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3 UNITED STATES BANKRUPTCY COURT  
4 EASTERN DISTRICT OF CALIFORNIA  
5 SACRAMENTO DIVISION  
6  
7  
8

9 In re )

Case No. 11-30367-A-7

10 CHRISTIAN ALBERTO ROMERO, )

11 )  
12 Debtor. )  
13 )

14 JANIS PANIZZA, )

Adv. No. 12-2097

15 Plaintiff, )  
16 )

17 vs. )

18 CHRISTIAN ALBERTO ROMERO, )

Date: October 25, 2012  
Time: 9:00 a.m.

19 Defendant. )  
20 )

21 **MEMORANDUM**

22 The plaintiff asks that a debt be excepted from the debtor's  
23 chapter 7 discharge. To do so, the plaintiff must prove that  
24 because she did not receive notice of, or have knowledge of, the  
25 chapter 7 case, she was unable to file a timely dischargeability  
26 complaint. Then, she must prove that the debt arises from a  
27 fraud perpetrated by the debtor. See 11 U.S.C. § 523(a) (2) (A)  
28 and (a) (3) (A).

I

When a debtor defrauds a creditor, in order to except the resulting liability from a chapter 7 discharge, the creditor must file a timely complaint in the bankruptcy case. Here, the deadline to file a dischargeability complaint was August 5, 2011. This was 60 days after the first date set for the meeting of creditors. See Fed. R. Bankr. P. 4007(c). The plaintiff did not meet this deadline. Her complaint was filed on February 29, 2012.

It is difficult to fault the plaintiff for meeting the August 5 deadline. The debtor did not list her as a creditor in his schedules and she was not given notice of the filing of the bankruptcy case or of the deadline for filing complaints.

However, the plaintiff was informed of the bankruptcy case by the debtor on July 12, 24 days before the deadline to file complaints expired. This can be determined from the face of the complaint and from two emails sent by the plaintiff to the debtor.

Her complaint alleges: "[The debtor] did not inform the Plaintiff of the filing of the bankruptcy until Plaintiff traveled to Sacramento to the Debtor's office. . . ." While the complaint does not mention the date of this office visit, the debtor sent two emails to the debtor, one on July 12 and another on July 13, referring to the visit as being on July 12. See Exhibits K and L.

Hence, it is clear that the plaintiff learned of the bankruptcy case more than three weeks prior to the deadline to file complaints. There is no evidence from the plaintiff that

1 she did any investigation concerning the bankruptcy and its  
2 possible impact on her rights against the debtor.

3       Instead, on July 22, 2011, the plaintiff filed suit in Los  
4 Angeles Superior Court. That suit appears calculated to not be  
5 seen as an attempt to collect a debt from the debtor and run  
6 afoul with his bankruptcy. Rather than demanding damages, it  
7 asks the state court to enjoin the debtor from conducting  
8 business until the debtor had completed the computer programming  
9 he allegedly agreed to do for the plaintiff.

10       Only after the debtor's bankruptcy attorney warned the  
11 plaintiff not to proceed with the state court suit on August 17,  
12 2011, did the plaintiff eventually appear in the bankruptcy case.  
13 On December 13, 2011, she unsuccessfully sought relief from the  
14 automatic stay in order to proceed in state court. After that  
15 motion was denied, this adversary proceeding was filed on  
16 February 29, 2012.

17       Even a creditor receiving no formal notice that its debtor  
18 has filed a bankruptcy case may have its claim discharged if the  
19 creditor nonetheless learns of the petition. Such knowledge  
20 imposes an obligation to inquire further. If the creditor fails  
21 to inquire further, it is nonetheless on notice of everything to  
22 which such inquiry would have led.

23       This is the premise of 11 U.S.C. § 523(a)(3). Section  
24 523(a)(3) bars the chapter 7 discharge of a claim omitted from  
25 the schedules unless the claim holder "had notice or actual  
26 knowledge of the case in time" to file a timely proof of claim or  
27 a complaint to except the debt from discharge under 11 U.S.C. §  
28 523(a)(2), (a)(4), or (a)(6).

1        In In re Price, 871 F.2d 97 (9<sup>th</sup> Cir. 1989), the Ninth  
2 Circuit concluded that a creditor's claim was discharged when the  
3 creditor learned of debtor's petition 58 days prior to the bar  
4 date but failed to make inquiry of the deadline and failed to  
5 file a timely dischargeability complaint.

6        On the other hand, in Manufacturers Hanover v. Dewalt (In re  
7 Dewalt), 961 F.2d 848 (9<sup>th</sup> Cir. 1992), the Ninth Circuit held  
8 that an unscheduled creditor's discovery of a bankruptcy petition  
9 seven days prior to the bar date for dischargeability complaints  
10 was insufficient notice even though "acting under ideal  
11 circumstances and with the utmost of diligence" the creditor  
12 might have requested an extension of the bar date.

