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UNPUBLISHED OPINION

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

In re	
JOHN A. DAHLSTROM and MARYLIN H. DAHLSTROM,	Bankruptcy Case No. 86C-01654
Debtors.	Chapter 11
JOHN A. DAHLSTROM,	Adversary Proceeding No. 89PC-0653
Plaintiff,	
vs.	
PLACER U.S., INC., a California Corporation,	
Defendant.	MEMORANDUM OPINION AND ORDER

The matter presently before the court is a motion filed by the defendant, Placer U.S., Inc. ("Placer"), for dismissal, or alternatively, for summary judgment of the above-captioned adversary proceeding. A hearing was held on December 13, 1989. Brent V. Manning appeared on behalf of Placer. Mona L. Lyman and L. Mark Ferre appeared on behalf of the plaintiff-debtor, John A. Dahlstrom ("Dahlstrom"). Counsel

presented argument after which the court took the matter under advisement. The court has carefully considered and reviewed the arguments of counsel and the memoranda submitted by the parties and has made an independent review of the pertinent authorities. Now being fully advised, the court renders the following decision.

PROCEDURAL POSTURE

The defendant's motion to dismiss is brought pursuant to Fed. R. Bankr. P. 7012 which makes Fed. R. Civ. P. 12(b)(6) applicable to adversary proceedings. A motion to dismiss under Rule 12(b)(6) for failure to state a claim "will not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." J. MOORE, MOORE'S FEDERAL PRACTICE, 1989 RULES PAMPHLET, at 130 (Federal Judiciary Ed. 1989) (citing *Haines v. Kerner*, 404 U.S. 519 (1972)).

BACKGROUND

In 1985, Placer brought an action in the Seventh Judicial District Court of the State of Nevada to quiet title in certain Nevada mining claims. *Placer U.S., Inc. v. Edward R. Wagner, et al.*, No. 13022 (7th D. Ct. Nev. filed Feb. 4, 1985) ("state court action"). Dahlstrom was not originally named as a defendant in the state court action.

On April 18, 1986, an involuntary petition under Chapter 7 of the Bankruptcy Code was filed against Dahlstrom by various creditors.[1] Five days later, on April 23, 1986, Action Mining, Inc., conveyed its interest in certain Nevada mining claims to Centennial, Inc. Dahlstrom was the president of Centennial, Inc., at that time. Because of the Action Mining transfer, Placer amended its state court complaint in October, 1986, to include Dahlstrom and Centennial, Inc., as co-defendants. On the basis of its informal knowledge of Dahlstrom's Chapter 11 case, Placer filed a proof of claim on December 29, 1986, estimating its unliquidated claim to be in excess of $10,000.00.

Notwithstanding Placer's proof of claim, Dahlstrom did not amend his schedules to reflect the claim. Furthermore, Dahlstrom did not amend his mailing matrix to list Placer as a creditor. As a result, Placer did not receive formal notice of Dahlstrom's bankruptcy case or of the matters involved therein. Although Placer received an objection to Dahlstrom's plan from First Security Mortgage Company which stated the confirmation hearing date, Placer did not receive formal notice of the hearing from Dahlstrom, nor did it receive a copy of his disclosure statement or his plan of reorganization.

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[1]On June 20, 1986, the case was converted to a case under Chapter 11 of the Code.

A confirmation hearing was held on August 14, 1987, at which time Dahlstrom's plan of reorganization was confirmed. The confirmation order was entered September 30, 1987. On June 7, 1989, the Nevada court entered judgment against Dahlstrom and each of the defendants named in that action jointly and severally in the amount of $560,993.92, plus punitive damages in the amount of $1,000,000.00, with interest accruing at the rate of twelve percent (12%) per annum from April 17, 1987, until paid. *Placer U.S., Inc. v. Edward R. Wagner, et al.*, No. 13022, slip opinion (7th D. Ct. Nev. June 7, 1989).

On September 19, 1989, Dahlstrom filed this adversary proceeding against Placer seeking declaratory and injunctive relief to prevent Placer from enforcing the state court judgment. The present motion followed.

DISCUSSION

I. Reasonable Notice

The parties both agree that Placer's claim is an "involuntary gap claim" under 11 U.S.C. § 502(f). Section 502(f) treats claims that arose "in the ordinary course of the debtor's business or financial affairs after the commencement of [an involuntary

case] but before the earlier of the appointment of a trustee and the order for relief"[2] as if they were prepetition claims.

As a prepetition claim, Dahlstrom contends that Placer's claim was discharged under 11 U.S.C. § 1141(d)(1)(A)[3] when his plan of reorganization was confirmed. Although Placer did not receive formal notice of the confirmation hearing, Dahlstrom argues that it had actual notice.

