IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

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CLERK, U.S. BANKRUPTCY COURT
BY _____ DEPUTY

IN RE:	§	
	§	
MARK MANNING, aka	§	Case No. 00-20599
MARK E. MANNING, CPA	§	
	§	
Debtor	§	Chapter 13

MEMORANDUM OF DECISION[1]

Before the Court for consideration are the "Motion of Holiday Hospitality Franchising, Inc. f/k/a Holiday Inns Franchising, Inc. to Deem Proof of Claim #31 Timely Filed, or Alternatively, Tardily Filed" and the corresponding "Objection to Proof of Claim #31 Filed by Holiday Hospitality Franchising, Inc. f/k/a Holiday Inns Franchising, Inc." filed by the Debtor, Mark Manning ("Debtor"), in the above-referenced Chapter 13 case. The parties concede that the claim of Holiday Hospitality Franchising, Inc. ("Holiday") was not filed by the stated bar date and that, unless the motion of Holiday is granted on some basis, the Debtor's objection must be sustained. The Court took these related matters under advisement at the conclusion of the hearing on January 9, 2001 in order to review the legal authorities applicable to these two contested matters. This memorandum of decision disposes of all issues pending before the Court.

I. JURISDICTION

This Court has jurisdiction to consider the Motion and Objection pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final order regarding these

[1]This Memorandum of Decision is not designated for publication and shall not considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as to other evidentiary doctrines applicable to the specific parties in this proceeding.

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contested matters since they each constitute a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A) (B) and (O).

II. FACTUAL AND PROCEDURAL BACKGROUND

The parties stipulated to virtually all of the relevant facts. The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on April 4, 2000. Prior to filing bankruptcy, the Debtor had been the general partner of VI-MTLS, a partnership which owned and managed hotels. While acting as the general partner of VI-MTLS, the Debtor personally guaranteed financial obligations under a license agreement with Holiday. VI-MTLS subsequently defaulted on the obligation and the Debtor became liable to Holiday in the amount of $269,744.97.

Despite the existence of the guaranty, the Debtor failed to list Holiday on either his schedules or his matrix of creditors which he filed in connection with his individual Chapter 13 case. Because Holiday was not listed on the Debtor's schedules or the matrix, it did not receive the notice of the commencement of the Chapter 13 bankruptcy case which notified creditors that the deadline for filing proofs of claim in the Debtor's Chapter 13 case would be August 16, 2000.

Through some unidentified means, however, Holiday became aware of the existence of the Debtor's Chapter 13 case. On July 27, 2000, twenty days prior to the claims bar date, Holiday's counsel, Mr. Mark Alfieri, telephoned the Debtor's attorney, Ms. Jean Taylor. Ms. Taylor confirmed to Holiday's counsel that the Debtor had indeed filed a case under Chapter 13 and she provided Mr. Alfieri with the Chapter 13 case number during that phone conversation. On August 1, 2000, Mr. Alfieri filed a notice of appearance on behalf of Holiday in the Debtor's bankruptcy case. On August 10, 2000, six days prior to the bar date, the Debtor amended his schedules, adding Holiday as a general unsecured creditor under Schedule F.

On October 4, 2000, Holiday filed its proof of claim asserting a general unsecured claim in the amount of $269,744.97. The Debtor filed an objection to the proof of claim on November 7, 2000, asserting that the claim should be disallowed as untimely under 11 U.S.C. §502(b)(9). Holiday filed a response to the Debtor's objection on November 22, 2000, and, on November 29, 2000, filed its corresponding motion to deem its proof of claim timely filed or alternatively tardily filed, to which the Debtor timely objected.

The Court conducted a consolidated hearing on the two contested matters. Holiday argues that its claim, though admittedly filed seven weeks after the established bar date for the filing of claims, should be deemed to be a timely-filed claim on due process grounds because it argues that it did not receive adequate notice of the Debtor's bankruptcy case. Alternatively, Holiday proposes that its claim should be allowed as a tardily-filed claim pursuant to the Fifth Circuit's holding in *In re Waindel*, 65 F.3d 1302 (5th Cir. 1995).

III. DISCUSSION

A. Due Process

As the United States Supreme Court pronounced over fifty years ago, notice satisfies due process if it (1) is reasonably calculated to reach all interested parties, (2) reasonably conveys all required information, and (3) permits a reasonable amount of time for response. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). As applied to this particular context, the Fifth Circuit has ruled that a creditor's claim against a debtor in a bankruptcy case can only be barred for untimeliness if it is shown that the creditor received reasonable notice and "whether notice to a creditor is adequate depends on the facts and

circumstances of a given case." *Matter of Robintech*, 863 F.2d 393, 396 (5th Cir. 1989), *cert. denied sub nom, Bullock v. Oppenheim, Appel, Dixon & Co.*, 493 U.S. 811 (1989).

