

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
MICHAEL L. THOMAS and)	CASE NO. 09-33212 HCD
LAURA J. THOMAS,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
MICHAEL L. THOMAS,)	
)	
PLAINTIFF,)	
vs.)	PROC. NO. 12-3045
)	
METAL PARTNERS, LLC)	
)	
DEFENDANT.)	

Appearances

Dean E. Leazenby, Esq., counsel for plaintiff, Warrick & Boyn, LLP, 121 West Franklin Street, Suite 400, Elkhart, Indiana 46516; and

Paul D. Eash, Esq., counsel for defendant, 306 West High Street, Elkhart, Indiana 46516.

MEMORANDUM OF DECISION

At South Bend, Indiana, on April 30, 2013.

Before the court are the cross-motions for summary judgment filed by the plaintiff Michael L. Thomas, chapter 7 debtor (“Thomas” or “debtor”), and by the defendant Metal Partners, LLC (“Metal Partners” or “creditor”). Each party requests summary judgment on the debtor’s Complaint to Determine Dischargeability of Debt, brought pursuant to 11 U.S.C. § 727(b). The parties submitted briefs and were granted a hearing to present their arguments, as well. For the reasons stated in this opinion, the court grants summary judgment in favor of Metal Partners and against Thomas.¹

¹ The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

BACKGROUND

The following facts are undisputed. Both before and after his bankruptcy case was filed, Thomas was a member and general manager of a now defunct entity known as Work Easy Trailers, LLC (“Work Easy Trailers”).² On August 27, 2008, Thomas, on behalf of Work Easy Trailers, executed an application for an open line of credit with Metal Partners, and agreed to be personally liable for the debts Work Easy Trailers owed to Metal Partners (“personal guaranty”).³

On July 8, 2009, Thomas and his wife filed a voluntary chapter 7 bankruptcy petition. Neither the debtors nor Work Easy Trailers owed a debt to Metal Partners prior to the bankruptcy, and the debtors did not schedule Metal Partners as a creditor. On October 19, 2009, the court’s Order of Discharge granted the debtors a discharge under 11 U.S.C. § 727. Their case was closed on November 16, 2009.

Between May 10, 2010, and June 25, 2010, Work Easy Trailers, through its representative Thomas, submitted orders for materials and services from Metal Partners. Metal Partners provided the ordered service and shipped the ordered materials to Work Easy Trailers between May 12 and June 28, 2010. The value of those services and materials was \$30,232.52. Work Easy Trailers was billed for the order but failed to pay Metal Partners the amount due and owing on account, \$30,232.52.

On August 26, 2011, nearly two years after the debtors’ discharge order was entered, Metal Partners filed a lawsuit against Work Easy Trailers and Thomas in the Elkhart Superior Court, seeking to hold them liable under the line of credit and personal guaranty for the cost of the goods sold by Metal

² On his bankruptcy Schedule I, Thomas stated that he was general manager of Work Easy Trailers.

³ The guaranty is found on the “Application for Open Line of Credit” established by Metal Partners. At the bottom of the Application is an “Authorization” which states:

I (we) hereby apply for business credit with Metal Partners, LLC and agree to payment within established credit terms (net 30 days). In consideration of extending credit to the applicant, I (we) agree to be personally, jointly and severally responsible for the payment of all sums due and owing and do unconditionally and irrevocably guaranty the applicant’s payments. . . .

R. 1, Ex. 4. The Application was signed by Michael Thomas, using the title “Member,” on August 27, 2008.

Partners to Work Easy Trailers after the Thomases' bankruptcy. The state court collection suit sought to collect the past due account of \$30,232.52 plus attorney fees of \$10,303.50.

On October 13, 2011, counsel for Thomas faxed to counsel for Metal Partners a copy of Thomas' Order of Discharge. This fax was the first notice Metal Partners received of the Thomases' bankruptcy.

On May 11, 2012, the Elkhart Superior Court entered a default judgment against Work Easy Trailers and Thomas and in favor of Metal Partners in the amount of \$30,232.52 plus post-judgment interest.

On June 11, 2012, the court granted the debtors' request to reopen their bankruptcy case. On June 28, 2012, the debtor Michael L. Thomas filed this Complaint to Determine Dischargeability of Debt. On October 9, 2012, he filed an amended Schedule F, including Metal Partners as a creditor holding a "business debt" in the amount of \$34,533.52. Schedule F further stated that "Michael Thomas executed a pre-petition personal guaranty of indebtedness owed by Work Easy Trailers to Metal Partners. At the time the bankruptcy petition was filed, the contingent debt was zero."

In this adversary proceeding, Thomas brought a Complaint pursuant to 11 U.S.C. § 727(b). Both parties sought summary judgment. After the filing of briefs and oral argument on the issues, the court took the matter under advisement.

DISCUSSION

Each party has filed a motion for summary judgment. This court renders summary judgment only if the record shows that "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts

showing that there is a genuine issue for trial.” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

When, as in this case, the parties have filed cross motions for summary judgment, the court must examine the evidence and “construe all facts and inferences therefrom ‘in favor of the party against whom the motion under consideration is made.’” *In re United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir. 2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir. 2005)). Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

In his Complaint Thomas asked the court to determine that the debt that Metal Partners sought to collect in the state court judgment had been discharged. He argued that his pre-petition guaranty of any indebtedness owed to Metal Partners by Work Easy Trailers was a contingent claim that was discharged in the court’s Order of Discharge. *See* R. 1, ¶ 12. He further asserted that Metal Partner’s attempt to enforce the guaranty violated the discharge injunction. He sought damages against Metal Partners for that violation. *See id.*, ¶ 15.

Thomas relied upon § 727(b) of the Bankruptcy Code, which provides:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case[.]

11 U.S.C. § 727(b). In voluntary chapter 7 cases the “order for relief” occurs at the moment the bankruptcy petition is filed and a debtor’s case commences. Therefore under § 727(b), debts arising before the case began are discharged and debts arising after the case began are not. *See Matter of Rosteck*, 899 F.2d 694, 696 (7th Cir. 1990).

Under § 524(a)(2), “a bankruptcy discharge operates as an injunction against any act to collect a discharged debt as a personal liability of the debtor.”⁴ *Kovacs v. U.S.*, 614 F.3d 666, 672 (7th Cir. 2010). It applies “only when a creditor acts to *collect* a pre-petition or discharged debt.” *In re Kuehn*, 563 F.3d 289, 291 (7th Cir. 2009) (italics in original). When a party alleges a violation of the discharge injunction, he has the burden of proving the violation by clear and convincing evidence. *See In re Barr*, 457 B.R. 733, 735 (Bankr. N.D. Ill. 2011).

In order to prove that a discharge injunction has been violated, “the debtor must show that the creditor acted intentionally, with knowledge that his act was in violation of the . . . injunction.” *Id.* (quoting *In re Kewanee Boiler Corp.*, 297 B.R. 720, 736 (Bankr. N.D. Ill. 2003)). To succeed, the debtor first must demonstrate that there was a debt and that the debt at issue was discharged. *See In re Weinhold*, 393 B.R. 623, 628 (Bankr. E.D. Wis. 2008) (citing cases). Then he must show that the creditor, Metal Partners, had knowledge of the § 524 injunction and intended the conduct that violated the injunction. *See id.* at 629. If a willful violation is demonstrated, both actual and punitive damages are available. *See Randolph v. IMBS, Inc.*, 368 F.3d 726, 728 (7th Cir. 2004).

In his briefs and at the oral argument, the debtor described the guaranty he executed as a contingent claim or right to payment that he was required to pay only upon the occurrence of a future event triggering his liability: in this case, Work Easy Trailer’s default. However, the debtor contended, because that debt was discharged in his bankruptcy, the indebtedness that Metal Partners sought to collect from Thomas in the state court lawsuit was discharged at that time as well. He relied primarily on *In re Lipa*, 433

⁴ The plaintiff did not cite the discharge injunction in the Complaint. The provision of the Bankruptcy Code most applicable to these facts is § 524(a), which presents the effects of a discharge:

A discharge in a case under this title –

...
(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524(a)(2).

B.R. 668 (Bankr. E.D. Mich. 2010), which stated that “a [contingent] right to payment that is not yet enforceable under non-bankruptcy law at the time of the bankruptcy filing may still constitute a claim that is dischargeable in the bankruptcy case, . . . [and] “[t]he classic example of a contingent debt is a guaranty because the guarantor has no liability unless and until the principal defaults.”” *Id.* at 670 (quoting *In re Pennypacker*, 115 B.R. 504, 507 (Bankr. E.D. Pa. 1990)). Noting that the terms “claim” and “debt” were “defined as broadly as possible,” *id.* at 671, the *Lipa* court concluded that the debtor’s personal guaranty was discharged in his bankruptcy.

Metal Partners responded that the debt at issue, unpaid by Work Easy Trailers or by its guarantor Thomas, was a debt that arose long after the court’s Order for Relief and was not in any way subject to the § 727(b) discharge. It explained that Work Easy Trailers owed nothing to Metal Partners when the bankruptcy petition was filed or when the Order of Discharge was issued. There was no debt for Thomas to guaranty then. Metal Partners argued that it therefore had no claim, contingent or otherwise, against Thomas that was discharged or subject to discharge. All the debts at issue now, debts owed by Work Easy Trailers to Metal Partners that were guaranteed by Thomas, accrued in May and June 2010, over 7 months after the Order of Discharge. Metal Partners pointed out as well that, since it was not listed as a creditor on the debtors’ bankruptcy petition, it had no knowledge of a debt or a contingent claim it might have against the debtor that was discharged or subject to discharge.

The creditor relied primarily on *In re Weeks*, 400 B.R. 117 (Bankr. W.D. Mich. 2009), which rejected the position “that the discharge of a debtor’s guaranty obligations extends so far as to include even yet to be incurred debts of the principal obligor” and stated that, “[a]t best, a creditor has only an expectancy with respect to such loans.” *Id.* at 124. *Weeks* held that the debtor was liable on his post-petition line of credit guaranty “because he chose not to revoke the open promises under his pre-petition guaranties” to repay future line-of-credit loans. *Id.* at 125. Metal Partners insisted that, in this case, neither Work Easy Trailers nor Thomas revoked the pre-petition guaranty under the line of credit account with Metal Partners.

The court begins with Thomas' assertion that his personal guaranty to pay Work Easy Trailers' debts was a contingent claim. Under the Bankruptcy Code, a "debt" is a "liability on a claim," and a "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(12); § 101(5)(A). The definitions are very broad. *See Matter of Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993); *Matter of Rosteck*, 899 F.2d at 696. With such broad definitions, "all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case." *Rosteck*, 899 F.2d at 696 (quoting *In re Energy Co-op*, 832 F.2d 997, 1001 (7th Cir. 1987)).

However, "contingent claim" is not defined in the Code. *Rosteck* defines "contingent" as

"[p]ossible but not assured; doubtful or uncertain; conditioned upon some future event which is itself uncertain or questionable. . . . [I]t implies that no present interest exists, and that whether such interest or right will ever exist depends upon a future uncertain event."

Rosteck, 899 F.2d at 697 (quoting *Grady v. A.H. Robins Co., Inc.*, 839 F.2d 198, 202 (4th Cir. 1988)).

Black's Law Dictionary defines "contingent claim" as "[a] claim that has not yet accrued and is dependent on some future event that may never happen." Black's Law Dictionary 282 (9th ed. 2009). Any consideration of what constitutes a contingent claim varies depending upon the posture of the case and nature of the claim, and the analysis must be done on a case-by-case basis. *See Matter of Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 974 F.2d 775, 781 (7th Cir. 1992).

The court turns to federal bankruptcy law to decide "when a claim arises for purposes of determining whether a party has a contingent claim that was discharged in bankruptcy." *In re Conseco, Inc.*, 330 B.R. 673, 685 (Bankr. N.D. Ill. 2005). When determining how broadly defined a "contingent claim" may be, "logic dictates that the concept cannot be limitless." *In re Miller*, 268 B.R. 826, 828 (Bankr. N.D. Ind. 2001). At some point, "'a right to payment becomes so contingent that it cannot fairly be deemed a right to payment at all.'" *In re Conseco*, 330 B.R. at 685 (quoting *In re CD Realty Partners*, 205 B.R. 651, 656 (Bankr. D. Mass. 1997)). The Seventh Circuit stated that it "greatly doubt[ed] that the issue [of determining

when a contingent tort claim exists] is one that lends itself to governance by formula.” *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000). Nevertheless, formulas have been set forth by various courts:

Grappling with the competing interests of a broad definition of claim intended to protect a debtor’s fresh start and the requirements of due process and a creditor’s right to compensation, courts have created three tests to determine when claims arise: 1) the right to payment approach; 2) the conduct approach; and 3) the relationship/fair contemplation approach.

In re Huffly Corp., 424 B.R. 295, 302-03 (Bankr. S.D. Ohio 2010); *see also In re Miller*, 268 B.R. at 828-29.

The “right to payment” or “accrual” approach “equates a claim solely with a right to payment under non-bankruptcy law.” *Miller*, 268 B.R. at 828. Under this method of analysis, a bankruptcy claim does not arise until a cause of action or right to payment has accrued under state or non-bankruptcy law.⁵ This test was established by the Third Circuit in *Matter of M. Frenville Co., Inc.*, 744 F.2d 332 (3d Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985), but was overruled by that appellate court, *en banc*, in *In re Grossman’s Inc.* on the ground that “it impose[d] too narrow an interpretation of a ‘claim’ under the Bankruptcy Code.” *Grossman’s*, 607 F.3d 114, 121 (3d Cir. 2010). The Third Circuit, reviewing asbestos-related tort claims in *Grossman’s*, held that “a ‘claim’ arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury, which underlies a ‘right to payment’ under the Bankruptcy Code.” *Id.* at 125.

The “conduct” approach “holds that so long as the [debtor’s] conduct giving rise to the creditor’s right to payment occurs prior to the petition, the resulting right to payment is a claim, assertable, and thus

⁵ Under Indiana law, a “guarantor is required to pay only if the principal debtor fails to pay.” *Hepburn v. Tri-County Bank*, 842 N.E.2d 378, 385 (Ind. App. 2006).

A guaranty is defined as a promise to answer for the debt, default, or miscarriage of another person. It is an agreement collateral to the debt itself and represents a conditional promise whereby the guarantor promises to pay only if the principal debtor fails to pay.

Grabill Cabinet Co., Inc. v. Sullivan, 919 N.E.2d 1162, 1165 (Ind. App. 2010) (quoting *S-Mart, Inc. v. Sweetwater Coffee Co., Ltd.*, 744 N.E.2d 580, 585 (Ind. App. 2001) (quotation marks omitted, citations omitted)). Moreover, a “continuing guaranty” is one that “contemplates a future course of dealing . . . to give the principal debtor a standing credit to be used by him from time to time.” *Id.* (citing 38 Am.Jur.2d Guaranty § 20 (1999)).

dischargeable, in bankruptcy.” *In re Miller*, 268 B.R. at 828 (citing cases). Under this test, a claim arises at the time the debtor’s conduct occurs, even if the actual injury is not suffered until after the bankruptcy filing. This method has been used in product liability cases: If a debtor’s acts giving rise to liability occurred pre-petition, the claim is a pre-petition contingent claim. *See Huffy*, 424 B.R. at 304 (describing test and criticisms of it). The Seventh Circuit used this approach in *Matter of UNR Industries, Inc.*, 20 F.3d 766 (7th Cir.), *cert. denied*, 513 U.S. 999 (1994), when determining whether an asbestos manufacturer’s chapter 11 plan could bind claimants who had been exposed to the debtor’s products pre-petition but who had yet to manifest any injury. The court noted that “[i]njuries attributable to past acts are certain to occur; although the identity of the victims remains to be ascertained, the existence of injury is real enough.” *Id.* at 770. It then stated that the definition of claim “is capacious” and that “[a]ttaching labels such as ‘contingent’ and ‘unmatured’ and ‘disputed’ to the interests of persons who will become sick in the future . . . does not put those interests beyond the power of the bankruptcy court.” *Id.* It confirmed that the debtor’s plan, which established a trust to compensate manifest and latent asbestos-related claims, should not be disturbed. *See id.* at 771.

The third approach is the “fair contemplation” test, which “holds that, where the possibility of the event triggering the right to payment is within the fair contemplation of the creditor at the time the petition is filed, the creditor has a bankruptcy claim.” *Miller*, 268 B.R. at 828. Similarly, a bankruptcy claim can be determined by “the extent of the pre-confirmation relationship between the debtor and the putative class of creditors.” *Id.* at 829. In the Seventh Circuit, this approach was used in *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 974 F.2d 775 (7th Cir. 1992), which formulated when a contingent claim arose in the context of environmental contamination cleanup. The court concluded that a contingent CERCLA claim existed, for purposes of bankruptcy, “when a potential CERCLA claimant can tie the bankruptcy debtor to a known release of a hazardous substance.” *Id.* at 786.

The “fair contemplation” test has been employed, as well, to analyze when a breach-of-contract claim exists. Courts have determined that a party to a contract should reasonably expect that another party will breach the contract and therefore that “a contingent claim arises at the time of contracting, not at the time of a subsequent breach.” *In re Conseco*, 330 B.R. at 686. Courts also have held the claim against a guarantor or indemnitor arises only when the principal has failed to make the required payment.

Under contract law, pre-petition conduct between parties can establish a situation in which upon occurrence of an event in the future, one party has to fulfill a promise to the other party. That is, a “contingent claim” is one in which the “debtor’s legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created.”

AM Intern., Inc. v. Datacard Corp., 146 B.R. 391, 405-06 (N.D. Ill. 1992) (citation omitted).

In this adversary proceeding, neither Thomas nor Metal Partners used these formulas to establish whether or when Metal Partner’s “contingent claim” arose and whether it was discharged. Instead, they each cited cases factually similar to the case herein, in which debtors had executed guarantees and later filed bankruptcy. The cases were distinguishable, however: The debtors therein were liable on the debts at issue at the time the petition was filed; therefore those debts were pre-petition debts. In this case, when the debtors filed bankruptcy they owed no pre-petition debt to Metal Partners. Thomas’ obligation under the guaranty never had been triggered, and the debtors did not list the guaranty as a contingent liability in their schedules. This fact distinguishes the case herein from the cases cited by both parties. *See, e.g., In re Lipa*, 433 B.R. 668, 669 (Bankr. E.D. Mich. 2010) (post-petition payments were being applied to pre-petition debt as a method for collecting pre-petition obligations); *In re Huff*, 424 B.R. 295, 298 (Bankr. S.D. Ohio 2010) (debtor’s indemnification agreement and misconduct arose pre-petition; because creditor had notice of bankruptcy and failed to file contingent claim, the claim was discharged); *In re Weeks*, 400 B.R. 117, 123 (Bankr. W.D. Mich. 2009) (no dispute that the debtor’s pre-petition guarantees of pre-petition obligations were discharged); *In re Haught*, 120 B.R. 233, 234 (Bankr. M.D. Fla. 1990) (no dispute that debtor was liable pre-petition on his guaranty of a line of credit).

Even in the case most similar to the one before this court, *In re Stillwell*, 2012 WL 441193 (Bankr. D. Neb. Feb. 10, 2012), the ultimate determining facts caused it to be inapposite. In *Stillwell*, the debtor executed a lease for his business and signed a personal guaranty for the lease payments more than 8 years before filing bankruptcy. When he filed chapter 7, the lease payments were current and there was no pre-petition obligation outstanding. The lessor was not listed on the bankruptcy schedules and did not receive notice of the bankruptcy filing. After the debtor's discharge, the debtor's company defaulted on the lease, and the lessor took steps to collect on the guaranty. The bankruptcy court reopened the case. It found that (1) the debtor did not sign as guarantor after the original lease, (2) the original guaranty was not in effect on the date of the bankruptcy filing, and (3) in any case, any contingent liability on the lease guaranty had been discharged in the no-asset case. Having reviewed all the case authorities upon which the parties relied, this court finds that they are clearly distinguishable and not controlling.

Returning to the three formulas upon which many courts rely when determining when a claim arises, the court finds that guarantees and other contingent obligations generally are evaluated under the "fair contemplation" or "relationship" category. Under that approach, the unchallenged facts indicate that Thomas' guaranty, executed a year before filing bankruptcy, would qualify as a pre-petition contingent liability owed to Metal Partners. In addition, Metal Partners held a pre-petition contingent claim against Thomas. Following the test, a court could find that the parties had held a business relationship and that it was within the fair contemplation of all the parties that Work Easy Trailers might default and that Thomas might be required to pay that debt. However, a court should find it significant that there was no actual debt owed by the debtor to Metal Partners when the petition was filed and that the Thomases did not declare the guaranty as a contingent debt on their schedules. Moreover, it seems apparent that Thomas either did not realize that Metal Partners was a potential creditor or did not recognize his responsibility to declare that obligation on the bankruptcy schedules. Because he did not consider the guaranty to be a pre-petition obligation, he did not list Metal Partners as a potential creditor holding a contingent claim.

The Seventh Circuit sagely advised that deciding when a contingent claim arises does not fit well into formulas and should be determined on a case-by-case basis. In this case, the court finds that Thomas, by not listing Metal Partners' contingent claim in the bankruptcy schedules, did not treat its claim as a contingent debt subject to discharge. The obligation arose only when the demand to pay Work Easy Trailers' bill was made, a year after bankruptcy. After Metal Partners obtained a judgment against him in state court, Thomas returned to this court to schedule his May 11, 2012 judgment debt to Metal Partners (in the amount of \$34,533.52) as a "business debt" which had been a contingent debt of \$0.00 when he filed the bankruptcy petition. In the court's view, the debtor himself did not consider his obligation as guarantor to be a ripe pre-petition contingent debt, and by not listing Metal Partners he gave it no opportunity to declare itself a contingent creditor.

Since Metal Partners had no notice of the Thomases' bankruptcy, the court weighs the debtor's right to a fresh start along with the creditor's right to due process. As the Third Circuit stated in *In re Grossman's Inc.*:

Any application of the test to be applied cannot be divorced from fundamental principles of due process. Notice is "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality . . ." *Mullane [v. Central Hanover Bank & Trust Co.]*, 339 U.S. [306,]at 314, 70 S.Ct. 652[, 94 L.Ed. 865 (1950)]. Without notice of a bankruptcy claim, the claimant will not have a meaningful opportunity to protect his or her claim. See 11 U.S.C. § 342(a) ("There shall be given such notice as is appropriate . . . of an order for relief . . . under [the Bankruptcy Code]."). Inadequate notice therefore "precludes discharge of a claim in bankruptcy." *Chemetron [Corp. v. Jones]*, 72 F.3d [341,] 346 [(3d Cir. 1995)].

607 F.3d at 125-26 (holding in an asbestos case that "a 'claim' arises when an individual is exposed pre-petition to a product or other conduct giving rise to an injury"). The Bankruptcy Code provides that a bankruptcy discharge "does not discharge any debt not listed in the debtor's schedule of debts unless the creditor 'had notice or actual knowledge' of the bankruptcy proceeding in time to make a timely filing in that proceeding." *Matter of Barnes*, 969 F.2d 526, 528 (7th Cir. 1992) (quoting 11 U.S.C. § 523(a)(3)(A)) (affirming discharge of debt held by creditor with notice of bankruptcy). The Seventh Circuit has found that, when an unsecured creditor was not given notice of a bankruptcy, it could not take the appropriate action

before a debtor was discharged. See *In re Smith*, 582 F.3d 767, 780 (7th Cir. 2009) (affirming that unscheduled creditors without notice could proceed with state court lawsuits against discharged chapter 7 debtor); *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 968 (7th Cir. 1996) (holding that debt of unscheduled creditor without notice or actual knowledge of bankruptcy was not discharged by discharge order); *In re Amari*, 483 B.R. 836, 843 (Bankr. N.D. Ill. 2012) (allowing dischargeability complaint to be deemed timely because creditor did not have notice or actual knowledge).

Some courts have questioned whether an unscheduled creditor without notice of the bankruptcy was harmed by the lack of knowledge and whether the debtor's failure to include the creditor in the schedules was intentional or fraudulent. See, e.g., *In re Beshensky*, 68 B.R. 452, 454 (Bankr. E.D. Wis. 1987). In this case, there was no evidence that Thomas intended not to schedule Metal Partners. However, he did not notify Metal Partners of the bankruptcy and did not attempt to reaffirm or revoke the guaranty (alternative suggestions made in *In re Weeks*, 400 B.R. at 121, 124). The court finds that the lack of notice caused harm to Metal Partners. Metal Partners relied upon Thomas' guaranty and did not know that the guarantor had filed bankruptcy. It continued to deal with Work Easy Trailers and to count on Thomas' promise that, if Work Easy Trailers failed to pay its bill, Thomas would cover it. Without awareness of the Thomases' bankruptcy filing, Metal Partners did not have the opportunity to protect itself from financial risk. It did not withdraw its continuing line of credit or adjust its business relationship with Work Easy Trailers and its guarantor. Only about a year after Thomas' discharge, when neither Work Easy Trailers nor its guarantor paid its obligations to Metal Partners, did Metal Partners have a cause of action against both the business and its guarantor Thomas. The court finds that due process concerns exist because Metal Partners had "no possible basis to know from the facts that a claim existed at the time of the discharge." *Boston and Maine Corp. v. Massachusetts Bay Transp. Auth.*, 587 F.3d 89, 103-04 (1st Cir. 2009). Such due process concerns "must guide courts in determining whether a potential right constitutes a contingent claim that is discharged in bankruptcy." *In re Conseco, Inc.*, 330 B.R. at 685. Based on the undisputed facts herein, the

court determines that Metal Partners was a possible creditor holding a pre-petition contingent claim in the Thomases' bankruptcy case, but that it was not scheduled and had no notice or actual knowledge of the chapter 7 case the Thomases filed. Consequently, the court determines that Metal Partners' contingent claim was not discharged by the court's order of discharge.

In conclusion, the court finds that the record shows that there is no genuine issue as to any material fact. The record further shows that Metal Partners was neither listed in the Thomases' bankruptcy schedules as a contingent creditor nor notified of the bankruptcy proceedings. The court determines that Thomas did not demonstrate that there was a contingent debt owed to Metal Partners that arose before the date of the order for relief and therefore was subject to discharge. *See* 11 U.S.C. § 727(b). In addition, Thomas failed in his burden of proving that Metal Partners violated the discharge injunction pursuant to 11 U.S.C. § 524(a)(2). Based on the undisputed facts herein, the court holds that Metal Partners' unscheduled pre-petition contingent claim was not discharged in the Thomases' bankruptcy proceedings.

CONCLUSION

For the reasons stated in this Memorandum of Decision, the court grants the Motion for Summary Judgment filed by the defendant Metal Partners, LLC, and denies the Motion for Summary Judgment filed by the plaintiff Michael L. Thomas, chapter 7 debtor. Judgment as a matter of law is granted to Metal Partners, LLC, defendant, and is denied to Michael L. Thomas, plaintiff.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT