SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: October 20, 2014

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

DEBORAH S. HANKINS, **CASE NO. 07-02833-NPO**

DEBTOR. **CHAPTER 7**

ORDER DENYING MOTION TO REOPEN BANKRUPTCY CASE

There came on for hearing on October 6, 2014 (the "Hearing"), the Motion to Reopen Bankruptcy Case (the "Motion to Reopen") (Dkt. 73) filed by the debtor, Deborah S. Hankins (the "Debtor"), and the Response in Opposition to the Motion to Reopen Bankruptcy Case of Creditors Paul Farmer and Jeannie Farmer (Dkt. 76) filed by Paul Farmer ("Mr. Farmer") and Jeannie Farmer ("Mrs. Farmer") (together with Mr. Farmer, the "Farmers"), in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Gregory J. Faries represented the Debtor; and Philip C. Hearn represented the Farmers.

Facts

1. On January 9, 2004, the Debtor and Mr. Farmer entered into a Promissory Note (the "First Promissory Note") (Dkt. 76 at 4, Ex. 1) in which Mr. Farmer agreed to loan the Debtor $10,000.00 "payable in 24 monthly installments commencing on February 9, 2004 and

every month thereafter until the last payment is made January 9, 2006 in the amount of $438.71 at an annual rate of 5% interest or balance may be paid early according to the attached amortization schedule." (*Id.*).

2. On June 1, 2004, the Debtor and the Farmers entered into a second Promissory Note (the "Second Promissory Note") (Dkt. 76 at 5, Ex. 2) in which the Farmers agreed to loan the Debtor $50,000.00 "payable in monthly installments commencing on June 20, 2004 and every month thereafter until the last payment is made. Monthly payments shall be $850.00 a month and may change according to the Prime Rate. Note shall be fulfilled when the last payment is made." (*Id.*). The First Promissory Note and the Second Promissory Note are sometimes referred to together as the "Promissory Notes." In addition to the loans of $60,000.00, the Farmers authorized the Debtor to charge an additional $60,000.00 to their American Express credit card.

3. The Debtor made monthly payments, in varying amounts, to the Farmers from April 2004 until December 2012. (Dkt. 76 at 6-38, Exs. 3-6).

4. On September 11, 2007, the Debtor commenced the Bankruptcy Case by filing a voluntary petition for relief (the "Petition") (Dkt. 1) under chapter 7 of the U.S. Bankruptcy Code. In her no-asset Bankruptcy Case, the Court granted the Debtor a discharge on November 17, 2008 of all her pre-petition debts, except as provided in 11 U.S.C. § 523.[1] (Dkt. 69). Also on November 17, 2008, the Court closed her Bankruptcy Case. (Dkt. 70).

5. The Debtor did not list the Farmers in her bankruptcy schedules as required by FED. R. BANKR. P. 1007(b)(1), and, therefore, the Farmers did not receive formal notice of the Bankruptcy Case. According to Mrs. Farmer, the Debtor informed her that she intended to file a

[1] From this point forward, all section references are to the U.S. Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

bankruptcy case but that "she wasn't putting me . . . in the bankruptcy because she was going to try to pay me off." (Hr'g Tr. 1:53:49 – 1:54:05).[2]

6. The Debtor continued making payments to the Farmers from 2007 through 2012, during the pendency of the Bankruptcy Case and even after it was closed. (Dkt. 76 at 6-38, Exs. 3-6). These payments did not cease until about four (4) years after the Debtor obtained a discharge in the Bankruptcy Case. Mrs. Farmer credibly testified at the Hearing that the Debtor made these payments to satisfy the Promissory Notes and the credit card debt. In contrast, the Debtor testified that she made these payments only because she wanted to help the Farmers with their personal credit card debt.

7. In 2012, the Debtor stopped making payments to the Farmers because, according to the Debtor, she could no longer afford them. Thereafter, the Farmers commenced a collection suit against the Debtor in the County Court of Hinds County, Mississippi.

8. In the Motion to Reopen, the Debtor asks the Court to reopen the Bankruptcy Case under § 350 so that she can amend her schedules to add the Farmers as pre-petition creditors, who she alleges were omitted from the original schedules because of an innocent mistake. The Farmers oppose the Motion to Reopen on grounds that the omission was intentional and that the amendment of her bankruptcy schedules six (6) years after the closing of the Bankruptcy Case would be inequitable.

Discussion

Pursuant to § 350(b), a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). Because there are no assets to administer, the

[2] The Hearing was not transcribed. This reference to Mrs. Farmer's testimony is cited by the timestamp of the audio recording.

only grounds to reopen the Bankruptcy Case are "to accord relief to the debtor, or for other cause." *Id*.

A discharge under § 727(b) does not discharge an individual debtor from any unscheduled debts, that is, debts that were "neither listed nor scheduled in time to permit . . . timely filing of a proof of claim," unless the creditor had notice or actual knowledge of the bankruptcy case in time to protect his rights. 11 U.S.C. § 523(a)(3). By having her Bankruptcy Case reopened and then amending the schedules, the Debtor hopes to bring the debts owed to the Farmers within the scope of her discharge.

At the Hearing, the parties agreed that the dischargeability issue is governed by *Stone v. Caplan (In re Stone)*, 10 F.3d 285 (5th Cir. 1994). There, the Fifth Circuit Court of Appeals held that debtors could reopen their no-asset chapter 7 case to amend the schedules to add creditors they inadvertently omitted from the schedules. *Id*. at 292. In determining whether a debtor's failure to list a creditor prevents the discharge of the unscheduled debt, the Fifth Circuit examined three (3) factors: (1) the reasons the debtor failed to list the creditor; (2) the amount of disruption which would likely occur; and (3) any prejudice suffered by the listed creditors and the unlisted creditor in question. *Stone,* 10 F.3d at 290-92.

The Court first considers whether the Debtor's failure to list the Farmers in her original schedules was inadvertent or intentional. "If the failure is attributable solely to negligence or inadvertence, . . . equity points toward discharge of the debt." *Id*. at 291. "The burden is on the debtor . . . to demonstrate absence of fraud or intentional design." *Faden v. Ins. Co. of N. Am.*, 96 F.3d 792, 796 (5th Cir. 1996) (quotation omitted).

As evidence that the Debtor's omission was intentional, Mrs. Farmer presented numerous exhibits indicating that the Debtor made regular, monthly payments to the Farmers for about

eight (8) years, from 2004 through 2012. Also, Mrs. Farmer testified that the Debtor expressly informed her that she would not include the Farmers in her Bankruptcy Case. This conversation took place in 2007, near the time the Debtor filed the Petition.

The Debtor testified that the omission was inadvertent, that she intended to discharge the debts owed to the Farmers when she initiated the Bankruptcy Case in 2007, and that she only recently learned that the debts had not been discharged in her Bankruptcy Case. She further explained that she continued paying the Farmers each month during the pendency of the Bankruptcy Case and afterwards, from 2007 through 2012, because of her selfless desire to help the Farmers with their personal credit card problems.

The Court finds Mrs. Farmer more credible than the Debtor. The Debtor's contention that her monthly payments to the Farmers were unrelated to the debts she owed them is incredulous. Why else would the Debtor continue making monthly payments to the Farmers for almost four (4) years after her discharge? Moreover, the conversation between Mrs. Farmer and the Debtor in 2007 shows that the Debtor knew about the debts she owed the Farmers when she

filed the Petition.[3] For these reasons, the Court finds that the Debtor has not met her burden of proving that the omission of the Farmers was inadvertent rather than intentional. Accordingly, the Court concludes that the Debtor has not met the first factor of the three-factor test set forth in *Stone* for the discharge of an unscheduled debt. Because the Debtor has not shown that the omission was inadvertent, the Court finds it unnecessary to address the second and third factors. *See Faden*, 96 F.3d at 796-97 (holding that even absent prejudice to creditors, an unscheduled debt should not be discharged in cases where the debtor's failure to list a creditor is the result of more than inadvertence).

As an alternative reason for denying the Motion to Reopen, the Court agrees with the Farmers that it would be inequitable to grant the Motion to Reopen when almost six (6) years have passed since the Bankruptcy Case was closed. Although the bankruptcy court's power to reopen a case is not limited by a certain time period in either § 350(b) or Rule 5010 of the Federal Rules of Bankruptcy Procedure, which implements § 350(b), the Fifth Circuit has observed that "the longer the time between the closing of the estate and the motion to reopen, . . .

