
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re

**Daniel L. Scarbrough and
Melanie Scarbrough,**

Debtors.

Bankruptcy Case Number 02-32949

Chapter 13

**MEMORANDUM DECISION AND ORDER ON GOLDENWEST CREDIT UNION'S
MOTION FOR ENLARGEMENT OF TIME TO FILE PROOF OF CLAIM, OR IN THE
ALTERNATIVE, TO EXCEPT DEBT FROM DISCHARGE**

Timothy W. Blackburn and Mary E. Westby, Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah for Goldenwest Credit Union.

Chris L. Schmutz, Schmutz & Mohlman, LLC, Bountiful, Utah for the Debtors.

Scott Blotter, Salt Lake City, Utah for the Chapter 13 Trustee, Andres Diaz.

This matter came before the Court on Goldenwest Credit Union's ("Goldenwest") "Motion for Enlargement of Time to File Proof of Claim, or in the Alternative, to Except Debt from Discharge" (the "Motion"). A hearing was held on May 5, 2003 to consider the Motion. Mary Westby appeared on behalf of Goldenwest, Scott Blotter appeared on behalf of the Chapter 13 Trustee (the "Trustee") and Chris Schmutz appeared on behalf of Daniel and Melanie Scarbrough (the "Debtors"). At the conclusion of the hearing, the Court took the matter under advisement and this Memorandum Decision and Order issues accordingly.

FACTUAL BACKGROUND

The facts involved in the issue before the court are not in dispute. The Debtors filed a petition for bankruptcy relief under Chapter 13 on August 5, 2002. Attached to the petition was a copy of the Debtors' creditor list, or matrix. The creditor list included Goldenwest as well as its counsel. The Debtors filed their statements and schedules on August 19, 2002. On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the Debtors list Goldenwest Credit Union as a creditor for loans incurred in 1999 totaling \$40,000. Only one other creditor, University of Utah Credit Union, appears on Schedule F. The University of Utah Credit Union was also listed on the creditor matrix filed by the Debtors with their petition.¹

Due to an error in the court clerk's office, the matrix did not appear on the court's record. Subsequently, when the notice of the bankruptcy was sent, it was not sent to Goldenwest or any other creditors other than Citifinancial Mortgage Company.² The notice of the case sent by the clerk's office also contained the date of the meeting of creditors as well as deadlines, including the deadline for filing proofs of claim, December 12, 2002. Because it was not sent notice of the case, Goldenwest only became aware of the bankruptcy filing after the deadline for filing proofs of claim had passed and, consequently, did not timely file a proof of claim. Goldenwest now asks the Court to allow it to file a late claim or to except its debt from discharge.

The Debtors do not oppose Goldenwest's motion to extend the time to file proofs of

¹ The Debtors also filed an amended Schedule F on October 9, 2002 to include one additional creditor, Ogden Standard Examiner c/o Express Recovery.

² It is unclear why the clerk's office sent notice of the filing and deadlines to Citifinancial.

claim, but do object to Goldenwest's debt being excepted from discharge. The Debtors argue that Goldenwest should be allowed to participate in the Chapter 13 plan, but argue that excepting the debt from discharge would "penalize the Debtors for an omission that was not their doing and of which they were ignorant until recently." (Debtors' Response at 2).

Goldenwest argues that Constitutional due process requires it be given an opportunity to file a late claim, otherwise, it may lose its \$40,000 claim. Without notice and an opportunity to be heard, Goldenwest argues, it cannot be deprived of property and cites case law wherein courts have held that without notice, creditors may not be held to the deadlines set.

The Chapter 13 Trustee argues that under Tenth Circuit Court of Appeals precedent, failure to receive notice is not grounds to extend the time for creditors to file a claim. For the following reasons, this Court agrees with the Trustee and denies the motion. However, the Court is convinced that due process has been violated and suggests other relief.

DISCUSSION

A. **Jurisdiction**

The Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G) and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

B. **Analysis**

Fundamental to Chapter 13 of the Bankruptcy Code is the opportunity afforded to creditors to file proofs of claim. 11 U.S.C. § 501(a) states that a "creditor or an indenture trustee

may file a proof of claim.”³ Rule 3002(c) of the Federal Rules of Bankruptcy Procedure⁴ implements the procedure to file a proof of claim and sets certain deadlines. It provides that in a “chapter 13 individual’s debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors.” Rule 3002(c) also sets forth certain exceptions to the 90 day deadline which are not applicable to this case.

In order to determine whether this deadline to file a claim may be enlarged, the Court must look at Rule 9006(b) which governs enlargement of time for deadlines set by the Bankruptcy Code and Rules. This rule generally provides that the court may, for cause, extend deadlines if the request is made prior to the expiration of the deadline. Additionally, Rule 9006(b)(1) provides that the court may “on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.” While “excusable neglect” is not defined, it appears clear that failure of the clerk’s office to send notice would meet the definition.⁵ However, Rule 9006(b)(3) states that “[t]he court may enlarge the time for taking action under Rule[] . . . 3002(c) . . . only to the extent and under the conditions stated in [that rule].” This language appears to limit extensions of time to file claims

³ All further references to the United States Code are to Title 11 unless otherwise noted.

⁴ All further references to “Rules” are references to the Federal Rules of Bankruptcy Procedure unless otherwise noted.

⁵ Section 342 of the Bankruptcy Code governs notice of the case and charges the clerk of the court with responsibility to send notice. The applicable portion of this section states that “[t]here shall be given such notice as is appropriate, including notice to any holder of a community claim, of an order for relief in a case under this title.” Rule 2002(a)(7) further clarifies that the clerk shall give notice to creditors of “the time fixed for filing proofs of claims pursuant to Rule 3003(c).”

to those specific exceptions listed under Rule 3002(c).

This interpretation is confirmed by the Tenth Circuit Court of Appeals' case of Jones v. Arros, 9 F.3d 79 (10th Cir. 1993). In that case, the Tenth Circuit reversed the bankruptcy court which had allowed a late filing of a claim. In Jones, a Chapter 12 creditor was not given notice of the debtor's bankruptcy petition and, therefore, failed to timely file a proof of claim. Relying on the Supreme Court case of Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380 (1993), the Tenth Circuit in Jones determined that the language of Rule 9006(b)(3) prohibited any enlargement of time other than for the reasons expressly provided for under Rule 3002(c). The court noted that while Pioneer involved a Chapter 7 case, Rule 3002(c) governs filing of proofs of claim under Chapters 7, 12 and 13, and, therefore, held that the creditor in Chapter 12 case was not allowed to file a late claim. See Jones, 9 F.3d at 81 ("Because Rule 3002(c) governs not only Chapter 7 but also Chapters 12 and 13, there is no excusable neglect exception available to [the creditor]. Rule 3002(c) allows no exception to the filing deadline for a creditor who was not notified of a bankruptcy.") (citations omitted).

This result seems harsh and appears to deprive the creditor of any remedy because under § 502(b)(9) a claim that is not timely filed is not allowed.⁶ The Trustee suggests that this is the proper result and that Goldenwest's remedy is to be found under § 523(a)(3) which provides that debts which are neither listed nor scheduled, unless the creditor had notice or actual knowledge, are not discharged and Goldenwest may seek to recover after the plan is completed. This is also

⁶ Section 502(b)(9) states that the court shall allow claims "except to the extent . . . (9) proof of such claim is not timely filed"

the remedy the Tenth Circuit contemplated in Jones. See Jones, 9 F.3d at 82 (“Because [the creditor] was not listed among [the debtor’s] creditors, [the] claim is nondischargeable. [The creditor] may now petition the bankruptcy court for relief from stay and bring an action against [the debtor], or [the creditor] may wait until the case ends and bring such an action.”). It is noteworthy that in the instant case, the Debtors appear to have properly scheduled Goldenwest on their Schedule F. Accordingly, it appears that section 523(a)(3) does not apply and Goldenwest’s claim, if disallowed, would be dischargeable under § 1328(a).⁷

If its claim is disallowed and the debt discharged, Goldenwest would be without an adequate remedy and would be deprived of its property. Without an adequate remedy, Goldenwest has been deprived of due process. The Fifth Amendment to the Constitution provides that a person may not be deprived of property without “due process of law.” U.S. Const. amend. V. Goldenwest did not receive “due process” because it was not sent notice of the filing of the case. See e.g., City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 297 (1953) (“But even creditors who have knowledge of a reorganization have a right to assume that the statutory ‘reasonable notice’ will be given them before their claims are forever barred. . . . The statutory command for notice embodies a basic principle of justice – that a reasonable opportunity to be heard must precede judicial denial of a party’s claimed rights.”); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 656-57 (1950) (“Many controversies have

⁷ Section 1328(a) provides that:

As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title. . . .

reged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”⁸ Under the circumstances of this case, the Bankruptcy Code provides no remedy to Goldenwest if its claim is disallowed because it was late filed. This is inconsistent with principles of due process and the Court must find another remedy.

The Court believes there are at least two options available to the Debtors to allow them to go forward with their case but that will also allow creditors who were not sent notice the opportunity to participate in the case. Initially, the Court contemplated that it may reset all the deadlines in the case to provide for notice of the bankruptcy to be resent to all creditors, including notice of another meeting of creditors within 30 days, time to file proofs of claim within 90 days of the meeting of creditors, 30 days to object to exemptions and a new confirmation date. This would afford all creditors who were not sent notice of the case an opportunity to attend a meeting of creditors and file proofs of claim and otherwise exercise their rights.⁹

⁸ The Court also notes the legislative history to § 342 wherein it states that “due process will certainly require notice to all creditors and equity security holders.” H.R. Rep. No. 95-595, at 331 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6288.

⁹ The Court is aware that since the filing of the case, creditors have received notice of the case from the Debtors. In particular, the Court notes that the Debtors’ Motion to Confirm Amended Plan by Consent, Objection to Claims and Motion for Allowance of Attorneys Fees (“Consent Motion”) was sent to a list of creditors, including all of the creditors listed on the Debtors’ schedules, on February 25, 2003. Included in the Consent Motion is a statement that “All creditors with unsecured claims who failed to file a proof of claim (as listed on Exhibit “A”) will also have their claims disallowed.” Included on Exhibit A are the Internal Revenue Service for \$45,000, Goldenwest Credit Union for \$40,000 and the University of Utah Credit Union for \$52,000 and \$18,000. The Debtor may argue that by February 25, 2003 all of the creditors had

The other option the Court contemplates is that afforded the Debtors under Rule 3004. Rule 3004 provides that a debtor or trustee may file a proof of claim on behalf of the creditor for inclusion in the case within 30 days after the deadline for filing proofs of claims by creditors. This deadline has also since expired. However, unlike the deadline for filing proofs of claim by creditors established by Rule 3002(c) which is expressly limited to enlargement only for those reasons set forth in that Rule as stated in Rule 9006(b)(3), Rule 3004 is not similarly limited. Therefore, Rule 9006(b)(1) applies and the deadline established by Rule 3004 may be enlarged upon a showing of "excusable neglect." See Ain v. Myers (In re Ain), 193 B.R. 41, 46 (D. Colo. 1996) ("a bankruptcy court may enlarge the time for taking action under rule 3004 if the court finds that excusable neglect exists pursuant to rule 9006(b)(1)").

It is unclear from the record before the Court why the Debtors did not file a claim on behalf of Goldenwest and the other creditors listed on amended Schedule F within the time period specified, and, therefore, this Court is unable, at this time, to determine if "excusable neglect" exists. The Court would, therefore, allow the Debtors to file proofs of claim on behalf of the creditors listed on the schedules for the amounts set forth on the schedules subject to a further hearing on whether the "excusable neglect" standard has been met and the claims should be allowed.

The Debtors shall alert the Court of their intentions at the previously scheduled confirmation hearing set for June 17, 2003.

received notice of the case and, other than Goldenwest, have not sought any relief from this Court and should, therefore, be estopped from asserting a claim if the Court were to reset the deadlines. The Court believes, however, that because the creditors did not receive notice of the case through the Debtors' Consent Motion until after the deadline for filing proofs of claim had expired, the creditors should be given an opportunity to file claims despite the subsequent notice.

CONCLUSION

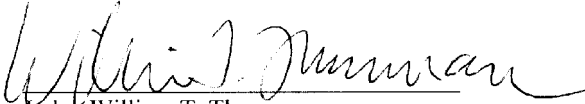
For the foregoing reasons, the Court denies Goldenwest's Motion. Rule 3002(c) prevents the Court from extending the deadline to file claims for any reason other than those specifically set forth in the rule. Lack of notice is not enumerated and therefore cannot be cause to extend the deadline. In addition, § 523(a)(3) does not apply and the Court, based on the facts and circumstances presented to it in this matter, can find no reason that would indicate that the debt would be excepted from discharge. However, because, under the circumstances of this case, the Bankruptcy Code provides no remedy to Goldenwest, due process would be violated if its debt was discharged when Goldenwest was not sent notice of the bankruptcy case in time to file a proof of claim. The Court makes a preliminary finding that under § 1325(a)(1) the proposed plan does not comply with the applicable provisions of the Bankruptcy Code because notice was not sent to creditors as required by § 342(a) and, therefore, the plan may be non-confirmable.

Accordingly, the Court

ORDERS that the Motion is denied; and further

ORDERS that at the confirmation hearing set for June 17, 2003, the Court will hear argument from the Debtors, and other interested parties, regarding the above-mentioned options available to them to remedy the due process violation.

DATED this 17th day of June, 2003.


Judge William T. Thurman
United States Bankruptcy Judge

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I, the undersigned, hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM DECISION AND ORDER ON Goldenwest CREDIT UNION'S MOTION FOR ENLARGEMENT OF TIME TO FILE PROOF OF CLAIM, OR IN THE ALTERNATIVE, TO EXCEPT DEBT FROM DISCHARGE** by facsimile and by mailing the same, postage prepaid, to the following, on the 12th day of June, 2003.

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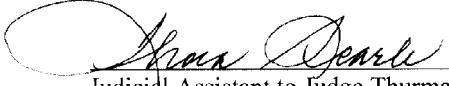
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June

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