THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 67-51366
	)	
DAVID FRANCIS BOURNE	)	CHAPTER 7
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM

ORDER RE: "APPLICATION TO REOPEN PROCEEDING UNDER TITLE 11 OF THE UNITED STATES CODE"

This matter came before the Court on an "Application to Reopen Proceeding Under Title 11 of the United States Code" (the "Motion to Reopen") filed by David Bourne ("Bourne") and an opposition to the Motion to Reopen (the "Objection") filed by the estate of judgment creditor, Alfred Levin (the "Levin Estate"). The Court held a hearing on the matter on April 5, 2000. Appearing at the hearing were Dean Konstand, counsel for Bourne, and Richard Sternberg, counsel for the Levin Estate. During the hearing, counsel presented legal argument as to whether or not the Court had jurisdiction to reopen Bourne's bankruptcy case. Neither party called any witnesses to testify and no documentary evidence was presented. At the conclusion of the hearing, the Court granted Bourne additional time in which to respond to the Objection. That pleading was timely filed and the matter was taken under advisement. (The "Motion to Reopen" and the response to the Objection shall hereinafter be collectively referred to as the "Motion").

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (O) over which this Court has jurisdiction pursuant to 28

U.S.C. §1334(b). Based upon the pleadings filed herein, the Court makes the following findings of fact and conclusions of law.

FACTS

The following facts are not disputed in this case. In June 1961, Alfred Levin obtained a judgment against Bourne for injuries sustained in an automobile accident. In November 1961, that judgment was partially satisfied through insurance proceeds. In March 1967, Bourne filed a voluntary petition under chapter VII of the Bankruptcy Act. Bourne's bankruptcy estate contained no assets and on August 1, 1967, Bourne received his discharge. Mr. Levin's deficiency judgment against Bourne was not listed in Bourne's bankruptcy schedules. The Levin Estate is now trying to satisfy the deficiency judgment by levying on an asset that was recently acquired by Bourne.

Through the Motion, Bourne seeks to reopen his 1967 bankruptcy case to include the deficiency judgment and to discharge that debt. Bourne contends that when he filed his bankruptcy petition he was not aware that the 1961 judgment remained partially unsatisfied and that, because his was a no asset case, "the Judgment Creditor, the Estate of Alfred Levin, is not prejudiced by the amending of the Schedule to include him as a Creditor of the within estate." *See* Motion to Reopen at pg. 2.

In the Objection, the Levin Estate contends that Bourne was aware of the deficiency judgment when he filed his bankruptcy petition. The Levin Estate further contends that, even if the deficiency judgment was omitted from Bourne's schedules through inadvertence or error, this Court is without jurisdiction, either at law or in equity, to reopen Bourne's case after the passage of so much time.

DISCUSSION

If this case was governed by the Bankruptcy Reform Act, the debt at issue would have been discharged regardless of whether it was included in Bourne's schedules. *See In*

re Madaj, 149 F.3d 467 (6th Cir. 1998) (holding that in a chapter 7 no asset case, non-scheduled, unsecured debts not otherwise subject to an exception from discharge pursuant to 11 U.S.C. §523 are automatically discharged).[1] However, because Bourne's petition was filed before October 1, 1979 (the effective date of the Bankruptcy Reform Act), this proceeding is governed by the Bankruptcy Act. Unlike the effect under the provisions of the modern day Bankruptcy Code, the effect of omitting a debt from a bankruptcy petition filed under the provisions of the Bankruptcy Act is not as clear.

Under the Bankruptcy Act, a discharge in bankruptcy released a debtor from all his provable debts "except such as . . . have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." *See* Bankruptcy Act §17(a)(3). Any claim that was not filed "within six months after the date set for the first meeting of creditors" was not allowed. *See* Bankruptcy Act §57(n).

The Bankruptcy Act further provided that bankruptcy courts had the authority to reopen estates "for cause shown" and Bankruptcy Rule 515 provided that "[a] case may be reopened on application by the bankrupt or other person to administer assets, to accord relief to the bankrupt, or for other good cause." *See* Bankruptcy Act §2(a)(8) and Bankruptcy Rule 515. The Advisory Committee for Bankruptcy Rule 515 noted that according relief to a debtor can be proper cause for reopening a bankruptcy case and that whether to open a case was a matter of discretion with the bankruptcy court. *See* Bankruptcy Rule 515 advisory committee's notes.

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[1] Neither party alleged in their pleadings or oral, legal argument that if the debt at issue would have been included in Bourne's schedules it could have somehow been excepted from Bourne's discharge.

Some courts have construed the above-referenced provisions of the Bankruptcy Act as an absolute bar to the reopening of a bankruptcy case to add an omitted creditor. For instance, in *Milando v. Perrone*, 157 F.2d 1002 (2nd Cir. 1946), the court held that where a debtor seeks to reopen a bankruptcy case to amend schedules to include a claim of a judgment creditor, and the debtor's purpose of bringing such creditor within the operation of a discharge could not be effected, the reopening and amendment are useless and should not be allowed. In reaching its holding, the court specifically considered the language of §2(a)(8) of the Bankruptcy Act regarding the reopening of a case but determined that the combined effect of §17(a)(3) and §57(n) would render such reopening useless because once an omitted claim could no longer be proved and allowed, that claim could no longer be brought within the operation of a debtor's discharge.

> [W]hether there is such a reserve of power need not be explored further here, since . . . there is no fraud or injustice so far as the bankrupt is concerned in applying the statute as written to cases of inadvertent omissions of claims. The District Court suggested that the creditor could not be harmed where the estate showed no assets; but this overlooks the all-inclusive operation of Sec. 17, sub. a(3), . . ., and thus inserts into the statute an exception not within its terms. It is only just that he who seeks the protection of a statutory bar against payment of his debts be required to bring himself within the provisions of the statutory grant.

Milando v. Perrone, 157 F.2d at 1004. *See also In re Hawk*, 114 F. 916 (8th Cir. 1902); *In re Cohen*, 32 F.Supp. 203 (D.N.J. 1940); *In re Kornblum*, 22 F.Supp. 245 (D.Minn. 1938); *In re Feldesman*, 13 F.Supp. 1010 (S.D.N.Y. 1935); *In re Atlas*, 49 F.2d 474 (E.D.N.Y. 1931); *In re Spicer*, 145 F. 431 (W.D.N.Y. 1906).

Other courts have construed these same provisions of the Bankruptcy Act as permitting a debtor to reopen a case and amend schedules to include an omitted creditor but only when exceptional circumstances exist. In *Robinson v. Mann*, 339 F.2d 547 (5th Cir. 1964), the court considered the limiting language of §57(n) of the Bankruptcy Act but

determined that such language did not, in and of itself, preclude the addition of omitted creditors after the six month deadline.

> We do not think that §57 sub. n deprives the courts of power to allow amendments by the bankrupt more than six months after the first meeting of creditors. That section is addressed to creditors, not the bankrupt. Its primary purpose is to prod creditors to seasonably present their claims, not to force bankrupts to seasonably present their amendments. A bankruptcy court is a court of equity, and in an appropriate case its inherent equity power may be invoked to allow amendment after six months . . . . However, amendments should not be allowed as a matter of course . . . . Section 57, sub n. evinces a statutory purpose to achieve speed and certainty in bankruptcy proceedings, and this purpose could be defeated by excessive amendments which disrupt and prolong the administration of the bankrupt's estate. Consequently, we hold that the proper rule is that amendment by the bankrupt may be allowed more than six months after the first meeting of creditors, but only in exceptional circumstances appealing to the equitable discretion of the bankruptcy court.

Robinson v. Mann, 339 F.2d at 550 (citations omitted). *See also Fourteenth Ave. Security Loan Ass'n v. Squire*, 96 F.2d 799 (3rd Cir. 1938); *Phillips v. Tarrier Co. of Delaware*, 93 F.2d 674 (5th Cir. 1938); *In re Souras*, 19 B.R. 798 (Bankr. E.D.Va. 1982); *In re Benak*, 374 F.Supp. 499 (D.Neb. 1974); *In re Boynton*, 24 F.Supp. 267 (W.D.Wash. 1938); *In re McKee*, 165 F. 269 (E.D.N.Y. 1908). In determining whether "exceptional circumstances" exist courts usually require that the case be a no-asset one; that there be no fraud or intentional laches on the part of the debtor; and that the creditor have been omitted through mistake or inadvertence. *In re Souras*, 19 B.R. at 801, *citing In re Benak*, 374 F.Supp. 499, 500 (D.C.Neb. 1974). Consideration is also be given to the closeness of the running of the six month period to when the amendment is sought. *In re Benak*, 374 F.Supp. at 500.

This Court considers the reasoning of the latter line of cases to be the more persuasive. However, because no evidence other than the chronology was presented

during the April 5th hearing on this matter, the Court is without enough information to determine whether "exceptional circumstances" exist to allow Bourne to reopen his bankruptcy case at this late date. The Court does note that the delay of more than 38 years, while certainly unusual, is plainly not an exceptional circumstance to warrant the relief that is sought.

CONCLUSION

Based upon the foregoing, the Court is unable to determine whether the Motion should be granted. **THEREFORE, IT IS HEREBY ORDERED:**

1. That an evidentiary hearing will be held on **June 6, 2000** at **10:00 a.m.**, in Room 250, U.S. Courthouse and Federal Building, 2 South Main Street, Akron, Ohio;
2. That by not later than **June 1, 2000**, the parties are to file with the Court and to furnish to each other all documents which they intend to introduce into evidence during the June 6th evidentiary hearing. Documents of Bourne are to be marked as Bourne's exhibits and identified by letters, and the Levin Estate's exhibits are to be marked as Levin Estate's exhibits and identified by number;
3. That by not later than **June 1, 2000**, the parties are to file with the Court and to furnish to each other the names and addresses of all witnesses they intend to call during the June 6th evidentiary hearing; and
4. That any objections to evidence made by the parties at the June 6th evidentiary hearing must identify the appropriate rule of the Federal Rules of Evidence on which such objection is based.

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MARILYN SHEA-STONUM
Bankruptcy Judge

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DATED: 5/11/00