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BANKRUPTCY

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Effect of Discharge

In each of three recent cases, a discharged bankrupt allowed judgment to go against him by default and then sought to annul the judgment or to enjoin its execution. In each case, the discharged bankrupt was denied relief.

Bordelon v. X-L Finance Co.[1] presented the following sequence of events. On February 10, 1965, the debtor filed his petition in bankruptcy, listing in his schedule of liabilities a note held by the defendant finance company, and on April 1, 1965, he received a discharge in bankruptcy. On April 6, 1965, the finance company sued on the note; thereafter, a default judgment was entered and a writ of garnishment was served on the debtor's employer. Action then was brought by the debtor to annul the judgment and to enjoin its execution.

The district court granted the relief prayed for, mistakenly relying upon *Mabry v. Beneficial Finance Co.*[2] The *Mabry* case was inapposite for the reason that the judgment there was obtained before the debtor received his discharge, which evidently he could not assert until the creditor attempted, after discharge, to garnish the debtor's wages. The court of appeal, in reversing the district court, correctly held that where judgment was obtained after discharge, it was improper to annul the judgment.

Investment Contracts, Inc. v. Jones[3] also involved an attempt to annul a default judgment. On July 6, 1967, the creditor brought an action on a note which was secured by a chattel mortgage on furniture. The debtors became bankrupt on the same day and received their discharge on September 15, 1967. Default judgment for the creditor was confirmed on January 31, 1968, and garnishment followed. In seeking to annul the judgment as one obtained by fraud,[4] the debtors claimed that the creditor's attorney notified them by letter that the trustee

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1. 227 So.2d 654 (La. App. 3d Cir. 1969).

2. 215 So.2d 192 (La. App. 3d Cir. 1968). *See The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Bankruptcy*, 30 LA. L. REV. 267 (1969).

3. 230 So.2d 262 (La. App. 1st Cir. 1969).

4. LA. CODE CIV. P. art. 2004.

in bankruptcy had disclaimed all interest in the mortgaged furniture and that the creditor was offering them a choice of keeping the furniture and paying the debt or relinquishing the furniture and being relieved of the debt, to which the debtors' attorney replied in writing that the creditor should pick up the furniture as the debtors were unable to pay. According to the creditor's evidence, much of the mortgaged furniture could not be found; the rest was in such bad condition that the creditor refused to receive it. The trial court concluded that the creditor was not guilty of fraud in proceeding with its action on the note, and the court of appeal declined to disturb this evaluation of the evidence. Regardless of any possible fraud, it plainly was the duty of the debtors to plead their discharge in bankruptcy as an affirmative defense[5] to the action on the note, and having failed to do so, they were not entitled to relief.

In *O'Neill v. D. H. Holmes Co.*[6] the debtor, who had listed in his schedule of liabilities the claim owed to the creditor, received his discharge in bankruptcy in November, 1967. A default judgment for the creditor was confirmed on September 20, 1968, and the creditor proceeded to garnishment in execution of the judgment. The debtor brought suit to enjoin garnishment of his wages, and prevailed in the trial court. He cited *Mabry v. Beneficial Finance Co.*[7] and *Louisiana Machinery Co. v. Passman*,[8] but, as the court of appeal said: "In both of these cases the judgments were rendered *before* the defendants were discharged. Consequently, the defense of discharge in bankruptcy was not available for either defendant to plead prior to rendition of judgment. . . . Here, the judgment against the bankrupt was rendered almost one year *subsequent* to the bankrupt's discharge."[9]

The debtor further contended that article 1005 of the Code of Civil Procedure, which lists discharge in bankruptcy among the affirmative defenses that must be set forth in the answer, frustrates the purpose of the Bankruptcy Act, to which it must yield under Article VI of the United States Constitution—the Supremacy Clause. This contention was plainly without merit. "The effect of a discharge upon a claim that is dischargeable

5. *Id.* art. 1005.
6. 232 So.2d 849 (La. App. 4th Cir. 1970).
7. 215 So.2d 192 (La. App. 3d Cir. 1968).
8. 158 So.2d 419 (La. App. 3d Cir. 1963).
9. 232 So.2d 849, 850 (La. App. 4th Cir. 1970).

