

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

IN RE:	§	
	§	
TIMOTHY J. BEVERLEY	§	Case No. 02-63531
	§	
	§	
Debtor	§	Chapter 11

**MEMORANDUM OF DECISION¹ REGARDING
ORDER DENYING MOTION FOR EXTENSION OF TIME
TO FILE COMPLAINT OBJECTING TO DISCHARGE**

This matter is before the Court upon consideration of the “Amended Motion for Extension of Time to Object to Discharge of Debtor” (the “Motion”) filed by U.S.A. Aviation Sales, Inc. (“Movant”) in the above-referenced case, and the objection filed thereto by the Debtor, Timothy J. Beverley (the “Debtor”). The Motion seeks an extension of the deadline established in this case within which to present a complaint objecting to the dischargeability of certain debts owed to the Movant by the Debtor “for fraud, breach of fiduciary duty, negligence, negligent misrepresentation, and civil conspiracy.” The Court finds that a decision on the Motion can be properly rendered without the necessity of hearing because, even if the Movant’s allegations were supported by admissible evidence, such proof would not entitle the Movant to the relief sought and the Debtor would be entitled to a decision in its favor as a matter of law.²

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

² This Court has jurisdiction to consider the motion pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final order in this contested matter since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(A), (I) and (O).

Factual and Procedural Background

The Court's docket establishes the relevant facts in this case. The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on September 24, 2002. The notice sent to creditors on or about September 27, 2002, which scheduled the §341(a) creditors' meeting, also referenced the “Deadline to File a Complaint Objecting to Discharge of the Debtor” (the “Objection Deadline”) which set the deadline for creditors to file a complaint objecting to the discharge of the Debtor as the “first date set for hearing on confirmation of plan.” That noticed deadline simply reflected the deadline actually established by Fed. R. Bankr. P. 4004(a), and the notice to creditors added that “[n]otice of that date will be sent at a later time.”

Although a listing was also given in the notice regarding the “Deadline to File a Complaint to Determine Dischargeability of Certain Debts” (the “Exception Deadline”), absolutely no information was provided in the notice as to the Exception Deadline, even though Fed. R. Bankr. P. 4007(c) clearly establishes that deadline by its declaration that “[A] complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a).” Thus, though such date was not noticed to creditors through the §341 notice as required by Fed. R. Bankr. P. 2002(f)(5), the deadline fixed by Rule 4007(c) was December 16, 2002.³

³ The sixtieth day actually fell on Sunday, December 15, 2002; thus, the deadline was extended to Monday, December 16th pursuant to Fed. R. Bankr. P. 9006(a).

On November 13, 2002, the Court granted without objection the Debtor's Motion for Joint Administration of Cases whereby the above-referenced case was jointly administered with three related cases with the directive that all pleadings affecting the Debtor's case (other than those specifically designated) were to be filed under the Tyler Jet, L.L.C. case, case no. 02-11164.

On November 26, 2002, the Movant filed its original Motion for Extension of Time to Object to Discharge of Debtor. Though the title of such motion might be ambiguous, the motion specifically references a dispute between the parties of a type which would relate solely to the Exception Deadline. Since no plan of reorganization had yet been proposed for the Debtor as of that time and the December 16th Exception Deadline had not yet passed, such motion was timely as to either deadline.

On December 12, 2002, the Movant mistakenly filed a Notice of Withdrawal of Motion for Extension of Time to Object to Discharge of Debtor which specifically stated that "U.S.A. Aviation Sales, Inc. has determined that such Motion for Extension of Time to Object to Discharge of Debtor is premature and therefore, withdraws such Motion without prejudice for the refile of such Motion at a later date." Though premature as to the Objection Deadline,⁴ the extension motion was clearly not premature as to the December 16th Exception Deadline.

⁴ It was premature since the specific calendar date of the Rule 4004 deadline was not yet capable of identification due to the fact that no plan had been filed by the Debtor as of that time. The Court ultimately established August 13, 2003 as the first date to consider confirmation of the Debtors' proposed joint Chapter 11 plan and, therefore, such date became the specific Objection Deadline.

Some months later, on May 20, 2003, the Movant filed a (Second) Motion for Extension of Time to Object to Discharge of Debtor, which was subsequently amended on May 22, 2003, and again on June 18, 2003, the latter of which stands as the current Motion. The Motion confirms the previous withdrawal was “based upon a mistaken interpretation . . . [that] the deadline for objecting to discharge of the Debtor . . . was interpreted to also be the deadline to file a complaint to determine dischargeability of certain debts. Based upon that mistaken interpretation, a Notice of Withdrawal of Motion for Extension of Time was filed on December 12, 2002.” The Motion thus confirms that, notwithstanding its title, the requested extension relates to the Exception Deadline and it asks for the prior December 2002 motion for extension of time to be reinstated and that additional time be given for further amendments to reflect current circumstances. The Debtor has objected to the Motion on the ground that such relief cannot be legitimately granted.

Discussion

Fed. R. Bankr. P. 4007(c) provides that, in a case under Chapter 7, 11, or 12:

A complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under §341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under the subdivision. *The motion shall be filed before the time has expired.*

FED. R. BANKR. P. 4007(c) (emphasis added).

It is undisputed in the present instance that the timely motion for extension of time was withdrawn by the Movant on December 12, 2002. Accordingly, absent some additional action to preserve its validity, the present Motion, filed originally on May 20, 2003, is untimely under the express provisions of Fed. R. Bankr. P. 4007(c).

However, the Movant asks the Court to allow its rescission of that withdrawal and to treat the current Motion as though it was filed on December 12, 2002, because its withdrawal of that original extension motion was based upon mistake and its erroneous interpretation of the §341 notice. Essentially, the Movant is asking the Court to exercise the discretion normally provided to it under Fed. R. Bankr. P. 9006(b). Rule 9006(b) provides that:

when an act is required or allowed to be done at or within a specified period by these rules . . . the court for cause shown may at any time in its discretion . . . (2) 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.⁵

While the Court might in other circumstances be authorized to act to relieve the Movant from the consequences of its mistake, the exercise of such authority in this instance is expressly prohibited by Fed. R. Bankr. P. 9006(b)(3) which permits an

⁵ See, *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L. Ed. 2d 74 (1993).

extension of time under Rule 4007(c) only “to the extent and under the conditions stated” in such rule . . . i.e, only if the creditor files a motion for extension before the 60-day period expires and then only “for cause.” As one well-known treatise explains,

The motion must be filed within the original time period allowed for dischargeability complaints. If the motion is not filed within that time period, the court has no discretion to grant the motion. Moreover, Rule 9006(b)(3) makes clear that the normal rule allowing an extension of time by motion filed after a time period has expired does not apply to the deadline set by Rule 4007. This rule marks a change from the practice under the former bankruptcy rules, which permitted a court to grant a motion filed after expiration of the time period allowed upon a showing of excusable neglect.

9 COLLIER ON BANKRUPTCY ¶ 4007.04[3][a] at p. 4007-15 (15th ed. rev. 2003).

This limitation on the Court's ability to provide the requested relief was recently confirmed by the Fifth Circuit in *Dunlap v. Dunlap (In re Dunlap)*, 217 F.3d 311 (5th Cir. 2000) in which it explained that:

Rule 4007(c) must be read in conjunction with Rule 9006(b)(3) which permits a bankruptcy court to “enlarge the time for taking action under [Rule 4007] . . . only to the extent and under the conditions stated in [that rule].” Fed. R. Bankr. P. 9006(b)(3). The strict time limitation placed upon creditors who wish to object to a debt's dischargeability reflects the Bankruptcy Code's goal of providing debtors with a fresh start. Rule 4007(c) evince[s] a strong intent that the participants in bankruptcy proceedings be assured that, within the set period of 60 days, they can know which debts are subject to an exception to discharge. Also, this fixed,

relatively short limitation period enables the debtor and creditors to make better-informed decisions early in the proceedings.

Dunlap, 217 F.3d at 315 (citations and quotations omitted); *see also In re Butler*, 237 B.R. 611, 615 (Bankr. N.D. Miss. 1999)[noting that “the Fifth Circuit has refused to extend, waive, or modify the sixty day limitations period in practically every factual scenario”].

This restriction on the Court’s inability to grant the requested relief is not affected by the fact that the Bankruptcy Clerk failed to place the Exception Deadline in the §341 notice. That specific scenario was addressed by the Fifth Circuit in *Neeley v. Murchison*, 815 F.2d 345 (5th Cir. 1987), in which the space provided in the §341 notice for the entry of the deadline to file complaints to determine dischargeability was not only left blank, but the creditors' attorneys were orally informed by Clerk's office personnel upon subsequent inquiry that no such deadline had been set. In rejecting the creditor's argument that the clerk's failure to give the 30-day notice of the deadline pursuant to Rule 2002(f) suspended the running of the limitation period, the Fifth Circuit found that, because of the specific interaction of Rules 4007 and 9006(b)(3) and the creditor's specific knowledge of the existence of the case (a fact which is not in dispute in the present case), creditor's counsel could not reasonably rely on the blank notice, nor even the oral assurances from the Clerk's staff, but instead had an affirmative duty to comply fully with the directives of Rule 4007(c). *See also, In re Hammons*, 252 B.R. 97, 99-100 (Bankr. N.D. Miss. 2000)[“Within the Fifth Circuit, the 60-day period for filing

complaints has been strictly enforced even in instances where the notice received by the creditor was defective or even non-existent.”](citing *Ramos v. Compton (In re Compton)*, 891 F.2d 1180 (5th Cir. 1990) and *Grossie v. Sam (In re Sam)*, 894 F.2d 778 (5th Cir. 1990)).

Because a bankruptcy court is authorized to grant an extension of time under Rule 4007(c) only to the extent and under the conditions stated in such rule, and because such conditions were not satisfied in this case, the Court is without authority to grant the relief sought by the Motion. Accordingly, the Amended Motion for Extension of Time to Object to Discharge of Debtor filed by U.S.A. Aviation Sales, Inc. in the above-referenced case must be denied and an appropriate order shall be entered which is consistent with this opinion.

Signed on 1/7/2004

A handwritten signature in cursive script, appearing to read "Bill Parker", written in black ink.

BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE