

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

GERALDINE COSTELLO,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2011-L-053
JAMES A. MICHALSKI,	:	
Defendant-Appellant.	:	

Civil Appeal from the Painesville Municipal Court, Case No. CVI 11 00219.

Judgment: Affirmed.

Geraldine Costello, pro se, 3583 North Ridge Road, Perry, OH 44081 (Plaintiff-Appellee).

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, Suite 305, Willoughby, OH 44094-4280 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} Appellant, James A. Michalski, appeals from a judgment of the Painesville Municipal Court, rendered in favor of appellee, Geraldine Costello, in the amount of \$3,000 plus interest and costs.

{¶2} Costello filed a small claims complaint against her nephew, Michalski, to recover on a promissory note. Costello alleged that Michalski owed her well in excess of the jurisdictional limits of the small claims court. However, she only sought \$3,000.

{¶3} A hearing was held before a magistrate. In November 2006, Costello loaned Michalski \$10,000. Two months later, Michalski personally signed a promissory note promising to pay Costello back with interest within a year. The promissory note was admitted into evidence as plaintiff's exhibit one. Michalski made some payments. However, he ignored Costello's requests for further payment.

{¶4} In September 2007, Michalski filed a voluntary petition for bankruptcy under Chapter 7. At the hearing before the magistrate, Michalski testified that he had "no idea" whether Costello was listed as a creditor in his bankruptcy petition. Michalski later conceded that he did not list Costello as a creditor in his petition. Nevertheless, Michalski claimed at the hearing that he listed the debt. However, the bankruptcy petition reveals that the debt owed to Costello was not listed. Michalski also maintained Costello knew that he filed for bankruptcy. Costello testified that she was not notified by Michalski or the bankruptcy court of the filing and that she had no knowledge that he filed for bankruptcy. In 2008, Michalski obtained a discharge in bankruptcy. On the date of the hearing in our case, the balance due on the promissory note was \$6,440. Michalski's sole defense was that the loan from Costello was discharged.

{¶5} After the hearing, the magistrate recommended that judgment be granted for Costello in the amount of \$3,000 plus four percent interest and costs. Michalski filed objections. Costello filed a response.

{¶6} The trial court overruled Michalski's objections, adopted the magistrate's decision in its entirety, and rendered judgment for Costello. Michalski filed a timely appeal and asserts the following assignment of error:

{¶7} “Did the Trial Court abuse its discretion in failing to honor the Defendant-Appellant’s bankruptcy?”

{¶8} In his sole assignment of error, Michalski argues the trial court abused its discretion in adopting the magistrate’s decision and not honoring his bankruptcy. He alleges that although he did not list Costello as a creditor in his petition, she had knowledge of the bankruptcy, and, therefore, his debt was discharged. He maintains the trial court exceeded its jurisdiction in awarding judgment in favor of Costello.

{¶9} The predicate to all of Michalski’s arguments presupposes that his debt to Costello was discharged in bankruptcy. However, for the following reasons, it was not.

{¶10} A review of the following two points is necessary in order to determine whether the debt owed on the promissory note was discharged.

{¶11} First, Section 521(a)(1)(A), Title 11, U.S.Code, states that a debtor *shall* file a list of creditors in his petition for bankruptcy.

{¶12} Second, with respect to discharge, Sections 523(a)(3)(A) and (B), Title 11, U.S.Code, provide that a discharge in bankruptcy does *not* discharge an individual debtor from any debt *neither listed nor scheduled* in time to permit timely filing of a proof of claim, *unless the creditor had notice or actual knowledge* of the case in time for such filing.

{¶13} In this context, a creditor does not have notice due to the mere filing of a bankruptcy petition. Rather, notice is established when a creditor that is listed by a debtor is notified by the bankruptcy court within the prescribed time. *In re Price* (C.A.9, 1989), 871 F.2d 97, 99.

{¶14} Thus, if a debtor fails to list a creditor and if the creditor did not have notice or actual knowledge of the bankruptcy proceeding, the debt is not discharged. *Colonial Sur. Co. v. Weizman* (C.A.1, 2009), 564 F.3d 526, 530. See, also, *Plain Dealer Publishing Co. v. Wilson Mills Foods, Inc.*, 8th Dist. No. 91985, 2009-Ohio-2042, at ¶21.

{¶15} In our case, although Michalski does not allege a manifest weight argument, we note that the trier of fact is in the best position to assess the credibility of witnesses. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Here, there was conflicting testimony between Michalski and Costello. At the hearing before the magistrate, Michalski testified that he had “no idea” whether Costello was listed as a creditor in his bankruptcy petition. He later admitted, however, that he did not list Costello as a creditor. Nevertheless, Michalski claimed at the hearing that he listed the debt. However, the bankruptcy petition reveals that the debt owed to Costello was not listed. Michalski also maintained Costello knew that he filed for bankruptcy. However, Costello stated at the hearing that she was not notified by Michalski or the bankruptcy court of the filing and that she had no knowledge that he filed for bankruptcy. Apparently, the trial court believed Costello’s testimony to be more credible. *Seasons Coal*, supra, at 80.

{¶16} Besides Michalski’s own conclusory assertion, there is nothing in the record that demonstrates Costello had notice or actual knowledge of the bankruptcy action. Thus, the debt owed on the promissory note was not discharged. Sections 523(a)(3)(A) and (B), Title 11, U.S.Code; *Price*, supra, at 99; *Weizman*, supra, at 530; *Plain Dealer*, supra, at ¶21. Therefore, the trial court did not err in adopting the magistrate’s decision and rendering judgment for Costello.

{¶17} For the foregoing reasons, Michalski's sole assignment of error is not well-taken. The judgment of the Painesville Municipal Court is affirmed.

CYNTHIA WESTCOTT RICE, J.,

MARY JANE TRAPP, J.,

concur.