IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE	§	
	§	
JOEL I. FRANKLIN and	§	
LUCY FRANKLIN	§	Case No. 96-62109
	§	
Debtors	§	Chapter 13
DAN A. DALTON, SR., BOBBY R. HUNT	§	
SHIRLEY M. HUNT, MARSHALL R.	§	
HUNT, and JEAN D. HUNT	§	
	§	
Plaintiffs	§	
	§	
v.	§	Adversary No. 99-6022
	§	
JOEL I. FRANKLIN	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION[1] REGARDING
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter is before the Court upon competing Motions for Summary Judgment (the "Motions") filed by Dan A. Dalton, Sr., Bobby R. Hunt, Shirley M. Hunt, Marshall R. Hunt, and Jean D. Hunt (the "Plaintiffs") and Joel I. Franklin (the "Defendant"). Based upon the Court's consideration of the pleadings and the proper summary judgment evidence submitted by the parties, including a Stipulation of Facts, the Court concludes that the Plaintiffs' Motion for Summary Judgment should be granted and that the Defendant's Motion for Summary Judgment should be denied.

[1] This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as other evidentiary doctrines applicable to the specific parties in this proceeding.

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I. JURISDICTION

This Court has jurisdiction to consider the Motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has authority to enter appropriate orders and judgments in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (B) and (O).

II. FACTUAL AND PROCEDURAL BACKGROUND

Before filing for bankruptcy protection, the Defendant, Joel I. Franklin ("Debtor" or "Defendant") was employed by Sunpoint Securities, Inc. as a securities salesman. Between April, 1995 and February, 1996, the Defendant played an instrumental role in a series of transactions in which Plaintiffs purchased certain promissory notes. Ultimately each issuer of such promissory notes defaulted on the obligations due and owing to the Plaintiffs. The following table illustrates the series of transactions:

Purchase Date	Plaintiff/Purchasers	Amount Paid	Note Maker	Default Date
4-5-95	Bobby R. & Shirley Hunt	$20,000.00	Avalon/Triwest Development LLC ("Avalon")	December, 1997
4-11-95	Marshall & Jean Hunt	$10,000.00	Avalon	December, 1997
1-25-96	Bobby R. Hunt	$60,000.00	G&W Asset Management, Inc. ("G & W")	January, 1997[2]
1-31-96	Dan A. Dalton, Sr.	$100,000.00	G & W	January, 1997
2-26-96	Bobby R. Hunt	$55,000.00	Sovereign Credit VII, L.C.	October, 1998

[2]G&W ultimately commenced a Chapter 11 bankruptcy proceeding in the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division.

In all of these transactions, the Defendant represented himself to be a registered representative of Sunpoint Securities and the Plaintiff-Purchasers in each instance dealt directly with the Debtor in the purchase of the referenced promissory note.

In August, 1996, after the purchase of the promissory notes, but some sixteen months prior to the first default under any of the transactions, the Defendant filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The Defendant's Chapter 13 plan, which was confirmed by the Court on April 4, 1997, required the Defendant to make sixty (60) monthly payments of $1,150.00 each. None of the Plaintiffs were listed on the matrix of creditors filed in connection with the case and therefore the Plaintiffs received no notice of the bankruptcy filing. Eight months after the confirmation of the Defendant's Chapter 13 plan, the first of the series of defaults by the respective makers of the promissory notes occurred.

On December 30, 1997, the Plaintiffs initiated a proceeding in state district court against the Defendant alleging fraud. The Defendant replied to the state law action by filing a notice of bankruptcy. On August 28, 1998, the Debtor filed an amended creditors' matrix in which he added the names and addresses of the Plaintiffs.

On April 30, 1999, the Plaintiffs filed the Complaint for Declaratory Relief in the present adversary proceeding seeking a declaration that the claims which they hold against the Defendant will not be discharged upon the Defendant's completion of his Chapter 13 plan. Both sides to this dispute have moved for summary judgment based, in part, upon stipulated facts. In their Motion for Summary Judgment, the Plaintiffs assert, in the alternative, that: (1) based on the case law interpreting 11 U.S.C. §101(5), their claims did not arise pre-petition and therefore remain unaffected by the bankruptcy filing; or (2) that, even if their claims did arise pre-petition,

they were not affected by the bankruptcy filing because they were not "provided for" in the Defendant's Chapter 13 plan. The Defendant asserts in his Motion for Summary Judgment that the Plaintiffs' claims arose pre-petition because the Defendant's alleged misconduct giving rise to the Plaintiffs' claims occurred prior to the filing of the Defendant's Chapter 13 petition and, as a result, such claims were discharged when the Court confirmed the Defendant's Chapter 13 plan.

