

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

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In re) Bankruptcy Case No. 81C-01756
)
PHILLIP GARTH READ and)
VIRGINIA ELISE READ,)
)
Debtors.) ORDER

Appearances: Michael E. Dyer of Richards, Brandt, Miller & Nelson, for the debtors; James M. Dean for Cottonwood Leasing.

The above-named debtors filed their chapter 7 petition on May 11, 1981 and were subsequently discharged on October 5, 1981. In March of 1982, Cottonwood Leasing (Cottonwood) commenced an action in state court against debtors, based upon debtors' personal guaranty of a corporate debt, which guarantee was entered into pre-petition. Cottonwood was not listed as a creditor on the debtors' schedule or statement of affairs and Cottonwood alleges that it had no notice or actual knowledge of the case until February 1982. These facts are not disputed by the debtors.

Cottonwood contends that the debt was not discharged and that it should be allowed to proceed to judgment in the state court.

The debtors moved the court to reopen the case, which motion was moot inasmuch as the trustee had obtained an order in August of 1982, reopening the case for the purpose of selling assets of

the debtor. Next, debtors filed amended schedules adding Cottonwood as a creditor. The debtors rely upon Rule 110 which states:

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

Apparently, debtors assume that by adding Cottonwood to the schedules, the debt will then be dischargeable.

The Advisory Committee's Note to Rule 110 states:

If a schedule is amended to include an additional creditor, the effect on the dischargeability of the creditor's claim is governed by the provisions of § 17 of the Act (see particularly § 17a(3)).

Section 523(a)(3) of the Code tracks the language of § 17a(3) of the Act and provides that a debtor is not discharged of any debt which is neither listed nor scheduled in time to permit the timely filing of a proof of claim, unless the creditor had notice or actual knowledge of the case in time for such filing.

It is undisputed that Cottonwood had no notice or actual knowledge of the case until February of 1982. Since the debtors were discharged on October 5, 1981, there was no possibility of Cottonwood filing a timely proof of claim. While debtors may, under Rule 110, amend their schedules, such amendment is not a determination of dischargeability. Based upon the facts before the court, debtors' amendment was not scheduled in time to permit

a timely filing of a proof of claim. Accordingly, the debt to Cottonwood is not discharged.

DATED this 20 day of September, 1983.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE