UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 02-38048
	)	
Tony M. Gallo and Joy E. Gallo,	)	Chapter 7
	)	
Debtors.	)	Adv. Pro. No. 04-3387
	)	
Tony M. Gallo,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
Sherry Zimmerman,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Sherry Zimmerman ("Defendant") is before the court on the "Reply to Violation of Stay" that she filed in this adversary proceeding on November 10, 2004, and again on March 3, 2005, which is in the nature of a motion to dismiss (the "Motion to Dismiss"). Tony M. Gallo ("Plaintiff") is before the court on the Motion for Summary Judgment that he filed in this proceeding on March 2, 2005 (the "S/J Motion"). After reviewing the motions, Defendant's response to the S/J Motion, and the documents submitted therewith, the court is unable to resolve the motions based on the current state of the record and will afford the parties an opportunity to supplement the record.

FACTUAL AND PROCEDURAL BACKGROUND

On November 22, 2002, Plaintiff and Joy E. Gallo ("Debtors") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. The case was treated as a "no asset" case, so the court did not set a deadline for filing proofs of claim. Rather, the notice of the meeting of creditors stated: "**Please Do Not File A Proof of Claim Unless You Receive a Notice to Do So.**" The notice explained:

Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. You therefore should not file a proof of claim at this time. If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.

The trustee filed a no asset report on January 28, 2003, Debtors received a discharge on March 20, 2003, and the case was closed on March 27, 2003.

It appears that, on July 31, 2003, Defendant filed a Small Claims Complaint against Plaintiff in the Municipal Court of Tiffin, Ohio, seeking a judgment in the amount of $425 plus interest for money lent to Plaintiff in April 2002 and not repaid. It further appears that judgment was granted, and that Defendant has obtained funds through garnishment.

On March 3, 2004, Plaintiff filed a motion to reopen the Chapter 7 case for the purpose of adding prepetition creditors, including Defendant, that were omitted from Debtors' schedules of liabilities. On March 26, 2004, the court entered an order denying the motion since, as more fully explained below, unlisted debts [other than debts of the type described in 11 U.S.C. § 523(a)(2), (4), or (6)] are dischargeable in "no asset" cases.

At some point, it appears that Plaintiff asked the Tiffin Municipal Court to dismiss the action and refund garnished wages, but that court denied such relief on October 8, 2004, without explanation.

On October 14, 2004, Plaintiff filed the complaint initiating this adversary proceeding. The complaint seeks a declaratory judgment that Defendants' actions in the Tiffin Municipal Court "are in violation of the discharge granted in this case," an injunction against continued collection efforts by Defendant, a refund of all sums collected by Defendant, $500 in punitive damages, and attorney's

fees. On November 10, 2004, Defendant filed a "Reply to Violation of Stay," asserting, in essence, that Plaintiff's indebtedness to her was not discharged since Defendant did not receive notice of the bankruptcy. Defendant also asserts that she relied on the Tiffin Municipal Court's October 2004 order "as the basis for continu[ing] the collection of the debt." Defendant asks the court to vacate the discharge order, dismiss Plaintiff's complaint, and award Defendant $500 in damages plus attorney's fees.

Plaintiff filed the S/J Motion on March 2, 2005,[1] without any supporting affidavits, pleadings, depositions, or discovery responses.[2] On March 3, 2005, Defendant filed a response, making the same arguments as are set forth in the Motion to Dismiss.

LAW AND ANALYSIS

If (i) Plaintiff's debt to Defendant was incurred prior to the commencement of Debtors' Chapter 7 case, and (ii) is not of the type described in 11 U.S.C. § 523(a)(2), (4), or (6), then the debt has been discharged in bankruptcy notwithstanding the lack of notice to Defendant. Such a debt is nondischargeable only if it was not listed or scheduled, or the creditor did not receive notice or actual knowledge of the case, in time to permit the timely filing of a proof of claim. 11 U.S.C. §523(a)(3)-(A). In "no asset" cases, i.e., cases in which it appears from the schedules that there are no assets from which a dividend can be paid, "the notice of the meeting of creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient assets become available for the payment of a dividend, further notice will be given for the filing of claims." Fed. R. Bankr. P. 2002(e). In that event, there is no deadline for filing proofs of claim unless and until such "further

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[1] On February 9, 2005, the court had entered a scheduling order setting March 1, 2005, as the deadline for motions for summary judgment. The court will nevertheless entertain the S/J Motion as no prejudice has been shown from the late filing, .

[2] The court may take judicial notice of Exhibit A to the complaint (a copy of this court's order denying Plaintiff's motion to reopen his Chapter 7 case), which is also Exhibit A to the Motion to Dismiss and to Defendant's response to the S/J Motion. But Exhibits B and C to the complaint (Exhibit C also being Exhibit B to the Motion to Dismiss and to Defendant's response to the S/J Motion) are not properly authenticated so may not be considered on a motion for summary judgment. *E.g.*, *United States v. Billheimer*, 197 F. Supp. 2d 1051, 1058 n.7 (S.D. Ohio 2002); *see* Fed. R. Evid. 901-903.

notice" is given. If the case never becomes an "asset" case, there is never a deadline for filing proofs of claim and so creditors always have "time to permit the timely filing of a proof of claim" even if they are never listed or scheduled and never receive notice or actual knowledge of the case. The Sixth Circuit has explained as follows:

> In a Chapter 7 no-asset case, however, the creditors cannot recover from the estate because there is nothing to recover. For this reason, there is no deadline for filing a timely proof of claim in a no-asset case. Technically speaking, therefore, no matter when the creditor learns of the bankruptcy, he is able to file a timely claim. Because § 523(a)(3)(A) excepts the unscheduled debt from discharge "unless such creditor had notice or actual knowledge of the case in time for such timely filing," the moment the creditor receives notice or knowledge of the bankruptcy case, § 523(a)(3)-(A) ceases to provide the basis for an exception from discharge. Consequently, the debt is at that point discharged.
>
> The result may seem strange at first blush, but it makes sense when one considers both the type of debt involved and the nature of a no-asset case. Unlike the fraudulent debts covered by §§ 523(a)(2), (4), and (6), the debts excepted from discharge by § 523(a)(3)(A) are not excepted because of their nature, but because an injustice will result if the debt is discharged in a situation where the creditor never had the opportunity to participate in the distribution of the assets of the estate.
>
> Yet, there are no proceeds to be distributed to the creditors in a no-asset case, which renders the notice function served by the scheduling of debts far less important. For precisely this reason, there is no deadline for the filing of proofs of claim in a no-asset case. For the most part, creditors in a no-asset case do not stand to gain by having their debts scheduled, nor do they stand to lose by having their debts omitted from the schedules. Thus, it should come as no surprise 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.

Zirnhelt v. Madaj (In re Madaj), 149 F.3d 467, 470 (6th Cir. 1998). Therefore, contrary to Defendant's arguments and apparent understanding, nothing the court did or did not do in its March 26, 2004, Order effected and discharge of Plaintiff's debt to Defendant.[3]

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[3] The date upon which Defendant received actual notice of the bankruptcy case may be relevant to damages. *But see* footnote 4 below. The lawyers' arguments suggest that there is a dispute of fact as to that date. At this point, these arguments on the date of notice lack proper (continued...)

The problem in this case is that Plaintiff has not placed before the court any properly authenticated evidence that the debt in question was incurred prepetition and is not of a type described in 11 U.S.C. § 523(a)(2), (4), or (6). While the Small Claims Complaint a copy of which is attached to the complaint initiating this adversary proceeding does indicate that both requirements are satisfied, the document is not certified or authenticated by an appropriate affidavit. *See* Fed. R. Evid. 902(4); *see also id.* R. 803(8). Upon the submission of such authentication, summary judgment declaring the debt discharged would appear to be appropriate.[4]

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff shall have 21 days from the entry of this order within which to file a certified copy of the Small Claims Complaint or an affidavit authenticating that document, and any other properly authenticated evidence he has to offer relating to the date the debt was incurred or its nature or otherwise in support of his complaint. Defendant shall then have 21 days after service of her copy of such filing(s) within which to file any properly authenticated evidence she has to offer relating to the date the debt was incurred or its nature or otherwise in opposition to Plaintiff's complaint. After such time periods have expired, the court anticipates ruling on the Motion to Dismiss and the S/J Motion without further notice or a hearing.

Mary Ann Whipple
United States Bankruptcy Judge

[3] (...continued)
evidentiary support in the record before the court.

[4] The court would also order the refund of any funds collected on the judgment after the commencement of the Chapter 7 case. No injunction against further collection activity would be warranted, however, because the Bankruptcy Code itself imposes such an injunction. 11 U.S.C. § 524(a)(2). Nor is the court presently inclined to award attorney's fees or other damages, due to both the lack of admissible factual proof in that regard and the lack in the S/J Motion of any legal authorities supporting such relief on a claim for violation of the discharge injunction. *Cf.* 11 U.S.C. § 362(h) (express statutory authorization of attorney's fees and punitive damages for certain violations of the automatic stay prior to discharge).