[3] As noted previously, a creditor's notice or actual knowledge of the pendency of a bankruptcy case may result in the discharge of an unscheduled debt. 11 U.S.C. § 523(a)(3). It is undisputed that the Farmers did not receive formal notice of the Bankruptcy Case. Although the Debtor told Mrs. Farmer about her Bankruptcy Case, she also assured Mrs. Farmer that the Bankruptcy Case would not adversely affect her rights. The Court finds that the Debtor's assurances, her omission of the Farmers from the schedules, and her uninterrupted payments to the Farmers eliminated any obligation of Mrs. Farmer to take steps in the Bankruptcy Case to protect her claims. In short, the Court finds that Mrs. Farmer's knowledge of the Bankruptcy Case was insufficient to discharge the unscheduled debts under § 523(a)(3). *Christopher v. Kendavis Holding Co. (In re Kendavis Holding Co.)*, 249 F.3d 383, 388 (5th Cir. 2001) (holding that a debtor's representation to its creditor that his rights would not be adversely affected was insufficient to place the burden on the creditor to pursue his claim in the debtor's bankruptcy case and, thus, did not support the discharge of his unscheduled debt under § 523(a)(3)). In reaching this result, the Court does not suggest that the "notice or actual knowledge" provision in § 523(a)(3) is limited to formal notice of a bankruptcy case. *See, e.g., Johnson v. Magee Rentals, Inc. (In re Johnson)*, 478 B.R. 235, 246-47 (Bankr. S.D. Miss. 2012) (holding that oral notice of a bankruptcy case satisfies the "knowledge" element of § 362(k)).

the more compelling the reason for reopening the estate should be." *Citizens Bank & Trust Co. v. Case (In re Case)*, 937 F.2d 1014, 1018 (5th Cir. 1991) (citation omitted). Moreover, a leading bankruptcy treatise provides that a motion to reopen "must be filed within a reasonable time . . . [and that] laches may apply." 9 COLLIER ON BANKRUPTCY ¶ 5010.02[6] (16th ed. 2014); *see Price v. Haker (In re Haker)*, 411 F.2d 568, 570 (5th Cir. 1969) (upholding denial of a motion to reopen a bankruptcy case because of laches).

Given that almost six (6) years have passed between the closing of the Bankruptcy Case in 2008 and the filing of the Motion to Reopen in 2014, the Court finds that the Debtor has not established a compelling reason why the Court should reopen the Bankruptcy Case. The Court further finds that the equitable doctrine of laches prevents the Debtor from reopening the Bankruptcy Case. "Laches requires proof of: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961) (citations omitted). The doctrine of laches is important in bankruptcy proceedings because "a chief purpose of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period." *Katchen v. Landy*, 382 U.S. 323, 328 (1966) (quotation omitted). Because almost six (6) have passed since the Motion to Reopen was filed, the Court finds, in the alternative, that the Motion to Reopen should be denied.

The Court does not suggest that the passage of time, without more, is generally sufficient to establish laches. Where, as in this Bankruptcy Case, the Farmers have relied in good faith on the administration and closing of the Bankruptcy Case for six (6) years, it would be prejudicial and unfair to allow the Debtor to include their debts in her discharge. Reopening the Bankruptcy Case would remove the element of certainty from the administration of the estate and closing of

the Bankruptcy Case. *See Dickenson v. Penland (In re Penland)*, 34 B.R. 536, 539 (Bankr. E.D. Tenn. 1983) (holding that the reopening of a case defeats the purposes of the bankruptcy laws and should be allowed "only for the most compelling cause").

In conclusion, the Court finds that the Debtor has not met her burden of establishing sufficient cause for reopening the Bankruptcy Case because (1) the Debtor's omission of the Farmers from the original schedules was intentional, not inadvertent, and (2) reopening the Bankruptcy Case almost six (6) years after the Bankruptcy Case was closed would be prejudicial to the Farmers. These findings are consistent with the "equitable principles" that formed the basis for the Fifth Circuit's decision in *Stone*.

At one time, the Farmers and the Debtor were good friends, and because of that friendship, the Farmers generously loaned the Debtor approximately $120,000.00, even going so far as to obtain a loan secured by their home to fund the Second Promissory Note. The Farmers' attempt to collect the debts from the Debtor and the Debtor's attempt to discharge her debts to the Farmers at this late date suggest a change in that relationship. Such a change, however, does not provide grounds for reopening the Bankruptcy Case and discharging the debt.

IT IS, THEREFORE, ORDERED that the Motion to Reopen hereby is denied.

##END OF ORDER##