



IT IS ORDERED as set forth below:

Date: March 11, 2011

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

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

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

IN THE MATTER OF:	:	CASE NUMBER
	:	
HENRY SAMUEL BANKS	:	03-12904-WHD
MELISSA DARLENE BANKS,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
DEBTORS.	:	BANKRUPTCY CODE

ORDER

Before the Court is the Motion Pursuant to Rule 11 U.S.C. 350(b) for Order to Reopen Case to Seek Sanctions for Violation of the Discharge Injunction against General Produce, Inc., filed by Henry and Melissa Banks. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. See 28 U.S.C. § 1334; 157(b)(2)(A).

Henry Banks (hereinafter the "Debtor") was the president, chief operating officer, and sole owner of Henry & Taylor Produce, LLC (hereinafter "Henry & Taylor"). General Produce, Inc. (hereinafter the "Respondent") is a wholesale produce vendor. Respondent

alleges that it sold Henry & Taylor \$147,910.38 worth of produce through an open account. On October 17, 2003, Henry & Taylor filed a voluntary Chapter 7 petition, and on October 29, 2003, Debtor and his wife, Melissa Banks, filed a voluntary Chapter 7 petition. Debtor received a Chapter 7 discharge on February 27, 2004. While Respondent was aware of, and participated as a creditor in, Henry & Taylor's bankruptcy case, Debtor did not list Respondent as a creditor in Debtor's bankruptcy schedules.

On March 5, 2004, Respondent filed suit in the U.S. District Court for the Northern District of Georgia, Newnan Division, Case Number 3:04-CV-036-JTC, in an attempt to recover the \$147,910.39 owed through its open account with Debtor. Debtor then filed an answer admitting that Respondent was still owed debt, but failed to raise his bankruptcy discharge as a defense to Respondent's claim. In July 2005, the District Court struck the Debtor's answer as a discovery sanction. In December 2005, the District Court entered a default judgment in favor of Respondent in the amount of \$212,732.89. On September 9, 2009, Respondent filed a garnishment suit against Debtor in the State Court of Fulton County. In response, on August 3, 2010, Debtor filed the instant motion.

Debtor requests reopening of his case to allow him to amend his schedules to add Respondent as a creditor and to seek an order enforcing the discharge injunction and an award of sanctions for Respondent's violation thereof. Respondent opposes the motion on the basis that the debt is nondischargeable under section 523(a)(3)(B) and reopening the case would, therefore, be futile. Respondent also urges the Court to apply the doctrine of

laches, as the Debtor has waited over six years to bring this motion.

Under section 350(b) of the Bankruptcy Code, “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.” 11 U.S.C. § 350(b). This court has broad discretion in determining whether to reopen a case under section 350(b). *See Faden v. Insurance Co. of N. Am. (In re Faden)*, 96 F.3d 792, 796 (5th Cir.1996); *In re Bianucci*, 4 F.3d 526, 528 (7th Cir.1993). As the effect of the discharge order is one of the fundamental purposes of filing a bankruptcy petition, enforcement of the discharge injunction is a valid basis for reopening a bankruptcy case.

As it happens in this case, before the Court can grant the Debtor’s requested relief, the Court must determine whether the debt at issue has in fact been discharged. As a technical matter, the Court notes that a motion to reopen the case is not essential to that determination, as a party can seek such a determination by filing a complaint at any time, even after the case has been closed, without filing a motion to reopen the bankruptcy case. *See In re Staffer*, 306 F.3d 967 (9th Cir. 2002) (finding that bankruptcy court erred in applying doctrine of laches to prevent creditor from reopening case to pursue its claim that unscheduled debt was not discharged, as whether laches could be asserted as an affirmative defense was an “extraneous issue at the motion-to-reopen stage”). Although the case would need to be reopened to permit the Court to enforce the discharge injunction and award sanctions if appropriate, reopening the case to determine whether a debt has been discharged

is simply an administrative convenience for the Clerk. *Id.*

Having considered the briefs filed by Debtor and Respondent, the Court concludes that the case should be reopened to permit Debtor to determine whether to seek a determination of discharge and pursue his claim against Respondent. Respondent asserts that the debt owed by Debtor to Respondent is nondischargeable under section 523(a)(3)(B) because it was not scheduled and is a debt that would otherwise have been nondischargeable under section 523(a)(4). Specifically, Respondent submits that the debt at issue arises from Debtor's defalcation of funds held by Debtor in trust for Respondent, pursuant to the Perishable Agricultural Commodities Act ("PACA"). *See* 7 U.S.C. § 499e(c)(1); *see also In re Perrine*, 2006 WL 6589890 (Bankr. N.D. Ga. Aug. 8, 2006) (Drake, J.) (debt resulting from breach of PACA trust held nondischargeable under section 523(a)(4)).

Section 523(a)(3)(B) provides a "discharge under section 727 of this title . . . does not discharge an individual debtor from any debt . . . neither listed nor scheduled . . . in time to permit . . . if such debt is of a kind specified in paragraph [523(a)](2), (4), or (6) . . . , timely filing of a proof of claim and timely request for a determination of dischargeability of such debt . . . , unless such creditor had notice or actual knowledge of the case in time for such timely filing." 11 U.S.C. § 523(a)(3)(B).

Debtor acknowledges that the debt owed to Respondent was not scheduled in time to permit Respondent to file a complaint to determine dischargeability and does not appear to controvert the legal conclusion that the debt is of the kind specified in section 523(a)(4).

Debtor does contend that this debt would fail to meet the requirements of section 523(a)(3)(B) due to Respondent's actual knowledge of the Debtor's bankruptcy case in time to file a complaint to determine dischargeability. Debtor believes that further discovery will disclose evidence to support Debtor's contention that Respondent had such actual knowledge.

In the exercise of the Court's discretion, and pursuant to section 350(b), the Motion to Reopen is **GRANTED**. The case is hereby reopened to permit the transaction of such business as is permitted by Title 11 of the United States Code, and it is

FURTHER ORDERED that, if no further action is taken by any party within 90 days of the entry of this Order, the Clerk of this court shall be authorized to close this case in the usual manner.

The Clerk is **DIRECTED** to serve a copy of this Order on Debtors, Debtors' counsel, Respondent, and Respondent's counsel.

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