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BANKRUPTCY

*Hector Currie**

EFFECT OF DISCHARGE

What was described as a seeming conflict between two Louisiana statutes arose in *Socony Mobil Oil Co. v. Burdette.*[1] The creditor obtained a money judgment against the debtor in September, 1963. The judgment, duly recorded in East Baton Rouge Parish, was a judicial mortgage on real property the debtor had acquired subject to a purchase-money mortgage in 1956. Subsequently the debtor became bankrupt and listed the judgment in his schedule of debts. He obtained a discharge in bankruptcy on September 15, 1964. Within the ten years allowed by statute,[2] the creditor brought an action to revive[3] the money judgment, to which the debtor pleaded his discharge in bankruptcy as an affirmative defense.[4] On the basis of this plea the trial court dismissed the action. The First Circuit Court of Appeal reversed.

When a judgment creditor brings a revival action: "A judgment shall be rendered in such a proceeding reviving the original judgment, unless the defendant shows good cause why it should not be revived."[5] Since 1970, a judgment debtor who has been discharged in bankruptcy, may, upon a rule to show cause against the clerk of court and ex officio recorder of mortgages, obtain "the cancellation of the inscription of any dischargeable judgment rendered twelve months previously unless the judgment creditor can prove that he continues to possess a secured interest in the property affected by such judgment . . . ."[6]

As the present action was one to revive a judgment, the burden was on the defendant to show good cause why it should not be revived. He did not show good cause by merely pleading the discharge in bankruptcy for the reason that a valid judgment lien, or judicial mortgage, on the property not administered in bankruptcy is unaffected by the discharge.[7] To prevent revival of the judgment the

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1. 295 So. 2d 854 (La. App. 1st Cir. 1974).

2. LA. CIV. CODE art. 3547.

3. *See* LA. CODE CIV. P. art. 2031, which provides a method of reviving money judgments.

4. *Id.* art. 1005.

5. LA. CIV. CODE art. 2031.

6. LA. R.S. 9:5166 (Supp. 1970). For a discussion of the statute, see *The Work of the Louisiana Appellate Courts for the 1971-1972 Term — Bankruptcy,* 33 LA. L. REV. 269, 270 (1973).

7. 1A W. COLLIER, BANKRUPTCY § 17.29 (1971) [hereinafter cited as COLLIER].

debtor should have proved, if he could, that the creditor had no secured interest in the property because of the prior conventional mortgage.

Kohnke v. Justice,[8] by contrast, was an action by a discharged judgment debtor to cancel the inscription of a dischargeable judgment. Accordingly, the burden was on the creditor to prove that he continued to possess a secured interest in the property. This meant, in the words of the Fourth Circuit Court of Appeal, "that the judgment creditor must prove that the property affected by his judgment is worth in dollar value an amount sufficiently in excess of existing encumbrances which prime his judgment as to afford him a secured interest in the property affected by his judgment."[9] No such proof was made, and the court of appeal, reversing the district court, ordered that the judgment be cancelled.

Hardy v. Kidder[10] had it origin in a traffic accident. Shortly after commencement of plaintiff's action for damages in 1969, defendant became bankrupt and in September 1969 he obtained a stay[11] of plaintiff's action pending discharge, which was granted in August, 1970. On November 20, 1970, a preliminary default was taken in plaintiff's action. On February 19, 1971, after evidence was presented for plaintiff, the judgment was confirmed. Included in the evidence was a letter from defendant's trustee in bankruptcy stating that defendant had been discharged from his debts including the one in suit. A notice of judgment was issued and was served on defendant on February 24. The following day defendant's attorneys, alleging that good grounds existed, moved for a new trial,[12] which was denied by the district court. The court of appeal affirmed[13] and the supreme court granted certiorari.[14]

In its original disposition,[15] with two dissents, the supreme court affirmed the judgment of the court of appeal. The unexplained failure of defendant's counsel to answer and plead the discharge in bankruptcy as an affirmative defense to plaintiff's action was not "good ground" for granting a new trial and the trial court thus had committed no abuse of discretion. On rehearing, however, the supreme court reversed,[16] with three dissents, and remanded the case to the district

8. 280 So. 2d 665 (La. App. 4th Cir. 1973).
9. *Id.* at 667.
10. 292 So. 2d 575 (La. 1974).
11. Pursuant to § 11a of the Bankruptcy Act, 11 U.S.C. § 29a (1970).
12. LA. CODE CIV. P. art. 1973.
13. 267 So. 2d 582 (La. App. 3d Cir. 1972).
14. 263 La. 622, 268 So. 2d 678 (1972).
15. Hardy v. Kidder, 292 So. 2d 575, 576 (La. 1974).
16. *Id.* at 577.

court for a new trial. The controlling opinion emphasized that the articles of the Code of Civil Procedure are to be construed liberally,[17] and held that there was good ground for the grant of a new trial in the interests of justice.

PROMISE TO PAY DISCHARGED DEBT

In Louisiana[18] and elsewhere a new promise to pay a debt discharged in bankruptcy is actionable without new consideration;[19] and giving a new note for a discharged debt amounts to such a promise.[20] If, however, the note is given not for payment of the discharged debt but for some other consideration which fails, the failure of consideration may be raised as a defense against anyone other than a holder in due course.[21] That was the situation in *Republic Finance of Gramercy, Inc. v. Davis,*[22] where the evidence showed that defendant made the note not to acknowledge a pre-existing debt but to regain possession of his furniture and appliances, relying on assurances by the plaintiff which were not fulfilled. Though the trial court held that defendant had failed to prove fraud and gave judgment on the note for the plaintiff, the court of appeal treated the case as one of failure of consideration, and reversed.

17. LA. CODE CIV. P. art. 5051.
18. Irwin v. Hunnewell, 207 La. 422, 21 So. 2d 485 (1945).
19. COLLIER § 17.33.
20. Booty v. American Fin. Corp., 224 So. 2d 512 (La. App. 2d Cir. 1969).
21. X-L Fin. Co. v. Gregoire, 217 So. 2d 463 (La. App. 1st. Cir. 1968).
22. 289 So. 2d 891 (La. App. 4th Cir. 1974).