UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
HERBERT HELLHOFF,	)	CASE NO. 09-81880 - MHM
KARIN HELLHOFF,	)	
	)	
Debtors.	)	

ORDER AND NOTICE REGARDING DISCHARGE INJUNCTION

By letter dated February 3, 2011, Debtor, who is proceeding *pro se*, requested that this court "notify the attorney Patrick Dawson to stop contacting me with any mail, and take me off his case." Apparently, attorney Dawson is still pursuing Debtor through a prepetition lawsuit filed by John S. Arth and Ellen Arth (the "Arths" in the State Court of Cobb County.

Review of the record shows that Debtor filed this no-asset case *pro se* August 21, 2009. Although Debtor disclosed the Arths' lawsuit in the Statement of Financial Affairs, neither the Arths nor attorney Dawson were included on Debtor's Schedule F or the mailing matrix. Based upon allegations in a Motion to Compel by the Arths dated January 21, 2011 (the "State Court Motion"), however, the Arths and attorney Dawson had actual notice of this case. Although the State Court Motion contains the erroneous allegation that this case was dismissed, the record shows that the Chapter 7 Trustee filed a No Distribution Report October 22, 2009, and Debtor received his discharge February 23, 2010.

The omission of the Arths from Schedule F and from the mailing matrix has no effect on whether the creditors' claim is 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--
>
> (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
>
> (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[.]

[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.

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) is 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 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

[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.

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 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 a debtor with denial of dischargeability of creditor's debt. Because the remedy for the omitted creditor is punitive to the 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.

Realizing that *pro se* litigants lack familiarity with bankruptcy law and procedure, the court liberally construes *pro se* pleadings to permit consideration of the relief sought within the applicable legal and procedural limitations. *See, Kilgo v. Ricks,* 983 F. 2d 189 (11th Cir. 1993). In the letter dated February 3, 2011, Debtor seeks enforcement of the discharge injunction of 11 U.S.C. §524. Accordingly, it is hereby

ORDERED that attorney Patrick Dawson and John S. Arth and Ellen Arth are ***directed*** to cease and desist all actions to prosecute their state court litigation against Debtor ***instanter***; provided, however, that, within 21 days of the date of entry of this order, Respondent attorney Patrick Dawson and John S. Arth and Ellen Arth may file a

written response to this order showing cause why they should not be required to discontinue all actions to prosecute their state court litigation against Debtor.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Debtor, attorney Patrick Dawson (who should provide a copy to Jon S. Arth and Ellen Arth), and the Chapter 7 Trustee; and shall mail a courtesy copy of this order to the Honorable David P. Darden, Judge, State Court of Cobb County.

IT IS SO ORDERED, this the 25th day of February, 2011.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

HERBERT HELLHOFF
KARIN HELLHOFF

09-81880-MHM

DISTRIBUTION LIST

Herbert Hellhoff
3073 Greenfield Drive
Marietta, GA 30068

Karin Hellhoff
3073 Greenfield Drive
Marietta, GA 30068

Patrick Dawson, Esquire
Suite J-43
701 Whitlock Avenue
Marietta, GA 30064

Patrick Dawson, Esquire
313 Creekstone Ridge
Woodstock, GA 30188

Janet Watts, Esquire
Suite C
600 North Glynn Street
Fayetteville, GA 30214

Honorable David P. Darden
State Court of Cobb County
12 East Park Square
Suite 4-A
Marietta, GA 30090