FRCP 15(b)
FRBP 7015
Due Process
Amended Pleadings
§ 727(a)(5)

Fenters v. United States Trustee
In re Fenters,
United States Trustee v. Fenters

Dist. Court # 96-6073
Case No. 694-62095-aer7
Adv. # 94-6491-aer

8/16/96 Judge Hogan Unpublished
(affirming J. Radcliffe-no underlying written opinion)

At the close of the United States Trustee's case in chief at a discharge trial, the bankruptcy court on its own motion amended the pleadings under FRBP 7015 and FRCP 15(b) to add a claim based on § 727(a)(5). At the close of evidence the court ruled against Debtor on the § 727(a)(5) claim and denied discharge.

Debtor appealed. The District Court affirmed. The bankruptcy court did not abuse its discretion in amending the pleading on its own motion. The original claim under § 727(a)(3) was sufficiently related to the § 727(a)(5) claim to put Debtor on notice. Debtor did not object to the amendment, claim surprise or request a continuance and did not inform the court at trial or on appeal what further evidence he would have adduced on the § 727(a)(5) issue.

Further, Debtor could not show the trial court's bias and thus deprivation of due process simply because the court ruled against him.

Finally, the bankruptcy court's findings of fact regarding Debtor's expenses and missing assets were not clearly erroneous.

E96-12(10)

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U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re LLOYD D. FENTERS, JR., Debtor.	Case No. 694-62095-aer7
LLOYD D. FENTERS, JR., Appellant, v. UNITED STATES TRUSTEE, Respondent.	Adversary No. 94-6491-aer District Ct. No. 96-6073 ORDER

HOGAN, J.

This is an appeal from a final judgment denying appellant a discharge in bankruptcy pursuant to 11 U.S.C. § 727(a)(5).

FACTS

Appellant filed a Chapter 7 bankruptcy petition on May 27, 1994. His schedule of assets indicates that he owns personal property valued at $56,265 and no real property.

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Respondent's Excerpt of Record (ER) 8, 9, 12. The value of appellant's personal property consists primarily of $45,000 in accounts receivable which have been turned over for collection, and a Chevrolet Blazer worth $10,000 but subject to a $12,000 debt. ER 11, 14. Appellant's schedule of liabilities lists debts of over $2.4 million. ER 8, 14, 19, 44. At trial, appellant's counsel stated that the schedules of liabilities were overstated; he estimated appellant's debts at approximately $500,000. TR 97-99.

Prior to filing bankruptcy appellant operated a trucking business and a truck brokerage. Appellant received approximately ten to twelve percent for brokering loads. At the height of his business in 1993, appellant had ten or eleven employees. TR 21-25.

In 1992, appellant had a gross profit of $332,421 from the truck brokerage and $289,732 of gross profit from running his own trucks. ER 66, 73. His net profit was $81,366, or approximately $130,000 after backing out depreciation and paying taxes. ER 66.

Appellant's business income declined in 1993 due to the fact that he was doing less brokering and more running his own trucks. Appellant did not file tax returns for 1993. He had very little business activity in 1994 and none after February 10, 1994.

At the time he filed bankruptcy, appellant's personal living expenses were approximately $1300 per month. ER 48.

Bankruptcy Judge Albert Radcliffe described the background to the present litigation as follows:

> First of all, I believe it's appropriate to recite a bit of brief background as to how we got to this place in time today. First of all, of course, the bankruptcy petition was filed on May 27, 1994 by the debtor under chapter 7. As the case progressed, In July of 1994 the case trustee, Michael Grassmueck, Inc. Filed a notice of intent to abandon basically the present claim for relief against the debtor based upon the fact that the estate lacked funds to finance the type of litigation that we've had today.
>
> That notice drew objections from some creditors, so a hearing was held on August 10, 1994. There was a concern stated at the hearing that there might be dissipation of assets. The trustee indicated that he thought the estate had a very good cause of action against the debtor to deny discharge, but simply lacked the funds to proceed. The Court outlined some alternatives at that hearing. The Court indicated that the concerned creditors could purchase the asset from the estate and proceed on their own if they wished; that they could fund the litigation by, in essence, paying money to the trustee. And as part of that hearing the Court indicated that the U.S. Trustee should undertake an investigation.
>
> The written order was entered on August 29, 1994 requiring the U.S. Trustee to investigate the matter and report back to the Court on November 30, 1994, which was just a few days after the complaint in this adversary proceeding was filed, basically reporting that an investigation had been conducted and that the U.S. Trustee was going to proceed with the lawsuit that we have before the Court today.

TR 109-110.

The adversary proceeding went to trial on the issue of whether appellant should be denied a discharge under 11 U.S.C. § 727(a)(3), which provides that

> (a) The court shall grant the debtor a discharge unless -
>
> * * *

> (3) The debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all the circumstances of the case[.]

At the close of the trustee's case in chief, the court indicated that the trustee had not presented sufficient evidence on the inadequate records claim because there was no evidence that the trustee or any creditor had demanded from appellant's accounting firm the documents it had in its possession. TR 63. At the same time, the court stated that the evidence supported a claim under section 727(a)(5):

> I need to refer the parties to Bankruptcy Rule 7015, and Federal Rule 15, particularly Federal Rule 15(b) which allows the amendment of pleadings to conform to the evidence presented at trial. My concern here is that Mr. Fenters has testified today that large amounts of money ran through his business operations. I believe for 1993 his testimony was one to one and a half million dollars, and the testimony for 1992 was almost three million dollars.
>
> The concern raised here is that if one examines again the bankruptcy schedules that have been submitted in this case, they reflect no interest in real property. The personal property assets are de minimus [sic] with the exception of $45,000 worth of accounts or accounts receivable denominated the "Carter-Jones Collection accounts"; there's a vehicle, and that's basically it.
>
> Contrasted to that there are large amounts of debts, a number of wage claims, over two and a half million dollars in general unsecured claims. The concern the Court has is that there's another basis to deny discharge contained in Section 727(a)(5) of the Code which provides "the debtor has failed to explain satisfactorily, before determination or denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities."

TR 64. The trial proceeded accordingly. Appellant made no claim that his ability to maintain a defense was prejudiced by the court's ruling, nor did he request a continuance in order to obtain additional evidence.

Appellant contends that (1) the bankruptcy judge erred in amending the pleadings, on its own motion, to raise the issue of 11 U.S.C. § 727(a)(5); (2) the bankruptcy judge violated appellant's rights by failing to be a fair and impartial trier of fact; and (3)the bankruptcy judge erred in denying appellant a discharge in bankruptcy.

STANDARDS OF REVIEW

The bankruptcy judge's actions in amending the pleadings to conform with the evidence is subject to an abuse of discretion standard of review. Campbell v. Trustees of Leland Stanford Jr. Univ., 817 F.2d 499, 506 (9th Cir. 1987).

The bankruptcy judge's denial of discharge invokes two standards of review--findings of fact are reviewed for clear error; conclusions of law are reviewed de novo. In re Cox, 41 F.3d 1294, 1296 (9th Cir. 1994).

DISCUSSION

1. Amending the Pleadings to Conform to the Evidence

Fed. R. Civ. P. 15(b), which is made applicable to bankruptcy adversary proceedings by Fed. R. Bank. P. 7015, provides:

> **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by

> express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of those issues. If evidence is objected to at the trial on the grounds that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Appellant does not expressly argue the bankruptcy court lacked the authority to amend the pleadings on its own motion. To the extent that such an argument could be read into appellant's brief, however, this court rejects it. See Underwriters Salvage Co. v. Davis & Shaw Furniture Co., 198 F.2d 450, 453 (10th Cir. 1952) ("[I]t is the duty of the court to consider issues raised by the evidence without objection even though no formal application is made to amend . . .").

Appellant contends that since the evidence presented by the parties which led Judge Radcliffe to amend the pleadings to add the section 727(a)(5) claim was also relevant to the section 727(a)(3) issue, which was raised in the pleadings, appellant did not necessarily impliedly consent to try the section 727(a)(5) issue. This argument is unavailing. First, the close relationship between sections 727(a)(3)

(lack of books and records) and (a)(5) (failure to explain satisfactorily any loss of assets or deficiency of assets to meet debtor's liabilities) makes any claim of prejudice to appellant suspect. The two claims are sufficiently related that the objection to discharge claim of the pleadings would have put appellant on notice of the related theory. In re Gunn, 111 B.R. 291 (9th Cir. BAP 1990).

More importantly, however, appellant wholly failed to object in any way to the addition of the section 727(a)(5) claim at trial, and did not claim surprise or request a continuance. Moreover, neither at trial nor on appeal has appellant informed the court what further evidence it would have brought forward on the section 727(a)(5) issue. Under such circumstances this court will not disturb the bankruptcy judge's amendment of the pleadings, for it was not an abuse of discretion to do so.

2. Appellant's Due Process Argument

Appellant claims he was denied due process of law because the trial judge was prejudiced against him. Adverse rulings do not constitute grounds for disqualification. United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986). The only support appellant has for the bare allegation that Judge Radcliffe was biased is the fact that the court ruled against appellant. A successful due process claim requires a stronger foundation than that shown by appellant.

3. The Court's Denial of Discharge

Appellant makes several contentions regarding the bankruptcy judge's findings of fact. First, appellant contends the finding that appellant's expenses during 1992 to 1994 were $15,000 per year is erroneous. Appellant's claimed living expenses at the time of filing were about $1,300 per month. From this, the bankruptcy judge deduced the $15,000 per year figure and stated "There is no evidence to indicate it was otherwise during 1993 and earlier." TR 114. Appellant contends this finding was error because it did not take into account the expenses of appellant's wife, since appellant was divorced shortly before the petition was filed. The portions of the transcript cited by appellant reveal nothing concerning appellant's living expenses. Indeed, there is nothing in the record to suggest appellants living expenses were different at any relevant period of time than they were as reflected in the petition.

Appellant next argues there is insufficient evidence to show that any assets are missing. Specifically, appellant argues that the bankruptcy judge ignored the explanation that net income for 1993 was substantially lower than 1992 due to a number of wrecked trucks. A review of the transcript reveals that the judge considered the evidence of the wrecked trucks, but found it unconvincing since the costs ordinarily associated with running those trucks were not incurred. TR 116.

Appellant's argument that he did not make as much money as it appears is unavailing. The bankruptcy judge undertook a detailed examination of the evidence, allowing adjustments for pass through income. TR 114. The determination that assets were missing was a reasonable interpretation of the evidence and not clearly erroneous.

CONCLUSION

The decision of the bankruptcy court is affirmed.

IT IS SO ORDERED.

DATED this 16th day of August, 1996.

UNITED STATES DISTRICT JUDGE

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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
BY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LLOYD D. FENTERS, JR.

Appellant,

v. **Civil No. 96-6073-HO**

U.S. TRUSTEE, PAUL GARRICK

Appellee.

JUDGMENT

The decision of the bankruptcy court is affirmed.

Dated: August 21, 1996.

Donald M. Cinnamond, Clerk

by Lea Force

Lea Force, Deputy