IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

IN RE:	**CHAPTER 7**
RICARDO GILDELATORREROCH	**CASE NO. 05-50497**
MICHAEL HEARNE	**PLAINTIFF**
VS	**ADVERSARY NO. 07-05004**
RICARDO GILDELATORREROCH	**DEFENDANT**

Hon. William P. Wessler
1624 24th Avenue
Gulfport, MS 39501

Hon. Wynn E. Clark
2510 16th Street
Gulfport, MS 39501

Hon. Christopher C. Van Cleave
146 Porter Avenue
Biloxi, MS 39533 — Attorneys for Plaintiff

Hon. William J. Little, Jr.[1]
Lentz & Little, P.A.
P.O. Box 927
Gulfport, MS 39052 — Attorney for Debtor/Defendant

Edward Ellington, Judge

[1]Jon C. Thornburg, Esq. and Robert Gambrell, Esq., with the law firm of Gambrell and Thornburg, were the attorneys of record for Ricardo Gildelatorreroch in his chapter 7 proceeding, case no. 05-50497. Mr. Gambrell also filed a Response to Motion to Reopen on November 20, 2006, after which point Mr. Little took over the representation of Mr. Gildelatorreroch.

MEMORANDUM OPINION AND ORDER ON
COMPLAINT TO DECLARE DEBT NOT DISCHARGED

This matter came on for trial on Count I of the *Complaint to Declare Debt Not Discharged* pursuant to 11 U.S.C. § 523(a)(3), filed by the Plaintiff, Michael Hearne, and the *Answer* thereto filed by the Debtor, Ricardo Gildelatorreroch.[2] The Court, having considered the pleadings and the testimony and exhibits presented at trial, along with the parties' post-trial briefs, concludes for the reasons that follow that Count I of the Plaintiff's *Complaint* is well taken and should be granted.

Jurisdiction

This Court has jurisdiction of the subject matter and the parties to this proceeding pursuant to 28 U.S.C. § 1334 and § 157. This matter is a core proceeding as defined in 28 U.S.C. § 157 (b)(2)(I).

Facts and Procedural History

On August 22, 2004, the Debtor, acting in his capacity as a Jackson County Reserve Deputy Sheriff, responded to a call from a convenience store clerk. The Plaintiff was present at the convenience store when the Debtor arrived. The Debtor confronted and ultimately shot the Plaintiff. Subsequently, on February 11, 2005, the Debtor filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code.[3] The Plaintiff had not filed a civil action against the Debtor at the time the Debtor's petition was filed.

---

[2]The Plaintiff's Complaint contained two counts. Count I prayed for relief pursuant to 11 U.S.C. § 523(a)(3); and Count II prayed for relief pursuant to 11 U.S.C. § 523(a)(6). Pursuant to an order of the Court entered on January 28, 2008,wherein the parties agreed to a bifurcation of the trial, the "issues joined in connection with count I of the Complaint" were tried on March 28, 2008, in Gulfport.

[3] Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

The Debtor was aware of the Plaintiff's name as a result of the shooting, and realizing the possibility that a lawsuit may arise from the shooting, the Debtor listed the Plaintiff in his schedules as a potential creditor. Notice of the Debtor's petition was sent to "Michael Hearn c/o George Shaddock, P.O. Box 0080, Pascagoula, MS 39568-0080." In this notice, the Plaintiff's name was misspelled, and the notice was sent to the care of George Shaddock, a criminal defense attorney on the Mississippi Gulf Coast, at P.O. Box 0080 Pascagoula, Mississippi 36568-0080. The Court finds that this is Shaddock's correct business mailing address, notwithstanding the Plaintiff's assertion that "P.O. Box 0080" is not the same as "P.O. Box 80."

The evidence and testimony presented at trial showed that the Plaintiff retained Clyde H. Gunn III, Esq. as his civil attorney, and that Mr. Gunn contacted Mr. Shaddock to consult with him in the event criminal charges were brought against the Plaintiff. None were. There is no evidence before the Court that the Plaintiff ever retained Mr. Shaddock. There is no evidence before the Court that the Plaintiff ever designated Mr. Shaddock as his agent for service of process. The evidence does show that the Plaintiff retained Mr. Gunn as his civil attorney. At trial, the Plaintiff, Mr. Shaddock, and Mr. Gunn each denied having received notice of the bankruptcy filing. Additionally, there is absolutely no evidence before the Court that the Plaintiff had actual notice of the Debtor's bankruptcy filing prior to the Court granting a discharge and closing the case.

The Debtor testified at trial that his bankruptcy attorney had advised him that notice to the Plaintiff's attorney would be sufficient to give the Plaintiff notice of the bankruptcy filing. The Debtor also testified that the only means by which he attempted to verify the name and address of the Plaintiff's attorney was by sorting through newspaper articles and television interviews. The Debtor admitted that he should have made more of an effort to locate the Plaintiff himself, but did

not. Evidence presented at trial showed that the Plaintiff's address was in the telephone directory available during the time period at issue and that the Debtor had access to this directory. However, the Debtor admitted that he failed to look up the Plaintiff's correct address in the then current, local telephone directory.

The deadline to raise objections to discharge in the Debtor's bankruptcy case was May 2, 2005. No objections were filed, and, on July 7, 2005, the Debtor received his discharge and the bankruptcy case was closed. The Plaintiff was unaware of the Debtor's bankruptcy filing at that time.

On October 18, 2005, the Plaintiff, by and through his attorney, Mr. Gunn, filed a civil complaint against the Debtor in the United States District Court for the Southern District of Mississippi, Case No. 1:05-cv-00476-LG-RHW. The Debtor's answer to the complaint filed in district court asserted bankruptcy as an affirmative defense. The Plaintiff first gained knowledge of the Debtor's bankruptcy case at that time.

The purpose of the district court suit, which is still pending, is to determine the amount of damages, if any, to which the Plaintiff is entitled on account of being shot by the Debtor on or about August 22, 2004. As such, the Plaintiff's claim against the Debtor in this adversary proceeding is unliquidated and contingent. The bankruptcy court makes no determination, herein, whether the Plaintiff is entitled to damages from the Debtor or, if he is, in what amount. Those determinations are left to the United States District Court for the Southern District of Mississippi.

On January 25, 2007, the Plaintiff initiated this adversary proceeding by filing his *Complaint to Declare Debt not Discharged.* In Count I, the Plaintiff maintains that the Debtor should be precluded from discharging his debt pursuant to § 523(a)(3) for failing to properly list and provide notice to him, resulting in the loss of opportunity to file an objection to the dischargeability of his debt.

Issue

This issue before the Court in this case is whether the notice the Debtor sent to George Shaddock provided constructive notice of his bankruptcy filing to the Plaintiff, Michael Hearne, so that the Debtor's debt to Hearne was discharged. The Court finds that it did not, and that the Debtor's debt, whatever that may be determined to be, is not dischargeable.

The Law

A.

Section 523(a)(3)of the Bankruptcy Code provides:

> (a) A discharge under §§ 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt
>
> > (3) neither listed or scheduled under §521(l) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit
> >
> > > (A) if such debt is not of a kind specified in paragraph (2) and (4) or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing.
> > >
> > > (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

Section 521(1), Federal Rule of Bankruptcy Procedure 1007,[4] and Rule 7 of the Uniform Local Rules for the United States Bankruptcy Courts in the Northern and Southern Districts of Mississippi ("Local Rule 7") act in concert to charge the Debtor and his attorney with the responsibility of accurately completing his schedules and master address list. Local Rule 7 states

[4]Hereinafter, all Rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

in pertinent part:

> The Debtor shall prepare and present a master address list on forms provided by the clerk. The master address list shall include the correct mailing addresses of the debtor, the attorney for the debtor, all creditors listed on the bankruptcy schedules and the U.S. trustee. The responsibility for maintaining the accuracy of the master address list shall be that of the attorney for the debtor or the debtor filing pro se, and not the responsibility of either the bankruptcy court or the clerk.

The burden is on the debtor to complete his schedules accurately. In re Faden, 96 F.3d 792, 795 (5th Cir. 1996) (citing In re Springer, 127 B.R. 702, 707 (Bankr. M.D. Fla. 1991)). "In the bankruptcy context, the 'only information about the identities and addresses of creditors to be served with the case notices comes from the debtor.'" In re Sedlacek, 325 B.R. 202, 211 (Bankr. E.D. Tenn.2005) (internal citation omitted). The "obligation to list all creditors' names and addresses is part of the debtor's duty of full disclosure that is the quid pro quo for the fresh start provided by the discharge." In re Hicks, 184 B.R. 954, 957 (Bankr. C.D. Cal. 1995).

In addition, constitutional due process requires proper notice. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Centr. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). "The purpose of requiring a debtor to list creditors with their proper mailing addresses is to afford those creditors basic due process notice." Id. (internal citation omitted). In order to satisfy the elements of due process, a debtor's schedules must contain accurate information concerning a creditor's address. SouthTrust Bankcard Ctr. v. Curenton (In re Curenton), 205 B.R. 967, 970 (Bankr. M.D. Ala. 1995). The determination of whether the particular method of notice is reasonable depends on the particular factual circumstances of the case.

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 484 (1988). Additionally, the burden of proof rests with the debtor to show that a creditor had "notice or actual knowledge" under section 523(a)(3). In re Faden, 96 F.3d at 795 (citing U.S. Small Business Admin. v. Bridges, 894 F.2d 108, 111 (5th Cir. 1990)).

The Fifth Circuit spoke directly to the issue of notice in In re Matter of Adams, 734 F. 2d 1094 (5th Cir. 1984). This Court is bound by the precedent set forth in that case. There, the Fifth Circuit held that "[i]t is well settled that if a debtor lists incorrectly the name or address of a creditor in the required schedules, so as to cause the creditor not to receive notice, that creditor's debt has not been 'duly scheduled'... and if the creditor has no actual knowledge of the bankruptcy proceeding, the creditor's debt is not dischargeable." Adams,734 F. 2d at 1098.

The pertinent section used in the Adams case was § 35(a)(3) of The Bankruptcy Act (1976) and provides:

> (a) *Debts not affected by discharge*
>
> A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, 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."

The Adams case was decided under The Bankruptcy Act, before the enactment of the Bankruptcy Code and the subsequent amendments made by BAPCPA. While the statutory language used in Adams and the present statutory language differ textually, their meaning, however, is the same. Nothing in the language of the Code or the BAPCPA amendments necessitates vacating the holding in Adams.

In Adams, the debtor correctly listed the name and address of a creditor on his schedules, but incorrectly listed the same information on his mailing matrix. Adams, 734 F. 2d at 1097. The creditor did not receive notice or have actual knowledge of the debtor's bankruptcy in order to file a timely objection to the discharge of his claim. Id. at 1098. The Fifth Circuit held that the debt was not dischargeable because the creditor was listed incorrectly and never received notice. Id. at 1094.

The Bankruptcy Court for the Southern District of Texas decided a case with facts somewhat similar to the case at bar in In re Hutchinson, 187 B.R. 533 (Bankr. S.D. Tex. 1995). In Hutchinson, the debtor scheduled a creditor with its name in care of the creditor's attorney in pending state court litigation. Id. at 534. There was no dispute that the address for the creditor's state court attorney was correct. Id. In that case, the bankruptcy court held that:

> the proper scheduling of a creditor requires listing the creditor at its own address or at least that of an agent designated for service of process. The Court is mindful that an appropriate address for service on a creditor may change throughout the course of a case by virtue of a notice of appearance filed pursuant to Fed.R.Bankr.P. 2002(g) or by filing of a proof of claim with a different address, **but the initial scheduling which occurs before a creditor or its attorney has made an appearance in the case should be the creditor's own address if it has one.**

Id. at 535 (emphasis added). The Hutchinson Court also pointed out that

> [t]he rules make no mention of scheduling creditors at the address of their last known attorney. *See* Midatlantic Nat'l Bank v. Kouterick (In re Kouterick), 161 B.R. 755, 758 (Bankr. D.N.J. 1993)("Rule 1007(a)(1) provides that the debtor shall file a list containing the names and addresses of each creditor; no mention is made of attorneys."); In re Horton, 149 B.R. 49, 60 (Bankr. S.D.N.Y. 1992)("The Bankruptcy Code and Rules only require that notice be sent to the creditor, not to a creditor's counsel even if that counsel is known."); In re Szczepanik, 146 B.R. 905, 912 (Bankr.E.D.N.Y. 1992)(The Bankruptcy Rules require that a debtor's schedule to list 'The name and address of each creditor.' An attorney's name is not an address.")

Id. at 535-36. "Moreover, '[g]enerally ... an attorney's representation of a party in one action does not make the attorney the agent for the party in an unrelated case between the same parties.'" Id.

(citing Maldonado v. Ramirez, 757 F.2d 48, 51 (3rd Cir. 1985)); Durbin Paper Stock Co. v. Hossain, 97 F.R.D. 639 (S.D. Fla. 1982).

The Fifth Circuit has also held that "service of process is not effectual on an attorney solely by reason of his capacity as an attorney. Rule 4(d)(1) [of the Federal Rules of Civil Procedure] allows service on an agent only if 'authorized by appointment or by law to receive service of process.'" Ransom v. Brennan, 437 F.2d 513, 518-19 (5th Cir. 1971). The validity of service of process upon a party's attorney depends on the authority of the attorney to receive process on behalf of the individual. *See* Maiz v. Virani, 311 F.3d 334, 340 (5th Cir. 2002). This tenet is also evidenced in Bankruptcy Rule 7004 which requires a complaint in an adversary proceeding to be served on the debtor and not just the debtor's bankruptcy attorney, as the attorney for the adversary proceeding may be different than the debtor's bankruptcy attorney. *See* Rule 7004(b)(9).

B.

In his *Post-Trial Brief*, the Debtor argues for the first time that even if the Plaintiff was not properly listed or scheduled nor given notice of the bankruptcy filing, the Plaintiff is still not entitled to an exception from discharge based on In re Stone, 10 F.3d 285 (5th Cir. 1994). In the Stone case, the Fifth Circuit discussed the history of 11 U.S.C. § 523(a)(3)(A) and determined that, in accordance with Robinson v. Mann, 339 F.2d 547, 550 (5th Cir. 1964), "out-of-time amendments would be allowed - but only if exceptional circumstances and equity so required." The Robinson Court set forth three factors for courts to consider when determining whether a debtor's failure to list a creditor will prevent discharge of the unscheduled debt. Stone, 10 F.3d at 290. Pursuant to Robinson, a court should examine 1) the reasons the debtor failed to list the creditor, 2) the amount of disruption which would likely occur, and 3) any prejudice suffered by the listed creditors and the unlisted creditor in question. Id.

This defense based on Stone was not pled in the Answer filed by the Debtor in this case, nor was it asserted at Trial. Rule 8(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings by Bankruptcy Rule 7008, requires that a responsive pleading must set forth certain enumerated affirmative defenses as well as "any other matter constituting an avoidance or affirmative defense." Fed. R. Civ. P. 8(c). An affirmative defense is defined as "[a] defendant's assertion raising new facts or arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all allegations in the complaint are true." *See* Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2nd Cir. 2003)(citing Black's Law Dictionary 430 (7th ed. 1999)). The Fifth Circuit has held:

> This Court does not look with favor upon tardy arguments that are brought to the lower court's attention post-trial after counsel has had the opportunity to salvage what [he] may from the record.

Risher v. Aldridge, 889 F.2d 592, 595 (5th Cir. 1989). Therefore, this Court finds that by failing to raise this defense until post-trial briefing, the Debtor has waived it. *See* Cunningham v. Healthco, Inc., 824 F.2d 1448, 1458 (5th Cir. 1987)("Defenses not raised at trial are ordinarily waived by the parties failing to raise them.")(internal citations omitted); Richardson v. Educ. Loan Serv. Ctr. Inc. (In re Richardson), 2005 WL 4677829, *4 (Bankr. E.D. La. 2005)(*quoting* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999))("The Federal Rules require an affirmative defense to be pleaded; failure to plead such a defense constitutes waiver."); Total Technical Serv., Inc. v. Whitworth (In re Whitworth), 150 B.R. 893, 899 (Bankr. D. Del. 1993); Egg Crate, Inc. v. Kossman (In re Kossman), 105 B.R. 283, 287 (Bankr. W.D. Penn. 1989)("Relief may be granted on the basis of a theory [] only if that theory was set forth in the pleadings or was tried with the express or implied consent of the parties.")(internal citation omitted). The Court is not inclined to adjudicate a defense the Plaintiff did not know was being asserted and, therefore, had no opportunity to rebut.

Even if the Court were to consider Debtor's tardy argument, the Stone case is distinguishable from the case at bar. Before the bankruptcy court granted a discharge and the case was closed in Stone, the debtors amended their schedules to include the previously unscheduled creditors and gave them notice in time to protect their rights. Stone, 10 F.3d at 292. The Stone court found that under those circumstances, § 523(a)(3)(A) was inapplicable, and the debt was discharged. In the case at bar, the Debtor never made any effort to amend his schedules to include the Plaintiff's claim, and the Plaintiff had no notice of the bankruptcy case until after the discharge was granted and the case closed. Even after the Plaintiff filed a suit against the Debtor in district court, the Debtor made no effort to cure his deficiency. Since the Debtor did not ever request an out-of-time amendment to cure his scheduling deficiency, the Stone case is not instructive, and the Debtor's reliance upon it is misplaced.

Moreover, as the party requesting equitable relief from the consequence of his failure to schedule the Plaintiff's claim properly so as to give the Plaintiff notice, the Debtor bears the burden to demonstrate that he is entitled to the equitable relief he seeks. The Court finds that, if it were to consider Debtor's newly asserted defense, the Debtor failed to bear its burden to provide the Court with the requisite evidence needed to prevail.

According to Stone and Robinson, the Court must first consider the reasons the Debtor failed to list the creditor. The Debtor testified that he followed his bankruptcy attorney's advice regarding listing the Plaintiff in care of the attorney he thought was representing him. The evidence showed that the Debtor did not even look in the then current telephone directory to attempt to locate the Plaintiff. While the evidence presented does not demonstrate an improper motive or fraud, it certainly demonstrates a lack of fundamental diligence on the part of both the Debtor and his

bankruptcy attorney which the Court is loathe to condone. This factor weighs against the Debtor.

The second Stone / Robinson factor focuses on undue disruption to the courts' dockets. Had the Debtor in this case moved to reopen the case and amend his schedules after being served with the Plaintiff's district court complaint, the Debtor might have minimized the disruption to the Court's docket. Instead, the Debtor objected to the case being reopened and has never made any attempt to cure his scheduling omission. In this case, the Debtor's failure to properly schedule has caused significant undue disruption to the Court's docket, including, but not limited to, an additional hearing in the main case, a hearing in the adversary proceeding, a status conference, and a trial. This factor weighs against the Debtor.

The third Stone / Robinson factor evaluates the prejudice to the creditor, in this case the Plaintiff. No testimony was offered by the Debtor at trial regarding this factor.

As stated previously, the Court finds that the Debtor's defense based on the Stone case was not timely pled and was, therefore, waived. Additionally, the Court finds that even if it determined that the Stone defense was timely pled, the Debtor's reliance upon Stone is misplaced since the Debtor never attempted to cure his scheduling deficiency. Further, the Court finds that even if it determined that the Stone defense applied to the Debtor, the Debtor failed to bear its burden of proof as to the defense.

Consequently, the Court finds that based on the facts of this case, the Court is bound by the precedent set in Adams and Hutchinson with regard to the notice issue.

Application of the Law to the Facts

In the case at bar, the Debtor sent notice of his bankruptcy filing to the attorney he thought was representing the Plaintiff in another capacity involving the shooting. At trial, the evidence

demonstrated that the Debtor was incorrect in that assumption. However, even if, for the sake of argument only, Mr. Shaddock did represent the Plaintiff in a different capacity related to the incident in which the Debtor shot the Plaintiff, notice to Mr Shaddock of the Debtor's bankruptcy filing was not effective as to the Plaintiff for the following reasons: (1) Mr. Shaddock's representation of the Plaintiff in a different action did not make Mr. Shaddock the agent for the Plaintiff in the bankruptcy action; and (2) the Plaintiff did not appoint Mr. Shaddock as his agent for service of process. *See* In re Adams, 734 F. 2d at 1094; Ransom, 427 F.2d at 513; Maiz, 311 F.3d at 334; In re Hutchinson, 187 B.R. at 533.

Application of Adams to the instant case leads the Court to conclude that the Plaintiff's debt was not "duly scheduled", the Plaintiff did not receive timely constructive notice, and the Plaintiff did not have "actual knowledge" of the Debtor's bankruptcy petition. Therefore, the Plaintiff's debt is "not dischargeable." *See* Adams,734 F. 2d at 1098.

Conclusion

Based on the foregoing, the Court concludes that Count I of the *Complaint to Declare Debt Not Discharged* filed by the Plaintiff, Michael Hearne, is well-taken and should be granted. Accordingly, the Court concludes that the Plaintiff is entitled to a judgment of non-dischargeability pursuant to §523(a)(3).

A separate judgment consistent with this opinion will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

SO ORDERED, this the 30th day of October, 2008.

/ s / EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE