

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. MB 03-048

Bankruptcy Case No. 97-11182-CJK

**JAMES W. HILL,
Debtor.**

**JAMES W. HILL,
Appellant,**

v.

**DONNA CHILDS and STEPHEN S. GRAY, as Chapter 7 Trustee,
Appellees.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)**

**Before
VOTOLATO, VAUGHN, and KORNREICH,
U.S. Bankruptcy Appellate Panel Judges.**

Richard N. Gottlieb, Esq., on brief for the Appellant.

Donna Childs, *pro se*, on brief for the Appellee.

March 23, 2004

VAUGHN, U.S. Bankruptcy Appellate Panel Judge.

James W. Hill (the “Debtor”) appeals the orders of the United States Bankruptcy Court for the District of Massachusetts (the “bankruptcy court”) entered on April 16, 2003, April 23, 2003, and May 27, 2003, respectively. The bankruptcy court denied the Debtor’s Motion to Extend Time to File Amended Schedules on April 16, 2003, and denied the Debtor’s Motion to Amend Schedule F and Creditor Matrix as moot on April 23, 2003. The Debtor’s request for reconsideration of the said two orders were denied by the bankruptcy court on May 27, 2003. For the reasons discussed below, the orders of the bankruptcy court are affirmed.

Background

On February 10, 1997, the Debtor filed a Chapter 7 bankruptcy petition. The Debtor listed \$625 in assets and \$346,582 in liabilities in his schedules. The Debtor’s ex-wife, Donna Childs, a creditor of the Debtor, was not listed in the schedules. On May 29, 1997, the Debtor received a discharge in this no asset case and the case was closed. On March 17, 2003, the Debtor filed a Motion to Reopen to add his ex-wife to his schedules as a creditor. In his affidavit in support of the Motion to Reopen, the Debtor stated that he was ordered by the Judgment of Divorce Nisi, issued by the Middlesex Probate and Family Court (“state court”), to indemnify his ex-wife for all arrearages and costs associated with the foreclosure or sale of the couple’s marital residence. The Debtor also stated that he did not include his ex-wife on Schedule F because he was informed by the mortgage holder that there was no outstanding balance on the mortgage. Noting that no objections were filed,¹ the bankruptcy court allowed the reopening of the case on

¹Ms. Childs’ objection to the Debtor’s Motion to Reopen was filed on April 11, 2003, two days after the bankruptcy court granted the Debtor’s motion. She contends that the Debtor owed her under the Judgment of Divorce Nisi not only the deficiency on the post-foreclosure sale of their marital property,

April 9, 2003, and directed that the Motion to Amend and the Amendment(s) be filed on or before April 16, 2003, at 4:00 p.m.

Having failed to file the amendments, on April 16, 2003, the Debtor filed a Motion to Extend Time to File Motion to Amend and Amended Schedules to April 23, 2003, and Donna Childs filed her objection. The bankruptcy court denied the motion without hearing, noting that “this case was filed more than seven years ago. More time is not appropriate.” Apparently unaware of the bankruptcy court’s order, the Debtor filed his Motion to Amend Schedule F and Creditor Matrix on the following day, April 17, 2003, but the bankruptcy court directed the clerk to close the case again and held the Debtor’s motion moot on April 23, 2003. On April 25, 2003, the Debtor filed a Motion for Reconsideration of Order Closing Case and Denying the Addition of Creditors, and Donna Childs objected to the motion. The bankruptcy court denied the motion. As grounds for denying the motion, the bankruptcy court stated that “the Court previously allowed the Debtor to re-open and he failed, without good cause, to file amended schedules in a timely manner more than seven years after this case was closed. Moreover, any amendment would not affect dischargeability of any debt nor will there be any dividend paid, thus amendment is futile.” The Debtor timely filed a notice of appeal, and this appeal ensued.

Jurisdiction and Standard of Review

The Bankruptcy Appellate Panel for the First Circuit (the “Panel”) has jurisdiction over this appeal under 28 U.S.C. § 158(a) and (b). A bankruptcy court’s conclusions of law are reviewed *de novo* and findings of fact for clear error. Brandt v. REPCO Printers &

but also condominium fees, taxes and clean-up costs. She also argues that the Debtor defied the state court’s judgment, which ordered the Debtor to assign his interest in his father’s estate to her in order to reimburse the aforementioned expenses.

Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 107 (1st Cir. 1997); Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995). Decisions entrusted to the discretion of the bankruptcy judges are reviewed for abuse of discretion. In re Moretti, 260 B.R. 602 (B.A.P. 1st Cir. 2001).

Discussion

_____The central issues presented in this appeal are whether the bankruptcy court abused its discretion in refusing to allow the Debtor, without holding a hearing, an extension of seven days within which to add a previously omitted creditor to the Debtor's schedules, and to reconsider the same request on the basis that the Debtor failed to file amended schedules in a timely manner without good cause and that the amendment would be futile. The Panel finds that the bankruptcy court did not abuse its discretion in ruling as it did.

Section 350(b) of the Bankruptcy Code provides that "a case may be reopened in the Court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause."² The language of section 350(b) gives the court broad discretion in the reopening of a case. See In re Shondel, 950 F.2d 1301 (7th Cir. 1991) (acknowledging that the trend in reopening cases under section 350(b) has been to allow the bankruptcy judge broad discretion to weigh the equitable factors in each case). Bankruptcy courts have allowed the reopening of cases to add creditors if the reopening will provide the debtors with any relief. See In re Jones, 191 B.R. 265 (Bankr. D. Mass. 1996); In re Walker, 195 B.R. 187 (Bankr. D.N.H. 1996).

