

**THIS OPINION IS NOT INTENDED FOR PUBLICATION**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE	))	CASE NO. 93-50634
MARGARET STYCHNO,	))	
Debtor.	))	CHAPTER 7
	))	
	))	JUDGE MARILYN SHEA-STONUM

**ORDER GRANTING MOTION OF  
U.S. TRUSTEE TO REOPEN CASE  
AND DENYING DEBTOR'S  
REQUEST FOR A HEARING**

This matter is before the Court on the motion of the U.S. Trustee to reopen this case to administer an unscheduled asset pursuant to 11 U.S.C. § 350(b). At a telephonic conference on August 19, 1997, the Court requested that the parties brief the issues re: the motion to reopen. As a result, the debtor filed a brief in support of an evidentiary hearing and to reopen the case; McDonald, Hopkins Burke & Haber, et al. (the "malpractice defendants") filed a brief in opposition to an evidentiary hearing and to reopening the case; and the U.S. Trustee filed a reply brief in support of its motion to reopen and in opposition to an evidentiary hearing.

I. JURISDICTION

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The motion before the Court involves a determination concerning property of the estate. Pursuant to 28 U.S.C. § 157(b)(2)(A), resolution of this motion is a core proceeding. This Court has jurisdiction over these matters pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

### **II. UNDISPUTED FACTS**

The parties agreed to various stipulations and filed them with the Court. Those stipulations are incorporated herein by this reference, including that (1) the Counterclaim and Third Party Complaint for legal malpractice was an asset of the bankruptcy estate under 11 U.S.C. § 541(a) at the time of filing the chapter 7 petition and (2) Margaret Stychno and her attorney failed to list the Counterclaim and Third Party Complaint for legal malpractice as an asset in the bankruptcy schedules for her chapter 7 case. Excluding the debtor, all parties involved stipulated to the following: The former trustee Joseph Houser complied with all procedural requirements of the United States Bankruptcy Code; attorney Kenneth Shaw, prior to the Bankruptcy Petition, had personal knowledge of the pending Counterclaim and Third Party Complaint for legal malpractice; and former trustee Joseph Houser never

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abandoned, through formal notice or otherwise, any interest of the estate in the Counterclaim and Third Party Complaint for legal malpractice.

### **III. ISSUE AND ANALYSIS**

The issue before the Court is whether the Court should reopen this case in order to allow the administration of a previously unscheduled asset and whether the Court must hold an evidentiary hearing in order to make that determination. The U.S. Trustee/movant argues that the Counterclaim and Third Party Complaint for legal malpractice were never abandoned and remain assets of the estate that have not been administered thereby meriting the reopening of this case pursuant to 11 U.S.C. § 350(b) and B. Rule 5010.

The debtor argues in the alternative: (1) the asset was abandoned by the trustee, despite the debtor's failure to list the asset on her schedules, and she may pursue the action in her own name in state court; or (2) the asset was never abandoned, it remains property of the estate, "the case should be reopened, and a trustee should be appointed who should be ordered to proceed on behalf of the Debtor in State Court, and/or the Debtor's counsel should be allowed to substitute for the same, and /or the Debtor should be allowed to join the Trustee in proceeding on behalf of the Debtor in the State Court matter."

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The malpractice defendants, having stipulated that the trustee never abandoned the Counterclaim and Third Party Complaint, argue that (1) the Court may deny the motion to reopen if the probability of recovery is too remote; (2) the debtor is not entitled to the benefit of reopening her Chapter 7 case; (3) the doctrine of laches bars the reopening of the debtor's case because she and her attorney knew of the asset and failed to list it as an asset; and despite having stipulated that the Trustee complied with all procedural requirements of the Bankruptcy Code, (4) the trustee's failure to act properly should bar the U.S. Trustee's motion to reopen so as not to prejudice the malpractice defendants for that failure.

### A. The Debtor's Arguments

The debtor argues that despite her failure to list the Counterclaim and Third Party Complaint on her schedules, the Counterclaim and Third Party Complaint were abandoned by operation of law when the debtor's chapter 7 case was closed pursuant to 11 U.S.C. § 554(c). In order for property to be abandoned by operation of law under section 554(c), the debtor must formally list the property on the appropriate schedules. *In re Hargreaves*, Case No. 92-51931(N.D. Ohio Jan. 31, 1997) at 6, 7. Only assets that are clearly scheduled can be deemed abandoned. *Id.* at 7; *In re McCoy*,

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139 B.R. 430, 432 (S.D. Ohio 1991). Thus, the Counterclaim and Third Party Complaint not scheduled as assets by the debtor remain property of the estate.

