

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: JOHN L. HERZOG, SR.

CASE NO. 02-13657

THOMAS R. GLOVER

PLAINTIFF

VERSUS

ADV. PROC. NO. 02-1179

JOHN L. HERZOG, SR.

DEFENDANT

Access to the exhibits referred to in this opinion may be obtained by contacting the court.

OPINION

On consideration before the court is a motion for summary judgment filed by the above captioned plaintiff, Thomas R. Glover, in the adversary proceeding that he initiated against the defendant, John L. Herzog, Sr.; a timely response having been filed by the said defendant; and the court, having heard and considered same, hereby finds as follows, to-wit:

I.

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

II.

Factual Summary

On January 25, 1999, the defendant, John L. Herzog, Sr., (“Herzog”), filed a voluntary petition for relief pursuant to Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Arkansas (“Arkansas Bankruptcy”), seeking, in part, to discharge obligations owed to the plaintiff, Thomas Glover (“Glover”). Glover filed an

adversary proceeding against Herzog objecting to his discharge pursuant to 11 U.S.C. §727(a), based on allegations that Herzog had made false oaths and had participated in fraudulent conduct. During the trial of the adversary proceeding in the “Arkansas Bankruptcy,” Herzog filed a motion in open court requesting that his discharge be waived. The waiver would specifically include the debts owed to Glover. The bankruptcy court granted Herzog’s motion after being assured that Herzog understood the consequences of his actions. Evidencing the pertinent events which occurred in the “Arkansas Bankruptcy,” particularly the waiver of discharge, are the following documents, which are appended hereto as lettered exhibits, to-wit:

Exhibit A - Debtor’s motion for approval of waiver of discharge pursuant to 11 U.S.C. §727(a)(10).

Exhibit A1 - Debtor’s waiver of discharge pursuant to 11 U.S.C. §727(a)(10), with the attached affidavit of Herzog.

Exhibit B - Transcript excerpt from the adversary proceeding in the “Arkansas Bankruptcy,” pages 381 - 385.

Exhibit C - Order approving Herzog’s waiver of discharge, executed by United States Bankruptcy Judge James G. Mixon, dated September 15, 2000.

Exhibit D - Notice of No Discharge filed in the “Arkansas Bankruptcy,” dated October 4, 2000.

In his affidavit, Exhibit A1 hereinabove, Herzog specifically stated under oath as follows:

3. My waiver of discharge represents a conscious and fully informed judgment reached after consultation with my attorney as to the consequences thereof.
4. My waiver of discharge is unconditional and without qualification.
5. My waiver of discharge extends to all of my debts as such term is defined in 11 U.S.C. §101(12).
6. Based on the foregoing, I respectfully request that the court approve my waiver of discharge without the necessity of a hearing in order to avoid unnecessary

expense and delay.

The transcript of the proceeding, Exhibit B hereinabove, is also significant. The following testimony is extracted, to-wit:

THE COURT: Mr. Streetman, do you have any objection?

MR. STREETMAN: No, Your Honor. I think probably under the Code he's entitled to that.

THE COURT: Mr. James, do you?

MR. JAMES: Your Honor, I do in one sense. Besides not liking it, I think we're right; we're stuck under the Code with it. When and if you accept this discharge, I do want to make a separate motion under Section 105. But prior to you accepting this discharge, given this Motion and the Waiver of Discharge, given the serious nature of it, I believe it would be appropriate for the Debtor to testify and be examined with regard to this Waiver. And we would ask that that be done.

THE COURT: For what purpose?

MR. JAMES: To make sure it's a clear and knowing Waiver on the part of the Debtor and to resolve any other issues which may arise with it.

THE COURT: I have no reason to think - Doctor Herzog, do you understand what the Waiver of Discharge is?

DR. HERZOG: Yes, Sir.

THE COURT: There's no reason to think he doesn't. It's a simple proposition, and it would - I just don't see any point in it.

MR. JAMES: Okay.

THE COURT: He's entitled to do that. He's caving in to the Complaint. I mean, he's conceding that he's not entitled to a discharge.

Prior to the initiation of the "Arkansas Bankruptcy," Glover had filed a complaint against Herzog and other defendants in the Circuit Court of Jefferson County, Arkansas, Cause No. CIV-97-250-2. Following the conclusion of the "Arkansas Bankruptcy" and Herzog's waiver of

discharge, the state court cause of action proceeded to trial and judgment. A copy of the actual judgment and verdict form, dated November 29, 2001, is attached to this opinion as Exhibit E.

In pertinent part, it provides as follows:

1. That Judgment be and is hereby granted in favor of Plaintiff Thomas Glover, against Defendant John Herzog as follows:

(1) Eight Hundred Ninety Eight Thousand Eight Hundred Eighty Six and 45/100 Dollars (\$898,886.45) in compensatory damages; (2) prejudgment interest at the rate of six percent (6%) per annum for the promissory note from its date of execution on November 5, 1996, in the amount of One Hundred Fifty Seven Thousand Four Hundred Forty One and 60/100 Dollars (\$157,441.60); (3) prejudgment interest for breach of oral contract from the date of filing the Complaint (March 21, 1997) until present, in the amount of Ninety Thousand Four Hundred Sixty Five and 60/100 Dollars (\$90,465.60); (4) costs of \$110,00, for a total Judgment of One Million One Hundred Forty Six Thousand Nine Hundred Three and 70/100 Dollars (\$1,146,903.70), together with post-judgment interest to accrue at the rate of ten percent (10%) per annum from November 15, 2001, until paid, for all of which garnishment and execution may issue.

2. Defendant John Herzog is hereby ordered to prepare a schedule, verified by affidavit, as aforesaid, and shall file the same with the Clerk of this Court, providing a copy to opposing counsel.

Subsequently, Herzog filed a voluntary petition for relief in the United States Bankruptcy Court for the Northern District of Mississippi, seeking, in effect, to discharge Glover's debt to which discharge was waived in the "Arkansas Bankruptcy." This, of course, followed the

judgment being entered in the Circuit Court of Jefferson County, Arkansas. In response to this most recent bankruptcy filing, Glover initiated the adversary proceeding, presently before the court, against Herzog to deny the dischargeability of the debts owed to Glover pursuant to §523(a)(10) of the Bankruptcy Code. As noted in the opening paragraph hereinabove, Glover also filed a motion for summary judgment which is the subject of this opinion.

In his response to Glover's motion for summary judgment, Herzog submitted another affidavit, under oath, which is attached to this opinion as Exhibit F. In pertinent part, Herzog states as follows, to-wit:

2. I did file a waiver of discharge in a proceeding bankruptcy in the State of Arkansas and the indebtedness to the Plaintiff in this cause was listed as a potential Creditor.
3. Prior to my filing the bankruptcy in Arkansas, I was the Defendant in that certain civil action in the Circuit Court of Jefferson County, Arkansas No. CIV-97-250-2, a copy of the Complaint and Judgment is attached to this Affidavit, marked Exhibit "A-1" and "A-2" respectively. This action was stayed due to me filing bankruptcy
4. During the hearing on the Plaintiff's Complaint to Determine the Dischargeability of a Debt, I was advised by my attorney to waive discharge in the bankruptcy and take my chances with the civil action. I took this to mean that I was simply getting out of Bankruptcy Court. I followed this advise not knowing that I could not, at a later date, return to Bankruptcy Court and discharge any part of the Judgment that may be entered in the civil action.
5. If I had known all the circumstances behind the waiver of discharge, i.e. not being able to file a second Petition in Bankruptcy Court for this indebtedness, I would not have agreed to same and go through another trial. I would have stayed in the Bankruptcy Court and taken my chances in that particular trial. Getting out of the bankruptcy and back into the civil matter was at a great expense to me, not to mention the emotional trauma.
6. Although, at the time of my waiver, I felt it was a "conscious and fully informed Judgment"; however, I subsequently discovered the total ramifications of such a waiver. If I had known the full ramifications, I would never have agreed to this

waiver of discharge.

III.

Glover's complaint is based on §523(a)(10) of the Bankruptcy Code which provides as follows, to-wit:

(a) A discharge under section 727, 1141, 1228(a) 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c (1), (2), (3), (4), (6), or (7) of such Act;

IV.

Summary judgment is properly granted when pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056; Uniform Local Bankruptcy Rule 18. The court must examine each issue in a light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Phillips v. OKC Corp., 812 F.2d 265 (5th Cir. 1987); Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). The moving party must demonstrate to the court the basis on which it believes that summary judgment is justified. The nonmoving party must then show that a genuine issue of material fact arises as to that issue. Celotex Corporation v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Leonard v. Dixie Well Service & Supply, Inc., 828 F.2d 291 (5th Cir. 1987), Putman v. Insurance Co. of North America, 673 F.Supp. 171 (N.D. Miss. 1987). An

issue is genuine if “there is sufficient evidence favoring the nonmoving party for a fact finder to find for that party.” Phillips, 812 F.2d at 273. A fact is material if it would “affect the outcome of the lawsuit under the governing substantive law.” Phillips, 812 F.2d at 272.

V.

Under ordinary circumstances, this court might euphemistically attempt to address the events occurring during Herzog’s serial bankruptcy filings. However, this is not an appropriate occasion for euphemisms. Rather, the scenario, orchestrated by Herzog, is a blatant effort to abuse the bankruptcy process. Herzog cannot manufacture a disputed material issue of fact by simply submitting a second sworn affidavit that is directly adverse to the earlier affidavit that he submitted in the “Arkansas Bankruptcy,” an affidavit which is coincidentally corroborated by the adversary proceeding transcript. Succinctly stated, Herzog is judicially estopped from attempting to take his current legal position which is completely inconsistent with the position that he took in the “Arkansas Bankruptcy.”

The Fifth Circuit Court of Appeals expressly recognized the doctrine of judicial estoppel in Ergo Science, Inc. v. Martin, et al, 73 F.3d 595 (5th Cir. 1996), where the court stated as follows:

Viewed in this light, the issue is more akin to judicial estoppel. The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. United States v. McCaskey, 9 F.3d 368, 378 (5th Cir. 1993), cert. denied, 511 U.S. 1042, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994). We recognize the applicability of this doctrine in this circuit because of its laudable policy goals. The doctrine prevents internal inconsistency, precludes litigants from “playing fast and loose” with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment.

73 F.3d 595 at 598.

See also, In the Matter of Coastal Plains, Inc., 179 F.3d 197 (5th Cir. 1999), and Hall v. GE Plastic Pacific PTE Ltd., et al, 2003 WL 1747764 (5th Cir. 2003).

To allow Herzog to go any further in this adversary proceeding would literally make a mockery of the “Arkansas Bankruptcy” where Herzog unconditionally and without qualification waived his discharge. This waiver represented a “conscious and fully informed judgment” on Herzog’s part “reached after consultation with his attorney as to the consequences thereof.” Because of the clear and unambiguous language in the former affidavit, this court disregards in its entirety the most recent affidavit executed by Herzog. Consequently, there is no genuine issue of material fact remaining in dispute insofar as this proceeding is concerned. Glover is entitled to summary judgment as a matter of law.

An order will be entered consistent with this opinion.

This the 5th day of May, 2003.

_____/s/_____
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE

