NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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In re: JACK L. CHODNICKI,

Chapter 7
Case No. 02-59210 (RTL)

Debtor.

- -X

OPINION

APPEARANCES:

COSNER & COSNER
RUSSELL J. HUEGEL, Esq.
Attorneys for Debtor, Jack L. Chodnicki

JAMES D. NICHOLS, Esq.
Attorney for Maria Bruno, Creditor

RAYMOND T. LYONS, U.S.B.J.

INTRODUCTION

Creditor, Maria Bruno, moved for reconsideration of an order determining that her claim against the Debtor has been discharged. She acknowledges receipt of notice that she had been added to the list of creditors but asserts she never received notice of the last date to file a complaint to determine dischargeability. After reconsideration, the court concludes that Ms. Bruno's claim has been discharged because she had actual knowledge of the bankruptcy case well before the last date for her to file a complaint to determine dischargeability. Even if she did not receive notice of the bar date (a fact disputed by the Debtor), she had a duty to inform herself of the deadlines in the case and failed to do so. Under 11 U.S.C. § 523(c)(1) her debt is

discharged.

JURISDICTION

This court has jurisdiction of this proceeding under 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a), and the Standing Order of Reference by the United States District Court for the District of New Jersey dated July 23, 1984, referring all proceedings arising under Title 11 of the United States Code to the bankruptcy court. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I) to determine the dischargeability of a particular debt.

Ordinarily, a proceeding to determine the dischargeability of a debt is an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001(6), which requires a complaint to commence the adversary proceeding under Rule 7003. The Debtor brought this issue before the court by motion to which the Creditor, Maria Bruno, objected. She now has moved for reconsideration. Since both parties apparently are content to proceed by motion, resulting in a contested matter under Rule 9014, no purpose would be served by requiring an adversary proceeding at this point.

FINDINGS OF FACTS AND PROCEDURAL HISTORY

This is a motion by Creditor, Maria Bruno, to reconsideration an order that was entered previously. The order granted the motion of the Debtor to reopen the case and contained a determination that the alleged debt of Maria Bruno was discharged. Ms. Bruno believes the court failed to consider that, although she was actually aware of the bankruptcy no later than February 9, 2006, she was not served with a copy of the court's order dated January 6, 2006 that gave her until March 7, 2006, to file a complaint to determine dischargeability. The court gave the parties an opportunity to brief the issue of whether a creditor that has notice of the

bankruptcy before the last date to file a complaint for determination of dischargeability, but is not notified of the bar date, nevertheless is barred from bringing such a complaint, with the result that the debt would be discharged. Ms. Bruno's attorney filed a letter brief.

Rather than filing a brief, the Debtor filed a new certification in which the Debtor now says that he included a copy of the January 6, 2006 order in the same envelope with the copy of the amendment to the schedules, which Ms. Bruno and her attorney acknowledged receiving. However, Ms. Bruno and her attorney dispute the Debtor's statement that the January 6, 2006, order was in the envelope.

In this case, Mr. Chodnicki filed a voluntary petition under chapter 13 of the Bankruptcy Code on July 8, 2002. He resided in Lincroft, New Jersey. Before his chapter 13 plan was confirmed, he filed a motion seeking authorization to refinance his Lincroft property and mentioned that he had a business associate and friend, Maria Bruno, who had offered to co-sign on this loan. Mr. Chodnicki indicated that he intended to convey an interest in the property to Maria Bruno who would then co-sign on the debt.

It was not until April of 2003 that Mr. Chodnicki's chapter 13 plan was confirmed – a somewhat longer time than usual. It is also unusual for a chapter 13 debtor to refinance prior to confirmation. Just a look at the docket shows that this was a troubled chapter 13 case. There were many motions filed by creditors and by the chapter 13 trustee. Mr. Chodnicki was having trouble completing his plan. After three years, he gave up on chapter 13 and filed a voluntary conversion to chapter 7 on October 14, 2005.

Accordingly, once the case was converted, the Clerk issued a notice of a meeting of creditors for the chapter 7 case under § 341 of the Bankruptcy Code for December 6, 2005. That

notice also contained a last date to file a complaint to determine dischargeability under § 523(c) of the Bankruptcy Code as February 6, 2006; in accordance with Rule 4007(c) that would be 60 days following the first date initially scheduled for the meeting of creditors. Maria Bruno was not on the list of people that received that notice of conversion, notice of the meeting of creditors, and notice of the bar date because she had not been listed as a creditor.

Coincidentally, on December 6, 2005, Ms. Bruno filed a complaint in state court alleging that Mr. Chodnicki had defrauded her. There had been an interim transfer of the Lincroft property to another person. Ms. Bruno had taken back a mortgage on this Lincroft property. She alleged that Mr. Chodnicki had fraudulently procured a discharge of that mortgage causing her damage.

On January 5, 2006, Mr. Chodnicki filed an amendment to his schedules of creditors and added Maria Bruno as a creditor, including both her address and an address for her attorney, James Nichols, who was also the attorney of record in the state court proceeding brought by Ms. Bruno. The court issued a standard order giving Ms. Bruno 60 days to file a complaint objecting to dischargeability under § 523(c). That order also requires that the Debtor serve a copy of that order on Ms. Bruno. Mr. Chodnicki did not file proof of service of the January 6, 2006 order. The 60 days from January 6 to file a complaint objecting to discharge would expire on March 7, 2006.

On February 9, 2006, James Nichols, Ms. Bruno's attorney, sent a letter to the Clerk of the Bankruptcy Court acknowledging that he and his client had received a copy of the amendment to the schedules. Mr. Nichols claimed that his client's debt should not be discharged because it was the product of fraud. The Clerk docketed that letter but no further action was

taken by the court in response to Mr. Nichols' letter. A second letter, also dated February 9, 2006, was addressed to the court. Mr. Nichols indicated that the Deputy Clerk had told him that his letter was not going to be treated as a complaint for determination of dischargeability. After that, no further action was taken by Ms. Bruno to file a complaint to determine dischargeability although the time period for her would not have expired until March 7, 2006.

Apparently, things proceeded in state court, so Mr. Chodnicki sought to do something here in the bankruptcy court. He filed a motion to reopen his case, pro se, in November of 2006. Mr. Nichols, on behalf of Ms. Bruno, filed an objection to that motion. On December 11, 2006, the court granted the motion to reopen the case anticipating that someone would file a proceeding for determination of whether Ms. Bruno's claim had been discharged, but nothing further came. In other words, neither Mr. Chodnicki nor Ms. Bruno did anything to get a determination as to whether her claim had been discharged. In state court, a deposition of Mr. Chodnicki was taken in July of 2007. Then in September of 2007, this time represented by Mr. Huegel's firm, Mr. Chodnicki filed another motion to reopen this case and sought a declaration that Maria Bruno's alleged debt had been discharged. He certified that he served an amendment to his schedules on Ms. Bruno and Mr. Nichols. He did not mention the January 6, 2006 order giving Ms. Bruno 60 days from that date in which to file a complaint. Mr. Nichols, on behalf of his client, filed opposition. The hearing on Mr. Chodnicki's motion to reopen was scheduled for October 15, 2007. Mr. Nichols did not appear. The court granted the motion and entered an order on October 18, 2007, finding that Ms. Bruno had notice of the bankruptcy case prior to the time that the bar date expired and that she did not file a complaint for determination of dischargeability; therefore, her debt had been discharged. That was followed shortly by this

motion to reconsider. And at that point, Mr. Nichols made clear that he and his client disclaimed ever receiving a copy of the January 6, 2006 order. Mr. Chodnicki now certifies that he mailed the order.

DISCUSSION

Under § 727(b) of the Bankruptcy Code, a discharge discharges the debtor of all debts that arose before the order of relief, except the debts made nondischargeable by § 523. In a converted case, § 348(b) of the Bankruptcy Code provides that, for purposes of § 727(b), the order for relief is the conversion. Therefore, Maria Bruno's debt, which appears to have arisen prior to October 14, 2005, the day of conversion, would be a debt that would be discharged unless it was excepted under § 523. Mr. Nichols' letter of February 9, 2006 to the Clerk of the Court alleges that his client's claim is nondischargeable because it was procured by fraud. Section 523(a)(2) is the specific section of the Code that makes fraud claims nondischargeable. Section 523(c)(1) provides:

> Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6) as the case may be, of subsection (a) of this section.

11 U.S.C. § 523(c)(1) (Supp. 2005).

Section 523(a)(3)(B) deals with unscheduled claims. It provides that creditors who are unscheduled and have fraud claims are not discharged unless they have notice or actual knowledge of the bankruptcy case in time to file a complaint. *See* 11 U.S.C. § 523(a)(3)(B) (Supp. 2005). Take note that it is "notice of the case" not "bar date" under the statute. Rule

4007(b) is a general rule that provides that a complaint to determine dischargeability can be filed at any time except for those undischargeable debts mentioned in § 523(c). FED. R. BANKR. P. 4007(b) (2007). For those nondischargeable debts, Rule 4007(c) says that: "A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." FED. R. BANKR. P. 4007(c) (2007). It provides that the court may extend that deadline before it expires and also mandates that the Clerk shall give 30 days notice of the bar date. *Id.*

In this case, the bar date under Rule 4007(c) would have expired on February 6, 2006, which was 60 days after the § 341 meeting following conversion. For Maria Bruno that date was extended by the court to March 7, 2006. However, the court did not give her notice of the extended bar date. The January 6, 2006 order required the Debtor to serve Maria Bruno with notice of that bar date. He says he did. She says he did not. Nevertheless, Maria Bruno had notice of the bankruptcy case, at least through her attorney, by February 9, 2006, which was after the initial bar date but before the extended bar date.

There is at least one case in New Jersey that is almost directly on point. *Dollinger v. Poskanzer (In re Poskanzer)*, 146 B.R. 125 (D.N.J. 1992), dealt with a creditor that was not scheduled by the debtor but who had actual notice of the bankruptcy case, and even had a representative attend the initial meeting of creditors. *Id.* at 126. That creditor, who happened to be an attorney himself, filed a complaint objecting to discharge on the basis of fraud. *Id.* However, his complaint was filed beyond the 60 day bar date. *Id.* Judge Wolin in the district court held that "a creditor's possession of actual knowledge of the case vitiates an inadequately noticed creditor's ability to file out of time." *Id.* at 128. Judge Wolin pointed out that the Third

Circuit had not ruled on this precise issue but several other circuits, including the Fifth, Ninth, Tenth, and Eleventh, had ruled. *Id.* His review of that case law indicates that the Code places a heavy burden on the creditor to protect his or her own rights and to inquire as to the bar date. *Id.* at 128-30. Although Rule 4007(c) requires the court to notify the creditor of the bar date, technical compliance with the notice requirement of Rule 4007(c) is not mandated by due process. *Id.* at 133.

The bankruptcy court is not bound by a decision by a district court judge, although appeals from the bankruptcy court go to the district court. *In re Brown*, 244 B.R. 62, 64 (Bankr. D.N.J. 2000). In *Threadgill v. Armstrong Cork Co.*, 928 F.2d 1366 (3d Cir. 1991), the court held that there is no law of the district. *Id.* at 1371. However, decisions by a district court judge are entitled to substantial deference. Although not binding authority, they can be considered persuasive. Such persuasive authority is of particular significance in this case because, as Judge Wolin pointed out, there are at least four circuit courts that have considered this question and found that there is a duty of inquiry. *Poskanzer*, 146 B.R. at 128.

In *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11th Cir. 1988), the court not only imposed the duty of inquiry on the creditor to determine when the bar date expires but pointed out that requiring compliance with Rule 4007(c) and its 30 day provision would be inconsistent with § 523(a)(3)(B). *Id.* at 460. Section 523(a)(3)(B) puts the burden on a creditor with notice to protect itself and that creditor can easily protect itself merely by reviewing the bankruptcy file. *Id.* at 460-61.

In this case, if either Maria Bruno or her attorney reviewed the bankruptcy file she or he would have seen the court entered an order on January 6, 2006 giving her until March 7, 2006 to

file a complaint to determine dischargeability, and she would have had plenty of time to do that. Mr. Nichols, in fact, learned from the Clerk that his letter, in which he asserts that the debt was nondischargeable by reason of fraud, would not be treated as a complaint to determine dischargeability. The obvious conclusion one would draw is that he then knew a complaint had to be filed and that if he did not have notice of the bar date he could have easily found it out.

Mr. Nichols cites in his letter brief *In re Staffer*, out of the Ninth Circuit. *Staffer v. Predovich (In re Staffer)*, 306 F.3d 967 (9th Cir. 2002). That case is distinguishable because the creditor in *Staffer* was never listed on the bankruptcy schedules, either initially or by amendment, and never had knowledge of the bankruptcy case until after the bar date. *Id.* at 969. The creditor in *Staffer* is clearly one that comes under § 523(a)(3)(B) and may file a complaint to determine dischargeability at anytime under Rule 4007(b). *Id.* at 971. Although the bankruptcy court in *Staffer* originally focused on the bar date of Rule 4007(c), the bankruptcy appellate panel in the Ninth Circuit held that was incorrect because the creditor never had knowledge or notice of the bankruptcy case prior to the bar date. *Id.* at 971-72.

Ms. Bruno is a different situation. She was scheduled, albeit by amendment, and she had actual knowledge of the bankruptcy case prior to the bar date of March 7, 2006. There is a dispute as to when she had notice. If one believes Mr. Chodnicki's certification, she had it shortly after the January 6, 2006 order was entered. But Mr. Nichols maintains that neither he nor Ms. Bruno actually received a copy of the amendment until February 9, 2006. No matter what date is accepted by the court as the true fact, either is well prior to the expiration of the bar date.

There is no reason to resolve this factual conflict because the law is clear. There is a duty

on the creditor to investigate the bar date. Ms. Bruno had actual knowledge of the bankruptcy case well before the bar date but failed to investigate. Therefore, the time to file a complaint to determine dischargeability has long since passed. Under § 523(c)(1), Ms. Bruno's claim is discharged.

The court has reconsidered the motion and comes to the same conclusion.

Dated: January 24, 2008

/S/ *Raymond T. Lyons*
United States Bankruptcy Judge