



**SO ORDERED,**

**Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: February 21, 2017**

**The Order of the Court is set forth below. The docket reflects the date entered.**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**ABE Q. MILLS TRUCKING CO.,**

**CASE NO. 16-02068-NPO**

**DEBTOR.**

**CHAPTER 11**

**ORDER DENYING IN PART AND GRANTING IN PART MOTION TO LIFT STAY**

This matter came before the Court for hearing on February 7, 2017, (the “First Hearing”) and February 15, 2017, (the “Second Hearing” or, together with the First Hearing, the “Hearings”) on the Motion to Lift Stay (the “Second Stay Motion”) (Dkt. 74) filed by David Elliott (“Elliott”) and the Answer and Response of Debtor to David Elliott’s Motion to Lift Stay (Dkt. 87) filed by Abe Q. Mills Trucking Co. (the “Debtor”) in the above-referenced chapter 11 bankruptcy case (the “Bankruptcy Case”). At the Hearings, Craig M. Geno represented the Debtor and Christopher H. Neyland (“Neyland”) represented Elliott.

**Facts**

On April 5, 2012, Elliott sustained a work-related injury while employed as a truck driver for the Debtor. (Dkt. 74-1 at 1). On June 26, 2012, Elliott filed a petition to controvert with the Mississippi Workers’ Compensation Commission in *David Elliott v. Abe Q. Mills Trucking Co.*, MWCC No. 1205950-M-1172-M (the “Workers’ Compensation Case”), seeking workers’

compensation benefits. (*Id.*). The Debtor did not have a workers' compensation policy in effect when the injury occurred. (*Id.*). In its answer to the petition to controvert, the Debtor admitted the work-related injury but denied compensability on the ground that it employed less than five (5) employees.<sup>1</sup> (*Id.*).

A hearing was held before an administrative judge solely on the issue of coverage at the Mississippi Workers' Compensation Commission on August 8, 2014. (*Id.*). On October 13, 2014, the administrative judge ruled that the Debtor was subject to the Mississippi Workers' Compensation Act at the time Elliott's work-related injury occurred. (*Id.* at 13-14). Notably, under the Mississippi Workers' Compensation Act, the president, secretary, and treasurer of a corporation that fails to carry workers' compensation insurance may be held personally liable for any compensation or other benefit that an injured worker may accrue. MISS. CODE ANN. § 71-3-83; *Jarrett v. Dillard*, 167 So. 3d 1147 (Miss. 2015).

The Debtor filed a voluntary petition for relief (the "Petition") (Dkt. 1) under chapter 11 of the Bankruptcy Code on June 27, 2016.<sup>2</sup> The official mailing matrix filed by the Debtor listed Elliott as a creditor. (Dkt. 3); 11 U.S.C. § 521(a); FED. R. BANKR. P. 1007(a). The standard form Notice of Chapter 11 Bankruptcy Case (the "Notice") (Dkt. 7) was issued to all creditors listed in the mailing matrix, including Elliott, on June 30, 2016. (Dkt. 17). The Notice informed Elliott that, among other things, the filing of the Bankruptcy Case imposed an automatic stay against most collection activities against the Debtor. 11 U.S.C. § 362(a). (Dkt. 7 at 1). The Notice also informed Elliott, pursuant to FED. R. BANKR. P. 2002(a)(7), that the deadline for filing a proof of

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<sup>1</sup> The Mississippi Workers' Compensation Act applies only to employers "that have in service five (5) or more workmen." MISS. CODE ANN. § 71-3-5.

<sup>2</sup> On June 28, 2016, the Debtor amended the Petition (Dkt. 12) to clarify that the Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).

claim was October 25, 2016. (*Id.* at 2). That same date is reflected at the top of the electronic docket in the Bankruptcy Case.

Under Rule 3003(c)(2) of the Federal Rules of Bankruptcy Procedure, any creditor whose claim is not scheduled or whose claim is scheduled as disputed, contingent, or unliquidated must file a proof of claim in a timely manner or that creditor “shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.” FED. R. BANKR. P. 3003(c)(2). In its bankruptcy schedules, the Debtor listed Elliott’s claim of \$40,217.35 as contingent, unliquidated, and disputed. (Dkt. 27 at 13). Elliott, however, did not file a proof of claim in the Bankruptcy Case. Instead, Elliott filed on November 18, 2016, the Motion to Lift Stay (the “First Stay Motion”) (Dkt. 59), asking the Court “to permit the consummation of certain claims and litigation . . . and to permit the pursuit of indemnity and medical benefits pursuant to the Mississippi Workers Compensation Act.” (*Id.* at 1).

The Court entered the Notice of Hearing and Deadlines (the “Hearing Notice”) (Dkt. 62), setting a hearing date of December 14, 2016, on the First Stay Motion. On November 21, 2016, the Clerk of the Bankruptcy Court issued the “Clerk’s Memorandum” (the “Clerk’s Memo”) (Dkt. 63) directing Neyland to mail a copy of the First Stay Motion and the Hearing Notice “to all affected parties and the Twenty Largest Unsecured Creditors” (Clerk’s Memo at 1) by November 23, 2016.

After Neyland failed to comply with the Clerk’s Memo, the Court entered the Order Denying Motion to Lift Stay Without Prejudice (Dkt. 73) on December 22, 2016. That same day, Elliott filed the Second Stay Motion seeking identical relief as the First Stay Motion. At the First Hearing, an issue was raised as to whether Elliott’s failure to file a proof of claim by the bar date of October 25, 2016, meant that he lost the right to participate in any distribution of assets of the

Debtor's bankruptcy estate and, if so, whether terminating the automatic stay to allow the workers' compensation claim to proceed would be futile. The Court continued and reset the First Hearing for February 15, 2017, to allow Neyland an opportunity to research the issue and provide written legal authority in support of his position.

Neyland did not submit a written brief, but at the Second Hearing cited the Eleventh Circuit Court of Appeals' decision in *The Charter Company v. Dioxin Claimants (In re The Charter Company)*, 876 F.2d 861 (11th Cir. 1989), for the proposition that a document other than a formal proof of claim may constitute an informal proof of claim for purposes of the bar date. Applying *Charter*, Neyland argued that the First Stay Motion, filed on November 18, 2016, constituted a timely-filed informal proof of claim because the original bar date of October 25, 2016, was automatically extended an additional ninety (90) days when the meeting of creditors under 11 U.S.C. § 341 was rescheduled to August 24, 2016. (Dkt. 32). According to Neyland, this "new" bar date of November 22, 2016, meant that the First Stay Motion, which he asked the Court to construe as an informal proof of claim, was filed timely.

### **Discussion**

The automatic stay of the commencement or continuation of a proceeding against a debtor under 11 U.S.C. § 362(a) continues until the earliest of the time the case is closed or dismissed or a discharge is granted or denied. 11 U.S.C. § 362(c). Under 11 U.S.C. § 362(d)(1), a party in interest may request relief from the stay "for cause." When no proof of claim has been filed, bankruptcy courts have denied a motion for relief from the automatic stay to pursue litigation in another forum since allowing that litigation to proceed would serve no purpose. *See, e.g., Wright v. Placid Oil Co.*, 107 B.R. 104 (N.D. Tex. 1989). Neyland argued that the First Stay Motion constituted a timely proof of claim entitling Elliott to a distribution of bankruptcy assets. The

Court rejects his argument.

Assuming that the First Stay Motion qualified as an informal proof of claim, it was not filed within the established bar date. In contrast to FED. R. BANKR. P. 3002(a) governing proofs of claim in a chapter 7, 12 or 13 case, which provides that proofs of claim shall be filed within ninety (90) days of the date set for the creditors' meeting, FED. R. BANKR. P. 3003(c)(3) governing proofs of claim in a chapter 11 proceeding instructs the bankruptcy court to fix a proof-of-claim deadline. In other words, in a chapter 11 proceeding the ninety (90)-day rule is inapplicable. Instead, the bar date is established by the Court. Neyland's attempt to extend the bar date based on the rescheduled date of the meeting of creditors is misplaced in this chapter 11 Bankruptcy Case.

The Court notes that Elliott did not file a motion seeking to file an untimely proof of claim due to excusable neglect. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993); FED. R. BANKR. P. 9006(b)(1). He chose instead to file the First Stay Motion and, later, the Second Stay Motion.

### **Conclusion**

The Court finds that in the absence of a timely proof of claim, the Second Stay Motion should be denied to the extent that Elliott seeks to recover workers' compensation benefits from the Debtor or its bankruptcy estate. *Wright*, 107 B.R. at 108. Elliott's failure to file a timely proof of claim, however, should not preclude him from pursuing a workers' compensation claim against a third party. *See Int'l Business Machines v. Fernstrom v. Storage & Van Co. (In re Fernstrom Storage & Van Co.)*, 938 F.2d 731 (7th Cir. 1991).

IT IS, THEREFORE, ORDERED that the Second Stay Motion is denied in part and granted in part.

IT IS FURTHER ORDERED that the Second Stay Motion is denied to the extent that Elliott seeks to recover indemnity and medical benefits against the Debtor or the Debtor's bankruptcy estate.

IT IS FURTHER ORDERED that the Second Stay Motion is granted, although lifting of the automatic stay is not required, to the extent that Elliott may recover indemnity and medical benefits under the Mississippi Workers' Compensation Act against a non-debtor.

##END OF ORDER##