² Unless otherwise noted, all statutory section references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§101, *et seq.*

The Debtor argues that the appropriate standard for the allowance of a motion to amend schedules of creditors upon reopening should be no different than the standard used if the case had never been closed. The Debtor contends that a debtor in a reopened case should also be permitted to amend schedules as a matter of course at any time before the case is closed under Fed. R. Bankr. P. 1009(a).³ This argument is not only incorrect but it is also misplaced. We have already held that Rule 1009(a) specifies no standard for amendment after the case is closed and that the relevant standard is supplied by Rule 9006(b)(1),⁴ In re Moretti, 260 B.R. at 607-608, and we need not address the issue again. Unlike the case of In re Moretti, where the debtor was denied leave to amend Schedule F, the Debtor in the instance case was *allowed* by the bankruptcy court to amend his schedules after his Chapter 7 case is reopened. We note that notwithstanding the Court's allowance, the Debtor failed to amend his schedules in a timely manner.

Alternatively, the Debtor asserts that even if the bankruptcy court was to apply the standard set forth under Rule 9006(b)(1), he has demonstrated both "good cause" and "excusable neglect" required by this Rule. This argument is closely related to the Debtor's next argument

³ Fed. R. Bankr. P. 1009(a) provides:

A voluntary petition, list, schedule, or statement may be amended by the debtor as a matter of course at any time before the case is closed.

⁴ Fed. R. Bankr. P. 9006(b)(1) provides:

Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion

(1) with or without motion or notice order the period enlarged if the request therefore is made before the expiration of the period originally prescribed or as extended by a previous order or

(2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

that the bankruptcy court's emphasis on the age of the case in refusing to extend time to file the amended schedules constituted an abuse of discretion.

Under the Rule 9006(b)(1), the determination of whether particular circumstances constitute cause to order the period enlarged is entrusted to the sound discretion of the bankruptcy judge ("the court...*may...in its discretion...order the period enlarged*") (emphasis added). See In re Moretti, 260 B.R. at 608. An abuse of a bankruptcy court's decision occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." Independent Oil & Chemical Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F. 2d 927, 929 (1st Cir. 1988).

The Debtor failed to provide "good cause" for his delay in filing the amendments. The Debtor states that he sought to add the claim of Nelnet, a student loan creditor, as well as the claim of Ms. Childs and that he needed more time to verify the creditor information.⁵ However, the Debtor clearly stated in his Motion to Reopen that he moved for an Order reopening his case for the specific purpose of adding his former spouse, Ms. Childs, but he did not state anything about the claim of Nelnet in the motion. The Debtor offered to pay \$5,000 to Ms. Childs in order to settle her claims against him on January 31, 2003, and Ms. Childs refused the settlement offer. This suggests that the Debtor did have enough information as to Ms. Childs and her claims when he filed the Motion to Reopen, so the Debtor had no cause to justify his delay.

⁵ It is only reasonable to assume that when the basis for a motion to reopen is to add creditors, the creditor information is known when the motion is filed.

The bankruptcy court was justifiably and well aware that the specific purpose of the Debtor's Motion to Reopen was to add Ms. Childs as a creditor. The age of the case is particularly relevant to the adjudication of the Motion to Extend Time because the Debtor has had ample opportunity to reopen his case and amend his schedules to reflect Ms. Childs' claims during the past seven years. The fact that the state court issued a Judgment of Contempt against the Debtor on July 10, 1995, and ordered him to be committed to a house of correction for sixty days indicates that the Debtor had actual and sufficient knowledge of Ms. Childs' claims against him at least since that time. Moreover, the Debtor was given seven days to file amended schedules from the date that the bankruptcy court allowed his case to be reopened. Therefore, under the circumstances, the bankruptcy court's finding that more time was not appropriate did not constitute an abuse of discretion.

Finally, the Debtor asserts that permitting the amendment is not an exercise in "futility" as the bankruptcy court held. We find no error here. Unfortunately, debtors often file motions to reopen for the purpose of adding creditors to the schedules in the mistaken belief that adding the creditor is necessary for the debt to be discharged. However, the late listing of an otherwise nondischargeable debt does not bring it within the scope of the discharge. Under section 523(a)(3), an unscheduled debt is excepted from discharge only if the failure to schedule resulted in the creditor's lacking knowledge of the case in time to file a proof of claim or, if the creditor holds a claim that would have been found nondischargeable under subsection 523(a)(2), (4), or (6), in time to file a dischargeability complaint. See Lawrence P. King et al., Collier on Bankruptcy ¶ 350.03 [2] (15th rev. ed. 2001).

As far as we know, Ms. Childs strongly objects to the discharge of her claims and the state court has not determined the dischargeability of the debt. Thus, the bankruptcy court correctly ruled that the Debtor's late scheduling of Ms. Childs' debt would not affect the dischargeability of the debt. Moreover, seven years have passed since the Debtor filed his Chapter 7 petition, and his estate has no known assets for distribution. The bankruptcy court does not need to permit an amendment of schedules until the Debtor's assets are discovered. Given the age of the case, it is very unlikely that there will be any future dividend. Thus, this Panel concludes that the bankruptcy court did not abuse its discretion in holding that the Debtor's amendment would be futile.

Conclusion

The bankruptcy court properly denied the Debtor's Motion to Extend Time to File Motion to Amend and Amended Schedules and the Motion for Reconsideration of Order Closing Case and Denying the Addition of Creditors. Accordingly, we AFFIRM the bankruptcy court's orders.