

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION**

<b>IN RE:</b>	)	
	)	
<b>Louise Burton-Alston,</b>	)	<b>Case No. 97-16333</b>
	)	
<b>Debtor.</b>	)	
_____	)	

**MEMORANDUM OPINION**

This matter came before the Court in Durham, North Carolina on December 1, 2005, upon the Motion to Reopen Case, filed by Felicia Livia Sprincenatu (“the Creditor”) on August 16, 2005. At the hearing, Karen G. Z. Macklin appeared for the Creditor; Richard M. Hutson appeared in his capacity as Chapter 13 Trustee (“the Trustee”); and Benjamin Lovell appeared as attorney for the Trustee. During a previous hearing, the Court excused the Debtor from appearing at the December 1, 2005 hearing. After consideration of the Creditor’s motion, the evidence presented at the hearings, the arguments of the parties, and the relevant law, the Court will deny the Creditor’s motion to reopen the Debtor’s case.

**I. BACKGROUND**

On December 10, 1997, the Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code. Prior to the Debtor filing her petition, the Debtor and the Creditor were involved in an automobile accident. The Creditor alleged that, as a result of this accident, she suffered a variety of damages. On February 24, 1998, the Creditor filed a proof of claim in the Debtor’s case in the amount of \$50,000. On June 6, 1998, the Creditor filed a motion for relief from the stay imposed by Section 362. In her motion, the Creditor sought leave from this Court to pursue a state court action against the Debtor. This Court, in an order dated September 9, 1998, entered a consent order allowing the Creditor to liquidate her claim in state court. The Creditor proceeded with her

claim in state court and, on August 2, 1999, the state court entered a consent judgment against the Debtor for \$30,000 (the “Consent Judgment”). On November 3, 1999, the Trustee filed a motion to include the Consent Judgment in the Debtor’s plan. As provided by the Debtor’s confirmed plan, unsecured claims were being paid a ten percent dividend. Therefore, because the Consent Judgment was an unsecured claim, the Trustee filed a motion proposing to pay ten percent of the Creditor’s claim and to discharge the balance. On December 17, 1999, the Creditor filed an objection to the Trustee’s motion. On February 9, 2000, after a hearing on the matter, this Court overruled the Creditor’s objection. The Creditor attempted to appeal this ruling of the Court. However, on May 4, 2000, this Court held that the Creditor’s notice of appeal had not been filed within the time limits prescribed by the Federal Rules of Bankruptcy Procedure. The Creditor then attempted to appeal the Court’s May 4, 2000 order. On July 20, 2000, the Court ruled that the Creditor’s second appeal was untimely filed. The Creditor then filed a timely appeal of the Court’s July 20, 2000 ruling. On June 18, 2001, the United States District Court for the Middle District of North Carolina affirmed this Court’s July 20, 2000 ruling that the Creditor’s appeal was not timely filed.

While the Creditor litigated her claim, the Trustee continued to receive and disburse payments pursuant to the Debtor’s plan. On December 31, 2001, the Trustee disbursed \$548.99 to the Creditor (the “Payment”). The Trustee sent the Payment, via first class United States mail, to 1715 Chapel Hill Road, Apt 1, Durham, North Carolina (the “Chapel Hill Road Address”). The Creditor had listed the Chapel Hill Road Address on her proof of claim and received all documents related to this proceeding at that address. The Payment was returned to the Trustee. The United States Postal Service marked the letter “Not Deliverable As Addressed - Unable To Forward.” Following the return of the Payment, the Trustee sought to locate the address of the Creditor. The Trustee’s attempts were unsuccessful and, on March 22, 2002, the Trustee filed a motion to disallow

the Creditor's claim as abandoned. The Court entered an order approving the Trustee's motion on April 4, 2002. The order provided that any party had forty days to object to the order. No objections were filed, and the Creditor's claim was disallowed as abandoned. The Debtor received a discharge on September 16, 2002. On January 17, 2003, the Debtor's case was closed.

On August 16, 2005, more than two and one half years after the case was closed, the Creditor filed the motion sub judice. After the Court granted the Creditor a series of continuances, the Court held a hearing on the Creditor's motion on December 1, 2005. In her motion and her testimony at the hearing, the Creditor stated four reasons for the Debtor's case to be reopened: (I) to determine the dischargeability of the debt owed to the Creditor; (ii) that the Debtor committed fraud in connection with the Consent Judgment; (iii) that the Trustee was negligent in his handling of the Creditor's claim; and (iv) that the Creditor suffered from mental disorders during the pendency of the Debtor's case.

## II. DISCUSSION

Section 350(b) of the Bankruptcy Code provides that "A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The decision to reopen a case lies within the discretion of the bankruptcy court. In re Hawkins, 727 F.2d 324, 326-27 (4th Cir. 1984); accord In re Thompson, 16 F.3d 576, 581-82 (4th Cir. 1994). Whether a case should be reopened depends on the particular facts and circumstances of the case at issue. See In re Hamlett, 304 B.R. 737, 740 (Bankr. M.D.N.C. 2003) (Stocks, C.J.). When exercising its discretion, the bankruptcy court should consider the equities of a case with an eye towards to the principles that underlie the Bankruptcy Code. See In re Kaspin, 265 B.R. 778, 780 (Bankr. N.D. Ohio 2001). As noted above, the Creditor has advanced four reasons for which the Debtor's case should be reopened. The Court will address each argument in

turn.

First, the Creditor stated in her motion that the Debtor's case should be reopened to determine the dischargeability of the debt owed to the Creditor. However, at the December 1, 2005 hearing on the Motion, the Creditor failed to address this point. The Creditor made no argument nor offered any evidence to support this argument. Lacking any supporting evidence, the Court will not reopen the Debtor's case on this basis.

Second, the Creditor stated in her motion that the Debtor committed fraud in connection with the Consent Judgment. Again, at the hearing, the Creditor offered no argument nor any evidence on this point. Lacking any supporting evidence, the Court will not reopen the Debtor's case on this basis.

Third, the Creditor stated in her motion and at the hearing that the Trustee was negligent in his handling of the Debtor's case. The Creditor alleged two instances of negligence. First, the Debtor alleged that the Trustee negligently failed to update the Creditor's address in January of 2001. The Creditor produced a copy of a letter dated January 1, 2001. The letter, addressed to the Trustee, indicated that the Creditor's address had changed from the Chapel Hill Road Address to an address on Vesson Avenue in Durham, North Carolina (the "Vesson Avenue Address"). The Creditor testified that she placed this letter in first class United States mail. As a general rule, when an item is properly addressed, stamped, and placed in first-class United States mail, courts presume that the item reached its destination. Fed. R. Bankr. P. 7005 (incorporating Fed. R. Civ. P. (5)(b)(2)(B)); see also In re Eagle Bus Mfg. Inc., 62 F.3d 730, 735 (5th Cir. 1995). When determining whether an item was properly mailed, courts generally consider whether the item was properly addressed, correct postage was affixed, and whether the item was placed into a United States Post Office receptacle. In re Eagle Bus, 62 F.3d at 735-36. When a court finds that an item

is properly mailed, a presumption arises that the item was received. See also In re Preston, 333 B.R. 346 (Bankr. M.D.N.C. 2005) (Stocks, C.J.)(improperly addressed item does not create a presumption of receipt)(citations omitted). The presumption created by a proper mailing can be rebutted; however, clear and convincing evidence that the item was not received is required to rebut the presumption that the item was received. See In re State Line Hotel, Inc., 323 B.R. 703, 709 (9th Cir. B.A.P. 2005). Mere denial of receipt is insufficient to rebut the presumption of receipt. Id.; accord In re Eagle Bus, 62 F.3d at 735; In re Bucknum, 951 F.2d 204, 206-07 (9th Cir. 1991)(stating that if a party were able to defeat the presumption of receipt by a mere affidavit, the system of deadlines and bar dates under the Bankruptcy Code would become meaningless).

In the instant matter, the Creditor testified that she properly mailed a letter indicating a change of address to the Trustee. No evidence to the contrary was presented. Hence, a presumption arises that the Trustee received the Creditor's letter indicating a change of address. However, the Trustee presented clear and convincing evidence to rebut this presumption. First, the Trustee testified as to the procedures used to process a creditor's notice of change of address. Second, the Trustee testified that the file showed no indication that a change of address notice was received. The Trustee testified that, in the thirty-four years in which he has served in his position, he knows of no instance in which a creditor sent a change of address notice to the Trustee's office but that such notice was not noted and processed correctly. Finally, the Trustee testified that, given the procedures and history of his office, the Creditor's notice was never delivered to the Trustee's office. The Court finds the Trustee's testimony to be clear and convincing evidence that the Creditor's change of address notice was never delivered to the Trustee's office. By outlining the procedures used by his office and the history of the effectiveness of those procedures, the Trustee has done more than merely deny receipt of the Creditor's letter. Therefore, the presumption that the notice was

delivered is rebutted. As such, the Court finds that the Trustee properly performed his duty.

In her second allegation of negligence, the Creditor stated that the Trustee was negligent in failing to update the Creditor's address when the Payment was returned in early 2002. The Creditor testified that the Trustee negligently failed to obtain the Vesson Avenue Address of the Creditor. In response to this allegation, the Trustee testified concerning the procedures his office follows when a payment is returned and marked undeliverable. First, a member of the Trustee's staff uses a directory assistance service to obtain a current address. If this is not successful, a member of the Trustee's staff will contact the debtor's attorney in the particular case and inquire if the debtor's attorney has a current address for the creditor in question. If these methods do not yield a current address, the Trustee will file a motion with the Court seeking to disallow the balance of the Creditor's claim as abandoned. The Trustee testified that his records indicate that each of these steps was followed in the Debtor's case. Further, a member of the Trustee's staff, Ms. Joann Baber, testified that she followed the procedures described by the Trustee but could not locate a current address for the Creditor. The Court finds the evidence presented by the Trustee to be persuasive. The Trustee's office followed procedures reasonably calculated to obtain the Creditor's address. Those procedures were not successful. However, the lack of success does not indicate culpability on the part of the Trustee or his staff. Indeed, the Creditor had opportunities to ensure that the Trustee had her current address. First, the Creditor did not leave a forwarding address when leaving the Chapel Hill Address. If the Creditor had done so, the Creditor would, in all likelihood, have received the Payment. Second, the Creditor, after sending her letter, could have called the Trustee to confirm that the letter was received. If the Creditor sought to receive correspondence related to the Debtor's case at an address other than the Chapel Hill Address, then the Creditor had a positive duty to update her address with the Trustee. See Fed. R. Bankr. P. 2002(g). The Creditor must bear

responsibility for failing to do so. As the evidence presented by the Trustee shows, the Trustee and his staff properly fulfilled their duties.

Fourth, the Creditor stated at the hearing that the Debtor's case should be reopened because the Creditor suffered from mental disorders while the Debtor's case was pending. Counsel for the Creditor implied, but did not state, that the Creditor would have proceeded in a different manner in this case and/or taken different actions to assert her rights if she were not suffering from these mental conditions. The Creditor testified that she suffered from certain mental conditions, including depression. The Creditor did not indicate the time period in which she was afflicted with these conditions, nor did the Creditor elaborate as to how such conditions prevented her from taking a different course of action or what that different course of action would be. The Court does not find the Creditor's testimony to be persuasive on the issue of her mental health. First, the Court notes that the Creditor's testimony at the hearing on her Motion was lucid and clear. The Creditor had no difficulty expressing herself. Second, the Creditor failed to produce any disinterested party to corroborate her testimony. The Creditor could have introduced testimony from professionals that treated her disorders or, at least, affidavits from medical professionals indicating that treatment for mental disorders had occurred and describing the effect of these disorders on the Creditor's mental abilities. However, the Creditor failed to introduce such evidence. As such, the Court finds the Creditor's evidence unpersuasive and finds that the Creditor's mental disorders, if any, do not provide a basis for reopening the Debtor's case.

### III. CONCLUSION

The Creditor has failed to carry her burden of proof and, therefore, the Court will deny her motion to reopen the Debtor's case. The Creditor failed to support her motion with credible evidence. As such, this Court finds that the equities of the case require denial of the Creditor's

motion.

This opinion constitutes the Court's findings of fact and conclusions of law. A separate order shall be entered pursuant to Fed. R. Bankr. P. 9021.



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**ORDER**

For the reasons stated in the memorandum opinion entered this date, it is ORDERED, ADJUDGED, and DECREED that Felicia Livia Sprincenatu's motion to reopen the Debtor's case is DENIED.