UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF	)	
	)	
JAY JOST,	)	CASE NO. BK83-1266
	)	
DEBTOR	)	CH. 7

MEMORANDUM OPINION

On December 2, 1987, the Court held a preliminary hearing on trustee's objection to claim filed by Refco, Inc., and Chicago Grain and Financial Future Company (hereinafter individually and collectively referred to as "Chicago"). The parties were given more time to present affidavit evidence concerning the factual background and to provide legal memoranda regarding the issues. Appearing on behalf of the trustee was Daniel Evans of Steier & Kreikemeier, P.C., of Omaha, Nebraska. Appearing on behalf of Chicago was Thomas O. Ashby of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, of Omaha, Nebraska. Appearing on behalf of an interested creditor in support of the trustee's objection was John Bernstein of Dixon & Dixon, P.C., of Omaha, Nebraska.

The Court has now had an opportunity to review the affidavit evidence concerning the factual background and to consider the memoranda of law provided by each of the parties. This memorandum opinion shall constitute findings of fact and conclusions of law as required by Bankruptcy Rule 7052.

Facts

This Chapter 7 case was originally determined to be a no-asset case and the original order for meeting of creditors informed the creditors that it was not necessary to file a claim. Approximately eighteen months later the trustee apparently determined that there were assets to be administered and, in May of 1985, the Clerk of the Bankruptcy Court sent a notice to all creditors fixing August 16, 1985, as the deadline for filing proofs of claim.

Chicago filed a proof of claim three days following the stated bar date. The claim was filed on August 19, 1985.

Trustee objected to the claim on the basis that it was filed beyond the bar date and, therefore, should not be considered.

Chicago suggests to the Court and strenuously argues that the objection should be overruled on any one of three theories. First, Chicago argues that the claim was filed late as a result of excusable neglect. In support of this argument the evidence shows that the actual proof of claim form properly executed by an agent or attorney of Chicago was received in the office of the Omaha law firm representing Chicago in the bankruptcy case on August 15, 1985. The responsible attorney in the Omaha office was not in the office on either August 14 or August 15, 1985. That attorney returned to the office sometime in the afternoon on the 16th day of August, 1985, but did not become aware of the claim in his correspondence until Monday, August 19, 1985. Upon finding the appropriate claim form, he supervised its filing on the 19th.

Chicago also argues that the filing on August 19, 1985, could simply be considered by the Court to be an amendment to an informal proof of claim which was properly before the Court and trustee, either through filing or through specific knowledge by the trustee of the existence of the claim. In support of this argument, Chicago presents evidence that the trustee and Chicago engaged in serious settlement negotiations of a claim by the trustee that Chicago had improperly set off certain assets of the estate post petition. As a result of those negotiations and the trustee's investigation of the "setoff", the trustee became aware of the amount and the basis for Chicago's claim, acknowledged the existence of such claim in a compromise which was presented to and approved by this Court and the written proof of claim filed on August 19, 1985, was consistent with the trustee's knowledge and the acknowledgment of the claim contained in the compromise documents.

Finally, Chicago suggests that the proof of claim was filed on a timely basis. In support of this argument, Chicago points out that the notice to creditors sent by the Clerk of the Bankruptcy Court in May of 1985 was served upon creditors by mail. That notice provided a specific date by which claims should be filed. Chicago points to Bankruptcy Rule 9006(f) which states:

> "(f) Additional Time After Service by Mail. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period."

In other words, Chicago suggests that since the notice was mailed by the Clerk of the Bankruptcy Court, Rule 9006(f) automatically extends the bar date by three days because of potential mail problems.

Conclusions of Law and Discussion

Comparing the facts as presented in this case to the law in the Eighth Circuit concerning the definition of "excusable neglect", this Court cannot find that the failure to file the claim by August 16, 1985, is a result of excusable neglect. The responsible lawyer was out of town on the day the proof of claim documentation reached his office. He was also out of town on the next day. He was not in the office until the afternoon of the 16th day of August, 1985. He apparently did not make any arrangements for other lawyers in the office to monitor this case. There is no evidence before the Court concerning why it took almost ninety days for the proof of claim materials to come from the Chicago office of the creditor or the Chicago attorney to the Omaha office of the Omaha attorney.

There is recent case law authority in the Eighth Circuit concerning the manner in which the Court should evaluate a claim of excusable neglect. In the case of Hanson v. First Bank of South Dakota, 828 F.2d 1310, 1314 (8th Cir. 1987) the Court stated:

> "Neither the Bankruptcy Code nor the Rules define excusable neglect. Rather, it is a flexible standard that is subject to interpretation by the trier of fact in each instance. A number of courts have interpreted 'excusable neglect' as meaning 'the failure to timely perform a duty due to circumstances which were beyond the reasonable control of the person whose duty it was to perform.' The burden of proving excusable neglect is on the parties seeking the enlargement of time.
>
> "Courts have been more inclined to conclude that there is 'excusable neglect' when the creditor was diligent and the late filing was due to inadequate notice or an event beyond the creditor's control. Conduct does not constitute excusable neglect, however, when the delay was within the creditor's control, and could have been prevented by the exercise of diligence by the party failing to perform."

This Court believes that the creditor could have provided the Omaha lawyer with the appropriate proof of claim materials sooner than August 14, 1985. In addition, the lawyer who was responsible for making certain the claim got filed on a timely basis could have provided backup arrangements in his office concerning the matter.

The filing on August 19, 1985, rather than August 16, 1985, is not a result of "excusable neglect."

