

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

UNITED STATES BANKRUPTCY COURT
WESTERN DIVISION
F1
DEC 09 1996
JED G. WEINIGER
CLERK OF COURT
WESTERN DISTRICT OF TENN.

IN RE
JULIEN J. HOHENBERG,
Debtor.

Case No. 9 1-20777B
Chapter 7

JACK F. MARLOW,
Plaintiff,

V.

Adversary No. 94-0087

JULIEN J. HOHENBERG,
Defendant.

HMF TRUST GROUP,
Substituted Plaintiff,

V.

Adversary No. 94-0086

JULIEN J. HOHENBERG,
Defendant.

HMF TRUST GROUP,
Substituted Plaintiff,

v .

Adversary No. 94-0095

JULIEN J. HOHENBERG,
Defendant.

MEMORANDUM OPINION ON DEBTOR'S MOTION TO DISMISS ADVERSARY PROCEEDING 94-0087 AND UNITED STATES TRUSTEE'S MOTION TO BE SUBSTITUTED OR TO INTERVENE IN THAT PROCEEDING, COMBINED WITH OPINION ON SUBSTITUTED PLAINTIFF'S MOTION TO VOLUNTARILY DISMISS ADVERSARY PROCEEDINGS 94-0086 AND 94-0095, COMBINED WITH OPINION OF UNITED STATES TRUSTEE'S MOTION TO BE SUBSTITUTED FOR PLAINTIFF IN ADVERSARY PROCEEDINGS 94-0086 AND 94-0095

On November 25, 1996, the Court considered the debtor's motion to dismiss an objection to discharge that was filed by Jack F. Marlow, Trustee for The Julien Company, a related bankruptcy

case number 90-20283B. The motion to dismiss had been filed on April 14, 1994, and after an initial hearing the Court entered an order expressing doubts about the standing of Mr. Marlow to pursue his objection to discharge but reserving a ruling until another order approving a settlement between Mr. Marlow and other entities including the chapter 7 Trustee in Mr. Hohenberg's personal case became final. That settlement, which has been called the "Global Settlement," was a complicated one, involving the primary creditors in both The Julien Company and Julien Hohenberg cases. The settlement agreement, which is docket number 799 in the Julien Hohenberg case file, was approved by an order entered on March 9, 1994 (docket entry 853 in case file). That order is now final, after an appeal by Mr. Hohenberg. The settlement was tentative until a final settlement date was reached under the settlement terms, but the final settlement date was reached as reflected by the chapter 7 Trustee's motion to dispose of the claims of creditors of this estate. That motion was filed on May 16, 1996 (docket entry 1214 in case file).

The history of this complicated settlement is important for an understanding of the context of the objections to discharge. Under the terms of the settlement, to which reference is made for the complete terms, Mr. Marlow had withdrawn his claims against the bankruptcy estate of Julien Hohenberg, and the objections to discharge tiled by both Bankers Trust Company and Allen S. Blair, chapter 7 Trustee were transferred to HMF Trust Group, which is composed of family members and entities related to the debtor Mr. Hohenberg. Also, under that settlement, HMF Trust Croup was assigned the claims of Bankers Trust Company and Mr. Blair; thus, HMF Trust Croup became the largest creditor of the Julien Hohenberg estate, holding approximately 99% of the allowed claims

against the estate.’ The priority and other claims of the Internal Revenue Service were settled and previously paid in another complicated settlement (adversary proceeding 94-0019), as were the claims of Mr. Hohenberg’s spouse (adversary proceedings 91-0297 and 94-0123). The United States Trustee was a participant in the two bankruptcy cases and was noticed on all settlements. In fact, an attorney from that office participated in many of the settlement discussions in both of these complicated bankruptcy cases. That office did not object to the Global Settlement.

The Court had deferred discovery and other activity in Mr. Marlow’s adversary proceeding number 94-0087 until the Global Settlement order became final. Similarly, activity in the other objections to discharge had been frozen pending the finality of the Global Settlement. See order in adversary proceeding 94-0087 dated May 19, 1994 (docket entry 8). That latter order, which observed the apparent similarity between Mr. Marlow’s objection and the objection to discharge filed by Allen S. Blair, chapter 7 Trustee in Mr. Hohenberg’s case, and which recognized that a general discharge may be denied only once, was noticed to the United States Trustee. It was apparent from that order, as well as from this Judge’s comments in open court, during which the United States Trustee’s representative would have been a participant, that the Court did not have a favorable opinion of Mr. Marlow’s standing to pursue his objection to discharge. While Mr. Marlow apparently had standing to file the objection originally because he at that time had a filed claim for \$14,286,493.10 (claim number 27), he withdrew that claim by an order dated April 1, 1994 (docket entry 869). That order specifically said that “all Proofs of Claims filed by Marlow are hereby withdrawn and no claims of Marlow shall be allowed.” Mr. Marlow’s objection to discharge was

¹ According to the case Trustee’s motion to dispose of claims in this estate (docket entry 1214), HMF Trust Group holds approximately \$35,000,000 in claims compared to \$116,064 in allowed claims from all other creditors.

filed on January 27, 1994, and it had as an attached exhibit his proof of claim as evidence of Mr. Marlow's unsecured claim. By the time the debtor filed his motion to dismiss on April 14, 1994, Mr. Marlow's claims had been withdrawn, leaving Mr. Marlow with no claims and no financial stake in this estate. Mr. Marlow, as the chapter 11 Trustee in the separate estate of The Julien Company, would have no standing solely due to his status as a case trustee in that case to object to Mr. Hohenberg's personal discharge. Once Mr. Marlow lost his financial interest in the individual case, he lost his standing to pursue an objection to discharge. This is especially so in light of the other objections to discharge that were pending by the time the Marlow claims were withdrawn. The United States Trustee was aware of these developments. Had that office been acting in reliance upon Mr. Marlow's objection to discharge, the time to seek to intervene in his objection or to be substituted for Mr. Marlow was in 1994 and not in 1996, when the United States Trustee first moved to participate in this adversary proceeding on October 1 (docket entry 18 in adversary proceeding 94-0087).

On September 6, 1996, the debtor renewed his motion to dismiss adversary proceeding 94-0087. By this point, the order approving the Global Settlement had become final and the chapter 7 Trustee had implemented that settlement by moving in the case to make a dividend payment to creditors and to dispose of the claims of HMF Trust Group. See docket entry 1214 in case file. Upon the renewal of the debtor's motion to dismiss Mr. Marlow's objection to discharge, the United States Trustee objected to the dismissal and moved to be substituted for Mr. Marlow or in the alternative to intervene in the proceeding. The United States Trustee relies primarily upon FED. R. CIV. P. 25(c), which is incorporated by FED. R. BANKR. P. 7025. The parties briefed the issues involving the United States Trustee's pleadings, and in hearings prior to November 25, the original

plaintiff Mr. Marlow and his counsel stated that Mr. Marlow did not resist the debtor's motion to dismiss. This left the Court with the issues of whether the United States Trustee could be substituted for Mr. Marlow, whether the United States could intervene in this objection to discharge, and whether the lack of Mr. Marlow's standing to pursue the objection to discharge would infect the United States Trustee's standing.

Before the Court could rule on those issues, the substituted plaintiffs in two other objections to discharge announced their intentions to dismiss voluntarily those adversary proceedings. This took the form of oral motions on October 25, 1996 to voluntarily dismiss adversary proceedings 94-0086 and 94-0095. These are adversary proceedings that were filed originally and respectively by Bankers Trust Company as a creditor and by Allen S. Blair as chapter 7 Trustee in the Julien Hohenberg individual case. In both of those proceedings and as a part of the implementation of the Global Settlement and claim disposition order (docket entry 1240 in case file), the original plaintiffs, Bankers Trust Company and Allen S. Blair, chapter 7 Trustee, had been substituted by the HMF Trust Group, the holders of the majority of claims against this estate. In each of the adversary proceedings orders were entered on July 22, 1996 substituting the HMF Trust Group and those orders stated that the original plaintiffs had transferred to the HMF Trust Group all of the original plaintiffs' "rights, title, and interest in this adversary proceeding." These orders of substitution, which are final orders, do not indicate that the United States Trustee signed the orders or that her office was noticed on the entry of the orders. However, it is clear that the substitution orders were a part of the implementation of the Global Settlement of which the United States Trustee was aware.

As a part of his argument of support of voluntary dismissal, Mr. McQuiston, attorney for HMF Trust Group, stated that his clients had bargained in the Global Settlement for many things,

including the right to “close things” in this bankruptcy case and the right to control these objections to discharge along with other litigation that HMF Trust Group acquired and is now dismissing. That is a compelling argument, especially in view of the fact that HMF Trust Group has approximately \$3.5 million in claims of which they have received approximately a 13% distribution. In contrast, the other allowed unsecured claims, which have also received a 13% distribution, total approximately \$116,000. See Order dated June 5, 1996 granting case Trustee’s motion to dispose of claims of HMF Trust Group and to pay dividend to creditors (docket entries 1214 and 1240 in case file).

The United States Trustee, on the other hand, correctly argues that she has a statutory right to object to a undeserving debtor’s general discharge. Specifically, the Bankruptcy Code gives “[t]he [case] trustee, a creditor, or the United States trustee [standing to] object to the granting of a discharge under subsection (a) of section [727].” 11 U.S.C. § 727(c)(1). That grant is tempered generally by the time restriction placed upon all objectors to discharge. In a chapter 7 liquidation case, such as this one, an objection to discharge must be filed within 60 days from the first date set for the §341 meeting of creditors. FED. R. BANKR. P. 4004(a). It is undisputed in this case that the three objections to discharge tiled by Mr. Marlow, Bankers Trust Company and Mr. Blair were filed timely and that the United States Trustee did not file an objection to discharge at any time.

The United States Trustee argued, however, and put on proof to support her argument, that she did not file a separate objection to discharge because of her reliance upon the filing by other interested parties. Such reliance has been recognized as a legitimate reason for excusing the non-filing of an objection and the substitution of the United States Trustee for an original plaintiff who chose not to pursue a timely filed objection. See, e.g., Advisory Committee Notes (1991) to FED. R. BANKR. P. 7041, reprinted in NORTON BANKR. RULES PHAMPLET 1995-1996 ED., 478; In *re*

Speece, 159 B.R. 314, n. 12 (Bankr. E.D. Cal. 1993); *In re Thomas*, 178 B.R. 852 (Bankr. W.D. Wash. 1995).

As an additional layer to the authority for the United States Trustee's position, FED. R. BANKR. P. 7041 provides that "a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiffs instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on such order of the court containing terms and conditions which the court deems proper." Thus, the United States may object to dismissal of another plaintiffs objection to discharge. The only logical conclusion from the Rule's requirement that the United States Trustee be noticed of the plaintiffs motion to dismiss an objection to discharge is that the United States Trustee may be substituted for that plaintiff. See, e.g. *In re Thomas*, 178 B.R. 852, 853. Otherwise, an opportunity to object to dismissal would be a hollow gesture.

In this particular case, there is a compelling argument that the substituted plaintiffs, who are the holders of almost all of the monetary claims in this estate and the family members who have non-monetary motives to end the litigation in this prolonged case, should be able to determine whether the debtor gets a discharge. After all, they are the ones who will lose the enforceability of their \$35 million in claims as a result of a discharge, and none of the holders of the \$116,000 in other allowed unsecured claims have appeared at any time in this case to object to the debtor's discharge or to seek determinations of nondischargeability of particular debts. It could be concluded that the monetary and non-monetary motivations of the HMF Trust Croup should prevail. There is no issue in this case about these plaintiffs having received any monetary incentive to dismiss their objections to discharge. Mr. McQuiston stated in court on October 25, 1996 that no settlement had been reached between his clients and the debtor and that no payments had been made to his clients to obtain their voluntary

dismissal. Rather, they **just** wanted to end the litigation that no doubt disturbs the family relationships.

It can be argued that the United States Trustee has waited too long to seek substitution in any objection to discharge. As observed in the discussion about Mr. **Marlow's** objection, the United States Trustee was on notice of the Court's view on Mr. **Marlow's** lack of standing since 1994. The proof offered on October 25, 1996, did not indicate, however, that the United States Trustee had relied only, if at all, upon Mr. **Marlow's** objection to discharge. Rather, the proof established that reliance had been placed upon the objection to discharge filed by Mr. Blair, the chapter 7 Trustee for Mr. Hohenberg's estate. It is true that the United States Trustee could have moved earlier to be substituted for Mr. Blair; however, until the Global Settlement became final and until it was implemented by Mr. Blair's payment to **HMF** Trust Group and other creditors pursuant to the June 5, 1996 order (docket entry 1240 in the case file), it was not clear to anyone that Mr. Blair would not pursue his objection to discharge. That objection, along with the other two, had been placed on hold by the Court pending the finality of the Global Settlement. Implementation of that settlement simply took away the case Trustee's incentive to pursue further litigation. Had the United States Trustee sought to be substituted earlier for the case Trustee, such a motion may have been premature. It would appear that the United States Trustee was faced with a **difficult** choice: Seek to intervene or be substituted earlier and perhaps disturb the complicated Global Settlement or wait to see whether at least one of the original **plaintiffs** would pursue their objections to discharge. The Court should not now second-guess the United States Trustee's choice.

It is true that the **HMF** Trust Group acquired from the case Trustee "[a]ll other unliquidated assets, interests, causes of action, and claims of the estate." Order dated June 5, 1996 (docket entry

1240 in case file). But the case Trustee could not convey to HMF Trust Croup the United States Trustee's independent potential cause of action.

With the substitution order on July 22, 1996 in adversary proceeding 94-0095, there was clearly a substitution of parties for purposes of FED. R. CIV. P. 25. Moreover, there was a transfer of interests for purposes of FED. R. CIV. P. 25(c). That latter Rule, taken in conjunction with FED. R. BANKR. P. 7041, provides authority for the United States Trustee to be substituted for Allen S. Blair, the original plaintiff, and for HMF Trust Croup, the substituted plaintiff, in adversary proceeding 94-0095. Moreover, this is an appropriate proceeding for the United States Trustee to inherit because the original plaintiff, the case Trustee, was appointed by and served under the supervision of the United States Trustee. 28 U.S.C. § 586(a).

The Court has considered the equitable argument made by HMF Trust Croup that it should control the right to dismiss its own objection to discharge. As observed previously, there are compelling factors to support that argument. However, the United States Trustee correctly points out that a debtor's entitlement to discharge is not a right but a privilege, one that the United States Trustee has a duty to protect against misuse. See, e.g., *In re Frommann*, 153 B.R. 113, 116 (E.D.N.Y. 1993); Douglass G. Boshkoff, *Limited, Conditional, And Suspended Discharges In Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69 (1982). A discharge may be denied to a debtor even though no creditors object to the discharge, because the Bankruptcy Code gives the United States Trustee standing to object. 11 U.S.C. § 727 (c). After all, the granting of or denial of a discharge goes to the heart of the integrity of the Bankruptcy Code. Finally, the Rule that controls voluntary dismissals of objections to discharge gives the Court discretion to allow dismissal only upon "terms and conditions which the court deems proper." FED. R. BANKR. P. 704 1. By

denying dismissal of the objection originally filed by the chapter 7 Trustee and by granting the United States Trustee's motion to be substituted as plaintiff in that proceeding number 94-0095 the Court is not ruling upon the merits of that objection; rather, the Court is allowing a substitution of plaintiffs so that a determination may be made upon the merits as to the debtor's entitlement to a general discharge.


A separate order will be entered in adversary proceeding 94-0095 denying the oral motion of HMF Trust Group to voluntarily dismiss this objection to discharge but granting the United States Trustee's oral motion to be substituted for the original plaintiff and for HMF Trust Group as plaintiff. The Court will conduct a chambers' conference with counsel for the debtor, HMF Trust Group, the case Trustee and the United States Trustee to discuss possible resolution of this one objection to discharge, to schedule discovery, dispositive motions and trial, and to discuss actions that may be needed to close this case

It is unnecessary for the United States Trustee to pursue more than one objection to discharge. The Court will grant the substituted plaintiffs oral motion to voluntarily dismiss the objection to discharge originally filed by Bankers Trust Company, adversary proceeding number 94-0086, and a separate order of dismissal will be entered in that proceeding, which order will deny the oral motion of the United States Trustee to intervene or to be substituted in adversary proceeding 94-0086.

The Court will grant the defendant's motion to dismiss the objection to discharge filed by Jack F. Marlow based upon the Court's finding that Mr. Mat-low was no longer a creditor when the debtor filed his motion to dismiss for lack of Mr. Marlow's standing and based upon the Court's finding that the United States Trustee delayed unnecessarily in moving to intervene or to be substituted for Mr.

Marlow. Moreover, as stated previously, it is unnecessary for the United States Trustee to pursue more than one objection to discharge. The debtor's motion to dismiss should be granted in order to eliminate unnecessary and costly litigation. As stated previously, the debtor may obtain or be denied a general discharge only once in this case.

Separate orders will be entered in each of these three adversary proceedings and this memorandum opinion will be entered in each of these proceedings.



WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

Dated: 12-9-96

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