11 U.S.C. § 523
11 U.S.C. § 727(a)(4)

In Re Brown Bk. No #3
88-02080
Rumble, et. al. v. Brown Adv. # 88-0563-P

7/27/90 CEL Unpublished

The complaint sought to deny the debtor's discharge under § 727(a) for allegedly making a false oath. The false statement was the debtor's failure to list a creditor on his schedules. The debtor sought dismissal of that claim, contending that only the omitted creditor had standing to assert the omission as a false oath. The court held that any creditor has standing to object to the discharge based on the alleged omission.

The complaint also sought a determination that the debt owed to the plaintiff was nondischargeable under various provisions of § 523. The alleged wrongful conduct was obtaining money from plaintiffs for investments and not applying the money to such investments. The debtor subsequently executed a note to evidence the obligation to the plaintiffs. The debtor contended that the note was a novation which extinguished the original, potentially nondischargeable, obligation. The court refused to dismiss the § 523 claim, holding that further evidence of intent was necessary to determine whether the underlying obligation was extinguished by the note. The court suggested that the note may have been intended only to evidence the original indebtedness rather than extinguish it.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Case No. 388-02080-H7
	)	
CHRISTEN MARC BROWN,	)	
	)	
Debtor.	)	
_____	)	
	)	
JAMES RUMBLE, GEORGE MASCIARELLI, MARY ANN HOOVER and MARY LOU HOLLEMAN,	)	Adversary No. 88-0563-P
	)	
Plaintiffs,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
CHRISTEN MARC BROWN,	)	
	)	
Defendant.	)	

Creditors filed this complaint seeking denial of defendant debtor's discharge for failing to list a creditor, alleging this to constitute a false oath in violation of 11 U.S.C. § 727(a)(4), and also alleged counts for determination that debts due plaintiffs were nondischargeable under various provisions of 11 U.S.C. § 523.

The counts under 11 U.S.C. § 523 all arise out of the same alleged conduct by the defendant, the alleged obtaining money from the plaintiffs for investments and not in fact applying the money to such investments. Ultimately, on January 23, 1984, defendant executed a promissory note to the

plaintiffs for $65,000, and also a document captioned "acknowledgment" as follows:

ACKNOWLEDGMENT

> I, Christen M. Brown, hereby acknowledge that on the 23rd day of January , 1984 I entered into a Promissory Note with George Masciarelli, Mary Ann Hoover, James Rumble and Mary Lou Holleman.
>
> This note is in the sum of $65,000 and represents sums which I owe said parties under a Co-ownership of Real Estate Agreement in which they were my partners. I agree to repay these sums to the partners and expressly declare that since said transaction has to do with an insider transaction that I agree that said amounts are due and payable and nondischargeable by me in bankruptcy.
>
> The partnership returns prepared by me up to this date are true and correct as filed and amended.
>
> Christen M. Brown

The defendant has not filed an answer to the complaint, but seeks its dismissal by motion contending that because the alleged omitted creditor was not a plaintiff there is a lack of standing to object to that omission, and as to the 11 U.S.C. § 523 counts urges that the note is not nondischargeable and that the underlying alleged misconduct related to the execution of the note would be subject to statutes of limitations.

Plaintiffs urge that the note was not given as a novation, and although conceding that the provision in the acknowledge that the "amounts are due and payable and nondischargeable by me in bankruptcy" is an unenforceable pre-petition waiver of discharge, assert that if the defendant relies on the note being given in satisfaction of the debt, he must plead and prove it, and that therefore the motion to dismiss on the present record should be denied. (Citing In re Anderson, 64 B.R. 331 (N.D. Ill. 1986).

See also In re Jones, 12 B.R. 199, (Bankr. D.S.C. 1981), at page 202 wherein the court reasons:

> "The general rule is that a note is evidence of indebtedness and does not extinguish the debt for which it is given. Maryland Casualty Co. v. Cushing,

> 171 F.2d 257 (7th Cir. 1948). For the defendants to prevail on their novation argument, they must establish an agreement that the note was given and received as a discharge of the original tort claim. See, General Insurance Company of America v. Klein, 517 S.W.2d 726 (mo. app. 1974); Maryland Casualty Co. v. Cushing, 171 F.2d 257 (7th Cir. 1948). In order to establish such an agreement, the defendants must prove that it was the clear and definite intention of C & S at the time of the execution of the note, to accept the note in full satisfaction of the fraud claim. . . ."

Also see In re Russie, 10 B.R. 832 (Bankr. N. D. Ill. E.D. 1981), in which the court notes that when a note is given as evidence of a debt and not as a new consideration, but to evidence the underlying nondischargeable debt, the note is therefore nondischargeable.

The court notes at page 835:

> "Thus Kelley reaffirms the general rule that when a debtor defrauds a creditor and then gives that creditor a note in the amount of the funds obtained, the court can look at the terms of the note and other extrinsic evidence to determine whether the note was given in satisfaction of the underlying debt or merely as evidence of the underlying debt. A note given as evidence of an underlying nondischargeable debt retains its nondischargeable character. See 8 BCJS § 573 a.; In re Wright, 584 F.2d 83, (5th Cir. 1978); Matter of Pigge, 539 F.2d 369 (4th Cir. 1976)."

There is in the "acknowledgment" given in connection with the note a basis for plaintiffs' contention that the note was not a novation and sufficient to require the defendant to plead and prove that it was making disposition of the proceedings by allowance of the defendant's motion to dismiss inappropriate.

The action on the note is not barred by the statute of limitations, and the nature of the underlying debt is subject to extrinsic evidence relating to its alleged nondischargeability. See In re Kelley, 259 F. Supp. 297, (N.D. Ca. 1965).

The defendant moves to dismiss the 11 U.S.C. § 727(a)(4) count because the plaintiffs are not the alleged omitted creditor and contends that

therefore they are not the real party in interest. That they are not the alleged omitted creditor does not deprive them of the right to allege the claimed false oath as parties in interest. It does, however, place them in the position of appropriate proof of materiality and elements of fraud in the alleged omission to support the count.

Although the ruling on the motion is interlocutory, the court will enter a separate order denying the defendant's motion to dismiss the plaintiffs' amended complaint filed September 11, 1989, and allowing the defendant twenty (20) days to file an answer to the amended complaint.

DATED this _____ day of July, 1990.

_____
C. E. LUCKEY
Bankruptcy Judge

cc: Lynn F. Jarvis
Steven Scroggin
U. S. Trustee