Chap 13 confirmation
Accrual of claim

Gerald Rogers, Case No. 02-66860-fra13

10/5/2004 FRA Unpublished

Debtor filed a chapter 7 case, was granted a discharge, and the no-asset case was closed. The Chapter 7 trustee thereafter learned that there was pending in U.S District Court a lawsuit that Debtor had filed against Qwest and Qwest Dex seeking money damages under a number of theories, including negligence and breach of contract. The complaint alleged that the actions of the defendants had forced the Debtor into insolvency and necessitated the filing of his chapter 7 bankruptcy case. The lawsuit had been filed after the discharge had been granted and the case closed. The chapter 7 trustee moved to have the bankruptcy case reopened in order to administer the newly discovered asset. Once the case was reopened, Debtor converted the case to Chapter 13 and filed a plan of reorganization which proposed to continue the litigation and use any proceeds of the lawsuit to pay creditors. The chapter 13 trustee objected to confirmation on a number of grounds and moved for reconversion to chapter 7.

Debtor argued that the claim against the defendants was a post-petition claim and not property of the chapter 7 estate, because Debtor was not aware at the petition date that he had a valid claim against the defendants. Under the “discovery rule,” a claim does not “accrue” under Oregon law in a tort action, for purposes of the statute of limitations, until a plaintiff knows or reasonably should know of a substantial possibility that an injury exists. An injury is defined as harm, causation, and tortious conduct.

The court, in rejecting Debtor’s argument, stated that for purposes of ownership in bankruptcy, a claim accrues when the actions giving rise to the injury occur, rather than when the statute of limitations period for bringing the action may start. Clearly, by the petition date there was an alleged injury. Moreover, it was also clear that by the petition date Debtor was aware of the facts giving rise to the injury and the claim had also, therefore, “accrued” under the discovery rule.

As the claim was property of the chapter 7 estate which had not been scheduled, it was not deemed abandoned when the case was closed. Debtor therefore lacked standing to bring the action against the defendants and the chapter 7 trustee was the true party in interest.

The bankruptcy court denied confirmation of the plan of reorganization on grounds of feasibility and lack of good faith. The case was reconverted to chapter 7.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE	)	Bankruptcy Case No.
	)	02-66860-fra13
GERALD ROGERS,	)	
	)	MEMORANDUM OPINION
Debtor.	)	

BACKGROUND

Debtor filed for bankruptcy under Chapter 7 in September 2002, but did not disclose in his schedules a claim against Qwest Corporation. An order was entered granting Debtor's discharge and closing the "no asset" case on January 9, 2003.

Complaint Filed in State Court

In February 2004, Debtor filed a complaint in the Jackson County Circuit Court against Qwest Corporation, alleging claims sounding in tort and alternatively for breach of contract. The action was thereafter removed to U.S. District Court. Debtor owns a business operated as a sole proprietorship named "Cleanco," which he operates out of his personal residence. The

complaint alleges that an employee of Qwest advised Debtor that because he operated his business out of his residence, he did not need to have a business telephone line, with its higher costs, but instead could obtain a second residential telephone line under the name of his business. Based on this information, Debtor decided to stop using his business telephone line and number in June 2000 and obtained a new residential telephone number for his business "Cleanco."

After obtaining the new telephone number for his business, Debtor requested that Qwest transfer any calls to the old number to the new one, but was told that this would not be possible. He was advised, however, that Qwest would list his new residential number alphabetically under the name Cleanco in the "white pages" of Qwest's telephone directory, and in the carpet cleaning category of the business "yellow pages" in Qwest's March 2001 Medford and surrounding areas telephone directory. When the March 2001 telephone directory was released, however, Debtor discovered that it listed his business with the old discontinued number rather than with the new number. This resulted, according to the complaint, in Debtor's customers believing that he had gone out of business.

Debtor contacted Qwest and asked that it take steps to correct the erroneous listing. Nothing was done to correct the problem at that time, but Qwest assured Debtor that the problem

would be corrected with the release of the March 2002 directory. When the March 2002 directory was released, however, the "yellow pages" listing had been corrected, but the "white pages" listing still contained the discontinued number for the Cleanco business. Qwest failed to do anything to fix the problem, but assured Debtor in January 2003 that the problem would be solved with the release of the March 2003 listing. The March 2003 telephone directory, however, had the same listing as that contained in the March 2002 directory. The complaint alleges that due to the erroneous listings in the March 2001 through March 2002 telephone directories, the Debtor was forced into insolvency, which necessitated the filing of bankruptcy in September 2002.

Actions Taken in Bankruptcy Court

The trustee in the (then closed) Chapter 7 case learned of the pendency of the District Court proceeding from the defendant and, on March 22, 2004, filed a motion to reopen the case. Soon thereafter, the defendant in the litigation filed a motion to dismiss, alleging that the Trustee, rather than the Debtor, was the appropriate party in interest. Debtor responded by filing a motion to convert this case to one under Chapter 13. An order was entered on April 21, 2004 vacating the discharge order previously entered in the chapter 7 case and converting the case to chapter 13. On August 6, 2004, the Debtor removed the action against Qwest to the bankruptcy court.

Debtor's plan of reorganization proposes to continue the litigation, and in fact relies on a successful outcome to fund most of the proposed payments. The chapter 13 trustee filed an objection to confirmation and a motion to reconvert to chapter 7, arguing that the doctrine of judicial estoppel prevents the Debtor from pursuing the claim against Qwest, because he had failed to disclose the existence of the claim in the original schedules. The trustee also argues that the Debtor's plan lacks feasibility and that the plan was not proposed in good faith.

A confirmation hearing was convened on August 21, 2004. The Debtor testified regarding the circumstances of the dispute with Qwest, stating that he was not conscious of any right to proceed against Qwest at the time he filed his bankruptcy. Instead, he claims, he tried his best to deal with Qwest for some time after the bankruptcy. It was only after his consultation with counsel[1] that Debtor became aware that he had a cause of action against defendant Qwest and authorized counsel to pursue it.

DISCUSSION

The Claim Against Qwest is Property of the Estate

Debtor contends that the claim against Qwest did not "accrue" until he subjectively became aware that he had a claim against Qwest. He testified that he had no reason to think there

[1] The same counsel, as it happens, who prepared Debtor's chapter 7 petition and schedules.

was the possibility of a claim against Qwest until Qwest failed to correct the erroneous listing in the March 2003 listing, Debtor sought the advice of counsel, and Debtor's attorney researched the issues and determined in August 2003 that there were viable claims against Qwest. Because the claims did not accrue until after the petition date, Debtor argues, they were not part of the chapter 7 estate.

A claim "accrues" under Oregon law for purposes of the statute of limitations in a tort action when the "plaintiff knows or in the exercise of reasonable care should have known facts which would make a reasonable person aware of a substantial possibility that [an injury] exists." Gaston v. Parsons et al., 318 Or. 247, 256, 864 P.2d 1319, 1324 (1994). Injury is defined as consisting of three elements: (1) harm, (2) causation, and (3) tortious conduct. Id at 255 and 1323. The discovery rule was designed "to give plaintiffs a reasonable opportunity to become aware of their claim." Id. In essence, it prevents the running of the statute of limitations on a tort claim until a plaintiff has a reasonable opportunity to determine that he or she has a claim.

Accrual for purposes of the start of the statute of limitations is not relevant, however, for purposes of determining when a cause of action accrues for the purpose of ownership in a bankruptcy proceeding. The Gaston court clearly stated that the

discovery rule allows plaintiffs to become "aware of their claim;" it did not hold that a claim does not exist until a plaintiff becomes aware of it. The focus of the inquiry must be the time at which the injury occurred. This is in accord with State Farm Life Insurance Co. v. Swift (In re Swift), 129 F.3d 792, 798 (5th Cir. 1997). In that case, cited with approval by the Ninth Circuit in Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001), the court analyzed the difference between accrual of a cause of action and accrual for purposes of the running of the statute of limitations. It concludes that "the statute of limitations may begin to run on a date other than that on which the suit could first be maintained. Swift at 796. "Discovery is relevant to the determination of when the statute of limitations begins to run, but it is not an element necessary for the cause of action to accrue for purposes beyond the statute of limitations." Swift at 798.

The complaint filed against Qwest alleges that the actions of Qwest "forced [Debtor] into insolvency and required [him] to file bankruptcy in September, 2002." Complaint ¶ 14. Clearly, by the petition date there was an alleged injury: harm,

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causation, and allegedly tortious conduct.[2] That claim belonged to the chapter 7 bankruptcy estate as of the petition date.

When a bankruptcy case is closed, property of the estate "that is not abandoned [under Code § 554(a)-(c)] and that is not administered in the case remains property of the estate." Code § 554(d). When an asset is listed in the bankruptcy, but not otherwise administered at the time the case is closed, it is deemed abandoned to the debtor at the time of closing, unless the court orders otherwise. Code § 554(c). Because the Debtor in the present case failed to schedule the asset, however, it was not deemed abandoned to the Debtor when the case was closed and continued to remain property of the estate and subject to administration by the Trustee. Cusano v. Klein, 264 F.3d at 945-946(internal citations omitted).

Good Faith

"The court pursuant to 11 U.S.C. § 1325(a)(3) has an independent duty to make a considered assessment of the debtor's good faith." In re Warren, 89 B.R. 87, 90 (9th Cir. BAP 1988)(internal citations omitted).

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[2] It is also equally clear that Debtor was aware by the petition date of all the facts necessary to a determination that he had suffered an injury: he knew he had suffered harm, he knew that Qwest had made promises to him which they failed to keep, and he knew that Qwest's failures caused his harm. It is knowledge of the facts giving rise to an injury, rather than knowledge of the legal theory of recovery, which starts the statute of limitations under the discovery rule. See Travis v. Knappenberger, 204 F.R.D. 652, 653 (D.Or. 2001)(Judge Redden, adopting Judge Hubel's Findings and Recommendations).

> [T]he proper inquiry is whether the [debtor] acted equitably in proposing [his] Chapter 13 plan. A bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. . . . [T]he court must make its good-faith determination in the light of all militating factors.

In re Goeb, 675 F.2d 1386, 1390 (9th Cir. 1982). A debtor's good faith should be determined on a case-by-case basis. Id.

As stated previously, the claim against Qwest was property of the estate. When the Debtor determined that the claim existed, he should have filed a motion to reopen his chapter 7 case under Code § 350(b)and amended the schedules to list the claim against Qwest. Instead, he filed the complaint in Jackson County Circuit Court in his own name as plaintiff, even though he lacked standing to do so. The case was only reopened when the chapter 7 trustee learned of the lawsuit from Qwest and the trustee himself moved to reopen. Finally, before the Trustee could begin administration of the asset, the case was converted to Chapter 13.

Based on the totality of the circumstances in this case, I find that the Debtor has failed to meet his burden of proof with respect to the good faith requirement of Code § 1325(a)(3). He failed to inform the chapter 7 trustee of the existence of an asset in which he, or his attorney, had to have known the trustee would assert an interest. I find unavailing his argument that

the actions or inaction by Qwest after the petition date created a "continuing tort" such that the chapter 7 trustee would be unable to fully administer the claim. Post-petition damages related to the pre-petition causes of action would most likely be considered property of the estate and recoverable by the chapter 7 trustee in any case. Swift, 129 F.3d at 799-801. Finally, it appears that the primary reason for conversion to chapter 13 was to maintain control of the lawsuit.

Other Confirmation Issues

1. Feasibility

Debtor's plan proposes a monthly plan payment of $27/month, which the chapter 13 trustee states would be insufficient to pay all priority claims and administrative expenses within five years. The plan relies on recovery from the lawsuit to pay unsecured creditors 100% of their claims. In failing to address the trustee's objection as to feasibility, Debtor has failed to meet his burden with respect to Code § 1325(a)(6) which requires that he show that he will be able to make all the payments required under the plan.

2. Best Interest of Creditors Test

Code § 1325(a)(4) requires that the value of all property distributed under the plan to unsecured creditors be at least the amount that would be paid if the plan were administered under Chapter 7.

a. Violation of Automatic Stay: I agree with the chapter 13 trustee that the Debtor most likely violated the automatic stay in filing the lawsuit, as the asset was property of the estate at the time the lawsuit was filed and the lawsuit was an attempt to exercise control over that property. Code § 362(a)(3). While a chapter 7 trustee is not authorized to claim damages under Code § 362(h), a chapter 7 trustee would have a potential recovery for violation of the automatic stay under the civil contempt power of the court under Code § 105(a). Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1189-90 (9th Cir. 2003)(internal citations omitted). This potential recovery would not be available if the case were to remain in chapter 13.

b. Judicial Estoppel: The equitable doctrine of judicial estoppel prevents a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking an inconsistent position. In re Hamilton, 270 F.3d 778, 782 (9th Cir. 2001). "In the bankruptcy context, a party is judicially estopped from asserting a cause of action not mentioned in a reorganization plan or otherwise mentioned in the debtor's schedules or disclosure statements." Id. at 783. Failure by the Debtor to disclose the lawsuit in his schedules, or to amend his schedules to disclose the lawsuit, it is argued, prevent him from later pursuing the claim against Qwest. The chapter 7 trustee, however, would not be so affected and could pursue a recovery

against Qwest. See An-Tze Cheng v. K & S Diversified Investments, Inc. (In re An-Tze Cheng), 308 B.R. 448 (9th Cir. BAP 2004).

However, as the Eleventh Circuit opined in Reynolds v. Wendy's Intern., Inc. (In re Parker), 365 F.3d 1268 (11th Cir. 2004), the better approach is to find that the Debtor lacked standing to bring the action in the first place.

CONCLUSION

I find that the Debtor lacked standing to bring the action against Qwest in the Jackson County Circuit Court, as the cause of action was property of the chapter 7 estate and subject to administration by the chapter 7 trustee. Debtor has not met his burden of proof with respect to good faith under Code § 1325(a)(3) and feasibility under Code § 1325(a)(6). Moreover, there are questions as to whether the Best Interest of Creditors test at § 1325(a)(4) has been met. Accordingly, confirmation of Debtor's plan of reorganization will be denied and the chapter 13 trustee's motion to reconvert to chapter 7 will be granted.

FRANK R. ALLEY, III
Bankruptcy Judge