2001

Don L. Hammond v. Laroy Orr : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH

DON L. HAMMOND, Plaintiff-Appellant	)	
vs.	)	Case No. 20011032-CA
LAROY ORR, Defendant-Appellee.	)	Priority No. 15

BRIEF OF APPELLEE

ON APPEAL FROM THE JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
THE HONORABLE J. DENNIS FREDERICK, JUDGE

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Statement of Jurisdiction and Nature of Proceedings

The Utah Court of Appeals has jurisdiction over this matter under U.C.A. § 78-2a-3(2)(j) and Rule 3(a) of the Utah Rules of Appellate Procedure. This Appeal is from the order of the Third District Court entered on November 15, 2001 dismissing this matter without prejudice.

Statement of Issue Presented for Review

Whether Defendant's debt to Plaintiff should be discharged in bankruptcy when Defendant listed Plaintiff in the bankruptcy filings with the last known address for Defendant and Plaintiff had moved from that address after the agreement upon which the debt was based was had matured.

Applicable Standard of Review

The trial court's ruling on Defendant's motion to dismiss is a matter of law and conclusions of law are reviewable for correctness and are given no special deference on appeal. Bingham v. Bingham, 872 P.2d 1065 (Utah App. 1994)

The primary issue in this case, the proper construction and application of section 523(a)(3)(A), is a question of law which this court reviews de novo. In re Herby's Foods, Inc., 2 F.3d 128, 130 (5th Cir.1993).

Applicable Statutory Provisions

The pertinent section of the Bankruptcy Reform Act of 1978 is 11 U.S.C. §523(a)(3).

"A discharge under section 727 ... does not discharge an individual debtor from any debt. ... neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit ... timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing ... "

Statement of the Case

1. On November 3, 1992 Mr. Hammond and Mr. Orr entered into an agreement. The basic terms of the agreement were that Mr. Hammond loaned money to Mr. Orr subject to certain terms and conditions. This agreement was consummated in the exchange of the money and Mr. Orr's signature on a piece of scratch paper.
2. At the time in which the agreement was made and during the time in which the agreement was in effect Mr. Hammond lived at the only address known to Mr. Orr.
3. The debt to Mr. Hammond became due and payable on or about February 1993. Mr. Hammond never approached Mr. Orr after the debt became past due.
4. After the debt was past due and after all contact had ceased with Mr. Orr, Mr. Hammond moved from the address that was known to Mr. Orr. Mr. Hammond never

notified Mr. Orr of the move or contacted Mr. Orr in any manner in regards to the debt.

5. On December 30, 1994 Mr. Orr initiated bankruptcy proceedings in the U.S. Bankruptcy Court, District of Utah, Case No. 94-26514.

6. Mr. Hammond was listed in the bankruptcy filing schedules at the address where he had resided while the debt was outstanding and where Mr. Hammond was living at the last contact with Mr. Orr.

7. On April 17, 1995 Mr. Orr was granted a discharge in his bankruptcy proceedings.

8. On or before November 3, 1998 Mr. Hammond came to the knowledge that Mr. Orr had filed for bankruptcy through researching on the Internet.

9. On November 4, 1998 Mr. Hammond filed this action.

10. On or about November 18, 1999 Mr. Orr filed a Motion to Dismiss and/or Stay under U.S. Bankruptcy Code in the Utah District Court matter. The motion was based upon the grounds that Mr. Orr had filed a bankruptcy and that bankruptcy was discharged. The motion was also based on the fact that Mr. Hammond had been listed in the bankruptcy schedules.

11. Mr. Orr's motion was granted and the order dismissing this action was entered on November 15, 2001.

12. Mr. Hammond has subsequently filed this appeal.

Summary of Argument

Despite the fact that Mr. Hammond was not provided notice of the bankruptcy proceeding his claim was not prejudiced in anyway and would have been dischargeable in the bankruptcy. Mr. Orr's listing of Mr. Hammond at the last known address was reasonable and was done in good faith.

Argument

The Fifth Circuit Court of Appeals applied the law in Robinson v. Mann, 339 F.2d 547 (5th Cir.1964) focusing upon the equitable powers of the bankruptcy court. The Court rejected other decisions, which had held that debtors were absolutely barred from amending their schedules after the proof-of-claim period. Id. at 549. Unlike Birkett and Milando, which strictly construed §523(a)(3) against the debtor, the Robinson Court determined that out-of-time amendments would be allowed--but only if exceptional circumstances and equity so required. Id. at 550.

The trial court in the instant case correctly applied the test to determine if a debt is excepted from discharge under Section 523(a)(3). However, there is no requirement that a debtor must act in bad faith in not properly listing a particular debt for a debt to be excepted from discharge. See In re Blossom, 57 B.R. 285, 287 (Bankr. N.Ohio 1986); In re Gray, 57 B.R. 927, 931 (Bankr. R.I. 1986), aff'd, 60 B.R. 428 (D.R.I. 1986).

The test is whether this debt was scheduled in time to permit a timely request for a determination of discharge or a timely proof of claim. Section 523(a)(3)(A) and (B). In order for a debt to be duly listed, the debtor must state the name and address of the creditor. Bankruptcy Rule 1007. The burden is on the debtors to use reasonable diligence in completing their schedules and lists. In re Robertson, 13 B.R. 726, 731 (Bankr. E.Va. 1981). See also In re Blossom, supra, 57 B.R. at 287; In re Gray, supra, 57 B.R. at 930. If a creditor proves that an address is incorrect, the debtor must justify the inaccuracy in preparing his schedules. Matter of Robertson, supra, 13 B.R. at 731. An incorrect or careless omission is not enough. 13 B.R. at 731.

Due process of law mandates notice is given to a creditor whose property rights are being affected so that he may have his day in court. Matter of Frankina, 29 B.R. 983, 985 (Bankr. E.Mich. 1983).

Section 523(a)(3) is designed to remedy the harm to creditors that results from not being able to participate in the bankruptcy case. See Stark v. St. Mary's Hospital, 717 F.2d 322, 324 (7th Cir. 1983) (the Bankruptcy Code makes clear that the right of the creditor that is protected by section 523(a)(3)(A) is the right to timely file a proof of claim); In re Beshensky, 68 B.R. 452, 454 (Bktcy. E.D. Wis. 1987) (the key inquiry should be whether the creditor has been harmed by being excluded from the schedules and whether or not the omission was due to fraud or intentional design). The "harm" caused by not receiving notice of the

bankruptcy filing may involve several different aspects depending on the particular case. Creditors are denied the opportunity to: (1) participate in the election of a trustee, (2) ask questions of the debtor at the meeting of creditors, (3) object to the debtor's claims of exempt property, (4) timely file a complaint objecting to discharge, (5) timely file a proof of claim and participate in any distribution, and (6) timely file a complaint to determine whether a debt is dischargeable under §523(a)(2), (4) or (6). It is important to note that the plain language of §523(a)(3) only incorporates the last two aspects of possible harm as grounds for finding the debt nondischargeable. For whatever reason, Congress chose not to provide a remedy for creditors whose only loss was the opportunity to elect a trustee, question the debtor at the meeting of creditors, object to the debtor's claims of exempt property or object to discharge. In this case, Mr. Hammond has no grounds for a finding of nondischargeability under §523(a)(3)(A).

Section 523(a)(3)(A) excepts from discharge unscheduled debts unless the creditor had notice or actual knowledge in time to file a proof of claim. Had this been an asset case, therefore, Hammond would not have had notice or actual knowledge of Orr's bankruptcy in time to file a proof of claim. However, Orr's case was a no-asset case.

Courts have consistently viewed no-asset cases differently under §523(a)(3) because, in many jurisdictions, proofs of claim are either unnecessary or not accepted for filing. Absent a showing

of fraud or intentional omission, §523(a)(3) does not act to deny a debtor's discharge for not listing or scheduling a creditor in time to file a proof of claim. Samuel v. Baitcher, 781 F.2d 1529, 1534 (11th Cir. 1986); Stark v. St. Mary's Hospital, 717 F.2d 322, 324 (7th Cir. 1983). See also In re Beshensky, 68 B.R. 452, 454 (Bktcy. E.D. Wis. 1987) and the cases cited therein. The cases reason that since a time is never set to file a proof of claim in a no-asset case, the creditor is not deprived of the opportunity to file a proof of claim within the meaning of §523(a)(3).

Therefore, absent a showing of fraud or intentional omission, Orr's debt to Hammond was discharged. There is no evidence that Orr fraudulently or intentionally listed Hammond's address incorrectly.

If no proof-of-claim deadline has ever been set, § 523(a)(3)(A), by its own terms, is inapplicable. In re Bulbin (Gordon v. Bulbin), 122 Bankr. 161, 161 (Bankr.D.D.C.1990); In re Hunter, 116 Bankr. 3, 4 (Bankr.D.D.C.1990).

The Robinson Court outlined three factors that courts must consider in determining whether a debtor's failure to list a creditor will prevent discharge of the unscheduled debt. Courts must examine 1) the reasons the debtor failed to list the creditor, 2) the amount of disruption which would likely occur, and 3) any prejudice suffered by the listed creditors and the unlisted creditor in question. Although the bankruptcy court strictly construed the failure-to-list provision, that court made

findings of fact that permit this Court to review the case sub judice in light of the three Robinson factors.

1. Reasons For The Failure To File

As the Sixth, Seventh, and Eleventh Circuits have determined, a court should not discharge a debt under section 523(a)(3) if the debtor's failure to schedule that debt was due to intentional design, fraud, or improper motive. Soult, 894 F.2d at 817; [**16] Baitcher, 781 F.2d at 1534; Rosinski, 759 F.2d at 541; Stark, 717 F.2d at 323-34. If the failure is attributable solely to negligence or inadvertence, however, equity points toward discharge of the debt.

In this case, Orr's failure to list Mr. Hammond's correct address on the section 521(1) schedules was completely due to mistake or inadvertence. In fact, there is no evidence whatever demonstrated that Mr. Orr had fraudulently or intentionally failed to list Mr. Hammond's current address on the schedule. Hence, the first factor supports discharge.

2. Disruption To The Courts

The second factor focuses on undue disruption to courts' dockets. While bankruptcy courts will certainly experience some disruption by allowing debtors to amend their schedules and creditors to submit proofs of claims outside the Rule 3002(c) time period, such disruption is not so inordinate as to tip the scales against discharging the debt. Here, Mr. Hammond has not suggested even

one way in which the discharge can or will unduly disrupt the courts, and this Court finds that no such disruption would occur. Therefore, the second factor likewise favors discharge.

3. Prejudice to Creditors

Without question, the third factor, which focuses on prejudice to the creditors--in conjunction with the first factor--is the most critical. Creditors are prejudiced only if their rights to receive their share of dividends and obtain dischargeability determinations are compromised. Soult, 894 F.2d at 817; Rosinski, 759 F.2d at 542; see also In re Haga (Haga v. National Union Fire Insurance Company), 131 Bankr. 320, 326 (Bankr.W.D.Tex.1991) (stating that "Congress apparently only considered [the omitted creditor's rights to share in any distribution and obtain a determination of dischargeability] as being material because only the inability to timely file a proof of claim and a dischargeability action are sufficient grounds under the Code to penalize the debtor" (citing In re Anderson, 72 Bankr. 783, 786 (Bankr.D.Minn.1987))).

The Sixth Circuit explained in Rosinski that section 523(a)(3) applies "only if [the] failure to include the creditor on the original schedule can be shown to have prejudiced him in some way or to have been part of a scheme of fraud or intentional design." 759 F.2d at 541; see also Soult, 894 F.2d at 817 (determining that bankruptcy courts may reopen cases so as to allow amendment

of schedules and discharge of debt if the "failure to schedule a debt was simply inadvertent and did not prejudice the creditor in any way").

No creditor has been or will be prejudiced here. Indeed, Mr. Hammond's rights to participate in dividends would not be any different had they been listed first on the schedules.

Further, Mr. Hammond only dischargeability claim arises from the failure-to-list statute. There is no question but that Mr. Hammond has had full opportunity to develop, brief, and argue that claim before this Court and the district. Hence, Mr. Hammond's right to have his dischargeability claim decided has not been compromised in any way. Additionally, the parties have not suggested any way that a listed creditor's right to a dischargeability decision could be prejudiced here. Thus, the third factor, like the first and second factors, favors discharge.

Because Mr. Orr's failure to list Mr. Hammond as a creditor was solely due to mistake or inadvertence and because Mr. Hammond was scheduled in time to protect his rights, section 523(a)(3)(A) is inapplicable here.

Conclusion

This court holds equitable powers to determine whether the debt should have been dischargeable. Under the definition embodied in §523 (a)(3) when there is a no-asset bankruptcy filing, such as this case by Mr. Orr, §523 (a)(3) does not apply. Even if Mr.

Hammond was not given notice in time to file a proof of claim. However, this being a no-asset case, proof of claim would not be filed.

Despite the fact that Mr. Hammond was not provided notice of the bankruptcy proceeding his claim was not prejudiced in anyway and would have been dischargeable in the bankruptcy.

Mr. Orr's listing of Mr. Hammond at the last known address was reasonable and was done in good faith.

Respectfully submitted this 2nd Day of July 2002.

Bryan R. Farris

Certificate of Service

I hereby certify that I mailed TWO (2) copies of the foregoing to David J. Hodgson, 954 East 7145 South, Suite B-205, Midvale, Utah 84047 on 3rd Day of July 2002.

Bryan R. Farris

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