

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

*Judgment*  
**FILED**  
at \_\_\_ O'clock & \_\_\_ min. \_\_\_ M  
**NOV 03 1997**  
**BRENDA K. ARGOE, CLERK**  
United States Bankruptcy Court  
Columbia, South Carolina (10)

IN RE:

James Douglas Allphin and Tamara Norman  
Allphin,

Debtors.

C/A No. 96-72207-W

**JUDGMENT**

Chapter 7

**ENTERED**

**NOV 04 1997**

**R.U.U.**

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the motion of the Debtor James Douglas Allphin to reopen this Chapter 7 case is granted and the Debtors are hereby directed to comply with the requirements as set forth in the attached Order.

.sse

*John Waites*  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
November 3, 1997.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

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United States Bankruptcy Court  
Columbia, South Carolina 29201

IN RE:

James Douglas Allphin and Tamara Norman  
Allphin,

Debtors.

C/A No. 96-72207-W

ORDER

Chapter 7

**ENTERED**

NOV 04 1997

**R.U.U.**

THIS MATTER comes before the Court upon the motion of the Debtor James Douglas Allphin to reopen this Chapter 7 case pursuant 11 U.S.C. § 350<sup>1</sup> to file an amendment to his schedules to reflect as an additional asset, a personal injury lawsuit against Winn-Dixie Charlotte, Inc. ("Winn-Dixie"). Winn-Dixie filed the sole objection to the motion. After receiving testimony and considering all the evidence, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

James Douglas Allphin ("Mr. Allphin" or the "Debtor") was allegedly injured on the premises of a Winn-Dixie store in Georgia on January 10, 1996. He became disabled and began to receive workers compensation benefits. On April 1, 1996, James Douglas Allphin and his wife, Tamara Norman Allphin ("Ms. Allphin" and jointly referred herein with Mr. Allphin as "the Debtors") filed their joint Chapter 7 bankruptcy petition through their attorney, Lee Ringler, Esquire. The case was declared to be a "no-asset" case and on July 19, 1996, the Debtors received their discharges and the case was closed. The schedules in that case reflect \$11,082.04

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<sup>1</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

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in secured debt and \$20,882.39 in unsecured debt, comprised primarily of medical and credit card debt. The schedules and statements also state that both Debtors are disabled and that their sole income is \$1,155.44 monthly workers compensation benefits to Mr. Allphin. In the Debtors' claim for property exemption, the Debtors list their interest in a 1990 mobile home, clothes, a television and video cassette recorder and jewelry. The Debtors' schedules and statements do not mention any cause of action or contingent claim against Winn-Dixie either as property of the estate or as an exempt personal injury claim. However, it is stipulated that the cause of action arose prepetition and therefore it is unsecured property of the estate.

In September of 1996, Mr. Allphin filed a personal injury lawsuit against Winn-Dixie in the United States District Court for the Southern District of Georgia ("District Court"). Upon the Debtor's disclosure of the bankruptcy in a mediation session on August 19, 1997, Winn-Dixie, by summary judgment motion, asserted a judicial estoppel defense to the lawsuit based upon Mr. Allphin's failure to list the cause of action against Winn-Dixie in his bankruptcy schedules and statements. On September 29, 1997, Mr. Allphin filed the within motion to reopen this Chapter 7 case to add the claim against Winn-Dixie as an asset of the estate and to list his claim for workers compensation benefits as an asset of the estate. Mr. Allphin states in his motion that he has a seventh grade education and did not believe that the claim against Winn-Dixie was the type of asset that needed to be included in his schedules and statements.

Winn-Dixie has filed an objection to the motion to reopen basing its argument upon four primary grounds. First, Winn-Dixie states that reopening a no-asset Chapter 7 case to add an asset that may be exempt is a futile act. Secondly, Winn-Dixie states that if the asset is exempt, it does not benefit creditors and therefore there is no need to reopen as such would be a waste of

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judicial resources. Thirdly, Winn-Dixie takes the position that because of the delay in filing the motion to reopen, the reopening of the case at this point in time should be denied on the grounds of laches. Finally, Winn-Dixie asserts that even if the case is reopened and the claim against Winn-Dixie is added as an asset, this will not impact or prejudice their judicial estoppel argument in District Court.

### CONCLUSIONS OF LAW

Section 350 of the Bankruptcy Code provides that “[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” 11 U.S.C. § 350(b). “The Fourth Circuit has determined that the issue of whether to permit a Debtor to reopen a case is a matter that rests upon the sound discretion of the court below, depending upon the circumstances of the case.” In re Thompson, 16 F.3d 576 (4th Cir. 1994), *cert. denied*, \_\_\_ U.S. \_\_\_, 114 S.Ct. 2709, 129 L.Ed. 2d 836 (1994) citing In re Hawkins 727 F.2d 324 (4th Cir. 1984). Based upon the circumstances as stated in the Findings of Fact, it appears that this case should be reopened for several reasons.

While futility and lack of benefit to creditors are legitimate reasons to deny a motion to reopen a case, see In re Gardner, 194 B.R. 576 (Bkrcty.D.S.C. 1996), such are not certainties in the instant case. Initially, the case was treated as a no asset case in 1996 and upon reopening the Chapter 7 Trustee shall be in charge of managing the cause of action which is reported to be a \$300,000 claim. Secondly, while the Debtor indicated the asset may be claimed as exempt pursuant to S.C. Code §15-41-30(11)(B), the allowance of the exemption is not certain.

Intentional concealment of estate property will bar the debtor from claiming such property as exempt, after it surfaces as an asset. See, e.g., Doan, 672 F.2d at 833; Calder v. Job (In re Calder), 973

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F.2d 862, 868 (10th Cir.1992). Intent to conceal is a factual determination to be made by a bankruptcy court, based upon the evidence presented and inferences drawn therefrom at trial. In re Yonikus, 996 F.2d at 872.

In re St. Angelo, 189 B.R. 24 (Bkrcty.D.R.I. 1995).

In any event, the Trustee and creditors will have a new thirty day period to review any claim for such an exemption to determine if it is objectionable. Rule 4003 of the Federal Rules of Bankruptcy Procedure. At the hearing on this motion, the Debtor testified that he would use the proceeds from the lawsuit to pay his creditors, despite his discharge, and therefore the Debtor may not even attempt to exempt his claim against Winn-Dixie. Additionally, upon reopening, the Chapter 7 Trustee, creditors or the United States Trustee would have the right to investigate whether the original failure to list this asset was intentional or an act which could lead to the revocation of the Debtor's discharge. All of these factors lead the Court to conclude that the reopening is not futile or a waste of resources and further that such appears to be in the best interest of the creditors of the estate.

Winn-Dixie additionally asserts that the reopening should be barred by laches; that is, the lack of diligence of the Debtor in moving to reopen the case which has caused prejudice to Winn-Dixie. However, Winn-Dixie is not a creditor or party in interest in the bankruptcy case, and setting aside the question of their standing to object to this motion, it certainly did not rely on the Debtors' failure to list the cause of action in the bankruptcy or the resulting delay in seeking the case reopened. The Debtor moved to reopen within approximately one month of the time when the failure to list the asset became an issue between Mr. Allphin and Winn-Dixie. Winn-Dixie's opposition to reopening is primarily an effort to preserve its judicial estoppel argument as a

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defense to the lawsuit in District Court. Therefore, this Court shall not bar the motion based upon the laches argument raised by Winn-Dixie.

Finally, Winn-Dixie argues that the reopening of the case to add the claim against Winn-Dixie as an asset of the estate has no prejudicial impact on their judicial estoppel argument in District Court. In such an instance, the reopening for amendment would not prejudice their litigation and therefore is no reason to disallow the reopening. The District Court is the proper court to make the determination regarding the judicial estoppel motions before it. It is therefore,

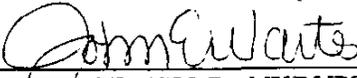
**ORDERED**, that the Debtor's motion to reopen this Chapter 7 case is granted. Pursuant to 28 U.S.C. Section 1930(a), the Debtor shall pay to the clerk of court the reopening fee within five (5) business days of the date of signing of this order and that receipt of such payment shall be acknowledged by the Clerk of Court at the bottom of this order and, upon such acknowledgment, this order shall become effective and shall be entered on the docket. If such payment is not made, this order is null and void, thus denying the motion to reopen. Any action proposed in the motion to reopen case must be initiated within (15) days of the entry of this order and upon failure of the Debtor to initiate action proposed in the motion to reopen by the above deadline, the clerk is hereby directed to close this case without further order.

In accordance with Federal Rule of Bankruptcy Procedure 5010, it is determined that the appointment of a trustee by the United States Trustee is necessary to protect the interests of creditors and the Debtor and to ensure the efficient administration of the case. The Debtors shall, within five (5) business days of the entry of this order, contact the trustee or United States Trustee and obtain the date, time, and location for the rescheduled section 341 meeting, if one is determined to be necessary, give written notice to all parties in interest of the rescheduled

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meeting, and file proof of such service with the Clerk of the Bankruptcy Court.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
November 3, 1997.

Receipt of Fee Acknowledged:  
BRENDA K. ARGOE, Clerk of Court

BY:   
Deputy Clerk

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