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Public Law: Discharge in Bankruptcy

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DISCHARGE IN BANKRUPTCY

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EFFECT OF DISCHARGE

Debtors sometimes mistakenly suppose that actions against them will automatically abate if the debtors become bankrupt. Three recent cases afford examples. In *Breaux v. Boutin*[1] a defendant contended in the court of appeal that, as he had been adjudicated bankrupt after the action began and as the judgment in favor of plaintiffs in the court below could not be executed, it followed that plaintiffs had stated no cause or right of action against him. In *Gumina v. Dupas*,[2] a discharged bankrupt sued to annul a default judgment entered in an action begun before bankruptcy. In *Public Finance Corp. v. Vice*,[3] defendants in an action on a note filed peremptory exceptions of no cause and no right of action on the ground that the debt had been discharged in bankruptcy. In no instance did the debtor prevail.

Each debtor might have applied to the bankruptcy court to stay the pending action until a discharge in bankruptcy could be obtained,[4] and ought thereafter to have pleaded the discharge in the pending action. All evidently assumed not only that the adjudication would operate, without more, to terminate the action but also that the discharge would extinguish the debt. In this they were mistaken. It is no part of a plaintiff's duty to allege that the debt on which he sues has *not* been discharged; rather, as article 1005 of the Code of Civil Procedure[5] explicitly provides, discharge in bankruptcy is an affirmative defense. It should be added, however, that a discharged bankrupt may still prevent execution of a judgment based on a debt affected by the discharge, provided only that the debt was properly scheduled in the bankruptcy proceeding.[6]

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1. 182 So. 2d 168 (La. App. 3d Cir. 1966).
2. 178 So. 2d 291 (La. App. 4th Cir. 1965).
3. 177 So. 2d 315 (La. App. 1st Cir. 1965).
4. See Bankruptcy Act § 11a, 11 U.S.C. § 29a (1964).
5. LA. CODE OF CIVIL PROCEDURE art. 1005 (1960).
6. See Bankruptcy Act § 17a(3), 11 U.S.C. § 35a(3) (1964).

DEBTS EXCEPTED FROM DISCHARGE

Section 17 of the Bankruptcy Act lists five categories of debts not affected by a discharge. Section 17a(2) provides in part:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . . except such as . . . (2) are liabilities for obtaining money or property by false pretences or false representations, or for obtaining money or property on credit, or obtaining the extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive . . . ."[7]

Where, after his debtor's bankruptcy, a creditor sues on a claim properly scheduled in bankruptcy, and the debtor pleads his discharge, the plaintiff, if he is to bring his claim within the language quoted above, must be able to show: "(1) That defendant made false representations; (2) that these representations were made with the intention of defrauding the plaintiff, and (3) that the plaintiff relied upon and was misled by the false pretenses or representations."[8]

Midland Discount Co. v. Robichaux[9] was an action on a note against a borrower who had submitted a false financial statement in writing. The lender, however, knew that the borrower had given false and incomplete information about his obligations, and this knowledge was held to preclude a finding of reliance on the statement.

In *Excel Fin. Camp v. Autin*,[10] defendant admitted making a financial statement in which he represented that he owed only one debt in an amount that was stated. Less than three months after giving the note in suit, defendant filed a petition in bankruptcy. Plaintiff's employee was allowed to testify, on information derived from a newspaper account, about debts scheduled by the bankrupt. Allowance of this testimony was erroneous under the best evidence rule (as was admission of oral evidence of defendant's discharge), and in any event without other proof

7. 11 U.S.C. § 35a(2) (1964).
8. DeLatour v. Lala, 15 La. App. 276, 278, 131 So. 211, 212 (Orl. Cir. 1930).
9. 184 So. 2d 93 (La. App. 4th Cir. 1966).
10. 177 So. 2d 662 (La. App. 4th Cir. 1965).

it failed to establish that debts owed at the date of bankruptcy were likewise in existence when the financial statement was made.

In *Seaboard Fin. Corp. v. Stipelcovich*[11] where the defendant signed an assumed name to two notes, admittedly because he was deeply in debt and in order to obtain credit, and the proof showed that plaintiff was misled by use of the assumed name, a default judgment on the notes was declared a non-dischargeable debt.

Section 17a(2) further provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . . except such as . . . (2) are liabilities . . . for willful and malicious injuries to the person or property of another. . . ."[12]

L. & M. Bldg. & Supply v. Soileau[13] was a garnishment proceeding in execution of judgment, where the judgment debtor intervened to assert that the judgment was unenforceable by reason of his subsequent bankruptcy. The plaintiff's petition had alleged, however, and the judgment had recited, an intentional conversion by defendant of plaintiff's funds. This finding incorporated in the judgment was conclusive against the judgment debtor and established a willful and malicious injury to the property of another within the language of section 17a(2).

American Home Assur. Co. v. Coleman[14] arose out of a highway collision caused apparently by defendant's minor son. The son admitted that he had been drinking, and liability for injury inflicted by a drunken driver is a non-dischargeable debt.[15] Defendant had filed a petition in bankruptcy, scheduling the debt that was owed as a result of the collision, and had received his discharge. The question was whether the nature of the liability, willful and malicious as to the son, could be attributed to the father so as to except it from the discharge. The answer was no. The case is unusual, but there seems little doubt that the father's responsibility[16] for the negligence of his son is not an adequate basis for imputing to the father the son's personal fault.

11. 176 So. 2d 170 (La. App. 4th Cir. 1965).
12. 11 U.S.C. § 35a(2) (1964).
13. 176 So. 2d 756 (La. App. 3d Cir. 1965).
14. 180 So. 2d 577 (La. App. 3d Cir. 1965).
15. LaFleur v. Fontenot, 120 So. 2d 538 (La. App. 1st Cir. 1960); Rosen v. Shingleur, 47 So. 2d 141 (La. App. 1st Cir. 1950).
16. See LA. CIVIL CODE art. 2318 (1870).

PROMISE TO PAY DISCHARGED DEBT

Since Lord Mansfield's day it has been settled that a new promise to pay a debt discharged in bankruptcy is actionable.[17] The new promise, however, must be distinct and unequivocal and the intention of the bankrupt to bind himself must be clear.[18] In *Securities Fin. Co. v. Marbury*[19] the discharged debtor told his creditor in one letter: "I am going to try and send you something each week," and in another letter asked that a payment book be mailed, "showing bal. to be paid at $24.00 every other week." It was held that as neither writing contained a clear, distinct and unequivocal promise to pay the debt, the discharge in bankruptcy was a good defense.

17. Trueman v. Fenton [1777], 2 Cowper 544.

18. See Irwin v. Hunnewell, 207 La. 422, 21 So. 2d 485 (1945), which refers to LA. CIVIL CODE arts. 1757, 1759 (1870) and states, 207 La. 422, 434, 21 So. 2d 485, 488: "The law on this subject is the same in Louisiana as it is in the other states."

19. 180 So. 2d 737 (La. App. 1st Cir. 1965).