SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: October 4, 2016

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:

JEFFERY K. EUBANKS AND RHONDA L. EUBANKS,	**CASE NO. 10-03588-NPO**
DEBTORS.	**CHAPTER 13**

ORDER GRANTING MOTION TO REOPEN CASE

This matter came before the Court for hearing on September 7, 2016 (the "Hearing"), on the Motion to Reopen Case (the "Motion") (Dkt. 80) and the proposed Order on Motion to Reopen Case (the "Proposed Order") (Dkt. 93) filed by Jeffery K. Eubanks and Rhonda L. Eubanks, the debtors (the "Debtors") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Justin Jones ("Jones") appeared on behalf of Harold J. Barkley, Jr., the standing chapter 13 panel trustee (the "Trustee"). Neither the Debtors, Patrick S. Wooten, the attorney who filed the Motion and the Proposed Order on behalf of the Debtors, nor anyone else acting on the Debtors' behalf appeared at the Hearing. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). Notice of the Motion was proper under the circumstances.

Facts

1. The Debtors initiated the Bankruptcy Case by filing a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on October 13, 2010 (the "Petition") (Dkt. 1).

2. The Debtors filed the Chapter 13 Plan (the "Plan") (Dkt. 2) contemporaneously with the Petition. In the Plan, the Debtors proposed to make sixty (60) monthly payments of $926.43.[1] (Plan at 1). The Order Confirming the Debtor's [*sic*] Plan, Awarding a Fee to the Debtor's [*sic*] Attorney and Related Orders (the "Confirmation Order") (Dkt. 38) was entered on February 10, 2011.

3. On September 2, 2015, the Trustee filed the Chapter 13 Standing Trustee's Final Report and Account (the "Trustee's Report") (Dkt. 73) indicating that the Debtors completed their Plan payments on May 21, 2015. According to the Trustee's Report, the Debtors' unsecured claims totaled $5,879.54, and they paid a total of $2,351.82 to their unsecured creditors. (Trustee's Report at 2).

4. The Discharge of Debtor after Completion of Chapter 13 Plan (Dkt. 76) discharging the Debtors and the Final Decree/Order Closing Case (Dkt. 77) were entered on October 5, 2015.

5. The Debtors filed the Motion on June 28, 2016. In the Motion, the Debtors provided that they filed a cause of action against Mark Porter ("Porter"), alleging that Porter

[1] The Debtors proposed that they would individually contribute $500.00 and $426.43 per month, respectively.

"caused an automobile accident to occur on October 31, 2014," which resulted "in physical and property damage to the Joint Debtor." (Mot. at 1). In the Motion, the Debtors stated that "[d]uring, or prior to the negotiation of [the claim against Porter], the above Joint Debtor filed the above cited bankruptcy matter . . . ." (*Id.*). According to the Motion, the Debtors reached a "proposed settlement" with Porter for "the estimated amount of $22,000.00." (*Id.*). The Debtors requested that the Court reopen the Bankruptcy Case "to protect the interest of the creditors and to insure [*sic*] the efficient administration of the bankruptcy estate." (*Id.*).

6. No objections to the Motion were filed, and the Debtors submitted the Proposed Order granting the Motion.

7. At the Hearing, Jones stated that the Debtors paid 40.00% to their unsecured creditors through the Plan. Jones also provided that if the Motion was granted, the Trustee would be able to use a portion of the settlement money from Porter to pay the remaining unsecured claims.

Discussion

Approximately nine (9) months after the Bankruptcy Case was closed and the Debtors received a discharge, the Debtors filed the Motion seeking to reopen the Bankruptcy Case in order to protect the interests of their unsecured creditors in light of a proposed settlement with Porter. The Court will first discuss the standard for reopening a closed chapter 13 bankruptcy case before determining whether the Debtors may reopen the Bankruptcy Case to pay unsecured creditors with settlement funds received from a post-confirmation automobile accident.

I. Standard for Reopening

A closed bankruptcy case may be reopened pursuant to § 350(b)[2] "to administer assets, to accord relief to the debtor, or for other cause." Section 350(b) grants the Court broad discretion to reopen a closed case when a debtor can show cause as to why the bankruptcy case should be reopened. *Citizens Bank & Trust Co. v. Case (In re Case)*, 937 F.2d 1014, 1018 (5th Cir. 1991); 3 COLLIER ON BANKRUPTCY § 350.03 (16th ed. 2016). Whether a court should grant a motion to reopen depends upon the circumstances of the individual case. *Id.*

A court's power to reopen a case is not limited by a certain time period under § 350(b) or Rule 5010 of the Federal Rules of Bankruptcy Procedure. However, "[t]he longer the time between the closing of the estate and the motion to reopen . . . the more compelling the reason for reopening the estate should be." *In re Case*, 937 F.2d at 1018. Additionally, the doctrine of laches may apply to bar the reopening of a bankruptcy case that has been closed for a significant amount of time. 3 COLLIER ON BANKRUPTCY ¶ 350.03[6]. Further, in deciding whether to reopen a bankruptcy case, a court should consider whether doing so would be futile. "If substantive relief [cannot] be granted in the reopened case, then there is no reason to grant a motion to reopen." *The First Nat'l Bank of Jeffersonville v. Goetz (In re Goetz)*, Adv. No. 08-3341, 2009 WL 1148580, at *2 (Bankr. S.D. Tex. Apr. 24, 2009). Thus, "if reopening a case would be futile and a waste of judicial resources or would serve no purpose, then cause to reopen does not exist." *Id.* (citations omitted).

Because the Debtors filed the Motion just nine (9) months after the Bankruptcy Case was closed, which is not a significant delay, the doctrine of laches does not operate as a bar to reopening the Bankruptcy Case. Although the Debtors did not testify at the Hearing, it appears

[2] Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless specified otherwise.

from the information contained in the Motion that the Debtors filed the Motion upon reaching a proposed settlement with Porter in the amount of $22,000.00. Nonetheless, the Court cannot reopen a closed bankruptcy case if doing so would be futile. Accordingly, the Court must determine whether settlement funds arising from a post-confirmation automobile accident may be used, post-discharge, to pay the Debtors' remaining unsecured claims. If not, reopening the Bankruptcy Case would be futile.

II. Reopening to Distribute Settlement Proceeds

The filing of a chapter 13 petition commences a bankruptcy case, which creates a bankruptcy estate. Section 1306 specifically states that property of the estate includes all property listed in § 541, including all property "that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted . . . ." 11 U.S.C. § 1306(a)(1). Conversely, § 1327(b) provides that "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." 11 U.S.C. § 1327(b). The Fifth Circuit Court of Appeals has noted that § 1306 and § 1327 appear to be in tension because "although a cause of action acquired post-confirmation and pre-closure, -dismissal, or -conversion would seem, on the one hand, to be 'property of the estate, under [§ 1306], it would also appear, on the other hand, to have 'vest[ed] . . . in the debtor' under § 1327(b)." *Flugence v. Axus Surplus Ins. Co. (In re Flugence*), 738 F.3d 126, 129 n.2 (5th Cir. 2013). In the Bankruptcy Case, however, the Confirmation Order provided that "[a]ll property shall remain property of the estate and shall vest in the debtor only upon dismissal, discharge, or conversion." (Confirmation Order at 2). Thus, pursuant to the Plan, the cause of action did not vest in the Debtors, but in the estate because it arose during the pendency

of the Bankruptcy Case.[3] Accordingly, because the accident occurred post-confirmation but pre-discharge, it was property of the estate subject to distribution under § 1306.

While § 1306 does not specifically require a debtor to amend his or her schedules to include property that was acquired after the petition was filed, courts within the Fifth Circuit have "held that a debtor who does not disclose a cause of action that arises after confirmation is judicially estopped from pursuing it . . . ." 8 COLLIER ON BANKRUPTCY ¶ 1306.02[2] (16th ed. 2016). In *In re Flugence,* the debtor had her chapter 13 plan confirmed and was subsequently involved in a car accident. *In re Flugence,* 738 F.3d at 128. The debtor then sued the defendants and eight months later received a discharge, and her bankruptcy case was closed. *Id.* The debtor never disclosed the accident or the resulting personal injury claim. *Id.*

In *In re Flugence,* after the defendants discovered that the debtor had not disclosed the personal injury claim in her bankruptcy case, they sought to have the complaint dismissed based on judicial estoppel. *Id.* The debtor subsequently moved to reopen her bankruptcy case. *Id.* The Fifth Circuit Court of Appeals noted that despite the Bankrutpcy Code's uncertainty regarding a debtor's obligation to disclose assets acquired post-confirmation, it had previously "settled that debtors have a duty to disclose [post-confirmation assets] to the bankruptcy court . . . . " *Id.* at 130 (citing *United States v. Beard,* 913 F.2d 193, 197 (5th Cir. 1990)). Even if an

[3] Although the cause of action arose during the pendency of the Bankruptcy Case, it was not settled until after the Debtors received a discharge and, pursuant to the Confirmation Order, property of the estate was returned to the Debtors upon discharge. Despite uncertainty regarding whether a post-confirmation cause of action that was settled post-discharge was property of the estate even though the confirmation order stated that property of the estate would vest with the debtor upon discharge, the Fifth Circuit held that "[w]hether a particular asset should be available to satisfy creditors is often a contested issue, and the debtor's duty to disclose assets—even where he has a colorable theory for why those assets should be shielded from creditors—allows that issue to be decided as a part of the orderly bankruptcy process." *In re Flugence,* 738 F.3d at 130. Accordingly, even though there may be a colorable claim regarding whether the settlement proceeds from the cause of action are in fact property of the estate, it is an issue to be decided when the Bankruptcy Case is reopened.

asset acquired post-confirmation is ultimately determined to be outside of the bankruptcy estate, debtors still "have a duty to disclose to the court the existence of assets whose immediate status in the bankruptcy case is uncertain . . . . " *Id.* at 130 n.4 (citation omitted). The Fifth Circuit held that the debtor's neglect of her duty to disclose the post-confirmation lawsuit was an affirmative representation "that she had no such claim." *Id.* at 130.

Citing *In re Flugence,* this Court held in *Fina Oil & Chemical Company v. Howard (In re Howard),* Adv. No. 14-05009-NPO (Dkt. 81), slip op., at *13 (Bankr. S.D. Miss. Oct. 27, 2014), that "[i]t is well settled in the Fifth Circuit that chapter 13 debtors have a continuing duty to disclose post-petition causes of action . . . [which] pertains to potential causes of action as well." The Court notes that unlike in *In re Flugence* and other cases reviewed by the Court, no objections to the Motion were filed. Further, unlike the debtor in *In re Flugence,* the Debtors appear to be seeking to reopen the Bankruptcy Case so that they can distribute settlement funds to previously unpaid unsecured creditors rather than to combat a judicial estoppel defense. The Motion, therefore, should be granted and the Bankruptcy Case should be reopened to allow the Debtors' assets to be administered. The Court also finds that the Debtors should have fourteen (14) days from the date of this Order in which to amend their schedules to include the cause of action.

IT IS, THEREFORE, ORDERED that the Motion is hereby granted.

IT IS FURTHER ORDERED that the Debtors shall have fourteen (14) days from the date of this Order in which to amend their schedules to include the cause of action.

##END OF ORDER##