UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

In re: CLAYTON S. DUNCAN and CLAUDIA R. DUNCAN,	)	Case No. 02-00196-LYN
Debtors,	)	
	)	Adv. No. 06-06022
CLAYTON S. DUNCAN,	)	
Plaintiff,	)	
v.	)	
SMITH TURF & IRRIGATION, LLC,	)	
Defendant,	)	

JUDGMENT

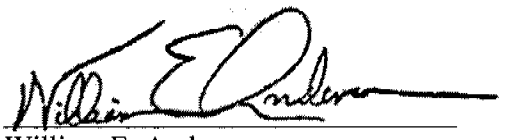
For the reasons stated in the accompanying memorandum,

It is ORDERED, ADJUDGED AND DECREED that the claims against the Plaintiff resulting from its guarantee of debts incurred by Duncan Irrigation, Inc., on and after March 2, 2005, and on and before September 30, 2005, were not claims against the estate of the Plaintiff in Bankruptcy Case no. 02-00196-LYN. Accordingly, such claims were not discharged by the discharge order in Case no. 02-00196-LYN. Furthermore, the Plaintiff's guarantee of debts owed to the Defendant by Duncan Irrigation, Inc., was not extinguished by law in Case no. 02-00196-LYN.

Upon entry of this judgment, the Clerk of this Court shall forward copies of this

judgment to Douglas E. Little, Esq., counsel for the plaintiff and Paul S. Bliley, Esq., counsel for the defendant.

Entered on this 25th day of October, 2006.



William E. Anderson
United States Bankruptcy Judge

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Plaintiff,	)	
v.	)	
SMITH TURF & IRRIGATION, LLC,	)	
Defendant,	)	

MEMORANDUM

This matter comes before the court on a complaint by Clayton S. Duncan ("the Plaintiff") seeking a declaration that any personal obligation he may have to pay amounts owed by Duncan Irrigation, Inc., to Smith Turf & Irrigation, LLC, ("the Defendant") was discharged by virtue of the discharge order entered in Bankruptcy Case no. 02-00196-LYN. The Defendant is successor in interest to Smith Turf & Irrigation Company. (The Defendant and Smith Turf & Irrigation Company are referred to collectively as "Smith").

This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This proceeding is a core proceeding. 28 U.S.C. § 157(b)(2)(I). This Court may enter a final order. This memorandum shall constitute the Court's findings of fact and conclusions of law as directed by Fed. R. Civ. P. 52, which is made applicable in this proceeding by Fed. R. Bankr. P. 7052.

Facts

Prior to the filing of the above-styled chapter 7 petition, the Plaintiff was president and sole shareholder of Duncan Irrigation, Inc., a Virginia Corporation. Smith Turf and Irrigation Company supplied goods to Duncan Irrigation, Inc.

On or about March 7, 2001, as part of a settlement agreement concerning outstanding debts, the Plaintiff executed a personal guaranty ("the Personal Guaranty"), guaranteeing the payment of all debts owed by Duncan Irrigation, Inc. to Smith Turf and Irrigation Company. As the successor in interest to Smith Turf and Irrigation Company, the Defendant became the guarantee (beneficiary) under the Personal Guaranty. The Plaintiff has never withdrawn his obligation under the Personal Guaranty by giving notice to the Defendant, either orally or in writing.

On January 16, 2002, the Plaintiff and his wife commenced the above-styled chapter 7 case by filing a bankruptcy petition. Smith Turf & Irrigation Company was not given notice, either actual or constructive, that the Plaintiff and his wife had filed the bankruptcy petition. The case was administered as a no-asset case and was closed on April 24, 2002.

After the case was closed, Smith Turf & Irrigation Company continued to provide Duncan Irrigation, Inc, with goods on credit. In March and April of 2003, Duncan Irrigation, Inc., informed Smith Turf & Irrigation Company that it could not meet its obligations under

payment schedule that the parties had agreed upon in March of 2001. The parties agreed to restructure the debt again.

Duncan Irrigation, Inc., defaulted. In late 2005, Smith Turf & Irrigation, LLC, instituted a collection action in the Circuit Court for Henrico County, Virginia, in the amount of $118,847.06 against the Plaintiff based on the Personal Guaranty and debts then owed to the Defendant by Duncan Irrigation, Inc. ("the Subject Debt"). All of the Subject Debt is based on purchase-money credit extended to Duncan Irrigation, Inc., by the Defendant from March 2, 2005, to September 30, 2005. After the collection action was commenced, the Plaintiff informed the Defendant that he had filed a petition in 2002 commencing the above-styled bankruptcy case. The Plaintiff asserted that the debts owed pursuant to the Personal Guaranty were discharged by the discharge order in that case.

The Plaintiff filed a motion to reopen the 2003 bankruptcy case which was granted on January 25, 2006. The Plaintiff then filed the instant adversary complaint, asking this Court to declare that the Subject Debt was discharged by the discharge order in his chapter 7 case.

Discussion

The parties have stipulated to the facts and agree that the matter is ripe for adjudication on cross-motions for summary judgment. A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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. Fed. R. Civ. P. 56(c) as made applicable by Fed. R. Bankr. P. 7056. The parties need not formally offer their outside matter as evidence or have it marked as an exhibit at the hearing on the motion. Wright, Miller & Kane, Federal

Practice and Procedure: Civil 3d, § 2721, p. 366 (1998). The court may not try issues of fact on a Rule 56 motion but may only determine whether there are issues to be tried. Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d,§ 2712, p. 205-6 (1998) (Citations omitted.). Summary judgment is improper if the existence of material fact issues is uncertain. Id. at 210.

The issue before the court is whether the Subject Debt was a debt subject to the discharge order. A discharge discharges a chapter 7 debtor from all debts that arose before the date of the order for relief unless the debt is one excepted under Section 523. 11 U.S.C. § 727(b).[1] The filing of a voluntary petition under any chapter of the bankruptcy code constitutes an order for relief. 11 U.S.C. § 301. Consequently, the Plaintiff's discharge discharged all of his debts that "arose" before he filed his petition, that is before January 16, 2002.

This, of course, begs the question: Did the Subject Debt arise before that date? A "debt" is a liability on a claim. 11 U.S.C. § 101(12). A "claim" includes any right to payment that is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured. 11 U.S.C. § 101(5).

The Debtor argues that the Subject Debt is based on a contingent claim that arose pre-petition. One Court has defined a Contingent claim as follows:

> The court concludes that claims are contingent as to liability if the debt is one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger the liability of the debtor to the alleged creditor and if such triggering event or occurrence was one reasonably contemplated by the debtor and

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[1] Section 727(b) provides:

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

creditor at the time the event giving rise to the claim occurred.

In re All Media Properties, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980). The Court in All Media indicated in dicta[2] that this definition includes claims arising from a guarantee to pay a third-party debt. "Thus, in the case of the classic contingent liability of a guarantor of a promissory note executed by a third party, both the creditor and guarantor knew there would be liability only if the principal maker defaulted. No obligation[3] arises until such default." All Media, 5. B.R. at 133.

If we combine the definition of a claim under Section 101(5) and the definition of a contingent claim in All Media in the context of a consensual guaranty, we may state that a creditor has a contingent claim against a guarantor if the guarantor will be required to pay the creditor only upon the occurrence or happening of an extrinsic event, the possibility of which is contemplated by the guarantor and the creditor.

If we are going to determine when the claim arises, we must determine what events, including the triggering event, are necessary before the debtor is obligated to make payment. We then must determine which of those events is the extrinsic triggering event, keeping in mind that the claim must arise before the occurrence of that event.

Three events must occur before a guarantor of debtor's debt is obligated to pay the debtor's creditor: (1) The guarantor must execute a guarantee; (2) the creditor must give value[4]

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[2] The dispute in All Media did not concern a debt arising from a guarantee.

[3] As will be seen, the guarantor's obligation arises upon default, but a contingent claim against the guarantor in bankruptcy arises before default.

[4] Under some circumstances, it may be possible for the creditor to give other consideration, such as a promise to give value. The distinction, however, is not relevant to the dispute herein.

to the debtor causing the debtor to be indebted to the creditor; and (3) the debtor must default on payment of the debt that the guarantor has guaranteed.[5]

The extrinsic triggering event must be one of these three events. If either the first or the second event, or both the first and second events, occur, a guarantor is not required to pay the creditor. Consequently, neither the first or second event, or both of them together, is the triggering event in the context of a consensual guarantee. It is only upon the happening of the third event, default, that the guarantor is required to make payment to the creditor. Default is the extrinsic triggering event contemplated by the parties. Consequently, it may be concluded that a contingent claim in the context of a consensual guarantee must arise before the debtor defaults on his or her obligation to the creditor.

And the contingent claim can only arise after the first two events have occurred. If neither of the first two events occurs, there can be no default and the guarantor will have no obligation to pay the creditor. If the creditor has given value to the debtor but the guarantor has not executed a guaranty, the guarantor cannot be obligated to pay the creditor upon default. If the guarantor has executed the guaranty, but the creditor has not extended value, there can be no default and the guarantor cannot be obligated to pay the creditor.

Consequently, when a debtor in bankruptcy is a guarantor, the creditor will only have a contingent claim against the bankruptcy estate if the guarantor executed a guarantee pre-petition and the creditor extended value to the third-party debtor pre-petition and if the third-party debtor has not, as of the date of petition, defaulted on his or her obligation to pay the creditor. If these conditions are met, then the creditor will have claim against the debtor's estate to the extent that

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[5] It is also possible that a creditor may be required under a guaranty to make demand for payment before the guarantor owes the creditor. This possibility is not relevant to this analysis.

it has given value that is guaranteed by the debtor in bankruptcy. To summarize, a creditor has a contingent claim against a debtor in bankruptcy if, as of the date of petition, (1) the debtor in bankruptcy has guaranteed the repayment of debt owed to the creditor by a third party-debtor (2) the creditor has given value to the third-party debtor; and (3) the third-party debtor has not default on his or her obligation to the creditor.

There is judicial support for this definition of a contingent claim when the debtor is the consensual guarantor for the payment of a third-party debt. In Resolution Trust Corporation v. Haught (In re Haught), 120 B.R. 233 (Bankr. M.D.Fla. 1990), a case on all fours with the one at the bar, the debtor executed the guaranty pre-petition, but the creditor gave value post-petition, the Court held that the contingent claim arose post-petition, not when the guarantee was executed. In Haught, the debtor guaranteed a fully funded $300,000.00 line of credit extended to Mainstar, Inc., ("Mainstar) by both Freedom Savings and Loan ("Freedom S&L") and the Resolution Trust Corporation ("the RTC") as the assignee of Freedom S&L. The debtor filed a chapter 7 petition but scheduled neither Freedom S&L nor the RTC as creditors in the case. After the case was filed, Mainstar repaid Freedom S&L in full.

Thereafter, Freedom S&L lent additional funds to Mainstar under the line of credit. Mainstar defaulted and the RTC filed a complaint against the debtor to determine whether the debtor's obligation to repay the debt arising from the lending of the additional funds were dischargeable. The Court held, without discussion, that it was irrelevant whether Freedom S&L and the RTC received notice of the case because the debts in question arose post-petition and were consequently unaffected by the debtor's discharge. Haught, 120 B.R. at 235. While the Court gave no basis for the conclusion that the debts arose post-petition, it is clear that the Court

determined that the relevant date was the date that the Freedom S&L and the RTC gave value, not the date that the guaranty was executed.

In Stucker v. Cardinal Building Materials, Inc., (In re Stucker), 153 B.R. 219 (Bankr. N.D. Ill. 1993) the debtor, in 1989, guaranteed the debts owed by Diversified Home Services, Inc., ("Diversified") to Cardinal Building Materials, Inc., ("Cardinal"). The debtor filed a chapter 7 petition, but did not schedule Cardinal as a creditor. No claims bar date was set and the case was closed after the trustee determined that there no assets available to administer. After Diversified defaulted on a debt to Cardinal, Cardinal brought a suit in state court against the debtor resulting in a judgment in the amount of $31,996.00. The bankruptcy case was reopened and the debtor brought an action to determine whether the debt arising from the guarantee was non-dischargeable. Cardinal argued that the claim did not arise until Diversified defaulted on its debt to the creditor. The Court disagreed and concluded that the subject debt was discharged because Cardinal's claim against the debtor "arose" when the debtor executed the guarantee in 1989.

In Stucker, the debtor executed the guarantee pre-petition. The Court did not discuss when the creditor extended value to Diversified, but rather held that the debtor's "pre-petition guarantee gave rise to a contingent claim . . ." Stucker, 153 B.R. at 223. While it is unclear whether the creditor extended credit to Diversified pre-petition and it may fairly inferred that it was.

The Plaintiff cites a number of opinions in support of the proposition that the Subject Debt was discharged, but none of these opinions concern a claim based on a consensual guaranty agreement. See Grady v. A. H. Robins, Inc., 839 F.2d 198 (4th Cir. 1988) (Claim based on

product liability tort), In re Parker, 264 B.R. 685 (10th Cir B.A.P. 2001), affd. 313 F.3rd 1267 (10th Cir. 2002) (Claim based on tort for legal malpractice), In re France, 138 B.R. 968 (D.Colo. 1992) (Based on a workman's compensation claim),

The Plaintiff also argues that his discharge extinguished the Personal Guaranty. The Court disagrees. A discharge operates as an injunction against the commencement or continuation of an action to collect any discharged debt as a personal liability of the debtor. 11 U.S.C. § 524(a)(2). A discharge does not extinguish a guarantee under which the debt may have arisen. The Bankruptcy Code contains no provision that either extinguishes or voids contracts that include a promise by a debtor to guarantee the debts of third parties. It is only the debts that arise pursuant to such guarantees that are affected by the discharge in bankruptcy. Consequently, the guarantee survives the discharge in bankruptcy.

The Plaintiff cites Motley v. Equity Title Co. (In re Motley), 268 B.R. 237 (Bankr. C.D.Cal. 2001) in support of the argument that a discharge extinguishes a guarantee. In Motley, in 1984 the debtors guaranteed payments due under a lease. In 1994, they filed a petition and eventually received a discharge in a no-asset chapter 7 case. In 1997, the tenants ceased making payments under the lease. The landlord brought suit in state court and obtained a judgment against the debtors and the defaulting tenant in the amount of approximately $92,000.00. The landlord recorded the judgment and obtained a lien on the debtors' residence.

Eventually, the debtors sold their residence. The buyer's lender required a title insurance policy demonstrating that it held a first position deed of trust. The title insurance company required an indemnity agreement from the debtors and a deposit from the debtors in the amount of the judgment. After the sale closed, the title insurance company paid the landlord the

judgment amount and made claim against the deposited amount. The debtors filed a motion in state court to vacate the judgment. The Court denied the motion.

The debtors filed a second bankruptcy petition. The Bankruptcy Court held that any obligation under the 1984 Guaranty arose when the Guaranty was executed and that any obligation to the landlord was discharged in the bankruptcy case filed in 1994.

The Court reasoned that:

> . . . At the time that the rent accrued the guaranty was gone. The United States Supreme Court has stated: "a bankruptcy discharge extinguishes ... an action against the debtor *in personam*...." Johnson v. Home State Bank, 501 U.S. 78, 84, 111 S.Ct. 2150, 2154, 115 L.Ed.2d 66 (1991). Thus there was no guaranty when [the tenant] defaulted on its rent obligations and [the creditor] brought its unlawful detainer action.

Motley, 268 B.R. at 241.

This Court respectfully declines to follow the reasoning in Motley. As noted, a discharge injunction enjoins any action to collect the discharged debt. See 11 U.S.C. § 524(a)(2). It does not void or extinguish a guarantee just because it enjoins a creditor from collecting a debt from a third party guarantor. Stated another way, just because a debt is uncollectible if the underlying basis for the debt is voided does not mean that the underlying basis for the debt is voided if the creditor is enjoined by the discharge injunction from collecting the debt.

Conclusion

There are no genuine issues of material fact. This matter is ready for adjudication on cross-motions for summary judgment. A creditor has a contingent claim against a debtor in bankruptcy if, as of the date of petition, (1) the debtor in bankruptcy has guaranteed the repayment of debt owed to the creditor by a third party debtor (2) the creditor has given value to the third-party debtor; and (3) the third-party debtor has not default on his or her obligation to

the creditor. In this case, the Plaintiff executed the guarantee pre-petition, and the default occurred post-petition, but the Defendant extended the credit creating the Subject Debt post-petition. Consequently, the claim arose post-petition. As such it did not constitute a contingent claim against the Plaintiff's bankruptcy estate and was not discharged by the Plaintiff's discharge. The Defendant is entitled to a judgment as a matter of law.

An appropriate judgment shall issue.

Upon entry of this memorandum the Clerk shall forward copies of this memorandum to Douglas E. Little, Esq., counsel for the plaintiff and Paul S. Bliley, Esq., counsel for the defendant.

Entered on this 25th day of October, 2006.

William E. Anderson
United States Bankruptcy Judge