13        While the court is mindful that the debtor is and was  
14 unrepresented by an attorney, it is clear from the record  
15 introduced at trial, that the plaintiff has been very proactive  
16 in her efforts, both in this court and in state court, to seek  
17 redress from the debtor, and her efforts were underway well  
18 before the bankruptcy case was even filed.

19        Apart from the numerous phone and email interactions with  
20 the debtor, her efforts to get the debtor to perform the contract  
21 included filing a complaint in state court, a motion to reopen  
22 the bankruptcy case, a motion for relief from the automatic stay,  
23 and the adversary proceeding. All of this was done without an  
24 attorney.

25        In these circumstances, the court concludes that when the  
26 plaintiff actually learned of the bankruptcy case approximately  
27 three weeks before the deadline for filing dischargeability  
28 complaints, it was incumbent on her to investigate further. Had

1 she done so, she would have learned of the deadline to file  
2 dischargeability complaints in time to file a complaint or to  
3 request an extension of the deadline. She did nothing.

4 The court concludes that the plaintiff had knowledge of the  
5 bankruptcy case in sufficient time to ascertain what impact it  
6 might have on her claim but she failed to act diligently.

7 While admitting that her complaint alleges that she learned  
8 of the bankruptcy case on July 12, 2011, at trial the plaintiff  
9 testified that this allegation was incorrect. She contradicted  
10 her complaint by testifying she learned of the bankruptcy after  
11 the deadline for filing complaints when she received the debtor's  
12 attorney's August 17 letter.

13 However, this testimony was not credible. It was given only  
14 after learning that the allegation in her complaint, viewed in  
15 light of the two emails she sent in mid-July, meant that she had  
16 learned of the bankruptcy three weeks before the deadline to file  
17 dischargeability complaints.

18 The court concludes that the plaintiff failed to file the  
19 complaint prior to the bar date for such complaints despite  
20 learning of the bankruptcy case in time to file a timely  
21 dischargeability complaint or to request an extension of that  
22 deadline.

## 23 II

24  
25 However, even if the court were to conclude that the  
26 plaintiff did not learn of the bankruptcy in time to file a  
27 timely dischargeability complaint, the result would not change  
28 because she has failed to prove fraud.

1       The plaintiff paid \$5,000 and other consideration to the  
2 debtor for computer programming services. He was asked to update  
3 a program for a children's game so that it would operate on the  
4 latest version of the Windows operating system. This program was  
5 sold to the public for use on home computers.

6       The parties disagree as to whether the debtor also agreed to  
7 adapt the program so that it, or a scaled down version of it,  
8 could be operated on an Internet site without downloading the  
9 program onto the user's computer.

10       The parties signed a written agreement on or about December  
11 1, 2008, for these services and that agreement supports the  
12 debtor's assertion that he did not agree to adapt the program to  
13 a web-based game. That contract specified that the debtor would  
14 "[c]reate a clone software for the web or [a] stand alone  
15 application . . . that works on newer operating systems like XP."  
16 [Emphasis added.] See Exhibit G.

17       The debtor delivered the updated stand-alone program on or  
18 about August 8, 2009, and hosted it on a website from which  
19 purchasers could download the program. See Exhibit F.

20       After August 8, 2009, the plaintiff made clear to the debtor  
21 that she also expected him to develop the web-based application.  
22 The debtor made some effort to accommodate her but, as he  
23 testified at trial, such work would entail many more hours of  
24 programming. He would not agree to do that work for just \$5,000  
25 and a cut of the sales. Also, he complained that the plaintiff  
26 had failed to provide him with the operating manuals for the  
27 program.

28 ///

The plaintiff produced no expert testimony to the effect that the debtor was unqualified to do the work required by the contract, or that he had failed to do it competently. The plaintiff asks the court to infer from the fact that the debtor did not produce a web-based application of her program that he never intended to do that work. At best, the record convinces the court only that plaintiff and the debtor had different understandings of what work was to be done. When it became clear that they each had a different understanding, the debtor made some misguided efforts to appease the plaintiff. But, those efforts do not convince the court that he agreed in the first instance to provide a web-based application or that he misrepresented his intention to do so.

The plaintiff has not proven that the debtor misrepresented his programming abilities or qualifications, or that he misrepresented his intentions to perform the contract as he understood it.

## III

For the foregoing reasons, judgment will be entered for the debtor. Counsel for the debtor shall lodge a conforming order.

Dated: \_\_\_\_\_ By the Court

Michael S. McManus, Judge  
United States Bankruptcy Court