

*** UNPUBLISHED OPINION ***

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

In re:

ORION DALE QUINLAN,
Debtor.

Bankruptcy Number 87B-04049

[Chapter 7]

COMMUNITY FIRST BANK,
Plaintiff,

Adversary Proceeding Number
87PB-0893

-vs-

ORION DALE QUINLAN,
Defendant.

MEMORANDUM OPINION

Steven R. Bailey, Esq., 2454 Washington Boulevard, Ogden, Utah,
Attorney for Plaintiff.

Orion Dale Quinlan, 2331 West 4475 South, Roy, Utah, Defendant
appearing pro se.

M. John Straley, Esq., Assistant United States Trustee, 125
South State Street, Salt Lake City, Utah 84111.

Review of this matter comes before the court upon a
motion to vacate the order of dismissal which was entered against

Community First Bank (Community). The dismissal resulted from Community's failure to comply with the Order Governing Scheduling and Preliminary Matters entered in this adversary proceeding which required a pretrial order to be filed on or before April 8, 1988, or the case would be dismissed. The pretrial order was not filed in a timely manner and, as a matter of course, the adversary proceeding was dismissed. As a result of the extraordinary circumstances of this case, the court vacates the Order of Dismissal only as it relates to a claim for relief under 11 U.S.C. § 727(a)(5).

BACKGROUND

Familiarity with the circumstances giving rise to this matter is important for an accurate understanding of the court's reasoning. The pleadings on file and arguments presented to the court establish the following facts. On August 6, 1987, Orion Dale Quinlan (Quinlan) filed a petition for relief under Chapter 7. This region having recently been certified for inclusion in the United States Trustee system, the United States Trustee's office appointed Steven R. Bailey, Esq., (Bailey) as the interim trustee. Bailey presided at the September 15, 1987, meeting of creditors held pursuant to 11 U.S.C. § 341. Quinlan appeared at the meeting of creditors and was examined by Bailey as the trustee. No election was held under Bankruptcy Rule 2003 and Bailey became the permanent trustee.

On September 17, 1987, Bailey filed his no asset report abandoning the trustee's interest in the property of the estate and asserting that there were no assets in Quinlan's estate to be administered for the benefit of creditors. Pursuant to the order of the court, all parties were sent notice that the last day to file objections to the dischargeability of Quinlan's debts was November 16, 1987. On November 16, 1987, Bailey filed with the United States Trustee his Resignation of Trustee. Two days after the last date to file objections to discharge, a new trustee, David Gladwell, Esq., was appointed to administer the estate.

On November 16, 1987, Bailey, on behalf of Community, filed this adversary proceeding for a determination of the nondischargeability of Quinlan's debt owed to Community.¹ The complaint sets forth three causes of action² against Quinlan. The first and second causes of action are plead under 11 U.S.C. § 523(a)(2)(B). The first cause of action alleges that Quinlan obtained, pursuant to a Cardholder Agreement and Disclosure Statement, a Master Card from Community that was issued in reliance upon an allegedly false written financial statement

¹ The Complaint is date stamped by machine as having been received by the Clerk's office on November 17, 1987. The Clerk's office's date imprinter was not functioning properly. Documentation within the court's file and the receipt for payment of the adversary filing fee indicates that the proceeding was, in fact, filed on November 16, 1987. This court has determined that the Complaint was timely filed.

² Properly designated as claims for relief. Bankruptcy Rule 7008.

dated August 14, 1986, slightly less than one year prior to filing. The second cause of action alleges that Tri-Star Distributing, Inc., borrowed from Community \$75,750.00, and that Quinlan as the guarantor on the loan, once again provided the August 14, 1986, financial statement which was relied upon by Community to its detriment. The financial statement represents that Quinlan's net worth was allegedly \$2,417,700.00, consisting of interests in cash, real and personal property, businesses and accounts and contracts receivable. As a result of these actions, Community asserts the debt owed to it by Quinlan should be nondischargeable.

The third cause of action is brought by Community pursuant to 11 U.S.C. § 727(a)(5). Community generally asserts that Quinlan has failed to satisfactorily explain the loss of various assets or the deficiency of those assets to meet his liabilities. The apparent basis for this claim is the discrepancy between the assets listed on the August 14, 1986, financial statement and the assets listed on Quinlan's bankruptcy schedules totaling \$7,170.00 in value. The Statement of Affairs filed in the case reflects no transfers, no receiverships, repossessions or returns, no property in the hands of third persons, and no losses having occurred within the last year.

Quinlan, now acting pro se, rather than filing an answer to Community's complaint, filed a Motion to Dismiss on December 9, 1987. Quinlan's Motion raises four "causes" for

dismissal. As a first cause, he generally denies the allegations of Community's complaint. The third cause for dismissal is set forth as follows:

3) Plaintiff attorney, Mr. Steven R. Bailey, is also the Defendant/Debtor's trustee in his bankruptcy proceedings and as such cannot serve in a dual role representing both Defendant/Debtor and Plaintiff. (See attachment #2).³

Community responded to Quinlan's Motion to Dismiss arguing that sufficient allegations were contained in the complaint to justify a trial on the merits under sections 523 and 727. Specifically, in answer to the third cause for dismissal, the response of Community states:

That Defendant's third cause for dismissal of the Complaint of Community First Bank is not relevant in that the Defendant's wife is not a party to this action and the facts stated in the third cause for dismissal are immaterial and irrelevant.⁴

Quinlan's Motion to Dismiss was not noticed for hearing and the court has never ruled upon the allegations contained therein.

On February 3, 1988, the Clerk of the Court conducted a scheduling conference telephonically with Bailey. Quinlan did not appear. That scheduling conference resulted in an order

³ Attachment #2 was the court-produced notice informing parties in interest of the meeting of creditors and identifying Bailey by name, address and telephone number as the interim trustee.

⁴ No record exists to indicate that Quinlan's wife filed a joint petition or participated in any way in these proceedings.

that set certain deadlines for the prosecution of this case. The deadlines provided for a motion cut-off deadline of March 30, 1988, an attorneys conference to be held April 4, 1988, a proposed pretrial order to be submitted no later than April 8, 1988, trial briefs to be presented April 27, 1988, and a first trial setting for one day on May 11, 1988. A copy of the Order Governing Scheduling and Preliminary Matters was forwarded to both Bailey and Quinlan. Paragraph 4 of the order indicates:

Failure of plaintiff's counsel to timely file a stipulated pretrial order, or a proposed pretrial order and an explanation as to the failure to stipulate, as described above, shall, unless the court grants relief for cause shown, result in the dismissal of the civil proceeding.

A proposed pretrial order was not timely filed. An Order of Dismissal was entered April 27, 1988, as a result of Community's failure to file the proposed pretrial order. On April 28, 1988, Bailey filed his Motion to Vacate Dismissal and an unsigned proposed pretrial order. The court also sent notice to the parties of a final pretrial conference scheduled for April 25, 1988. Neither party appeared at that conference.

Bailey argues several excuses for the failure of Community to properly proceed.⁵ Attached to the Motion to Vacate

⁵ Community asserts that no prejudice would result to Quinlan by proceeding with the trial. Prejudice would, of course, apply if the case should properly have been dismissed and was not. This nondischargeability action is now otherwise time barred.

Dismissal was Bailey's affidavit. His statements at the hearing on the Motion to Vacate conformed to his statements in his affidavit. Bailey indicated that through inadvertence he believed the adversary proceeding to have been placed upon the court's expedited trial calendar as a "fast track" trial.⁶ However, a statement of intention, required in fast track trials indicating readiness to proceed to trial, was not filed on Community's behalf. The affidavit of Bailey further states that all discovery has been completed in the case and that the parties have gone to considerable expense to enable them to fully litigate the issues raised by the complaint of nondischargeability. At the May 6, 1988, hearing on this matter, Bailey represented that he was prepared to proceed to trial five days hence and that the case was in a posture to be heard by the court.

Quinlan filed a motion to dismiss Plaintiff's Motion to Vacate Dismissal and again raises an objection to Bailey's representing Community. Quinlan asserts that:

Plaintiff's attorney also served as Defendant's bankruptcy trustee and as such utilized privileged information in the development of his case against Defendant.

⁶ That trial procedure applies to cases that can be adjudicated on a relatively summary basis and heard by trial in no longer than two hours. In order to retain a trial date and properly prosecute a "fast track" trial, the court requires that the plaintiff file, thirty days prior to trial, a statement of intention, indicating a readiness to proceed with trial. Failure to file that statement of intention results in dismissal of the proceeding.

This is evidenced by his responding to my Motion to Dismiss with privileged information from another case.⁷

Quinlan also asserts that he acted properly and cooperated with every order of the court related to this adversary proceeding.

DISCUSSION

Under the scenario set forth above, it is the court's task to determine whether or not the order dismissing the adversary proceeding should be vacated. Bailey requests that the court vacate the order of dismissal for the failure to file the pretrial order. Bankruptcy Rule 9024, as it incorporates Rule 60(b)1 of the Federal Rules of Civil Procedure, allows the court to relieve a party from a final judgment, order or proceeding for reasons including mistake, inadvertence, surprise or excusable neglect. Rule 9024, as it incorporates Federal Rule 60(b)6 allows the court to grant relief based on any other reason justifying relief. Because of the unique circumstances and considering the equities of the situation, the dismissal should be vacated only in part.

The court finds that this case has been marred by several procedural and substantive deficiencies including the following:

⁷ No evidence was presented at the hearing by Quinlan regarding Bailey's alleged use of privileged information.

1) No answer has ever been filed, unless the motion to dismiss originally filed by Quinlan is deemed to be an answer;

2) A pending motion to dismiss has been filed and responded to, but no hearing has ever been held and the issues raised still remain unresolved;

3) The pretrial order, which was filed after the order of dismissal was entered, is not signed and, apparently, has not been agreed to, stipulated to or discussed by the parties; and

4) Community asserts that the reason for not timely filing the pretrial order was that the case was assumed to be on a fast track trial schedule, yet Community never filed a notice of readiness for trial as required in such proceedings.

The court further finds that the cumulative nature of these flaws, at best, evidences a failure to attend to detail. At worst, the conduct of the plaintiff represents a cavalier attitude toward this court, the defendant, and the value this court places upon its time. The conduct of plaintiff presents mere sloppy trial preparation. Based on the record before the court, the court finds there has been no showing that the dismissal should be vacated due to mistake, inadvertence,

surprise or excusable neglect. Therefore, the court denies Community's motion to vacate the dismissal order as it pertains to those actions brought pursuant to 11 U.S.C. § 523.

The remainder of this case consisting of the 11 U.S.C. § 727 action presents a much more serious matter. At the time Bailey filed the complaint and signed the pleadings, he had access to information regarding the assets of Quinlan that allegedly existed one year prior to filing the bankruptcy which were purportedly worth \$2,417,700.00. Without that information, the evidentiary support of the section 523 and section 727 actions are nonexistent. If that evidence was not relied upon by Bailey in preparing the complaint, he would not have had sufficient information as required by Bankruptcy Rule 9011 to sign the complaint. Bailey apparently obtained this information while still the trustee of this estate.

A Chapter 7 trustee with access to such information is required under 11 U.S.C. § 704(4) to investigate any discrepancies between the information set forth in a financial statement and the answers given under oath in the bankruptcy schedules. Bailey made no representation that, in his capacity as trustee, he ever investigated the issues raised by the financial statement. By waiting to withdraw as the trustee until the last date to file objections to discharge, Bailey precluded another trustee from acting upon this information, if appropriate. At the hearing, when asked about his withdrawal as

trustee, Bailey responded that he recognized his conflict of interest in the case from the files and also at the section 341 meeting when it became apparent that the debtor was attempting to discharge a debt owed to "a long-standing client", Community First Bank.

As a trustee, Bailey's sole responsibility was to represent the estate. Section 323 of the Bankruptcy Code, which sets forth the role and capacity of the trustee, provides in part: "[t]he trustee in a case under this title is the representative of the estate." In addition, the Code sets forth duties of a trustee that create a fiduciary duty to protect the integrity of the Bankruptcy Court, the rights of all creditors and the debtor's estate. The duties of a trustee, as set forth under 11 U.S.C. § 704 include the duties to "investigate the financial affairs of the debtor," and "if advisable [to] oppose the discharge of the debtor".

At the commencement of a Chapter 7 case, the Bankruptcy Code provides for the appointment of an interim trustee who must be a disinterested person. 11 U.S.C. § 701(a)(1). The Code includes in its definition of a disinterested person, a person who "does not have an interest materially adverse to the interests of the estate...." 11 U.S.C. § 101(13)(E). A trustee would not be a disinterested person and could not act as trustee if he or she also represented a creditor of the estate. It is clear to this court that this system of bankruptcy would not

function but for the independent role of Chapter 7 trustees. Even though the United States Trustee is now directed by Congress to oversee Chapter 7 trustees, the trustees continue to be officers of this court. As officers of the court, the trustees are expected to conduct themselves with the highest ethical standards expected from all fiduciaries functioning within this system.

Bailey's failure to timely withdraw in order to allow an independent trustee to investigate the case may have been through inadvertence. Such conduct does, nonetheless, cause both debtors and creditors to have little faith in the system that is designed to protect their respective rights. Conflicts of this nature must be immediately resolved upon learning of the conflict. This should take place either prior to or at the time of the meeting of creditors. Certainly no trustee could ever represent an estate in which he or she had an attorney-client relationship with a creditor.

Because of Bailey's conflict of interest, the mere withdrawal as trustee does not necessarily mean that his representation of Community is proper. Once Bailey had acted in his capacity as trustee by presiding at the meeting of creditors, it was not proper for him to represent Community. When an attorney is involved in a conflict of interest by the dual representation of adverse parties, the mere withdrawal from the representation of one of those parties does not cure the conflict

of interest. Margulies By Margulies v. Upchurch, 696 P.2d 1195, 1203 (Utah 1985). This court has previously indicated that it will tolerate only the highest standard of conduct of the members of the bar and will not permit the practice of attorneys engaging in actual conflicts of interest. See In re Roberts, 46 B.R. 815 (Bankr. D. Utah 1985), aff'd in part, 75 B.R. 402 (D. Utah 1987). This case clearly involves an actual conflict of interest.

Furthermore, this court expects the members of the bar to have complied with the Utah Code of Professional Responsibility and now the Utah Rules of Professional Conduct including those matters involving conflicts of interest. It is recommended that counsel carefully review the new Rules of Professional Conduct and pay particular attention to Rules 1.7, 1.8 and 1.9 dealing with conflicts of interest.

It is difficult, at this stage, to undo the problems created by the way this case has been conducted. The taint placed upon this proceeding has infected at least the section 523 actions to the extent that it is, in this court's mind, impossible to cleanse them. In addition to the procedural justifications for dismissal of the section 523 actions, the conduct of Bailey also warrants dismissal of these actions. Community bears the burden of its counsel's actions, and certainly is not blameless. It is, after all, Community who retained Bailey after receiving notice of the bankruptcy filing.

This court will not speculate that Community retained Bailey because he was the trustee.

Quinlan has not received a discharge in this case because the timely filing of the complaint has had the effect of tolling the discharge order. Because the motion of Community to vacate the Order of Dismissal was also timely filed, a final order of dismissal in this proceeding has not been entered. The court, creditors and the debtor have a right to the review of this case by an independent trustee in order to determine whether or not the section 727 action is appropriate. Therefore, based on the unique circumstances in this case, and as provided by Rule 9024 as it incorporates Federal Rule 60(b)6 this court will order as follows:

1) The motion to vacate the order of dismissal as it relates to the first and second causes of action of the plaintiff's complaint is hereby denied.

2) The motion to vacate the order of dismissal as it relates to the third cause of action is hereby granted.

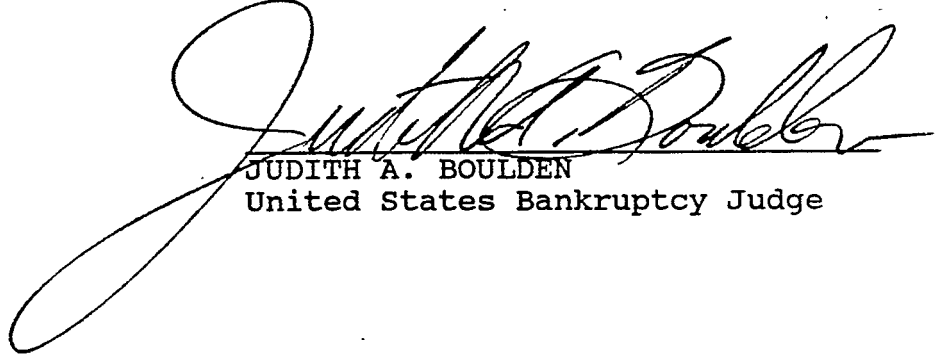
3) The United States Trustee is directed to take appropriate action to ensure the proper administration of this estate.

4) David Gladwell, Trustee, is hereby substituted as plaintiff herein and is

directed to either schedule and provide notice to Quinlan of a continued pretrial scheduling conference or file a motion to dismiss this proceeding within twenty days.

IT IS SO ORDERED.

DATED this 26th day of May, 1988.



JUDITH A. BOULDEN
United States Bankruptcy Judge