SO ORDERED.

SIGNED this 16 day of May, 2006.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
DALLEN DAVID HARRIS,	)	**Case No. 00-14685**
CHRISTIE ANN HARRIS,	)	**Chapter 7**
	)	
Debtors.	)	
	)	

ORDER GRANTING SUMMARY JUDGMENT AND DENYING DEBTOR'S MOTION TO REOPEN CASE

Debtors Dallen David Harris and Christie Ann Harris move to reopen their bankruptcy case pursuant to 11 U.S.C. § 350(b)[1] in order to schedule and discharge an unscheduled debt (*i.e.*, a pre-petition default judgment entered against debtor Dallen Harris in favor of Nancy C. Millett ("Millett"), arising out of property damage from a motor vehicle accident). (Dkt. 69). Millett moves for summary judgment, arguing there is no genuine issue as to any material fact

[1] All further statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise noted.

and that she is entitled to an order overruling debtors' motion as a matter of law. (Dkt. 85). Debtors failed to file a timely response to Millett's motion and, after careful review of the record, the Court concludes that it should be GRANTED and debtors' motion to reopen the case DENIED.

Jurisdiction

The Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), 157(b)(2)(I), and 1334.

Summary Judgment Standards

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment and is made applicable to contested matters by Rule 9014 of the Federal Rules of Bankruptcy Procedure. Rule 56, in articulating the standard of review for summary judgment motions, provides that judgment shall be rendered if all pleadings, depositions, answers to interrogatories, and admissions and affidavits on file show that there are no genuine issues of any material fact and the moving party is entitled to judgment as a matter of law.[2] "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment, the requirement is that there be no genuine issue of material fact."[3] In determining whether any genuine issues of material fact exist, the Court must construe the record liberally in favor of the party opposing the summary judgment.[4] However, the opposing party's conclusive allegations are not sufficient to establish an issue of fact and defeat

---

[2] Fed.R.Civ.P. 56(c); Fed. R. Bankr.P. 7056, 9014.

[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[4] *McKibben v. Chubb*, 840 F.2d 1525, 1528 (10th Cir.1988) (citation omitted).

the motion.[5]

Factual Background

The statement of uncontroverted facts set forth in Millett's Motion for Summary Judgment is deemed admitted because the debtors did not file a timely response.[6] The uncontroverted facts are summarized below.

On April 9, 1991, Dallen Harris ("Harris") was involved in a motor vehicle accident with Millett. Millett commenced a lawsuit against Harris in the District Court of Sedgwick County, Kansas, case no. 92L17388, for property damage sustained as a result of Harris' negligent driving. On December 23, 1992, that court entered a default judgment in favor of Millett ("the judgment" or "the Millett debt"). Pursuant to K.S.A. 60-2202, the judgment was transcribed as a judgment lien in the District Court of Sedgwick County, Kansas, case no. 96C1562 ("the state action"). Thereafter, Harris' earnings were garnished pursuant to a garnishment order issued in the state action. Payments totally $561.84 were made on the judgment.

On November 27, 2000, the debtors filed bankruptcy under chapter 7. Millett was not scheduled as a creditor. On October 4, 2001, the Court granted the debtors' discharge, but the case remained open because the Trustee had discovered additional assets. This Court entered an Order setting a claims bar date of May 13, 2002 on January 31, 2002. The Trustee made a distribution to unsecured creditors in January 2003. The total distribution was $1,848.47. The bankruptcy case was closed on May 28, 2003.

Millett received no notice of the bankruptcy proceeding until well after the discharge

---

[5] *Id.*

[6] See D.Kan. LBR 7056.1.

order was entered and the date for filing of claims had passed. Millett first learned of the Harris' bankruptcy on or about March 29, 2004. Millett had filed a motion in state court to revive her judgment and Harris contacted Millet's counsel after receiving the motion to advise he had previously filed bankruptcy. Not until debtors attempted to amend their schedules in April of 2005 were Millett or her counsel mentioned in the bankruptcy file.

On April 8, 2004, Millett filed a motion in the state court action to determine whether her judgment had been discharged in the Harris' bankruptcy. The state court issued an order on October 8, 2004 determining that the judgment had not been discharged. This order recites that it was entered by agreement of the parties. In the order, the state court found that "pursuant to 11 U.S.C. § 523(a)(3)(A) the instant judgment is not discharged by the [Harris'] bankruptcy and that [Millett] may take such further action and issue such process as may be deemed necessary to collect the judgment in this action."[7]

On April 20, 2005, the debtors filed an amendment to their schedules and a motion to reopen their case pursuant to § 350(b) in order to schedule the Millett debt and have it discharge. Notably, the debtors' motion recites that they "have become aware of pre-petition debt inadvertently omitted from the original filing" and that, at the time of the 2000 filing, "Debtors did not realize they had this debt."[8] Millett objected to the motion to reopen, asserting that her claim was not dischargeable pursuant to § 523(a)(3)(A) because the motion to reopen came long after the claims bar date and the complete distribution of the estate's assets. After issuing written discovery to which the debtors failed to respond, Millett filed this motion. After seeking

[7] Dkt. 85, Ex. B.

[8] Dkt. 69.

and receiving an extension to file a response in opposition to this motion, the debtors failed to file a timely response.[9]

IV. Analysis

A. Debtors Failure to Respond to this Motion

As a preliminary matter, this Court's local rules authorize the granting of this motion as uncontested since Debtors failed to file a response. D.Kan. Rule 7.4 provides if a respondent fails to file a response within the time required by D.Kan. Rule 6.1(d), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice. Because the relief sought be the debtors bears directly on the scope of Dallen Harris' discharge, some discussion of the merits is in order.

B. Reopening a Case for Cause

Section 350(b) provides for a case to be reopened "to accord relief to the debtor, or for other cause."[10] Here, Harris seeks to reopen the case to include Millett's 14-year-old judgment in the schedules and, presumably, discharge his debt to her. Bankruptcy courts are accorded broad discretion in determining whether to reopen a case. Generally speaking, these motions should be liberally granted.[11] "Cause" in the context of § 350(b) has been interpreted as service to the public interest and the purposes of the bankruptcy code. Specifically, a case may be reopened if the Court receives a "seasonable and diligent application," filed with good cause and

---

[9] Dkt. 105.

[10] 11 U.S.C. § 350(b).

[11] 2 William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d § 34:3 (2d ed. 1994). See *In re Kapsin*, 265 B.R. 778, 780 (Bankr. N. D. Ohio 2001) and *In re Rettemnier*, 113 B.R. 757, 759 (Bankr. S.D. Fla. 1990).

in the absence of intervening rights that would make reopening the case inequitable and unjust.[12] The person seeking reopening has the burden of proof on these issues.

In this case, Harris failed to controvert any of the factual allegations made by Nancy Millett whatsoever. The Court notes, too, that Harris failed to respond to any written discovery, including requests for admissions. He filed this application to reopen in April of 2005, nearly five years after filing the petition, three years after the claims bar date had run, and two years after the case was closed. The Court also notes with disdain the fact that this motion was filed only six months after Harris agreed to the entry of a state court order finding this debt to have been excepted from his discharge. This is hardly a "seasonable and diligent" application.

The fact that a sister court of competent jurisdiction has already determined the issue that caused Harris to seek to reopen this case suggests a complete lack of good cause. And, the fact that Harris waited to file this motion to reopen until long after the claims bar date ran and the trustee had completed his distribution of assets in the case demonstrates the inequity and injustice that would result to Nancy Millett were this case to be reopened. Thus, there is no good cause whatsoever to reopen this case.

C. Reopening to Accord Relief to the Debtor: The Dischargeability of the Millett Debt

Even if there were valid cause to reopen the case, and even if the state court had not already decided that Millett's debt should be excepted from discharge, Harris could not be accorded meaningful relief because Millet's debt is excepted from discharge by operation of §

[12] Norton, *supra* note 11, § 34:5. See *In re Admire*, 15 B.R. 405, 407 (Bankr. Mo. 1981) and *In re Baker*, 299 F.Supp. 404, 407 (W.D. Mo. 1969).

