UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CHARLES R. KOTARY — CASE NO. 97-60363

Debtor — Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion filed by Charles R. Kotary ("Debtor") on March 29, 2000, seeking to reopen his chapter 7 bankruptcy case in order to add Alside Supply Center, Syracuse Division of Associated Materials, Inc. ("Alside") as a creditor pursuant to § 350(b) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Alside filed opposition to the motion on April 20, 1999.

The motion was heard on April 25, 2000, in Utica, New York. Following oral argument, the Court requested that the parties provide it with memoranda of law by May 22, 2000. The motion was again heard on May 23, 2000, and the matter was submitted for decision.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(O).

FACTS

On September 30, 1996, the Debtor allegedly signed an agreement guaranteeing the liability of, Home Remodelers of CNY, Inc. ("Home Remodelers"), a corporation wholly owned by Debtor's son, in connection with credit extensions by Alside to Home Remodelers ("Guarantee").[1] [2] On April 17, 1997, the Debtor filed a voluntary petition and schedules pursuant to chapter 7 of the Code. Debtor failed to list Alside as a creditor based on the Guarantee on his schedules. On June 6, 1997, the Debtor received a discharge. The case was determined to be a no asset case and was closed by the chapter 7 trustee on August 21, 1997.

Between August 12, 1997, and September 1, 1998, Alside allegedly sold materials to Home Remodelers on a credit basis. Home Remodelers defaulted on its obligations and on or about January 19, 1999, Alside commenced an action in New York State Supreme Court, County of Onondaga ("State Court"), against Home Remodelers and the Debtor. Neither defendant

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[1] At the hearing, there were some allegations that the Debtor did not actually sign the Guarantee and that his son had signed Debtor's name. That issue is not before this Court.

[2] Although the Debtor's motion also seeks to reopen the case to add Home Remodelers as a creditor, none of the arguments made on behalf of the Debtor indicate any basis for asserting that Home Remodelers was a creditor of the Debtor at the time the case was commenced.

answered the complaint and on April 27, 1999, a default judgment was entered against the Debtor and Home Remoderlers in the amount of $12,596.26.

Debtor seeks to reopen his case to add Alside as a creditor and have his obligation based on the default judgment discharged.

ARGUMENTS

The Debtor urges the Court to exercise its discretion and allow the case to be reopened in order to give the Debtor the full benefit of a "fresh start." It is the Debtor's position that the debt owed to Alside, based on the Guarantee, is a prepetition obligation that would have been discharged but for the fact that the Debtor failed to list it in his schedules. Debtor asserts that he unintentionally and inadvertently omitted the Guarantee to Alside from his schedules, not recognizing that it was a contingent obligation.

Alside opposes the request, arguing that the Debtor has failed to satisfy his burden of establishing "cause" to reopen the case. Alside contends that although the Guarantee was signed pre-petition, the debt was incurred post-petition when it actually advanced credit to Home Remodelers. Alside argues that the Debtor is bound by the default judgment entered in State Court. It is Alside's position that based on the Debtor's failure to file an answer to its complaint in State Court asserting an affirmative defense that the debt was discharged in his prior bankruptcy, he has waived the defense and *res judicata* prevents him from making arguments that could have been made in the State Court action.

DISCUSSION

Pre-petition Debt or Post-petition Debt

Debtor seeks to re-open his case in order to add Alside as a creditor. The Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. §101(10)(A). A "claim" includes "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ." 11 U.S.C. § 101(5)(A).

"A guarantee is a classic illustration of a contingent claim." *In re Barnett*, 42 B.R. 254, 257 (Bankr. S.D.N.Y. 1984) (citation omitted); *In re Stucker*, 153 B.R. 219, 222 (Bankr. N.D. Ill. 1993). It represents an obligation that will become due upon the happening of a future event that was contemplated by the parties at the time the relationship between them was created. *In re Manville Forest Products Corp.*, 209 F.3d 125, 128-29 (2d Cir. 2000) (citation omitted); *see also In re Caldor, Inc.-NY*, 240 B.R. 180, 191 (Bankr. S.D.N.Y. 1999) (noting that a "claim is 'contingent' when the debtor's legal obligation to pay it does not come into existence until triggered by the occurrence of a future event.").

Under the terms of the Guarantee, the Debtor agreed to pay Alside if and when Home Remodelers defaulted on its obligation to pay for goods purchased on credit. Thus, Alside's claim was a contingent one.

According to Alside, it provided Home Remodelers with goods between August 12, 1997

and September 30, 1998, for which it obtained a default judgment against both Home Remodelers and the Debtor on April 27, 1999, in the amount of $12,596.26.

Unless Alside's claim was a prepetition obligation, the Court need not address whether to reopen the Debtor's case to add Alside as a creditor. According to the Second Circuit Court of Appeals,

> [a] valid prepetition claim requires two elements. *See LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478, 497 (2d Cir. 1995). First, the claimant must possess a right to payment. Second, that right must have arisen prior to the filing of the bankruptcy petition (footnote omitted).

Manville Forest Products, 209 F.3d at 128.

Under the terms of the Guarantee, Alside had the right to seek payment from the Debtor in the event of default by Home Remodelers. The Guarantee was executed pre-petition on September 30, 1996. "When parties agree in advance that one party will indemnify the other party in the event of a certain occurrence, there exists a right to payment, albeit contingent (footnote omitted), upon the signing of the agreement (citations omitted)." *Avellino & Bienes v. M. Frenville Co. (In re M. Frenville Co.)*, 744 F.2d 332, 336 (3d Cir. 1984); *see also Manville Forest Products*, 209 F.3d at 129 (discussing the fact that under contract law a right to payment under an indemnification agreement arises at the time the agreement is executed); *Caldor*, 240 B.R. at 193 (stating that "courts in this circuit have consistently held that contract-based claims arise under federal bankruptcy law when the contract is entered into); *Stucker*, 153 B.R. at 222 (noting that a contingent claim arose from the time of the execution of the guarantee (citations omitted)). Thus, this Court concludes that Alside's claim against the Debtor based on the Guarantee was a pre-petition claim.

The Court must then address whether to grant the Debtor's request to reopen his case pursuant to Code § 350(b) in order to amend his schedules and add Alside as a creditor. The decision to reopen a case is a matter of the Court's discretion. *See In re Moyette*, 231 B.R. 494, 497 (E.D.N.Y. 1999) (citing *In re Emmerling*, 223 B.R. 860, 864-65 (2d Cir. BAP 1997)). Generally, the courts are inclined to grant the relief to reopen a case in order to discharge an omitted debt provided there is no harm or prejudice to the creditor. *Moyette*, 231 B.R. at 497 (citation omitted).

Pursuant to Code § 523(a)(3), a discharge under Code § 727 does not discharge an individual debtor from any debt neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit -

> (A) if such debt is not of a kind specified in paragraph (2), (4) or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
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> (B) if such debt is of a kind specified in paragraph (2), (4) or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request . . . .

11 U.S.C. § 523(a)(3)(A) and (B).

The question of dischargeability of Alside's debt pursuant to Code § 523(a)(3) is one over which this Court has concurrent but not exclusive jurisdiction. 28 U.S.C. §§ 1334(b) and 157 (a); *see In re Haga*, 131 B.R. 320, 326 (Bankr. W.D. Tex. 1991); *In re Bowen*, 102 B.R. 752, 754 (9th Cir. BAP 1989); *In re Coppi*, 75 B.R. 81, 82 (Bankr. S.D. Iowa 1987) (citations omitted); *In*

re Dabbs, 72 B.R. 73, 74 (Bankr. N.D. Ala. 1987); *In re Iannacone*, 21 B.R. 153, 155 (Bankr. D. Mass. 1982). As such, the issue of dischargeability could have and should have been raised by the Debtor in the State Court action commenced by Alside. *See In re Richards*, 131 B.R. 76, 78 (Bankr. S.D. Ohio 1991).[3]

Having failed to raise the defense of a discharge in bankruptcy pursuant to Code § 523(a)(3) in an answer or motion to dismiss the action commenced by Alside in State Court, *res judicata* prevents this Court from addressing the issue now.[4] *See Aurre*, 60 B.R. at 628. In *Aurre* a default judgment was entered in state court after the debtor had received his discharge in his bankruptcy case. The bankruptcy court concluded that under the doctrine of *res judicata* the debtor was unable to avail himself of defenses he otherwise might have raised in the state court action. *Id.*; *see also Richards*, 131 B.R. at 78. In *Coppi* the debtors asserted an affirmative defense of dischargeability in bankruptcy and the state court rendered judgment in favor of the creditor. *Coppi,* 75 B.R. at 82. The bankruptcy court declined to reopen the debtors' case, viewing their request simply as an attempt to relitigate and perhaps overturn the state court ruling. *Id.* at 83.

Given the fact that Alside obtained a default judgment in the prior State Court action, this

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[3] While *Richards* dealt with an issue of dischargeability pursuant to Code § 523(a)(5), the Court finds its discussion and that of *In re Aurre*, 60 B.R. 621 (Bankr. S.D.N.Y. 1986) relevant to the matter herein. Both courts addressed the fact that state courts and federal courts have concurrent jurisdiction over Code § 523(a)(5). *See id.* at 624; *Richards*, 131 B.R. at 78. The courts' analysis of concurrent jurisdiction has equal relevancy to Code § 523(a)(3).

[4] As pointed out by the court in *Haga*, the bankruptcy court has exclusive jurisdiction to determine dischargeability pursuant to Code § 523(a)(2), (4) or (6). The State Court may not try the merits of such actions but may determine whether there is a colorable or viable claim under those three subsections of Code § 523 in considering relief pursuant to Code § 523(a)(3), which references the three. *See Haga*, 131 B.R. at 326-27.

Court is bound by the judgment of the State Court and must deny the Debtor's motion to reopen the case since adding Alside as a creditor would not provide the Debtor with the remedy he seeks, namely, to have Alside's judgment determined dischargeable pursuant to Code § 523(a)(3). As discussed above, that issue could have been raised in the State Court and *res judicata* prevents this Court from looking behind the State Court judgment.

Based on the foregoing, it is hereby

ORDERED that the Debtor's motion seeking to reopen his case pursuant to Code § 350(b) is denied.

Dated at Utica, New York

this 13th day of November 2000

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge