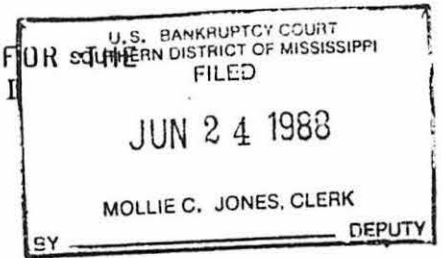


IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE:

DELMAR LEON SIMMONS, JR.

CASE NO. 8700218JC

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Edward Ellington, Bankruptcy Judge

OPINION AND ORDER

THIS MATTER came on for hearing on the "Motion for an Extension of Time to Object to Confirmation of Plan" filed by The Insurance Company of North America and the "Response to Motion for an Extension of Time to Object to Confirmation of Plan" filed by the Debtor. In addition to the oral testimony presented in open court, each party submitted proposed findings of fact and conclusions of law.

After examining all evidence presented, this Court finds that the Motion is not well taken and is

thereby denied. Thus, The Insurance Company of North America is barred from objecting to the Debtor's Chapter 13 Plan. The Order Confirming Plan entered April 2, 1987, remains in full force and effect.

FACTS

On February 3, 1987, Delmar Leon Simmons, Jr. filed his Petition for Relief under Chapter 13 of the Bankruptcy Code.

On February 12, 1987, the Court issued its "Order for Meeting of Creditors" combined with notice of certain other matters. The order provided that the "341 Meeting" was to be held on March 11, 1987, and that a hearing on confirmation of the plan was to be held on March 20, 1987. The order further stated:

ANY OBJECTION TO CONFIRMATION OR VALUATION MUST BE FILED IN WRITING, SETTING OUT OBJECTION IN DETAIL, AT LEAST 5 DAYS PRIOR TO CONFIRMATION DATE - ORIGINAL TO COURT AND COPIES TO TRUSTEE AND DEBTOR'S ATTORNEY.

COPY OF PLAN MAY BE OBTAINED FROM THE BANKRUPTCY COURT.

[Emphasis Added.]

Therefore, the deadline for filing an objection to the confirmation of the Debtor's plan was Monday, March 16, 1987 (actual deadline would have fallen on Sunday, March 15th.)

All of the Debtor's creditors listed on his schedules received this 341 Meeting notice. The

Insurance Company of North America (INA) was listed on the Debtor's schedules as an unsecured creditor in the amount of \$50,386.15. INA had obtained this \$50,386.15 judgment against the debtor for monies INA had paid to Lamar Life Insurance Company under its employee dishonesty bond.

INA's address was listed on the Debtor's schedules as: P. O. Box 7728, Philadelphia, PA 19101. No argument has been raised by INA over the validity of this address.

The Debtor's attorney was unable to attend the 341 Meeting on March 11, 1987. He contacted the Trustee's office and requested that the meeting be reset. All creditors were notified of the reset date.

Prior to the time the Debtor filed his petition, Mr. William C. Stennett had represented INA in its attempts to collect its judgment against the Debtor. Mr. Stennett was contacted by telephone by Mr. Eaton's office on March 10, 1987. Mr. Stennett was informed that the 341 Meeting scheduled for March 11, 1987 was rescheduled for March 25, 1987. At the hearing, Mr. Stennett testified that the telephone call from Debtor's attorney on March 10, 1987 was the first he had heard of Mr. Simmons having filed bankruptcy. (T. 14).

At some point after March 10, 1987, the Trustee's office entered Mr. Stennett on the Debtor's

mailing list on file with Electronic Processing, Inc. (EPI). EPI is the computer service which is used nationwide by many Chapter 13 Trustees. After the Trustee's office feeds in the information on a particular debtor, EPI prints and then mails out the 341 Meeting notice to all of the debtor's creditors. This is where the problem arose. Instead of simply resetting the 341 Meeting, a new 341 Meeting notice was generated and sent to Mr. Stennett on March 24, 1987. This second notice contained a new confirmation date and deadline for filing objections to confirmation of the Debtor's plan.

The second 341 Meeting notice (2nd notice) provided that the 341 Meeting was to be held March 25, 1987, and that a hearing on confirmation of the plan would be held March 31, 1987. This order also stated that any objections to confirmation must be filed at least five days prior to the confirmation date. Thus, the deadline in the 2nd notice for filing an objection to confirmation was March 26, 1987.

On March 25, 1987, the 341 Meeting was held by the Trustee, Charles A. Brewer. The Debtor and his attorney were present. Mr. William C. Stennett was also present in his capacity as attorney for INA. (T. 8).

On April 2, 1987, the Debtor's Chapter 13 plan was confirmed by the Court as no objections had been filed.

On April 29, 1987, INA filed a "Motion for an Extension of Time to Object to Confirmation of Plan." INA contends that it received insufficient notice to object to the Debtor's plan. INA argues that Rule 2002(b) requires a 25 day notice of the time fixed for filing objections to confirmation of a plan. INA states that it did not receive a 25 day notice as required by Rule 2002(b) as the 2nd notice was mailed on March 24, 1987, with a confirmation date of March 31, 1987. INA requests the Court under authority of Rule 9006(b)(1) to enlarge the deadline for filing an objection to confirmation of the Debtor's plan. INA argues that the failure of counsel for INA to timely file an objection was entirely reasonable and constitutes excusable neglect.

DISCUSSION

The Court will first consider the procedural framework provided for the confirmation of the debtor's plan who has filed for relief under Chapter 13 of the Bankruptcy Code.

Section 1324 of the Code provides:

Confirmation hearing. After notice, the court shall hold a hearing on confirmation of the plan. A party

in interest may object to the confirmation of the plan.

Bankruptcy Rule 2002(b) provides in relevant part:

Twenty-five-day Notices to Parties in Interest. . . . the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of. . . (2) the time fixed for filing objections to the hearing to consider confirmation of a plan.

Objections to confirmation of the plan and the hearing as to the objections are controlled by Bankruptcy Rule 3020(b):

Objections to and Hearing on Confirmation.

(1) **Objections.** Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) **Hearing.** The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may find, without receiving evidence, that the plan has been proposed in good faith and not by any means forbidden by law.

In the case at bar, pursuant to §1324, the Court on February 12, 1987, issued its order for the 341 Meeting to be held on March 11, 1987. As required

by Rule 2002(b), the Court further ordered that the confirmation hearing would be held on March 20, 1987, and that any objection had to be filed in writing at least five (5) days prior to the confirmation date, i.e. March 16, 1987. The notice was issued well over the 25 day time period required by Rule 2002(b). The 2nd notice which was generated and sent only to Mr. Stennett changed the date of the 341 Meeting to March 25, 1987, and extended the date for filing objections to Debtor's confirmation until March 26, 1987.

INA does not deny that it received the first notice (which was mailed February 12, 1987) which established March 16, 1987 as the deadline for filing an objection to confirmation. In accordance with Rule 1007(b)(2), the Debtor filed his "Chapter 13 Statement" which conformed with Official Form No. 10. Debtor listed INA as a creditor and listed INA's address. There is no dispute that the address listed for INA by the Debtor is correct. Rather, INA argues that the Debtor was required to notify Mr. Stennett since the Debtor was aware that Mr. Stennett had represented INA locally.

This argument is not well taken. The Debtor is simply required to list the name and address of the creditor. Rule 1007(b)(2) does not require the Debtor to list the counsel of a creditor in his schedules. The Debtor properly listed INA in his Chapter 13 Statement.

INA failed to file a written objection to the Debtor's confirmation on or before either the original March 16, 1987 deadline or the second deadline of March 26, 1987. Thus, an Order Confirming Plan was entered on April 2, 1987.

On April 28, 1987, Mr. Stennett filed on behalf of INA a "Motion for an Extension of Time to Object to Confirmation of Plan" pursuant to Rule 9006.

Bankruptcy Rule 9006(b)(1) provides:

In General. Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (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.

Thus, the Court, for cause shown, may in its discretion enlarge the time to file an objection to confirmation if INA's failure to abide by the time limit was the result of excusable neglect.

Two cases are repeatedly cited on the issue of excusable neglect: Beneficial Finance Co. v. Manning (In re Manning), 4 BCD 304 (Bankr.D.Conn. 1978)

and In re Figueroa, 33 B.R. 298 (Bankr.S.D.N.Y. 1983).

The court in Figueroa stated:

The phrase "excusable neglect" is not defined anywhere in the Rules or the Code. In re Digby, 29 B.R. 658, 663 (Bkrtcy.N.D. Ohio W.D. 1983); In re Horvath, 20 B.R. 962, 966 (Bkrtcy.S.D.N.Y. 1982). In re Heyward, 15 B.R. 629, 635 (Bkrtcy. E.D.N.Y. 1981). Rather, it is a flexible concept and has become a term of art, subject to interpretation by the trier of facts and has been defined as:

. . .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.

In re Manning, 4 B.C.D. 304, 305 (Bkrtcy.D.Conn. 1978). . . .

In re Figueroa, 33 B.R. at 301.

Applying this standard to the case at bar, Mr. Stennett testified that he discovered the 2nd notice from the court in a stack of old mail. He did not have an explanation for why the notice was in his old mail. Even more importantly, INA itself received the 341 Meeting notice mailed on February 12, 1987. This notice gave INA more than sufficient time before the March 16, 1987 bar date to contact its attorney and file an objection to the Debtor's plan. Consequently, neither the actions of INA nor the actions of its counsel rise to the level of "circumstances which were beyond the reasonable control of the person whose duty it was to perform." In re Figueroa, 33 B.R. at 301.

In Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118 (9th Cir. 1983), the creditor failed to file an objection to the confirmation of the Debtor's Plan. As in the case at bar, the creditor in Gregory received the 341 Meeting notice, but failed to respond by the deadline. In ruling that the creditor received proper notice of the 341 Meeting, the Court stated:

When the holder of a large, unsecured claim such as Lawrence receives any notice from the bankruptcy court that its debtor has initiated bankruptcy proceedings, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceedings to which the notice refers at its peril.

705 F.2d at 1123.

Without ruling on the issue, it appears that INA's failure to object to the Debtor's Chapter 13 plan has not greatly prejudiced INA. Because of the minimal earnings of the Debtor, after payment to his secured creditors no funds were available for payment to his unsecured creditors. Additionally, Section 1328(a)(1) and (2) of the Bankruptcy Code sets out the two types of debts which are nondischargeable in a Chapter 13: 1) long term debts and 2) debts arising from alimony and child support. It appears that INA's claim is not in either of these categories and therefore, would be dischargeable in a Chapter 13.

In the response filed by the Debtor, the Debtor seeks recovery of attorney fees for having to defend against INA's motion. However, the Debtor has failed to establish any grounds which would justify an award of attorney fees.

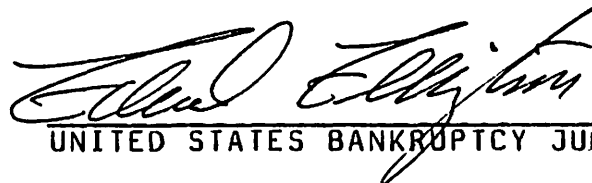
CONCLUSION

After considering all evidence presented, the court finds that INA has failed to meet the standards under Rule 9006(b) which would allow the Court to enlarge the time for INA to object to the confirmation of the Debtor's plan.

THEREFORE, IT IS ORDERED that The Insurance Company of North America's Motion for an Extension of Time to Object to Confirmation of Plan is hereby denied and that Delmar Leon Simmons, Jr.'s Chapter 13 plan shall continue as previously confirmed by order of this Court.

IT IS FURTHER ORDERED that the Debtor's request for attorney fees is hereby denied.

SO ORDERED this the 24th day of June, 1988.


UNITED STATES BANKRUPTCY JUDGE