# STATE OF MICHIGAN

# COURT OF APPEALS

FIRST PLACE BANK, f/k/a FRANKLIN BANK, N.A.,

Plaintiff-Appellee,

v

CASINO CONCEPTS BY DESIGN, INC.,

Defendant,

and

TERRI A. TATE,

Defendant-Appellant.

UNPUBLISHED
January 29, 2013

No. 306883
Oakland Circuit Court
LC No. 2011-117075-CK

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

In this action to collect a debt owed by Casino Concepts by Design, Inc. ("Casino Concepts"), and guaranteed by Terri Tate, Tate appeals as of right from a judgment of $415,135.14 against her pursuant to First Place Bank's[1] ("the Bank") motion for summary disposition.[2] The trial court determined that the undisputed debt was not discharged in Tate's prior Chapter 7 bankruptcy proceeding because it was not listed in the bankruptcy petition. We affirm.

Tate argues that the trial court erred in granting the Bank's motion for summary disposition and awarding judgment in favor of the Bank because the debt based on Tate's personal guarantee of the Casino Concepts loan was discharged in her prior no-asset, Chapter 7 bankruptcy proceeding. We disagree.

[1] Formerly known as Franklin Bank, N.A.

[2] MCR 2.116(C)(10).

A trial court's decision on a motion for summary disposition is reviewed de novo.[3] Summary disposition may be granted under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court must consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial."[4]

The federal bankruptcy code requires a debtor to file a list of creditors when filing a bankruptcy petition.[5] Tate received a discharge in bankruptcy under Chapter 7, 11 USC 727, for individual debtors. 11 USC 523(a) provides categories of debt that are not discharged in bankruptcy. 11 USC 523(a)(3)(A) removes from discharge debts that are:

> neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit –
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing . . . .

Tate does not dispute that she failed to list her debt to the Bank in her schedule of debts filed in the prior bankruptcy proceeding, and she does not contend that the Bank had notice or actual knowledge of the bankruptcy case before it was closed. Instead, she argues that because her bankruptcy case was a "no-asset bankruptcy," the undisclosed debt was discharged, notwithstanding § 523(a)(3)(A), because the Bank would not have received a distribution from the bankruptcy estate even if it had received timely notice of the bankruptcy proceeding.

In *In re Madaj*,[6] the debtors (a husband and wife) borrowed a substantial sum of money from the husband's foster parents. The debtors filed a petition for Chapter 7 bankruptcy, but did not include the foster parents in the list of creditors filed with the petition. The no-asset case was administered and the debtors obtained a discharge under 11 USC 727.[7] The creditors later filed suit against the debtors in state court and obtained a judgment for the unpaid loan balance.[8] The court summarized the ensuing proceedings as follows:

> The Debtors moved to reopen their Chapter 7 proceeding in order to list the debt, claiming that their failure to include it initially had been due to

---

[3] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[4] *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

[5] 11 USC 521(a)(1)(A).

[6] *In re Madaj*, 149 F3d 467 (CA 6, 1998).

[7] *Id*. at 468.

[8] *Id*.

> forgetfulness and inadvertence. The Creditors objected to the motion to reopen, claiming that in light of their repeated requests for payment and the Debtors' protests of poverty, the Debtors' memory lapse was not credible, and that the Debtors had failed to list the debt because they intended to defraud the Creditors. The Creditors opposed the reopening of the Chapter 7 proceeding because they believed, and still believe, that an unlisted debt is not discharged, and that the Debtors ought not be permitted to now list this debt and obtain its discharge. The parties agree that if this debt had been timely scheduled, it would have been dischargeable under 11 USC § 523, and that even if the debt had been listed and a proof of claim had been filed, because this was a no-asset case, there would have been no payment on the debt. The Bankruptcy Court denied the Debtors' motion to reopen, but held that the debt to the Creditors was nonetheless discharged, and the District Court affirmed.[9]

The Sixth Circuit Court of Appeals affirmed the district court's ruling. The court stated that it is not necessary to reopen a bankruptcy case in order to discharge a pre-petition debt not listed in the bankruptcy petition.[10] The court observed that 11 USC 523(a)(3)(A) "does not except an unscheduled debt from discharge if the creditor had notice or actual knowledge of the bankruptcy case in time for timely filing of a proof of claim."[11] The court noted that a debtor cannot omit uninformed creditors from the schedule in order to deny them the opportunity to recover from the bankruptcy estate.[12] But if the estate has no assets, the creditors could not have recovered regardless of whether they were listed on the schedule.[13] The court explained:

> In a Chapter 7 no-asset case, however, the creditors cannot recover from the estate because there is nothing to recover. For this reason, there is no deadline for filing a timely proof of claim in a no-asset case. Technically speaking, therefore, no matter when the creditor learns of the bankruptcy, he is able to file a timely claim. Because § 523(a)(3)(A) excepts the unscheduled debt from discharge "unless such creditor had notice or actual knowledge of the case in time for such timely filing," the moment the creditor receives notice or knowledge of the bankruptcy case, § 523(a)(3)(A) ceases to provide the basis for an exception from discharge. Consequently, the debt is at that point discharged.[14]

---

[9] *Id.*

[10] *Id.*

[11] *Id.* at 469.

[12] *Id.*

[13] *Id.* at 470.

[14] *Id.*

The court further commented that "there are no proceeds to be distributed to the creditors in a no-asset case, which renders the notice function served by the scheduling of debts far less important."[15]

Conversely, in *Colonial Surety Co v Weizman*,[16] the court concluded that non-listed debts are not discharged in bankruptcy, even in a no-asset bankruptcy. In that case, the defendant was an indemnitor for a debt owed to the plaintiff pursuant to a bonding agreement for certain construction contracts.[17] When the plaintiff brought suit against the defendant, the defendant argued that his liability to the plaintiff was expunged by his discharge in chapter 7 bankruptcy. The defendant had not included the plaintiff in the schedule of creditors.[18] The court cited *In re Beezley*,[19] in which the Ninth Circuit Court of Appeals construed § 523(a)(3) "not to apply to so-called no asset bankruptcies[.]"[20] The *Colonial Surety* court disagreed with *In re Beezley*, stating:

> Section 523(a)(3) uses the phrase "in time to permit . . . timely filing of a proof of claim," and *Beezley* reasoned that the no-notice/no discharge provision does not apply to no asset cases because no bar date is ever established and therefore no filing of a claim is ever rendered untimely. With respect, we think that the statute aims to assure creditor notice before discharge and the idea that "timely filing" remains available after the bankruptcy proceeding closed is surely not what Congress had in mind.[21]

The *Colonial Surety* court commented that while the *In re Beezley* court's reading of § 523(a)(3) "has been followed, usually without much analysis, by other circuits; stress is usually placed on the absence of prejudice and on remedies available to the un-notified creditor if the debtor acted with fraudulent intent or if unlisted assets held are later discovered."[22] The court cited *In re Madaj* as an example of a decision that followed the reasoning in *In re Beezley*.[23] The *Colonial Surety* court cited *In re Stark*[24] as a case that followed "a different approach . . . in which it

---

[15] *Id*.

[16] *Colonial Surety Co v Weizman*, 564 F3d 526 (CA 1, 2009).

[17] *Id*. at 527-528.

[18] *Id*. at 528.

[19] *In re Beezley*, 994 F2d 1433 (CA 9, 1993).

[20] *Colonial Surety*, 564 F3d at 530.

[21] *Id*. at 531 (emphasis omitted).

[22] *Id*.

[23] *Id*. at 531 n 5.

[24] *In re Stark*, 717 F2d 322 (CA 7, 1983).

assumed that an unlisted debt was not discharged."[25] The court in *Colonial Surety* favored the approach in *In re Stark*, stating:

> In *Stark*, the holding was that that a no asset debtor could, long after the discharge, ask the bankruptcy court to reopen the proceeding to list belatedly a creditor who was innocently omitted and who would have received no benefit from notice.[26] But such a course properly leaves the burden on the debtor to show that the law and equities justify this relief—absent which the debt will remain undischarged.
>
> * * *
>
> Nothing in the language or history of the 1978 revision of section 523(a)(3) indicates that Congress aimed to carve out no asset bankruptcies from what we perceive to be a general rule that listing the creditor is a condition of discharge. The qualifying phrase about timely filing recognizes that notice may be given late in the bankruptcy-proceeding day but still in time for the creditor to participate in the bankruptcy proceeding. Here, the bankruptcy proceeding was completed with no notice to Colonial.[27]

The court in *Colonial Surety* rejected what it described as a "shortcut to a no harm, no foul outcome" in the decisions that assumed that an un-notified creditor is not harmed by the lack of notice when the debtor claims to have no distributable assets.[28]

Tate incorrectly asserts that this Court is bound to follow *In re Madaj* because Michigan is a Sixth Circuit state. In *Schueler v Weintrob*, our Supreme Court stated that Michigan "adhere[s] to the rule that a State court is bound by the authoritative holdings of Federal courts upon Federal questions," but also explained that "where the Federal circuit courts of appeals themselves are in disagreement upon the proper interpretation of a Federal act, we feel free to choose the view which seems most appropriate to us."[29] The Supreme Court clarified this rule in *Abela v Gen Motors Corp*,[30] in which it stated:

> Although state courts are bound by the decisions of the United States Supreme Court construing federal law,[31] there is no similar obligation with respect to

---

[25] *Colonial Surety*, 564 F3d at 531 (emphasis omitted).

[26] *In re Stark*, 717 F2d at 324.

[27] *Colonial Surety*, 564 F3d at 532.

[28] *Id*.

[29] *Schueler v Weintrob*, 360 Mich 621, 633-634; 105 NW2d 42 (1960).

[30] *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

[31] *Chesapeake & O R Co v Martin*, 283 US 209, 220-221; 51 S Ct 453; 75 L Ed 983 (1931).

> decisions of the lower federal courts.[32] . . . In [*Schueler*], we were faced with conflicting decisions of lower federal courts and, of course, were "free to choose the view which seems most appropriate to us."[33] However, that statement does not establish the converse—that where there is no such conflict, we are bound to follow the decisions of even a single lower federal court. Although lower federal court decisions may be persuasive, they are not binding on state courts.[34]

Accordingly, we are not bound to follow the decision in *In re Madaj*.

We believe that *Colonial Surety*[35] represents the more appropriate approach. It is well established in Michigan law that "[n]othing may be read into a clear statute 'that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'"[36] The approach in *In re Madaj* requires that we read into § 523(a)(3)(A) an additional category of undisclosed debts that are discharged in bankruptcy, namely, debts against a no-asset bankruptcy estate. Because the approach in *Colonial Surety* is more consistent with this state's jurisprudence, we conclude that the trial court properly followed, as more persuasive, the reasoning and rationale set forth in that case. Accordingly, the trial court properly concluded that the Bank's unlisted debt was not discharged in bankruptcy.

Tate alternatively argues that the Bank's action to collect the debt against her is barred by res judicata. Tate did not raise this res judicata issue in the trial court. Therefore, this issue is unpreserved and our review is limited to plain error affecting the outcome of the lower court proceedings.[37] There is no merit to Tate's res judicata argument.

The doctrine of res judicata bars a subsequent action between the same parties when "the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies."[38] Citing the Sixth Circuit's decision in *In re Madaj*, Tate confusingly asserts, "[B]ecause the issue of dischargability has been decided in the United States Sixth Circuit Court of Appeals, the trial court's judgment was res judicata and should have no effect on whether Appellant TATE owes a debt to Appellee." This argument is clearly incorrect because *In re Madaj* involved different

---

[32] *Winget v Grand Trunk W R Co*, 210 Mich 100, 117; 177 NW 273 (1920). See generally, 21 CJS, Courts, § 159, pp 195-197; 20 Am Jur 2d, Courts, § 171, pp 454-455.

[33] *Schueler*, 360 Mich at 634.

[34] *Abela*, 469 Mich at 606-607.

[35] *Colonial Surety*, 564 F3d 526.

[36] *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 237; 818 NW2d 489 (2012) (citation omitted).

[37] *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

[38] *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 43; 795 NW2d 229 (2010) (citation and quotations omitted).

parties and different circumstances. Tate has not identified a prior action between the same parties to this action that may be given res judicata effect. To the extent that Tate is again arguing that the trial court was bound to follow *In re Madaj*, as we have previously explained, the court was not required to follow that decision.

Affirmed.

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Patrick M. Meter