IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In Re:	*		
JUAN MARCELINO DE LA CRUZ ASUNCION, III	*	Case No.	05-32329-DK
	*	Chapter	7
	*		
	*		
Debtor(s)	*		

RAMZ KHLEIF
LARA KHLEIF

Movants

vs.

JUAN MARCELINO DE LA CRUZ ASUNCION, III

Respondent

MEMORANDUM ORDER DENYING MOTION TO REOPEN
NO ASSET CHAPTER 7 CASE

Movants, Ramz Khleif and Lara Khleif, seek to reopen this closed, no asset case so that Movants may prosecute an adversary proceeding seeking to determine that an alleged debt is non-dischargeable pursuant to 11 U.S.C.§ 523(a)(3) and therefore has not been discharged by the discharge order previously entered in this closed case. The motion represents that the Debtor failed to list Movants on any schedule of creditors and that Movants had no knowledge of the filing of the case.

As the docket of this bankruptcy case indicates, an Order Discharging Debtor was entered on January 6, 2006 and on January 9, 2006 a Final Decree was entered closing the case. Over two years later, Movants filed a motion to reopen the case seeking the opportunity to file a complaint instituting an adversary proceeding for a determination that the debt allegedly held by Movants has not been discharged by the order of discharge entered in this case.[1]

It appears that on or about November 1, 2007, Movants commenced an action in the District Court of Maryland for Howard County asserting a claim for damages against the Debtor/Respondent. A "Suggestion of Bankruptcy" was filed therein by Debtor asserting that the alleged obligation had been discharged by the discharge granted in this bankruptcy case. Movants did not contest that assertion in the state court action but instead seek to reopen this bankruptcy case. As set-forth on the record at a hearing upon the Motion to Reopen held on August 20, 2008, this court will deny the motion, for the reasons set forth in In re Stecklow, 144 B.R. 314 (Bankr. D. Md. 1992), and in In re Harmon, 213 B.R. 805 (Bankr. D.Md. 1997).

As explained in the Stecklow and Harmon opinions, the failure by the Debtor to list the creditor does not automatically deprive the Debtor of a discharge of the claim held by the creditor. 11 U.S.C. § 523(a)(3) prevents the discharge of an unlisted claim if the failure to schedule the claim results in that creditor being deprived of the opportunity to timely file a proof of claim. In addition, if the claim is of a kind which would have been held nondischargeable by reason of false pretenses, fraud, willful and malicious injury, as more fully set forth in 11 U.S.C. §§ 523(a)(2), (4), and (6), the failure to schedule the claim will prevent the discharge of the unscheduled claim where such failure also prevented the creditor from filing a timely request for determination of dischargeability.

Because this bankruptcy case was a no asset case, the notice sent to creditors who had been scheduled did not contain a deadline for filing proofs of claims. Accordingly, the failure to schedule the Movants' debt did not deprive the Movants of the opportunity to timely file a proof of claim; and it therefore appears that the Movants' claim may have been discharged, even though it had not been scheduled. If the Movants' claim arises from fraud, misrepresentation, or willful and malicious injury, as more fully set forth in 11 U.S.C. §§ 523(a)(2), (4), or (6), that claim may not have been discharged.

Movants seek to assert that the claim brought in the action before the state court is excepted from discharge as a debt incurred by fraud as described under 11 U.S.C. § 523(a)(2) and that Movants

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[1]An adversary proceeding was commenced prematurely by the Movants without awaiting the Court's ruling upon the Motion to Reopen.

had no knowledge of the bankruptcy case before the expiration of the bar date to bring an action to determine the debt non-dischargeable. However, as made clear in the opinions cited above, under the circumstances of this case, the issue of non-dischargeability under 11 U.S.C. § 523(a)(3) may be determined in the state court action. A defense of discharge has been apparently asserted in the action brought in the District Court of Maryland for Howard County court by the filing of a document entitled: "Suggestion of Bankruptcy."[2] Plaintiff creditor may challenge that defense in the state court, which court has concurrent jurisdiction to decide the issue under 28 U.S.C. § 1334. The automatic stay imposed by 11 U.S.C. § 362(a) is no longer applicable. 11 U.S.C. § 362(c)(2). To succeed in defeating the defense of discharge, creditor will have to prove by a preponderance of the evidence two required elements. First, that creditors had no notice or knowledge of the bankruptcy case in sufficient time to file a timely complaint pursuant to 11 U.S.C.§ 523(c), the bar date for which in this case was January 3, 2006. Second, that the debt is of a type described in 11 U.S.C. § 523(a)(2),(4), or (6).

For these reasons, it is not necessary to reopen this case. Accordingly, it is, by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that the motion by the Debtor(s) to reopen this case is denied; and it is further

ORDERED, that the adversary proceeding filed on August 19, 2008 will be dismissed by separate order.

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[2]A pleading entitled "Suggestion of Bankruptcy" is generally merely a colloquial caption for a notice of the commencement of a bankruptcy case and the resultant automatic stay created by the bankruptcy. See Local Bankruptcy Rule 2071-1 and Local Bankruptcy Form A. A defense asserting discharge in bankruptcy (as opposed to notice of stay) appears more properly to be brought by motion, or contained in a Notice of Intent to Defend. Md. Rules of Civ. Proc. 3-311(a) and 3-307(a), Cf. Md. Rule of Civ. Proc. 2-322(b).

END OF ORDER

cc: Debtor(s)' Attorney - George Edwin Rippel, Jr., Esq.
Debtor(s)
U.S. Trustee
Movant Creditor's counsel - Thomas Mallon, Esq.