

§ 523(a)(3)(A)
§ 727(d)
§ 727(e)
Due Process

In re Ford, Case No. 390-30671-P7
Ford v. Ford, Adv. No. 92-3227
Civ. No. 96-482-HA

10/3/96 Haggerty, J (Affirming ELP) Unpublished

Debtor filed Chapter 7, but failed to list plaintiff as a creditor. The case was treated as a no asset case, based on debtor's fraudulent representation that he had no assets, and his debts were discharged and the case closed. More than a year later, debtor moved to reopen the case to add plaintiff to his schedules. After the case was reopened, plaintiff filed a complaint objecting to debtor's discharge and asserting that her debt was nondischargeable under § 523(a)(3)(A). The District Court affirmed Judge Perris's opinion, 159 BR 590, in which she had held that the debt was discharged because § 523(a)(3)(A) did not apply in a no-asset, no claims bar date case. Further, application of § 727(e), the one year time bar, to plaintiff's request for revocation of discharge on the basis of fraud would violate due process, where debtor had concealed his bankruptcy until after the time limit has passed. The court held that § 523(a)(3)(A) does not apply in a case that is treated as a no asset case, even if the case was treated as a no asset case as a result of debtor's fraudulent concealment of assets. Applying § 727(e) to bar plaintiff from seeking to revoke debtor's discharge under § 727(d) is an unconstitutional violation of due

process when the debtor has concealed the bankruptcy past the time limit for filing a complaint to revoke discharge, because notice is a constitutional requirement before property can be taken.

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Date: 10/3/96

Donald M. Cinnamond, Clerk

By: [Signature], Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

CLERK, U.S. BANKRUPTCY COURT DISTRICT OF OREGON

OCT - 3 1996

In re)
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 WILLIAM O. FORD, JR.,)
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 Debtor.)
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 JULANNE I. FORD,)
)
 Plaintiff/Respondent,)
)
 v.)
)
 WILLIAM O. FORD, JR.,)
)
 Defendant/Respondent)
)
 v.)
)
 UNITED STATES OF AMERICA,)
)
 Intervenor/Appellant.)
 _____)

Bankruptcy No. 390-30671-P7
 Adv. No. 92-3227-P
 Civil No. 96-482-HA

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OPINION

1 - OPINION

96-18(12) 60

Danny H. Gerlt
9498 S.W. Barbur Boulevard, Suite 305
Portland, Oregon 97219
Attorney for Plaintiff/Respondent Julianne Ford

Virgil E. Dugger
17641 S.E. Stark Street
Portland, Oregon 97233
Attorney for Defendant/Respondent William Ford

J. Christopher Kohn
Tracy J. Whitaker
John T. Stemplewicz
Phillip M. Seligman
Attorneys, Civil Division
United States Department of Justice
P.O. Box 875
Ben Franklin Station
Washington, DC 20044
Attorneys for Intervenor/Appellant United States of America

HAGGERTY, Judge:

After debtor's Chapter 7 bankruptcy case was reopened to add a previously unscheduled creditor, creditor filed a complaint objecting to discharge of all pre-petition debts and seeking determination that the unscheduled debt was nondischargeable. The United States intervened pursuant to 28 U.S.C. § 2403 (a), because a question as to the constitutionality of 11 U.S.C. § 727 was raised. The Bankruptcy Court held that (1) a discharge exception for unlisted, unscheduled debts is inapplicable in a no asset, no claim-bar case; and (2) due process precluded dischargeability of a debt where the debtor fraudulently concealed his bankruptcy from creditors until the one-year statute of limitations for revocation of discharge on fraud grounds had expired. The Bankruptcy Appellate Panel ("BAP") affirmed. The appellant United States brings this appeal. For the reasons stated below, the order of the Bankruptcy Court and the BAP is affirmed.

BACKGROUND

The debtor, William Ford, filed for bankruptcy under Chapter 7 on February 8, 1990. A year prior to the bankruptcy, the plaintiff, Julanne Ford, was awarded a money judgment against debtor as part of a divorce decree. Debtor never made payments on that money judgment. On the schedules of assets and liabilities filed with his bankruptcy petition, debtor did not list any liability to plaintiff and claimed he had no assets from which a dividend could be paid. Because debtor listed no assets available for distribution to his creditors in bankruptcy, no bar date establishing a deadline for creditors to file proofs of claim was set by the court.

On February 16, 1990 the clerk sent "notice of no dividend" to all scheduled creditors pursuant to Bankruptcy Rule 2002 and Bankruptcy Court Local Rule 3002-1 (a). The notice stated that the creditors need not file proofs of claim, and that the creditors would be notified and given an opportunity to file claims if it later appeared that there were assets. No assets from which a dividend could be paid were discovered. On June 1, 1990 debtor received a discharge of all his pre-petition debts and the case was closed.

On April 24, 1992, debtor filed an ex parte motion to reopen the case in order to schedule plaintiff as an unsecured creditor. The motion was granted, and debtor amended his schedule to add plaintiff as an unsecured creditor. On May 22, 1992, plaintiff filed her complaint objecting to the discharge and seeking to establish that her claim was nondischargeable under 11 U.S.C. § 523 (a) (3) (A).¹

Section 523 (a) (3) (A) excepts from discharge those debts

¹ Unless otherwise indicated, all chapter references are to Chapter 11 of the Bankruptcy Code.

(3) neither listed nor scheduled . . . in time to permit --

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing

After a hearing, the Bankruptcy Court found that debtor intentionally omitted assets from his schedules, and intentionally did not schedule plaintiff as a creditor. The Bankruptcy Court also found that plaintiff did not have notice or actual knowledge of debtor's bankruptcy case until September 1991, over one year after the discharge, and thereby was deprived of the right to successfully object to debtor's discharge.

Pursuant to 28 U.S.C. § 2403 (a), the Bankruptcy Court notified the United States that the discharge of plaintiff's claim may raise due process concerns. The United States intervened. The Bankruptcy Court held that plaintiff's debt was discharged by § 727 and that her debt was not excepted by § 523 (a) (3) (A). Section 727 (b) provides:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter

A creditor may request a revocation of a discharge if the discharge was obtained through the fraud of the debtor, and the creditor did not know of such fraud until after the discharge. 11 U.S.C. § 727 (d) (1). Section 727 (e) provides that a request for revocation of a discharge on the grounds of fraud must be made within one year after the discharge is granted. Since plaintiff was barred by the one-year statute of limitations in § 727 (e) from bringing a claim based on fraud, the bankruptcy court held § 727 unconstitutional as it applied in this case. The BAP affirmed.

The United States filed a notice of appeal to this court on August 20, 1993. On the same day, Ford filed a Chapter 13 petition with the Bankruptcy Court. Pursuant to 11 U.S.C. § 362,

the appeal was automatically stayed pending the resolution of the Chapter 13 case. On June 5, 1995, Ford's Chapter 13 petition was dismissed and the stay of this appeal was lifted.

ISSUES ON APPEAL

The issues presented by the United States on appeal are as follows:

1. Did the BAP err in affirming the Bankruptcy Court's finding that plaintiff's claim is not excepted from discharge under § 523 (a) (3) (A)?
2. Did the BAP err in affirming the Bankruptcy Court's finding that § 727 is unconstitutional as applied in this case?

APPLICABLE STANDARD

In reviewing a bankruptcy court decision, this court acts as an appellate tribunal, and is governed by traditional standards of appellate review. Factual findings are reviewed under the clearly erroneous standard, and conclusions of law are reviewed *de novo*. Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986).

The issue of dischargeability of debt is one of statutory interpretation, a question of law that the district court reviews *de novo*. In re Acequia, Inc., 787 F.2d 1352, 1357 (9th Cir. 1987). *De novo* review requires consideration of the matter anew, as if it had neither been heard before, nor a decision been previously rendered. United States v. Silverman, 861 F.2d 571, 576 (9th Cir. 1988). The issue of constitutionality of a section of the Bankruptcy Court is a question of law and is reviewed *de novo*.

ANALYSIS

The United States asserts that plaintiff's claim should be excepted from discharge under § 523 (a) (3) (A). Exceptions to discharge are confined to those plainly expressed in the

Bankruptcy Code. In re Norman, 25 B.R. 545, 547 (Bankr. S.D. Cal. 1982). In addition, exceptions to discharge should be strictly construed in favor of the debtor. In re Klapp, 706 F.2d 998, 999 (9th Cir. 1983).

Following the Ninth Circuit's decision in In re Beezley, the Bankruptcy Court held that plaintiff's claim was discharged because § 523 (a) (3) (A) is inapplicable to a no asset, no claim-bar case. In re Ford, 159 B.R. 590, 591 (Bankr. D. Or. 1993). See In re Beezley, 994 F.2d 1433 (9th Cir. 1993). The United States argues that the debt is nondischargeable under § 523 (a) (3) (A) because plaintiff did not have notice or actual knowledge of debtor's bankruptcy in time to object to debtor's discharge.

In Beezley, the debtor moved to reopen his no asset, no bar date Chapter 7 bankruptcy case in order to amend his schedules to list an omitted creditor. The debtor believed that it was necessary to amend the schedules in order to discharge the unsecured debt. The Ninth Circuit held that after a no asset, no bar date case is closed, dischargeability is unaffected by scheduling. Therefore, amending the schedules would be "a pointless exercise." Beezley, 994 F.2d at 1434.

In a no asset, no bar date case, § 727 (b) operates to discharge all pre-petition debts, whether scheduled or unsecured, unless excepted from discharge by § 523 (a). If the omitted debt is of the type covered by § 523 (a) (3) (A), the debt has already been discharged pursuant to § 727. Id.

The United States attempts to distinguish this case from Beezley, arguing that the Bankruptcy Court found that Ford had assets at the time schedules were filed and that he fraudulently concealed his assets. The United States contends that since Ford had assets at the time he filed for bankruptcy, his case should have been treated as an asset case and the

Bankruptcy Court should have set a bar date establishing a deadline for creditors to file proofs of claim. If a claims-bar date had been set by the Bankruptcy Court, plaintiff's debt would be excepted from discharge under § 523 (a) (3) (A), because she would not have received notice "in time for such timely filing."

The narrow question presented is whether Beezley controls in a case in which the debtor fraudulently conceals assets at the time of filing bankruptcy so that no bar date is set. This court holds that the Ninth Circuit's decision in Beezley is controlling in such a case. Since no bar date for filing claims was set, plaintiff was not deprived of the right to file a timely proof of claim. Debtor's bad faith is irrelevant, because scheduling does not effect dischargeability of the debt. Beezley, 994 F.2d at 1439 (Justice O'Scannlain concurring).

Furthermore, the Bankruptcy Code provides a creditor a remedy where a discharge has been procured by fraud. Section 727 (d) allows a bankruptcy court to revoke a previously granted discharge if such discharge was "obtained through fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge." This provision, however, is limited by § 727 (e), which requires that requests for revocation of a discharge be made within one year after such discharge is granted. In the present case, the Bankruptcy Court found that plaintiff did not have notice or actual knowledge of debtor's bankruptcy petition until September 1991. Since debtor received a discharge of all pre-petition debts on June 1, 1990, plaintiff could not have known of debtor's fraud until after the one-year statute of limitations for revocation on fraud grounds had expired. The Bankruptcy Court found that plaintiff could have successfully contested debtor's discharge, but that debtor, "by concealing his bankruptcy for a long-enough period of time, assured his discharge would be incontestable on the basis of fraud.

That concealment also deprived the plaintiff of any opportunity to protect her debt by challenging the debtor's discharge." In re Ford, 159 B.R. at 593.

The United States does not challenge the Bankruptcy Court's findings that debtor fraudulently concealed his bankruptcy from plaintiff and that debtor intentionally omitted plaintiff from his schedules. The United States does, however, challenge the Bankruptcy Courts holding that due process precludes the dischargeability of a debt where debtor fraudulently concealed his bankruptcy from a creditor until the one-year statute of limitations for revocation on fraud grounds had expired. This challenge is rejected.

Since plaintiff did not have notice or actual knowledge of debtor's fraud until after the one-year statute of limitations had expired, plaintiff, an unsecured creditor, was denied the rights guaranteed by the Bankruptcy Code. Specifically, the Bankruptcy Court found that if plaintiff had received notice of the bankruptcy, she could have successfully contested the debtor's discharge. In re Ford, 159 B.R. at 594.

Notice is not only a statutory requirement under § 523 (a) (3) (A), but is also a constitutional requirement. Due process provided by the Fifth Amendment of the United States Constitution requires that a person be given notice and an opportunity to be heard before property can be taken. Unsecured creditors are entitled to procedural due process protection. Credit Alliance Corporation v. Dunning-Ray Insurance Agency, Inc. (In re Blumer), 66 B.R. 109, 114 (9th Cir. BAP 1986), aff'd without opinion 826 F.2d 1069 (9th Cir. 1987). Procedural due process requires that individualized notice be given before rights are affected in a judicial proceeding. Texaco v. Short, 454 U.S. 516, 534-35 (1982); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

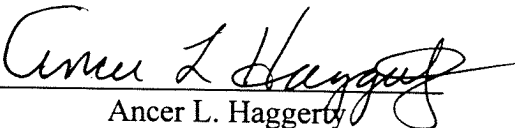
Under the Ninth Circuit’s decision in Beezley, an unscheduled debt of the type described in § 523 (a) (3) (A) is discharged even if the creditor did not have notice or actual knowledge of the debtor’s claim. 994 F.2d at 1434. As Judge O’Scannlain explains in his concurring opinion, in a no asset case where no bar date is set, “§ 523 (a) (3) (A) is not implicated because there can never be a time in which it is too late ‘to permit a timely filing of a proof of claim.’” Id. at 1436 (citing In re Mendiola, 99 B.R. 864, 867 (Bankr. N.D. Ill. 1989)). Here, plaintiff’s omitted debt was discharged pursuant to § 727. Thus, plaintiff did not have notice of debtor’s bankruptcy in time to challenge debtor’s discharge on June 1, 1990. The Bankruptcy Court found that plaintiff did not have notice or actual knowledge of the bankruptcy until September 1991, more than one year after the discharge. Plaintiff was denied due process because she did not have notice of debtor’s bankruptcy in time to utilize the revocation for fraud provision found in § 727.

Accordingly, this court agrees with the Bankruptcy Court that § 727 is unconstitutional in no asset, no bar date cases in which an omitted creditor does not have notice or actual knowledge of the debtor’s discharge until after the one year statute of limitations for revocation on fraud grounds has expired.

CONCLUSION

The Bankruptcy Court properly held that plaintiff's unscheduled debt was discharged by § 727 because § 523 (a) (3) (A) is inapplicable in no asset, no bar date cases and that principles of due process precluded dischargeability of a debt where the debtor fraudulently concealed his bankruptcy from his creditors until the period for revocation of discharge on fraud grounds had expired. This court does not find § 727 unconstitutional in all applications, but only invalid as applied in the circumstances of this case. Accordingly, this court affirms the decision of the BAP upholding the Bankruptcy Court.

Dated this 3. day of October, 1996.


Ancer L. Haggerty
United States District Judge