

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
R & D MACHINE TOOL, INC.,)	CASE NO. BK92-80612
)	
DEBTOR)	CH. 7
)	Fil. 263, 290, 307
)	and 291, 306, 311

MEMORANDUM

Hearing was held on April 25, 1994, on Trustee's Motion for Interim Distribution and Motion to File Proof of Claim Out of Time filed by Swanson-Erie Corporation. Appearing as Trustee was Richard D. Myers. Appearing on behalf of the movant was Robert Ginn of Omaha, Nebraska. Appearing on behalf of Dale Nelson and Richard Walter was Charles Smith of Council Bluffs, Iowa. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (B).

Background

The debtor, R & D Machine Tool Inc., filed for relief under Chapter 11 of the Bankruptcy Code on April 3, 1992. The debtor's bankruptcy schedules listed Swanson-Erie Corporation (Swanson) as the holder of an unsecured claim which was not disputed. Swanson was included on the mailing matrix used in this case. Swanson was appointed to the Committee of Unsecured Creditors.

On June 5, 1992, the debtor's case was converted to a Chapter 7 case. The Notice of Commencement of Case under Chapter 7 states, "Filing Claims: Deadline to File a Proof of Claim is 10/13/92." Filing no. 82. Swanson's name and address were included on the attached mailing matrix. Swanson did not file a proof of claim until March 24, 1994. Claim no. 78.

The trustee has moved for permission to distribute some of the assets of the estate. Swanson has resisted because it is not included in the distribution, due to the tardiness of its proof of claim and has requested permission to file a proof of claim out of time. Two unsecured creditors, Dale Nelson and Richard Walter, have objected to Swanson's request to file a proof of claim out of

time and resist Swanson's resistance to the trustee's motion to distribute assets of the estate.

The proposed distribution is the result of a settlement agreement between the trustee, Dale Nelson and Richard Walter. If the distribution is limited to those proofs of claims timely filed, the distribution will pay about 88% to general unsecured creditors, while Dale Nelson and Richard Walter will receive about 8% for their unsecured claims. Nelson and Walter allege that allowing Swanson's claim will dilute their dividend, which is contrary to the expectations of Nelson and Walter when they entered into the settlement agreement.

Discussion and Decision

11 U.S.C. § 502 states that any proof of claim filed under Section 501 of Title 11 is deemed allowed unless a party in interest objects. In this case, the trustee filed its objections to claims and moved for permission to distribute the estate prior to Swanson's proof of claim being filed. However, the trustee, Nelson, and Walter have resisted the Swanson's request to file its proof of claim out of time and request that the interim distribution be approved, as is.

In Chapter 7 cases, a late filed proof of claim is subject to Sections 726(a)(2) and (a)(3), which state:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed -- (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is --

(A) timely filed under section 501(a) of this title; (B) timely filed under section 501(b) or 501(c) of this title; or (C) tardily filed under section 501(a) of this title, if -- (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and (ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

11 U.S.C. § 726(a)(2) & (a)(3).

Fed. Bankr. R. 3002(c) states that a proof of claim for a Chapter 7 case must be filed within ninety days after the first date set for the meeting of creditors.

In this case, Swanson did receive notice of the conversion and had knowledge of the conversion; therefore, Swanson's late proof of claim is not entitled to the same priority as other unsecured claims under Section 725(a)(2)(C). Under the clear language of the statute, Swanson's claim is a third priority claim under Section 726(a)(3) because the claim is an allowed unsecured claim that has been filed late despite the facts that Swanson received notice of the proof of claim filing deadline and that Swanson had knowledge of the bankruptcy case.

The plain language of a statute is conclusive as to its meaning, except when the plain language is demonstrably at odds with the intent of Congress. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S. Ct. 1026, 1031, 103 L. Ed. 2d 290 (1989). The legislative history supports the plain meaning of the statute and states:

The provision [Section 726(a)(2)(C)] was written to permit distribution to creditors that tardily file claims if their tardiness was due to lack of notice or knowledge of the case. Though it is in the interest of the estate to encourage timely filing, when tardy filing is not the result of a failure to act by the creditor, the normal subordination penalty should not apply. Third, distribution is to general unsecured creditors who tardily file.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 383 (1977); **S. Rep. No. 989**, 95th Cong., 2d Sess. 97 (1978); U.S.C.C.A.N. 1978, pp. 5787, 5883, 5963, 6339.

However, Swanson argues that the proper treatment for its late filed proof of claim is pursuant to the "excusable neglect" standard contained in Fed. Bankr. R. 9006(b)(1) (hereafter

"Rule ____") and explained in Pioneer Investment Services Co. v. Brunswick Associates, ___ U.S. ___, 113 S. Ct. 1489, 123 L. Ed. 74 (1993). Swanson takes the position that when the debtor filed Chapter 11 bankruptcy, it was not necessary for Swanson to file a proof of claim. Therefore, when the debtor converted, Swanson was not made aware of the need to file a proof of claim, and the conversion notice did not sufficiently notify Swanson that it was obligated to file a proof of claim because it did not specify that claims "deemed filed" and allowed in a Chapter 11 case had to actually be filed in the Chapter 7 case. Swanson did not seek the advice of legal counsel regarding the legal effect of the conversion.

It is not necessary to address whether Swanson's conduct constituted "excusable neglect" because that defense is not available in a Chapter 7 case. In re Osman, 164 B.R. 709, 711 (Bankr. S.D. Ga. 1993) (citing In re Jones, 154 B.R. 816, 818 (Bankr. M.D. Ga. 1993), and In re Bailey, 151 B.R. 28, 34 (Bankr. N.D.N.Y. 1993), for the proposition that "excusable neglect" may not be employed in a case under Chapter 7, Chapter 12, or Chapter 13 to deem an otherwise tardy claim as timely filed). See also Brunswick, ___ U.S. ___, ___ n. 4, 113 S. Ct. 1489, 1495 n. 4, 123 L. Ed. 2d 74 (stating in dicta that Rule 9006(b)(3) excludes Rule 3002(c) in Chapter 7 cases from the "excusable neglect" standard).

Rule 9006(b)(1), which contains the "excusable neglect" defense, is subject to Rule 9006(b)(3). This Rule provides that the time period for filing proofs of claims may be enlarged only to the extent permitted in Rule 3002. Rule 3002 contains no circumstances that would permit Swanson's proof of claim to be filed late and receive the same treatment as an unsecured claim filed within the permitted time limit.

Several bankruptcy courts have considered the same issue and have concluded that an unsecured creditor who has notice or knowledge of the Chapter 7 case but who has failed to timely file a proof of claim possesses an allowed unsecured claim and is subject to third priority under Section 726(a)(3), behind timely filed unsecured creditors. In re Corporacion de Servicios Medico, 149 B.R. 746 (Bankr. D.P.R. 1993) (holding that an unsecured claim holder who had knowledge of a case being converted from Chapter 11 to Chapter 7 but who filed a proof of claim in the Chapter 7 case late had an allowed unsecured claim and was only entitled to third priority behind timely filed unsecured creditors pursuant to 726(a)(2) and (a)(3). However, unsecured creditors without knowledge or notice of the conversion to Chapter 7 were entitled to the same priority status as timely filed unsecured claims under Section 726(a)(2)(C)); In re Osman, 164 B.R. 709 (Bankr. S.D. Ga. 1993) (holding that an unsecured creditor without actual notice or

knowledge of bankruptcy case was entitled to same treatment as unsecured creditors who had timely filed claims, and discussing thoroughly the existing law and cases on the subject).

Several courts have treated Rule 3002 as a statute of limitation and have absolutely barred any late filed claims in Chapter 7 cases. Osman, 164 B.R. at 712 n. 7 (listing Chapter 7 cases that have construed Rule 3002 as a bar to tardily filed claims, including a Fourth Circuit case). However, at least in a Chapter 7 case, these cases appear to be in conflict with the Bankruptcy Code. Section 502 treats any proof of claim filed as allowed and explicitly states the grounds upon which a court may disallow a claim. The timeliness of the filing of the proof of claim is not listed as a means to disallow a claim. See 11 U.S.C. § 502(a) & (b). Section 502 together with Section 726(a) are consistent with their treatment of allowed unsecured claims and were drafted with the assumption that late filed claims would not be disallowed. Vecchio v. United States (In re Vecchio), ___ F.2d ___, 1994 WL 113545 (2nd Cir. 1994) (holding that under Sections 502(a), (b) and 726(a) claims may be allowed and tardily filed, despite Bankruptcy Rules); United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1089 (6th Cir. 1990) (holding that a tardily filed proof of claim by creditor with notice was allowable and was afforded to appropriate treatment under Section 726(a)); Osman, 164 B.R. at 714.

One bankruptcy court believes the conflict arose when the drafters of the Bankruptcy Code hastily copied Rule 302 from the previous bankruptcy rules, which dealt with a bankruptcy statute that did explicitly disallow late filed proofs of claims, and created Rule 3002 without noticing that the underlying statute had changed and no longer disallowed tardy proofs of claims. In re Hausladen, 146 B.R. 557, 559 (Bankr. D. Minn. 1992) (holding that an unsecured creditor's proof of claim was allowed even though tardily filed in a Chapter 13 case). In the instance where there is a conflict between the Code and the Rules, the Code prevails. Rules Enabling Act, 28 U.S.C. § 2075; Osman, 164 B.R. at 714 (citing In re Stoecker, 151 B.R. 989, 1004; In re Roberts, 68 B.R. 1004, 1006 (Bankr. E.D. Mich. 1987); United New Mexico Bank v. Wilferth (In re Wilferth), 57 B.R. 693, 694 (Bankr. D.N.M. 1986)).

Conclusive evidence that Rule 3002 does not absolutely bar late filed claims, at least in Chapter 7 cases, is located in the Rule itself. Rule 3002(c)(6) explicitly states that in a Chapter 7 case a court may grant an extension of time to file a proof of claim against any surplus remaining after all allowed claims are paid in full. Fed. Bankr. R. 3002(c)(6). It appears that this subsection contemplates that tardily filed proof of claims filed before distribution are allowed and paid in accordance with

Sections 502(a), (b) and 726(a), while those who do not file prior to distribution are entitled to the remaining surplus.

Swanson is permitted to file its proof of claim out of time. The objections by the trustee, Nelson and Walter are overruled to the extent that the objections seek to have Swanson's claim absolutely time barred. However, because Swanson had notice of the conversion of the case from Chapter 11 to Chapter 7, Swanson's claim will be treated as a late filed claim under Section 726(a)(3) and is entitled to payment only after timely filed allowed unsecured claims are paid in full under Section 726(a)(2). The objection by Swanson to the trustee's Motion for Interim Distribution is overruled. The interim distribution will not pay timely filed allowed unsecured claim holders under Section 726(a)(2) in full.

Separate journal entry to be entered.

DATED: May 11, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.

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<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 263, 290, 307
)	and 291, 306, 311
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	
)	DATE: May 11, 1994
<u>Defendant(s)</u>)	HEARING DATE: April 25,
)	1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Motion for Interim Distribution and Motion to File Proof of Claim Out of Time filed by Swanson-Erie Corporation.

APPEARANCES

Richard D. Myers, Trustee
Robert Ginn, Attorney for movant
Charles Smith, Attorney for Dale Nelson and Richard Walter

IT IS ORDERED:

Late filed proof of claim allowed with distribution rights pursuant to 11 U.S.C. § 726(a)(3). See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.