

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
ROBERT I. MENDYK,)	CASE NO. BK81-1200
)	
DEBTOR)	
)	
ROY SCHOOLEY,)	A81-634
)	
Plaintiff)	
)	
vs.)	
)	
ROBERT I. MENDYK,)	
)	
Defendant)	

MEMORANDUM

As submitted to the Court at a hearing on pretrial conference, plaintiff seeks, under §523(c) of the Bankruptcy Code, a determination that a debt owed him by the defendant/debtor in the amount of \$4,650 arising from a Municipal Court judgment is nondischargeable due to the fraud or willful and malicious injury by the debtor to his property. The defendant's conflicting motion is one for summary judgment based upon the untimely filing of the plaintiff's adversary complaint. It was determined at pretrial conference that the pretrial on the issue of nondischargeability be continued until further order pending resolution of the defendant's motion for summary judgment. The summary judgment motion has been submitted to the Court on briefs in lieu of oral argument by counsel.

In his answer to the complaint and later motion for summary judgment, the defendant alleges that the plaintiff Roy Schooley was named as a creditor in his bankruptcy schedules filed June 8, 1981, BK81-1200, and that, by this Court's order dated July 17th, September 8, 1981, was established as the last day for filing of any complaint to determine the dischargeability of a debt pursuant to 11 U.S.C. §523(c). A copy of that order has been submitted to the Court for its consideration. Mr. Mendyk further alleges that Mr. Schooley received notice for the last day of filing such a complaint but failed to timely do so. Mr. Schooley's complaint to determine the nondischargeability of a debt under §523(c) was in fact filed September 18, 1981, ten days after the deadline set by this Court.

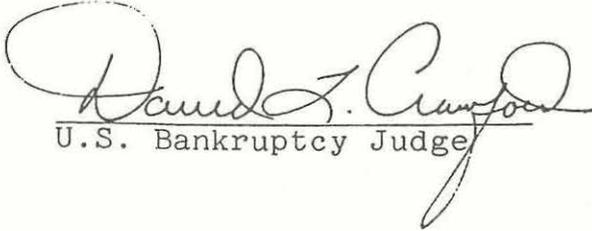
The plaintiff Mr. Schooley admits that September 8 was fixed as the final date for filing objections to discharge and that the discharge hearing was originally scheduled for September 21, 1981. He argues, however, that due to the filing of an objection to discharge by another creditor, Alnor Corporation, on September 3, the discharge hearing was not held and has not been held to this date. Creditor's brief cites to this Court In Re Repino, 11 B.R. 651 (N.Y. 1981). That case allowed the filing of an objection to discharge on the grounds of fraud as in the instant case within ninety days after the first meeting of creditors. In interpreting Bankruptcy Rule 906(b) that Court read the phrase "the period originally prescribed" within which the Bankruptcy Court may extend the time for filing, to be the deadline fixed in Rule 404(a) which is 90 days from the date of the first meeting of creditors. While I would agree that pursuant to Rule 404(a) and 409(a)(2), a maximum of 90 days after the first meeting of creditors may be allowed for objections to discharge or debt dischargeability, that subsection also provides for the Court's discretion in fixing such a deadline as long as the maximum of 90 days and the minimum of 30 days are complied with. By order of this Court, the deadline for filing objections to discharge was set as September 8, 1981. Bankruptcy Rule 906(b) permits the Court for cause shown at any time in its discretion to (1) ". . . order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. . . ." In accordance with my interpretation of Rule 404 previously cited, the term "originally prescribed" by this Court order has elapsed and Rule 906(b)(1) cannot apply in this case.

Subsection (2) of Rule 906 addresses applications for extension of time made after the expiration of the specific period ordered by the Court. That subsection would permit the enlargement of time where failure to act was the result of excusable neglect. Nowhere in the briefs nor filings before me is there any indication of excusable neglect in the plaintiff's late filing of this discharge-ability complaint; there is only a statement by the plaintiff that he did indeed file ten days late. Ledwith v. Storkan, 2 F.R.D. 539 (D. Neb. 1942) sets forth the standards for excusable neglect under Federal Rules of Civil Procedure 60(b), the rule dealing with relief from judgment or order as a result of mistake, inadvertence, excusable neglect, etc. Although no judgment or order has been entered against Mr. Schooley, the case directly refers to situations similar to the instant case. The defendants in Ledwith sought relief against judgment chiefly upon an assertion of excusable neglect in consequence of their attorney's omission to file an answer in their behalf. In that case it was held that the neglect upon which a judgment can be reversed, ". . . must be excusable, and real and practical grounds for excuse must be factually shown in support of the motion." Ledwith, supra, at 544. The case goes on to say that if the showing made is inadequate to fairly establish excusable neglect, it is the duty of the Court to find accordingly and deny the relief sought. As no showing of excusable neglect has been made by Mr. Schooley and in fact no

application has been made for an enlargement of time, Bankruptcy Rule 906(b)(2) is unavailable as a defense to the motion for summary judgment, and the motion should be granted.

DATED: August 10, 1982.

BY THE COURT:


U.S. Bankruptcy Judge

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