523(a)(3)(A). Section 727(b) discharges all prepetition debt except as provided in Section 523. Section 523(a)(3)(A) excepts from discharge debts–

> 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 paragraphs (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 . . . . [13]

In other words, a claim will not be discharged if it was neither listed nor scheduled and the creditor did not have notice or actual knowledge of the case so that the creditor could timely file a claim.

Here, the last date upon which Nancy Millett could have filed a proof of claim and participated in a distribution of estate assets was May 13, 2002. The uncontroverted facts are that she never received notice of this case until she filed her motion for revivor in 2004. Accordingly, a bankruptcy court would likely conclude that this debt was excepted from Dallen Harris' discharge. It is well within a court's discretion to decline to reopen a case merely to determine the dischargeability of a debt other than one excepted by subparagraphs (2), (4), and (6) of § 523 because the bankruptcy court's jurisdiction to determine their dischargeability is concurrent with that of other courts.[14] As noted below, another court has in fact exercised its concurrent jurisdiction and made that determination in this case.

---

[13] 11 U.S.C. § 523(a)(3)(A).

[14] Norton, *supra* note 11, § 34:6. *See In re Smith*, 125 B.R. 630 (Bankr. E.D. Okla. 1991).

D. Preclusive Effect of State Court Order on Dischargeability

On October 8, 2004, the state court entered its order determining that Millett's debt was excepted from Dallen Harris' discharge under Section 523(a)(3)(A). There is no question that the state court had concurrent jurisdiction of that controversy.[15] The principles of collateral estoppel preclude relitigation of the issue in this Court.[16] This Court will not, and should not, reopen a bankruptcy case to revisit or reconsider the state court's determination.[17]

The state district court determined that Millett did not receive notice of the bankruptcy nor did she have actual knowledge of the case in time to file her claim. This factual determination, made by a court of competent jurisdiction, precludes this Court from relitigating that issue.[18] Accordingly, there is no genuine factual or legal issue that the debt owed to Millett is nondischargeable under Section 523(a)(3)(A). This Court must give full faith and credit to that court's determination of the issue. Therefore, this Court can afford debtor no relief that would justify the reopening of this case.

F. Justification for Filing This Motion and Fed. R. Bank. P. 9011

As noted above, the uncontroverted facts in this matter demonstrate that Dallen Harris, through other counsel, agreed to the state court's determination of the very issue he now seeks to

---

[15] *Id. See also Beardslee v. Beardslee (In re Beardslee)*, 209 B.R. 1004, 1009 (Bankr.D.Kan.1997).

[16] *Goss v. Goss*, 722 F.2d 599, 602 (10th Cir.1983).

[17] *In re Brice*, 79 B.R. 310 (Bankr. S.D. Ohio, 1987) (Once issue of dischargeability has been conclusively determined by a court of competent jurisdiction, neither bankruptcy court nor any other court is free to reopen that judgment.).

[18] *In re Wallace*, 840 F.2d 762 (10th Cir. 1988)(The doctrine of collateral estoppel may be invoked to bar relitigation of the factual issues underlying the determination of dischargeability.). *See also In re Brice*, 79 B.R. 310 (Bankr. S.D. Ohio 1987)

have this Court determine. Indeed, the state court's order was entered a mere six months before the motion to reopen was filed. Yet, debtors' motion recites only the "debtors have become aware of pre-petition debt inadvertently omitted" that "they did not realize they had." Clearly, debtors knew that the statements in the motion to reopen were incomplete, if not false on their face. It is equally clear that had debtors' counsel engaged in even cursory review of the record and applicable law, he would have known that, too.

This conduct is dangerously close to that often sanctioned by federal courts under Fed. R. Bank. P. 9011. This Court grants many motions to reopen as a matter of course, without objection or more than routine judicial review. This Court's willingness to do that is based, in large part, upon its ability to rely upon the representations of counsel and parties in their papers that the remedy sought is lawful and that the facts as pled are true. These are the inherent representations made every time a lawyer or a party signs a paper filed in this Court.[19] There is no motion for such sanctions pending at this time and, until a motion is filed, let these comments be fair warning that similar future indiscretions will not be taken lightly.

Conclusion

Nancy Millet is entitled to judgment as a matter of law that Debtors' motion to reopen this case should be DENIED.

# # #

[19] Fed. R. Bank. P. 9011(b).