

11 U.S.C. § 1328(a)
11 U.S.C. § 523(a)

In re Doublas Bachman Crites

Case No. 386-06989-psh 13

9/26/96

PSH

Published

The debtor filed an adversary proceeding seeking a ruling that an unsecured debt owed to the defendant, State of Oregon Bureau of Labor and Industries, ("BOLI") was discharged under § 1328(a) when he completed his Chapter 13 plan.

The debtor filed his Chapter 13 following a Chapter 7 case in which the debt owed to BOLI had been found to be nondischargeable. BOLI was not listed in the debtor's Chapter 13 schedules and received no notice of the Chapter 13 filing until after the debtor completed his plan. The debtors plan provided for full payment of all priority and secured debt. General unsecured creditors received no payments. A portion of the debt owed to BOLI would have been entitled to priority in the Chapter 13 case. The balance would have been general unsecured debt. the debtor conceded that the portion of the debt entitled to priority in the Chapter 13 was not discharged upon completion of the Chapter 13 plan but argued that the general unsecured portion of the debt was discharged.

The debtor argued that In re Beezely and In re Ford, read together, established a rule that unsecured debt was discharged in a bankruptcy unless the lack of notice to the creditor deprived the creditor of a meaningful right such as the right to object to discharge. The court rejected the argument that Beezely and Ford controlled the decision in this case noting that both were based on an analysis of § 523(a) which is inapplicable in Chapter 13 actions.

The court noted that under § 1328(a), completion of plan payments discharges only debts "provided for" under the plan. It rejected the debtors argument that a plan which provided for 0% to unsecured creditors "provided for" all unsecured creditors, regardless of whether those creditors were scheduled. In doing so the court, citing In re Gregory noted that there is a difference between a 0% plan and one which fails to acknowledge an unsecured claim because, where the debt is unacknowledged, "the creditor has no ability to object in a meaningful way, to confirmation of the debtor's plan." The court concluded, therefore, that an unsecured

debt is not "provided for" in the plan and is not discharged upon completion of plan payments.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

IN RE)
DOUGLAS BACHMAN CRITES,) Case No. 386-06989psh13
) Adversary Case No.96-3057
Debtor,)
DOUGLAS BACHMAN CRITES,)
)
Plaintiff,) MEMORANDUM OPINION
)
v.)
)
STATE OF OREGON ex rel MARY)
ROBERTS BUREAU OF LABOR AND)
INDUSTRIES,)
)
Defendant.)

The debtor has filed an adversary proceeding seeking a ruling that a unscheduled general unsecured debt owed to the defendant, State of Oregon Bureau of Labor and Industries, ("BOLI") was discharged under 11 U.S.C. § 1328(a) when he completed his Chapter 13 plan. The parties have submitted this issue to the court through cross motions for summary judgment. I have jurisdiction under 28

1 U.S.C. §§ 1334(b) and 157(a) and Local District Court Rule 2101-1.
2 This is a core proceeding in which I may enter a final judgment.
3 28 U.S.C. § 157 (b) (2) (I). I find that the matter may be determined
4 on the motions.

5 FACTS

6 The debtor filed a Chapter 7 on October 11, 1984. Prior to
7 entry of an order of discharge in that case BOLI filed a timely
8 adversary proceeding which included counts under both 11 U.S.C. §§
9 523 and 727. It alleged that the debtor, as the sole shareholder of
10 Capitol Dairy Queen, Inc., operated the corporation as his alter ego.
11 In this capacity he obtained the services of approximately 50
12 employees when he knew that the corporation was insolvent and would
13 not be able to pay wages to those employees as they came due. The
14 complaint further alleged that the debtor had transferred and removed
15 corporate property within one year prior to filing the petition with
16 the intent to hinder or defraud his creditors.

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18 The adversary proceeding remained active for over a year. In
19 April, 1986, BOLI and the debtor entered into a stipulation in which
20 the debtor agreed to entry of a judgment of non-dischargeability in
21 favor of BOLI in the amount of \$21,707 plus interest at 7.50% per
22 annum. That judgment was docketed on April 28, 1986. On October 21,
23 1986 the court entered an order of discharge on behalf of the debtor.
24 The Chapter 7 case was closed on December 5, 1986.

25
26 The debtor filed a Chapter 13 petition on December 24, 1986,
less than three weeks later. When he filed his Chapter 13 petition

1 the debtor scheduled three priority creditors with claims totaling
2 \$22,254 and three unsecured non-priority claimants with debts
3 totaling \$1,950. The priority creditors were the United States
4 Internal Revenue Service, The State of Oregon Department of Revenue
5 and the State of Oregon Employment Division. The parties agree that
6 BOLI was not scheduled as either a priority or general unsecured
7 creditor in this case. Therefore, it did not receive formal notice
8 that the Chapter 13 case had been filed.¹ Further, there has been no
9 evidence presented by either party suggesting that at any time during
10 the Chapter 13 proceedings BOLI had actual notice of that filing.
11 Given the size of the BOLI obligation and the then recent litigation
12 history between the parties, I must assume that the debtor did not
13 intend to provide BOLI with notice of the Chapter 13 case.²

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15 The debtor's proposed plan provided that priority creditors
16 would be paid in full and general unsecured creditors would receive
17 19% of their allowed claims. At the time of confirmation the
18 percentage to general unsecured creditors was reduced to zero. The
19 debtor completed his plan and obtained a discharge under 11 U.S.C. §
20 1328(a) on September 30, 1993.

21 On April 13, 1995, in an attempt to collect on the 1986
22 judgment, BOLI garnished certain of the debtor's funds held by First
23 Interstate Bank and by his employer. At that time the debtor
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25 ¹ The debtor does not assert that notice to the Oregon
26 Department of Revenue or the Oregon Employment Division constituted
notice to the Oregon Bureau of Labor and Industries.

² The holding in this case would not be affected if I found
that the lack of notice was unintentional.

1 notified BOLI that its obligation had been discharged in the debtor's
2 Chapter 13 bankruptcy. Thereafter the court granted the debtor's
3 motion to reopen his Chapter 13 case for the purpose of filing the
4 instant suit. This adversary proceeding was filed on January 26,
5 1996.

6 LEGAL ANALYSIS

7 The debtor contends that In re Beezely, 994 F.2d 1433 (9th Cir.
8 1993) and In re Ford, 159 B.R. 590 (Bankr. D.Or. 1993) read together:
9

10 "established a logical statutory and constitutional
balancing test that:

11 (1) protects an unlisted creditor when the lack
of notice deprives him of a meaningful right (to
12 contest dischargeability, e.g.) but,

13 (2) protect's [sic] the debtor's right to
discharge where lack of notice to the unlisted
14 creditor was a mere "formal error" which caused
no injury."

15 (Pl's Mem. Supp. Sum. J. at 5)

16 Based on this analysis the debtor concedes that \$3,971.41 of the
17 judgment BOLI obtained, which represents employees' wages which would
18 have been entitled to priority status in his Chapter 13 case, should
19 be exempted from discharge because the failure to schedule that
20 amount deprived BOLI of the right to have it paid in full under the
21 plan. He contends, however, that since general unsecured creditors
22 received no payments under the plan, the failure to schedule the
23 unsecured debt caused no injury. Therefore that portion of the
24 judgment should be found to have been discharged.

25 In Beezely a Chapter 7 debtor, having failed to schedule a
26 prepetition judgment creditor, attempted to reopen his case to amend

1 his schedules to include it. In denying his motion to reopen the
2 court analyzed 11 U.S.C. § 523(a)(3) under the particular facts and
3 found that such a motion was a pointless exercise. It held that the
4 purpose of § 523(a)(3)(A) was to deny discharge of unscheduled debt
5 if the failure to schedule the debt deprived the creditor of the
6 opportunity to file a timely claim. The purpose of § 523(a)(3)(B)
7 was to deny discharge of an unscheduled debt if the failure to
8 schedule the debt deprived a creditor holding claims for intentional
9 torts the opportunity to file either a timely claim or a timely
10 nondischargeability complaint. In a case like Beezely, where the
11 estate had no nonexempt assets and, consequently, the court does not
12 send out notice of a bar date beyond which claims would be treated as
13 untimely, § 523(a)(3)(A) "is not implicated 'because there can never
14 be a time when it is too late 'to permit timely filing of a proof of
15 claim''." Beezely, at page 1436 citing In re Mendiola, 99 B.R.864,
16 867 (Bankr. N.D.Ill. 1989). If an unscheduled debt were for an
17 intentional tort, the language of § 523(a)(3)(B) denied discharge.
18 Adding a creditor to the schedules later would not change the effect
19 of this statute.
20

21 In Ford, as in Beezely, the Chapter 7 debtor had filed what was
22 administered as a no nonexempt asset case; consequently, the court
23 did not send out notice to creditors of a deadline for filing timely
24 proofs of claim. After discharge the debtor reopened the case to add
25 an omitted prepetition creditor. The creditor filed an adversary
26 complaint seeking a judgment that the claim was non-dischargeable

1 under § 523(a)(3)(A) and that the debtor's discharge should be
2 revoked.

3 The court found that the creditor would have prevailed on a
4 complaint to deny discharge under 11 U.S.C. § 727 had she had an
5 opportunity to timely file such a complaint. Nonetheless, declaring
6 itself bound by the holding in Beezely, it found that § 523(a)(3)(A)
7 did not deny discharge of the debt. It concluded, however, that
8 "since the plaintiff's debt was unsecured and she received neither
9 knowledge nor notice of the case in time to successfully challenge
10 the debtor's discharge, procedural due process requires that the
11 plaintiff's debt remained unaffected by the Order of Discharge...."
12 Id. at 594.

14 I do not think that either Beezely, or Ford to the extent that it
15 follows Beezely, is pertinent to the issue before this court.
16 Beezely was a case filed under Chapter 7. The court was asked to
17 interpret one of the subsections of § 523(a). These subsections
18 describe those debts which are not included in the discharge from
19 debt which individual debtors otherwise usually receive in Chapter 7
20 from the bankruptcy court. By its own terms § 523(a) does not apply
21 to debtors, who, as with Mr. Crites, receive a debt discharge under
22 11 U.S.C. § 1328(a).

24 The debtor propounds the proposition that Beezely, through its
25 interpretation of § 523(a)(3)(A), enunciates a form of "no harm-no
26 foul" rule which can be transposed into any set of bankruptcy
circumstances involving a general unsecured creditor who has received

1 no notice of the bankruptcy filing.³ There are two problems with this
2 proposition. First, Beezely was an opinion narrowly written,
3 focusing only on interpreting the technical and confusing language of
4 § 523(a)(3). This subsection applies only under a specific, narrow
5 set of facts. I do not think the opinion was intended to be read
6 outside the narrow confines of its own facts and law.⁴

7
8 Second, the debtor's proposition assumes his failure to notify
9 BOLI of his Chapter 13 filing resulted in no harm to it as a general
10 unsecured creditor. He presumes that the only "meaningful right"
11 which a general unsecured creditor in the Chapter 13 process has is
12 the right to file a timely proof of claim which, if allowed,
13 generates plan payments from the debtor. This is an incorrect
14 presumption.

15 The Chapter 13 process allows general unsecured creditors
16 several procedural rights, most of which, because of the speed with
17 which Chapter 13 plans are before the court for confirmation, must be
18 exercised early in the case. They may object to confirmation of a
19 plan on several different bases, including the plan's lack of

21 ³ For purposes of his argument the debtor seems conveniently
22 to have forgotten that the Beezely court also found that if the
23 creditor who received no notice held a debt which represented an
intentional tort that § 523(a)(3)(B) would except that debt from
discharge.

24 ⁴ Unlike Chapter 13, Chapter 7 directs a process of rapid
25 liquidation of any nonexempt assets for distribution to unsecured
26 creditors and rapid discharge of debt. In Chapter 7 general
unsecured creditors have very limited options to exercise in
protecting their right to payment. They may file a proof of claim,
they may file a complaint to determine whether their debt is
nondischargeable under one of the provisions of 11 U.S.C. § 523(a),
or they may file a complaint under 11 U.S.C. § 727(a) to deny the
discharge as to all indebtedness.

1 feasibility⁵, the debtor's failure to file the plan in good faith,⁶
2 the plan's failure to meet the "best interests of creditors" test⁷ or
3 to meet the "disposable income test"⁸, as well as the right to request
4 modification of a confirmed plan.⁹ The debtor's failure to schedule
5 the debt owed to BOLI deprived BOLI of all of these rights. Nor are
6 these rights deminimus. On the contrary, if the court were to
7 sustain the creditor's position under any of these Code sections
8 either its treatment under the plan would improve or the Chapter 13
9 case would be dismissed.¹⁰

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11 The debtor recognizes that for an allowed claim to be discharged
12 through Chapter 13 it must be "provided for" in the plan.¹¹ The Ninth
13 Circuit has defined the term "provided for" as used in several
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17 ⁵ 11 U.S.C. § 1325(a)(6).

18 ⁶ 11 U.S.C. § 1325(a)(3).

19 ⁷ 11 U.S.C. § 1325(a)(4).

20 ⁸ 11 U.S.C. § 1325(b).

21 ⁹ 11 U.S.C. § 1329(a).

22 ¹⁰ If I were to find the plan was not feasible or had been
23 filed in bad faith I would dismiss the case. The creditor then
24 would be free to pursue the debtor in a nonbankruptcy forum for the
25 full amount of the debt. If I were to find either that the "best
26 interest of creditors" test or the "disposable income" test had not
been met the debtor would be required to increase the amount to be
paid through the plan for the benefit of creditors. Finally, a
creditor will ask the court to modify a confirmed plan when it
results in an increased monetary benefit to itself.

¹¹ 11 U.S.C. § 1328(a). In contrast, with the exceptions
enumerated in 11 U.S.C. § 523(a), Chapter 7 discharges all det
arising before entry of the order for relief. 11 U.S.C. § 727(b).

1 sections of Chapter 13¹² to mean that the plan must "make a provision
2 for' it, i.e., deal with it or refer to it." In re Gregory 705 F.2d
3 1118 (9th Cir. 1983). In this case paragraph 2(d) of the debtor's
4 plan, while not listing specific creditors by name, states that
5 general unsecured creditors will receive no payments under the plan.
6 The debtor contends, therefore, that, all general unsecured creditors
7 having been "referred to" as a class by the plan terms, BOLI's
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10 unscheduled general unsecured claim was "provided for" and thus
11 discharged through the provisions of 11 U.S.C. § 1328(a).

12 In Gregory the court held that a zero percent plan "provided
13 for" a scheduled unsecured claim and that consequently that claim
14 would be discharged upon completion of plan payments. In doing so
15 the court rejected an unsecured creditor's argument that there was no
16 difference between a zero percent plan and one which failed to
17 acknowledge the unsecured claim, noting that

18 " In the former case the creditor has no ability to object,
19 in a meaningful way, to confirmation of the debtor's plan."

20 In In re Tomlan 907 F.2d 114 (9th Cir. 1990) the court, citing
21 Gregory, picked up on this theme.

22 "[I]n the former case [where the process has not
23 acknowledged the creditor] the unsecured creditor.... is
24 not a part of the plan and hence, he may assume that the
25 plan will not affect the obligations owing him.... [I]t
26 would be manifestly unfair to discharge such creditors'
obligations upon the consummation of a plan which they
could not contest.... On the other hand, when a debtor
proposes to pay nothing to unsecured creditors the latter
have notice of the possible discharge of their debt and may

¹² 11 U.S.C. §§ 1325(a)(5), 1327(a), 1328(a), 1329(a)(3).

1 actively seek to obtain a denial of confirmation based upon
2 a lack of good faith on the part of the debtor or upon
3 other improprieties. Once confirmation occurs, these
4 unsecured creditors may appeal the trial court's decision.
Such procedural rights are denied a creditor who is
completely omitted from a Chapter 13 plan."

5 Id. at 793.

6 The debtor misses the critical distinction between his facts and
7 those in both Gregory and Tomlan. In the latter cases the creditors
8 were included in the debtors' schedules and received notice of the
9 Chapter 13 process. They then failed to act to preserve their rights
10 in a timely fashion. The imperative from these cases is that the
11 Ninth Circuit definition of "provided for" as used in Chapter 13
12 perforce includes notice to creditors which is sufficient to provide
13 them with the opportunity to timely participate in the procedural
14 rights granted to them in that chapter.

15 In short, for purposes of Chapter 13, the seemingly
16 unpretentious two word phrase, "provided for", encompasses the
17 procedural due process requirements of the 5th Amendment to the
18 United States Constitution. I agree with the debtor that Ford
19 contains language which is of relevance to the issue before me.
20 However, the language supports BOLI's position rather than his own.
21 In bankruptcy cases, where the parties and the court are so often
22 focused on the minutia of financial controversy, certain language in
23 Ford bears repeating.

24
25 "In a judicial proceeding, procedural due process
26 requires that individualized notice be given before rights
can be affected. Texaco, Inc. v. Short, 454 U.S. 516, 534-
35, 102 S.Ct. 7811, 794-95, 70 L.Ed.2d 738 (1982); Mullane

1 v. Central Hanover Bank & Trust Co., supra, 339 U.S. 306,
2 3114, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

3 The United States Supreme Court has found that the
4 fundamental requirement of due process, the right to be
5 heard, is meaningless without notice. Mullane v. Central
6 Hanover Bank & Trust Co., supra, 339 U.S. 306, 314, 70
7 S.Ct. 652, 657. 'An elementary and fundamental requirement
8 of due process in any proceeding which is to be accorded
9 finality is notice reasonably calculated, under all of the
10 circumstances, to apprise interested parties of the
11 pendency of the action and afford them an opportunity to
12 present their objections.'
13 339 U.S. at 314, 70 S.Ct. at 657."

14 BOLI's claim, not having been provided for in the debtor's
15 Chapter 13 plan, was not discharged when the court granted the debtor
16 his discharge under 11 U.S.C. § 1328 (a).

17 For the reasons stated, the court will deny the debtor's motion
18 for summary judgment and grant BOLI's cross motion. This memorandum
19 opinion contains the court's findings of fact and conclusions of law
20 pursuant to Fed. R. Bankr. P. 7052 and they will not be separately
21 stated.

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POLLY S. HIGDON
Bankruptcy Judge