

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)
) Bankr. No. 96-40587
)
KIM M. KRUEGER) Chapter 7
a/k/a KIM M. JOHNSON)
Soc. Sec. No. [REDACTED]-4382) MEMORANDUM OF DECISION RE:
) DEBTOR'S MOTION TO REMOVE
) JUDGMENT LIENS
Debtor.)
)

The matter before the Court is Debtor's MOTION TO REMOVE JUDGMENT LIENS and an objection thereto filed by creditor Darla Moulton. This is a core proceeding under 28 U.S.C. § 157(b)(2). This MEMORANDUM OF DECISION and subsequent order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Debtor's MOTION must be granted.

I.
SUMMARY OF FACTS

Debtor filed a Chapter 7 petition on August 7, 1996. In her schedules of assets and liabilities filed August 22, 1996, Debtor stated the only real property she owned on the petition date was her homestead. She declared that homestead exempt. She listed Darla Moulton as an unsecured judgment creditor for \$192.19.

On April 21, 1997, Debtor filed a MOTION TO REMOVE JUDGMENT LIENS, wherein she sought a discharge of several judgments, including the judgment held by Darla Moulton. Darla Moulton filed an objection

on April 28, 1997.¹ She stated in the objection that she had previously filed an "Adversary proceeding" against Debtor at the § 341 meeting of creditors. Darla Moulton contended that her claim should not be discharged because Debtor defrauded her and because Debtor could repay her debts.

A hearing was held June 10, 1997. Appearances included Chan B. Masselink for Debtor and Darla Moulton, *pro se*. At the hearing, Darla Moulton reiterated that she had filed an adversary proceeding against Debtor that had not been ruled upon. She further stated that she had sent a cover letter with the adversary proceeding document setting forth why she was unable to pay the filing fee. She also said that she had sent a letter to Debtor's attorney. Darla Moulton presented to the Court a copy of an adversary proceeding cover sheet and stated this it was a copy of the document she had filed to commence the adversary proceeding [marked as Exhibit 1]. She did not have a copy of the cover letter or the letter to Debtor's counsel.

At the hearing, the Court informed Darla Moulton that the Court did not have any adversary proceeding complaint, cover sheet, or correspondence involving a dischargeability complaint against Debtor by her. The Court also informed Darla Moulton that it did not have authority to waive the filing fee for her in this type of

¹ Darla Moulton also submitted an unsigned, undated cover letter [received April 28, 1997] that explained, among other things, why she was unable to type the objection.

adversary proceeding. The Court took the matter under advisement so that it could check all the Court's records for the missing adversary proceeding cover sheet and the cover letter that Darla Moulton had mailed shortly after the § 341 meeting, which had been held August 30, 1996.

Following the hearing, the Court checked its files and asked the case trustee and United States Trustee to check their files for the missing documents, also. No one found Darla Moulton's adversary proceeding cover sheet or cover letter.

II.

TIMELINESS OF ADVERSARY PROCEEDING COMPLAINT

Under Federal Rule of Bankruptcy Procedure [F.R.Bankr.P.] 4007(c), a complaint objecting to the dischargeability of a debt for fraud or willful and malicious injury -- set forth at 11 U.S.C. §§ 523(a)(2), (4), or (6) -- must be filed within sixty days after the date originally set for the § 341 meeting of creditors unless an extension is granted before the original deadline passes. When Rule 4007(c) and the applicable dates in this case are considered, the Court concludes that Darla Moulton does not have a pending dischargeability complaint against Debtor because a complaint was not timely *filed*.

The deadline under Rule 4007(c) for filing a fraud-based dischargeability complaint here was October 29, 1996. By that date, the Court had not received any complaint or similar document from Darla Moulton. Under F.Rs.Bankr.P. 4007(c) and 7005 and

Federal Rule of Civil Procedure [F.R.Civ.P.] 5(e), the person filing the complaint has the burden to be sure the pleading arrives at the court house. Unlike the service of pleadings on other parties, there is no presumption that an adversary proceeding complaint has been filed simply because it has been placed in the mail. Compare F.R.Bankr.P. 7005 and F.R.Civ.P. 5(e) to F.R.Bankr.P. 9006(e). Therefor, a dischargeability complaint against Debtor cannot be recognized at this stage of the case. The deadline for doing so has passed and the Court does not have the power to alter that deadline. *Estate of Oliver Hanson v. Walgamuth (In re Walgamuth)*, 144 B.R. 465, 467-68 (Bankr. D.S.D. 1992) (case cited therein).

Although Darla Moulton's claim is small, that fact does not alter the outcome. See *Walgamuth*, 144 B.R. at 467-68 (dischargeability complaint for more than \$250,000.00 was untimely filed). All fraud-based dischargeability complaints must be filed by the same deadline. Further, the Court does not have authority to waive that adversary filing fee for this creditor.²

III. REMOVAL OF THE JUDGMENT

Section 524(a) (1) of the Bankruptcy Code provides:

- (a) A discharge in a case under this title --
(1) voids any judgment at any time obtained,

² Congress is presently considering legislation to allow some bankruptcy fees to be waived for indigent litigants but such a law is not currently effective in the District of South Dakota.

to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived[.]

It is a key part of a debtor's discharge and clearly discharges a debtor's personal liability under a judgment against him.

Section 15-16-20 of the South Dakota Code establishes the procedure for removing a judgment from the records of a county clerk of courts. Once a bankruptcy debtor receives a discharge, he must file a motion before the Bankruptcy Court and get an order that lists the judgments to be discharged. When the clerk of courts receives that order, he must indicate on his records that the judgment is deemed discharged or satisfied.

Once a judgment is deemed discharged or satisfied on the county's records, the creditor's judgment lien may become unenforceable. Under South Dakota law, S.D.C.L. §§ 15-16-7 and 15-16-35, a judgment lien may attach only to non homestead real property. If the debtor owned non homestead real property in the county when he filed his petition in bankruptcy, the judgment creditor would have a lien on that property based on the judgment. The judgment would be paid from the sale proceeds when the land is sold by the bankruptcy case trustee. If the trustee abandons the land, the judgment creditor's lien would survive the debtor's bankruptcy and the judgment creditor may enforce the judgment lien later.

If the debtor did not have any non homestead real property when he filed his bankruptcy petition, however, there was no real property to which the judgment creditor's judgment lien attached and became enforceable pre-petition. Further, once the judgment has been discharged in the bankruptcy case, the creditor no longer has a judgment that can become a lien on any real property the debtor may acquire after the bankruptcy. Finally, the bankruptcy laws established by Congress do not allow the Court to consider a judgment creditor's financial condition when determining whether the judgment they hold against a debtor is discharged.

In this case, Debtor did not have any real property on the petition date except her exempt homestead. Therefore, Darla Moulton's judgment did not have real property to which it attached and became enforceable before the petition date. Consequently, her judgment would be discharged under 11 U.S.C. § 524(a) and may be removed from the Clerk of Court's records as provided by S.D.C.L. § 15-16-20.

Counsel for Debtor shall prepare an appropriate order granting Debtor's MOTION TO REMOVE JUDGMENT LIENS.

Dated this 5th day of September 1997.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: 20
Date: 09-05-97

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

SEP 05 1997

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota



Case: 96-40587 Form id: 122 Ntc Date: 09/05/97 Off: 4 Page : 1

Total notices mailed: 4

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Aty Engberg, Harry A. PO Box 495, Sioux Falls, SD 57101

Trustee Yarnall, Rick A. PO Box J, Sioux Falls, SD 57101

Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321