

ENTERED
3-2-95

FILED

95 FEB 28 PM 3:00

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

DIST. CLERK

In Re: Debtor JAMES I. WARD, JR.

BANKRUPTCY CASE NO: 94-74034

ESTATE OF MADELEINE SAMSON,)
by and through its)
Personal Representative, the)
REVEREND JOSEPH MURPHY,)
for the benefit of the)
Estate's residuary beneficiaries,)
The Extension Society; St. Jude's)
Hospital for Children; Little)
Sisters of the Poor; Xavier)
Association for the Blind;)
Graymore Friars; Sacred Heart)
Missions; Association of the Blind)
at Charleston, South Carolina;)
American Cancer Society; Charles)
Webb Center; Guest House at)
Garrison, New York; and the)
Disabled American Veterans,)
Plaintiff,)
v.)
JAMES I. WARD, JR.,)
Defendant.)

CHAPTER 7
ADVERSARY NO: 94-8253

ORDER

This matter is before the Court on motions by the debtor for a jury trial, to dismiss the creditor's prayer for attorney's fees and to dismiss pursuant to F.R.C.P. 12.

The debtor commenced his case under Chapter 7 of the bankruptcy code on August 24, 1994. The Estate thereafter filed an adversary proceeding seeking a determination by the Court that its judgment is non-dischargeable. In answering the Complaint and counterclaiming, Ward demanded a trial by jury.

This Court finds that this filing involves an equitable procedure under the bankruptcy code and this precludes the debtor from requesting a jury trial. See, Granfinanciera, S.A., v. Nordberg, 109 S.Ct. 2782, 492 U.S. 33,106 C. Ed. 26 (1989). ~~Under 28 U.S.C.A. § 1411, jury trials for personal injury or wrongful death tort claims are preserved. By negative implication, claims other than personal injury and wrongful death tort claims do not invoke an individual's right to a jury trial in a pending bankruptcy action. Since the debtor here is not asserting a personal injury or wrongful death tort claim, he is not entitled to a jury trial. In addition, under 28 U.S.C.A. § 157, bankruptcy judges may hear and determine all court proceedings arising under Title 11. Court proceedings include "...determinations as to the dischargibility of particular debts..." 28 U.S.C.A. § 157(2)(I).~~ (gw)

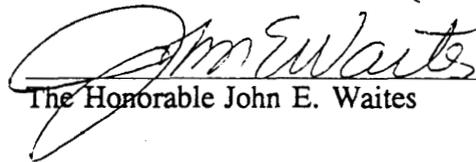
The creditor here has filed a complaint to determine the dischargibility of the bankruptcy filing in response to the debtor's bankruptcy filing. Thus, I find, hold and rule that the debtor does not have a right to have a trial by jury and the debtor's demand for the same is denied.

The debtor also filed a motion to strike the creditor's claim for attorney's fees. This motion is granted. If the creditor has grounds it can seek attorney's fees through sanctions under Local Rule 9011, F.R.C.P. 11, or other authority found applicable by the Court.

The debtor additionally filed two Motions pursuant to F.R.C.P. 12 to dismiss the Plaintiff's Complaint on two grounds: 1) that the Complaint fails to state facts upon which relief can be granted and 2) that the legal doctrine of res judicata bars litigation of this claim by the creditor. A reading of the creditor's Complaint indicates that it has been sufficiently pled to plead an action to determine dischargibility of a debt pursuant to 11 U.S.C.A. § 523. Therefore, the Motion to Dismiss based upon failure to state facts sufficient to support a cause of action is denied.

The debtor's motion to dismiss the case based on grounds of res judicata is also denied. Under F.R.C.P. 12(b), if "...matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56..." Here, the creditor objected to evidence being presented outside the pleadings and the Court excluded the same. Therefore, the motion to dismiss based upon res judicata is denied because it seeks to present matters not before the Court. The debtor may renew this motion as a motion for summary judgment if he has good grounds.

AND IT IS SO ORDERED.


The Honorable John E. Waites

2/28, 1995
Columbia, South Carolina