

DEC 09 2005

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	EC-05-1071-SBMa
7	GAVRILO SPAICH,)	Bk. No.	04-24880-B11
8	Debtor.)	Adv. No.	04-02294
9	_____)		
10	GAVRILO SPAICH,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	SUSAN K. SMITH, Trustee,)		
14	Appellee.)		
15	_____)		

Argued and Submitted on
October 20, 2005 at Sacramento, California

Filed - December 9, 2005

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Jane Dickson McKeag, Bankruptcy Judge, Presiding

Before: SMITH, BRANDT and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Gavriilo Spaich ("Debtor") appeals a final judgment by the
2 bankruptcy court, entered February 5, 2005, which denied him a
3 discharge under § 727.² We AFFIRM.

4 **I. FACTS**

5 Debtor is the president and sole shareholder of Spaich
6 Farms, Inc. ("Spaich Farms"). Spaich Farms filed a chapter 11
7 bankruptcy, and Susan K. Smith ("Smith") was duly appointed the
8 trustee. On May 12, 2004, Debtor filed his own individual
9 chapter 11 petition, which is the subject of this appeal. Debtor
10 did not schedule Smith, or Spaich Farms, as a creditor. On
11 November 16, 2004, after the claims bar date had passed, Smith
12 filed a proof of claim.³

13 On August 10, 2004, Smith initiated an adversary proceeding
14 objecting to Debtor's discharge under §§ 727(a)(2)-(a)(7). On
15 January 26, 2005, the day before the adversary was set to go to
16 trial, Debtor filed an objection to the proof of claim asserting
17 that the claim was untimely, lacked adequate documentation, and
18 failed to specify a precise amount.

19 At trial, Debtor orally moved the court to either dismiss
20 the complaint on the ground that the claim objection deprived
21 Smith of standing to prosecute, or alternatively, to postpone the
22 trial until Smith's status as a creditor could be determined.
23 The court denied both requests, and the trial went forward.

24
25 ² Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

27 ³ The claims bar date expired on September 16, 2004.
28 Subsequent to the filing of this appeal, on July 7, 2005, the
bankruptcy court deemed Smith's proof of claim to be timely.

1 discharge action. Therefore, we find that the issue is moot.⁴

2 Debtor also complains that standing to object to a
3 discharge, in general, is too broad. He argues that anyone can
4 have standing to object to discharge by simply filing a claim, or
5 as in this case, a late filed proof of claim. In this regard,
6 Debtor requests that we fashion a new rule that would require the
7 adjudication of a claim before its holder is permitted to file an
8 action challenging a debtor's discharge. We decline to do so.

9 First, there is nothing in the Code or the Rules which
10 suggest that only creditors with proven claims may file such an
11 action, and case law suggests the contrary. See § 727(c)(1); See
12 In re O'Callaghan, 304 B.R. 500, 511 (Bankr. M.D. Fla. 2003) ("the
13 fact that a proof of claim is challenged and the claim is
14 disputed would not detract from the status of an entity as a
15 creditor until the claim is ultimately disallowed."). Second,
16 and most importantly, "rule-making" is beyond our province and
17 authority.

18 B. Judgment Denying Discharge

19 With certain limitations, an individual chapter 11 debtor
20 receives a discharge upon confirmation of a chapter 11 plan.
21 § 1141(d)(1). The confirmation of a plan does not, however,
22 discharge a debtor if

23 _____
24 ⁴ Debtor also contends in his brief that an unscheduled
25 creditor who files a late proof of claim lacks standing to bring
26 a § 727 action. We need not address this issue since, according
27 to the docket, the bankruptcy court has entered an order deeming
28 Smith's claim to be timely. Moreover, even if that order were
before us - which it is not - the complaint objecting to
discharge, filed prior to the expiration of the bar date, would
likely qualify as a timely filed "informal claim." See In re
Hayes, 327 B.R. 453, 461-62 (Bankr. C.D. Cal. 2005).

1 (A) the plan provides for the liquidation of
2 all or substantially all of the property of
the estate;

3 (B) the debtor does not engage in business
4 after consummation of the plan; and

5 (C) the debtor would be denied a discharge
6 under section 727(a) of this title if the
case were a case under chapter 7 of this
title.

7 § 1141(d) (3) (emphasis added).

8 The three subparts of § 1141(d) (3) are written in the
9 conjunctive, meaning that an individual chapter 11 debtor will
10 only be denied a discharge if, in addition to the existence of
11 grounds for denial of discharge under § 727(a), the confirmed
12 plan is a liquidating one and the debtor does not engage in
13 business after the plan has been consummated. In re Williams,
14 227 B.R. 589, 593 (D.R.I. 1998).

15 According to Debtor, the complaint should have included
16 allegations under §§ 1141(d) (3) (A) and (B) and the absence of
17 such allegations, as well as any supporting evidence at trial,
18 deprived the court of authority to enter the judgment denying
19 discharge.

20 Debtor's position is not supported by either § 1141(d) (3) or
21 Rule 4004(a). Rule 4004(a), which establishes the procedure for
22 the filing of § 727 complaints objecting to discharge, provides

23 In a chapter 7 liquidation case **a complaint**
24 **objecting to the debtor's discharge under**
25 **§ 727(a)** of the Code shall be filed no later
than 60 days after the first date set for the
26 meeting of creditors under § 341(a). In a
chapter 11 reorganization case, **the complaint**
27 shall be filed no later than the first date
set for the hearing on confirmation.

28 Fed. R. Bank. P. 4004(a) (emphasis added).

1 To rephrase Rule 4004(a), in a chapter 7 case, a complaint
2 objecting to discharge under § 727(a) must be filed not more than
3 60 days after the § 341(a) meeting of creditors, but in a chapter
4 11 case, such a complaint (under § 727(a)) must be filed by the
5 first date set for confirmation of the chapter 11 plan. Though
6 Rule 4004(a) clearly governs the filing of § 727 complaints in
7 chapter 11 cases, it makes no reference to § 1141(d)(3). This
8 makes sense because the denial of a chapter 11 debtor's discharge
9 under 1141(d)(3) only comes into play upon confirmation of a
10 plan. Yet, as indicated above, under Rule 4004(a), the § 727
11 complaint must be filed before plan confirmation. Thus, while a
12 creditor seeking denial of a chapter 11 debtor's discharge must
13 obtain findings warranting denial under § 727(a), the creditor
14 need not plead allegations under § 1141(d)(3)(A) and (B) in the
15 § 727(a) complaint; findings regarding the latter may be sought
16 as part of the plan confirmation process.

17 There is no dispute that the bankruptcy court made findings
18 under § 727(a) (in satisfaction of § 1141(d)(3)(C)) in the
19 adversary proceeding, but made no findings regarding the nature
20 of a confirmed chapter 11 plan,⁵ or Debtor's future business
21 plans (in satisfaction of §§ 1141(d)(3)(A) and (B),
22 respectively). Further, Debtor is correct that § 727(a) findings
23 alone are insufficient to deny his discharge under § 1141(d)(3).
24 Smith concedes this point. If this were the end of the story,
25 remand to the bankruptcy court for additional findings under
26 §§ 1141(d)(3)(A) and (B) would be appropriate. However, this is

27 ⁵ As of the time of the trial, Debtor had filed a disclosure
28 statement and a chapter 11 plan, but had not obtained approval or
confirmation of either.

1 not the case.

2 After entry of the § 727 judgment, and after the
3 commencement of this appeal, the court entered an order
4 confirming the chapter 11 trustee's liquidating plan. In this
5 regard, the court made the following specific findings under
6 § 1141(d) (3):

7 Pursuant to 11 U.S.C. § 1141, confirmation of
8 the Plan does not discharge Debtor because:

9 a. The Plan is a liquidating plan;

10 b. The Debtor is not continuing in business
as defined in 11 U.S.C. § 1141(d) (3) (B);

11 c. The Debtor would be denied a discharge
12 under section 727(a) of the Bankruptcy Code
if the case were a case under Chapter 7 of
13 the Bankruptcy Code.

14 See Findings of Fact and Conclusions of Law in Support of Order
15 Confirming Trustee's First Amended Plan of Reorganization.⁶

16 VI. CONCLUSION

17 To the extent that the entry of the judgment denying
18 discharge was premature due to the absence of findings under
19 §§ 1141(d) (3) (A) and (B), that infirmity has been adequately
20 cured by the subsequent findings noted above. It would be an
21 exercise in futility to remand the matter back to the bankruptcy
22 court to make findings that have already been made. Therefore,
23 we AFFIRM with instructions that the court enter an amended
24 judgment denying discharge under § 1141(d) (3).

25
26
27
28 ⁶ The order confirming the trustee's plan was not submitted
as part of the record.