FILED
04 DEC 27 PM 3:44
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
AKRON

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	) CASE NO. 03-53438
Yaneth Garcia Solh,	) CHAPTER 7
DEBTOR.	) JUDGE MARILYN SHEA-STONUM
Karynne Nolan, Plaintiff,	) Adv. No. 04-5097
v.	) MEMORANDUM OPINION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
Yaneth Garcia Solh, Defendant.	)

This matter is before the Court on the Motion of Karynne Nolan (the "Plaintiff") for Summary Judgment [docket #12] (the "Motion") and the opposition (the "Response") of Yaneth Garcia Solh (the "Defendant") to the Motion [docket #13].

JURISDICTION

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 the provisions of 28 U.S.C. § 157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334(b).

UNDISPUTED FACTS

The facts in this matter are not in dispute. The Plaintiff set forth the following facts in her motion and Defendant admitted the "relevant facts as set forth in the [Motion]." *See* Response, p. 1.

1. On July 3, 2003, Defendant filed a voluntary petition for relief under Chapter 7 of title 11 of the United States Code (the "Bankruptcy Code"). [docket #1].

AO 72A
(Rev. 8/82)

2. Plaintiff was not listed as a creditor in the Defendant's schedules. [docket #1].

3. On October 17, 2003, the Court issued a notice of claims bar date in the Defendant's bankruptcy case. The claims bar date was January 12, 2004. [docket # 11].

4. The Defendant received her discharge on November 10, 2003 pursuant to § 727 of the Bankruptcy Code. [docket # 13].

5. On April 23, 2004, the Defendant filed an Amended Schedule F, listing plaintiff as a creditor in this case. [docket # 15].

6. This is an "asset case." [docket # 20].

7. Plaintiff had no notice or actual knowledge of the pendency of the Defendant's bankruptcy case prior to April 27, 2004 when she received notice from Defendant's counsel. *See* uncontested Affidavit of Karynne Nolan, Exhibit A to the Motion.

8. Defendant was aware of Plaintiff's claim against her at the time she filed her bankruptcy case.

DISCUSSION

A court shall grant a party's motion for summary judgment "if...there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); FED. R. BANKR. P. 7056.

> Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

DiCarlo v. Potter, 358 F.3d 408, 414 (6th Cir. 2004). The party moving for summary

judgment bears the initial burden of showing the court that there is an absence of a genuine dispute over any material fact, *Searcy v. City of Dayton*, 38 F.3d 282, 286 (6th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and, upon review, the court should draw all reasonable inferences in favor of the nonmoving party. *DiCarlo v. Potter*, 358 F.3d at 414; *Searcy v. City of Dayton*, 38 F.3d 282, 285 (6th Cir. 1994); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 285 (6th Cir. 1991). A material fact is one that must be decided before there can be a resolution of the substantive issue that is the subject of the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Plaintiff has shown, and Defendant does not dispute, that there are no genuine issues of material fact. Plaintiff asks this Court to find, as a matter of law, that she is entitled to a judgment that her claim against the Defendant is excepted from the Defendant's discharge pursuant to the provisions of 11 U.S.C. § 523(a)(3)(A). For the reasons set forth more fully below, the Court finds that as a matter of law the Plaintiff is entitled to a judgment that her claim against Defendant is excepted from discharge.

A discharge under 11 U.S.C. § 727 discharges every prepetition debt, without regard to whether a proof of claim has been filed, unless that debt is specifically excepted from discharge under 11 U.S.C. § 523. *Zirnhelt v. Madaj (In re Madaj)*, 149 F.3d 467 (6th Cir. 1998).

Section 523(a)(3) contains the only exceptions for unlisted and unscheduled debts. Bankruptcy Code § 523(a)(3)(A) provides, in pertinent part:

> a discharge under section 727 ... of this title does not discharge an individual debtor from any debt ...
>
> (3) 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

> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing;

The statute is clear: an unscheduled debt, known to the debtor, will not be discharged unless the creditor had notice or actual knowledge of the bankruptcy case in time to file a proof of claim before the bar date. *See In re Madaj*, 149 F.3d 467; accord *In re Talon Automotive Group, Inc.*, 284 B.R. 622, 626 (Bankr. E.D. Mich. 2002).

The *Madaj* court held that "the exception contained in § 523(a)(3)(A) – designed as it is to prevent an ignorant creditor from suffering an unjust loss by having a debt discharged without his knowing it – operates differently in no-asset cases where there is little risk that a creditor will suffer a disadvantage resulting from an unscheduled debt." *In re Madaj*, 149 F.3d at 470.

In contrast to the situation in *Madaj*, this is an asset case. Defendant does not dispute that this is an asset case , nor does the Defendant dispute his failure to list or schedule the debt owed to the Plaintiff, nor does the Defendant dispute that the Plaintiff did not have notice or actual knowledge of the bankruptcy case until after the bar date had passed. Rather, the Defendant argues that because this case is only a little bit of an asset case (approximately $1,500 to distribute to holders of $11,316 in claims (excluding Plaintiff's claim), the Plaintiff should only be entitled to have her debt determined non-dischargeable to the extent of the financial loss Plaintiff sustained as a result of not receiving a pro rata share of the distribution from the Defendant's bankruptcy estate.

The Court is not persuaded by the Defendant's arguments. This is an asset case and the Defendant had a duty to schedule known creditors. The Defendant's failure to do

so results in the non-dischargeability of the Plaintiff's debt pursuant to Bankruptcy Code § 523(a)(3)(A).

The Plaintiff's Motion for Summary Judgment is well taken and will be granted. Judgment consistent with this opinion will be entered separately.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

◆◆◆◆◆◆◆◆◆◆◆◆◆

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this Sep 27, 2004 day of, the foregoing Opinion was sent via regular U.S. Mail to:

David O. Simon
1370 Ontario Street
Standard Building, Suite 450
Cleveland, Ohio 44113-1744
Counsel for Plaintiff

Timothy P. Assaf
230 White Pond Drive, Suite A
Akron, Ohio 44313-7239
Counsel for Defendant-Debtor

Claire Marie Boogos
Deputy Clerk