In the alternative, the debtor argues that "the case should be reopened, and a trustee should be appointed who should be ordered to proceed on behalf of the Debtor in State Court, and/or the Debtor's counsel should be allowed to substitute for the same, and /or the Debtor should be allowed to join the Trustee in proceeding on behalf of the Debtor in the State Court matter." A closed case may be reopened in order to administer a previously unadministered asset. 11 U.S.C. § 350(b); *In re Atkinson*, 62 B.R. 678, 679(Bankr. D. Nevada 1986); *In re Winebrenner*, 170 B.R. 878, 882(Bankr. E.D. Va. 1994)("The possibility that the trustee could realize assets for the estate by pursuing these unabandoned causes of action provides cause to reopen the bankruptcy case."); see *Scharmer v. Carrollton Manufacturing Company, et al.*, 525 F.2d 95, 98-99(6th Cir. 1975); *In re McCoy*, 139 B.R. 430(S.D. Ohio 1991). The debtor argues that a hearing is necessary in order for the Court to make its determination on whether in its discretion, the Court should reopen the debtor's case. The only fact in dispute, the knowledge of trustee Houser regarding the Counterclaim and the Third Party Complaint, is not relevant to the

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Court's inquiry. A hearing is not needed. The Court may in its discretion reopen the debtor's case to allow previously unscheduled and unadministered assets to be administered.

### B. The Malpractice Defendant's Arguments

The malpractice defendants argue that, if the probability of recovery on the assets is too remote, then the Court in its discretion should deny the motion to reopen. The malpractice defendants rely on *In re Johnson*, 291 F.2d 910 (8th Cir. 1961) and *Price v. Haker* (*In re Haker*), 411 F.2d 568 (5th Cir. 1969) for that proposition. The malpractice defendants' reliance is misplaced. The *Johnson* court recognizes that a motion to reopen is a matter addressed to the sound discretion of the court. *Johnson*, 291 F.2d at 911. An appellate court will not disturb the lower court's decision on this issue absent an abuse of discretion. See *Id.* The *Johnson* court holds that the lower court's decision not to reopen a case will stand unless "assets of such probability, administrability and substance ... appear to exist as to make it unreasonable under all the circumstances for the court not to deal with them." *Id.* The holding of the *Johnson* Court does not require the lower court, in the first instance, to determine whether "assets of such probability exist." Rather, it sets forth the standard for the reviewing court in these matters.

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Similarly, the Court in *In re Haker* deals only with the standard for finding an abuse of discretion rather than the standards the lower court should follow in determining how to exercise its discretion. The value of the asset is not a relevant factor in determining the motion to reopen. "The trustee must be given the opportunity to value each piece of property in the estate." *In re Winebrenner*, 170 B.R. at 883; see *Scharmer v. Carrollton Manufacturing Company et al.*, 525 F.2d 95, 99 (6th Cir. 1975).

Additionally the malpractice defendants argue that the debtor is not entitled to the benefit of reopening her Chapter 7 case. (In their pleading the malpractice defendants wrote " The debtor's obvious goal in this matter is to receive authority, i.e. abandonment by the trustee, to pursue her alleged malpractice claim in her own name in state court.") The motion to reopen pending before this Court is the motion of the U.S. Trustee which seeks the reopening of the debtor's case to permit a chapter 7 trustee to investigate and administer an unscheduled asset of the estate for the benefit of **creditors**.

The malpractice defendants also argue that the doctrine of laches bars the reopening of the debtor's case. The malpractice defendants suggest that several years have passed since Ms. Stychno and her attorney had personal

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knowledge of the Counterclaim and Third Party Complaint. Although this passage of time may be a defense to the actual Counterclaim and Third Party Complaint perhaps as to any participation in recover by the debtor, it is not a defense to the U.S. Trustee's motion to reopen. The debtor's case was closed for 9 months prior to the filing of the motion to reopen. The Chapter 7 trustee, Houser, "complied with all procedural requirements of the bankruptcy code." See Stipulation # 3. The malpractice defendants have not alleged any harm that falls upon them due the delay in time. Thus, the doctrine of laches does not bar the reopening of this case.

The last argument made by the malpractice defendants is that the trustee's failure to properly investigate the debtor's assets should not operate to prejudice the malpractice defendants after the passage of so much time. They provide no citations to relevant law on this issue and they have stipulated that the trustee complied with all procedural requirements. This may be a disguised argument for abandonment of the assets by the trustee. However, that argument, as discussed above, fails. Further, these malpractice defendants should be estopped from making that argument based on their stipulations before this court and their state court pleadings wherein they assert that the



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Counterclaim and Third Party Complaint remain property of the estate.

C. The U.S. Trustee's Argument

When an asset of the bankruptcy estate remains after the case has been closed, the Court may reopen the case to permit the administration of the asset. *In re Winebrenner*, 170 B.R. at 882. The possibility that a trustee could recover on the Counterclaim and Third Party Complaint establishes cause to reopen the bankruptcy case. The parties have stipulated that the Counterclaim and Third Party Complaint are assets of the estate. As discussed earlier, the assets were not abandoned, formally or by operation of law. Thus, the assets remain in the estate and the motion to reopen may in the Court's discretion be granted. 11 U.S.C. § 350(b).

IV. CONCLUSION

For the foregoing reasons, the motion of the U.S. Trustee to reopen this case is granted and the debtor's request for a hearing is denied.

**IT IS SO ORDERED.**

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MARILYN SHEA-STONUM  
Bankruptcy Judge

**DATED: 10/6/97**