In the present case, it is undisputed that Holiday's counsel received oral notice of the Debtor's bankruptcy case on July 27, 2000 --- twenty days prior to the bar date --- and timely responded to that notice by filing a Notice of Appearance in the case on August 1, 2000. Yet Holiday asserts that its due process rights were violated because it was never provided written notice of the established bar date.

The Fifth Circuit has repeatedly recognized that due process is satisfied, even if notice is not actually mailed to a creditor. In *Grossie v. Sam (Matter of Sam*, 894 F.2d 778 (5th Cir. 1990), a claimant's attorney received a notice of automatic stay from a debtor's attorney nineteen days prior to the deadline for filing dischargeability complaints, although such deadline was not identified in that notice. Relying in part upon the fact that the bar date in that case was established under the Federal Rules of Bankruptcy Procedure (as is a claims bar date in a Chapter 13 case), the Circuit recognized that "the purpose of the notice requirement [of a bar date] is satisfied when the creditor has actual knowledge of the case in time to permit him to take steps to protect his rights." *Id.* at 781. As to constitutional concerns, the Circuit specifically found that

> [w]hen Grossie received the Notice of Automatic Stay eighteen days prior to the bar date, he was on notice that his section 1983 claim against Sam was affected by Sam's bankruptcy, and he had eighteen days to inquire as to the bar date and file his complaint or a motion to extend the bar date. Thus, Grossie had the "actual knowledge ***of the case***" necessary to permit him to take steps to protect his rights. Such notice is all that is required by section 523(a)(3)(B), and because that notice apprised him of the pendency of the action and was timely enough to afford him an opportunity to present his objections, it satisfies constitutional procedural due process requirements.

Id. at 781-82 (emphasis in original).

Applying that standard four years later in *Sequa Corp. v. Christopher (Matter of Christopher)*, 28 F.3d 512, 519 (5th Cir. 1994), the Fifth Circuit again concluded that "due process requires only notice that is both adequate to apprise a party of the pendency of an action affecting its rights and timely enough to allow the party to present its objections." The Circuit specifically affirmed that "it does not offend due process to view actual notice of a debtor's bankruptcy to a prepetition creditor as placing a burden on the creditor to come forward with his claim." *Id.* at 517.[2]

The Court finds that the oral notice of the Debtor's bankruptcy case received by Holiday's counsel, some twenty (20) days before the bar date, apprised Holiday of the pendency of the Debtor's chapter 13 case, and gave Holiday ample time to determine the bar date and to file its proof of claim. Holiday was aware that its rights could be affected by the pendency of the Debtor's bankruptcy case, as evidenced by its immediate filing of a Notice of Appearance, and it had an affirmative duty to ascertain any pending deadlines which potentially could affect its rights. The mere fact because it might have calculated its claim with greater mathematical precision given more time cannot excuse Holiday's failure to act at all. Accordingly, the Court finds that the notice received by Holiday in this case satisfied the requirements of due process and thus its claim cannot be deemed to have been timely filed.

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[2] The Court notes that the Fifth Circuit has recently recognized the continued viability of the *Sam* and *Christopher* holdings. *See, Matter of National Gypsum Co.*, 208 F.3d 498, 510 (5th Cir. 2000).

B. Allowing the Claim as Tardily Filed

Having determined that Holiday's due process rights were satisfied in this case, the Court turns to Holiday's alternative argument that its claim should be deemed allowed as a tardily filed claim under the rationale of *In re Waindel*, 65 F.3d 1307 (5th Cir. 1995), a Chapter 13 case in which the Fifth Circuit held that a tardily filed claim could not be disallowed solely on the basis that it was tardily filed. However, the Court finds *Waindel* to be inapplicable to the case at bar. At the time *Waindel* was decided, Fed. R. Bankr. P. 3002(a) required that a proof of claim be timely filed to be allowed; however, there was nothing in 11 U.S.C. §502, the Bankruptcy Code section dealing with the allowance of claims, that disallowed a claim for being filed tardily. The Fifth Circuit found that "to the extent that Rule 3002(a) declares every untimely filed claim to be disallowed, the Rule impermissibly conflicts with the Code." *Id.* at 1309. The Fifth Circuit concluded that courts should look only to 11 U.S.C. §502 to decide if a claim is to be allowed or disallowed, and that Rule 3002(a) merely provided the basis for distinguishing between timely filed and tardily filed claims. *Id.* Therefore, it is appropriate for the Court to look at the present version of §502 to determine if there is now a basis for disallowing Holiday's claim.

Applicable to all bankruptcy cases filed after October 22, 1994, §502 was amended by the Congress in 1994 with the addition of subsection (b)(9) which states that:

> [i]f [an] objection to claim is made, the court, after notice and a hearing, shall determine the amount of such claim, ...and shall allow such claim in such amount except to the extent that proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title...

Thus, §502 now provides that a proof of claim which is not timely filed may be disallowed upon the objection of an interested party solely for the reason of its tardiness.[3] Even the *Waindel* court itself acknowledged that Congress had already legislatively fixed the problem it was addressing through the addition of subsection (b)(9) to §502, but noted that it was bound to follow the law in existence at the time the case was filed. *Waindel*, 65 F.3d at 1308. Thus, §502 now does provide a statutory basis for the disallowance of claims based solely upon untimeliness and it would appear to mandate that the Debtor's objection to Holiday's claim be sustained.

However, notwithstanding the language of §502(b)(9), the amendment's legislative history, and the dicta in *Waindel*, Holiday argues that its claim should be allowed as tardily filed based on the exception contained in §502(b)(9) for claims allowed pursuant to 11 U.S.C. §726(a)(1), (2), or (3). Pursuant to 11 U.S.C. §103(a), chapters 1, 3, and 5 of the Bankruptcy Code apply in a case under chapter 7, 11, 12, or 13 of the Bankruptcy Code. Holiday asserts that because §502(b)(9) makes reference to §726(a), that §726(a) applies in all chapters including Chapter 13, and therefore, its claim must be allowed as a tardily filed claim under either §726(a)(2) or (3).

Holiday's argument is without merit. The reference to §726(a) in §502(b)(9) does not make the former applicable in all bankruptcy cases. Rather, the exception stated in §502(b)(9) merely acknowledges that, because of §726(a), tardily-filed claims, in Chapter 7 cases only, are allowed, but subordinated, to timely-filed claims in the Chapter 7 distribution scheme. *See, In re Lang*, 196 B.R. 528, 530 (Bankr. D. Ariz. 1996)["This court must conclude that the exceptions

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[3] The legislative history of this statute also makes it clear that it was intended to fill the gap between §502 of the Bankruptcy Code and Rule 3002. *See* H.R. No. 103-835, at 48 (1994).

for late-filed claims set forth in §726, and referenced in §502, are only applicable to claims filed in a Chapter 7 case."]. This is the correct statutory interpretation. Otherwise, §502(b)(9) would be rendered superfluous by its own language. Under Holiday's statutory interpretation, the possibility of disallowing a claim on the basis of untimeliness would be eliminated since tardily-filed claims would always be allowable in every chapter simply because they are allowable under §726(a)(3). *See, In re Dennis*, 230 B.R. 244, 249 (Bankr. D.N.J. 1999)["If the mere mention in chapter 5 of an exception for late claims in chapter 7 automatically extended to the other chapters, it would be an exception without meaning, for the exception would swallow the Rule."]. Obviously that is not what Congress intended nor what it achieved when it adopted §502(b)(9). That statute now provides a proper statutory basis upon which this Court can sustain the Debtor's objection to Holiday's claim because of its untimeliness and the Court is compelled to do so.

Accordingly, for the foregoing reasons, the "Motion of Holiday Hospitality Franchising, Inc. f/k/a Holiday Inns Franchising, Inc. to Deem Proof of Claim #31 Timely Filed, or Alternatively, Tardily Filed" must be denied and the corresponding "Objection to Proof of Claim #31 Filed by Holiday Hospitality Franchising, Inc. f/k/a Holiday Inns Franchising, Inc." filed by the Debtor, Mark Manning, must be sustained. This memorandum of decision constitutes the Court's findings of fact and conclusions of law[4] pursuant to Fed. R. Civ. P. 52, as incorporated into contested matters in bankruptcy cases by Fed. R. Bankr. P. 7052 and 9014. Separate orders

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[4]To the extent that any finding of fact is construed to be a conclusion of law, it is hereby adopted as such. To the extent any conclusion of law is construed to be a finding of fact, it is hereby adopted as such. The Court reserves the right to make additional findings and conclusions as necessary or as may be requested by any party.

will be entered as to each pleading which is consistent with this opinion.

SIGNED this the 5th day of February, 2001.

BILL PARKER
UNITED STATES BANKRUPTCY COURT

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