

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

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In re:

ALLEN VINCENT MOXLEY, aka
A. V. "MOXLEY" and
SHARON M. MOXLEY,

Debtors.

MEMORANDUM DECISION
AND ORDER

Civil No. 83-1817
U.S. DISTRICT COURT DISTRICT OF UTAH

JUL 17 1987

ALLEN VINCENT MOXLEY,

Appellant,

PAUL L. BADGER
Bankruptcy No. 83C-02914

-vs-

DON & MYRLE BINGHAM and
NORTHWESTERN MUTUAL LIFE,

Appellees.

This matter is before the court on appeal from the United States Bankruptcy Court for the District of Utah. Appellant Allan Vincent Moxley and appellees Northwestern Mutual Life and Don and Myrle Bingham filed memoranda and this matter was argued orally on June 23, 1987. Following oral argument the court took this matter under advisement. After considering the arguments of counsel, the memoranda and the relevant authority the court now renders the following decision and order.

This appeal raises issues regarding the reopening of a Chapter 7 no-asset bankruptcy case to allow the debtor to amend his schedule of liabilities. Moxley filed a Chapter 7 no-asset

bankruptcy petition on October 28, 1983.¹ Moxley also filed a Statement of All Debts of Debtor, listing unsecured creditors of the estate. Moxley was discharged from bankruptcy on January 30, 1984.

On December 13, 1983 appellees Don and Myrle Bingham filed a complaint against Moxley and Northwestern in the Third Judicial District Court of Salt Lake City. This litigation involves Moxley's pre-petition sale of insurance to the Bingham. On August 18, 1986 Northwestern filed a cross-claim for contribution and indemnity against Moxley.

The Bingham and Northwestern were not listed as creditors in Moxley's Statement of Debts because Moxley did not know of these claims when he filed for bankruptcy. Even though the Bingham lawsuit was filed at least a month and a half before Moxley's discharge, Moxley did not amend his Statement of Debts to include this claim.

The Bingham litigation appears to fall within the coverage of Moxley's professional malpractice insurance policy. Moxley's insurance carrier has retained counsel on behalf of Moxley to represent him against the Bingham; this same counsel represents Moxley in this matter.

Moxley petitioned the bankruptcy court to reopen his bankruptcy case pursuant to 11 U.S.C. § 350(b), which states:

¹ Moxley filed a joint petition with Sharon Moxley.

A case may be reopened and the court in which such case was closed to administer assets, to accord of relief to the debtor, or for other cause.

The bankruptcy court denied debtor's motion without prejudice. The court specifically stated that it would reconsider Moxley's motion to reopen following determination of liability in the Bingham action.

Appellant argues that the bankruptcy court's refusal to reopen his case is error. Moxley cites court opinions from other circuits that indicate permission to reopen Chapter 7 no-asset bankruptcies should be liberally granted because reopening such cases does not harm creditors. See In re Rosinski, 759 F.2d 539 (6th Cir. 1985); In re Stark, 717 F.2d 322 (7th Cir. 1983). These courts hold that absent fraud or intentional design, the debtor's right to discharge all debts assumes greater importance than creditors' rights, since there are no assets anyway. Rosinski, 759 F.2d at 542; Stark, 717 F.2d at 324.

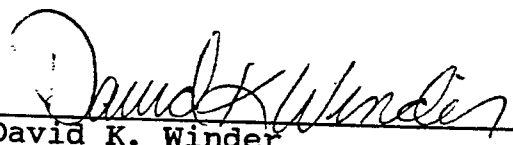
This authority, however, does not persuade the court that the bankruptcy court erred. Section 350(b) contains discretionary phraseology: "A case may be reopened ..." Moxley, in essence argues that this discretion is lost in Chapter 7 no-asset bankruptcies. Given the unusual facts in this case this court believes that discretion must remain in the bankruptcy court. The bankruptcy court did not, with finality, deny Moxley's petition. Moxley has simply been requested to await the

outcome of the Bingham litigation. If that litigation results in personal liability to Moxley, then the court will reconsider his petition to reopen. Since the facts indicate Moxley's malpractice carrier will most likely cover any judgment against Moxley, the bankruptcy court's decision is eminently sensible.

Accordingly,

IT IS HEREBY ORDERED that the decision of the bankruptcy court is affirmed.

Dated this 16th day of July, 1987.




David K. Winder
United States District Judge

; Mailed a copy of the foregoing to the following named counsel this 17th day of July, 1987.

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