Louisiana Law Review

Volume 32 | Number 2
The Work of the Louisiana Appellate Courts for the 1970-1971 Term: A Symposium
February 1972

Public Law: Bankruptcy

Hector Currie

BANKRUPTCY

*Hector Currie**

Effect of Discharge

Ettredge v. Sales Financing Management, Inc.,[1] was an action to cancel a judgment discharged in bankruptcy.[2] The creditor had obtained a deficiency judgment by default on September 21, 1966, and the debtors received a discharge in bankruptcy on October 27, 1966. The trial court ordered the judgment cancelled. To appellant's contention that discharge in bankruptcy is an affirmative defense which the debtor must plead,[3] it was a sufficient answer in the court of appeal that the discharge could not be pleaded where it was not received until after judgment had been entered. Cancellation of the judgment therefore was proper. If the discharge had preceded judgment, the creditor's argument would have prevailed.[4]

It is settled that a valid lien on property not administered in bankruptcy (for example, exempt property or property abandoned by the trustee) is unaffected by the discharge.[5] In *Travelers Indemnity Co. v. Dubois*,[6] plaintiff got judgment on September 17, 1968, in Rapides Parish, and had it recorded in that parish. Defendant filed his petition in bankruptcy on January 6, 1969, scheduling among his debts the Rapides Parish judgment, and among his assets some land in Grant Parish. He was discharged on March 10, 1969. In May, 1969, plaintiff caused its judgment to be made executory in Grant Parish and in August, 1969, defendant received his Grant Parish land, "subject to any existing liens or mortgages," from the trustee. Action was brought to subject the land to plaintiff's judgment, and defendant prayed that plaintiff be enjoined from seizing and selling the land. An injunction issued, and the court of appeal affirmed. Had the debtor owned immovable property in Rapides Parish, the judicial mortgage that arose on or after September 17, 1968, might have

---

* Professor of Law, Louisiana State University.

1. 247 So.2d 674 (La. App. 2d Cir. 1971).
2. *See* LA. R.S. 9:5166 (Supp. 1970).
3. *See* LA. CODE CIV. P. art. 1005.
4. Other cases illustrating this distinction are discussed in *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Bankruptcy*, 31 LA. L. REV. 307 (1971), and in *The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Bankruptcy*, 30 LA. L. REV. 267 (1970).
5. 1A W. COLLIER, BANKRUPTCY § 17.29 (1971).
6. 236 So.2d 912 (La. App. 3d Cir. 1970).

been avoided as a lien obtained by legal proceedings on property of an insolvent debtor within four months of his bankruptcy.[7] If, however, the debtor was solvent on the date of recordation of the judgment, the judicial mortgage would have subsisted, despite the discharge, on any immovable property the debtor owned in the parish where the judgment was recorded;[8] but the effect of the judgment could not be extended, after the discharge, to land in another parish.

Debts Unaffected by Discharge

Section 17 of the Bankruptcy Act lists categories of debt not affected by a discharge. Section 17 begins: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except . . . ."[9]

American Road Insurance Co. v. Roux[10] was a subrogation action for property damage, to which defendant pleaded discharge in bankruptcy as an affirmative defense. The trial court gave judgment for the defendant but was reversed on appeal. Tort claims are not provable in bankruptcy except for those that are reduced to judgment before bankruptcy, those that can be asserted in quasi-contract, and actions of negligence instituted prior to and pending at the date the petition in bankruptcy was filed.[11] As the debt owed to the plaintiff came within none of these exceptions, and thus was not provable in bankruptcy, it was not discharged. *Resolute Insurance Co. v. Underwood*,[12] a similar case,[13] was followed by the court of appeal.

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 re-

7. 11 U.S.C. § 107(a) (1964).
8. Schexnailder v Fontenot, 147 La. 467, 85 So. 207 (1920).
9. 11 U.S.C. § 35(a) (1964).
10. 242 So.2d 95 (La. App. 4th Cir. 1970).
11. U.S.C. § 103(a)(1), (4), (7) (1964).
12. 230 So.2d 433 (La. App. 1st Cir. 1970), *cert. denied*, 255 La. 809, 233 So.2d 249.
13. For comment, *see The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Bankruptcy*, 31 LA L. REV. 307 (1971).

> specting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive. . . ."[14]

In an action brought by a creditor on a properly scheduled claim after his debtor's bankruptcy, the plaintiff, in order to defeat a plea of discharge in bankruptcy, has been required to show: "(1) [t]hat 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."[15]

One such recent case[16] was reversed to give the defendant an opportunity, denied him in the trial court, to present evidence of his good faith. Another such case[17] was remanded for reception of newly discovered evidence of defendant's alleged bad faith. In a third case,[18] plaintiff failed to prove reliance on the financial statements.

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. . . ."[19]

Tamborella v. Robison[20] held that a claim was duly scheduled, hence discharged, where the only address given was "Shreveport, La." The court of appeal called on *Kreitlein v. Ferger*,[21] where the United States Supreme Court found "a schedule listing the creditor's residence as Indianapolis . . . at least, prima facie sufficient"[22] in the absence of proof that the bankrupt knew the complete address. Further, the court of appeal

14. 11 U.S.C. § 35(a)(2) (1964).
15. De Latour v. Lala, 15 La. App. 276, 278, 131 So. 211, 212 (Orl. Cir. 1930).
16. CHF Fin. Disc. A Co. v. Brasseux, 237 So.2d 701 (La. App. 4th Cir. 1970).
17. Guaranty Bank & Trust Co. v. Hill, 242 So.2d 580 (La. App. 1st Cir. 1970).
18. Friendly Fin. Serv. Mid-City, Inc. v. Windham, 240 So.2d 26 (La. App. 2d Cir. 1970), *cert. denied*, 257 La. 171, 241 So.2d 530.
19. 11 U.S.C. § 35(a)(3) (1964).
20. 245 So.2d 476 (La. App. 2d Cir. 1971), *cert. denied*, 258 La. 761, 247 So.2d 862.
21. 238 U.S. 21 (1915).
22. *Id.* at 34.

added, it is the duty of the referee to "examine all schedules . . . and cause such as are incomplete and defective to be amended. . . ."[23] In the first place, however, it is the bankrupt's duty to "prepare . . . a list of all his creditors . . . showing their residences or places of business, if known, or if unknown that fact to be stated . . . ,"[24] and where he has done neither the one thing nor the other it seems doubtful that he has duly scheduled the claim.[25] Nor is the bankrupt exculpated by the referee's inaction. *Kreitlein v. Ferger* is a dubious decision, which is not to say that the court of appeal was wrong to follow it.

In *Livingston State Bank & Trust Co. v. Fairchild*,[26] the bankrupt had properly scheduled a judgment that the bank had obtained against him as maker of a note, but had failed to schedule an accommodation endorser as a creditor. An accommodation party is a contingent creditor entitled to reimbursement for any payment required of him, and this claim is provable[27] in the bankruptcy of the maker as a debt founded on an implied contract.[28] If the indorser had been held to payment and then had sued the maker for reimbursement, discharge in bankruptcy would not have been available as a defense. What happened, however, was that the bank assigned its judgment to the indorser without the bankrupt judgment debtor's knowledge, and the assignee enforced the judgment by garnishment. The debtor then moved to dissolve the garnishment on the ground that the judgment had been discharged in bankruptcy. He lost in the trial court but prevailed on appeal. Where a debtor has no knowledge of the assignment, he may duly schedule the debt in the name of the original creditor, and he is under no duty to ascertain independently whether or not an assignment has been made.[29]

It should be noted that in all the foregoing cases bankruptcy occurred before December 18, 1970, the effective date of Public Law 91-467. 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

23. 11 U.S.C. § 67(a)(3) (1964).
24. *Id.* § 25(a)(8).
25. *Cf.* 1A W. COLLIER, BANKRUPTCY § 17.23[4] (1971).
26. 248 So.2d 14 (La. App. 1st Cir. 1971).
27. *In re* Seigel, 43 F. Supp. 778 (N.D. Ga. 1942).
28. 11 U.S.C. § 103(4) (1964).
29. 1A W. COLLIER, BANKRUPTCY § 17.23[3] (1971).

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.

Promise to Pay Discharged Debt

In Louisiana,[30] and generally, a new promise to pay a debt discharged in bankruptcy is actionable without new consideration;[31] and giving a new note for a discharged debt amounts to such a promise.[32] In *Port Finance Co. v. Daigle*,[33] the debtor signed a new note and the creditor gave new consideration, but the debtor had been coerced into signing, or so the jury believed. In reversing a judgment for defendant, the court of appeal held, over a vigorous dissent, that the evidence did not support the verdict.

CONFLICT OF LAWS

*Robert A. Pascal**

Alimony

de Lavergne v. de Lavergne[1] presents a fascinating problem evoking meditation on the bases of "conflict of laws" rules. A wife domiciled in Louisiana sued *ex parte* in Louisiana for a judgment of separation from bed and board from her husband domiciled in France. In the same suit she asked for alimony *according to Louisiana law*. The defendant husband not being present in the state or expected to appear voluntarily, the plaintiff wife, treating her cause of action for alimony as one for money, proceeded *quasi in rem* by attaching the defendant husband's beneficial interest in a Louisiana trust. A judgment for alimony in the amount of $600 monthly followed, but no attempt was made to enforce payments until $5400 was due. The wife then asked for and received a judgment ordering execution of the whole out of the husband's beneficial interest in trust attached on the commencement of suit. The husband thereupon alleged the nullity of the original alimony judgment, contending that a suit for alimony is not one "for money" which might be

30. Irwin v. Hunnewell, 207 La. 422, 21 So.2d 485 (1945).
31. 1A W. COLLIER, BANKRUPTCY § 17.33 (1971).
32. Booty v. Amer. Fin. Corp., 224 So.2d 512 (La. App. 2d Cir. 1969).
33. 236 So.2d 256 (La. App. 3d Cir. 1970).

* Professor of Law, Louisiana State University.

1. 244 So.2d 698 (La. App. 4th Cir. 1971).