

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re:

**MARION STRAND,
Debtor.**

BK. NO. 90-21668

A.P. NO. 91-2153

**MARION STRAND,
Plaintiff,**

vs.

**MBNA AMERICA, N.A.,
Defendant.**

DECISION

The plaintiff, proceeding *pro se*, commenced this Adversary Proceeding to receive injunctive relief, pursuant to 11 U.S.C. §524(a)(2), against MBNA's attempts to collect certain credit card debt, alleging that the debt was discharged in her pending Chapter 7 bankruptcy case. MBNA contends that the debt in question was incurred postpetition and therefore was not discharged. This case is before the Court on the defendant's motion and plaintiff's cross-motion for summary judgment.

FINDINGS OF FACT

On August 10, 1990, Marion Strand filed a voluntary Chapter 7 petition. Upon motion of the standing Chapter 13 Trustee, the Chapter 7 case was dismissed by Judge Hayes on October 4, 1990 because Ms. Strand had a Chapter 13 case then pending in the Court. Ms. Strand appealed the dismissal Order. The Chapter 13 case was later dismissed on February 11, 1991 while the appeal was pending. The District Court reinstated the Chapter 7 case on March 7, 1991 since the simultaneous Chapter 13 case was no longer pending.

Ms. Strand filed a Motion to amend her schedule of creditors to include the defendant

MBNA, and by Court order of May 7, 1991, she was allowed to amend the schedule and add certain credit card debt owed to MBNA which had been incurred on and after January 9, 1990. MBNA contends that it never received notice of the Motion.

As of December 31, 1990, Ms. Strand's credit card account with MBNA had a zero balance. Ms. Strand began incurring additional charges on January 9, 1991, and continued using the credit card even after MBNA had been added as a creditor on May 7, 1991. Ms. Strand believes all of the credit card debt incurred through May 31, 1991, when she stopped incurring additional charges, is discharged.

Ms. Strand commenced an Adversary Proceeding on August 24, 1991 requesting injunctive relief against MBNA's efforts to collect her outstanding credit card indebtedness. MBNA served its answer on September 23, 1991. After a pretrial conference, the Court entered an Order requiring that discovery be complete by November 30, 1991 and directing that the matter would be called on the Court's December 16, 1991 Trial Calendar to set the case down for trial. Plaintiff requested an enlargement of the time to complete discovery before the Trial Calendar Call on December 16, 1991 which MBNA opposed. When the defendant did not appear at the Trial Calendar Call, a default was granted by Judge Hayes and an order was entered on January 2, 1992. Because there appeared to be significant confusion over the status of the proceedings, and because the pleadings indicated that MBNA had a meritorious defense, on January 6, 1992, Judge Ninfo, who had replaced Judge Hayes after his retirement on January 2, 1992, found defendant's failure to appear at the Trial Calendar Call to be excusable neglect, set aside the January 2, 1992 order for default and restored the case to the Trial Calendar on January 21, 1992. Ms. Strand has appealed that order.

Even though Ms. Strand had requested additional time for discovery, since she requested summary judgment in this case by cross-motion, attached the same copies of the credit card statements to her cross-motion as were attached to MBNA's Answer, and does not dispute the chronology of this case, the Court does not feel any additional discovery is necessary and that it can

determine the dischargeability of her debt to MBNA.

Since the events of this case have become complicated, it is necessary to resolve several issues raised by Ms. Strand. Ms. Strand appears, from her papers, to have brought this Adversary Proceeding to prevent the collection of her credit card indebtedness to MBNA which she asserts was discharged on June 13, 1991 when a Discharge Order was entered by the Court.

The MBNA debt at issue was not listed on Ms. Strand's original schedule of creditors filed with the Court or even incurred by her until after the filing of her bankruptcy. Pursuant to Bankruptcy Rule 1009(a), Ms. Strand made a motion to amend her schedule of creditors to add MBNA, as any debtor may, as a matter of course, at any time before the case is closed. Although there is some dispute over whether MBNA was given notice of the Motion to amend, even if MBNA was served it may have decided not to appear to oppose the motion based on the position that this particular indebtedness is nondischargeable.

Bankruptcy Rule 1009 allows an amendment to a petition or schedule, but this is a purely procedural change and does not affect the substantive rights of the parties. As the Advisory Committee Note to Rule 1009 indicates, the amendment does not affect the non-dischargeability of a debt that is not timely filed and was not scheduled under 11 U.S.C. §523(a)(3). In the same manner, the amendment would not affect the Court's determination of whether a debt was dischargeable under any subsection of Section 523 or 727.

In other words, when a motion to amend pursuant to Rule 1009 is brought before the Court, there is only a determination on whether a debt may be added and not whether it is discharged or dischargeable. Issues of dischargeability must be brought under Bankruptcy Rule 4007 as an Adversary Proceeding.

Whether it was timely added to the schedule or not, the debt to MBNA is nondischargeable in Ms. Strand's pending case, because it is a postpetition debt. Section 727(b) of the Bankruptcy Code states that a discharge under Chapter 7 "discharges the debtor from all debts that arose before

the date of the order for relief under this chapter." Ms. Strand filed her bankruptcy petition on August 10, 1990 which constituted the order for relief under Chapter 7 of the Bankruptcy Code. 11 U.S.C. §301 (1990). Ms. Strand has raised the issue of whether the reinstatement of her case changed the date of the order for relief. To reinstate a case means "to place [the] case again in same position as before dismissal." *Black's Law Dictionary*, 1287 (6th ed. 1990). Therefore, the order for relief is still August 10, 1990 even after the Chapter 7 case was reinstated by the District Court on March 7, 1991. Ms. Strand incurred debts to MBNA by reason of charges on her credit card from January 9, 1991 to May 31, 1991. All of these charges and the resulting indebtedness were incurred after the date of the Order for relief which occurred when she filed her voluntary petition on August 10, 1990, and therefore are postpetition. Postpetition debts are no dischargeable in bankruptcy. *Bush v. Taylor*, 912 F.2d 989, 993 (8th Cir. 1990); *Matter of Rosteck*, 899 F.2d 694, 696 (7th Cir. 1990).

Ms. Strands' indebtedness to MBNA resulting from her credit card charges between January 9, 1991 and May 31, 1991 is not discharged in her Bankruptcy case, since it is postpetition debt. Therefore, the Court denies her the injunctive relief requested in her Adversary Proceeding.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: March 23, 1992