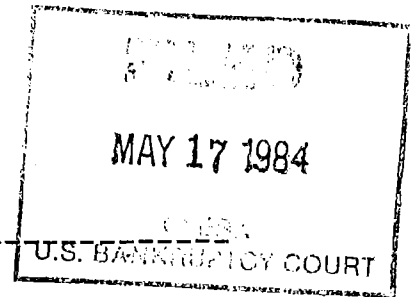


UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN



In re:

Case Number:

RICHARD H. HUTTER,

EF7-82-01275

Debtor.

MENOMONIE FARMERS CREDIT UNION,
Falls Branch,

Plaintiff,

Adversary Number:

vs.

83-0300-7

RICHARD H. HUTTER,

Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW,
AND
ORDER GRANTING MOTION TO DISMISS

Menomonie Farmers Credit Union, Falls Branch, by Attorney D. Peter Seguin of Seguin & Wing, having filed an Amended Complaint; and Debtor Richard H. Hutter, by Attorney Leo A. Beskar of Rodli, Beskar & Boles, S.C., having moved to dismiss and for attorneys' fees; and the Debtor's Motion having come on for a hearing; the Court, having considered the argument of counsel and the complete record and file herein, and being fully advised in the premises, FINDS THAT:

1. On April 11, 1979, the Debtor signed a Consumer Farm Security Agreement with Menomonie Farmers Credit Union, Falls

Branch (MFCU), indicating that he was the owner of two H & S self-unloading chopper boxes (Model XL, serial nos. 1469 & 1470) and two Lindsay wagons (Model 225-12 ton).

2. On November 17, 1980, the Debtor signed a Consumer Note with MFCU which included a security agreement granting MFCU a security interest in the aforementioned boxes and wagons.

3. On July 22, 1982, the Debtor filed for relief under Chapter 7 of the Bankruptcy Code.

4. Schedule A-2 of the Debtor's petition listed MFCU as a secured creditor holding a security interest in the aforementioned boxes and wagons.

5. On August 5, 1982, this Court notified creditors that the last day to object to the discharge of the Debtor was October 18, 1982.

6. On August 28, 1982, Trustee Peter F. Herrell conducted an auction of the Debtor's non-exempt personal property.

7. At said auction, the auctioneer was informed by the Debtor and the Debtor's father and brother that the aforementioned boxes and wagons were not the property of the Debtor. Accordingly, the auctioneer did not sell the boxes and wagons.

8. On the same day as the auction, the auctioneer notified MFCU of the events set forth above and MFCU, in turn, notified its attorney (at that time MFCU was not represented by Attorney Seguin).

9. On December 13, 1982, the Debtor's discharge was concluded.

10. On December 17, 1982, MFCU's attorney wrote to the Debtor's attorney, in pertinent part:

. . . apparently I was in error in alleging that Hutter had sold certain items to his father and brother. Apparently, the items consisting of a couple of choppers and a couple of wagons were sold directly from the dealers to the parties involved, and never were owned by Mr. Hutter.

. . .

It seems to me that mortgaging property in which you have no interest is clearly fraudulent, and perhaps criminal. It further seems based on this new information we would be able to prevail upon the bankruptcy court to re-open the case and object to the discharge as to us. . . .

11. On January 7, 1983, the Debtor's attorney responded, in essence, that there had been no wrong-doing.

12. On December 12, 1983, MFCU filed its original Complaint in this matter.

13. On January 24, 1984, the Debtor's attorney provided MFCU's attorney (Mr. Seguin) with documentation of the Debtor's lack of ownership interest in the boxes and wagons.

Discussion

14. Statutory Bars. MFCU has acknowledged that a Complaint to determine dischargeability of a debt under 11 U.S.C. sec. 523(a)(2) is no longer timely. 11 U.S.C. 523(c); Bankr.R. 4007(c).

15. It is also clear that an objection to discharge under 11 U.S.C. sec. 727(a) is no longer timely. Bankr.R.4004(a).

16. However, a Request to revoke a discharge under 11 U.S.C. sec. 727(d) is not statutorily time barred. 11 U.S.C. sec. 727(e).

17. Laches. To say that a section 727(d) Request is not statutorily time barred is not to say that the Complaint sub judice is free from laches.

18. "[A] chief purpose of the bankruptcy laws is 'to secure a prompt and effectual administration and settlement of the estate. . . within a limited period.'" Katchen v. Landy, 382 U.S. 323, 328, 86 S.Ct. 467, 15 L.Ed.2d 391 (1966).

19. As early as December 17, 1982--less than a week after the discharge was concluded--MFCU took the position that it had a cause of action, Paragraph 10 supra. Nevertheless, although there is no evidence of any negotiation after January 7, 1983, MFCU did not file a Complaint until December 12, 1983.

20. The last-minute cloud placed upon the Debtor's "fresh start" by MFCU's Complaint can not be permitted.

21. In addition, Section 727(d)(1) permits a request for revocation on the grounds of fraud only when "the requesting party did not know of such fraud until after the granting of such discharge."

22. While the Court accepts as true MFCU's allegation of a lack of actual knowledge of fraud prior to January 24, 1984, see Miree v. Dekalb County, 433 U.S. 25, 27 n. 2,

97 S.Ct. 2490, 53 L.Ed.2d 557 (1977) (complaint accepted as true during consideration of motion to dismiss), it appears that MFCU had notice of the alleged fraud on August 28, 1982-- more than three months prior to the conclusion of discharge. See Paragraph 8 supra.

23. Being put on notice, MFCU was required to diligently investigate and pursue available pre-discharge remedies. Its failure to do so was laches. See In re McElmurry, 23 B.R.533 (W.D.Mo. 1982).

24. Assuming this Court is empowered to grant costs and attorneys' fees, see 11 U.S.C. sec. 523(d) (consumer debtor may recover in sec. 523 cases), but see 11 U.S.C. sec. 101(7) (consumer debt defined) and compare sec. 523 with sec. 727 (latter is silent regarding costs and attorneys' fees), it would be clearly inequitable to grant such a judgment.

CONCLUSION OF LAW

The Amended Complaint filed in the above captioned matter by Menomonie Farmers Credit Union is statutorily and equitably barred.

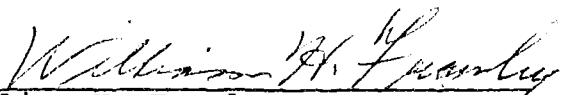
ORDER

IT IS ORDERED THAT the Motion to Dismiss filed in the above captioned matter by Debtor Richard H. Hutter be, and

the same hereby is, GRANTED, without costs to either party.

Dated: May 17, 1984.

BY THE COURT:



William H. Frawley
Bankruptcy Judge