Timothy Dunbar appeared for Plaintiff/Debtor Stephen Cochran. Attorney Jay Roberts appeared for Defendant Toni Bender. After oral arguments by counsel, the matter was taken under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

STATEMENT OF THE CASE

Debtor Stephen Cochran moves for summary judgment on his adversary complaint which seeks a determination that Defendant Toni Bender's claim as codebtor was discharged in his bankruptcy case. Debtor filed his Chapter 7 Petition August 1, 1994. Ms. Bender was identified as a codebtor in Debtor's Schedule H. She was not listed as a creditor. Debtor's Chapter 7 case was a no-asset case and thus no bar date for claims was set. Discharge was entered November 11, 1994.

At the time the petition was filed, Debtor and Ms. Bender were living together and engaged. Ms. Bender alleges in her pleadings that she was present at a conference between Debtor and his attorney. She further asserts that Debtor decided at that meeting not to list Ms. Bender as a creditor and agreed to pay her if creditors sought satisfaction of their joint debts from her after his discharge. Debtor's attorney adamantly denies that such a meeting occurred or that such an agreement was reached in his presence.

Debtor and Ms. Bender have since broken off their engagement and no longer reside together. After Ms. Bender paid joint debts to creditors, she requested payment from Debtor as he had agreed. He refused and she filed a state court action. Debtor now asserts that his discharge encompasses any liability to Ms. Bender on joint debts existing at the time he filed his bankruptcy petition. Ms. Bender asserts that Debtor's agreement to repay her constitutes a reaffirmation of the debt.

CONCLUSIONS OF LAW

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care". Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir. 1990); Geiger v. Tokheim, 191 B.R. 781, 785 (N.D. Iowa 1996). The court has also recognized the principle that "the summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole which are designed to secure the just, speedy and inexpensive determination of every action." Wabun-Inini, 900 F.2d at 1238 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2554-55 (1986)).

In considering a motion for summary judgment, the Court must determine whether the record, viewed in a light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Rabushka v. Crane Co., ___ F.3d ___, 1997 WL 450369, at *3 (8th Cir. Aug. 11, 1997).

> After the moving party points out the absence of evidence to support the nonmoving party's case, the nonmoving party "must advance specific facts to create a genuine issue of material fact for trial." A genuine issue of material fact exists if the evidence is sufficient to allow a reasonable [factfinder] to return a verdict for the nonmoving party. However, the mere existence of a scintilla of evidence in favor of the nonmoving party's position is insufficient to create a genuine issue of material fact.

Id. (citations omitted). The existence of some factual disputes does not preclude summary judgment unless the factual disputes are relevant and could affect the outcome of the case. Adams v. Erwin Weller Co., 87 F.3d 269, 271 (8th Cir. 1996).

Every prepetition debt is discharged under § 727(b). Judd v. Wolfe, 78 F.3d 110, 114 (3d Cir. 1996). There is no exception for unlisted or unscheduled debts. Id.; In re Baskowitz, 194 B.R. 839, 843 (Bankr. E.D. Mo. 1996). Section 727(b) is subject to § 523(a)(3) which provides that unlisted debts may be nondischargeable, unless the creditor had notice or actual knowledge of the case. Judd, 78 F.3d at 114.

Debtor moves for summary judgment based on Ms. Bender's actual knowledge of his bankruptcy case. Ms. Bender admits she had actual knowledge of the case but asserts that Debtor is still liable based on his agreement to repay her. A similar set of facts was considered in In re Barnes, 969 F.2d 526 (7th Cir. 1992). The debtor borrowed money from a friend and coworker, told the friend about his bankruptcy case and promised to repay the debt, but did not list the debt in his schedules. Id. at 527. The court described this as a "sneaky (in fact unlawful . . .) maneuver that would enable [the creditor] to collect his debt in full outside the bankruptcy proceeding." Id. at 528. The court considered the theories of estoppel and fraud. It stated:

> Section 523(a)(3)(A) is we believe intended for the protection of other creditors as well as the creditor whose debt is not listed. The reason is similar to that which forbids preferential treatment by an insolvent or incipiently insolvent debtor. If such treatment were allowed, creditors would race to make special deals with the debtor . . . .
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> If after all [] debts are listed and discharged the debtor feels, and attempts to honor, a moral obligation to repay some or all of the debts in full . . . the law interposes no objection. There is in that case no preexisting deal that is sought to be enforced. But a creditor who has notice of the bankruptcy proceeding cannot be permitted by facile

> invocation of fraud or estoppel to bypass the proceeding by suing to collect the original debt and thus undermine the statute's purpose.

Id. at 529-30.

In In re Lucchesi, 181 B.R. 922, 925 (Bankr. W.D. Tenn. 1995), the debtor did not list family members as unsecured creditors in his Chapter 11 liquidation case but promised to pay them back after bankruptcy. No assets were available for distribution to unsecured creditors. Id. at 927. These family creditors had knowledge of the case and preferred not to be listed on the schedules. Id. at 925. The court held that the oral promise to repay his family did not constitute a reaffirmation. A reaffirmation requires a written agreement filed before discharge is entered. Id. at 929. It further held that the debts were discharged due to the creditors' actual knowledge of the bankruptcy case. Id. at 930. Section 523(a)(3)(B) places the burden on creditors to come forward before the bar date, exercise due diligence and take necessary steps to preserve their claims. Id. at 927.

In In re Alton, 837 F.2d 457, 458 (11th Cir. 1988), a debtor did not list a creditor with whom he was involved in litigation on his schedules, but sent notice of the bankruptcy to the creditor three weeks after he filed his petition. The court rejected the creditor's "equities argument". Id. It noted that the debtor by his own actions first deprived the creditor of official notice by omitting him from the creditor list and then put the creditor on actual notice by mailing a notice of the proceeding and stay to stop the litigation. Id. at 458-59. Even on these harsh facts, the court concluded that the specifications in the Code placed an obligation on the creditor to pursue the case and take timely action to pursue his claim in bankruptcy court. Id. at 459.

Ms. Bender argues that a genuine dispute exists regarding what occurred during her alleged conversation with Debtor and Attorney Dunbar. She further asserts that Debtor's denial that this meeting occurred generates a factual dispute which precludes summary judgment. The Court concludes that this series of allegations and denials does not generate an issue of material fact. Admittedly, if true, such assertions may raise disturbing ethical issues. However, their existence or non-existence does not generate fact questions which preclude summary judgment.

The relevant facts are: 1) Debtor was liable to Ms. Bender as a co-debtor for prepetition joint debts, 2) Ms. Bender had actual knowledge of Debtor's bankruptcy case and 3) no written reaffirmation agreement was filed prior to Debtor's discharge. Because Ms. Bender had actual knowledge of Debtor's bankruptcy case, Debtor's liability to her was discharged. Debtor did not reaffirm his debt to Ms. Bender in writing as required by § 524(c). These facts are undisputed and entitle Debtor to summary judgment as a matter of law.

WHEREFORE, Debtor's Motion for Summary Judgment is GRANTED.

FURTHER, the discharge entered November 11, 1994 discharged Debtor's liability to Defendant Toni Bender on joint debts existing at the time Debtor filed his bankruptcy petition on August 1, 1994.

FURTHER, judgment shall enter for Plaintiff/Debtor Stephen Cochran and against Defendant Toni Bender.

SO ORDERED this 19th day of August, 1997.

Paul J. Kilburg

U.S. Bankruptcy Judge