With regard to the argument that the August 19, 1985, filing should be considered as an amendment to an informal proof of claim, this Court rejects the position of Chicago. Although the Court acknowledges the possibility that there can be an informal proof of claim even in the face of the rules concerning the form of a proof of claim, this Court cannot find that there was an informal proof of claim in this case.

There is no argument that the trustee, through his attorney, was aware that the debtor had an account with Chicago, that the obligation to Chicago was a significant amount of money, and that as late as July, 1985, by oral agreement with trustee's lawyer, Chicago made certain that its right to pursue the obligation in the bankruptcy proceeding was preserved. Such knowledge is not binding upon the trustee and is not necessarily an informal proof of claim.

First of all, there is nothing in the settlement agreement between the trustee and Chicago which indicates the exact amount of the claim. Secondly, there is nothing in the settlement agreement which would lead the trustee to believe that the general notice he had of the obligation running from the debtor to Chicago was all of the notice he was going to get concerning the specifics of the claim. Finally, the written compromise and settlement agreement which was approved by this Court does not refer in any way to the claim which is now asserted by Chicago. Therefore, the only real evidence of an informal proof of claim is the affidavit by counsel for the trustee that he was aware of the approximate amount of the obligation and that Chicago did not desire to give up any rights it may have had in addition to the "setoff" which was being settled.

The written stipulation between the parties was filed on or about July 16, 1985, and has been reviewed by this Court as part of this decision.

The United States District Court for the District of Nebraska in ruling on a bankruptcy appeal from this Court as recently as October 28, 1987, defined the requirements for an informal proof of claim. The Court stated:

> "Thus, in order to constitute an informal proof of claim, a document must satisfy a three-prong test: the document must state in an explicit demand showing (1) the nature of its claim; (2) the amount of the claim against the estate; and (3) must evidence an intent to hold the debtor liable."

Matter of DLJ Farms, Inc., BK84-1541, CV 86-0-857, slip op. at 4 (D. Neb., Oct. 28, 1987).

The conclusion of the District Court followed a recitation of significant case authority concerning the determination by the trier of fact of the existence of an informal claim.

This Court does not consider the documents filed and the understanding the trustee's attorney had concerning Chicago's potential claim to be sufficient to constitute informal proofs of claim.

The final argument of Chicago is that the written proof of claim filed on August 19, 1985, was timely because of the saving provision of Bankruptcy Rule 9006(f). The trustee, in opposition to Chicago, suggests that Rule 9006(f) is not the rule which applies in this case. The trustee suggests that this rule is general in nature and that as a principle of statutory construction those provisions which are specific in nature control over those which are general in nature. The trustee argues that Rule 9006(b)(3) is a specific portion of the bankruptcy rules which controls over the general provisions of Rule 9006(f). Rule 9006(b)(3) states:

> "(3) Enlargement Limited. The court may enlarge the time for taking action under Rules ... 3002(c) ... only to the extent and under the conditions stated in [that rule]."

Since Rule 3002(c)(5) is the rule which governs notice to creditors in a Chapter 7 case when the initial notice provided that no claim needed to be filed, the trustee urges the Court to make its ruling solely on the language of Rule 3002(c)(5). That rule provides:

> "If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(c), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within ninety (90) days after the mailing of the notice."

The Clerk of the Bankruptcy Court mailed out the notice to creditors on May 16, 1985, and set the bar date as August 16, 1985. Since there are actually ninety-two days between May 16, 1985, and the end of the work day on August 16, 1985, the trustee suggests the Clerk gave two extra days for filing beyond the time allowed by the rules and, therefore, this claim, rather than being three days late was actually five days later. More serious than that concern, however, is the concern by the trustee that the

specific Rules 3002(c) and 9006(b)(3) do not permit an extension of time, in consideration of mail or for any other reason. Therefore, the Court should not permit this creditor to take advantage of a general mail rule 9006(f) to give an extension of time for filing which is otherwise not authorized.

It is also urged by the creditor supporting the position of the trustee that since under Bankruptcy Rule 3002(c) a proof of claim in a Chapter 7 case shall be filed within ninety days after the first date set for the meeting of creditors, Rule 9006(f) has no applicability to filing dates concerning proofs of claim. This argument, though interesting, has nothing to do with this particular case. Creditors were directed not to file a proof of claim within ninety days of the first meeting of creditors. Creditors were provided by notice mailed to them approximately eighteen months after the first meeting of creditors that a proof of claim had to be filed by August 16, 1985.

The arguments of the objecting parties are rejected. Bankruptcy Rule 9006(f) does not provide the Court with power to extend or enlarge time frames for taking action. What Rule 9006(f) does is assume that the parties who have received notice from the Clerk of the Bankruptcy Court through the mail of the time in which an act is to performed, have lost three days simply as a result of the operation of the mail system. It gives all parties an additional three days to perform the act required by the notice. It is in a section of Rule 9006 totally separate from the section entitled "Enlargement." It stands alone and is totally separate from those sections of the rule which permit and restrict the Court's power to enlarge time frames. It specifically provides that anyone served by mail with the type of notice that is of concern in this case is granted an additional three days to perform the act required.

Therefore, this Court finds that the filing of the proof of claim on August 19, 1985, within three days of August 16, 1985, is timely filed and the objection to the claim is overruled.

Separate Journal Entry shall be filed.

DATED: February 5, 1988.

BY THE COURT:

Timothy J. Mahoney

U.S. Bankruptcy Judge