

May 30, 2002

**Barbara A.
Schermerhorn
Clerk**

NOT FOR PUBLICATION
**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE GALE DUANE COWDIN and
SHIRLEY ANN COWDIN, formerly
known as Shirley Ann Clark-Cowdin,

Debtors.

BAP No. WO-01-080

VERNON L. DANIELS,

Appellant,

v.

GALE DUANE COWDIN and SHIRLEY
ANN COWDIN,

Appellees.

Bankr. No. 01-12600
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, CORDOVA, and BROWN¹, Bankruptcy Judges.

PER CURIAM.

The Reverend Vernon Daniels appeals from an order of the United States Bankruptcy Court for the Western District of Oklahoma denying his motion for enlargement of time to file a complaint under 11 U.S.C. § 523(c) against the Chapter 7 Debtors, Gale Duane Cowdin and Shirley Ann Cowdin. For the reasons set forth herein, the order of the bankruptcy court is AFFIRMED.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Elizabeth E. Brown, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Colorado, sitting by designation.

JURISDICTION AND STANDARD OF REVIEW

With the consent of the parties, the Bankruptcy Appellate Panel has jurisdiction to hear timely-filed appeals from final judgments, orders, and decrees of bankruptcy courts within the circuit. 28 U.S.C. § 158(a), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002(a). Here, none of the parties has opted to have this appeal heard by the District court for the Western District of Oklahoma, so they are deemed to have consented to the Bankruptcy Appellate Panel's jurisdiction. Fed. R. Bankr. P. 8001(d). Furthermore, the Court has jurisdiction over the appeal because Daniels's notice of appeal was timely filed from a final order of the bankruptcy court.

The bankruptcy court's conclusions of law with respect to the Appellant's request for an enlargement of time to file a dischargeability complaint are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). A bankruptcy court's findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. P. 8013.

BACKGROUND

For several years, the Cowdins were members of the Parkview Baptist Church in Norman, Oklahoma, where Reverend Daniels served as pastor until February 1997. Daniels alleges that the Cowdins, together with their son, Gerald Clark, borrowed money from him over the course of many years, "to the extent they impoverished him of the bulk of his liquid estate."² (Appellant's Opening Br. at 1.) In 1994, the Cowdins executed a promissory note in favor of the Daniels in the principal amount of \$108,000.00. (App. to Appellant's Opening Br. at 0034.) Reverend Daniels also asserts that, by 1993, the church owed him back compensation in excess of \$300,000.00.

In February 1997, the members of Parkview Baptist Church held a meeting, and a majority of those present, including the Cowdins, voted to terminate Reverend

² Gerald Clark is the Defendant in a companion case, *Daniels v. Clark (In re Clark)*, BAP No. WO-01-026.

Daniels's employment as pastor. (Second Amended Petition, *in App.* to Appellant's Opening Br. at 0027.)

Reverend Daniels filed an action against the Cowdins in Oklahoma State Court in June 1997, seeking \$82,000 under the promissory note, and an additional \$25,573 in damages. (Petition, *in App.* to Appellant's Opening Br. at 0032–33.) In July 1998, Reverend Daniels commenced another action in Oklahoma State Court against the Cowdins and other church members seeking amounts allegedly owed to him under an employment contract with Parkview, and damages arising from the alleged wrongful termination of his employment. (Second Amended Petition, *in App.* to Appellant's Opening Br. at 0026–31.)

Reverend Daniels alleges that the Cowdins and their son used Parkview church property to conduct a day care business, and because they wished to expand the business, conspired to take over the church. Reverend Daniels claims the Cowdins concocted false claims against him and caused the February 1997 meeting to be held without notice to him or to the members of the church, in an unlawful and illegal manner. He further alleges that after terminating his employment, the Cowdins and their son sold the church's assets and bought a larger church facility to accommodate their day care business. Reverend Daniels contends they converted the church's assets to their own business purposes, defaulted on bank loans, and caused the closure of the new church. He claims that, due to the Cowdins' actions, he lost his employment, his medical insurance, his retirement, and his standing in the community.

The Cowdins filed for Chapter 13 relief in 1998. Reverend Daniels objected to confirmation of the Cowdins' plan and filed a motion to determine the value of his claim, alleging that his claims of intentional interference with contract, in excess of \$1,000,000.00, should be nondischargeable as arising from willful and malicious injury. He also stated that the Cowdins fraudulently induced him to loan them money. (*App.* to Appellant's Opening Br. at 0036-38.) In June 1999, the Chapter 13 case was

dismissed on motion of the Chapter 13 trustee. (App. to Appellant's Opening Br. at 0039.)

On March 20, 2001, the Cowdins filed their Chapter 7 case. (App. to Appellant's Opening Br. at 0001.) Reverend Daniels was listed as a creditor and received notice of the bankruptcy case and the deadline for filing objections to discharge and to dischargeability of individual debts. The bar date for objecting to discharge or dischargeability was June 25, 2001. (App. to Appellant's Opening Br. at 0001.) Reverend Daniels did not file a complaint objecting to the Cowdins' discharge or the dischargeability of any debt owed to him prior to that date, and the Cowdins received a discharge on July 2, 2001. (App. to Appellant's Opening Br. at 0002.)

On July 27, 2001, Reverend Daniels filed a Motion to Allow Exception to Discharge and Brief in Support. (App. to Appellant's Opening Br. at 0023–25.) In the Motion, Reverend Daniels admitted he received notice of the March 27, 2001, first meeting of creditors under 11 U.S.C. § 341 and the bar date for filing exceptions to discharge and dischargeability. He conceded he did not act in a timely manner, claiming he assumed his attorney had received the same notice and would act on his behalf. Reverend Daniels's attorney stated that he first became aware of the Cowdins' bankruptcy case on July 22, 2001, after the bar date for filing § 523 complaints had expired. (App. to Appellant's Opening Br. at 0023.) The Cowdins objected to Daniels's July 27, 2001, Motion on the grounds that he was precluded from filing an untimely complaint under Fed. R. Bankr. P. 4007(c).

The bankruptcy court held a hearing on Reverend Daniels's Motion on September 5, 2001. Reverend Daniels argued that the equities weighed in favor of granting an extension due to his age and the wrongful conduct of the Cowdins. Reverend Daniels further argued that because he had objected to confirmation of the plan in the Cowdins' previous Chapter 13 case and had asserted similar objections to those that he would raise in a § 523(a) complaint, a complaint objecting to dischargeability in the Cowdins'

Chapter 7 case should relate back to the time he filed the objection to confirmation of the plan in the Chapter 13 case.

The bankruptcy court denied Reverend Daniels's Motion, concluding that the proposed complaint was untimely under Fed. R. Bankr. P. 4007(c), that the time to seek an extension of the bar date had expired before Reverend Daniels filed his Motion, and that an exception for excusable neglect does not apply to matters under Rule 4007(c).

This appeal followed.

DISCUSSION

Reverend Daniels seeks to file a complaint against the Cowdins under 11 U.S.C. § 523(a)(2). Section 523(c) of the Bankruptcy Code states that a “debtor shall be discharged from a debt of a kind specified in paragraph (2) . . . of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge” 11 U.S.C. § 523(c). Rule 4007(c) of the Federal Rules of Bankruptcy Procedure, which sets time limits for § 523(c), provides:

A complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Fed. R. Bankr. P. 4007(c). Further, Fed. R. Bankr. P. 9006(b)(3) states: “The court may enlarge the time for taking action under Rules . . . 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.” Fed. R. Bankr. P. 9006(b)(3). It is uncontested that Reverend Daniels did not file his Motion until well after the time for filing a § 523 complaint had expired, and under the above express provisions, the bankruptcy court did not err in refusing to extend the time to allow him to file such a complaint.

Reverend Daniels argues that his failure to meet the bar date was warranted, and

the equities favor granting him more time. However, such suggestions of “excusable neglect” do not apply to this case. A failure to act is excused as a result of excusable neglect only in situations where a time period under the applicable law may be enlarged under Fed. R. Bankr. P. 9006(b)(1). *Jones v. Arross*, 9 F.3d 79, 81 (10th Cir. 1993) (refusing to apply excusable neglect under Rule 9006(b)(1), because appellant sought to enlarge the time for filing a claim under Fed. R. Bankr. P. 3002(c), and that time period may only be enlarged under Fed. R. Bankr. P. 9006(b)(3)). As noted above, this case is not governed by Rule 9006(b)(1), but rather by Fed. R. Bankr. P. 9006(b)(3), which limits enlargement of the sixty-day period set forth in Fed. R. Bankr. P. 4007(c) “only to the extent and under the conditions stated in” that rule. Fed. R. Bankr. P. 9006(b)(3). Because Rule 4007(c) requires a motion for an extension of time to be filed prior to the expiration of the sixty-day period stated therein, excusable neglect or equitable factors may not be applied to enlarge the time period. Reverend Daniels’s case is distinguishable from *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), because that case involved the late filing of a proof of claim, which is governed by Fed. R. Bankr. P. 3003, and the time period established in Rule 3003 may be enlarged under Rule 9006(b)(1) if excusable neglect exists.

Reverend Daniels also argues that his objection to the dischargeability of his alleged claims in the Cowdins’ Chapter 7 case should “relate back” to his objection to plan confirmation in their Chapter 13 case. However, he has provided no authority for the proposition that an objection to confirmation in an earlier case can constitute an “informal complaint” in a different case filed approximately three years later. He contends that the objection to confirmation should have put the Cowdins on notice of his claims against them. However, the Cowdins demonstrated that they recognized him as a creditor with potential claims when they sent him notice of the meeting of creditors and the bar date for filing § 523(a) complaints. Accordingly, this additional equitable

argument is neither persuasive nor sufficient.

The language of 11 U.S.C. § 523(c) and Fed. R. Bankr. P. 4007(c) and 9006(b) is clear that a complaint under 11 U.S.C. § 523(a)(2),(4),(6), and (15) must be filed during the prescribed sixty-day period. *See Resolution Trust Corp. v. McKendry (In re McKendry)*, 40 F.3d 331, 336 (10th Cir. 1994) (“If claims of nondischargeability under § 523(c) are not brought within the sixty-day period, the debts are discharged.”). Further, under Rule 4007(c) any request to extend the sixty-day time limit must be made prior to the expiration of the bar date, and Rule 9006(b)(3) prevents a court from enlarging the time to make such a request. *Themy v. Yu (In re Themy)*, 6 F.3d 688, 689 (10th Cir. 1993).

In *Themy*, the Tenth Circuit adopted a strict interpretation of the time limit of Rule 4007(c), and noted that 11 U.S.C. § 105(a) would permit an extension of the deadline only if a court needed to exercise its equitable powers to correct its own mistakes. *Id.* Specifically, the Tenth Circuit stated:

Rules 4004(a) and 4007(c) set a strict sixty-day time limit within which a creditor may dispute the discharge of the debtor and the dischargeability of debts. . . . Together, these rules prohibit a court from sua sponte extending the time in which to file dischargeability complaints. *See Anwiler v. Patchett (In re Anwiler)*, 958 F.2d 925, 927 (9th Cir.), *cert. denied*, 506 U.S. 882, 113 S.Ct. 236, 121 L.Ed.2d 171 (1992). This circuit has strictly construed such deadlines, holding that a Chapter 7 creditor with actual notice of a bankruptcy is bound by the sixty-day limit even if no formal notice of the deadline is received. *See Walker v. Wilde (In re Walker)*, 927 F.2d 1138, 1145 (10th Cir. 1991); *Yukon Self Storage Fund v. Green (In re Green)*, 876 F.2d 854, 857 (10th Cir. 1989).

Id. Under these standards, Reverend Daniels has failed to show that he should be allowed an extension of time.

CONCLUSION

For these reasons, the order of the bankruptcy court is AFFIRMED.