IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

IN RE: **CHAPTER 7**

EUAL THOMAS MILLER **CASE NO. 0306692JEE**
DONNA JOY MILLER

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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE *APPLICATION TO REOPEN CASE* AND THE *OBJECTION TO APPLICATION TO REOPEN CASE*

This matter came before the Court for trial on the *Application to Reopen Case* filed by Madison County Bank (Bank) by and through its attorney, Ernest W. Stewart, and the *Objection to Application to Reopen Case* filed by Eual Thomas Miller and Donna Joy Miller (Debtors) by and through their attorney, William R. Armstrong. At the conclusion of the trial, the parties submitted letter briefs to the Court. After considering all testimony and evidence presented, the arguments of the parties, the pleadings and the briefs, the Court finds that the application is not well taken and should be denied.

FINDINGS OF FACT

On November 18, 2003, the Debtors filed a joint petition under Chapter 7 of the United States Bankruptcy Code. As required by 11 U. S. C. § 521[1], the Debtors' *Statement of Financial Affairs* and *Schedules* were also filed with their petition on November 18, 2003.

On *Schedule D–Creditors Holding Secured Claims* (Schedule D) the Debtors listed the following:

Account No. 200247 MADISON COUNTY BANK C/O ERNEST W. STEWART P.O. BOX 2757 MADISON, MS 39130-2757	Lien: PMSI Security: FURNITURE, FIXTURES ATTY FEES OF $13,651.38 ARE ALSO CLAIMED AND DISPUTED VALUE: $20,000

Schedule D recites that the amount of the Bank's claim without deducting the value of the collateral is $40,958, that the unsecured portion is $20,958 and that the claim is "contingent, unliquidated and disputed."

On *Schedule F–Creditors Holding Unsecured Nonpriority Claims* (Schedule F) the Debtors listed the following:

STEWART & ASSOCIATES, PLLC P.O. BOX 2757 MADISON, MS 39130-2757	COLLECTING FOR MADISON COUNTY BANK

Schedule F further recites that this listing is for "Notice Only."

Also on November 18, 2003, the Debtors filed a *Master Address List* (Matrix) as required by Federal Rule of Bankruptcy Procedure[2] 1007(a)(1) and Rule 7 of the *Uniform Local Bankruptcy*

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[1]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[2]Hereinafter, all rules refer to the Federal Rules of Bankruptcy Procedure unless otherwise specifically noted.

Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi.

The following addresses are included on the Debtors' Matrix:

MADISON COUNTY BANK
C/O ERNEST W. STEWART
P.O. BOX 2757
MADISON, MS 39130-2757[3]

STEWART & ASSOCIATES, PLLC
P.O. BOX 2757
MADISON, MS 39130-2757

On November 22, 2003, the *Notice of Chapter 7 Bankruptcy, Meeting of Creditors, & Deadlines* (341 Notice) was mailed to the two addresses listed above. The Debtors were granted a discharge on March 23, 2004. On March 26, 2004, the *Discharge of Debtor* was also mailed to the two addresses listed above. If notices or pleadings sent to any address listed on a debtor's matrix are returned by the United States Postal Service, the procedure in the Bankruptcy Clerk's Office is to make a notation on the matrix that mail to a particular address was returned. In the case at bar, neither the Bank's address nor Stewart & Associates' address bears such a notation.

As stated above, the Debtors were granted a discharge on March 23, 2004, and their case was closed on March 23, 2004. On May 10, 2004, the Bank filed an *Application to Reopen Case*. In its application, the Bank alleges that it "was never given nor did it ever receive any notice of the bankruptcy filing." *Application to Reopen*, May 10, 2004, p. 1. The Bank seeks to have the Debtors' case reopened in order to allow the Bank to file an adversary proceeding to object to the discharge of its particular debt[4].

The Debtors filed an *Objection to Application to Reopen Case* on June 7, 2004. The Debtors

[3]For purposes of this opinion, the address styled *Madison County Bank c/o Ernest W. Stewart* will be referred to as the Bank's address.

[4]The Debtors are guarantors on a loan the Bank made to Peace Street Wine & Spirits, LLC. Peace Street Wine & Spirits was a liquor store operated by the Debtors.

allege that the Bank was properly scheduled and given notice at the address of its attorney, and that the Debtors' debt to the Bank was discharged. Consequently, the Debtors argue that the case should not be reopened.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A), (I), and (O).

II.

A motion to reopen a case is controlled by § 350(b). Section 350(b) 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*." 11 U. S. C. § 350(b) (emphasis added).

In addressing § 350(b), the Court of Appeals for the Fifth Circuit has held that the phrase *for other cause* "is a broad term which gives the bankruptcy court discretion to reopen a closed estate or proceeding when cause for such reopening has been shown....This discretion depends upon the circumstances of the individual case and accords with the equitable nature of all bankruptcy court proceedings." *Citizens Bank & Trust Company v. Case (In re Case),* 937 F. 2d 1014, 1018 (5th Cir. 1991)(citations omitted).

The United States Bankruptcy Court for the Eastern District of Tennessee addressed the issue of when a court should reopen a bankruptcy case in *In re Patterson,* 297 B.R. 110, (Bankr. E.D. Tenn. 2003). The *Patterson* court found:

> However, "[t]he Court will not reopen [a] case if doing so would be futile[.]" *In re Phillips,* 288 B.R. 585, 587 (Bankr. M.D.Ga. 2002); *accord*, *Chanute Prod. Credit Assoc. v. Schicke (In re Schicke),* 290 B.R. 792, 798 (10th Cir. BAP 2003)("A bankruptcy court that refuses to reopen a Chapter 7 case that has been closed will not abuse its discretion if it cannot afford the moving party any relief in the reopened case.").

In re Patterson, 297 B.R. at 114.

"Ordinarily, for a court to grant a motion to reopen, the moving party must demonstrate that there is cause. There is no cause if reopening would serve no purpose." *In re Alexander*, 300 B.R. 650, 654 (Bankr. E.D.Va. 2003). *See also State Bank of India v. Chalasani (In re Chalasani),* 92 F.3d 1300, 1307 (2nd Cir. 1996)("[I]f the decision not to reopen was bottomed on a finding that the default judgment could not be set aside, such is a permissible basis to deny relief, because reopening in that event would be meaningless.")

Therefore, the Court must determine if reopening the Debtors' case would serve a purpose. The Bank seeks to reopen the Debtors' bankruptcy case in order to file a complaint objecting to the dischargeability of its debt for the "fraudulent sale of collateral out of trust, without remitting the proceeds therefrom to Applicant." *Application*, p. 1. While the Bank's application does not cite a specific code section, this would appear to be a complaint to determine the dischargeability of a particular debt pursuant to § 523(a)(6).

Rule 4007(c) sets the bar date for filing a complaint under § 523 as sixty days after the first date set for the 341 meeting of creditors. Rule 2002(f)(5) requires the clerk to give notice to all creditors of "the time fixed for filing a complaint to determine the dischargeability of a debt pursuant to § 523 of the Code as provided in Rule 4007...." Fed. R. Bank. P. 2002(f)(5). In the case at bar, the deadline to file a complaint to determine the dischargeability of a particular debt was March 8, 2004. Therefore, the Court must determine if the Bank's claim would be time barred so that it would

be futile to reopen the Debtors' case.

The Court of Appeals for the Fifth Circuit has held that "(a) creditor's claim can be barred for untimeliness only upon a showing that it received reasonable notice." *Oppenheim, Appel, Dixon & Co., v. Bullock (In re Robintech, Inc.),* 863 F.2d 393, 396 (5th Cir. 1989), *cert. denied, Bullock v. Oppenheim,* 493 U.S. 811 (1989). Therefore, in order to ascertain if the Bank is time barred from filing a § 523 complaint, the Court must determine if the Bank received reasonable notice.

In *Greyhound Lines, Inc. v. Rogers,* the Fifth Circuit held:

> (T)hat (a) correctly mailed notice creates a presumption that proper notice was given. Further, (a) correctly mailed notice also triggers a parallel common law presumption that proper notice was given....*Cf. Beck v. Somerset Technologies, Inc.* 882 F.2d 993, 996 (5th Cir. 1989)("Proof that a letter properly directed was placed in a U.S. Post office mail receptacle creates a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed."). Thus, the question becomes whether the sender properly mailed the notice and not whether the intended recipient received it....A denial of receipt is insufficient to rebut a presumption that proper notice was given, but it does raise a factual issue. *In re Schepps,* 152 B.R. at 139. Consequently, the issue is whether notice was properly sent. Evidence that the notice was never mailed or that no other creditor received notice will rebut the presumption that proper notice was given. "In effect, the presumption may only be overcome by 'evidence that the mailing was not, in fact, accomplished.'" *Id.* To determine if a mailing was accomplished the courts may consider whether the notice was correctly addressed, whether proper postage was affixed, whether it was properly mailed, and whether a proper certificate of service was filed. Mailing a notice by First Class U.S. Mail to the last known address of a creditor satisfies due process because it is "reasonably calculated" to inform the creditor of the bar date....*Mackie v. Production Oil Co.,* 100 B.R. 826, 828 (N.D. Tex. 1988).

Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg.), 62 F.3d 730, 735-36 (5th Cir. 1995)(citations omitted).

Applying the standards established by the Fifth Circuit in *Greyhound Lines* to the case at bar, the Court finds that on November 20, 2003, the 341 Notice was mailed to all creditors. The bar date for filing a complaint under § 523 or § 727 was set for March 8, 2004. The certificate of service

shows that all creditors on the mailing matrix were mailed the 341 Notice. As stated previously, there is no notation on either the address for the Bank or for Stewart & Associates that the notices mailed to either party were returned. Rule 9006(e) states that notice by mail is complete upon mailing. Therefore, the Court finds that there has been no evidence that the notices sent by the Court to Madison County Bank c/o Ernest Stewart or to Stewart & Associates were improperly mailed or were returned to the Court. Consequently, the Court finds that the notices mailed to the Bank were properly mailed and that there is a presumption that proper notice was given to the Bank.

Even though the mail sent to the Bank and to Stewart & Associates was not returned to the Court, the Bank contends that it did not receive proper notice because the Debtors failed to use the correct address for the Bank. As stated previously, the Debtors filed their Matrix in compliance with Rule 1007(a)(1) and Uniform Local Rule 7. At the trial, the Debtors introduced into evidence a letter dated October 28, 2003, which the Debtors had received from Stewart & Associates. The letter advises the Debtors that their account No. 200247 with the Bank, which is the account in controversy, had been turned over to Stewart & Associates by the Bank for collection. The letter goes on to make demand for payment from the Debtors, and the final paragraph of the letter states, "You must address all communications and send all remittances to the undersigned at Stewart & Associates, and mail to this office at P. O. Box 2757, Madison, MS 39130-2757." *Trial Exhibit 2.* The testimony at the trial was that this letter from Stewart and Associates was the reason the Debtors listed the Bank on the Matrix as "Madison County Bank c/o Ernest Stewart, P.O. Box 2757, Madison, MS 39130-2757" and the reason Stewart & Associates was on the Matrix for notice purposes. Based upon the October 28, 2003, letter, the Court finds that the Debtors' use of "Madison County Bank c/o Ernest Stewart, P.O. Box 2757, Madison, MS 39130-2757" as the

address for the Bank was reasonable, and therefore, the Bank received reasonable notice of the bankruptcy filing and of the various bar dates. *See also Robbins v. Amoco Production Co.*, 952 F.2d 901, 908 (5th Cir. 1992)(reh'g denied 1992)(A creditor was put on "inquiry notice" of the bankruptcy filing by virtue of the notice being mailed to the creditor's former attorney.)

Further, assuming for the sake of argument that the Bank's mailing address was so deficient so that the Bank did not receive reasonable notice of the Debtors' bankruptcy to enable the Bank to timely file an objection to the dischargeability of its debt, Keith Newcomb, Executive Vice President of the Bank, testified at trial that sometime in late 2003, possibly December of 2003, the Bank ran a credit check on the Debtors and learned that the Debtors had filed bankruptcy. Therefore, Mr. Newcomb's testimony shows that the Bank had obtained actual notice of the Debtors' bankruptcy prior to the March 8, 2004, deadline. As the Bank had actual notice of the Debtors' bankruptcy prior to the March 8, 2004, deadline, the Bank had sufficient time to have protected its rights by either filing a timely complaint or a motion for extension of time. Consequently, the Bank would be time barred from filing a § 523 complaint. *Ramos v. Compton (In re Compton)*, 891 F.2d 1180, 1184-85 (5th Cir. 1990). *See also Bank of Winona v. Butler (In re Butler)*, 237 B.R. 611, 614-15 (Bankr. N.D. Miss. 1999).

CONCLUSION

Having found that the Bank would be time barred from filing a § 523 complaint under any circumstances, the Court finds that there is no cause under § 350(b) for reopening the Debtors' Chapter 7 case because reopening the case would be meaningless and would serve no purpose. Therefore, the motion to reopen should be denied.

A separate judgment consistent with this opinion will be entered in accordance with Rules

9014 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 30th day of November, 2004.

/s/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE