

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
THOMAS EARL BOONE, SR. and) CASE NO. 09-21261 JPK
NICHELLE BOONE,) Chapter 7
)
Debtors.)

ORDER CONCERNING MOTION TO REOPEN
BANKRUPTCY CASE ("MOTION TO REOPEN")

On January 14, 2011, the court conducted a hearing regarding the Motion to Reopen, filed by the debtors on December 11, 2010. Both debtors appeared personally and by counsel Andrew L. Kraemer; the Chapter 7 Trustee originally assigned to this case, Kenneth A. Manning, appeared as an observer essentially.

The motion was filed to reopen the case in order to allow the debtors to file proceedings before the court with respect to alleged actions of HSBC Auto Finance. The purpose of the hearing was to determine whether or not the case should be reopened, in relation to whether or not the debtors could proceed with an action over which the court had jurisdiction.

At the hearing, the court expressed its determination that the Motion to Reopen would be denied, because the court did not deem there to be any action over which the court could exercise jurisdiction in relation to the matters for which the debtors sought to reopen the case. The court having now reviewed the matter in more detail, determines that the case should be reopened.

The Chapter 7 bankruptcy case of Thomas Earl Boone, Sr. and Nichelle Boone was initiated by voluntary petition filed on April 3, 2009. The filing of that case put into effect the automatic stay provided by 11 U.S.C. § 362(a). On June 15, 2009, a reaffirmation agreement between the debtors and HSBC Auto Finance was filed as record entry #24. A motion for the court to approve this agreement was never filed, and therefore the court never reviewed the

agreement; N.D.Ind.L.B.R. B-4008-1(a). Part C of the reaffirmation agreement states the certification by Attorney D. Eric Neff that the agreement does not impose an undue hardship on the debtors; however, Part D of the agreement clearly states to the contrary, by establishing a significant deficiency between the debtors' income and their expenses exclusive of payments on the reaffirmation agreement. However, when one reviews Schedules I and J filed by the debtors at the inception of the case, one discovers that there is a net surplus of Schedule I income after deduction of Schedule J expenses of in excess of \$500.00, and that Schedule J includes an installment payment with respect to an automobile.¹

On June 17, 2009, the Chapter 7 Trustee filed a no asset report (record entry #25). On September 21, 2009, the order granting the debtors' discharge was entered (record entry #32). On November 6, 2009, an order closing the case was entered (record entry #39).

At the hearing held on January 14, 2011, the debtors testified that they received a letter on September 29, 2009 from HSBC Auto Finance which advised them that they had defaulted under the terms of their payment obligations to the creditor, and that the vehicle subject to the reaffirmation agreement would be repossessed. The debtors stated that the repossession took place on Sunday, October 2, 2009.

In the Motion to Reopen, the debtors appear to propose to file an action against HSBC Auto Finance for breach of the reaffirmation agreement, and also potentially for breach of a

¹ There are two different Schedule Js in the initial filing, stating two different amounts for an automobile installment loan. Additionally, the resulting figure in Schedule J (Schedule I income minus Schedule J expenses) does not come close to mirroring the income stated in Schedule I. Not that it is material to this decision, but when one actually reconciles the ineptly prepared Schedules I and J with the equally ineptly prepared Part D of the reaffirmation agreement, one is left with the conclusion that the payment of \$461.59 per month to HSBC Auto Finance under the reaffirmation agreement did not create an undue hardship. As a result, even though no motion was filed for review of the reaffirmation agreement, none was required: the debtors were both represented by an attorney during the negotiation process of the reaffirmation agreement, and the reaffirmation agreement did not constitute an undue hardship on the debtors or their dependents. Assuming the reconciliation previously stated, the reaffirmation agreement was effective without an order of the court approving it.

stay or injunction imposed by the Bankruptcy Code. As stated at the hearing on January 14, 2011, the court does not deem itself to have jurisdiction over a breach of contract action with respect to the reaffirmation agreement – that is a matter for state courts. In addition, because the debtors' indebtedness to HSBC Auto Finance was reaffirmed, the provisions of 11 U.S.C. § 524(a)(2) do not apply – those provisions only apply to a discharged debt.

However, the debtors may be able to state a claim for violation of 11 U.S.C. § 362(a), assertable by an action pursuant to 11 U.S.C. § 362(k). While there is a widespread misperception that a trustee's no-asset report ends the administration of assets of the debtors and has some implication on the automatic stay, that is not correct. 11 U.S.C. § 554(c) provides that the effective date of abandonment of property not administered is the date of closing of the case. Until the case is closed, property of the Chapter 7 bankruptcy estate remains property of the Chapter 7 bankruptcy estate, regardless of the Trustee's statement in a final report that he/she has no intention to administer it. Thus, the vehicle of the debtors alleged to have been repossessed by HSBC Auto Finance remained property of the estate until November 6, 2009.

An unchallenged exemption of property by the debtors removes property from the estate in an of itself. In Schedule C filed at the inception of the case, the debtors stated an exemption of \$4,000.00 for three vehicles, including that subject to the HSBC Auto Finance reaffirmation agreement. However, the blanket value ascribed to the three vehicles by Schedule B was \$11,500.00, leaving an equity in the estate – perhaps secured by a lien, but still an interest in property of the estate – of \$7,500.00, a portion of which can be reasonably ascribed to the vehicle repossessed by HSBC Auto Finance. 11 U.S.C. § 362(c)(2) provides that the stay of most actions under 11 U.S.C. § 362(a) is terminated by the earliest of the time the case is closed; the time the case is dismissed; or the time a discharge is granted to the debtors. Thus, certain provisions of 11 U.S.C. § 362(a) were eviscerated by the debtors' discharge. However,

11 U.S.C. § 362(c)(1) provides that “the stay of act against the property of the estate under sub-section (a) of this section continues until such property is no longer property of the estate”. Thus, pursuant to 11 U.S.C. § 554(c), until the case was closed, the estate’s interest in the motor vehicle which provided security for HSBC Auto Finance’s debt continued. If the debtors’ assertions are established, at minimum a violation of 11 U.S.C. § 362(a)(3) and/or (4) may be established.

The court thus determines that under the circumstances of this case, the debtors may be able to establish a violation of 11 U.S.C. § 362(a)(3) and/or (4), actionable under 11 U.S.C. § 362(k). The court therefore determines that the Motion to Reopen should be granted.

IT IS ORDERED that the debtors’ Motion to Reopen is granted.

IT IS FURTHER ORDERED that the debtors shall file whatever action they deem necessary to file with respect to any asserted violation of 11 U.S.C. § 362(a) by HSBC Auto Finance by **March 14, 2011**.²

Dated at Hammond, Indiana on February 14, 2011.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtors, Attorney for Debtors
Trustee, US Trustee

² The debtors are advised that if the action seeks to recover monies paid to HSBC Auto Finance or to recover the vehicle repossessed by HSBC Auto Finance, an adversary proceeding will be necessary under Fed.R.Bankr.P. 7001(1). If the action seeks only damages for alleged violation of the automatic stay – apart from the recovery of money paid to property repossessed – then the action may be commenced by a motion pursuant to 11 U.S.C. § 362(k).