is to afford a valid defense to the prosecution of the claim to judgment, or the satisfaction of the judgment if the claim has gone to judgment. The discharge is not a payment or extinguishment of the debt; it is simply a bar to all future legal proceedings for the enforcement of the discharged debt."[10]

Owing to the enactment of Public Law 467 of the 91st Congress, which took effect sixty days after its approval by the President on October 19, 1970, the problem of the preceding three cases should no longer arise. Among other changes, this latest amendment to the Bankruptcy Act empowers courts of bankruptcy to determine the dischargeability of any debt; to render judgment for a nondischargeable debt and order enforcement of the judgment; to nullify any judgment as a determination of personal liability on a discharged debt; and to enjoin creditors from suing on, or using any process to collect, a discharged debt.

Debts Unaffected by Discharge

Section 17 of the Bankruptcy Act specifies debts not affected by a discharge. Section 17 begins: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, . . . except. . . ."[11]

Resolute Insurance Co. v. Underwood[12] involved a subrogation action for property damage caused by defendant's negligence. Defendant admitted his negligence but pleaded discharge in bankruptcy as an affirmative defense. The trial court concluded that the claim, being one not provable in bankruptcy, was unaffected by the discharge, and gave judgment for plaintiff. The court of appeal affirmed.

Claims arising in tort are ordinarily not provable in bankruptcy.[13] Section 63a[14] lists debts that may be proved. Among these are: "(1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition . . . ; (4) an open account, or a contract express or implied . . . ; (7) the right to recover damages in any

10. 1 W. COLLIER, BANKRUPTCY § 17.27 (1969).
11. 11 U.S.C. § 35a (1964).
12. 230 So.2d 433 (La. App. 1st Cir. 1970), *cert. denied*, 255 La. 809, 233 So.2d 249 (1970).
13. 3A W. COLLIER, BANKRUPTCY § 63.25 (1969).
14. 11 U.S.C. § 103a (1964).

action for negligence instituted prior to and pending at the time of the filing of the petition in bankruptcy. . . ."

As no judgment was obtained in this case before bankruptcy, section 63a(1) did not apply. As no action for negligence was instituted prior to bankruptcy, section 63a(7) did not apply. Defendant, however, relied on section 63a(4), and on section 63a(8) which refers to "contingent debts and contingent contractual liabilities," but neither provision was helpful. There was no unjust enrichment, hence no implied contract, for "where the enrichment is zero, there is no provable claim."[15] The phrase "contingent debts and contingent contractual liabilities," though not without ambiguity, has been said to "embrace every type of claim otherwise provable under § 63: clause (8) was not intended to broaden or restrict the *type* of provable claim; it was merely intended to eliminate any restriction of fixed liability."[16] Plaintiff's claim was not provable, and discharge in bankruptcy was not a good defense.

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 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. . . ."[17]

Where a creditor brings an action after bankruptcy on a properly scheduled claim, and the debtor pleads his discharge, the creditor must 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."[18]

In one such recent action, the creditor prevailed.[19] In an-

15. 3A W. COLLIER, BANKRUPTCY § 63.25 (1969).
16. *Id.* § 63.30.
17. 11 U.S.C. § 35a (2) (1964).
18. DeLatour v. Lala, 15 La. App. 276, 278, 131 So. 211, 212 (Orl. Cir. 1930). These requirements have been repeated in scores of cases.
19. North Am. Fin. Corp. v. Ketchum, 223 So.2d 697 (La. App. 4th Cir. 1969).

other case, the proof did not show a materially false statement in writing.[20] In two other cases, reliance by the plaintiff was not proved.[21]

Section 17a(2) provides further:

> "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. . . ."

In *Mid-South Finance & Thrift, Inc. v. Cupit*[22] action was brought on a note. Defendant, who had listed the note in his schedule of liabilities, pleaded discharge in bankruptcy. Plaintiff sought to bring its claim within section 17a(2) by asserting that defendant had willfully and wrongfully disposed of certain movables covered by a chattel mortgage that secured the note.

It is clear that "a wrongful act done intentionally, which necessarily produces harm and is without just cause or excuse, may constitute a willful and malicious injury. . . . Thus the conversion of another's property without his knowledge or consent, done intentionally and without justification or excuse, to another's injury, is a willful and malicious injury within the meaning of the exception."[23] And it has been held that a debt will not be discharged where property mortgaged to secure the indebtedness has been wrongfully disposed of, concealed, or removed by the debtor.[24] In the *Cupit* case, however, plaintiff bought the mortgaged property from the trustee in bankruptcy after its manager had identified at defendant's house each item covered by the mortgage. Defendant and his wife soon moved to another city, leaving the property in the house and notifying plaintiff where the property was and that it might be taken. Defendant owed no duty to keep plaintiff's property safe; his only duty was to give plaintiff notice as he had done. The judgment of the trial court dismissing the lender's action was affirmed.

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20. Great S. Mtge. & Loan Corp. v. Dillon, 230 So.2d 901 (La. App. 4th Cir. 1970).

21. First Nat'l Bank v. Leblanc, 234 So.2d 431 (La. App. 3d Cir. 1970); Sales Purchase Corp. v. Barnes, 228 So.2d 155 (La. App. 2d Cir. 1969), *cert. denied*, 255 La. 276, 230 So.2d 586 (1970).

22. 225 So.2d 125 (La. App. 2d Cir. 1969).

23. 1 W. COLLIER, BANKRUPTCY § 17.17[1] (1969).

24. X-L Fin. Co. v. Adams, 187 So.2d 759 (La. App. 1st Cir. 1966); Excel Fin. Camp, Inc. v. Tannerhill, 140 So.2d 202 (La. App. 4th Cir. 1962). *See also* LA. R.S. 9:5359 (Supp. 1970).

Promise to Pay Discharged Debt

Though the Bankruptcy Act does not refer to revival of debts, a new promise to pay a debt discharged in bankruptcy is generally actionable without new consideration as a matter of state law.[25] This is true in Louisiana.[26] The promise may be made at any time after filing of the petition in bankruptcy,[27] but it must be "definite, express, distinct, and unambiguous."[28] An expression that does not amount to a clear and unequivocal promise to pay is not sufficient.[29]

The court in *Beneficial Finance Co. v. Lalumia*[30] held that, in the absence of a new promise, the making of payments on a note after the debtor had filed his petition in bankruptcy did not revive liability on the discharged debt or create a new enforceable obligation. This is the uniform result.[31] Giving a new note for a debt discharged in bankruptcy does, however, amount to a new promise that creates an enforceable obligation, as *Booty v. American Finance Corp.*[32] recognized.[33]

CONFLICT OF LAWS

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Divorce Jurisdiction

The decision in *Self v. Self*[1] violates the due process clause by denying to a person the application of the only state's law which is applicable to him in the only state which can hear his suit. In so doing it also violates indirectly the full faith and credit and equal protection clauses of the United States Constitution.

Plaintiff and his wife were separated from bed and board while domiciled in Louisiana. Subsequently the wife moved her

25. 1 W. COLLIER, BANKRUPTCY § 17.33 (1969).
26. Irwin v. Hunnewell, 207 La. 422, 21 So.2d 485 (1945), refers to LA. CIV. CODE arts. 1757, 1759, and states: "The law on this subject is the same in Louisiana as it is in the other states." *Id.* at 434, 21 So.2d at 488.
27. 1 W. COLLIER, BANKRUPTCY § 17.36 (1969).
28. *Id.* § 17.34.
29. Securities Fin. Co. v. Marbury, 180 So.2d 737 (La. App. 1st Cir. 1965).
30. 223 So.2d 202 (La. App. 4th Cir. 1969).
31. 1 W. COLLIER, BANKRUPTCY § 17.37 (1969).
32. 224 So.2d 512 (La. App. 2d Cir. 1969). The issue arose on a reconventional demand in the debtor's action for damages for invasion of privacy.
33. *See* Dinger v. Rothery, 10 N.J. Misc. 938, 161 A. 645 (1932).

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1. 228 So.2d 518 (La. App. 3d Cir. 1969).