NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 04-21909
	)	
RICHARD J. CATALANO,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
RICHARD J. CATALANO,	)	Adversary Proceeding No. 09-1175
	)	
Plaintiff,	)	
	)	
v.	)	**MEMORANDUM OF OPINION**
	)	
PLAIN DEALER PUBLISHING COMPANY,	)	
	)	
Defendant.	)	

Prepetition, the plaintiff-debtor Richard Catalano signed a personal guaranty in favor of the defendant Plain Dealer Publishing Company with respect to advertising that the debtor's former business wished to place in the newspaper. The debtor filed this adversary proceeding seeking a determination that the debt arising under the guaranty is dischargeable under 11 U.S.C. § 523(a)(3). The parties submitted this matter for decision on stipulated facts and briefs.[1] For the reasons stated below, the court finds that the plaintiff is entitled to judgment on the complaint.

I. JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the

[1] *See* docket 13.

United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

II. FACTS

The parties stipulated to these facts:[2]

> 1. Plaintiff is indebted to Plain Dealer as a result of credit extended for advertising services provided to Plaintiff's former business, Wilson Mills Foods, Inc. fdba Catalano's Stop-N-Shop in the amount of $73,989.87 plus interest and costs.
>
> 2. The liability of Plaintiff for this obligation is based upon Plaintiff's execution of two (2) Personal Guarantees, which are part of the larger Retail Advertising Agreement, dated March 22, 1999 and October 18, 2001, respectively.
>
> 3. The Retail Advertising Agreements both contained provisions for automatic renewal of the Agreement for one-year periods, unless either party gave written notice of its intention not to renew, at least 30 days prior to expiration of the term.
>
> 4. From March 22, 1999 until September 17, 2004, Catalano's Stop-N-Shop continued to advertise with Plain Dealer under the Retail Advertising Agreement, utilizing Defendant's credit facility, and continued to make periodic payments on said account.
>
> 5. Between March 22, 1999 and September 17, 2004, no party to the Retail Advertising Agreement exercised the right to cancel the Agreement.
>
> 6. On September 17, 2004, Plaintiff filed his voluntary petition under Chapter 7 of the Bankruptcy Code . . . which case remains pending before this Court.
>
> 7. The deadline to object to discharge was set for December 13, 2004.
>
> 8. The Chapter 7 Trustee issued a Notice of Assets on October 27, 2004 and the deadline to file proofs of claim was set for February

[2] Docket 15.

5, 2005.

9. A discharge was issued on May 24, 2005.

10. Plaintiff failed to originally schedule Defendant as a creditor in his bankruptcy case.

11. Defendant had no actual notice of Plaintiff's bankruptcy prior to the December 13, 2004 discharge objection deadline or the February 5, 2005 claims bar date.

12. Catalano's Stop-N-Shop placed post-petition orders with Defendant for advertisements throughout 2004, 2005, 2006 and into calender year 2007.

13. Catalano's Stop-N-Shop continued to utilize Defendant's credit facility to finance the advertising services and made regular payments on the account to Defendant throughout 2004, 2005, 2006 and into 2007.

14. From September 17, 2004 through 2007, no party to the Retail Advertising Agreement exercised the right to cancel the Agreement.

15. The balance due and owing to Defendant, referenced in [Stipulation] #1 above relates to advertising services and credit used after the filing of Plaintiff's Chapter 7 proceedings on September 17, 2004.

16. On September 26, 2007, Defendant filed its action against Wilson Mills Foods, Inc. and against Plaintiff with the Court of Common Pleas for Cuyahoga County, being entitled *The Plain Dealer Publishing Company v. Wilson Mills Foods, Inc., et al.*, and being Case Number CV 07 636942.

17. On April 10, 2008, Plaintiff amended his Schedule F to add Defendant as an unsecured creditor and gave notice of such filing and of the bankruptcy case to Defendant and its counsel.

18. On July 22, 2008, the Motion for Summary Judgment filed by Defendant was granted in the State Court action and judgment was rendered in the sum of $62,691.98, plus interest and costs in favor of Defendant and against Plaintiff and Wilson Mills Foods, Inc.

19. Plaintiff filed his Notice of Appeal on August 21, 2008.

20. On April 30, 2009, the Court of Appeals of Ohio for the Eight Appellate District released its Journal Entry and Opinion affirming the judgment in the State Court action. In its Journal Entry and Opinion, the Court of Appeals specifically stated that "we are not holding that the debt upon which Catalano was sued was not discharged in bankruptcy, or cannot still be discharged in bankruptcy; rather we hold only that Catalano did not produce evidence of such discharge sufficient to overcome his burden for summary judgment."

