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BANKRUPTCY

Hector Currie*

EFFECT OF DISCHARGE

Two courts of appeal have considered the recurring problem of enforcement of judgments against discharged bankrupts. In *Mabry v. Beneficial Finance Co.*,¹ action was begun by the creditor on November 15, 1966, service was made on defendant the next day, and a default judgment was taken on December 8, 1966. Meantime, on December 1, 1966, the debtor had filed his petition in bankruptcy. A discharge in bankruptcy was granted on February 2, 1967. Later, when the creditor sought to garnish wages of the debtor, the latter brought action to enjoin enforcement of the judgment. The district court denied an injunction. The court of appeal reversed.

In holding for the creditor, the district court relied on *Gumina v. Dupas*² and *Home Finance Service v. Taylor*.³ The first was an action by a discharged bankrupt to annul a default judgment rendered about a year after the discharge in bankruptcy was granted. The second, a garnishment proceeding in aid of a judgment rendered against a discharged bankrupt more than a year after his discharge, was met by assertion of the discharge in bankruptcy as a defense. Instead of suffering judgment by default, each of these bankrupts should have pleaded his discharge in bankruptcy as an affirmative defense.⁴ Having failed to do so, he was bound by the judgment. *Mabry*, however, could not plead a discharge granted only after judgment had been entered against him. His opportunity came when the creditor sought to enforce the judgment. Reliance on the *Gumina* and *Taylor* cases by the district court was misplaced.

The court of appeal cited *Louisiana Machinery Co. v. Passman*⁵ in support of its decision that *Mabry* was entitled to an injunction. On March 24, 1952, Passman filed a petition in bankruptcy and was adjudicated a bankrupt. On March 26, 1952, action was begun against him in a state court where judgment by default was obtained on May 28, 1952. On July 29, 1952, he re-

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1. 215 So.2d 192 (La. App. 3d Cir. 1968).

2. 178 So.2d 291 (La. App. 4th Cir. 1965).

3. 187 So.2d 778 (La. App. 1st Cir. 1966).

4. LA. CODE Civ. P. art. 1005.

5. 158 So.2d 419 (La. App. 3d Cir. 1963).

ceived his discharge in bankruptcy. On May 18, 1962, an assignee of the judgment sought to revive it.⁶ As Passman had not received a discharge in bankruptcy when the judgment was obtained, he was properly allowed to plead his discharge in the revival action.

*Consolidated Credit Corp. v. Hurts*⁷ was a garnishment proceeding in which, in effect, defendant pleaded his discharge in bankruptcy as a defense. On December 11, 1964, defendant became bankrupt. On December 15, 1964, plaintiff brought action on a note, and on January 27, 1965, judgment was entered by default. On March 23, 1966, defendant received his discharge. On April 12, 1966, plaintiff sought to garnish defendant's wages. As defendant obviously could not have pleaded a discharge not yet obtained, the court of appeal held that he had not lost his defense, relying on the *Passman* case. Plaintiff, however, urged, in support of its argument of waiver, that defendant was required to have the pending action stayed until a discharge was obtained, then to plead the discharge. Section 11a⁸ of the Bankruptcy Act provides: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged bankrupt, such action may be further stayed until the question of his discharge is determined . . ." Application for a stay may be made either to the bankruptcy court or to the court in which the suit is pending,⁹ and although section 11a refers only to actions pending when the petition is filed, it is clear that the bankruptcy court can stay new suits in the exercise of its general jurisdiction.¹⁰ Obtaining a stay of pending or new actions on claims that will be affected by a discharge is generally the advisable course for the bankrupt, but, as the court of appeal recognizes, it is not mandatory that he seek a stay.

Collier summarizes the problem in these words: "Ordinarily, it would seem that the better practice for the bankrupt to pursue is, after the commencement of the bankruptcy proceedings, to procure a stay of all pending suits and those that may be brought

6. See LA. CODE CIV. P. art. 2031.

7. 215 So.2d 560 (La. App. 1st Cir. 1968).

8. 11 U.S.C. § 29a (1964).

9. 8 H. REMINGTON, BANKRUPTCY LAW § 3254 (1955) adds: "As a matter of comity, it should first be made to the latter court." See also 1 W. COLLIER ON BANKRUPTCY § 11.08 (1969).

10. 8 H. REMINGTON, BANKRUPTCY LAW § 3263 (1955). See Bankruptcy Act § 2a(15), 11 U.S.C. § 11a(15) (1964).

subsequent to the commencement of the bankruptcy proceeding, where such suits are founded upon dischargeable claims, and then, when the discharge is granted, to plead it. If the suit has not been stayed, and a judgment is entered *prior* to the award of a discharge, the discharge, when obtained, may be availed of as a bar to further remedies on the judgment."¹¹

If a judgment is entered *after* the award of a discharge, even a short time afterwards,¹² and even where the suit was stayed but the stay has expired,¹³ and the bankrupt failed to plead discharge in bankruptcy, he has lost his defense and he cannot prevent enforcement of the judgment.¹⁴

DEBTS EXCEPTED FROM DISCHARGE

Section 17 of the Bankruptcy Act lists categories of debt not affected by a discharge. Section 17a(2) provides:

"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 pretenses 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"¹⁵

The plaintiff in an action after bankruptcy on a properly scheduled claim, where the debtor pleads his discharge, 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."¹⁶

In two recent cases¹⁷ of this sort, the creditor prevailed. In other instances, the action failed for want of proof of falsity,¹⁸

11. 1 W. COLLIER, BANKRUPTCY § 17.32 (1969).

12. *Carpenter v. X-L Finance Co.*, 195 So.2d 156 (La. App. 1st Cir. 1967).

13. *X-L Finance Co. v. Fenske*, 197 So.2d 182 (La. App. 1st Cir. 1967).

14. 8 H. REMINGTON, BANKRUPTCY LAW § 3240 (1955).

15. 11 U.S.C. § 35a(2) (1964).

16. *DeLatour v. Lala*, 15 La. App. 276, 278, 131 So. 211, 212 (Orl. Cir. 1930).

17. *Time Pay Plans v. Lacopulos*, 218 So.2d 653 (La. App. 4th Cir. 1969); *Foundation Plan v. Catchings*, 218 So.2d 656 (La. App. 4th Cir. 1969).

18. *Southern Discount Co. v. Marchand*, 218 So.2d 645 (La. App. 4th Cir. 1969).

fraudulent intent,¹⁹ or reliance by the plaintiff,²⁰ or owing to some combination of these elements.²¹

Section 17a(3) provides:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy"²²

*Eagle Finance Corp. v. Duhon*²³ was an action begun on December 22, 1967, in which defendant answered on January 4, 1968, alleging his bankruptcy on November 28, 1967. Defendant was granted a discharge in bankruptcy on January 31, 1968, and was allowed to amend his answer to plead the discharge. The court of appeal held that plaintiff had notice of bankruptcy in time to protect his rights in the bankruptcy court, and that his claim was discharged whether or not it had been scheduled. In *Shreveport Wholesale Credit Men's Ass'n v. Quarles*,²⁴ however, defendant was unable to prove actual knowledge of bankruptcy by the holder of an unscheduled claim.

TRUSTEE'S POWERS OF AVOIDANCE

*Holohan v. Durand*²⁵ was an action by a trustee in bankruptcy against the bankrupt and the bankrupt's wife and daughter to nullify as a simulation a sale of immovable property to the daughter. As the grantors reserved the usufruct for life, it was presumed that the sale was simulated.²⁶ Even apart from the presumption, however, a simulated sale was established by the evidence.

There are two sources in the Bankruptcy Act of the trustee's

19. *Beneficial Finance Co. v. Cote*, 216 So.2d 163 (La. App. 2d Cir. 1968).
 20. *Carville PHS Employees Fed. Credit Union v. Jones*, 221 So. 2d 905 (La. App. 1st Cir. 1969); *Consolidated Credit Corp. v. Matherne*, 217 So.2d 426 (La. App. 1st Cir. 1968); *Beneficial Fin. Co. v. Brantley*, 211 So.2d 782 (La. App. 2d Cir. 1968).

21. *Texas Industries v. Pruett*, 219 So.2d 813 (La. App. 2d Cir. 1969) (no proof of falsity or of reliance; the court also found no malicious injuries to property within Section 17a(2)); *Atlas Credit Corp. v. Miller*, 216 So.2d 100 (La. App. 1st Cir. 1968) (no proof of fraudulent intent or of reliance).

22. 11 U.S.C. § 35a(3) (1964).

23. 216 So.2d 367 (La. App. 3d Cir. 1968).

24. 212 So.2d 433 (La. App. 2d Cir. 1968).

25. 220 So.2d 527 (La. App. 4th Cir. 1969).

26. LA. CIV. CODE art. 2480.

power to avoid fraudulent conveyances. One is section 67d,²⁷ largely derived from the Uniform Fraudulent Conveyance Act,²⁸ which may be considered a re-statement of the common law of fraudulent conveyances.²⁹ The other is section 70e, which provides in part: "A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor."³⁰ In most states, the law of fraudulent conveyances, made available to trustees in bankruptcy through section 70e, is substantially similar to section 67d; in Louisiana, however, trustees in bankruptcy often have a choice of substantive law.³¹ The transfer in *Holohan v. Durand* could have been attacked under section 67d had it not been made more than a year before bankruptcy³² and promptly recorded.³³ As it was, the trustee necessarily invoked section 70e.

CONFLICT OF LAWS

Robert A. Pascal*

FULL FAITH AND CREDIT

The decision in *Liebendorfer v. Gayle*¹ raises a fascinating question which the writer finds difficult to answer. Husband and wife, Louisiana domiciliaries, were separated from bed and board in Louisiana and some months later a conventional partition of community assets was executed by them. Thereafter the wife secured from an Arkansas court a divorce judgment in which the conventional partition was "incorporated"—apparently at her request, without opposition of the husband, and without allegation of its defect or invalidity by either spouse. Following this the wife sought a Louisiana declaration of the nullity of the partition, alleging fraud on the husband's part in the classification

27. 11 U.S.C. § 107d (1964).

28. 9B UNIFORM LAWS ANN. 48 (1957).

29. 4 W. COLLIER, BANKRUPTCY § 67.29[2] (1967).

30. 11 U.S.C. § 110e (1964).

31. For a discussion of differences between the common law of fraudulent conveyances and the Louisiana law, see Currie, *The First Act of Bankruptcy in Louisiana*, 27 LA. L. REV. 16 (1966).

32. Bankruptcy Act § 67d(2), 11 U.S.C. § 107d(2) (1964).

33. Bankruptcy Act § 67d(5), 11 U.S.C. § 107d(5) (1964).

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1. 217 So.2d 37 (La. App. 3d Cir. 1968), cert. denied.