UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re	)	
	)	
JAMES ALBERT RAINES and LORI KAY RAINES,	)	Bankruptcy Case No. 84C-01879
	)	
	)	
Debtors.	)	MEMORANDUM OPINION

Appearances: W. Thomas Harris, Salt Lake City, Utah, for the debtors; Charles E. Bradford, Bountiful, Utah, for Care Free Homes, Inc.

This matter comes before the Court pursuant to an "OBJECTION TO MOTION TO RE-OPEN." The debtors herein originally filed their chapter 7 petition on July 11, 1984. The case was administered and closed as a "no asset" case. Pursuant to the debtors' motion, this case was reopened on March 9, 1986 to allow the debtors to add Care Free Homes, Inc. ("Care Free") to their A-3 schedule of unsecured creditors. Care Free then filed an objection to the motion to reopen. A hearing on that objection was held on September 26, 1986. The Court, now having reviewed the pleadings and affidavits on file herein and having considered the arguments of counsel, renders the following memorandum decision.

BACKGROUND

In July 1981, James and Lori Raines purchased a Fleetwood mobile home from Care Free on a sales purchase contract. Prior to their first payment under the contract, the debtors were notified by Citicorp Person to Person that the sales contract had been assigned to Citicorp and that all payments should be made to that institution. The debtors made payments to Citicorp for approximately two years. The mobile home was voluntarily returned to Citicorp in July 1983. The debtors received no notification that the contract had been reassigned to Care Free pursuant to a recourse provision in the assignment document.

The debtors filed their chapter 7 petition on July 11, 1984. Citicorp Acceptance Corporation was listed as an unsecured creditor on their A-3 schedule. That listing indicated that the debt was "incurred July 1981" on the "purchase of a Fleetwood Stoneridge Mobile Home" which was "returned to [the] creditor [in] July 1983" and that they were "subject to a possible deficiency judgment." The debt was also listed as "disputed." However, Care Free Homes, Inc. was not listed as a creditor. This case was administered as a "no asset" case; the debtors were discharged; and the case was closed on November 30, 1984.

On May 8, 1985, the debtors were served with a 10-day summons and complaint, filed in Third District Court for the State of Utah, encaptioned Care Free Homes v. Raines. Care Free

obtained a default judgment against the debtors in that action.[1] Care Free's attorney, Charles Bradford, began collection activities in the summer of 1985. Debtors' counsel sent a letter to Bradford, dated September 23, 1985, referring to the debtors' discharge in bankruptcy and setting forth their position that the debt was either discharged or they were entitled to have the case reopened to add Care Free to the bankruptcy schedules.

On February 14, 1986, debtors filed their motion to reopen. The certificate of mailing indicates that a copy of the motion was mailed to both Care Free and Mr. Bradford. However, Care Free and Bradford have both filed affidavits certifying that they did not receive the pleading. An order reopening the case was executed by the Court on March 9, 1986. A mailing certificate on file with the Court indicates that a copy of a "NOTICE OF REOPENED CASE" was mailed to Care Free. That certificate was not properly signed by the deputy clerk. Care Free does acknowledge,

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[1] The evidence is in dispute whether the Raines filed an answer in the state court action. Debtors' affidavit states:

> We prepared a written answer within twenty days which was mailed to Charles E. Bradford attorney for Care Free Homes. We alleged the filing and discharge in this Chapter 7 case and listed our bankruptcy case number.

However, the Court does not have that pleading now before it.

however, that it received notice of the discharge of the reopened case. On July 24, 1986, Care Free filed an "OBJECTION TO MOTION TO RE-OPEN."

On September 5, 1986, prior to the hearing on its objection and without obtaining relief from the automatic stay, Care Free served the debtors with a motion and order in supplemental proceedings pursuant to its state court judgment. Mr. Bradford obtained $50.00 from the debtors at that hearing and subsequently garnished their wages in the amounts of $126.00 and $90.00.

CLAIMS OF THE PARTIES

The debtors' position in this matter is that they properly listed Citicorp as the creditor to whom the obligation was owed. They had received notice from Citicorp of an assignment from Care Free and no notice of a further assignment or reassignment was ever served upon them. The debtors further claim that Care Free continued to pursue collection of its claim against them, even after actual knowledge of the reopened case, in violation of the automatic stay.

Care Free's position is that it was not listed on the schedules and was not given actual or constructive knowledge of the bankruptcy filing or discharge until many months after the discharge was entered and the case was closed, by which time Care Free had filed its state court action, obtained a judgment and

incurred substantial costs and expenses. Care Free contends that the debtors knew of its claim because the sales contract was assigned to Citicorp with recourse. Care Free requests that the Court reclose the case nunc pro tunc as of the date of the debtors' original discharge; or, alternatively, that Care Free be given an opportunity to be heard.

Care Free has been given its opportunity for a hearing and the Court will now rule on the propriety of reopening this case.

DISCUSSION

Initially, Care Free contends that the order reopening this case should be set aside since it never received notice of the motion to reopen. Since Care Free has now been heard on the merits of its objection, that claim may now have been effectively rendered moot. Notwithstanding, the Court believes Care Free's notice argument is without legal basis. Debtors' mailing certificate indicates that both Care Free and Bradford were mailed a copy of the motion to reopen. Bradford claims not to have received it. The unsigned mailing certificate of the Clerk's office indicates that Care Free was mailed a "NOTICE OF REOPENED CASE." Care Free's president claims it was not received. The debtors also certify in their affidavit that they mailed an answer in the state court proceeding to Mr. Bradford. Bradford likewise claims not to have received that document.

The Court must indulge a rebuttable presumption that when parties present mailing certificates of service of documents, that those documents were, in fact, mailed as certified. B.R. 7005; F.R.C.P. 5(b) (Service is complete upon mailing). Otherwise, the availability of service by mail would prove to be meaningless. The Court finds that in this case there is simply insufficient evidence now before the Court to rebut that presumption.[2]

The Court now turns to the merits of Care Free's objection. Under the factual circumstances of this case, the Court believes the motion to reopen the case in order to add Care Free Homes to the debtors' A-3 schedule was not improvidently granted.

Section 350(b) of the Bankruptcy Code provides:

> 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.

Bankruptcy Rule 5010 implements § 350(b):

> A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code.

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2 Of course, the notice of reopening purportedly sent by the Clerk's office was not properly certified. However, the motion to reopen was properly accompanied by a valid mailing certificate.

The rules do not specify, as they do in other contexts, that such relief may only be granted "after notice and a hearing." Likewise, the rule does not expressly authorize the issuance of such orders on an ex parte basis without notice to affected creditors. Rule 9013 does address those issues:

> A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those persons specified by these rules or, if service is not required or the persons to be served are not specified by these rules, the moving party shall serve the persons the court directs.

Similarly, Rule 5 of the Rules of Practice of this Court provides in pertinent part:

> (a) Definitions. The term "motion" shall mean motion, application, request, or other proceeding in the nature of a motion in which a party seeks an order or determination of the court.
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> (e) Motions. All motions shall be filed with the clerk or presented to the court . . . and such motions shall be supported by a memorandum of authorities filed or presented with the motion;
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> . . .
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> (f) Memoranda of Authorities. Memoranda should be as brief as the circumstances of the case permit. . . . Memoranda should

include a concise statement of each basis for the pleading and limited citations to cases or other authority.

In light of the apparent ambiguities in the Code and the rules regarding the procedure governing motions to reopen, some courts have granted the motions ex parte as a matter of course, even without notice to parties in interest. In re Daniels, 34 B.R. 782 (Bkrtcy. 9th Cir. 1983); In re Davidson, 36 B.R. 539 (Bkrtcy. D.N.J. 1983). A creditor is then allowed to file an objection to the granting of the motion. This Court believes that in those instances in which the case is reopened to add a creditor to the schedules in order to have the debt to that creditor discharged, the motion to reopen is more similar to a contested matter, governed by Rule 9014 which requires notice and the opportunity for a hearing. As was the case here, to grant the motion ex parte as a matter of course and then to consider the propriety of granting the order for the first time on what effectively amounts to as a motion to set aside the order appears to the Court to be unseemly. The Court believes that an appropriate procedure relating to a motion to reopen the case for the purpose of adding an unscheduled creditor would be by a properly noticed motion allowing the affected creditor to request a hearing if desired. Of course, upon a proper application of § 102(1), it would not always be necessary to conduct an actual

hearing if such a hearing is not timely requested. However, such a procedure would allow the Court to appropriately consider the merits of the motion prior to entering the order.

Pursuant to 350(b), the decision whether to reopen a case is within the sound discretion of the bankruptcy court. In re Rosinski, 759 F.2d 539 (6th Cir. 1985); Robinson v. Mann, 339 F.2d 547 (5th Cir. 1964); In re Mitchell, 47 B.R. 213 (Bkrtcy. N.D. Texas 1985); In re Minniefield, 42 B.R. 509 (Bkrtcy. N.D. Ala. 1984). The courts generally have allowed debtors to amend their schedules to list a previously unknown or inadvertently omitted creditor when the creditor has not been unjustifiably prejudiced and there is no evidence of fraud, intentional laches, or reckless disregard for the accuracy of the schedules. In re Stark, 717 F.2d 322, 324 (7th Cir. 1983) ("In a no asset bankruptcy where notice has been given . . . the debtor may reopen the estate to add an omitted creditor where there is no evidence of fraud or intentional design."); In re Rosinski, 759 F.2d 539, 541 (6th Cir. 1985) ("[T]he key inquiry" is whether the debtor's failure to list the creditor "can be shown to have prejudiced him in some way or to have been part of a scheme of fraud or intentional design."); In re Mitchell, 47 B.R. 209 (Bkrtcy. N.D. Texas 1985); In re Scism, 41 B.R. 384, 388 (Bkrtcy. W.D. Okla. 1984); In re Davidson, 36 B.R. 539 (Bkrtcy. D.N.J. 1983).

In Mitchell, supra, the court listed additional factors which the courts should consider:

> These include whether reopening and allowing the creditor sufficient time to object to discharge will place him in approximately the same position he would have been had he been listed on the original schedule; the creditor's collection efforts subsequent to discharge; the debtor's knowledge, either actual or constructive, of the debt at issue both prior to filing and subsequent to discharge; and the burden to the debtor of assuming the omitted debt.

47 B.R. at 211.

On the strength of the evidence before the Court, we cannot find fraud, intentional design or laches, or reckless disregard for the accuracy of the schedules--nor has Care Free so alleged. The Court finds that reopening this case was appropriate considering its surrounding circumstances. The debtors listed Citicorp on its schedules. The debtors had effectively been notified that their contract had been assigned to Citicorp. It was Citicorp to whom they had been making payments. It was Citicorp to whom they returned the mobile home prior to filing their bankruptcy petition. There is nothing before the Court which would indicate that they had any knowledge that the contract had been reassigned pursuant to the recourse provision. Certainly no notice of reassignment was ever served upon the debtors.

The only issue left to be resolved is whether Care Free would be unjustifiably prejudiced by allowing this case to be reopened. Care Free argues that it incurred expenses and attorney's fees in pursuing its collection activities. There is some support in the case law for the position taken by Care Free. See, In re Blossom, 57 B.R. 285, 287 (Bkrtcy. N.D. Ohio 1986) ("Where a creditor has expended time and effort in attempting to collect a debt which has been omitted from a petition, the expenditure of that time and effort is sufficient harm to the creditor so as not to warrant a reopening of the case."); In re Scism, 41 B.R. 384 (Bkrtcy. W.D. Okla. 1984); In re Davidson, 36 B.R. 539 (Bkrtcy. D.N.J. 1983) ("The debtors must pay the reasonable attorney's fees expended by the creditors in attempting to collect this debt from the time the creditors should have received notice . . . until the time they actually received such notice."). However, in this case, the Court believes the omitted creditor was not materially prejudiced because it did not receive official notice of the bankruptcy filing. The testimony before the Court is that Care Free's attorney was repeatedly advised that its actions were in violation of the automatic stay. To the extent that it proceeded in the face of such advice, it did so at its own risk. Moreover, the Court agrees with the debtors that until proper notice of the

reassignment of the contract was served upon them, the assignee should be charged with constructive knowledge of official notices served upon its assignor.

Accordingly, Care Free's objection to the reopening of this case is overruled. The attorney for the debtor is requested to file an appropriate order in accordance with Local Rule 13(h).

DATED this 8 day of July, 1987.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE