



**IT IS ORDERED as set forth below:**

**Date: July 22, 2009**

**W. H. Drake  
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBER</b>
	:	
WILLIAM RANDY JOHNSON	:	02-18777-WHD
PANITA KUMPIMARN JOHNSON,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
DEBTORS.	:	BANKRUPTCY CODE

**ORDER**

Before the Court is Debtor's Motion Pursuit to Rule 9020 and 11 U.S.C. 105(a) and 362 for Order to Enforce Discharge Injunction and/or Motion for Sanctions and Punitive Damages against Joyce Todd, Todd A. Harding, William J. Maddox, and Maddox & Harding, LLC and/or Motion to Determine Dischargeability of a Prepetition Judgment/Claim to Preclude Motion to Reopen Bankruptcy Case, filed by the Debtors in the above-captioned bankruptcy case. The Court reopened this Chapter 7 case by Order entered on March 4, 2009, for the purpose of determining whether a debt owed by the Debtor to

Joyce Todd was discharged and, if so, whether the individuals named in the Debtors' motion violated the discharge injunction and should be sanctioned for having done so. Having held a hearing on the matter on March 27, 2009, the Court concludes that the debt was not discharged and, accordingly, no sanctions for violating the discharge injunction shall be imposed. The Court further concludes, however, that the dismissal of the Debtor's appeal of Todd's judgment violated the automatic stay.

#### **FINDINGS OF FACT**

Prior to the filing of his bankruptcy petition, the Debtor filed suit against Joyce Todd (hereinafter "Todd") in the Magistrate Court of Spalding County for \$8,272 plus attorney's fees, alleging that Todd owed him these funds for installing a roof system on her mobile home. Todd, through her attorney, William Johnston, filed a counterclaim, in which she alleged that the work was done improperly. The magistrate court ruled against the Debtor on his claim and in favor of Todd on her counterclaim. The court awarded Todd a judgment in the amount of \$2,093 on February 1, 2001. The Debtor appealed that judgment to the State Court of Spalding County. The Debtor's financial situation deteriorated during the process of the appeal to the point that he could not continue prosecuting the appeal. This deterioration culminated in the filing of a voluntary Chapter 7 bankruptcy petition on October 4, 2002.

Gary W. Brown (hereinafter the "Trustee") was appointed as the trustee of the

Debtors' bankruptcy estate. In October 2003, the Trustee filed a report of assets and requested that a claims bar date be set. On October 11, 2003, the Clerk of Court mailed the notice of the claims bar date, which was January 7, 2004, to all parties on the creditors' matrix. In the process of scheduling over one hundred creditors, however, the Debtor and his attorney inadvertently omitted Todd from the list of creditors. Accordingly, neither notice of the Debtor's bankruptcy case nor notice of the claims bar date was mailed to Todd. Notice of the bankruptcy case and the claims bar date was mailed to attorney Edward Bullard. Bullard practices law in the law firm of Shepherd and Johnston with Todd's attorney, William Johnston. However, the notice of the Debtor's bankruptcy case was mailed to Bullard on behalf of two of Bullard's clients who were also creditors of the Debtor.

The Trustee later filed a dividend report, indicating that he paid approximately \$42,000 to creditors and for administrative expenses. Of this figure, approximately \$12,000 went to legal and accounting fees, expenses, and filing fees. The remaining \$30,000 was paid to the IRS. General unsecured creditors received no money. The Debtor received his discharge on April 19, 2003, and the case was closed in May 2006.

On October 3, 2005, the State Court of Spalding County dismissed the Debtor's appeal of Todd's judgment for failure to prosecute. Subsequently, the judgment became dormant. In November 2008, Todd obtained new counsel, Todd Harding and William Maddox, and on December 29, 2008, filed a motion in the Magistrate Court of Spalding County to revive the judgment. The motion came before the Honorable Gail Rogers at a

hearing on January 22, 2009. At that time, the Debtor argued that the judgment should not be revived because his personal liability for the debt had been discharged in his bankruptcy case and because the dismissal of his appeal of the judgment violated the automatic stay. Todd asserted that the debt had not been discharged because she was not scheduled as a creditor. Judge Rogers deferred ruling on the matter to allow the Debtor to proceed with his motion to reopen his bankruptcy case.

### CONCLUSIONS OF LAW

#### A. *Dischargeability of the Debt Under Section 523(a)(3)*

Under section 523(a)(3), a debt is not discharged if it is "neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit [,] . . . if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing." 11U.S.C. § 523(a)(3)(A). There is no dispute that the debt at issue here was not scheduled, and there have been no allegations to suggest that the debt is of a kind that would be nondischargeable under sections 523(a)(2), (a)(4), or (a)(6). Accordingly, if Todd did not receive "notice" or "actual knowledge" of the debt before January 7, 2004, the debt has not been discharged.<sup>1</sup>

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<sup>1</sup> The Court has considered and rejects the Debtor's argument that section 523(a)(3)(A) does not apply in his case because no dividend was made to unsecured creditors. Although this Court has previously held that section 523(a)(3)(A) does not apply in a "no-asset" case, this holding is based on the legal conclusion that, in a "no-asset" case, no bar

Todd's testimony establishes that she did not have actual knowledge of the bankruptcy case until after the expiration of the claims bar date. Therefore, to succeed in his attempt to have this debt declared discharged, the Debtor must prove that Todd received notice of the bankruptcy case in time to file a claim. *See Matter of Faden*, 96 F.3d 792, 795 (5th Cir. 1996) ("In addition, the burden of proof rests with the debtor to show that a creditor had 'notice or actual knowledge' under section 523(a)(3).")

For purposes of section 523(a)(3), "notice" is "notice reasonably calculated, given the factual circumstances, to inform claimants of a proceeding that affects their rights." *In re Kendavis Holding Co.*, 249 F.3d 383, 387-88 (5th Cir. 2001); *see also Faden*, 96 F.3d at 795-96 (sending notice to the creditor's parent corporation when the debtors had a valid address in their own files for the creditor was not reasonably calculated to inform the creditor of the bankruptcy proceeding); *In re First Amer. Health Care of Ga.*, 219 B.R. 324, (Bankr. S.D. Ga. 1998). Notice sent to an attorney on behalf of a client is generally not reasonably calculated to inform a creditor of a bankruptcy case if the notice does not give any indication as to the identity of the real party in interest. *See In re Osman*, 164 B.R. 709, 715 (Bankr. S.D. Ga. 1993); *see also Maldonado v. Ramirez*, 757 F.3d 48, 51 (3d Cir. 1985) ("[A]n attorney given notice of the bankruptcy on behalf of a particular client is not called upon to review all of his or her files to ascertain whether any other client may also have a

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date is ever established for the filing of claims, making it impossible to file an untimely claim. In this case, a bar date was established. Although the case was the equivalent to a "no-asset" case for holders of general unsecured claims, it was not a "no-asset" case with regard to all unsecured claim holders.

claim against the bankrupt. Notice sent to an authorized attorney or agent must at least signify the client for whom it is intended so that the attorney can know whom to advise to assert a claim in the bankruptcy.").

Here, the Debtor asserts that Todd received "notice" of his bankruptcy case because:

1) he mailed notice of his bankruptcy case on October 22, 2002 to an attorney, Edward Bullard, who was employed at the same law firm as Todd's former attorney, William Johnston; and 2) Johnston, in connection with his representation of other clients who were also creditors of the Debtor, was, at some point in time, aware of the Debtor's bankruptcy case.

Todd acknowledges that notice of the bankruptcy case was sent to attorney Bullard, but testified that Bullard never represented her. Todd cannot be bound by the receipt of notice by an attorney who did not represent her. Even if Bullard did represent Todd, the evidence in this case establishes that all notices of the bankruptcy case were sent to Bullard on behalf of clients other than Todd, who were also creditors of the Debtor's estate. Bullard would have had no reason to investigate whether Todd was also a creditor of the Debtor. Further, the fact that Johnston was generally aware that the Debtor had filed bankruptcy is not "notice" within the meaning of section 523(a)(3). The Debtor took no steps to ensure that Johnston was notified of his bankruptcy case in a way that was reasonably calculated to provide notice to Todd.

Having found that Todd did not receive notice or have actual knowledge of the

Debtor's bankruptcy in time to file a timely proof of claim, the Court hereby concludes that the debt was not discharged. Accordingly, the Debtor's request for sanctions against Todd and her attorneys, Todd Harding and William Maddox, must be **DENIED**.

*B. Dismissal of the Debtor's Appeal Violated the Automatic Stay*

It does appear, however, that the dismissal of the Debtor's appeal of the magistrate court's ruling on the Debtor's claim against Todd violated the automatic stay. The Debtor's claim against Todd arose prior to the Debtor's bankruptcy filing. Therefore, the claim became property of the Debtor's bankruptcy estate. *See* 11 U.S.C. § 541(a) (defining property of a debtor's estate to include "all legal or equitable interests of the debtor and property as of the commencement of the case"); *see also Barger v. City of Cartersville*, 348 F.3d 1289, 1291 (11th Cir. 2003) ("[P]roperty of the bankruptcy estate includes all potential causes of action that exist at the time petitioner files for bankruptcy."). The magistrate court presumably ruled against the Debtor as to his claim against Todd and, finding in favor of Todd on her counterclaim, entered a judgment in favor of Todd. The Debtor appealed the ruling. Accordingly, the Debtor's claim against Todd remained viable, and the Trustee did not abandon the claim, pursuant to section 554(a) or (b). Because the claim was not scheduled, the claim was not deemed to be abandoned under section 554(c), even upon the closing of the bankruptcy case. *See* 11 U.S.C. § 554.

Section 362(a)(3) of the Code provides a stay of "any act[s] . . . to exercise control

over property of the estate." 11 U.S.C. § 362(a)(3). The automatic stay comes into effect immediately upon the commencement of the bankruptcy case and is "good against the world, regardless" of whether a party has notice of the stay or the bankruptcy filing. *In re Peralta*, 317 B.R. 381 (9th Cir. BAP 2004); *see also In re Smith*, 180 B.R. 311 n.17 (Bankr. N.D. Ga. 1995) (Murphy, J.). The stay provided by section 362(a)(3) terminates only when "property is no longer property of the estate." 11 U.S.C. § 362(c)(1). As noted above, the Debtor's claim against Todd has never stopped being property of the estate. Consequently, the dismissal of the Debtor's appeal of the ruling denying his claim against Todd constituted an act to exercise control over property of the estate and violated section 362(a)(3). Any act taken in violation of the automatic stay is void and without effect. *See In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir.1984). Therefore, the dismissal of the Debtor's appeal of the ruling on his claim against Todd is void.

It should be clarified here that the dismissal of the Debtor's appeal of the ruling awarding Todd a judgment against him did not violate the automatic stay. Any stay that would have protected the Debtor from the dismissal of his appeal of the entry of that judgment terminated under section 362(c)(2) at the time the Debtor's discharge was entered, which occurred on April 19, 2003, prior to the dismissal of the Debtor's appeal. *See* 11 U.S.C. § 362(c)(2).

The Trustee is the proper party to pursue the reinstatement of the appeal of the ruling denying the Debtor's claim against Todd. The Debtor lacks standing to do so. Accordingly,

the Court directs the United States Trustee to appoint a trustee for the limited purpose of investigating whether the estate would benefit from the pursuit of the appeal of the ruling denying the Debtor's claim against Todd. The trustee shall file a report within ninety (90) days of the date of the entry of this Order indicating whether the trustee intends to pursue the reinstatement of the appeal.

**The Clerk is DIRECTED to serve a copy of this Order on the Debtor, Todd, counsel for Todd, the former Chapter 7 Trustee, and the United States Trustee.**

**END OF DOCUMENT**