UNPUBLISHED

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

In re:	)	
	)	
JAMES SELL PARSON,	)	Case No. 01-73786-SCS
BRENDA MARSHALL PARSON,	)	
Debtors.	)	
	)	Chapter 7

MEMORANDUM OPINION

This matter came before the Court upon the Motion to Reopen filed on August 8, 2007, by Newport News Shipbuilding Employees' Credit Union, by counsel, in the above-captioned matter. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157(b)(2) and 1334(b). Venue is proper pursuant to 28 U.S.C. § 1409(a).

A hearing was held on September 20, 2007, which James Sell Parson and Brenda Marshall Parson, the Debtors in this matter; Glenn Tankersley, counsel for the Parsons; Raymond Bacon, counsel for Newport News Shipbuilding Employees' Credit Union ("NNSECU"); Carolyn Camardo, counsel for the Chapter 7 Trustee, Charles L. Marcus; and Cecelia Weschler, counsel for the United States Trustee, attended. The Court continued the hearing to October 18, 2007, and permitted the parties to submit briefs in support of their positions.

The Court held the continued hearing on October 18, 2007, which Mr. and Mrs. Parson; Messrs. Tankersley and Bacon; Ms. Weschler; and Kelly Barnhart, counsel for the Chapter 7 Trustee, attended. At the hearing, the Court found, for the reasons stated from the bench, that the Motion to Reopen should be denied. The Court reserved the right to supplement its oral ruling with a written memorandum opinion. By entry of this Memorandum Opinion, the Court hereby supplements the Order Denying Motion to Reopen entered in this case on October 19, 2007.

I. PROCEDURAL HISTORY

Mr. and Mrs. Parson filed, by counsel,[1] their petition under Chapter 7 of the Bankruptcy Code on November 3, 2001. Charles L. Marcus was appointed to serve as Chapter 7 Trustee of the Parsons' bankruptcy case. In their schedules, Mr. and Mrs. Parson listed among their assets real residential property located in Smithfield, Virginia, ("the Property") with Mr. Parson was listed as the owner of the real property. Mr. Parson placed a current market value of $100,100.00 on the Property as of the date of the filing of the petition. The Property was scheduled as subject to a security interest in favor of Washington Mutual Finance with a secured claim in the amount of $112,000.00. Mr. Parson also claimed an exemption of $1.00 in the Property pursuant to Virginia Code Section 34-4. On their Chapter 7 Individual Debtor's Statement of Intention, Mr. and Mrs. Parson listed their intent to retain the Property, noting that the debt would be reaffirmed pursuant to 11 U.S.C. § 524(c).

Mr. Parson listed two unsecured claims on Schedule F in favor of Newport News Ship Building:[2] one labeled as a credit card debt, incurred November 1996, in the amount of $8,507.50; and a second labeled as a loan incurred in February 1998, in the amount of $7,200.00. Question 4 on the required Statement of Financial Affairs, which requires a debtor to list lawsuits pending within one year of filing, lists a garnishment proceeding captioned "Newport News Shipb [*sic*] Employee CU v. James S. Parson" as pending in the General District Court for the City of Newport News, Virginia, with a scheduled hearing date of November 13, 2001. Subpart B of Question 4

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[1] Mr. and Mrs. Parson originally retained attorney Steven M. Oser to represent them in their Chapter 7 case. Prior to their case being reopened, the Parsons moved to substitute as their attorney Steve C. Taylor of the Law Offices of Steve C. Taylor, P.C., which substitution was permitted by order entered by the Court on November 20, 2006. Glenn Tankersley is an attorney associated with Mr. Taylor's law firm.

[2] The Court interprets, based upon the proceedings that have occurred in this case, that this creditor is the same entity as Newport News Shipbuilding Employees' Credit Union, the movant in the instant matter.

reveals that Newport News Shipbuilding Employees' Credit Union garnished a checking account on October 1, 2001, that was valued at $4,894.00.[3] Mr. and Mrs. Parson amended certain schedules during the course of their bankruptcy, but no amendments were made regarding any of the items related to NNSECU.

On December 17, 2001, the Chapter 7 Trustee filed a Trustee Report of No Distribution in which he certified he had performed the duties required under Section 704 of the Bankruptcy Code and concluded that there were no assets to administer for the benefit of the Parsons' creditors.

On January 16, 2002, Washington Mutual Home Loan, Inc., filed, by counsel, a motion seeking relief from the automatic stay with regard to the Property due to a default in monthly payments.[4] Mr. and Mrs. Parson filed, by counsel, a response asking that the motion be denied and stating among their defenses that they had entered into a repayment agreement regarding certain arrears prior to filing their Chapter 7 petition. A hearing on the Motion for Relief from Stay was scheduled for February 14, 2002, but was cancelled after the parties reached a settlement, which was contained in the order entered by this Court on March 5, 2002, granting Washington Mutual Home Loan, Inc., relief from the automatic stay as to the Property.

Mr. and Mrs. Parson received their Chapter 7 discharge on February 22, 2002. The case was closed on March 5, 2002, and the Chapter 7 Trustee was discharged from his duties in the case.

On October 6, 2006, Mr. and Mrs. Parson, by counsel, filed a Motion to Reopen their Chapter 7 case. The Parsons prayed that the Court reopen their bankruptcy case to allow them to file a Motion to Avoid a Judicial Lien against Newport News Shipbuilding Employees' Credit Union ("NNSECU"). Specifically, the Parsons alleged that they had searched for liens against the Property at the time of filing, but that unknown to them, NNSECU had recorded a judgment obtained in

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[3] It is not disclosed whether the garnished account was held only in the name of Mr. Parson, or whether the Parsons jointly held the account.

[4] Also on January 16, 2002, Washington Mutual Home Loans, Inc., filed, by counsel, a Proof of Claim listing a total indebtedness owed by the Parsons of $114,886.79.

Newport News General District Court against the Property, located in Isle of Wight County, Virginia, nine months prior to filing. The Parsons further alleged that NNSECU had filed, on May 11, 2004, an action in the Circuit Court for the County of Isle of Wight, Virginia, based on the docketed judgment. A hearing on the Parsons' Motion to Reopen was scheduled for November 16, 2006.

NNSECU, by counsel, filed a Response to the Parsons' Motion to Reopen, requesting that the Court deny the Motion, asserting that the Parsons were aware of or could have discovered that NNSECU had recorded the judgment against the Property at the time they filed their bankruptcy petition and should not now be allowed to file a motion to avoid that lien. Further, NNSECU alleged the Parsons filed their Motion to Reopen "as a method to hinder and delay a Creditor's Suit . . . that has been filed in the Circuit Court for the County of Isle of Wight."

Prior to the hearing on their Motion to Reopen, the Parsons moved to substitute as their attorney Steve C. Taylor of the Law Offices of Steve C. Taylor, P.C. The hearing on the Parsons' Motion to Reopen was held on November 16, 2006, which Mr. Parson, Mr. Bacon for NNSECU, and Joseph Spence, an attorney associated with the Law Offices of Steve C. Taylor, P.C., attended. The hearing was continued to allow the Parsons' to have the benefit of counsel. The Court permitted the substitution of counsel by order entered November 20, 2006.

The continued hearing on the Parsons' Motion to Reopen was held on December 14, 2006. Appearing at the hearing were Mr. and Mrs. Parson; Mr. Tankersley on behalf of the Parsons; Mr. Bacon on behalf of NNSECU; and former counsel for the Parsons, Steven M. Oser. The Court granted the Motion to Reopen upon the condition that the Parsons file an action to remove the lien within thirty days.

An order granting the Motion to Reopen was not timely submitted to the Court within ten days after the hearing. The Clerk's Office of this Court sent a notice to the Parsons' counsel on January 10, 2007, informing him that an order dismissing the matter for failure to prosecute would

be entered if an order was not submitted by January 16, 2007. An order was received by the Court on January 10, 2007, but was rejected and returned to the Parsons' counsel as it contained the inaccurate statement that no responsive pleadings had been filed to the motion. A second order was submitted and entered by the Court on January 17, 2007.

On January 18, 2007, NNSECU filed, by counsel, a Motion to Dismiss with Prejudice, which sought the dismissal of the Parsons' bankruptcy case with prejudice for the failure to timely submit a proper order regarding their Motion to Reopen and for the failure to timely file the appropriate lien avoidance pleading as ordered by the Court. NNSECU also requested an award of attorney fees and costs. A hearing on the Motion to Dismiss with Prejudice was scheduled for February 22, 2007.

On January 29, 2007, counsel for the Parsons filed a response to NNSECU's Motion to Dismiss with Prejudice. In their response, the Parsons admitted certain allegations, denied others, and requested that NNSECU's motion be denied. Also on January 29, 2007, the Parsons' filed on their behalf a Motion to Avoid Lien, asserting that NNSECU's judicial lien should be avoided pursuant to 11 U.S.C. § 522(f) because it impaired the exemptions claimed in the Property. Counsel for NNSECU filed a response to the Motion to Avoid Lien on February 7, 2007, admitting certain allegations and denying others. NNSECU asserted among its defenses to the motion that no allegation was made that equity in the property was insufficient to support the lien; that the motion was not timely filed; and that laches barred such a motion. A hearing on the Motion to Avoid Lien was scheduled for March 15, 2007.

On February 22, 2007, this Court held a hearing on the Motion to Dismiss with Prejudice, which counsel for the Parsons and NNSECU attended. Upon consideration of the pleadings and representations of counsel, the Court ordered that the order granting the Motion to Reopen should be amended to provide that the Parsons file, within seven days of entry of the Amended Order Granting Motion to Reopen, any and all necessary pleadings they intended to rely upon in the course of seeking to avoid the judicial lien of NNSECU or suffer dismissal of their bankruptcy case with

prejudice. The Court continued the hearing on the Motion to Dismiss with Prejudice to the date and time established for the hearing on the Parsons' Motion to Avoid Lien. The Court also announced that it would consider at that hearing whether sanctions against the Parsons' counsel were appropriate. The Court prepared and entered an Amended Order Granting Motion to Reopen on February 23, 2007, memorializing its oral ruling made on February 22, 2007.

Counsel for the Parsons filed an Amended Motion to Avoid Lien on February 28, 2007. The amended motion contained an additional allegation that the Property had no equity at the time of filing after the secured claim was deducted from the Property's value and set forth specific values regarding the Property, the existing secured claim, and estimated amount of the claim held by NNSECU.

On March 1, 2007, a Supplemental Response to NNSECU's Motion to Dismiss with Prejudice, along with several exhibits to the response, was filed by the Parsons, by counsel. The Supplemental Response outlined in additional detail the timeline concerning the submission of the order granting the Parsons' Motion to Reopen to the Court and denied that any delay in the proceeding was intentional.

NNSECU filed a response to the Amended Motion to Avoid Lien on March 9, 2007, in which it admitted certain allegations and denied others. NNSECU argued, in addition to its previous assertions, that equity did exist in the Property according to an appraisal that it had ordered on the Property. NNSECU also alleged that the Parsons filed the Motion to Reopen because NNSECU would not halt the collection proceeding that was pending in the Circuit Court for the County of Isle of Wight, Virginia. Along with the response, NNSECU filed as an exhibit the resumé and qualifications of a real estate appraiser, along with a document that purported to be a summary of that appraiser's appraisal of the Property.

On March 13, 2007, counsel for NNSECU filed a Motion to Strike the Parsons' Motion and Amended Motion to avoid the NNSECU lien. In that motion, NNSECU alleged that the Amended

Motion to Avoid Lien did not state a claim upon which relief could be granted on several bases, including that the Parsons' improperly disclosed their expert witness and that the Parsons' could not, under the Federal Rules of Evidence, testify as to the value of the Property. NNSECU prayed that the Parsons' lien avoidance motions be stricken; that their case be dismissed without prejudice; that the Court sanction the Parsons and their counsel; and that the Court award NNSECU attorney fees and costs.

On March 14, 2007, the day prior to the hearing on the lien avoidance action and the continued hearing on NNSECU's Motion to Dismiss with Prejudice, counsel for the Parsons filed as an exhibit a four-page document labeled as "Qualifications of Expert Witness."

At the hearings held on March 15, 2007, the Court, upon consideration of the representations and argument of counsel for both parties, found that the matters were not in a proper procedural posture so as to afford both parties due process and that the matters should be continued to allow the parties to properly disclose their expert witnesses, exchange appraisal reports, and conduct discovery. Specifically, the Court ordered the parties to properly disclose their expert witnesses and exchange their appraisal reports within five days. The Court also allowed fifteen days for the parties to conduct discovery and take any necessary depositions. The Court continued the hearings to May 7, 2007.

Counsel for NNSECU filed exhibits and a witness list with the Court on March 20, 2007. Also on March 20, 2007, counsel for the Parsons filed a copy of an appraisal. On March 27, 2007, counsel for the Parsons filed a witness list. The hearings scheduled for May 7, 2007, were continued to June 13, 2007, due to a family emergency of the Parsons' counsel.

At the June 13, 2007, hearings, evidence in the form of documents and testimony regarding the valuation of the Property was presented by the Parsons and NNSECU. Counsel for NNSECU renewed his Motion to Strike during the course of the hearings. Upon consideration of the pleadings, evidence, and arguments, the Court found that the value of the Property at the time of

filing was $159,500.00 and thus found that the Motion to Avoid Lien, as amended, should be denied. Further, the Court found that the Motion to Strike should be denied. At the conclusion of the hearing, counsel for the Parsons moved to convert their case to one under Chapter 13 of the Bankruptcy Code. The Court directed that any motion to convert be filed within ten days and if filed, the Court would promptly set the matter for hearing. NNSECU's Motion to Dismiss with Prejudice was mooted by the Court's rulings. The parties drafted the order memorializing the Court's ruling, which was submitted to and entered by the Court on July 5, 2007. The Parsons did not file a motion to convert their case to one under Chapter 13, and on July 18, 2007, the case was once again closed.

NNSECU, by counsel, filed a Motion to Reopen the Parsons' case on August 7, 2007. NNSECU asserted that under 11 U.S.C. § 363 the Chapter 7 Trustee had a duty to administer an asset of the estate as may be "compatible with the best interests of parties in interest." Thus, when the Parsons chose to reopen their case for the lien avoidance proceeding, they subjected themselves to any benefits or burdens as a result of that action, and the Chapter 7 Trustee should be permitted to administer any assets available. On August 29, 2007, NNSECU filed an Amended Motion to Reopen, further asserting that a Chapter 7 Trustee should be appointed in this case to administer the assets of the case.

The Court held a hearing on NNSECU's Motion to Reopen on September 20, 2007. Appearing at the hearing were Messrs. Bacon and Quadros on behalf of NNSECU; the Parsons, and Mr. Tankersley on behalf of the Parsons; Ms. Weschler on behalf of the United States Trustee; and Ms. Camardo on behalf of the Chapter 7 Trustee. Mr. Bacon asserted that once the case was reopened, the Chapter 7 Trustee may administer any assets of the estate, including assets that the Trustee had previously abandoned. Mr. Bacon suggested that the Historical and Statutory Notes which accompany 11 U.S.C. § 350 support his interpretation. Additionally, Mr. Bacon asserted that *In re Shelton*, 201 B.R. 147, 151 (Bankr. E.D. Va. 1996), holds that a Chapter 7 Trustee's ability to

administer an asset of the bankruptcy estate is revived after a previously closed case is reopened. On behalf of the Parsons, Mr. Tankersley argued that once a case is closed, a creditor may not move to have the case reopened so that a Chapter 7 Trustee may administer an asset that was previously abandoned to the debtors. Mr. Tankerlsey further represented to the Court that the Parsons filed a Chapter 13 case on August 14, 2007, which was pending before Judge David H. Adams of this Court. The Parsons' proposed Chapter 13 Plan in that case would pay, with interest, the secured portion of NNSECU's claim within one year of the plan's confirmation. Finally, counsel for the United States Trustee represented to the Court that the asset at issue was properly abandoned by the Chapter 7 Trustee under 11 U.S.C. § 554, and that NNSECU could not now ask the Court to reopen the case so that a trustee could be appointed to administer an asset which was previously abandoned. The Court continued the hearing until October 18, 2007, and permitted the parties to submit briefs in support of their positions.

NNSECU submitted its brief on October 5, 2007, which framed the issue before the Court as whether the Parsons' residence should have been administered after this Court denied the Parsons' Motion to Avoid Lien. First, NNSECU argues that the plain language of 11 U.S.C. § 350 imposes no limitation upon the type of assets that may be administered after a case is reopened. NNSECU further asserted that § 554(c) of the Bankruptcy Code does not contain any language to suggest that a "technical abandonment" of assets by a Chapter 7 Trustee is irrevocable, and that *In re Sutton*, 10 B.R. 737 (Bankr. E.D. Va. 1981)—cited by counsel for the United States Trustee at the previous hearing—does not stand for the proposition that once an asset is abandoned by a Chapter 7 Trustee, it cannot be revested in the bankruptcy estate because the *Sutton* Court's decision was based on Federal Rule of Civil Procedure 60, not 11 U.S.C. § 350. NNSECU cites *In re Shelton* as well as *In re Collins*, 173 F.3d 924 (4th Cir. 1999), and *In re Plumlee*, 236 B.R. 606 (E.D. Va. 1999), as support for its position that once a case is reopened, any assets that were within the estate prior to the initial closure may be administered by a trustee.

The Parsons filed a brief in response on October 16, 2007, suggesting that the issue to be decided was whether this Court has the authority to reopen Chapter 7 case in which a discharge had been issued solely for the purpose of appointing a trustee, and under what circumstances should the Court reopen a previously closed case. The Parsons argue that the Court's decision in *In re Shelton* has no bearing on the instant case, as the debtors in that case purposefully concealed assets from the Chapter 7 Trustee, while in the instant case the Chapter 7 Trustee filed a Report of No Distribution after full and honest disclosure from the Parsons. Moreover, the Parsons argue that NNESCU had ample opportunity to move for a Chapter 7 Trustee to be appointed to administer that estate while this case was reopened upon their Motion to Avoid Lien. Further, the Parsons argue that *In re Sutton* holds that once a trustee abandons property of the estate, that property becomes beyond the reach of the trustee. Once a Chapter 7 Trustee filed his final Trustee Report of No Distribution—as the Chapter 7 Trustee did in the Parsons' case—Federal Rule of Bankruptcy Procedure 5009 creates a presumption that the estate of the debtor has been fully administered. Finally, the Parsons state that any action which NNSECU seeks to pursue against the should be carried out in the currently pending Chapter 13 case, where the Chapter 13 Plan proposes pay the secured potion of NNESCU claim.

The Court held the continued hearing on NNSECU's Motion to Reopen on October 18, 2007. Appearing at the hearing were Messrs. Bacon and Quadros; the Parsons; Mr. Tankersley; Ms. Weschler; and Ms. Barnhart on behalf of the Chapter 7 Trustee. At the hearing, counsel for the Parsons and for NNSECU presented arguments to the Court consistent with the arguments in their briefs. Additionally, Ms. Barnhart represented that the Chapter 7 Trustee properly abandoned the property to the Parsons, and that upon the reopening of a case property previously abandoned by the Chapter 7 Trustee is not revested in the estate. Upon consideration of the parties' briefs and the arguments presented at the continued hearing, for reasons stated from the bench, the Court denied NNSECU's Motion to Reopen the case. At the conclusion of the hearing, Mr. Bacon reserved

NNSECU's right to appeal the Court's decision.

The Court entered an Order Denying Motion to Reopen on October 19, 2007. Counsel for NNSECU filed a Notice of Appeal with the Court on October 26, 2007.

II. CONCLUSIONS OF LAW

A.

Under § 350(b) of the Bankruptcy Code, there are three conditions in which the court can grant the reopening of a bankruptcy case: to administer assets; to accord relief to the debtor; and for other cause. *Huennekens v. Greene* (*In re Dove*), 199 B.R. 342, 345 (Bankr. E.D. Va. 1996). Notwithstanding the three prongs of § 350(b), it is axiomatic that the court has final discretion in deciding whether to reopen a case. *In re Shelton*, 201 B.R. 147, 151 (Bankr. E.D. Va. 1996); *In re Walker*, 198 B.R. 476, 478 (Bankr. E.D. Va. 1996) (citing *Thompson v. Virginia* (*In re Thompson*), 16 F.3d 576, 581–82 (4th Cir. 1994); *Hawkins v. Landmark Fin. Co.* (*In re Hawkins*), 727 F.2d 324, 326 (4th Cir. 1984)). According to Judge Tice, a court will invoke its discretion and deny the reopening of a bankruptcy case "where it appears that to do so would be futile and a waste of judicial resources." *In re Carberry*, 186 B.R. 401, 402 (Bankr. E.D. Va. 1995).

In discussing the gravity of reopening a bankruptcy case, the Fourth Circuit has stated that:

> [R]e-opening defeats one of the major purposes of the Bankruptcy Act; to stabilize an insolvent debtor's financial position at the time of the filing of the petition, to relieve him of his existing financial burdens, and to provide his then assets for the relief of his creditors. Re-opening removes the element of certainty from the adjudication and settlement of the estates. It is as essential to the creditors as it is desirable to the bankrupt that this element of certainty be destroyed only for the most compelling cause.

Reid v. Richardson, 304 F.2d 351, 355 (4th Cir. 1962). "Before reopening a case, the court should make the threshold determination that one of the three grounds articulated in § 350(b) exists." *In re Lee*, 356 B.R. 177, 180 (Bankr. N.D. W. Va. 2006). Among the factors that courts consider when

making a determination under § 350(b) are the delay between the closing of the case and the motion to reopen as well as the prejudice that it would cause to nonmovant. *See, e.g.*, *Reid*, 304 F.2d at 355; *In re Paul*, 194 B.R. 381, 383 (Bankr. D.S.C. 1995). To grant a motion to reopen "[t]he moving party must demonstrate that there is a compelling cause. There is no cause if reopening would serve no purpose." *Horizon Aviation of Va., Inc. v. Alexander*, 296 B.R. 380, 382 (E.D. Va. 2003) (citing *In re Carberry*, 186 B.R. at 403).

The moving party, NNSECU in this case, has the burden to demonstrate that there is a sufficient legal basis to reopen the case. *In re Hardy*, 209 B.R. 371, 374 (Bankr. E.D. Va. 1997) (citing *In re Winburn*, 196 B.R. 894, 897 (Bankr. N.D. Fla. 1996)). If there are no assets to be administered in this case, the motion to reopen is futile as the relief sought by NNSECU may not be granted, and the motion to reopen should be denied.

NNSECU seeks the reopening of the Parsons' Chapter 7 bankruptcy purportedly to administer an asset; that is, to compel a Chapter 7 Trustee to liquidate the Property which serves as personal residence of the Parsons. However, even if this Court elected to exercise its discretion to reopen this bankruptcy case for the second time, the abandonment of the Parsons' Property by the Chapter 7 Trustee in this case precludes administration of the Property and thus makes granting of the motion to reopen here without any purpose.

This Court has previously concluded that abandonment of an asset by a trustee removes the property from the estate and precludes subsequent administration by the trustee:

> It is a principle of uniform application that once an asset of the estate has been abandoned by the trustee, it is no longer part of the estate and is effectively beyond the reach and control of the trustee. Indeed, in light of cases decided under the Bankruptcy Act of 1898, the trustee may be precluded from reclaiming property which is abandoned; and this, in turn, has been carried over to the Bankruptcy Code. It has been stated that abandonment is deemed irrevocable "regardless of any

subsequent discovery that the property had greater value than previously believed."

In re Sutton, 10 B.R. 737, 739–40 (Bankr. E.D. Va. 1981) (citing *In re Polumbo*, 271 F. Supp. 640, 643 (W.D. Va. 1967) (internal citations omitted)); *accord In re Avis*, No. 95-12007-AM, 1996 WL 910911, at *4 (Bankr. E.D. Va. Mar. 12, 1996) ("[I]t appears well-settled that abandonment, if it does occur, 'is irrevocable, regardless of any subsequent discovery that the property had greater value than previously believed.'"); *In re Hood*, 92 B.R. 648, 655–56 (Bankr. E.D. Va.1988), *aff'd* 92 B.R. 656 (E.D. Va. 1988) ("Property abandoned pursuant to Section 554 generally cannot be recovered by the debtor's estate notwithstanding a later determination of value which might have benefitted the estate."). Other jurisdictions have also found that abandonment of an asset by a trustee is irrevocable. *See In re Lintz West Side Lumber, Inc.*, 655 F.2d 786, 789 (7th Cir. 1981); *Russell v. Tadlock* (*In re Tadlock*), 338 B.R. 436, 439 (B.A.P. 10th Cir. 2006); *Vasquez v. Adair* (*In re Adair*), 253 B.R. 85, 89–90 (B.A.P. 9th Cir. 2000); *In re O'Neal*, 374 B.R. 348, 352 (Bankr. S.D. Fla. 2007); *In re Johnson*, 361 B.R. 903, 908 (Bankr. D. Mont. 2007); *In re Locklair*, No. 03-50924, 2006 WL 1491440, at *2 (Bankr. M.D.N.C. May 18, 2006) (unreported decision); *In re Ruggles*, No. 91-10624, 2006 WL 830035, at *3 (Bankr. D. Vt. Mar. 29, 2006) (unreported decision); *In re Burchette*, No. 03-51766C-7, 2002 WL 31051033, at *2 (Bankr. M.D.N.C. June 21, 2002); *In re Ozer*, 208 B.R. 630, 633 (Bankr. E.D.N.Y. 1997); *In re Gracyk*, 103 B.R. 865, 867 (Bankr. N.D. Ohio 1989); Killebrew v. Brewer (*In re Killebrew*), 101 B.R. 471, 474 (Bankr. S.D. Miss.1988); In re Bryson, 53 B.R. 3,4 (Bankr. M.D. Tenn. 1985); *Murray Mitchell Bldg. Supply Co. v. The Burch Co.* (*In re The Burch Co.*), 37 B.R. 273, 274 (Bankr. D.S.C. 1983); *In re Atkinson*, 62 B.R. 678, 679 (Bankr. D. Nev. 1986); *Wallace v. Enriquez* (*In re Enriquez*), 22 B.R. 934, 935 (Bankr. D. Neb.1982).

Judge Bostetter recognized the two exceptions to this rule:

> There are but two principal exceptions to the above-referenced rule of irrevocability of abandonment under applicable law. Property will not be deemed to have been abandoned by the trustee where it was actually concealed from him or where his knowledge of the existence of the property was one of mere suspicion, which engendered only a cursory investigation. The rule also is not applicable in those situations where the property is unscheduled by the debtor, thus preventing the trustee from having "knowledge, or sufficient means of knowledge, of its existence."

Sutton, 10 B.R. at 740 (quoting *Dushane v. Beall*, 161 U.S. 513, 518 (1896)).[5] As in *Sutton*, neither of these exceptions are applicable here. The Parsons properly scheduled the Property at the time of their original filing. The Chapter 7 Trustee had knowledge of the existence of the asset and ample opportunity for due investigation of the nature and value of the Property. *See In re Killebrew*, 101 B.R. at 474 (noting that the trustee fully informed of debtor's interest in the property at issue).

NNSECU relies upon another decision of this Court to advocate the reopening of this case for a second time. In *In re Shelton*, 201 B.R. 147 (Bankr. E.D. Va. 1996), the Court permitted the reopening of a husband's case and consolidated it with his wife's case, which was justified by the serial filings of the spouses in an apparent attempt to shield property held by tenancy by the entirety from their joint creditors. NNSECU especially looks to the conclusion there that:

> Courts have found that once a case is reopened, the original case is revived, including all procedural and substantive rights of the debtor and presumably the trustee. Following this logic, reopening and thereby reviving a debtor's case would effectively negate any technical abandonments which may have occurred when the case was originally closed. In essence, reopening a closed case restores the "status quo" of the original case prior to closing, and would revive the trustee's right to administer all property that was in the estate prior to the initial closure.

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[5] The trustee in *Sutton* also asserted a third exception was recognized "where an unintentional abandonment of an asset of the estate is effectuated." *Sutton*, 10 B.R. at 740. Even if this is a valid exception to the irrevocability of abandonment, there is nothing in this case to suggest that the abandonment here by the Chapter 7 Trustee was other than fully intentional upon the filing of his Report of No Distribution.

Id. at 155 (quoting *In re Cassell*, 41 B.R. 737, 740 (Bankr. E.D. Va. 1984) (internal citations omitted)). NNSECU accordingly asserts that, upon reopening this case for the purpose of litigating whether the Parsons were entitled pursuant to 11 U.S.C. § 522 to avoid the judgment lien of NNSECU upon the Property, the "technical abandonment" of the residence was thereby negated, and the Chapter 7 Trustee would be unencumbered by his earlier abandonment from proceeding to liquidate the Property. NNSECU further argues that this Court has not considered the effect of 11 U.S.C. § 350 upon an abandonment when a case is reopened.

This reliance is misplaced for a number of reasons. First, other courts have rejected the conclusion that reopening a case "automatically" revokes earlier property abandonments. Illustrative is *Woods v. Kenan* (*In re Woods*):

> Others have held that the reopening of a case under § 350(b) automatically revives the original case and negates any technical abandonments.
> . . . .
>
> We disagree with [this] approach because we do not think reopening a case should always automatically have such a potentially unexpected and unwanted legal consequence. We see no reason, for example, why a debtor seeking to reopen a case in order to schedule an overlooked debt should have to relinquish all technically abandoned properties (which may have in the meantime increased in value through the debtor's efforts); or why, after an intentional technical abandonment, reopening should always bring burdensome properties back into the estate. The reopening of a case is merely a ministerial or mechanical act [that] . . . has no independent legal significance and determines nothing with respect to the merits of the case. Moreover, § 350(b) does not indicate what effect reopening has on technical abandonments, and it does not by its terms provide authority to revoke an abandonment.[6]

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[6] In the instant matter, no trustee was appointed at the reopening of the case because no administration of the estate was contemplated, as the reopening was for the sole purpose of permitting Parson to file and prosecute a motion to avoid the judgment lien of NNSECU upon the personal residence, which was ultimately denied by the Court and the case was closed.

173 F.3d 770, 777 (10th Cir. 1999) (quoting *United States v. Germaine* (*In re Germaine*), 152 B.R. 619, 624 (B.A.P. 9th Cir. 1993) (internal quotations and citations omitted)); *cf.* Fed. R. Bankr. P. 5010 advisory committee's note ("In most reopened cases, a trustee is not needed because there are no assets to be administered.").

Those decisions where an earlier abandonment was negated, including *Shelton*, have largely involved compelling actions or omissions by the debtor which interfered with a trustee's ability to administer an asset, exemplified by the *Shelton* Court's finding that the debtor and his spouse had made serial filings to prevent administration of their tenancy by the entirety property. *See, e.g.*, *Compass Bank for Savings v. Billingham* (*In re Graves*), 212 B.R. 692, 695–96 (B.A.P. 1st Cir. 1997) (finding that property which was earlier technically abandoned, came back into estate when case reopened where asset was "improperly reported on the debtor's schedules" and there was a "short interval" during which the case was actually closed); *Tschirn v. Secor Bank*, 123 B.R. 215, 218 (E.D. La. 1991) (stating abandonment could be revoked if trustee was misled); *In re Kopp*, No. 04-23171, 2007 WL 2475938, at *3 (Bankr. D. Kan. Aug. 31, 2007) (holding abandonment permitted to be revoked because "[t]he facts of this case describe a debtor who made little or no disclosure and then sat tight, hoping the trustee would fail to ask the right questions"); *In re Gonzalez*, 302 B.R. 687, 692 (Bankr. C.D. Cal. 2003) (permitting abandonment to be revoked because "the information provided by the debtor was either false or incomplete"). There is no evidence of misconduct by the Parsons.

Second, a reading of the *Cassell* decision suggests that the reliance by *Shelton* upon the language that reopening reinstates all procedural aspects of a case, including a trustee's rights, is beyond the actual holding of *Cassell*, especially when viewed in its factual context. *Cassell*

involved a reopening of a case for the purpose of the debtor filing a motion to redeem an automobile. In that context, the Court remarked: "The effect of reopening a case is to put the bankruptcy estate back into the process of administration. The original bankruptcy is revived including all the procedural and substantive rights of the debtor. Such rights would include the right of redemption under section 722." *In re Cassell*, 41 B.R. at 740 (citation omitted). The Court simply contemplated that the ordered reopening empowered the debtor to effect a redemption of a certain asset and did not consider the much broader proposition that a case reopening re-empowers a trustee or negates an earlier abandonment.

Third, this case has been closed now for the second time. NNSECU made no attempt to seek appointment of a Chapter 7 Trustee or to compel administration of the Property after the case was reopened for the purpose of prosecution of the motion to avoid lien. After adjudication of the motion to avoid lien and the resulting denial of the motion, the case, without protest or motion by NNSECU, was closed for the second time. Substantial time—in this instance over five and one-half years—has expired since the filing by the Chapter 7 Trustee of his Report of No Distribution which caused the abandonment of the Parsons' Property and the closing of this case. "When deciding whether to reopen an estate, the length of time between the estate's closing and the motion to reopen it should be of crucial significance to the bankruptcy court." *Stackhouse v. Plumlee* (*In re Plumlee*), 236 B.R. 606, 610 (E.D. Va. 1999) (*citing Reid v. Richardson*, 304 F.2d 351, 355 (4th Cir. 1962)). "[A]s the time between closing of the estate and its reopening increases, so must also the cause for reopening increase in weight." *Id.* at 611. This substantial expiration of time further weighs against the reopening of this case again at this time. As there are no assets to administer and a failing by NNSECU to show cause to reopen this matter, the Motion to Reopen must be denied.

B.

A second consideration present here also weighs against granting NNSECU's Motion to Reopen. The Parsons, subsequent to the closure of this case after adjudication of the motion to avoid lien, filed a Chapter 13 case now pending before Judge Adams of this Court ("Chapter 13 Case"). In the Chapter 13 Case, the Parsons have proposed in their Chapter 13 Plan to retain the Property and pay the indebtedness secured by the Property over time in accordance with their Plan provisions, including NNSECU's judgment lien which this Court declined to avoid. To reopen the Chapter 7 Case while the Chapter 13 Case remains pending would cause two simultaneous bankruptcy cases for the Parsons. This simultaneous pendency of these cases would inevitably result in conflict, as the Chapter 7 Case would liquidate the Parsons' Property, while the Property would be retained by the debtors under the terms of the Chapter 13 Plan.

Further complicating this dilemma is the fact that the Chapter 7 Trustee in the reopened Chapter 7 Case could attempt to liquidate property that at this time is property under the control of the Chapter 13 Trustee. To reopen the Chapter 7 Case would invariably have the practical effect of collaterally dismantling the Chapter 13 Case and Chapter 13 Plan when NNSECU has not directly challenged the Chapter 13 Case in any manner, either by moving to dismiss the proceeding or lodging any objection to confirmation of the Chapter 13 Plan.

The pendency of two simultaneous bankruptcy cases and estates is a difficult conundrum for a court even where both cases are voluntarily commenced by the debtor. It is this difficulty that has lead a majority of courts to adopt a "per se" rule that a debtor may not have two cases simultaneously pending. *See, e.g.*, *Turner v. Citizens Nat'l Bank of Hammond* (*In re Turner*), 207 B.R. 373, 379 (B.A.P. 2d Cir. 1997) (holding, at the preliminary injunction stage, that a Chapter 13

case filed before the debtor receives his Chapter 7 discharge is a nullity); *Scruggs v. Scruggs* (*In re Scruggs*), 320 B.R. 94, 96 (Bankr. D.S.C. 2004) (citing cases); *In re Lord*, 295 B.R. 16, 19 (Bankr. E.D.N.Y. 2003) (barring a debtor from filing a Chapter 13 proceeding before the Chapter 7 case is closed even if the debtor has already received a discharge in the Chapter 7 case); *In re Jackson*, 108 B.R. 251, 252 (Bankr. E.D. Cal.1989) ("[o]nce a bankruptcy case is filed, a second case which affects the same debt cannot be maintained.").[7] The majority of decisions have relied on the Supreme Court's holding in *Freshman v. Atkins*, 269 U.S. 121 (1925), which involved a debtor who had been denied a discharge in one bankruptcy proceeding, and while that case was pending, had filed a second petition seeking to discharge both the debts listed in the first petition and some new debts. The Court allowed the petition only with respect to the new debts, writing that the "pendency of the first application precluded a consideration of the second in respect of the same debts." *Id*. at 122. It analogized this situation to the common law plea of "prior suit pending," which reflected

[7] Judge Tice of this Court has allowed a debtor to maintain two bankruptcy cases simultaneously, but under unique circumstances that are not present in the instant matter. *See TransAmerica Credit Corp. v. Bullock* (*In re Bullock*), 206 B.R. 389 (Bankr. E.D. Va. 1997). In *Bullock*, the debtor's previously filed Chapter 7 case was still pending at the time she filed her Chapter 13 case. Judge Tice found that, unlike in her Chapter 7 case, the debtor was not seeking to discharge the mortgage debt at issue in her Chapter 13 case, since the last payment on the principal balance of her mortgage would not be due until a date after the anticipated conclusion of her Chapter 13 plan. *Id.* at 390–93. Other extenuating circumstances were also present in the *Bullock* matter. The objecting creditor and its successors failed to give the debtor notice of default that resulted after a preceding Chapter 13 case. Additionally, the debtor, at the suggestion of her attorney, whom she later replaced, filed for relief under Chapter 7 of the Bankruptcy Code instead of under Chapter 13 in order to save her home from foreclosure. Judge Tice also found that the filing of the Chapter 13 did not hinder the administration of the Chapter 7 bankruptcy estate, as the debtor received her discharge in her Chapter 7 case within five days of filing her Chapter 13 case; thus, she was not seeking to "operate" two cases simultaneously. *Id*. at 394. In the instant matter, the Chapter 7 Case has been closed for a second time, and the asset which NNSECU would have this Court administer is now being administered in the Parsons' Chapter 13 Plan.

"the general rule that the law will not tolerate two suits at the same time for the same cause." *Id.* at 123.

This concept has been embodied in the "single estate rule" which holds that "a debtor cannot maintain simultaneous bankruptcy cases because '[a] debtor possesses only one estate for purposes of trusteeship.'" *Baltrotsky v. K. H. Funding, Inc.* (*In re Baltrotsky*), No. Civ. A DKC2004-2643, 2004 WL 2937537, at *4 (D. Md. Dec. 20, 2004) (quoting *Assocs. Fin. Servs. Corp. v. Cowen* (*In re Cowen*), 29 B.R. 888, 894 (Bankr. S.D. Ohio 1983)). Under this rule, "'property cannot be an asset of both estates simultaneously.'" *See In re Studio Five Clothing Stores, Inc.*, 192 B.R. 998, 1006 (Bankr. C.D. Cal.1996) (quoting *Grimes v. United States* (*In re Grimes*), 117 B.R. 531, 536 (B.A.P. 9th Cir. 1990) (original alteration omitted)); *see also Bateman v. Grover* (*In re Berg*), 45 B.R. 899, 903 (B.A.P. 9th Cir. 1984); *In re Rose*, No. 01-49703, 2007 WL 2915229, at *2 (Bankr. W.D. Wash. June 7, 2007) (citing *In re Berg*, 45 B.R. at 903; *In re Sanchez-Dobazo*, 343 B.R. 742, 745–46 (Bankr. S.D. Fla. 2006).

Reopening the Parsons' Chapter 7 Case would violate "the single estate rule" by having the Property of the Parsons as an asset in the Chapter 7 Case and the Chapter 13 Case simultaneously. This would be particularly egregious here where the creditor in question, NNSECU, has not in any way challenged the continuation of the Chapter 13 Case and has failed to move to dismiss the Chapter 13 Case or object to confirmation of the Chapter 13 Plan of the Parsons.

No cause exists to reopen the Chapter 7 Case, and the Motion to Reopen accordingly has been denied and dismissed by separate order of this Court entered on October 19, 2007.

The Clerk shall deliver copies of this Memorandum Opinion to the Debtors; Counsel for the Debtors; Counsel for Newport News Shipbuilding Employees' Credit Union; Counsel for the

Chapter 7 Trustee; and Counsel for the United States Trustee.

IT IS SO ORDERED.

Entered this 6th day of November, 2007, at Norfolk, Virginia.

/s/ Stephen C. St. John

STEPHEN C. ST. JOHN
United States Bankruptcy Judge