United States Courts
Southern District of Texas
ENTERED

FEB 17 2004

Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY and FIRST AMERICAN TITLE INSURANCE COMPANY, Appellants,	§ § § § § §	BANKRUPTCY NO. 01-40386-H5-7 ADVERSARY NO. 02-3537
vs.	§ §	CIVIL ACTION NO. H-03-1837
THEODORE WILLIAM WRIGHT, Appellee.	§ §	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Pending before the Court is the appeal of Old Republic National Title Insurance Company (hereinafter "Old Republic") and First American Title Insurance Company (hereinafter "First American") from an unfavorable decision of the United States Bankruptcy Court. In the prior proceeding, Old Republic and First American sought to revoke a discharge of debt issued to Theodore William Wright. The Bankruptcy Court granted summary judgment in favor of Wright, and Old Republic and First American appeal from that decision. Having carefully reviewed the briefs, the record, and the

applicable law, the Court REVERSES the grant of summary judgment and REMANDS the case for proceedings consistent with this memorandum.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case grows out of two routine real estate transactions in Phoenix, Arizona that separately involve Old Republic and First American title insurance companies. Through a subsidiary, Old Republic issued a title policy on a property sold by Giles and Susan Tipsword to Robert and Lena Richards in May 1998. Wright held a mortgage on the Tipsword property. At the closing, Old Republic undertook to pay-off the mortgage in the amount of $165,890 to Wright. Unbeknownst to Old Republic, Wright had sold or assigned his mortgage to Accubank Mortgage Company shortly before accepting the payoff. Ultimately, Old Republic paid $199,192.20 to protect the Richards' title.

In a similar fashion, First American issued a title policy on a real estate sale from David and Nancy Hussey to Michael and Gail Manns in August 1999. Pursuant to that sale, First American undertook to pay-off the Hussey mortgage held by Wright. First American obtained and paid a payoff amount of $182,097.36 from Wright. As with the Old Republic transaction, Wright had previously sold the Hussey mortgage to Accubank. Ultimately, First American paid $215,362.76 to protect the Manns' title.

On October 30, 2000, Old Republic and First American filed suit against Wright in the state courts of Arizona alleging conversion. While the conversion litigation progressed, Wright moved to Houston, Texas and established residency. On September 25, 2001, Wright filed a voluntary petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code. On Schedule F, Wright listed his creditors holding unsecured

nonpriority claims, including First American and Old Republic. As required under the Bankruptcy Code, Wright provided a mailing address for each creditor. For First American, Wright entered 111 West Monroe in Phoenix, Arizona. For Old Republic, Wright entered 3200 North Central Avenue in Phoenix, Arizona. The Bankruptcy Court granted Wright a discharge of all dischargeable debts on January 30, 2002.

On August 21, 2002, Old Republic and First American filed a complaint to revoke discharge of debt pursuant to 11 U.S.C. § 523(a)(2)(A), 523(a)(4) and 523(a)(6). Wright answered and by motion moved to dismiss the complaint pursuant to FED. R. BANKR. P. 7012(b)(6) and 11 U.S.C. § 727(d)(1). Later, the bankruptcy court converted the dismissal motion into a motion for summary judgment pursuant to FED. R. CIV. P. 56.

Before responding, Old Republic and First American filed a series of motions to extend the time to present summary judgment evidence. On February 3, 2003, and again on February 19, 2003, they filed motions for extensions of time. In granting the second motion, the bankruptcy court extended the time to respond until February 27. However, Old Republic and First American missed the deadline and filed a third motion for extension of time on March 3, 2003. The bankruptcy court denied this motion. Nevertheless, on March 12, 2003, Old Republic and First American filed their untimely response to Wright's motion for summary judgment. Their response included affidavits of corporate officers from both Old Republic and First American stating that Wright entered out-dated mailing addresses for both creditors in his bankruptcy petition. In addition, Old Republic and First American pointed out that the mailing address given for Old Republic had been vacant since October of 2000, nearly one year prior to Wright's

petition. And that the mailing address given for First American had been vacant since July of 1999, over two years previous to his petition.

On April 17, 2003, the bankruptcy court granted Wright's motion for summary judgment on two bases. The first was a judicial admission by the two creditors that Wright had "scheduled" them. Secondly, the bankruptcy court held that notice to the creditors themselves was sufficient under the Bankruptcy Code, regardless of Wright's failure to notify their attorneys or the Arizona state court hearing their conversion claims. On April 28, 2003, Old Republic and First American filed this pending notice of appeal.

III. CONTENTIONS

In support of their appeal, Old Republic and First American urge that Wright shoulders the burden to properly schedule his creditors. With this burden, Wright must prove that he performed three tasks in his bankruptcy petition: (1) that he used diligence to obtain accurate mailing addresses for his creditors; (2) that he properly entered those addresses on his bankruptcy schedules; and (3) that he properly addressed the notices sent to his creditors. Wright contends that summary judgment in his favor was proper because Old Republic and First American judicially admitted that they were scheduled on his bankruptcy petition. Additionally, Wright points to the mailing addresses of both creditors contained in his schedules and the bankruptcy court's service list and certification as proof of notice.

IV. ANALYSIS

A. Standard of Review

A district court acts in an appellate capacity when reviewing the findings of a bankruptcy court. 28 U.S.C. § 158(a); *In re Webb*, 954 F.2d 1102, 1103 (5th Cir. 1992). In this role, a district court reviews conclusions of law de novo. *In re Killebrew*, 888 F.2d 1516, 1519 (5th Cir. 1989). However, a district court can disregard a bankruptcy court's findings of fact only if clearly erroneous. *In re Barron*, 325 F.3d 690, 692 (5th Cir. 2003). When evaluating factual determinations, a district court gives due regard to "the opportunity of the bankruptcy court to judge the credibility of witnesses." FED. R. BANKR. P. 8013; *Webb*, 954 F.2d at 1104. A district court's review of a bankruptcy court's decision to grant summary judgment is a de novo consideration. *In re Jones*, 143 B.R. 687, 689 (S.D. Tex. 1991).

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to . . . judgment as a matter of law. FED. R. CIV. P. 56(c). The moving party bears the initial burden of informing the Court of the basis of its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once the moving party meets its burden, the non-moving party must go beyond the pleadings and designate specific facts in the record showing that there is a genuine issue for trial. *Id.* at 324. An issue is genuine if the evidence is sufficient for a reasonable jury to return a verdict for the non-moving party. *See Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 247-49 (1986). A failure on the part of the non-moving party to offer proof concerning an essential element of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *See Saunders v. Michelin Tire Corp.*, 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry is whether the material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail as a matter of law. *See Anderson*, 477 U.S. at 251-52. The substantive law of the case identifies those facts that are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law preclude the entry of a summary judgment. *Id.*

B. Notice to Creditors

Title 11 U.S.C. § 521 imposes certain duties on a debtor in a bankruptcy proceeding. Among the duties is a debtor duty to "file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures and a statement of the debtor's financial affairs." 11 U.S.C. § 521(1). The bankruptcy rules specify that a debtor shall, at a minimum, file a list of creditors with their names and addresses with the bankruptcy petition. FED. R. BANKR. P. 1007(a). Alternatively, a debtor may file a schedule of liabilities. *Id.* The bankruptcy rules require production of a list or schedule of creditors so that the bankruptcy court may give notice to creditors about the meeting of creditors and the order of relief. *See* FED. R. BANKR. P. 1007 advisory committee's note.

A creditor's untimely claim is barred "only upon a showing that it received reasonable notice." *Oppenheim, Appel, Dixon & Co. v. Bullock (In re Robintech, Inc.)*, 863 F.2d 393, 396 (5th Cir. 1989) (citing *New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293, 297 (1953). Whether a creditor has received adequate notice depends on the particular facts and circumstances of each case. *Id.* Under the bankruptcy rules, notice to a creditor is complete upon mailing. FED. R. BANKR. P. 9006(e). But this does not conclude the analysis. To benefit from this presumption, the notice must be *correctly* mailed. *Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg. Inc.)*, 62 F.3d 730, 735 (5th Cir. 1995) (emphasis added); *See also Beck v. Somerset Tech., Inc.*, 882 F.2d 993, 996 (5th Cir. 1989) ("Proof that a letter properly directed was placed in a U.S. Post Office mail receptacle creates a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed."). Therefore, before the presumption of notice arises, a court must address "whether the sender properly mailed the notice." *In re Eagle Bus Mfg. Inc.*, 62 F.3d at 735; *In re Schepps Food Stores Inc.*, 152 B.R. 136, 139 (Bankr. S.D. Tex. 1993).

In the Fifth Circuit, a creditor cannot rebut the presumption of receipt by a mere denial of receipt. *Beck*, 882 F.2d at 996 (holding that an employee's testimony that he did not recall receiving the letter was insufficient to rebut the presumption). However, a creditor's denial does raise a question of fact. *In re Eagle Bus Mfg. Inc.*, 62 F.3d at 735. Here, the issue is whether Wright complied with the strictures of 11 U.S.C. § 521(1) and FED. R. BANKR. P. 1007(a) and gave sufficient notice to his creditors. Sworn affidavits from officers of Old Republic and First American state that the creditors did not receive notice and, moreover, that the notice was mailed to an incorrect address. Standing alone,

these affidavits raise a question of fact as to whether the creditors received notice. *Id.* Because a question of fact exists on a material issue, entry of summary judgment was improper. *See Anderson*, 477 U.S. at 251-52.

The Fifth Circuit also recognizes that the presumption of receipt is overcome by evidence that the mailing never occurred. *In re Eagle Bus Mfg. Inc.*, 62 F.3d at 735. In this inquiry, a court may consider factors such as whether the notice was properly addressed, whether sufficient postage was attached to the notice, whether it was properly mailed, and whether a proper certificate of service was filed. *Id.* A court evaluates these factors using a "facts-and-circumstances" test. *In re Robintech, Inc.*, 863 F.2d at 398.

Here, the Court takes judicial notice that the mailing addressees used by Wright in his September 2001 bankruptcy petition were out-of-date. Therefore, the notices sent to the creditors were improperly addressed. The Court also takes judicial notice that the up-to-date mailing addresses were reasonably ascertainable by consulting any one of numerous sources. Moreover, Wright could have contacted the title companies attorneys. Wright knew these attorneys well because he was actively engaged in the Arizona conversion litigation with them.

Finally, it must be said that bankruptcy courts are courts of equity. *NCNB Texas Nat'l Bank v. Jones (In re Jones)*, 966 F.2d 169, 173 (5th Cir. 1992). As such, 11 U.S.C. § 105 authorizes the issuance of "any order, process, or judgment that is necessary to carry out the provisions of this title." A bankruptcy court has the "equitable power and the duty 'to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate.'" *In re Multiponics, Inc.*, 622 F.2d 709, 714 (5th Cir. 1980) (quoting *Pepper v. Litton*, 308 U.S. 295, 308 (1939)).

It is undisputed that Old Republic and First American suffered injuries exceeding $400,000 which they attribute to the fraud of Wright. Compelling facts exist suggesting that Wright intentionally committed these wrongs. Wright points to a business associate as the wrongdoer. At this junction, whether Wright or his associate committed the conversion is immaterial, Old Republic and First American have been defrauded.

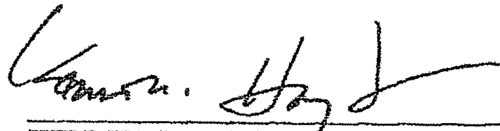
Turning to Wright's contentions, the bankruptcy court granted summary judgment based, in part, on a "judicial admission" by Old Republic and First American that Wright "scheduled" them. However, at no time did they admit that Wright *duly* scheduled them. Wright's use of out-dated mailing addresses can hardly be considered compliance with 11 U.S.C. § 521(1) and FED. R. BANKR. P. 1007(a). Wright contends that the mere listing of a mailing address for each creditor is sufficient compliance with the notice requirement. Hardly the mere inclusion of an address, of some kind, is sufficient to give the notice intended by the bankruptcy code and rules. Accordingly, the Court concludes that an issue of material fact existed and that entry of summary judgment was improper.

V. CONCLUSION

In light of the foregoing discussion and analysis, the Court REVERSES the bankruptcy court's grant of summary judgment and REMANDS the case for proceedings in accordance with this memorandum opinion.

It is so ORDERED.

Signed this 13th day of February, 2004



KENNETH M. HOYT
United States District Court