III. DISCUSSION

A. Standard for Summary Judgment.

The parties bring their respective Motions for Summary Judgment in the adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056. That rule incorporates Federal Rule of Civil Procedure 56 which provides that summary judgment shall be rendered "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 judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *quoting* FED. R. CIV. P. 56(c). If a summary judgment motion is properly supported, a party opposing the motion may not merely rest upon the contents of its pleadings, but rather must demonstrate in specific responsive pleadings the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), *citing* FED. R. CIV. P. 56(e). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary

judgment." *Anderson, Id.* at 248, 106 S.Ct. at 2510.

The parties have stipulated that there is no factual dispute in need of resolution and have presented opposing motions for summary judgment based upon application of appropriate law. For cases in which the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *Mansker v. TMG Life Ins. Co.,* 54 F.3d 1322, 1326 (8th Cir. 1995); *Thompson Everett, Inc. v. National Cable Advertising, L.P.,* 57 F.3d 1317, 1323 (4th Cir. 1995)["A federal court may resolve the legal questions between the parties as a matter of law and enter judgment accordingly."].

Though the parties spent considerable effort in their respective motions debating the time period in which the Plaintiffs' claims arose, the determinative issue in this litigation in the opinion of the Court is whether the Plaintiffs' claims were "provided for" under the Debtor-Defendant's Chapter 13 plan, such that the Defendant's successful completion of that plan would result in a discharge of the Plaintiffs' claims.

B. Whether Plaintiffs' Claims Were "Provided For" Under 11 U.S.C. §1328(a).

In their Motion for Summary Judgment, the Plaintiffs assert that their claims could not have been "provided for" in the Defendant's confirmed Chapter 13 plan because they received no notice of the pendency of the Defendant's Chapter 13 case prior to confirmation of the Debtor's plan. Accordingly, the Plaintiffs assert that they are entitled to judgment, as a matter of law, that their claims will not be discharged, even in the event that the Debtor-Defendant completes all of his payments under the plan.

The scope of a discharge in a Chapter 13 case, and the prerequisites for the entry thereof, are controlled by the provisions of 11 U.S.C. §1328(a). §1328(a) provides that:

> As soon as practicable after completion by the debtor of all payments under the plan,...the court shall grant the debtor a discharge of all debts *provided for* by the plan.... (emphasis added).

Under this statute, a debt is discharged if two prerequisites are met: (1) the debt was provided for in the confirmed Chapter 13 plan, and (2) the debtor has completed all payments due under such plan. A debt is "provided for" by a Chapter 13 plan if the plan acknowledges the debt, even if the plan does not propose to make any payments on the claim or the plan does not specifically name the creditor. *In re Hairopoulos,* 118 F.3d 1240, 1243 (8th Cir. 1997), *citing In re Gregory*, 705 F.2d 1118, 1122 (9th Cir. 1983).

However, there is a clear consensus in the Chapter 13 jurisprudence that "a claim cannot be considered to have been provided for by the plan if a creditor does not receive proper notice of the proceedings." *Hairopoulos,* 118 F.3d at 1244, *citing In re Ryan*, 78 B.R. 175, 177-78 (Bankr. E.D.Tenn. 1987); *In re Greenburgh*, 151 B.R. 709, 716 (Bankr. E.D.Pa. 1993); and *In re Cash*, 51 B.R. 927, 929 (Bankr. N.D. Ala. 1985). Not only is this notice requirement rooted in the Bankruptcy Code and Rules[3], it has constitutional implications as well. *In re Riley*, 204 B.R. 28, 31 (Bankr. E.D.Ark. 1996)["The term 'provided for' in section 1328 encompasses the procedural due process requirements embodied in the Fifth Amendment to the U.S. Constitution."]. This "constitutional component of notice is based upon a recognition that creditors have a right to

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[3]*See, e.g.*, 11 U.S.C. §342(a) and Fed. R. Bankr. P. 2002.

adequate notice and the opportunity to participate in a meaningful way in the course of bankruptcy proceedings." *In re Elstien*, 238 B.R. 747, 756 (Bankr. N.D. Ill. 1999), *quoting Hairopoulos*, 118 F.3d at 1244. More specifically,

> the rule that a debt is provided for in a plan only if the creditor had adequate notice follows from the rule that a claim is allowed only if a proof of claim is filed. *See*, §502(a). A creditor deprived of adequate knowledge will not file a proof of claim. In that event, the debt will not be paid no matter what the plan says.

U.S. v. Trembath (In re Trembath), 205 B.R. 909, 913-14 (Bankr. N.D. Ill. 1997). *Accord, In re Curenton*, 205 B.R. 967, 970 (Bankr. M.D. Ala. 1995) [holding that any debt not adequately listed in debtor's schedules is not "provided for by the plan."]. Thus, "the term 'provided for' as used in chapter 13 includes notice to creditors which is sufficient to provide them with the opportunity to timely participate in the procedural rights granted to them in that chapter." *Crites v. State of Oregon (In re Crites)*, 201 B.R. 277, 281 (Bankr. D. Ore. 1996). Without such notice, a creditor's debt cannot be considered to be "provided for" by a Chapter 13 plan.

In the case before the Court, it is undisputed that the Plaintiffs were not listed on any creditors' matrix filed by the Debtor prior to the confirmation of the Defendant's Chapter 13 plan on April 4, 1997 and that, in fact, the Debtor did not add the Plaintiffs to the matrix until August 28, 1998, some 16 months after confirmation of the Debtor's Chapter 13 plan. Based on this lack of timely notice of the bankruptcy proceedings, the Plaintiffs were denied any meaningful opportunity to participate in the Chapter 13 process. Thus, this Court concludes that, as a matter of law, the Plaintiffs' claims are not provided for by the Debtor's confirmed Chapter 13 plan and shall not be discharged, even if the Debtor completes payments under the plan and an order of

discharge is ultimately entered.

Without recognizing the applicability of the foregoing jurisprudence and notwithstanding the fact that he has not yet completed all of the payments under his Chapter 13 plan, the Debtor-Defendant asserts, as the sole grounds supporting his motion for summary judgment, that he is entitled to judgment as a matter of law because the Plaintiffs' claims were discharged ***upon confirmation*** of his Chapter 13 plan. In support of such proposition, he cites the Court to *In re Phillips*, 175 B.R. 901 (Bankr. E.D. Tex. 1994). However, the Defendant fails to recognize that *Phillips* was a Chapter 11 case involving the construction of 11 U.S.C. §1141 and addresses the effect of the confirmation of a Chapter 11 plan of reorganization upon pre-confirmation claims. In relying upon and implementing the plain language of §1141(d)(1)(A)[4], Judge Abel correctly found that any claim against a Chapter 11 debtor which arose prior to confirmation was discharged upon confirmation of the Chapter 11 plan.

However, §1141(d)(1)(A), and correspondingly the *Phillips* opinion, have absolutely no application in a Chapter 13 case. As stated earlier, the entry of a discharge in a Chapter 13 case is exclusively controlled by the provisions of 11 U.S.C. §1328, which withholds the entry of discharge in a Chapter 13 case until such time as a debtor completes all of the payments due under a confirmed Chapter 13 plan. Therefore, the assertion by the Defendant that the Plaintiffs' claims were discharged upon confirmation of his Chapter 13 plan is erroneous as a matter of law.

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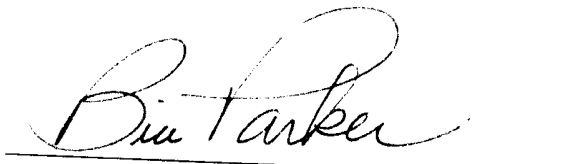
[4] 11 U.S.C. §1141(d)(1)(A) provides as follows:

> Except as provided in this subsection, in the plan, or in the order confirming the plan, ***the confirmation of a plan*** discharges the debtor from any debt ***that arose before the date of such confirmation***... (emphasis added).

IV. CONCLUSION

This Court concludes that the Plaintiffs, Dan A. Dalton, Sr., Bobby R. Hunt, Shirley M. Hunt, Marshall R. Hunt, and Jean D. Hunt, are entitled to summary judgment that their claims will not be discharged upon the Defendant's completion of payments under his confirmed Chapter 13 plan because, as a matter of law, such claims could not have been provided for in the Debtor's Chapter 13 plan. The Court correspondingly concludes that the Defendant's Motion for Summary Judgment should be denied. Appropriate orders and a judgment will be entered which are consistent with this opinion.

Signed this the 5th day of November, 1999.



BILL PARKER
UNITED STATES BANKRUPTCY JUDGE

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