

1 new order
appealed to 10th Circuit
Court on 7/27/88
COPY of appeal attached

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

JUN 30 12 26 PM '88

MARKUS G. ZIMMER
CLERK

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

<p>In re WESLEY G. HARLINE, Debtor.</p>	<p>87PA-0184 87PA-0185</p>
<p>DLB COLLECTION TRUST and DARWIN M. LARSEN, Plaintiffs-Appellants, vs. WESLEY G. HARLINE, Defendant-Appellee.</p>	<p>Case nos. C-87-699J NC-87-99S</p>
<p>ZIONS FIRST NATIONAL BANK, Plaintiff-Appellant, vs. WESLEY G. HARLINE, Defendant-Appellee.</p>	<p>ORDER</p>

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

These appeals are from the dismissal in bankruptcy court of complaints objecting to discharge of debt. The bankruptcy court dismissed appellants' complaints on the basis that they had been filed after the statutory period had run. Plaintiffs-appellants DLB Collection Trust (DLB) and Zions First National Bank (Zions)

timely appealed and this court took jurisdiction under 28 U.S.C. § 158(a). The cases were consolidated because the appeals involve virtually identical facts and legal issues.

The debtor (Harline) filed a voluntary petition under Chapter 11 of the bankruptcy code on February 14, 1986. The bankruptcy court converted the case to a case under Chapter 7 on October 29, 1986. The clerk of the bankruptcy court then sent out notice that the creditors meeting would be held on December 9, 1986. The court's notice listed February 11, 1986 (emphasis added) as the date fixed for filing complaints objecting to the discharge of the debtor. Under Bankruptcy Rule 4004(a) the date should have been listed as February 7, 1987. (As the 7th of February was a Saturday the effective date would have been February 9, 1987.) Zions and DLB Collection filed complaints objecting to the debtor's discharge on February 11, 1987.

Harline filed a motion to dismiss or to strike appellants' complaints on the basis that they were not timely filed. Harline's argument that conversion from a Chapter 11 to a Chapter 7 did not alter the time for filing adversary actions was rejected by the bankruptcy court which held that "upon conversion from Chapter 11 to Chapter 7, creditors shall have 60 days from the date set for the first meeting of creditors in the Chapter 7 bankruptcy in which to file a complaint objecting to the dischargeability of a debt". That argument is not at issue on this appeal.

Harline raised the issue that the complaints were not timely filed for the Chapter 7 action when he filed his reply brief.

After hearing arguments on Harline's motion to dismiss, the bankruptcy court stated that the date setting the deadline for filing was in error and concluded that the "date itself is one on which a party could not reasonably rely." Transcript of Hearing, No. 86A-623 July 9, 1987, at 45. The bankruptcy court held that creditors had the duty to compute the date by which complaints must be filed.

The bankruptcy court relied on the reasoning in Neeley v. Murchison, 815 F.2d 345 (5th Cir. 1987), in its dismissal of appellants' complaints. In Neeley the notice to creditors was blank where the date for filing complaints objecting to discharge should have been entered. The Neeley court upheld the dismissal of the complaint but noted that this was not a case where "the clerk gave an affirmative but erroneous notice of a bar date upon which the creditor might reasonably have relied." 815 F.2d at 347 n. 5.

Under Bankruptcy Rule 4004 (a) "a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors." The period of time may be extended by motion of any party brought prior to the running of the sixty days. B.R. 4004 (b). No extension of time was requested here. However, this is not a case where the parties have asked for an extension of time but have made an untimely request. Rather this is a case

where the court's clerk fixes an erroneous date, upon which a party relies.

Under Bankruptcy Rule 2002(f) the clerk of the court must give creditors notice by mail of the time fixed for filing a complaint objecting to the debtor's discharge. Under the doctrine expressed in Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950), the notice must reasonably convey the required information. Where it does not, then the court must determine that no adequate notice has been given.

The date on the notice sent out to creditors here was a date that had come and gone before the filing of debtor's petition. Such an erroneous date is not proper notice. It complies neither with the statute nor the rules. In Rowe International v. Herd, 840 F.2d 757 (10th Cir. 1988) a similar error regarding the date fixed for filing a proof of claim was made. The Tenth Circuit court upheld a district court decision that no reasonable notice was given where the year listed was in error. The court reasoned that the notice must be "clear and definite, not abstract and ambiguous." The court held that "[a] creditor is not charged with interpreting a notice, containing an obviously invalid alternative bar date, which is ambiguous at best and incomprehensible at worst." Id., at 759.

Rowe reaffirms the principle set out in Reliable Electric Co. Inc. v. Olson Construction Company, 726 F.2d 620 (10th Cir. 1984), that a "creditor has a 'right to assume' that he will

receive all of the notices required by statute before his claim is forever barred." 726 F.2d at 622.

The bankruptcy court and the district court sitting in bankruptcy have the power to extend the time for filing objections to discharge on motion of the parties after notice and hearing pursuant to Rule 4004 (b). While no mention is made in the rule that the court has the power to do so sua sponte, it appears to this court that such can be done to rectify the court's own error.

The fact situation in In re Hickey, 58 Bankr. 106 (Bkctcy. S.D. Ohio 1986), parallels the situation here. In Hickey the court's notice listed a date three days past the statutory deadline. In deciding whether to dismiss the complaint filed on the erroneous deadline the court held that "litigants who reasonably rely on dates established by an order of this court will not be deprived of their day in court simply because of a clerical error committed by the court itself, especially when that error in no way prejudices the rights of any party." Id. at 108. The Hickey court found nothing in the Rules "which abrogate this Court's inherent power to remedy defaults which arise out of the court's own clerical errors." Id.

In In re Riso, 57 Bankr. 789 (D.N.H. 1986) a creditor relied on an erroneous notice of time for filing objections to discharge. The Riso court cited to In re Martin Edsel, 228 F. Supp 538, 539 (D.N.H. 1963) which had held that if the bankruptcy court did not exercise its equitable powers to lift the statutory

bar then injustice would occur. The Riso court reasoned that it must possess the power to correct its own mistakes to prevent injustice and that while the court's power could not be used to create a substantive right it could use its powers to allow a creditor to exercise its existing right. In re Riso, 57 Bankr. at 793.

The court in In re Schwartz & Meyers, 64 Bankr. 948 (Bankr. S.D.N.Y. 1986) itself set back the deadline for filing objections to discharge when its clerk sent out an erroneous date with such an extension on it. The court reasoned that the sixty days could not run until parties received formal notice of the deadline.

In In Re Silbey, 71 Bankr. 147 (Bankr. D. Mass. 1987), the clerk's notice listed a date one day past the statutory deadline. The court refused to dismiss a complaint filed on the erroneous date on the basis that the court's equitable powers allowed it to extend the period "if equity would be served by ignoring the technical tardiness." Id. at 149.

The clerk's erroneous notice in this case does not constitute proper notice of the filing deadline. Furthermore, the creditors here did not have the affirmative duty to compute the correct date when the notice listed an obviously erroneous date.

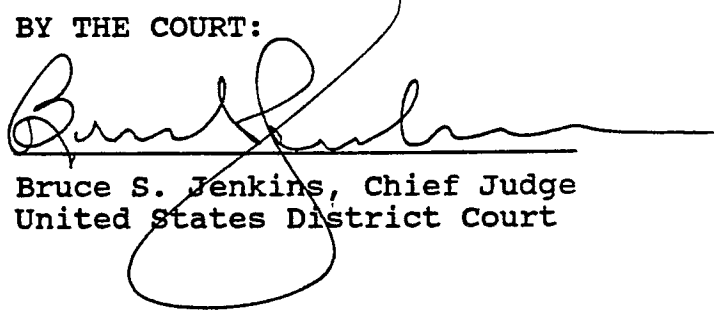
The issue is whether the court has the power to correct its own mistakes. The court holds that the erroneous date February 11, 1986 should be corrected to February 11, 1987. The court

holds that the complaints were timely filed and remands the cases to the bankruptcy court for further action.

SO ORDERED.

Dated this 30 day of June, 1988

BY THE COURT:

A handwritten signature in black ink, appearing to read "Bruce S. Jenkins", written over a horizontal line. The signature is cursive and extends to the right of the line.

Bruce S. Jenkins, Chief Judge
United States District Court

FILED
UNITED STATES
DISTRICT COURT
DISTRICT OF UTAH

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MARKUS B. ZIMMER
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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re)
)
WESLEY G. HARLINE,)
)
Debtor.)
-----)

DLB COLLECTION TRUST and)
DARWIN M. LARSEN,)
Plaintiffs-Appellants,)

v.)

WESLEY G. HARLINE,)
Defendant-Appellee.)
-----)

ZIONS FIRST NATIONAL BANK,)
Plaintiff-Appellant,)

v.)

WESLEY G. HARLINE,)
Defendant-Appellee.)

NOTICE OF APPEAL

Case Nos. C-87-699J
NC-87-99S

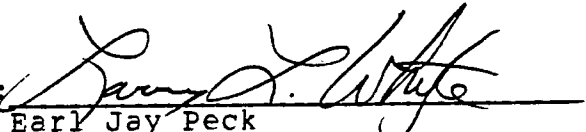
Consolidated as C-87-699J

Notice is hereby given that Defendant Wesley G. Harline, pursuant to Federal Rules of Appellate Procedure 3 and 4, and 28 U.S.C. § 1292(a), appeals to the United States Court of Appeals for the Tenth Circuit the June 30, 1988, Order of this Court.

Submitted this 27th day of July, 1988.

NIELSEN & SENIOR

By:

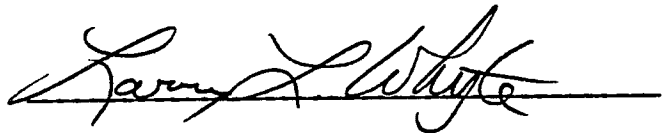

Early Jay Peck
Larry L. Whyte

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 1988, I caused a true and correct copy of the foregoing Notice of Appeal to be placed in the United States Mail, first-class, postage prepaid, addressed to the following:

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