

9-24-05

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF GEORGIA
 ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
RICK ANTHONY BRUNATTI,)	
a/k/a RICK A. BRUNATTI,)	CASE NO. 05-66202-MHM
DELINDA COWART BRUNATTI,)	
a/k/a DELINDA C. BRUNATTI,)	
)	
Debtors.)	

ORDER DENYING MOTION TO REOPEN

This case commenced April 2, 2005. Debtors' discharge was entered July 29, 2005.

Prior to filing this bankruptcy case, two state court cases were pending: One filed by JSH & Associates ("JSH") against Debtors and another filed by Debtors against JSH & Associates.¹ When Debtors filed this Chapter 7 case, those two state court cases were stayed by 11 U.S.C. §362(a).

Following the entry of Debtors' discharge, Debtors filed a motion to reopen their state court case against JSH. In that case, Debtors asserted a fraud claim against JSH. JSH had asserted a counterclaim against Debtors and their company, LRB Real Estate, LLC ("LRB"), for damages for filing frivolous litigation and against LRB on its promissory note.² When, after their discharge, Debtors sought to reopen their state court case, JSH

¹ The case filed by Debtors also included Louis S. Hafner and Judy S. Hafner as defendants. They were subsequently dismissed as defendants and are not parties to the current proceedings.

² LRB had purchased its business from JSH and, as part of the purchase price, had signed a promissory note to JSH.

successfully argued that both cases should be reopened and consolidated. The state court order noted that Debtors had consented to consolidation of the two cases. The state court order also specifically stated that the cases were reopened to dispose of Debtors' claims and JSH's claims, listing the issues to be decided as:

- Debtors' fraud claims,
- JSH's counterclaim against LRB on the note,
- JSH's counterclaim against LRB for frivolous litigation, and
- JSH's counterclaim against Debtors for frivolous litigation based upon their post-bankruptcy actions.

Following the reopening of the state court cases, the state court entered an order granting JSH's motion for summary judgment against LRB on the note.³ On its own motion, however, the court dismissed JSH's counterclaim for attorneys fees, finding that such a request must be brought in the form of motion, not as a counterclaim, citing *Nuckols v. Nuckols*, 226 Ga. App. 194, 486 S.E. 2d 194 (1997). Thereafter, JSH filed a motion for an assessment of attorneys fees against Debtors and LRB for frivolous litigation under O.C.G.A. §9-15-14. That motion was granted by order entered May 11, 2006, assessing attorneys fees in the amount of \$11,057.50 against Debtors and LRB, jointly and severally and \$1,995 against Debtors. Debtors appealed the attorneys fee award, asserting their discharge in bankruptcy, and the appeal was denied without opinion.

³ Judgment was entered against LRB in the amount of \$167,125.72.

JSH opposes reopening this bankruptcy case, asserting that Debtors' post-discharge conduct gave rise to the attorneys fee award and, therefore, is not subject to the discharge injunction. JSH also asserts that the state court order is *res judicata* to the attorneys fee issue. Debtors contend that \$6,206.20 of the attorneys fees assessed against them were incurred prepetition and thus were discharged.

Pursuant to 11 U.S.C. §350(b), a case may be reopened "to administer assets, to accord relief to the debtor, or for other cause." Bankruptcy Rule 5010 provides:

a case may be reopened on motion of the debtor or other party in interest pursuant to §350(b) of the Code. In a Chapter 7 or a Chapter 13 case a trustee shall be appointed unless the court determines that a trustee is not necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

A decision to reopen a case pursuant to §350(b) is within the discretion of the bankruptcy court. *In re Blossom*, 57 B.R. 285 (Bankr. N.D. Ohio 1986).

State courts and bankruptcy courts have concurrent jurisdiction to determine whether a claim has been discharged in a bankruptcy proceeding. *In re Coppi*, 75 B.R. 81 (Bankr. S.D. Iowa 1987); *In re Tinnenberg*, 57 B.R. 430 (Bankr. E.D. N.Y. 1985). *See also*, *Cummings v. Cummings*, 244 F. 3d 1263 (11th Cir. 2001). Debtors attempt to distinguish *Coppi* and *Tinnenberg* on the grounds that both involved claims that had not been listed in the debtors' bankruptcy schedules. That distinction, however, is not significant.

In both *Coppi* and *Tinnenberg*, the debtors sought to reopen because a judgment had been entered against them post-discharge. The basis of the holdings in those cases rested not upon the debtors' failure to list the claims in their schedules, but on the conclusion that, when the lawsuits were filed in state court, the state court became the proper forum to determine whether the claims had been discharged in bankruptcy. As a matter of comity and in accordance with preclusion principles, if Debtors disagree with the state court's conclusions, Debtors' remedy is through appeal, not through a collateral attack on the judgment in bankruptcy court.

Additionally, even if the bankruptcy court could review the state court judgment, the attorneys fees award does not appear to be a claim that arose before Debtors' bankruptcy petition was filed. The Bankruptcy Code, §101(5) defines a claim as:

...right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[.]

Under Georgia law, a litigant is not authorized to seek an award for litigation expenses and attorneys fees for frivolous action until *after* a case is concluded. O.C.G.A. § 9-15-14.

Swafford v. Bradford, 225 Ga.App. 486, 484 S.E.2d 300 (1997); *Hallman v. Emory University*, 225 Ga. App. 247, 483 S.E.2d 362 (1997). Therefore, until the proceeding is concluded in favor of the party who then seeks an award of attorneys fees, any "claim" for attorneys fees is merely speculative. It appears that under Georgia law, JSH had no prepetition claim for attorneys fees arising from frivolous litigation because that litigation

had not concluded, and JSH would never have had such a claim unless Debtors recommenced their litigation against JSH after the discharge was entered, which they did.

Because the discharge injunction in Debtors' bankruptcy case does not operate against claims arising following the discharge, reopening this case would serve no purpose.

Accordingly, it is hereby

ORDERED that Debtors' motion to reopen is *denied*.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtors, Debtors' attorney, the Chapter 7 Trustee, and all creditors and parties in interest.

IT IS SO ORDERED, this the 21st day of September, 2007.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE