IT IS ORDERED as set forth below:

Date: May 22, 2008

C. Ray Mullins
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U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 02-65783-CRM
JEFFERY LEWIS CHANDLER,	CHAPTER 7
Debtor.	

ORDER GRANTING MOTION TO RECONSIDER

THE MATTER under consideration is Georgia Peach Credit Union's Motion to Reconsider this Court's Order Granting the Debtor's Motion to Reopen his Chapter 7 Case (the "GPCU Motion"). The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J). Georgia Peach Credit Union ("GPCU") contends that it was unaware of the Jeffrey Lewis Chandler (the "Debtor")

bankruptcy case prior to discharge and, consequently, properly proceeded in an action to determine the dischargeability of its debt in state court. The Debtor contends that he properly amended his schedules to include GPCU and that its debt was discharged.

Factual Background

The Debtor had an account with GPCU since 1995. The Debtor filed a chapter 13 petition on May 28, 2002. GPCU was not listed in the Statement of Financial Affairs ("SOFA"). On July 26, 2002, the schedules were amended to include GPCU, listing its address as "466 East Tower, 205 Butler Street, SE, Atlanta, GA 30334." The chapter 13 plan was confirmed on September 11, 2002. Despite the amendment to the schedules, GPCU was not added to the creditor mailing matrix. GPCU asserts that it was unaware of the bankruptcy and continued to make cash advances to the Debtor. On May 3, 2002, less than one month prior to filing, GPCU made a $1,500.00 advance to Debtor. During the pendency of the case, GPCU made three additional advances to the Debtor in the amounts of $700.00, $250.00, and $2,000.00. The Debtor continued to make payments on the account until January 2004.

The case was converted to chapter 7 on February 4, 2004. In the second SOFA, filed on the date of conversion, the Debtor listed GPCU among its creditors but incorrectly listed its address as "52 N. Avondale Rd., Avondale Estates, GA 30002-1322." That address is actually the address of *Peach State Credit Union*. GPCU never received notice of the conversion to chapter 7 and was never added to the creditor mailing matrix. The Debtor received his discharge on May 11, 2004.

On October 24, 2004, after two demand letters, the Debtor contacted GPCU to notify them of his bankruptcy case. On April 6, 2005, counsel for GPCU, Joseph Nardone, informed

Debtor's counsel of the post-petition cash advances to the Debtor and that GPCU had not been properly listed as a creditor. On March 31, 2007, Robert Wayne, bankruptcy counsel for GPCU, discussed reopening the case with Debtor's counsel, but learned that counsel no longer represented the Debtor. On April 3, 2007, GPCU filed a state court action to determine the dischargeability of its debt, styled: Georgia Peach Credit Union v. Jeffrey L. Chandler State Court Cobb County Case No. 2007A-4961-7 (the "Cobb County Litigation"). Debtor file a *pro se* answer on April 11, 2007. On August 2, 2007, the State Court of Cobb County granted GPCU's motion for summary judgment against the Debtor.

On August 22, 2007, the Debtor filed a Motion to Reopen (the "Motion") in order to file an adversary proceeding against GPCU to determine the dischargeability of GPCU's debt. The Motion and notice were sent to the correct address but under the wrong name. GPCU claims that it never received the Motion or notice. On October 24, 2007, the Motion was granted without objection.

The GPCU Motion was filed on November 28, 2007 requesting that the Court reconsider its decision to reopen the Debtor's case. GPCU contends that the Debtor deliberately omitted GPCU from his bankruptcy schedules and therefore, was not entitled to discharge the GPCU debt. GPCU asserts five arguments: (1) the Debtor is guilty of laches and unjustified delay; (2) the Debtor's actions have prejudiced GPCU; (3) the Debtor's failure to list GPCU as a creditor caused it harm; (4) the Debtor has not acted in good faith; and (5) that collateral estoppel precludes the relitigation of the issue of dischargeability in the bankruptcy court.

At a hearing held on December 20, 2007, this Court directed the Debtor to file a responsive brief. In his brief, Debtor primarily contends that GPCU was added to his schedules

by amendment and as a result, GPCU's subsequent actions were undertaken with knowledge of the risks. Debtor cites little statutory law or case law in support of its position. Having read and considered both briefs, the GPCU Motion is granted.

