

**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 GRANTING "APPLICATION TO REOPEN  
PROCEEDING UNDER TITLE 11 OF THE UNITED STATES CODE"**

This matter came on for a hearing on before the Court on the "Application to Reopen Proceeding Under Title 11 of the United States Code" (the "Motion to Reopen") filed by David Bourne ("Bourne") and the opposition to the Motion to Reopen (the "Objection") filed by the estate of judgment creditor, Alfred Levin ("Levin").

Through the Motion to Reopen, Bourne seeks to reopen his 1967 bankruptcy case to include a deficiency judgment and to discharge that debt. Bourne contends that when he filed his bankruptcy petition he was not aware that a 1961 judgment obtained by Levin 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, Levin's counsel contends that Bourne was aware of the deficiency judgment when he filed his bankruptcy petition.

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

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U.S.C. §1334(b).<sup>1</sup> Based upon the record evidence, the Court makes the following findings of fact and conclusions of law.

**FINDINGS OF FACT**

In June 1961, Alfred Levin obtained a judgment against Bourne in the amount of \$17,000 for injuries sustained in an automobile accident. At the time of the accident Bourne was 17 years old. In November 1961, that judgment was partially satisfied through insurance proceeds in the amount of \$10,000. Levin's counsel sent a letter dated October 31, 1961 to Bourne's parents which informed Bourne's parents that they were responsible for the deficiency judgment of January 1961. Levin Estate Exhibit (hereinafter "LX") 10. The letter provided in pertinent part:

It is the opinion of this office that you as parents of a minor under 18 years of age are responsible for the judgment of June 7, 1961 . . . . LX 10.

Levin unsuccessfully brought suit against Bourne's parents to collect the deficiency judgment. *See Levin v. Bourne* 117 Ohio App. 269 (1962).

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. Levin's deficiency judgment against Bourne was not listed in Bourne's bankruptcy schedules. Bourne testified that he was only recently contacted with regard to the deficiency judgment. Counsel for Levin sent a letter dated August 18, 1999 to Bourne which notified him that no action had been taken to collect on the

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<sup>1</sup> This case was referred by the district court to the bankruptcy court under the Bankruptcy Act of 1898. Once a reference was made by the district court, the bankruptcy "referee sat as a court of bankruptcy and the proceedings were those of that court." *See* Colliers on Bankruptcy ¶ 1.01[1][a][ii] 1999. Currently, title 28 of the United States Code defines the jurisdiction of bankruptcy courts. Thus, with respect to matters referred to the bankruptcy court, the Court looks to the provisions of title 28 for jurisdiction.

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deficiency judgment "until it was learned that your mother had passed away and left you the home in which you live." LX 39 ¶ 1. Bourne testified that he was aware of the deficiency judgment, but that since Levin brought suit against his parents and not him, Bourne thought that he was not liable for the deficiency judgment. Levin is now trying to satisfy the deficiency judgment by levying on Bourne's parent's home which Bourne has now inherited.

The Court finds that, as of 1967 through 1999, the combination of Levin's suit against Bourne's parents and the fact that Bourne was not contacted with regard to the deficiency led Bourne to believe erroneously, but in good faith, that he was not personally liable for the deficiency judgment.

### **CONCLUSIONS OF LAW**

If this case were 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 (6<sup>th</sup> 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).<sup>2</sup> Bourne's petition was filed before October 1, 1979 (the effective date of the Bankruptcy Reform Act) and therefore, this proceeding is governed by the Bankruptcy Act.

Consistent with this Court's order entered on May 11, 2000, Bourne must show that "exceptional circumstances" exist in order to reopen his case and amend the schedules to include Levin as an omitted creditor. *See Robinson v. Mann*, 339 F.2d 547, 550 (5<sup>th</sup>

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<sup>2</sup> 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.

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Cir. 1964); *See also Fourteenth Ave. Security Loan Ass'n v. Squire*, 96 F.2d 799 (3<sup>rd</sup> Cir. 1938); *Phillips v. Tarrier Co. of Delaware*, 93 F.2d 674 (5<sup>th</sup> 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. Bourne has met his burden.

Bourne's 1967 bankruptcy was a no-asset case and there is no evidence of fraud or intentional laches on the part of Bourne. Levin actively pursued Bourne's parents and not Bourne for the deficiency judgment. In contrast, although Bourne had been employed prior to his bankruptcy, no collection action directed at him was taken, e.g. garnishment of wages or bank accounts. Bourne concluded erroneously, in good faith, that he was not responsible for the deficiency judgment and therefore, the omission of the judgment from his schedules was either mistake or inadvertence.

Levin's counsel has made much of Bourne's relationship with his parents and time spent with them as an indication that Bourne should have known that he was liable for the deficiency. However, counsel offered no evidence to refute Bourne's testimony that he

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<sup>3</sup> In fact, during the June 6, 2000 hearing, Levin's counsel stated that he had not attempted any garnishments or other actions to impair Bourne's livelihood but rather chose to wait until such time that a

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was not contacted concerning the deficiency prior to filing his 1967 bankruptcy.<sup>3</sup> Further, Bourne's claim that he inadvertently omitted the deficiency from his schedules is supported by the fact that Bourne's case was a no-asset one in which he had nothing to gain by not including the deficiency on his schedules. Finally, while the delay of more than 38 years is plainly not an "exceptional circumstance" that in itself justifies the reopening of the case, the Court concludes that the delay was caused by Bourne's continuing lack of any understanding of his personal liability with respect to the deficiency judgment. As such, the delay is not an adverse factor in this case.

**CONCLUSION**

The Court concludes that "exceptional circumstances" exist and that the Motion to Reopen is well taken. The Objection is overruled. Bourne is entitled to reopen his 1967 bankruptcy case to amend his schedules and list Levin as a creditor.

**IT IS SO ORDERED**

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MARILYN SHEA-STONUM  
Bankruptcy Judge

**DATED: 8/11/00**

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leivable asset, Bourne's parent's home, passed to Bourne. The letter dated August 18, 1999 sent by Levin's counsel to Bourne confirms that Levin had not taken any action to collect the deficiency in the preceding 39 years. LX 39 ¶ 1.