

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
MICHAEL CHARLES SCHICKE,)	Case No. 96-10945
)	Chapter 7
Debtor.)	
_____)	

**ORDER DENYING CHANUTE PRODUCTION CREDIT ASSOCIATION'S
MOTION TO REOPEN DEBTOR'S BANKRUPTCY CASE**

PCA moves to reopen debtor's bankruptcy case because it neither received notice nor had actual knowledge of the case's filing. Debtor listed the PCA as a creditor, but instead of listing PCA's street address in Chanute, Kansas, debtor listed PCA in care of one of the attorneys who represented the creditor in state court proceedings against the debtor, but who, unbeknownst to the debtor, no longer had responsibility for the case at the time of debtor's filing. At the time of debtor's filing, the original law firm continued to do extensive legal work for the PCA on matters other than debtor's. While debtor's effort to list PCA was technically deficient under Fed. R. Bankr. P. 1007 (which requires that the creditor's street address, if known to debtor, be used), debtor asserts that listing the attorney was notice reasonably calculated to give the creditor actual knowledge of the case. This matter was tried to the Court on September 25, 2001. As is more fully detailed below, the Court finds it more likely than not that PCA and/or its agent, the law firm, had or could have had actual knowledge of the filing and the case should not be reopened to enable PCA to challenge debtor's discharge.

FINDINGS OF FACT

This story begins in April of 1984, when PCA was granted judgment in the Montgomery

County, Kansas, District Court against Michael Schicke in the amount of \$583,186.39.¹ That court found that Schicke induced PCA to make loans to him by using false financial statements and other knowing misrepresentations concerning his financial condition. Much of the fraud attributed to Schicke centered on his faulty representations concerning the extent of his ownership of livestock and his failure to use loan proceeds to acquire livestock.²

During the 1984 litigation, PCA was represented by one William Coombs, an attorney regularly practicing in Chanute, Kansas. Schicke was represented by Robert Claus of Independence. According to the testimony of James Neely, Vice President of Frontier Farm Credit, formerly known as Chanute PCA, Mr. Coombs contracted cancer in 1989 and, because of his illness, the PCA retained attorney Frank Beyerl to handle the Schicke matter. In July of 1991, Mr. Beyerl filed a praecipe of execution to maintain the judgment's vitality. See Kan. Stat. Ann. §60-2403. In October of 1991, Mr. Coombs issued a similar praecipe. That praecipe suggested that the debt had, because of interest accrual, swelled to \$1,268,579.69.³ It appears to this Court that, from 1991 until 1995, Mr. Coombs and Mr. Beyerl each represented PCA in the Schicke matter in state court.

In November of 1995, Beyerl was suspended from the practice of law. Shortly thereafter, PCA hired Kent Pringle, Esq., now practicing independently of Mr. Coombs. Pringle was charged with monitoring the judgment. He did not file an entry of appearance in the Montgomery County case when he was retained.

¹Case No. 81 C 97 I, Chanute Production Credit Association v. Schicke.

²PCA Exhibit 1.

³PCA Exhibit 4.

Schicke filed this bankruptcy case on March 27, 1996, using the services of his current attorney, Philip Bernhart. In Schicke's Schedules, the PCA is listed as a secured creditor in the following manner:

Chanute Production Credit Association
c/o Coombs & Hull
P.O. Box 306
Chanute, Kansas 66720

In both his papers and his testimony, Schicke asserted that he knew of no other address for the PCA. He testified that he did not know the proper name of PCA. Moreover, he could not say when he had last heard from PCA prior to the filing. He believed he had been in the PCA office during the 1980's when he contracted for the loan which is the basis for the judgment.

Neely testified that Schicke had indeed had contact with the PCA as late as 1991, when, represented by Woody Smith, Esq., Schicke sought the release of the PCA's judgment lien against his homestead at Tyro, Kansas, so that the place could be sold. PCA introduced copies of correspondence between Smith and Neely concerning this transaction as well as a copy of the lien release.⁴ Neely could not say, however, that Smith ever sent copies of any of this correspondence, all on PCA letterhead, to Schicke. PCA also introduced a copy of letter from Ed Fike, Neely's predecessor at the PCA, to Schicke circa 1987 in which Fike advises Schicke that his loan file had been transferred to the Ninth District PCA, apparently another of PCA's many monikers.⁵ Schicke was not asked on cross examination if he recalled seeing copies of any of this correspondence. While the Court can assume he received Fike's letter in 1987, nine years before his 1996 filing here, this seems, at best, a flimsy basis upon which to impute to Schicke rote knowledge of PCA's

⁴PCA's Exhibit 17 and 18.

⁵PCA's Exhibit 16.

street address. Mr. Neely testified that he believed this letter was the last direct communication between the debtor and the PCA.

PCA has operated under a plethora of names over the years. In 1996, PCA was called Farm Credit Services, although PCA had also been known as the Federal Land Bank Association, and is currently known as Frontier Farm Credit. PCA introduced into evidence an advertisement placed in Farm Talk, a magazine for farmers, on November 22, 1995. The advertisement reads, “Whether you know us by Federal Land Bank Association, Production Credit Association or Farm Credit Services. . . .”⁶ Interestingly, the advertisement contains only a phone number and no address. Schicke testified that he never subscribed to or read Farm Talk.

PCA asserts that it had no notice or actual knowledge of the filing of this case until after the entry of Schicke’s discharge in November, 1996. However, the Court’s file contains a certificate of service of the Notice of Commencement to Coombs & Hull as of April 2, 1996. The bank officer testified that the PCA received the discharge notice⁷ from attorney Mike Hull, who, by 1996, had joined Coombs in the practice of law. Neely testified that he is the “litigation” officer for the PCA in explaining why attorney Hull would have directed the discharge to him. Hull, Neely explained, delivered the discharge order at the same time he returned to PCA some title abstracts he had examined for the bank. Hull’s receipt of the discharge, combined with the Court’s certificate of service of the notice, satisfies this Court as a matter of common sense that Hull’s office more likely than not also received other notices pertinent to the case, including the notice of commencement of the case. During this period, Coombs & Hull received mail addressed

⁶PCA Exhibit 15.

⁷PCA’s Exhibit 10.

to P.O. Box 306 in Chanute, the same address included in Schicke's schedules for PCA.

For reasons unknown and unexplained, PCA did not call Hull as a witness in this matter. The Court can only assume that if attorney Hull could have testified that he did *not* receive the first notice, PCA would have subpoenaed him for that purpose. Hull's absence, and the absence of any probative testimony about what the Coombs office did or did not receive, leaves the Court with a serious question about what the Coombs office knew and when it knew it. The Court has no question, however, that the Coombs office was actively engaged in representing the PCA in many matters at the time it may have received this notice. If the Coombs office did receive the notice of commencement (as the docket indicates it did), because it essentially served as PCA's general counsel, PCA should be charged with the Coombs' office's knowledge of the filing.

Sometime in September of 1996, Pringle filed a renewal affidavit to extend the validity of the state court judgment for another five years. Thereafter, Pringle sought post-judgment remedies in state court. After being advised of the filing of this case, the state court declined further action in the matter and refused to exercise its concurrent jurisdiction with this Court to determine whether or not PCA's debt had been discharged. While Pringle's actions in 1996 could be taken to mean that PCA had no knowledge of the filing, it is more likely that Pringle had no knowledge of it. Again, the Court was offered no testimony from Pringle or Hull concerning what they knew and when. One can only assume that if their testimony would have been favorable to PCA's position, it would have been presented. Because it was not, and because PCA has the burden of proof on this point, the Court is left to draw its own factual conclusions concerning PCA's notice or knowledge and that of its counsel.

The district court's refusal to enforce post-judgment remedies against Schicke was affirmed by the Kansas Court of Appeals in 2000. That court stated that this Court was in the best

position to determine whether PCA had received notice of the bankruptcy that was “reasonably calculated under all the circumstances” to afford PCA an opportunity to protect its claim. Chanute Prod. Credit Assen v. Schicke, 27 Kan. App. 2d 769, 772-73, 9 P.3d 561 (2000). This motion followed.

Schicke objected and moved for summary judgment denying PCA’s motion to reopen. This Court denied Schicke’s motion, finding that a genuine issue of material fact remained concerning whether PCA had received actual notice of Schicke’s bankruptcy. In re Schicke, Case No. 96-10945 (Bank. D. Kan. January 29, 2001). The Court heard testimony and argument concerning the current matter on September 25, 2001 in an effort to determine whether PCA had actual notice or knowledge of the filing notwithstanding the manner in which its debt was scheduled by the debtor. The Court concludes that PCA did have or should have imputed to it the requisite actual notice or knowledge of this case.

JURISDICTION

The Court has jurisdiction over this proceeding. 28 U.S.C. § 1334. This matter is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

ANALYSIS

Section 350(b) of the Bankruptcy Code allows the Court the discretion to reopen a case “to administer assets, to accord relief to the debtor, or for other cause.”⁸ § 350(b). Here, PCA seeks to have this case reopened so that it may challenge Schicke’s discharge. At trial, PCA had the burden of demonstrating that cause existed for the reopening of Schicke’s case. See In re Cloninger, 209 B.R. 125, 126 (Bankr. E.D. Ark. 1997). Whether to reopen the case is within this

⁸All references are to Title 11, United States Code, unless otherwise noted.

Court's sound discretion. In re Daniels, 163 B.R. 893 (Bankr. S.D. Ga. 1994). Whether a case should be reopened at all turns on whether the Court will have the authority to conduct the business PCA requests (presumably a challenge to the dischargeability of its debt) once the case is reopened. See In the Matter of Hanks, 182 B.R. 930, 933 (Bankr. N.D. Ga. 1995).

PCA asserts that it neither received notice nor had actual knowledge of this case in time to file an exception to discharge complaint before the expiration of the deadline for filing such complaints under Fed. R. Bankr. P. 4007(c), which, in this case, was July 1, 1996. PCA further asserts that this lack of notice or knowledge arises from the erroneous listing of PCA as a creditor with PCA's counsel's address. Thus the fate of PCA's debt depends on whether it may take advantage of the narrow exception to discharge granted to creditors who lack notice or knowledge of a case which is contained in §523(a)(3)(B).

Section 523(a)(3)(B) provides that a discharge under section 727, 1141, 1228(a), (b), or 1328(b) 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 –

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, *unless such creditor had notice or actual knowledge of the case in time for such timely filing and request*; (Emphasis added).

Thus, if PCA could show that its debt met one of the enumerated exceptions to discharge, that it was neither listed nor scheduled in Schicke's petition, and did not receive notice or have actual knowledge of Schicke's pending bankruptcy case in time to timely file a dischargeability complaint before the expiration of the filing deadline under Fed. R. Bankr.

P. 4007(c), a Court might not enforce the ordinarily stringent deadline included in the Rule. In re O'Shaughnessy, 252 B.R. 722, 731 (Bankr. N.D. Ill. 2000).

PCA's exception to discharge would likely be based on either the actual fraud provisions of §523(a)(2) or the malicious damage provisions of §523(a)(6). Certainly there is an adequate predicate laid for these exceptions in the state court journal entry which details the debtor's fraudulent activity. The time for bringing an exception to discharge complaint is governed by Fed. R. Bankr. P. 4007(c), which generally provides that a complaint to determine dischargeability must be filed within 60 days of the § 341 meeting. Courts do excuse creditors from this deadline when the creditor could not have filed a complaint because he was omitted from the schedules. In re Wilborn, 205 B.R. 202, 207 (9th Cir. B.A.P. 1996). In a closed no asset case, if the debt is of a type covered by section 523(a)(3)(B), it has not been discharged and is nondischargeable. Id. (citation omitted). Generally, courts have not enforced the sixty-day bar date where a creditor did not receive notice of the bankruptcy or of the bar date. O'Shaughnessy, 252 B.R. at 731 (citing In re Marino, 195 B.R. 886, 891 (Bankr. N.D. Ill. 1996)).

Assuming the manner in which Schicke scheduled PCA resulted in it being "not listed," PCA would still have to demonstrate that it received neither notice nor actual knowledge of Schicke's case in order to benefit from the safe harbor of §523(a)(3)(B). If PCA did not have actual knowledge of Schicke's case, then PCA would be allowed to file its complaint under either Fed. R. Bankr. P. 4007(b), which provides that "[a] complaint other than under § 523(c) may be filed at any time," or PCA could implore the Court to exercise its equitable powers of § 105(a) to estop Schicke from asserting the passing of the 60-day deadline as a defense. See Wilborn, 205 B.R. at 208.

Unfortunately, PCA did not prove by a preponderance of the evidence that it had no knowledge of the filing. While this Court has no reason to doubt the veracity and candor of Jim Neely, the absence of any testimony from Mike Hull, combined with the fact that Coombs & Hull remained active counsel to the PCA throughout the pertinent time period renders this Court unable to conclude that Coombs & Hull never received notice of this case. The Notice of Commencement of Schicke's bankruptcy was not sent to PCA's actual address, but was instead sent to Coombs & Hull, PCA's attorneys of record in the Montgomery County case records and PCA's regular counsel on other matters. While Coombs & Hull was not actively involved in the Schicke collection matter in 1996, neither had it withdrawn its entry of appearance. Further, Kent Pringle had not entered his appearance in the state court case. Thus, while not in precise compliance with the Rules, notice sent to Coombs & Hull should have been sufficient and was reasonably calculated to give PCA knowledge of Schicke's case. It is generally held that a creditor having actual knowledge of a bankruptcy filing prior to the Fed. R. Bankr. P. 4007(c) bar date may not file a late complaint, even though it did not receive formal notice of the bar date. See In re Main, 111 B.R. 535 , 538 (Bankr. W.D. Pa. 1990).

"Reasonable notice" has been defined by the United States Supreme Court as "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). The totality of the circumstances should be examined to determine whether notice was reasonable. Marino, 195 B.R. at 895 (citing People ex rel. Hartigan v. Peter, 871 F.2d 1336, 1340 (7th Cir. 1989). Actual notice to a creditor's attorney of the pendency of a

bankruptcy may, in appropriate circumstances, meet the “reasonable notice” requirement. Carpet Services v. Hutchinson (In re Hutchinson), 187 B.R. 533, 535 (Bankr. S.D. Tex. 1995).

As a general rule, notice to a creditor’s attorney of a bankruptcy filing will be sufficient if the attorney received knowledge of it while representing the client in enforcing a claim against the debtor. 3 Collier on Bankruptcy § 532.13 (15th ed. 2000); In re Hatch, 175 B.R. 429, 433 (Bankr. D. Mass. 1994); Linder v. Trump’s Castle Assoc., 155 B.R. 102, 105 (D. N.J. 1993); Denmon v. Runyon, 208 B.R. 225, 228 (D. Kan. 1997)(“Linder expands the opportunity for notice by allowing notice to a party’s attorney to serve as constructive notice to a party.”) “An attorney’s actual notice of a bankruptcy may be imputed to his client if it occurs within the scope of the attorney-client relationship.” In re Marino, 195 B.R. at 895. In light of these rules, this Court must conclude that PCA was “listed” for notice purposes and that the “safe harbor” provisions of §523(a)(3)(B) do not apply.

The facts in this case show that it was reasonable for Schicke to send notice of his bankruptcy to Coombs & Hull, PCA’s attorneys who secured the state court judgment and maintained its validity for the following ten years. The Court’s experience and common sense suggest that if Coombs & Hull received the discharge notice, they likely received the commencement notice. And, even if Coombs & Hull were no longer litigation counsel to the PCA, their active involvement as PCA’s counsel for other purposes would likely have required them to share the commencement notice with the bank. Because Coombs & Hull remained PCA’s attorney of record in the state court case and because PCA’s “actual” attorney in the case, Kent Pringle, had not entered an appearance, Schicke’s directing

notice to Coombs & Hull appears reasonable in the circumstances.

Moreover, debtor's counsel made an effort to locate the address of Chanute PCA by inquiring of the Kansas Secretary of State, but, as PCA is a federally chartered corporation, it was not found in the Secretary's records. Further, PCA has undergone multiple name changes over the years as evidenced by the advertisement in Farm Talk magazine. PCA presented evidence that in 1987, it had corresponded with both Schicke and another of Schicke's attorneys, Woody Smith. PCA's actual address is printed at the top of the stationery, however the likelihood that Schicke (or anyone else) would recall the address at nine years remove is slim at best.

In short, the Court is simply not persuaded that PCA did not have, or could not easily have obtained, knowledge of this filing. PCA was listed as a creditor at the address of the law firm, Coombs & Hull, who had represented it in the state court proceedings for many years. This was notice reasonably calculated under all the circumstances to give PCA notice. The court file in this case demonstrates that notice of the commencement of this case and of the Fed. R. Bankr. P. 4007 deadline was sent to Coombs & Hull. That the bankruptcy of a notorious borrower whose liability exceeded \$1.0 million at the time of his filing and who listed the PCA in care of the lawyers who had acted to collect the judgment for several years and still represented the PCA on other matters never came to the PCA's attention is not likely. In the absence of any affirmative testimony by Hull that the law firm did not receive the notice, the Court is forced to conclude that PCA's regular attorneys were aware of the filing and that notice to them was reasonably calculated to give knowledge of this case to the PCA. PCA therefore cannot avail itself of the safe harbor of §523(a)(3)(B) and would not be permitted to commence a complaint for exception to

discharge were this case to be reopened. Because PCA has not borne its burden of proof in this matter, its motion to reopen these proceedings to prosecute an exception to discharge some five years out of time is denied.

IT IS SO ORDERED.

Dated this 15th day of November, 2001, at Wichita, Kansas.

**ROBERT E. NUGENT, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS**

Certificate of Service

The undersigned certifies that copies of the **Memorandum and Opinion** were deposited in the United States mail, postage prepaid on this 15th day of November, 2001, to the following:

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