In *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620 (10th Cir. 1984), the Tenth Circuit held that a debtor's failure to give a creditor reasonable notice of a plan confirmation hearing constituted a denial of due process and thus the district court did not err in concluding that the creditor's claim was not subject to the debtor's plan and, therefore, not dischargeable. Discussing the due process standard as it "specifically applie[s] to bankruptcy reorganization proceedings," the court stated that

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[2]11 U.S.C. § 502(f) states:

> In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

[3]11 U.S.C. § 1141(d)(1)(A) states:

> (d)(1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan–
>
> (A) discharges the debtor from any debt that arose before the date of such confirmation, ...

"a creditor, who has general knowledge of a debtor's reorganization proceeding, has no duty to inquire about further court action. The creditor has a 'right to assume' that he will receive all of the notices required by statute before his claim is forever barred." *Id.* at 622. According to the court in *Reliable Elec. Co.,* therefore, a claim will not be discharged under 11 U.S.C. § 1141(d)(1)(A) unless the creditor has been formally notified of all of the vital steps in the reorganization case so that it has an opportunity to protect its interests. *Id.* at 623. The debtor has an affirmative duty to inform all of his known creditors that his case exists and of the proceedings therein. *See also In re Herd,* 840 F.2d 757, 759 (10th Cir. 1988) ("In *Reliable Elec. Co.* . . . we discussed the requirement that adequate formal notice must be given to known creditors to be constitutionally adequate. Even if a creditor is aware of bankruptcy proceedings, there must be reasonable notice before a claim will be barred . . . . ") (Emphasis added.)

In the present case, Placer filed a proof of claim against Dahlstrom in December, 1986. The order confirming Dahlstrom's Chapter 11 plan was entered on September 30, 1987. Accordingly, for approximately nine months prior to the confirmation of his plan, Dahlstrom knew, or should have known, of Placer's status as a potential creditor. Despite this fact, Dahlstrom did not fulfill his duty to provide Placer with formal notice of his reorganization proceedings. To be entitled to relief so extraordinary as a discharge, Dahlstrom must first fulfill all of his duties. Accordingly,

as a matter of law, Placer's claim was not discharged upon plan confirmation under § 1141(d)(1)(A).

In response to Dahlstrom's contention that Placer had a duty to inform itself of all relevant hearings upon actual notice of his case, the court notes that similar to the creditor in *Reliable Elec. Co.,* Placer acted "reasonably when it expected the same formal notice of the confirmation hearing which was sent to other identifiable creditors." 726 F.2d at 622. Furthermore, Dahlstrom's reliance on *Smith v. Martinez,* 51 B.R. 944 (Bankr. D. Colo. 1985), is inapposite. In *Smith,* the court estopped certain creditors from raising preconfirmation notice issues due to the fact that they had manifested an intent to be bound by a postconfirmation modification to the debtor's Chapter 13 plan. The court acknowledged *Reliable Elec. Co.,* but found it distinguishable on its facts. The facts in this case are analogous to *Reliable Elec. Co.*[4]

[4]Since the Tenth Circuit's holding in *Reliable Elec. Co. v. Olson Constr. Co.,* 726 F.2d 620 (10th Cir. 1984), it has decided *In re Republic Trust & Savings Co.,* No. 88-2182, slip op. (10th Cir. Mar. 5, 1990), and *In re Green,* 876 F.2d 854 (10th Cir. 1989). While those cases appear to be supportive of Dahlstrom's position, they are in fact distinguishable. In *Republic,* the claimants' due process argument was rejected because they were not creditors of the estate. In *Green,* a Chapter 7 case, the court specifically distinguished *Reliable Elec. Co.* on the basis that it was a Chapter 11 case. In this case, Placer is clearly a creditor of the estate and the case is a case under Chapter 11. Accordingly, *Reliable Elec. Co.* provides the proper analysis.

II. Rule 60(b)

Dahlstrom argues that the Nevada judgment is incorrect because that court applied the law of the wrong state. He maintains that the court should correct the state court judgment pursuant to Fed. R. Civ. P. 60(b), which is made applicable to bankruptcy proceedings under Fed. R. Bankr. P. 9024.

Rule 60(b) states in relevant part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment. . . ." In *United States v. 31.63 Acres of Land*, 840 F.2d 760, 761 (10th Cir. 1988), the Tenth Circuit held that "a motion under Rule 60(b) cannot be used as a substitute for appeal." *See also Morris v. Adams-Millis Corp.*, 758 F.2d 1352, 1357 (10th Cir. 1985).

In the present case, Dahlstrom is attempting to use Rule 60(b) as a substitute for a timely appeal on the merits. As stated by the Tenth Circuit in *31.63 Acres of Land*, this type of action is simply not permitted. Accordingly, the state court judgment will stand.

CONCLUSION

IT IS HEREBY ORDERED that Placer's motion to dismiss the above-captioned adversary proceeding is GRANTED.

DATED this 3 day of April, 1990.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT