

FILED

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN 012 JUN 28 AM 9: 38

In re:

Chapter 7

US BANKRUPTCY COURT
EASTERN DISTRICT OF WI

DOUGLAS MYERS and
CAROL MYERS,

Case No. 09-33813-jes

Debtors.

DOUGLAS MYERS and
CAROL MYERS,

Plaintiffs,

-v-

Adversary No. 11-2542

ANTHONY AND JOY ASTA, and
ANTHONY AND JOY ASTA REVOCABLE
LIVING TRUST DATED JANUARY 11, 2000,

Defendants.

DECISION

An adversary proceeding was commenced by the debtors, Douglas and Carol Myers (hereafter "the Myers") against Anthony and Joy Asta (hereafter "the Astas") and The Anthony and Joy Asta Revocable Living Trust (hereafter "Asta Trust"). This adversary proceeding is based upon the Myers' assertions that the Astas violated the discharge injunction under §§ 524 of the Bankruptcy Code.

This adversary proceeding came on for trial on May 23, 2012.

Facts

This case teaches a bitter lesson – always be wary of mixing friendship with business. If the business fails, it can spell not only the end of the business but also the end of a friendship between the parties involved.

The Myers operated an electrical contracting business known as Bayshore Electric, LLC, of which Carol Myers was the sole member. On January 24, 2006, Bayshore Electric borrowed \$50,000 from the Asta Trust, evidenced by a promissory note signed by Carol Myers for Bayshore Electric and Anthony Asta, as trustee of the Asta Trust. The note called for annual interest payments at 4% for 5 years, with a variable rate thereafter, and the entire note becoming due 10 years after execution. The note was not personally guaranteed by either Mr. or Mrs. Myers. Bayshore Electric remitted interest payments for two years and then partial interest payments the next two years, after which time, all payments stopped. This caused the Astas to initiate efforts to collect on this obligation. Meanwhile, the Myers filed a joint petition in bankruptcy under chapter 7 on September 24, 2009 and received a bankruptcy discharge on January 19, 2010. Neither the Astas nor the Asta Trust were listed as creditors and notice of the bankruptcy was not sent to either of these parties.

The first time that the Astas learned of the Myers personal bankruptcy was on March 16, 2011, as a result of a letter sent by the Myers' attorney, Jeffrey Hahn to Atty David Schiltz, who was at that time representing the Astas in their efforts to collect the Bayshore Electric debt. Despite Atty Hahn's notification of the Myers' bankruptcy,

the Astas filed a lawsuit in Walworth County, Wisconsin, joining Bayshore Electric and the Myers as defendants. The Astas were not represented in this lawsuit by Atty Schiltz, but instead by Atty Mark Sostarich. On July 1, 2011, a stipulation was entered into by the parties in the Walworth County lawsuit, dismissing the Myers from this suit and entering a judgment against Bayshore Electric in the amount of \$55,506.88. On that same day, Bayshore Electric filed its own petition in bankruptcy under chapter 7 listing the Asta Trust c/o Mark Sostarich, but not the Astas personally, on its list of creditors. No address was provided for the Asta Trust or for Atty Sostarich and, therefore, neither was included in the mailing matrix.

Numerous attempts were made by the Astas to collect this debt by both text message and voice mail directed towards the Myers. The Astas acknowledged that these efforts were made both before and after the Astas learned of the Myers' bankruptcy. The Astas testified that the communications were sent out of frustration on their part.

Although frustration was a factor, these communications were also an attempt to obtain payment on the outstanding Bayshore Electric debt. The communications from the Astas can only be charitably described as nasty and, in several instances, vulgar in their contents. The court fully understands why the Astas were frustrated, particularly in view of the timing of the stipulation arising out of the Walworth County lawsuit dismissing the Myers and entering of a judgment against Bayshore Electric, which occurred on the same date that Bayshore Electric filed its chapter 7 petition in bankruptcy.

Law

Under Bankruptcy Code Sec. 524(a): “A discharge in a case under this title – (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any such debt as a personal liability of the debtor. . . .” (emphasis added)

Sec. 101(12) of the Bankruptcy Code defines the term “debt” as “liability on a claim.” Sec. 727(b) states, in part, the following: “A discharge under subsection (a) of this section discharges a debtor from all debts that arose before the date of the order for relief under this chapter.” (emphasis added)

The problem in this case is that the demand for payment did not involve a debt due from either Douglas Myers or Carol Myers personally to the Asta Trust. The record of this case, including the note itself, amply establish that this was a debt solely between Bayshore Electric and the Asta Trust. Wis. Stats. § 183.0304(1), which deals with limited liability company provisions, specifically states that only the limited liability company, and not a member or manager of the limited liability company, is liable on the LLC’s debt. There was no personal guarantee by either of the Myers in connection with this debt. While the Myers may have some claim against the Astas for harassment, such action, if any, does not belong in the bankruptcy court and must be brought elsewhere.

The Myers submit that, while this was not a debt, it falls within the broader definition of claim, and that “it is clear that a claim within the meaning of the Code

includes a disputed right to payment.” (Pl. brief at page 3). However, a “claim” is defined in § 101(5) as a right to payment, which is lacking in this case. Because there is no obligation from the Myers personally to the Astas or the Asta Trust, there is no right to payment as a matter of law. Only if it is first established that there is a right to payment does it then become appropriate to determine if such right to payment is disputed or undisputed and if it was discharged in bankruptcy.

The Myers further argue that because Mr. Asta previously sent a letter to the court “claim[ing] to be a creditor of the Myers”, the doctrine of judicial estoppel precludes the Astas from now taking a position which is “clearly inconsistent” with their prior position. The court disagrees that the positions taken by the Astas in this proceeding were “clearly inconsistent”. The letter that Mr. Asta sent to the court on April 18, 2011, stated in part as follows: “My wife and I borrowed them money to start their business but they have not paid us in years.” (emphasis added) While this statement clearly indicated that the money was lent for business purposes, it was not conclusive as to whether Mr. Asta was attempting to hold the Myers personally liable for such debt. The court concludes that judicial estoppel does not apply in this case.

This court is satisfied that the omissions of the Bayshore Electric debt from the Myers’ bankruptcy schedules were not inadvertent. The Myers were represented by competent bankruptcy counsel and, as Mr. Myers testified at the trial, he was advised by his bankruptcy attorneys that because neither Mr. nor Mrs. Myers had personally guaranteed the debt, such debt was solely a debt of Bayshore Electric and not of the Myers individually, and was properly omitted from the Myers’ personal bankruptcy

schedules.


For all of these reasons, the court dismisses this adversary proceeding, with prejudice and without costs to either party.

This decision constitutes the court's findings of fact and conclusions of law, pursuant to Fed. R. Bankr. P. 7052.

A separate order shall be issued.

Dated at Milwaukee, Wisconsin, this 28 day of June, 2012.

BY THE COURT:



JAMES E. SHAPIRO
U. S. BANKRUPTCY JUDGE