UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

BRUCE B. HOPCUS
DENISE M. HOPCUS

Case No. 92-11439 K

Debtors

ITT FINANCIAL SERVICES

Plaintiff

-vs-

AP 92-1228 K

BRUCE B. HOPCUS
DENISE M. HOPCUS

Defendants

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DECISION AND ORDER

This is a motion to vacate a default judgment previously entered in an Adversary Proceeding on a Dischargeability Complaint.

A recitation of the bizarre facts before the Court is essential. They describe the proverbial "comedy of errors."

On May 30, 1986, Bruce and Denise Hopcus (the Debtors)

filed a petition under Chapter 7. They were discharged on September 24, 1986. (Case 86-11133 M)

On March 26, 1992, the Debtors borrowed $3377.88 from ITT Financial Services (hereinafter ITT), partially secured by certain home entertainment equipment.

On April 23, 1992, the Debtors filed another Chapter 7 petition, disclosing in the Statement of Affairs the 1986 filing by the Debtors. (This was five weeks earlier than the 6-year bar 11 U.S.C. § 727(a)(8) permits.) The bar date for the filing of Complaints Objecting to Discharge or to Dischargeability of Particular Debts in the present case was set as July 27, 1992.

On June 26, 1992 the Debtors recognized the 6-year bar problem and moved to dismiss their petition without prejudice to immediate refiling. Counsel's certification filed on that date attests to service on ITT and all other creditors by first class mail. That motion was heard on July 22, 1992, was unopposed, and was granted from the bench, with the debtor instructed to submit an order. No Order of Dismissal was submitted until now; hence, no notice has gone to creditors of the fact of dismissal even as of this date.

On July 28, 1992, ITT filed a 11 U.S.C. § 523(a)(2) Complaint alleging falsehoods in the application that led to the March 26, 1992 loan. ITT served the Complaint on July 31, 1992, according to the Affidavit of Service, which was after the grant of dismissal, from the Bench.

On July 29, 1992, despite the Debtors' ineligibility for discharge and the verbal grant of dismissal of the case, the Court entered a discharge and mailed notice thereof.

The Debtors and their counsel misinterpreted the Order as having foreclosed ITT's complaint on timeliness grounds. But they also felt that if the discharge were to be vacated, the ITT action was moot. In any event, although they did make an offer to ITT to settle the account (which offer ITT attests it did not respond to in any way), they did not answer in the ITT Adversary Proceeding or otherwise defend.

Despite the grant of the motion to dismiss the case, the Court granted Default Judgment to ITT on September 30, 1992.

Whereupon the Debtors brought the present motion to vacate that judgment, and also submitted for the Court's consideration the proposed Order dismissing the Chapter 7 case pursuant to the motion heard and granted on July 22, 1992.

Errors appear to have been made on all sides. ITT did not respond to the Debtors' motion to dismiss the case. The Court granted discharge despite grant of a motion to dismiss based on the debtors' ineligibility to receive a discharge. The Debtors gave undue weight to the erroneously-issued Discharge Order and ignored the Dischargeability Complaint; and the Court entered a default judgment.

ITT argues that the Court "should protect the rights acquired in reliance on said bankruptcy case... [I]f the Judgment

is not preserved, then the parties herein will have to expend further time and expense in State Court ... The Default Judgment herein should remain final in ... as reasonable reliance was made upon said Default Judgment by the Plaintiff herein." It cites *In re Pocklington*, 21 B.R. 199 (Bankr. S.D. Cal. 1982), for the proposition that the Court should retain jurisdiction of an adversary proceeding despite the dismissal of the underlying bankruptcy case.

I do not disagree with *Pocklington* or similar cases. The real issue, however, presently before this Court is whether the default should be res judicata as to ITT's right to money judgment and as to the non-dischargeability of that obligation in any new bankruptcy case that the Debtors might file, and I find that it should not have such effect.

ITT failed to appear in response to the Debtor's Motion to Dismiss their case, which Motion was served and heard before ITT filed its Adversary Proceeding. Under Bankruptcy Rule 4007(c), ITT could have obtained an extension of time to file its complaint if it was concerned that consideration of the Motion to Dismiss would carry past the July 27, 1992 bar date. Having failed to oppose dismissal, ITT cannot now be heard to complain of the consequence of the grant of dismissal, which was to render its subsequent Complaint meaningless and to render the subsequent grant of discharge and of default judgment, administrative errors.

The Default Judgment must be vacated as the Court's

mistake under F.R.Civ.P. Rule 60 and Bankruptcy Rule 9024. This is also true of the Order of Discharge.

The Court will enter Orders accordingly, and dismiss the case. This Adversary Proceeding is dismissed as moot in light of the dismissal of the Debtors' case without discharge of the Debtors.

Dated: Buffalo, New York
November 26, 1992

U.S.B.J.