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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
Northern Division

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|------------------------|---|-------------------------------|
| In re | : | |
| | : | |
| RICHARD EUGENE NILSSON | : | Bankruptcy No. B-76-633 |
| | : | |
| Bankrupt | : | |
| | : | |
| BRANDT A. CHILD and | : | |
| LUE A. CHILD | : | |
| | : | |
| Plaintiffs | : | MEMORANDUM DECISION AND ORDER |
| | : | |
| vs | : | |
| | : | |
| RICHARD EUGENE NILSSON | : | |
| | : | |
| Defendant | : | |

Appearances: Duane A. Burnett on behalf of the plaintiffs, Brandt A. and Lue A. Child. Pete N. Vlahos for the defendant bankrupt, Richard Eugene Nilsson.

Plaintiffs filed an action in the Second Judicial District for the State of Utah on August 1, 1975. Defendant Nilsson was apparently properly served with a summons and complaint at that time. On July 8, 1976, Nilsson filed a Chapter XIII petition in the bankruptcy court. The Childs were not listed as creditors on the Chapter XIII schedules. On March 22, 1977, Nilsson was adjudged a bankrupt by the Court. Plaintiffs, who were still not listed as creditors, apparently received no notice of the adjudication. June 6, 1977 was set as the last day for the filing of objections to discharge. October 7, 1977 was set as the last day for filing of claims in the case.

On April 6, 1979, nearly three years after the original filing in the bankruptcy court, an application to add the Childs as creditors was filed with the Court. Notice was duly sent out to the Childs and apparently received by them on May 10, 1979. The case which had begun in state court in 1975 had meanwhile proceeded without interruption until defendant thus notified plaintiffs, apparently in the closing

stages of their state court proceeding, of the bankruptcy. Plaintiffs thereafter refrained from further action in the state court and brought an action in this Court, on August 17, 1979, to have their debt determined to be nondischargeable under §17a(3) of the Bankruptcy Act, 11 U.S.C. §35a(3), and to be allowed to continue their suit against the bankrupt to its conclusion.

A pre-trial conference was held on October 18, 1979 in which a scheduling order was established for the filing of motions. As the parties speculated that the matter could be wholly resolved by motion, no trial date was set. Motions for summary judgment were thereafter filed by both parties. Plaintiffs' motion for summary judgment is based upon defendant's failure to list the Childs as creditors on his bankruptcy schedules, the effect of §17a(3), 11 U.S.C. §35a(3), and their allegation that the Court does not have equitable power to extend the time for filing claims under §57n, 11 U.S.C. §93n. Defendant's motion for summary judgment is based upon his contentions that the complaint does not state a claim upon which relief can be granted and that the bankruptcy schedules were amended to include the Childs and notice of such amendment was given to them so as to discharge their claim. Although both motions were accompanied by memoranda, neither were supported by affidavits. The motions were duly answered by the opposing parties and were then submitted to the Court for decision.

Turning first to defendant's motion for summary judgment, the Court concludes that this motion must be denied. Defendant's initial contention that the complaint does not state a claim upon which relief can be granted is not well founded. Although it is true that plaintiffs do not state the specific section under which they are asking for the determination of their debt as nondischargeable, the averments are sufficient to comply with the liberal federal requirement of "notice" pleading found in Rule 8(a), Fed.R. Civ.P.,

made applicable to this proceeding by Rule 708, Fed.R. Bankr.P. This rule does not require a detailed pleading, but only a "short and plain statement of the claim" so as to provide the defendant with fair notice of the general claim and the grounds upon which it lies. See Conley v. Gibson, 355 U.S. 41 (1957). The averments made in plaintiff's complaint clearly state a claim which falls within the exception to discharge found in §17a(3) of the Bankruptcy Act, 11 U.S.C. §35a(3), and as such provides the defendant with adequate information upon which to answer and defend against such allegations.


Defendant's second contention that the debt is dischargeable due to his amended scheduling of plaintiffs as creditors is not grantable as a matter of law. The amendment was not allowed by order of the Court, but was merely filed by the bankrupt and noticed out. Thus, the fact that it was filed carries no concomitant legal recognition by the Court. The legal effect of such addition is not decided at the time the filing is made, but at the time the issue is brought before the Court in an adversary context. Therefore, just because a creditor was added does not mean that its debt will be discharged under §17a(3) of the Act. By the terms of §17a(3), the debt must have been "duly scheduled in time for proof and allowance" (emphasis added) or the creditor must have "notice or actual knowledge" of the bankruptcy proceedings before the debt will be discharged. Notice or knowledge by a creditor, such as would work to discharge his debt, has been interpreted by this Court in Howe v. B & D Billing, No. B-78-01008 (D. Utah October 2, 1979), to mean notice or knowledge received in time to allow a creditor to file a claim and avail himself of the opportunity of participating in the administration of the estate. The creditor in Howe received actual notice almost a month and a half before the claims date ran, giving the creditor ample time to participate

in the estate pursuant to a validly filed proof of claim. Such is not the case here, the date for filing proofs of claim having expired nearly two and one half years ago.

On its face, the motion of plaintiffs is grantable as a matter of law. As stated, a debt is not discharged under §17a(3), 11 U.S.C. §35a(3), if the debt is not "duly scheduled in time for proof and allowance" and the creditor does not have actual knowledge of the proceeding in time to file a proof of claim. This is clearly the case here. Although some courts have held that §57n, 11 U.S.C. §93n, is a mandatory limitation on the filing and allowance of claims, other courts, including this one, have given relief under the general equity powers of the bankruptcy court by extending the time for filing proofs of claim in exceptional circumstances. Therefore, if facts were presented which could give rise to equitable relief, the creditors involved here might still be entitled to file a claim and participate in the estate as no distribution of assets has yet been made. Here, however, the bankrupt offers only a sketchy excuse for his failure to include the Childs based on an alleged assignment by the plaintiffs herein of their claim. This fact merits little equitable consideration as the bankrupt also failed to list the alleged assignees as creditors on his bankruptcy schedule. Since facts giving rise to equitable relief have not been alleged here, and since the burden rests upon the bankrupt to show that a creditor is not discharged under §17a(3) when not duly listed, the Court determines the debt of the Childs to be nondischargeable as a matter of law under §17a(3), 11 U.S.C. §35a(3).

IT IS ORDERED that plaintiffs' motion for summary judgment be, and it is, granted, and that defendant's motion for summary judgment be, and it is, denied.

DATED this 16 day of May, 1980.


Ralph R. Mabey
United States Bankruptcy Judge