21. In early 2007, Wilson Mills Foods, Inc. and Brian Bash, Chapter 7 Trustee, sold substantially all of its assets to Giant Eagle pursuant to a certain Asset Purchase Agreement and Orders of this Court. The Chapter 7 trustee received the sum of $600,000.00 solely from that sale as the share of the Debtor/Plaintiff.

22. The Chapter 7 Trustee received a total of $710,066.91 in liquidated assets for the Estate, which funds were disbursed by the Trustee on or about May 28, 2009, according to the Chapter 7 Trustee's Final Account and Distribution Report filed by said Trustee on August 13, 2009.

23. At the time funds were disbursed by the Trustee, Defendant had actual notice of the pending Chapter 7 case.

The court makes these additional findings of fact based on documents filed by the parties:[3]

1. The Retail Advertising Agreement dated October 18, 2001 is between the defendant and Catalano's. It has an effective date of November 23, 2001. That document states that:

> This contract shall be automatically renewed for successive periods of one year each at the rates in effect on the latest anniversary date (or at revised rates of which Publisher gives notice as hereinafter

[3] The debtor filed the documents with the complaint and the defendant filed them with its brief.

provided), unless either party notifies the other in writing of its desire to terminate the same at least 30 days prior to the latest anniversary date.

2. The March 18, 1999 agreement includes similar terms.

3. These are the terms of the debtor's guaranty as set out in the March 18, 1999 agreement:

> PERSONAL GUARANTY
> To induce the Plain Dealer to accept the above contract, I assume personal and individual responsibility and liability for payment under the contract, and I personally guarantee the complete performance by Advertiser of all of its obligations and prompt payment of all bills thereunder and I waive all notice of demand, of default, and of modification, and consent to any and all modifications thereof. Further, I waive my rights of indemnification by, reimbursement from, and subrogation against Advertiser which may arise or become fixed in the event I must perform my obligations or make any payment under this Personal Guaranty.

The debtor signed and printed his name below this statement.

4. The October 18, 2001 agreement states:

> PERSONAL GUARANTEE
> The undersigned consents to The Plain Dealer Publishing Company obtaining a consumer credit report on _____ for the purpose of evaluating the creditworthiness of _____ in connection with this application.

The debtor signed his name below this statement and above the word "Guarantor".

* * * * *

The parties did not address the relevance of the 1999 agreement given that the defendant and Catalano's later entered into the 2001 agreement on the same subject. Nor did they address the fact that the 1999 agreement has language creating a guaranty, while the 2001 agreement

seemingly does not. Nevertheless, the parties stipulated that the debtor is liable to the defendant in the principal amount of $73,989.87, that the liability is based on the two "Personal Guarantees," and that the balance due relates to services provided by the defendant to Catalano's after the debtor filed his chapter 7 case in 2004. The court will, therefore, proceed on the assumption that the operative agreement is the 2001 agreement and that the debtor guaranteed obligations under it.

III. THE POSITIONS OF THE PARTIES

The debtor's position is that his debt under the guaranty arose before his bankruptcy filing. Although the debtor did not initially schedule the debt, he argues that he gave the defendant notice of the bankruptcy in enough time that it could have timely filed a proof of claim and participated in the dividend paid to creditors, thus making the debt dischargeable under 11 U.S.C. § 523(a)(3)(A). The defendant argues that its claim arose after the chapter 7 case was filed and is not subject to discharge.

IV. ISSUES

(1) Whether the debt under the guaranty is a prepetition debt or a postpetition debt; and

(2) If the debt is a prepetition debt, whether it is discharged under § 523(a)(3)(A).

V. DISCUSSION[4]

A. Prepetition Debt or Postpetition Debt?

Under bankruptcy code § 727(b), the discharge granted to a debtor discharges debts

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[4] The debtor filed his case before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. All references to the bankruptcy code are, therefore, to the pre-BAPCPA code.

which arose prepetition. 11 U.S.C. § 727(b) (providing that a discharge "discharges the debtor from all debts that arose before the date for the order for relief under [chapter 7];" and 11 U.S.C. § 301 (providing that the commencement of a debtor's case constitutes the order for relief). The term "debt" "means liability on a claim," 11 U.S.C. § 101(12), and "claim" means "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]" 11 U.S.C. § 101(5)(A). Because the term debt is defined by reference to the definition of claim, the two words are coextensive. *CPT Holdings, Inc. v. Indus. & Allied Employees Union Pension Plan, Local 73*, 162 F.3d 405, 407 (6th Cir. 1998) (citing *Penn. Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 558 (1990)). "Congress described the definition [of the term "claim"] as the 'broadest possible,' and . . . 'contemplates that all legal obligations of the debtor will be able to be dealt with in the bankruptcy case[.]" *Id.* at 407-8 (quoting U.S. Code Cong. & Admin. News 1978, p. 6266)).

Under the statutory definitions, a debtor's contingent liability constitutes a debt if the creditor's right to payment arose prepetition. "[R]elevant non-bankruptcy law must be examined to see whether a right to payment, even a contingent right exists." *Id.* at 409. A debtor's liability as a guarantor before the default of the principal obligor is frequently cited as an example of contingent debt. *See for example Glance v. Carroll (In re Glance)*, 487 F.3d 317, 322 (6th Cir. 2007) ("Yes, a guarantee represents a contingent debt until the principal obligor defaults."); *In re Cox*, No. 08- 61964, 2009 WL 1586674, at *3 (Bankr. N.D. Ohio Feb. 13, 2009) (noting that a "guaranty is a classic example of a contingent obligation"); *see also Woburn Assocs. v. Kahn (In re Hemingway Transp., Inc.)*, 954 F.2d 1, 8 (1st Cir. 1992) ("As most courts now recognize, the

term "claim" is broad enough to encompass an unliquidated, contingent right to payment under a prepetition indemnification agreement executed by the debtor, even though the triggering contingency does not occur until after the filing of the petition under the Bankruptcy Code.); *Republic Bank of Cal., N.A. v. Getzoff (In re Getzoff)*, 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995) (noting that the debtor's guaranty represented "contingent liability to the Bank in the event GAC defaulted on any obligation 'now or hereafter made' to the Bank ... [which] debt was discharged in bankruptcy.").

The debtor, relying on the above reasoning, argues that his obligation under the guaranties arose when he signed them, which was before he filed the chapter 7 case. To support a contrary result, the defendant argues that the 1999 and 2001 agreements and guaranties were not single contracts. Instead, the defendant contends, the parties entered into new contracts each time the agreements renewed annually. Under this theory, the agreements that renewed after the bankruptcy filing are new postpetition agreements and thus the obligations which the debtor incurred under them are not subject to discharge. Ohio law does not, however, support this argument.

Under Ohio law:[5]

> a distinction must be made between contracts containing options to 'renew' for a given term or terms and those containing options to 'extend' for a given term. A contract containing an option to renew has the effect of granting a right to execute a *new* contract upon exercise of the option and the new contract is operative immediately after the terminal date of the original agreement. In other words, a contract containing a renewal option constitutes a

[5] The parties did not stipulate as to the controlling law and the agreements do not include a choice-of-law provision. Absent evidence to the contrary, the court assumes that Ohio law controls the agreements.

> present grant only for the original term, and a new contract must be executed at the end of such term if the option to renew is to be exercised. On the other hand, a contract which may be characterized as one containing an option to extend an agreement constitutes a present grant which, upon exercise of the option, operates to extend the term of the original agreement and the contract then becomes one for both the original and the extended term.

State ex rel. Preston v. Ferguson, 166 N.E.2d 365, 371 (Ohio 1960) (emphasis in original); *see also Estate of Kinsey v. Janes,* 613 N.E.2d 686, 690 (Ohio Ct. App. 1992); *City of Xenia v. State of Ohio*, 746 N.E.2d 666, 672-73 (Ohio Ct. App. 2000). A contract must clearly state that the parties intend the contract to be subject to an option for renewal; otherwise, the contract is interpreted as providing for an extension. *Gibbons-Barry v. Cincinnati Ins. Cos.*, No. 01AP-1437, 2002 WL 31087264, at *3 (Ohio Ct. App. Sept. 19, 2002); *Med. Life Ins. Co. v. Lamar*, No. 00AP-201, 2000 WL 1911665, at *4 (Ohio Ct. App. Jan. 9, 2000).

The 2001 agreement between the defendant and Catalano's states that it will automatically renew at the end of its original one-year term for a period of one year from year to year unless one party notifies the other of an intention not to renew. These terms show that the same contract was to be extended annually at the parties' option, not that the parties had an option to execute a new contract annually. Consequently, the annual extensions of the agreement were not new contracts.

The defendant argues that, "once it is established that [the] business automatically renewed the Agreement with the Defendant and that a new Agreement or contract was created, the question becomes: did Plaintiff's Personal Guaranty renew as well to become a post-petition obligation of this debtor?" The defendant then cites *McClure-Johnston Co. v. Jordan (In re*

Jordan), Adv. No. 05-1134, 2006 WL 1999117 (Bankr. M.D. Ala. Jun. 15, 2006) for the proposition that the debtor gave a continuing guaranty that created postpetition debt. Because the court has concluded that a new contract between the defendant and Catalano's did not come into existence annually, this point is moot. Alternatively, to the extent that the argument can stand on its own without reference to the automatic renewal argument, the result is the same.

The debtor's guaranty is a contract and is interpreted under the same rules that apply to other contracts. *G.F. Bus. Equip., Inc. v. Liston*, 454 N.E.2d 1358, 1359-60 (Ohio Ct. App. 1982). "The purpose of contract construction is to effectuate the intent of the parties. *Stone v. Nat'l City Bank*, 665 N.E.2d 746, 750 (Ohio Ct. App. 1995). "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Id.*

In this case, the only guaranty language is that found in the 1999 agreement. The parties agree, however, that the debtor's guaranty existed after the defendant and Catalano's entered into the 2001 contract, even though the 2001 contract does not include terms of the guaranty. Thus, the debtor's liability on the guaranty must have arisen under the 1999 contract rather than, as the defendant argues, a new contract that was created each year. The logic of this is illustrated by this question: if the debtor entered into a new guaranty each year, what were its terms?

The *Jordan* case, decided under Alabama law, considered different facts and is not dispositive here. *See also Weeks v. Isabella Bank Corp. (In re Weeks)*, 400 B.R. 117 (Bankr. W.D. Mich. 2009) (concluding under very different facts that a debtor's guaranty created postpetition liability.)

B. 11 U.S.C. § 523(a)(3)

Not all prepetition debt is discharged. Recognizing this, the debtor requests a

determination that the debt does not fall under bankruptcy code § 523(a)(3)(A). That section provides that a chapter 7 discharge does not discharge a 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[.]

11 U.S.C. § 523(a)(3)(A). The defendant responds that the debt is postpetition debt that would not be eligible for any payment from the bankruptcy estate. The court has found to the contrary above.

The stipulated facts establish that the debtor did not initially schedule the defendant as a creditor and that the defendant did not have notice of the case before the February 5, 2005 claims bar date. The debt, therefore, appears at first glance to fall within the terms of § 523(a)(3)(A). In chapter 7 cases, however, some untimely claims are allowed. Section 502(a)(9) provides that tardily filed claims shall not be allowed "except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a)[.]" 11 U.S.C. § 502(b)(9). And § 726(a)(2)(C) permits payment of tardily filed unsecured claims if the creditor did not have notice or actual knowledge of the case in time to file a timely claim and the claim is filed in time to permit payment of the claim. 11 U.S.C. § 726(a)(2)(C). The debtor argues that a tardily filed claim which is allowed under these provisions is equivalent to a timely filed claim for purposes of § 523(a)(3)(A). The Sixth Circuit adopted that line of reasoning in *Kowalski v. Romano (In re Romano)*, 59 Fed. Appx. 709, 713-14 (6th Cir. 2003), and as a result this court accepts it here.

The stipulations show that the defendant learned of the debtor's chapter 7 case in time to file a tardy claim and participate in the chapter 7 distribution. Its debt is not, therefore, excepted from discharge under § 523(a)(3)(A).

VI. CONCLUSION

For the reasons stated, the plaintiff is entitled to a judgment that his liability to the defendant under his guaranty is discharged under 11 U.S.C. § 523(a)(3). A separate judgment will be entered reflecting this decision.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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RICHARD J. CATALANO,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
RICHARD J. CATALANO,	)	Adversary Proceeding No. 09-1175
	)	
Plaintiff,	)	
	)	
v.	)	**JUDGMENT**
	)	
PLAIN DEALER PUBLISHING COMPANY,	)	
	)	
Defendant.	)	

For reasons stated in the memorandum of opinion entered this same date, the plaintiff is granted judgment on the complaint and his liability to the defendant under his guaranty is determined to be dischargeable under 11 U.S.C. § 523(a)(3).

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge