Intake Binder

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In Re:

LOIS BROWN,

Debtor(s).

CASE NO. 90-20730

DECISION & ORDER

BACKGROUND

On April 10, 1990, Lois Brown (the "Debtor") filed a petition initiating a Chapter 13 case. Along with the petition, the Debtor filed schedules, including a Schedule of Unsecured Creditors which did not include Peter A. Mazzara, d/b/a Quality Auto Sales ("Mazzara"), and a Chapter 13 plan which proposed to pay the claims of all unsecured creditors in full. The Court's records also indicate that:

(1) At a May 16, 1990 confirmation hearing, the Debtor orally modified her plan to reduce the weekly plan payments from $185.58 to $150.00 with unsecured creditors to receive a pro rata share of their claims over a five-year term (the "Plan");

(2) On July 6, 1990, an order was entered confirming the Plan;

(3) On June 29, 1992, an order was entered granting American Home Funding, which held a second mortgage on the Debtor's residence, relief from the stay provided by Section 362;

(4) On October 24, 1994, the Chapter 13 Trustee (the "Trustee") filed a motion to have the Debtor's Chapter 13 case dismissed because of her failure to make Plan payments;

(5) On March 2, 1995, the Trustee filed a Final Report and Account which indicated that unsecured creditors had received a distribution from the Trustee in the Debtor's

Chapter 13 case of 49.74% of their allowed claims;

(6) On March 2, 1995, an order was entered dismissing the Debtor's Chapter 13 case; and

(7) On May 16, 1995, the Debtor's Chapter 13 case was closed.

On April 17, 1996, the Debtor filed a motion (the "Motion to Reopen") requesting that the Court exercise its discretion under Section 350(b) to reopen her Chapter 13 case so that she could commence an adversary proceeding against Mazzara and Sande Macaluso ("Macaluso"), a Rochester City Court Marshal, for wilful violations of the stay provided by Section 362. In the Motion to Reopen, it was alleged that: (1) the Debtor was granted a discharge when her case was closed on May 16, 1995; (2) the Debtor's purpose in seeking the relief proposed was to protect her fresh start; (3) on or about July 3, 1990, Mazzara had commenced a Rochester City Court small claims action (the "City Court Action") against the Debtor for breach of contract in connection with her January 24, 1990 purchase and financing of an automobile (the "Automobile"); (4) on or about July 30, 1990, a default judgment had been entered in the City Court Action for the amount of $1,789.00 (the "Mazzara Judgment"); (5) the commencement of the City Court Action and the entry of the Mazzara Judgment while the Debtor's Chapter 13 case was pending violated the stay which went into effect under Section 362 as of the filing of her petition on April 10, 1990; (6) the Debtor did not list Mazzara on her schedules because she believed the

obligation resulting from the purchase and financing of the Automobile was her son's obligation, since the Automobile was purchased for him and he was supposed to pay for it; (7) neither the Debtor nor any attorney or representative of the Debtor had advised Mazzara of the Debtor's Chapter 13 case until approximately September, 1995 when, as part of enforcement proceedings on the Mazzara Judgment, an income execution was served by Macaluso on the Debtor's employer; (8) approximately $2,000.00 had been collected on the income execution; (9) Mazzara and Macaluso had continued enforcement proceedings on the Mazzara Judgment even after the Debtor notified them of the details of her prior Chapter 13 proceeding; (10) shortly after the entry of the Mazzara Judgment, the Automobile was repossessed by Mazzara; (11) when the Automobile was repossessed, the Debtor retained an attorney and asserted a number of claims (the "Debtor Claims") against Mazzara arising out of the repossession and the original purchase and financing transaction; (12) the assertion of the Debtor Claims contributed to Mazzara filing his own Chapter 7 bankruptcy case in March, 1991; (13) in his Chapter 7 case, Mazzara obtained a discharge pursuant to Section 727; and (14) the Debtor Claims, which the Debtor admittedly did not pursue in the Mazzara Chapter 7 case, exceeded the amount of the Mazzara Judgment.

On May 7, 1996, an Answering Affidavit was interposed on behalf of Mazzara which included allegations that: (1) after the

Mazzara Judgment was entered, Macaluso notified both the Debtor and her employer of the Judgment and attempted to collect on the Judgment by an income execution; and (2) the explanation the employer gave for not honoring the income execution was that the Debtor had a number of other income executions on file, not because she had a pending bankruptcy.

At the May 15, 1996 return date of the Motion to Reopen, after oral argument indicated that: (1) Mazzara may not have listed the Mazzara Judgment as an asset in his Chapter 7 bankruptcy case; (2) the Debtor's attorney failed to provide a satisfactory explanation for why the Debtor or her attorneys did not advise the Trustee or the Court of the City Court Action, the Mazzara Judgment, even after it had been obtained and initial enforcement proceedings taken, or the Debtor Claims; (3) the Debtor's attorney failed to provide a satisfactory explanation for why the Debtor did not take any action in the Mazzara Chapter 7 bankruptcy case to have the Debtor Claims allowed, which may have provided her with a right of setoff or a defense against the enforcement of the Mazzara Judgment; and (4) the Debtor's attorney failed to provide a satisfactory explanation for why within a year of the entry of the Mazzara Judgment the Debtor did not move in the City Court Action to either have the Judgment vacated or to establish, before or in connection with the Mazzara Chapter 7 case which may have required relief from the stay, a defense to the enforcement of the Mazzara

Judgment, the Court adjourned the matter and directed the parties to advise Mazzara's Chapter 7 trustee (the "Mazzara Trustee") of the matter.

