

RENDERED: NOVEMBER 2, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000296-MR

STEVE PAPASTEFANOU

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE A. WILSON, JUDGE
ACTION NO. 09-CI-01212

THE CADLE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JONES, AND THOMPSON, JUDGES.

JONES, JUDGE: Appellant, Steve Papastefanou, appeals an order of the Warren Circuit Court denying his motion for relief from judgment under CR¹ 60.02(e).

Finding no error, we AFFIRM.

¹ Kentucky Rules of Civil Procedure.

I. BACKGROUND

On October 3, 1995, The Cadle Company (“Cadle”) obtained a judgment against Steve Papastefanou in the Superior Court of New Hampshire. In 1997, Papastefanou filed a petition for Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Maryland and listed Cadle as a creditor (the “1997 Bankruptcy”). Cadle filed an adversary proceeding against Papastefanou in the 1997 Bankruptcy case, objecting to discharge of the debt owed to it under 11 U.S.C.² § 727. Cadle moved for default judgment against Papastefanou twice during the adversary proceeding. While the docket sheet for the adversary proceeding in the 1997 Bankruptcy indicates that Papastefanou filed responses in opposition to both of Cadle’s motions for default judgment, Cadle’s second motion for default judgment was granted and the bankruptcy court entered the following order:

The Court having read and considered the Complaint Objecting to Discharge as well as the Motion for Judgment by Default filed by Plaintiff, and for good cause appearing, it is this 5th day of February, 1998,

ORDERED that the Debtor’s Chapter 7 case be and hereby is dismissed with prejudice,

ORDERED that the Debtor’s discharge under Chapter 7 of the Bankruptcy Code be and hereby is denied.

R. 61.

² United States Code.

In 2003, Papastefanou, this time joined by his wife, filed a second petition for Chapter 7 bankruptcy in the District of Maryland (the “2003 Bankruptcy”). Cadle was again listed as one of Papastefanou’s creditors. While Cadle moved for and was granted an extension of time to file a complaint contesting the dischargeability of Papastefanou’s debt to it, Cadle did not file an adversary proceeding in the 2003 Bankruptcy case. On September 18, 2003, the bankruptcy court entered the following order:

It appearing the debtors are entitled to a discharge,

IT IS ORDERED:

The debtors are granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

R. 14.

On July 13, 2009, Cadle registered its New Hampshire judgment against Papastefanou in the Warren Circuit Court, pursuant to KRS³ 426.960. Papastefanou did not file an objection to registration of the judgment and, accordingly, that judgment became valid and enforceable against Papastefanou following twenty days of its filing. KRS 426.960(3). On September 8, 2009, the attorney who represented Papastefanou in the 2003 Bankruptcy filed a notice of suggestion of bankruptcy with the circuit court, notifying the court that Papastefanou had filed a Chapter 7 bankruptcy case in 2003. In February of 2015,

³ Kentucky Revised Statutes.

Cadle filed an affidavit for writ of non-wage garnishment. On March 16, 2015, U.S. Bank filed an affidavit and answer of garnishee indicating that it was forwarding \$10,120.06 to Cadle for partial satisfaction of the judgment against Papastefanou.

Almost seven years after Cadle had registered its judgment, on March 23, 2016, Papastefanou filed a motion to set aside Cadle's judgment and a motion to reopen the case. Papastefanou contended that Cadle's judgment against him must be set aside under CR 60.02(e), as the judgment was discharged in the 2003 Bankruptcy. Papastefanou attached a copy of the 2003 Bankruptcy proceedings, which indicated that Cadle had been listed as a creditor in that proceeding and that Papastefanou had been granted a discharge by the September 18, 2003 Order.

Cadle responded to Papastefanou's motions on March 30, 2016. Cadle argued that Papastefanou's CR 60.02 motion was untimely, as Cadle had registered its judgment against Papastefanou more than six and a half years ago. Additionally, Cadle contended that the debt Papastefanou owed to it had not been discharged in the 2003 Bankruptcy and that, therefore, the judgment was still valid. Cadle noted that Papastefanou was denied discharge in the 1997 Bankruptcy. Cadle contended that the bankruptcy court's determination that the debt was non-dischargeable made the debt's discharge status incontestable in any future bankruptcy proceeding filed by Papastefanou, including the 2003 Bankruptcy.

Accordingly, Cadle contended that the judgment it had obtained against Papastefanou was still valid and enforceable.

The circuit court heard arguments on Papastefanou's CR 60.02(e) motion on April 4, 2016. After counsel had argued their respective positions, the circuit court opined that it had not been presented with any documentation clearly indicating that Papastefanou's debt to Cadle had been discharged in the 2003 Bankruptcy. The circuit court indicated that it would be denying Papastefanou's motion; however, the court stated that if Papastefanou went to the Maryland Bankruptcy Court and obtained documentation that his debt to Cadle had been discharged by the 2003 Bankruptcy, it would reconsider its decision. On April 5, 2016, the circuit court entered an order denying Papastefanou's motion to set aside the judgment. As grounds for denial of the motion, the circuit court found that the motion was untimely under CR 60.02 and was unsupported in fact and/or law. The circuit court found that Papastefanou's argument that the 2003 Bankruptcy had discharged his debt to Cadle was invalid, as an adjudication in the 1997 Bankruptcy had determined that Papastefanou's debt to Cadle was non-dischargeable.

On November 2, 2016, Papastefanou again moved to reopen the case and to set aside Cadle's judgment against him under CR 60.02(e). Papastefanou maintained his argument that the judgment against him had been discharged by

virtue of the 2003 Bankruptcy. This time, Papastefanou attached a certified copy of the entire file from the 2003 Bankruptcy. Papastefanou contended that the file demonstrated that his debt to Cadle had been listed in the petition for bankruptcy, that the bankruptcy court had entered a general order of discharge, and that the attorney for Cadle had been listed as a recipient of that order. Cadle responded to Papastefanou's motion on November 15, 2016. Cadle maintained its arguments that the motion was untimely under CR 60.02 and that the 2003 Bankruptcy did not discharge Papastefanou's debt to Cadle. Additionally, Cadle noted that Papastefanou's most recent CR 60.02 motion simply recycled his previously made arguments, with the only difference being that Papastefanou had attached a "certified copy" of the discharge order from the 2003 Bankruptcy. Cadle argued that Papastefanou's CR 60.02 motion could be denied on that ground alone, as Papastefanou had not appealed the prior denial of his CR 60.02 motion and because CR 60.02 does not permit successive post-judgment motions. The circuit court held a hearing on the motion on November 21, 2016. At the conclusion of the hearing, the circuit court instructed both parties to file post-hearing memoranda concerning the preclusive effect, if any, the 1997 Bankruptcy had on the 2003 Bankruptcy.

Cadle and Papastefanou filed post-hearing memoranda on December 9, 2016. Cadle cited to numerous authorities supporting its position that a denial of

discharge, or a finding that a particular debt is non-dischargeable, in a Chapter 7 proceeding bars discharge of that debt in a subsequent Chapter 7 proceeding.

Cadle contended that the fact that its request that discharge be denied was granted in the same order granting its motion for a default judgment did not change the analysis and cited to authority supporting its contention. Additionally, Cadle argued that there was no requirement for it to have relitigated the status of Papastefanou's debt to it in the 2003 Bankruptcy proceedings for the preclusive effect of the order in the 1997 Bankruptcy to apply. Cadle contended that, pursuant to 11 U.S.C. § 523(a)(10), any discharge Papastefanou obtained in the 2003 Bankruptcy could not have discharged his debt to Cadle.

In his post-hearing memorandum, Papastefanou argued that because the order denying discharge in the 1997 Bankruptcy had been entered on default judgment, there was no preclusive effect. Papastefanou cited to numerous authorities in support of this position; however, all but one of the cases to which he cited dealt with whether a default judgment entered in a state court proceeding could have preclusive effect regarding the dischargeability of a debt in a subsequent bankruptcy proceeding. Papastefanou additionally noted that, in the 2003 Bankruptcy, Cadle had failed to argue that the order in the 1997 Bankruptcy precluded discharge of Papastefanou's debt to it.

At the January 17, 2017, motion hour, the circuit court stated that it had read the parties' memoranda and had consulted with a federal bankruptcy judge. The circuit court indicated that it was of the opinion that, despite Papastefanou's contentions, the fact that Cadle's attorney was listed on the certificate of service for the discharge order in the 2003 Bankruptcy was not determinative of whether Papastefanou's debt to Cadle had been discharged. On January 20, 2017, the circuit court entered an order denying Papastefanou's motion to reopen the case and to vacate the judgment under CR 60.02(e). The order stated that the circuit court was denying Papastefanou's motions on the same grounds as stated in its April 5, 2016 order and because the previous disposition of the issue was binding on the parties.

This appeal followed.

II. STANDARD OF REVIEW

We review a circuit court's denial of a CR 60.02 motion for an abuse of discretion. *Djoric v. Commonwealth*, 487 S.W.3d 908, 910 (Ky. App. 2016). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

III. ANALYSIS

Under CR 60.02(e), a court may relieve a movant from a final judgment if that “judgment is void, or has been satisfied, released, or discharged” On appeal, Papastefanou contends that the circuit court erroneously denied his CR 60.02(e) motion, as he believes that he has clearly demonstrated that the 2003 Bankruptcy discharged his debt to Cadle, therefore making Cadle’s judgment against him unenforceable. We disagree.

To demonstrate that the 2003 Bankruptcy had discharged his debt to Cadle, Papastefanou attached a certified copy of the 2003 Bankruptcy, which indicated that Cadle was listed as a creditor on the schedules to Papastefanou’s petition for bankruptcy and that Cadle’s attorney was served with a copy of the order for discharge. Papastefanou contends that this is all that is required to show that his debt to Cadle was discharged, as a discharge in bankruptcy voids all debts that arose before the entry of the order of discharge. While Papastefanou acknowledges that, in the 1997 Bankruptcy, he listed Cadle as a creditor and he was denied discharge of his debt, he contends that the 1997 Bankruptcy can have no effect on the 2003 Bankruptcy because the denial of discharge was granted on default judgment.

Papastefanou is correct that, *generally*, a grant of discharge under 11 U.S.C. § 727 will relieve a debtor from all previously incurred debts.

Unsurprisingly, however, there are exceptions to that general rule, which are codified in 11 U.S.C. § 523. One such exception provides that a discharge under 11 U.S.C. § 727 does not discharge a debtor from any debt “that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title . . . in which the debtor . . . was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7)” 11 U.S.C. § 523(a)(10). “[T]he effect of having a discharge denied is harsh: it renders all the debts/claims which could have been included in the petition forever nondischargeable in bankruptcy, thereby subjecting the debtor’s assets and future income to all claims of such creditors.” *In re Halishak*, 337 B.R. 620, 625 (Bankr. N.D. Ohio 2005) (citing 11 U.S.C. § 523(a)(10)). It makes no difference whether the debtor was denied discharge on a motion for default judgment. *See In re Smith*, 401 B.R. 733 (Bankr. D. Md. 2008); *In re Basford*, 363 B.R. 832, 834 (Bankr. N.D. Ohio 2006). Further, “[u]nlike other exceptions to discharge, the exception of § 523(a)(10) operates automatically and the creditor is not required to seek a determination of dischargeability from the bankruptcy court in order to take advantage of it.” *In re Smith*, 133 B.R. 467, 470 (Bankr. N.D. Ind. 1991) (citing 11 U.S.C. § 523(c)).

However, 11 U.S.C. § 523(a)(10) does not treat all denials of discharge equally. 11 U.S.C. § 523(a)(10) specifically states that it excepts from discharge those debts that were previously denied discharge under certain

subsections of 11 U.S.C. § 727(a). By negative inference, if a debtor was denied discharge in a prior bankruptcy proceeding under 11 U.S.C. § 727(a)(1), (8)-(12)—absent some other exception—he would not be forever barred from having his debt discharged in a subsequent bankruptcy proceeding. 11 U.S.C. § 523(a)(10). The record before us clearly demonstrates the following: Cadle was listed as a creditor in the 1997 Bankruptcy; Cadle filed an adversary proceeding in which it objected to discharge of Papastefanou’s debt under 11 U.S.C. § 727; and the bankruptcy court denied discharge. It is unclear, however, under which subsection of 11 U.S.C. § 727(a) Papastefanou’s discharge was denied. Accordingly, it is unclear whether 11 U.S.C. § 523(a)(10) was triggered in the 2003 Bankruptcy to exclude Papastefanou’s debt to Cadle from the general order of discharge.

In order to be granted relief under CR 60.02, the movant must demonstrate why he is entitled to extraordinary relief and “must affirmatively allege facts which, if true, justify vacating the judgment.” *Gross v. Commonwealth*, 648 S.W.2d 853, 856 (Ky. 1983). The only affirmative facts Papastefanou presented to the circuit court were that he was granted a general discharge in the 2003 Bankruptcy, that he named Cadle as a creditor, and that Cadle’s attorney was listed on the certificate of service. Those facts, without more, are insufficient to demonstrate that Cadle’s judgment against Papastefanou has been discharged. To be clear—in affirming the circuit court’s denial of

Papastefanou's CR 60.02 motion we are not making any determination as to whether Papastefanou's debt to Cadle was, in fact, discharged by the 2003 Bankruptcy. Nonetheless, as Papastefanou was unable to prove that the judgment was discharged, we cannot find that the circuit court abused its discretion in denying his CR 60.02(e) motion. To the extent that Papastefanou seeks a determination of whether his debt to Cadle has been discharged, it would seem that the most prudent, and in fact the proper, steps to take would be to reopen the 2003 Bankruptcy. Likewise, to the extent that Papastefanou argues that Cadle is in violation of the permanent injunction contained in 11 U.S.C. § 727, Papastefanou's exclusive remedy is within the jurisdiction of the bankruptcy court under the bankruptcy code. *See* 11 U.S.C. § 105.

Moreover, the circuit court additionally denied Papastefanou's motion as being untimely. Motions made pursuant to CR 60.02(e) must be made "within a reasonable time[.]" CR 60.02. Papastefanou did not file his 60.02 motion until almost seven years after Cadle registered its judgment in Kentucky. Papastefanou has not cited any reason for this delay, besides the fact that he believed that the judgment against him was unenforceable. "What constitutes a reasonable time in which to move to vacate a judgment under CR 60.02 is a matter that addresses itself to the discretion of the trial court." *Gross*, 648 S.W.2d at 858. Based on the

facts of this case, we cannot conclude that the circuit court abused its discretion in finding that Papastefanou had not made his motion within a reasonable time.

IV. CONCLUSION

In light of the foregoing, we AFFIRM the order of the Warren Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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