Legal Standard for Motion to Reconsider

Rule 59 of the Federal Rules of Civil Procedure ("FRCP"), made applicable to bankruptcy proceedings by Rule 9023 of the Federal Rules of Bankruptcy Procedure ("FRBP") permits a court to "grant a new trial on all or some of the issues" for any reason for "which a rehearing has heretofore been granted." Rule 60 of the FRCP, made applicable to bankruptcy proceedings by Rule 9024 of the FRBP permits a court to grant a party relief from a final judgment, order, or proceedings for any reason justifying the relief.

The goal of the provisions is to correct errors of law or misapprehensions of fact. In re McDaniel, 217 B.R. 348 (Bankr. N.D. Ga 1998) (Drake, J.) (citing Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993)). Motions to reconsider are not to be used (i) to relitigate issues, (ii) as a substitute for appeal, or (iii) to raise arguments which could have been asserted prior to entry of order. See O'Neal v. Kennamer, 958 F.2d 1044 (11th Cir. 1992); Ogier v. Regions Bank (In re Trimble House Corp.), 2004 Bankr. LEXIS 431 (Bankr. N.D. Ga. 2004) (Murphy, J.). Nonetheless, the decision to alter or amend a judgment is in the sound discretion of the trial judge. Futures Trading Comm'n v. Am. Commodities Group, 753 F.2d 862, 866 (11th Cir. 1984); Am. Home Assur. Co. v. Glenn Estess & Assoc., Inc., 763 F.2d 1237, 1238-39 (11th Cir. 1985); McCarthy v. Mason, 714 F.2d 234, 237 (2d Cir. 1983); Weems v. McCloud, 619 F.2d 1081, 1098 (5th Cir. 1980).

Legal Standard for a Motion to Reopen

Section 350(b) of the Bankruptcy Code provides: "a case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor or for other cause." The decision to reopen is left to the discretion of the bankruptcy judge. See e.g. Hawkins v. Landmark Finance Co., 727 F.2d 324, 326 (4th Cir. 1984); Price v. Haker (In re Haker), 411 F.2d 568, 569 (5th Cir. 1969); In re Ronsinski, 759 F.2d 539 (6th Cir. 1985); Matter of Stark, 717 F.2d 322 (7th Cir. 1983). When considering a motion to reopen a court must balance the interests of creditors with the "fresh start" principal of the Bankruptcy Code. In re Beezley, 994 F.2d 1433 (9th Cir. 1993). Courts generally consider three factors: (1) the benefit to the debtor, (2) the prejudice to the opposing party; and (3) the benefit to the creditors. In re Rochester, 308 B.R. 596, 601 (Bankr. N.D. Ga. 2004); In re Lewis, 273 B.R. 739, 744 (Bankr. N.D. Ga. 2001). A debtor's desire to amend its bankruptcy schedules to add a creditor is ordinarily sufficient cause to reopen a case. In re Jensen, 46 B.R. 578, 581 (Bankr. E.D.N.Y. 1985). However, the debtor's motives must be balanced against the potential harm done to the opposing creditor. In re McDaniel, 217 B.R. at 352. In making the decision to reopen a case, the bankruptcy court should exercise its equitable powers with respect to substance over technical considerations to ensure substantial justice. In re Shondel, 950 F.2d 1301, 1304 (7th Cir. 1991) (citing In re Stark, 717 F.2d 322, 323 (7th Cir. 1983)).

In In re Guzman, 130 B.R. 489 (Bankr. W.D. Tex 1991), a bankruptcy court rejected a debtor's motion to reopen his chapter 7 case for the sole purpose of determining the dischargeability of a the debt of a creditor that had not been previously listed on the debtor's schedules. The court noted that adding the name of a creditor to a no-asset chapter 7 case was

futile, as section 727(b) of the Bankruptcy Code dictates that all of a debtor's prepetition debts are discharged without regard to the list of scheduled creditors. Id. at 491. The court recommended precisely the actions taken by GPCU in the present case - state court litigation to determine the dischargeability of the debt. Id. Other courts have used similar logic to deny motions to reopen no-asset chapter 7 cases. See e.g. Beezley v. Cal. Land Title Co., 994 F.2d 1433 (9th Cir. 1993) (denying a debtor's request to reopen a no-asset chapter 7 case in order to add an omitted creditor because no relief would have resulted); In re Thibodeau, 136 B.R. 7, 10 (Bankr. D. Mass. 1992) (criticizing courts that permit reopening of no-asset chapter 7 cases of basing their holdings on a misunderstanding of the law); In re Mendiola, 99 B.R. 864, 865 (Bankr. N.D. Ill. 1989); but see Stark v. St. Mary's Hosp. (In re Stark), 717 F.2d 322 (7th Cir. 1983) (reopening a no-asset bankruptcy case in order to add a creditor where there was no evidence of fraud or intentional design); In re McKinnon, 165 B.R. 55, 57 (specifically disagreeing with Thibodeau and Mendiola that a no-asset case should not be reopened to add an omitted creditor as ignoring the consequences in a case that is later reopened to administer previously undiscovered assets).

The Debtor is guilty of laches and unjustified delay

The Debtor unjustifiably delayed filing the Motion to the detriment of GPCU. While the Bankruptcy Code does not provide a time limit for filing a motion to reopen, laches is a valid ground for denial. Traub v. Marshall Field & Co., 182 F. 622 (5th Cir. 1910); In re Hunter, 283 B.R. 353 (Bankr. M.D. Fla. 2002). Time delay alone, however, is not sufficient. See e.g. In re Bianucci, 4 F.3d 526, 528 (7th Cir. 1993) (finding that time delay without more was not sufficient to bar a debtor from reopening a case). Courts have generally looked to the diligence

of the debtor in seeking to reopen the case and any prejudice to the opposing creditor if the case were reopened. In re Paul, 194 B.R. 381 (Bankr. D.S.C. 1995); see also In re Frasier, 294 B.R. 362 (Bankr. D. Colo. 2003) (citing Costello v. United States, 365 U.S. 265, 282, 81 S.Ct. 534, 543 (1961) (stating that the general rule when courts apply the doctrine of laches involves an inquiry into the diligence of the party against whom the defense is asserted and the potential for prejudice to the non-asserting party)). Some courts have found that where the creditor has incurred some expense pursuing its rights under state law, the delay coupled with the expense, may prevent the debtor from reopening the case. See e.g. Hawkins, 727 F.2d 324 (upholding a bankruptcy court's refusal to reopen a case so that a debtor could file a motion to avoid a lien eight months after it closed and the creditor had incurred expense and legal fees in seeking to foreclose); In re Towns, 16 B.R. 949, 954 (Bankr. N.D. Iowa 1982) (holding that once a replevin action had commenced, a debtor could not reopen its case to file a motion to avoid lien); In re Blossom, 57 B.R. 285 (Bankr. N.D. Ohio 1986) (barring a debtor from reopening his case once the creditor had collected on a debt omitted from the case by the debtor).

The Debtor did not move to reopen his case for three years after his discharge and two years after GPCU's counsel made Debtor's counsel aware of its claim. The time in this case far exceeds the 8 months that triggered the laches defense in Hawkins. GPCU has also demonstrated, in its pleadings and representations to the court, that it has expended significant expense pursuing the Cobb County Litigation and opposing the Motion.

The Debtor's actions have prejudiced GPCU

The Debtor's failure to add GPCU to the schedules caused GPCU to incur substantial attorney's fees in pursuing its claims in the Cobb County Litigation. Substantial prejudice

coupled with unreasonable delay may bar a debtor from reopening his case. See Hawkins, 727 F.2d 324.

In In re Thompson, 19 B.R. 858 (Bankr. S.D. Ala. 1982), the court refused to reopen a no-asset chapter 7 case to add a creditor to his schedules. Although the creditor had not been denied the right to participate in a distribution, the court found that the creditor had been prejudiced because it had expended great time and effort collecting the debt in state court. Id. at 859. The Thompson court noted that state court could decide dischargeabilty. Id. at 860. The Debtor's actions caused GPCU to incur the cost of the Cobb County Litigation and now, he seeks to return to this Court.

The Debtor's initial failure to list GPCU harmed GPCU

GPCU claims that the Debtor caused it harm by continuing to seek and receive post-petition cash advances without providing GPCU with notice of his bankruptcy. The Debtor received a total of $2,950.00 in post-petition cash advances from GPCU, which remain unpaid. Concealment of a bankruptcy can be considered quantifiable harm by a court. See In re Fraza, 143 B.R. 584 (Bankr. D.R.I. 1992) . In Fraza, the court declined to permit debtors to reopen their case to add an unsecured creditor on the grounds of laches, fraud, and prejudice to the unlisted creditor. The court found it persuasive that the bank claimed it would not have made a second loan to the debtors' son had it know the debtors, the guarantors of the first and second loan, were in bankruptcy. Likewise, in the present case, GPCU has alleged that it would not have extended the post-petition loans to the Debtor had it been aware of his bankruptcy case.

The Debtor has not acted in good faith

The Debtor has not acted in good faith with respect to the failure to properly add GPCU

as a creditor. When considering a debtor's motion to reopen a case to add a creditor, a court may use its discretion to deny the motion where a creditor demonstrates that a debtor omitted the creditor intentionally. In re Baitcher, 781 F.2d 1529 (11th Cir. 1986), Stark, 717 F.2d at 324, Hawkins, 727 F.2d at 326, In re Rhodes, 88 B.R. 199 (Bankr. E.D. Ark. 1988), Matter of Davidson, 36 B.R. 539 (Bankr. D.N.J. 1983). In In re Delfino, 351 B.R. 786 (Bankr. S.D. Fla. 2006), the court denied the debtor's motion to reopen citing both laches and equitable grounds. The court concluded that the debtor's failure to reopen the bankruptcy case until after the creditor had incurred substantial state litigation costs and after an unfavorable result for the debtor was "marked by a want of good faith." Id. at 790.

Though Debtor's counsel attempted to amend the schedules to include GPCU, the addition was not effective. GPCU claims that it did not receive notice of the amendment and Debtor offers no evidence to the contrary. Despite knowledge of the proper mailing address for GPCU at the time of conversion, the Debtor again failed to properly schedule the debt. In his answer in the Cobb County Litigation, the Debtor admitted: "When I filed Chapter 13 I ask [sic] that Peach State be paid and not added to my list of creditors."[1] He also admitted that his counsel used the incorrect address for GPCU when he later converted his chapter 13 case to chapter 7. GPCU's Brief in Opposition to Debtor's Motion to Reopen Chapter 7 Case, p. 4 ¶2 (hereinafter "GPCU's Brief").

Collateral estoppel precludes relitigation of the issue of dischargeability

The doctrine of collateral estoppel precludes the relitigation of a dischargeability issue

[1] Presumably, during the pendency of the bankruptcy case and Cobb County Litigation, the Debtor repeatedly confused GPCU with Peach State Credit Union.

that has been heard by a court of competent jurisdiction. In re Benham, 157 B.R. 655, 656 (Bankr. E.D. Ark. 1993) (citing Richards v. Richards (In re Richards), 131 B.R. 76, 78 (Bankr. S. Ohio 1991)); see Goss v. Goss, 722 F.2d 599 (10th Cir. 1983). It is well established that bankruptcy courts have concurrent, not exclusive, jurisdiction over dischargeability proceedings under section 523(a)(3) of the Bankruptcy Code. In re Tinnenberg, 57 B.R. 430, 432 (Bankr. E.D.N.Y. 1985); In re Rediker, 25 B.R. 71, 74 (Bankr. M.D. Tenn. 1982); In re Iannacone, 21 B.R. 153, 155 (Bankr. Mass. 1982); In re McNeil, 13 B.R. 743, 747 (S.D.N.Y. 1981); Cf. 11 U.S.C. §523(a)(2), (4), or (6)(where the bankruptcy court has exclusive jurisdiction). Where a state court has concurrent jurisdiction, its judgment may not be disregarded as a nullity. In re Crowder, 37 B.R. 53, 55 (Bankr. S.D. Fla. 1984).

In its complaint in the Cobb County Litigation, GPCU contended that it had never been properly listed as a creditor in the Debtor's bankruptcy case and that the GPCU debt was not discharged. The Debtor was served on May 2, 2007 and answered, *pro se*, on May 11, 2007. Debtor admitted that he did not intend for GPCU to be added to the bankruptcy and he continued to borrow money and make payments on the account post-petition. The state court, in its order granting GPCU summary judgment, stated: "The Defendant has not submitted evidence to rebut the account information provided by the Plaintiff nor shown that this debt was properly discharged in Bankruptcy Court Proceedings." GPCU's Brief p. 6 ¶1. This Court will not provide the Debtor with a "second bite at the apple" to determine the dischargeability of the debt.

This Court agrees with GPCU that the Order Granting the Debtor's Motion to Reopen should be vacated. The Court finds that GPCU was unaware of the Debtor's bankruptcy until

after the Debtor's discharge and, therefore GPCU properly litigated the dischargeability issue in state court. That judgment bars the relitigation of the issue of dischargeability in this Court. Accordingly,

IT IS ORDERED that the GPCU Motion be and is hereby **GRANTED.**

IT IS FURTHER ORDERED that the Order Granting the Debtor's Motion to Reopen Case be and is hereby **VACATED.**

The Clerk of Court is directed to serve a copy of this Order upon Debtor, Debtor's counsel, the Respondent, Respondent's counsel, the Chapter 7 Trustee, and the United States Trustee.

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