On a July 17, 1996 adjourned hearing date, the Mazzara Trustee indicated that he did not wish to further pursue the matter, since any additional recovery by the estate would only inure to the benefit of priority taxing authorities, the parties made final oral arguments and the Court reserved decision and afforded the parties until August 24, 1996 to make any voluntary submissions.

DISCUSSION

Section 350(b) provides that: "A case may be reopened in the Court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." It is clear that the decision as to whether to reopen a case is in the discretion of the Bankruptcy Court.[1]

On March 22, 1993, this Court issued a Notice to the bar, which is available in the Clerk's Office and is distributed to all attorneys upon their admission to the Bankruptcy Court for the Western District of New York at Rochester, which provides in part that "In order to be in a position to exercise its discretion when ... motions are presented to the Court to reopen a closed

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[1] *See In re Tucker*, 143 B.R. 330 (Bankr. W.D.N.Y. 1992).

bankruptcy case, the Court requires the moving papers to have sufficient detail as to exactly what relief is proposed to be obtained in the reopened case as well as a showing by the moving party that there is a reasonable likelihood that such relief will be granted."

I do not believe that it would be a proper exercise of my discretion to reopen the Debtor's case, as requested, because on all of the facts and circumstances presented, if the case were reopened and the proposed adversary proceeding commenced, I would not grant the relief the Debtor would be seeking in that adversary proceeding. Rather, on all the facts and circumstances presented, I would exercise my power and discretion under Section 362(d) and Section 105 to annul the stay in the Debtor's Chapter 13 case as to the City Court Action, the entry of the Mazzara Judgment, and any and all enforcement proceedings which took place in connection with the Mazzara Judgment between its entry and May 16, 1995, the date when the Debtor's Chapter 13 case was closed and the stay terminated pursuant to Section 362(c)(2).

As set forth by this Court in its unpublished decision in *In re Wynn*, No. 94-22611 (Bankr. W.D.N.Y. Sept. 20, 1996):

> "Courts generally have held that to grant retroactive relief such as annulling the stay, a creditor must show that it was unaware of the bankruptcy case and demonstrate either some substantial prejudice or bad faith on the part of the debtor. Elements of bad faith which courts have often recognized are that the debtor has unreasonably withheld notice of the stay or attempted

to use the stay unfairly.[8]

[8] *See In re Pulley*, 196 B.R. 502 (Bankr. W.D.Ark. 1996) and the cases cited therein, including *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993); and *In re Smith Corset Shops*, 696 F.2d 971 (1st Cir. 1982)."

The Court would exercise its power and discretion to annul the stay in the Debtor's Chapter 13 case, to the extent set forth above, for the following reasons: (1) the Debtor and her attorneys failed to advise the Trustee and the Court of the City Court Action, although she does not deny that she was properly served in the Action; (2) the Debtor and her attorneys failed to advise the Trustee and the Court of the Mazzara Judgment during her Chapter 13 case, including when she was notified by Macaluso of the Judgment, after initial enforcement attempts during her Chapter 13 case and when Mazzara filed his own Chapter 7 case and she was listed as a creditor; (3) the Debtor and her attorneys failed to advise Mazzara or Macaluso of her Chapter 13 case until September, 1995, which was after the case was closed in May, 1995, notwithstanding: (a) the City Court Action; (b) initial enforcement attempts to collect the Mazzara Judgment; (c) her retention of an attorney to assert the Debtor Claims after repossession of the Automobile; and (d) Mazzara's own Chapter 7 bankruptcy filing; (4) the Debtor's failure to advise the Trustee, the Court or Mazzara of her Chapter 13 case prejudiced Mazzara to the extent that: (a) the Mazzara Judgment, which was a final and non-appealable judgment, did not receive its

pro rata distribution from the Chapter 13 estate (even with the Mazzara Judgment included it would likely have been in excess of 40%); and (b) additional enforcement proceedings have been conducted and related expenses incurred; (5) the Debtor and her attorneys elected to proceed in the City Court Action and all of the related matters involving Mazzara without the assistance of the Bankruptcy Court or the protection of the Bankruptcy Code, including failing to move in the City Court Action to vacate the Mazzara Judgment, but the Debtor now wishes to use the Bankruptcy Court to obtain a "second bite at the apple" after the manner in which she and her attorneys elected to proceed proved unsuccessful; (6) the Debtor did not complete her Plan and, therefore, did not receive a discharge in her Chapter 13 case, so that all of her creditors, including Mazzara who holds a final judgment, now have the right to collect the balance due them under state law by proper legal means; (7) the Debtor failed to participate in the Mazzara bankruptcy case, which she could have done as a means of establishing a setoff or defense to the enforcement and collection of the Mazzara Judgment if the Debtor Claims were valid, and which would have alerted the Mazzara Trustee as to the existence of the Mazzara Judgment; (8) the Debtor, having elected to proceed in State Court, still has whatever State Court rights and remedies she may have in connection with the enforcement of the Mazzara Judgment; and (9) the actions of Mazzara and Macaluso, since they

were admittedly unaware of the Debtor's Chapter 13 case, were not wilful violations of the stay, but were technical violations only, and any actions after May 16,1995, when the stay had been terminated, could not be wilful violations of the stay.

CONCLUSION

The Motion by the Debtor to reopen her Chapter 13 case in order to be able to commence an adversary proceeding against Mazzara and Macaluso for wilful violations of the automatic stay is in all respects denied.

IT IS SO ORDERED.

/S/

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY JUDGE

Dated: October 3, 1996