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11 U.S.C. § 727(a)
Bank. R. 4004(a)

In re David and Kathleen Jackson Case No. 397-32137-psh7
Lee v Jackson Ad. No. 97-3313

December 17, 1997 P.H. Unpublished

The plaintiff was a shareholder and director in a corporation to which the debtor owed money, but was not a creditor of the debtors at the time the bankruptcy was filed. Creditor filed a complaint objecting to the debtors' discharge under § 727(a) and the debtors moved to dismiss on the grounds that the plaintiff was not the real party in interest. The plaintiff thereafter arranged for the corporation to transfer its claim against the debtors to the plaintiff and his fellow stockholders individually. The transfer of the corporation's claim against the debtors occurred after the bar date for filing complaints objecting to discharge under § 727(a).

The court found that the real issue was not whether the plaintiff was a real party in interest, but whether he had standing to bring the § 727(a) action. Only a creditor, the trustee or the United States trustee has standing to bring an such action under § 727(c). Prior to the assignment from the corporation the plaintiff was not a creditor and therefore lacked standing to bring a § 727(a) suit. The assignment did not occur until after the bar date for filing claims under § 727(a). The court, citing In re Folk, 211 B.R. 378 (9th Cir. BAP 1997) held that under the circumstances of the case it would undermine the statute of limitations set by Rule 4004(a) to recognize standing in the plaintiff after the bar date for filing complaints under § 727(a).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 397-32137psh7
DAVID JACKSON and)
KATHLEEN JACKSON,)
) Debtors.)
_____) Adversary Proceeding
) No.97-3313
JEFF LEE,)
) Plaintiff,)
) v.) MEMORANDUM OPINION
))
DAVID JACKSON and)
KATHLEEN JACKSON,)
) Defendants.)
_____)

The plaintiff seeks to deny the debtors a discharge under 11 U.S.C. § 727(a)(2)(A). The adversary proceeding was filed within the 60 day time limit established by Bankruptcy Rule 4004(a). The debtors contend that the case should be dismissed because the plaintiff is not the real party in interest.

The parties' pleadings reflect that they agree on the following facts. The plaintiff is a shareholder and former officer of Managing,

1 Leasing & Selling, Inc. ("MLS"), a corporation which held a claim
2 against the debtors at the time they filed their bankruptcy petition.

3
4 Shortly after the bankruptcy filing its Board of Directors
5 dissolved MLS. At the time of the dissolution a resolution was signed
6 by the board members of MLS which empowered the corporation's officers,
7 which included the plaintiff, to take any action "in the name and on
8 behalf of the Corporation" to implement the terms of the plan of
9 dissolution. Shortly after the corporate Articles of Dissolution were
10 filed with the Secretary of State the plaintiff brought the instant
11 action in his own name, appearing pro se.

12 The debtors originally filed a motion to dismiss, arguing that
13 Local Bankruptcy Rule 9010-1C requires that a corporate creditor be
14 represented before the court by an attorney. This court denied that
15 motion on the grounds that the adversary proceeding had been filed by
16 the plaintiff individually, not on behalf of MLS, and under our local
17 rules an individual may represent himself before the court.

18 The parties' pleadings reflect that they also agree that after
19 the debtors filed their initial motion to dismiss and prior to the time
20 they filed their present motion to dismiss, MLS assigned its interest
21 in its claim against the debtors to its shareholders. Consequently,
22 at the time of the hearing on this motion the plaintiff holds an
23 interest in a claim against the debtors. Nonetheless, the debtors
24 contend that the proceeding must be dismissed because the plaintiff was
25 not the real party in interest at the time the adversary proceeding was
26 commenced.

1 The plaintiff argues that because MLS was dissolved before the
2 adversary proceeding was filed it ceased to exist as a legal entity and
3 its assets, including its claim against the debtors, were necessarily
4 transferred to its shareholders. The plaintiff is wrong. Under Oregon
5 law, a corporation "is an entity separate and distinct from its
6 stockholders, with separate and distinct rights and liabilities..."
7 W.D. Miller Lumber Corporation v. Miller, 225 OR 427, 433; 357 F.2d
8 503, 506 (Or. 1960). Further, dissolution of a corporation does not
9 end its existence or transfer title to its property. ORS 60.637(2)(a).
10 On the contrary, a dissolved corporation "continues its corporate
11 existence...[and may carry on any business] appropriate to wind up and
12 liquidate its business and affairs." ORS 60.637(1). The powers
13 retained by a dissolved corporation specifically include the power to
14 commence a lawsuit in the corporate name. ORS 60.637(2)(e).

15 Although the debtors argue that the plaintiff's complaint should
16 be dismissed because he is not the real party in interest, the court
17 believes the real issue before the court is whether the plaintiff had
18 standing to bring this suit at the time it was filed.

19 "The distinction between standing to sue and the real party in
20 interest doctrine is often blurred by judges and lawyers. Tate v. Snap-
21 on Tool Corporation, 1997 WL 106275 (N.D. Ill. 1997). Both concepts are
22 "used to designate a plaintiff who possesses a sufficient interest in
23 the action to entitle him to be heard on the merits." Charles A.
24 Wright et al., *Federal Practice and Procedure* § 1542 (2nd Ed. 1990).
25 However, "the real party in interest principle is a means to identify
26 the person who possesses the right sought to be enforced ... [whereas]

1 standing involves determination whether the plaintiff can show an
2 injury in fact traceable to the conduct of the defendant." Firestone
3 v. Galbreath, 976 F.2d 279 (6th Cir. 1992). Thus, for example, a
4 Chapter 7 debtor may have standing to bring suit for a prepetition
5 claim if he can show he was injured as a result of a defendant's
6 conduct. However, because of the bankruptcy filing the estate, not the
7 debtor, may possess the right to enforce the claim. Under those
8 circumstances the debtor would not be the real party in interest to
9 bring a suit to enforce the prepetition claim.

10 Under Section 727(c)(1) only the trustee, a creditor, and the
11 United States Trustee have standing to object to the granting of a
12 discharge under § 727(a). The Code defines "creditor" in part as an
13 entity that has a claim, i.e., a right to payment, against the debtor.
14 At the time this adversary proceeding was filed MLS had not yet
15 assigned its claim against the debtors to the plaintiff. Consequently,
16 the plaintiff was not then a creditor and did not have standing to
17 bring the § 727(a) action.

18 The court addressed a similar issue in In re Folks, 211 B.R. 378
19 (9th Cir. BAP 1997). In Folks the debtor was an officer, insider and
20 director of BYCA Television Distribution, Inc. ("BYCA"), a corporation
21 which was also in bankruptcy. CBS, Inc. ("CBS") held a claim against
22 BYCA. CBS filed a § 727(a) adversary proceeding against Folks,
23 claiming creditor status based on an alter ego claim against Folks for
24 the debts of BYCA. Folks moved to dismiss on the grounds that the
25 alter ego claim was the property of the BYCA bankruptcy estate and
26 could be asserted only by the trustee in that case.

1 The bankruptcy court entered a tentative ruling in which it
2 agreed with Folks' contention that the alter ego claim was property of
3 the BYCA bankruptcy estate and could not be asserted by CBS. However,
4 before it entered its final order on that issue CBS filed a motion in
5 the corporate case to compel the BYCA trustee to abandon the estate's
6 alter ego claim to CBS. This motion was filed well after the bar date
7 for filing § 727(a) actions had run in the Folks case. Consequently,
8 CBS asked the bankruptcy court to enter an order of abandonment of the
9 alter ego claim in the corporate bankruptcy case with retroactive
10 effect to the date CBS filed the § 727(a) action in the Folks case.

11 Although the bankruptcy court granted CBS's the motion to compel
12 abandonment it found that CBS was not a creditor of Folks at the time
13 it filed its § 727(a) action and consequently had no standing to do so.
14 It further found that the order it had entered in the corporate case,
15 although reciting retroactive effect to the date of the § 727(a)
16 filing, did not confer standing on CBS to pursue that action.

17 The Bankruptcy Appellate Panel affirmed. It held that any
18 attempt by the bankruptcy court to confer standing after the bar date
19 for filing objections to discharge under § 727(a) would run afoul of
20 Bankruptcy Rule 4004(a) which requires that a complaint objecting to
21 discharge be filed within 60 days of the first date set for the meeting
22 of creditors. It concluded, that under these circumstances the court
23 does not have the power to "retroactively imbue [the plaintiff] with
24 standing." Id. at 388.

25 In this case, as in Folks, the plaintiff was not a creditor of
26 the debtors when he filed this proceeding and therefore had no standing

1 to file it. The record reflects that he obtained his status as a
2 creditor, through assignment, only after the bar date under Bankruptcy
3 Rule 4004(a) for filing such a proceeding had passed. Not only does
4 this court not have jurisdiction, absent standing by the parties, to
5 hear this action, but, as indicated in Folks, under the particular
6 facts of both cases it would undermine the statute of limitations
7 established by Bankruptcy Rule 4004(a) for this court to recognize
8 standing in the plaintiff after the bar date set by that rule has
9 passed.

10 For these reasons the court will enter an order dismissing this
11 adversary proceeding. When it appears that a § 727 count may be
12 dismissed prior to a hearing on the merits I would normally ask the
13 trustee, pursuant to BR 7041 and prior to dismissal, to investigate
14 whether he believes it is appropriate for him to substitute as the
15 party plaintiff to pursue the allegations of the complaint. However,
16 under the particular facts of this case, if the trustee were to be
17 substituted as party plaintiff in this action he also would have no
18 standing to pursue the § 727(a) claim, as the proceeding originally was
19 not timely filed by a person with standing to do so. However, the
20 trustee may have cause, under § 727(d) to seek revocation of the
21 debtors' discharge if the allegations of the plaintiff's complaint
22 appear to have merit. The court therefore will ask the Chapter 7
23 trustee to investigate the allegations of the complaint to determine
24 whether he believes that there are grounds for seeking revocation of
25 the debtors' discharge under § 727(d).

26 This memorandum opinion contains the court's findings of fact

1 and conclusions of law and pursuant to Bankruptcy Rule 7052, they will
2 not be separately stated.

3 An order consistent herewith shall be entered.

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POLLY S. HIGDON
Chief Bankruptcy Judge