UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
SALVATORE CASTELLANA	)	CASE NO. 03-95436-MHM
	)	
Debtor	)	

ORDER DENYING MOTION TO REOPEN

This matter on Debtor's motion to reopen this case. For the reasons set forth below, the motion to reopen is denied.

Debtor filed his Chapter 7 petition May 21, 2003. Debtors' case was a no-asset case. Debtor's discharge was entered November 8, 2003. Debtors inadvertently failed to list debts to Fleet Credit Card Services and Bank of America. Debtor now wishes to amend his schedules to add said creditors as an unsecured creditors and have their claims 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).

Debtor's motion to reopen is unnecessary because reopening to amend schedules to add previously omitted creditors has no effect on whether those creditors' claims are discharged. *Keenom v. All American Marketing,* 231 B.R. 116, 121 fn 5 (Bankr. M.D. Ga. 1999) (J. Walker); *In re Cheely*, 280 B.R. 763 (Bankr. M.D. Ga. 2002); *Beezley v.*

California Land Title Company, 994 F. 2d 1433 (9th Cir. 1993); and *In re Mendiola*, 99 B.R. 864 (Bankr. N.D. Ill. 1989). Section §727(b) provides that, unless a claim is nondischargeable under §523, a discharge discharges a debtor "from all debts that arose before the date of the order for relief...." The only grounds under which an omitted debt is nondischargeable *because* it was omitted are set forth in §523(a)(3).[1] Section 523(a)(3) provides that a claim against a debtor is not discharged if it is:

> (3) 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--
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> (A) 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; or
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> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(Emphasis added). In a no-asset case, pursuant to Bankruptcy Rules 2002(e) and 3002(c)(5), no time limit for filing proofs of claim is set unless assets become available for distribution to creditors, in which case, all creditors are notified and accorded an opportunity to file proofs of claim. Therefore, §523(a)(3)(A) appears to be inapplicable in a no-asset Chapter 7 case; and, whether or not it was listed in a debtor's schedules, a prepetition claim is discharged unless the claim is of a kind specified in paragraph (2), (4), or (6) of §523(a).

The *Keenom* court describes three ways to obtain a determination regarding the dischargeability of an omitted debt: (1) a state court can decide the dischargeability issue

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[1] Other subsections of §523(a), except §523(a)(2), (4), or (6), may be applicable to render a debt nondischargeable, without regard to whether the debt had been listed in the debtor's bankruptcy schedules.

when the debtor interposes in a state court collection action the defense of discharge in bankruptcy;[2] (2) the bankruptcy court can determine dischargeability following a motion by the debtor or the omitted creditor to reopen the case and file a complaint under Bankruptcy Rule 7001 to obtain a declaratory judgment regarding dischargeability; and (3) the bankruptcy court can determine dischargeability when the debtor moves to enforce the discharge injunction. Under none of these three options is the creditor required to prove the merits of a claim under §523(a)(2), (4) or (6); instead the creditor must prove only a colorable or viable claim under one of those subsections. Proof under §523(a)(3)(B) is a two-part endeavor: first, the creditor must show it lacked notice of the bankruptcy case before expiration of the §523(c) bar date; and second, the creditor must show that its claim is "of a kind specified in paragraph (2), (4), or (6)." Congress' use of the term "of a kind" evidences its intent that a trial of the merits is unnecessary. In the case of *Haga v. National Union Fire Insurance Co. of Pittsburgh, Pa.*, 131 B.R. 320 (Bankr. W.D. Tex. 1991), the court explained that Congress determined that denial to creditor of the right to file a proof of claim (and share in the distribution of estate assets, if any) and the right to obtain a determination of nondischargeability of the creditor's debt are the only material harms to an omitted creditor. Accordingly, those are the logical (and only) grounds for penalizing Debtor with denial of dischargeability of creditor's debt. Because the remedy for the omitted creditor is punitive to Debtor, such creditor should not be required to prove the merits of its claim but held to a lower standard of proof: the existence of a colorable claim only. Additionally, trying the claim on its merits would run afoul of the time bar described in §523(c) and Bankruptcy Rule 4007. The burden of proof to show a colorable claim remains with the creditor.

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[2] Under §523(c), the bankruptcy court has the exclusive jurisdiction to determine dischargeability only under §523(a)(2), (4) or (6). For all other subsections of §523(a), including §523(a)(3), the bankruptcy court has concurrent jurisdiction with state courts.

As reopening this case to allow Debtor to amend his schedules to add omitted creditors is unnecessary and will not affect the dischargeability of the claims, it is hereby

ORDERED that Debtor's motion to reopen is denied.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, Debtor's attorney, creditors Fleet Credit Card Service and Bank of America, the Chapter 7 Trustee and the U.S. Trustee.

IT IS SO ORDERED, this the 28th day of January, 2004.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE