

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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JOSE A. RODRIGUEZ

*Debtor(s).*

Bankruptcy No. 96-31392XF

Chapter 7

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HARRIS TRUST AND SAVINGS BANK

*Plaintiff(s)*

Adversary No. 97-9014F

vs.

JOSE A. RODRIGUEZ

*Defendant(s)*

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### MOTION TO RECONSIDER and MOTION TO DISMISS

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Harris Trust and Savings Bank and Jose A. Rodriguez ask the court to reconsider its order denying their motion to compromise. Also, Harris Trust moves to dismiss its complaint. Hearing on the motions was held April 15, 1998 in Fort Dodge. Mark D. Reed appeared for Harris Trust. Dan T. McGrevey appeared for Jose Rodriguez. Habbo G. Fokkena, the case trustee, also appeared.

Jose A. Rodriguez, a medical doctor, filed his chapter 7 petition on June 3, 1996. The filing was apparently precipitated by his divorce from Jacquelyn H. Rodriguez in February 1996. In his schedules, he listed the monthly debt to his former wife, secured debt totaling \$451,000.00 and unsecured debt totaling \$112,784.25. He did not list Harris Trust as a creditor. Among his scheduled assets were "household furnishings" valued at \$2,000.00. The furnishings were not itemized. He claimed them as exempt to their full value.

On August 12, 1996, after the meeting of creditors had been held, Rodriguez amended his schedules. He increased the value of the household furnishings to \$5,965.00. Oddly, he amended his Schedule C to claim the household furnishings exempt to the full extent of their amended value. I say "oddly" because Iowa law clearly limits the household goods exemption to \$2,000.00. Iowa Code § 627.6(5). It appears that the amended schedules were served on only the trustee, the U.S. trustee and the attorney for his former spouse. If this were so, the service was inadequate, as the Federal Rules of Bankruptcy Procedure require service of notice of any amendments to the schedules on "any entity affected thereby." Fed.R.Bankr.P. 1009(a). All creditors are affected by a change in debtor's claim of exemptions. All should have been served. None of the three entities served filed objection to the amended claims of exemption.

Debtor amended his Statement of Affairs to disclose a previously undisclosed gift to his fiancé of an engagement ring valued by him at \$6,200.25. There was also limited notice of this amendment. Debtor amended his schedules also to add creditors. He served the added creditors with notice of the filing (see case file, docket no. 13). Harris Trust, under the name of "BankCard," received a notice of discharge.

In November 1996, Harris Trust moved for an extension of time in which to file a complaint to determine dischargeability of debt and to object to discharge (case file, docket no. 17). The motion was granted (case file, docket no. 23).

Harris Trust filed its complaint on January 22, 1997 (adversary, docket no. 1). It was in two counts. Count I requested that Harris Trust's claim against Rodriguez be excepted from discharge because of fraud. It alleged that of its \$7,648.20 claim, \$5,809.78 was presumptively nondischargeable under 11 U.S.C. § 523(a)(2)(C) (consumer debts for luxury

goods incurred within 60 days of filing are presumed nondischargeable).

Count II objected to debtor's discharge. It alleged that debtor knew of his duty to list all creditors "yet he purposefully failed to include" the debt to Harris Trust. Also, Harris Trust alleged that "during a 9½ month period beginning with August 26, 1995 and ending June 11, 1996 ... Debtor incurred \$15,795.42 for household merchandise from Nebraska Furniture Mart" and that debtor was in possession of the property when he filed, but that he knowingly and purposely failed to include them in his petition." (Complaint, docket no. 1, Count II, ¶ 9). Harris Trust alleged that debtor's actions were a concealment of property of the estate, showed an intent to hinder, delay or defraud Harris Trust and the bankruptcy trustee, and amounted to a false oath (Complaint, ¶¶ 10-12).

On July 22, 1997, Harris Trust and debtor filed a motion asking for approval of a settlement of their dispute (adversary, docket no. 12). The settlement provided that judgment would enter in favor of Harris Trust against Rodriguez for \$6,750.00 and that the judgment would be nondischargeable under 11 U.S.C. § 523(a)(2)(A). Rodriguez would pay the judgment at the rate of \$250.00 per month. Although it was not expressed in the motion, it appeared to be the intent of the parties that Harris Trust's objection to discharge would be dismissed. Because the settlement implied dismissal of the objection to discharge, the court required notice of the settlement to all creditors (see Fed.R.Bankr.P. 7041).

The motion to compromise and notice of a bar date for objections was served on all creditors (docket no. 14). No one objected. That is not surprising, however, as any creditor receiving the notice and motion would have been informed only of the parties' intent to compromise Harris Trust's dischargeability action on its own claim. There was no mention of the existence or disposition of the objection to discharge.

Hearing on the motion was held October 3, 1997 in Fort Dodge. After hearing the argument of the parties, the court declined to approve the compromise. I believed it was not a reasonable compromise as to the objection to discharge. I disposed of the motion on its merits. I did not then determine the adequacy of notice.

Final trial on the complaint was scheduled for April 15, 1998. On April 9, 1998, Harris Trust and Rodriguez filed their joint motion for reconsideration, and Harris Trust filed its motion to dismiss. The motion to reconsider was not served on anyone. The motion to dismiss was served on only the U.S. trustee, the trustee and counsel for the former spouse.

Attached to the motion for reconsideration were three exhibits, one of which was the supporting affidavit of Jose Rodriguez. The affidavit made reference to an appraisal of household goods being attached to the affidavit. No such appraisal was attached. At the hearing, counsel for the debtor attempted to correct the error by submitting another original of the affidavit with the appraisal attached. It became clear at the hearing that the attachment was incomplete. Counsel's copy of the complete appraisal was then attached to the Rodriguez affidavit. As it is more appropriately a trial exhibit than an amendment to the motion, I admit it into evidence as Exhibit A.

The trustee had no objection to the parties' motion to compromise or to the dismissal of the objection to discharge. I can infer nothing from the silence of creditors as they have not been served with the motions or the amendments which added the additional furniture to the schedules.

To dismiss the complaint, Harris Trust is being paid a significant portion of its claim against Rodriguez. Plaintiff says it is satisfied that it would not be able to prove the elements of its objection to discharge.

I have reconsidered my prior order. To that extent, only the motion to reconsider is granted. Harris Trust and Rodriguez have again presented their case for compromise and dismissal. The compromise will not be approved, and the motion to dismiss will be denied. It will be necessary for the parties to proceed to trial. Harris Trust has raised a plausible objection to discharge. The debtor's explanation thus far is unsatisfactory. There is nothing in this settlement that benefits other creditors.

Harris Trust says that in the approximately nine months prior to debtor's bankruptcy, there was shipped to the debtor \$8,674.68 worth of furniture and that after the petition was filed, \$5,618.97 worth of furniture was shipped to the debtor (Motion to Dismiss, § 5). Harris Trust says that during the bankruptcy, all of the furniture was appraised for \$4,950.00 (Debtor's Affidavit). For purposes of the motion, I will take the shipment assertions as true. However, it became obvious at the hearing that the appraisal assertions were incorrect. At the hearing, the parties could not find on the appraisal the

items purchased prior to bankruptcy. It appeared that the appraised items were not those items which were purchased by debtor around the time of the bankruptcy. If this is so, then at filing, the debtor had possession of furniture then recently purchased at a cost of \$8,674.68 and \$4,950.00 in other furniture. Yet the debtor listed the furniture as having a value of \$2,000.00.

To this point, debtor's explanation is unsatisfactory. In his affidavit, he states:

5. That I did not list the information concerning the purchase of the furniture and the debt on my bankruptcy petition simply because I misunderstood the situation. I believed that since I was not listing the debt on the bankruptcy petition and since the debt was the same as the value of the furniture, that I did not need to list this debt. I cannot honestly say that I misunderstood the information provided by my counsel or whether the debt was discussed at all, but I do now realize that I should have initially listed both the property and debt and filed for a reaffirmation agreement if that was legally possible.

Debtor's Affidavit, Exhibit A, ¶ 5. This explanation is not coherent.

Harris Trust has alleged that the debtor provided false schedules under oath. With reference to the former Bankruptcy Act, the Circuit Court has said the false oath necessary to justify a denial of discharge involves "an intentional untruth in a matter material to an issue which is itself material." Aronofsky v. Bostian, 133 F.2d 290, 292 (8<sup>th</sup> Cir. 1943). The nature and value of debtor's assets are material to a case. Although mistakes and misunderstandings are not penalized, the debtor's explanation has thus far not satisfied me that it is unlikely plaintiff will prevail on the merits.

The likelihood of success on the merits of the claim is one aspect of the court's consideration of compromise. In re Flight Transportation Corp. Securities Litigation, 730 F.2d 1128, 1135 (8<sup>th</sup> Cir. 1984) (citing Drexel v. Loomis, 35 F.2d 800, 806 (8<sup>th</sup> Cir. 1929)). Other aspects include the difficulties which may be encountered in collection, the complexity of the litigation and the expense, inconvenience and delay involved in it, and the interests of creditors. Id.

Although factually intense, the issues are not particularly complex. As nothing is given to other unsecured creditors under this settlement, I do not think that delay or collectibility are relevant factors. As to the creditors' interests, they would lie in an appropriate disposition of this matter after a complete airing of the facts.

Little that the parties have argued supports the compromise so far as the objection to discharge is concerned. Accordingly,

IT IS ORDERED that the motion to reconsider is granted.

IT IS FURTHER ORDERED that the motion to compromise is denied, and the motion to dismiss is denied.

IT IS FURTHER ORDERED that the debtor shall amend his schedules to itemize and to value all items of household goods and furnishings owned by him at the time of the petition. He shall serve a copy of the amendment and a copy of his previously filed claim of exemptions on all creditors and parties-in-interest.

SO ORDERED THIS DAY OF APRIL 1998.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to Mark Reed, Dan McGrevey, Habbo Fokkena and U.S. Trustee.