In the United States Bankruptcy Court

for the Northern District of Iowa

DONALD D. KRIEGER and GLORIA KRIEGER	Bankruptcy No. Y80-04151
Debtors	Chapter 7

MEMORANDUM OF DECISION RE: FmHA'S MOTION TO RECONSIDER DISALLOWANCE OF CLAIM

The United States of America on behalf of the Farmers Home Administration (FmHA) asks the court to reconsider its order disallowing FmHA's unsecured claim. Trial was held in Sioux City, Iowa on October 24, 1989. The court now issues this memorandum of decision including findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. §157 (b) (2) (B) .

FINDINGS OF FACT

Donald and Gloria Krieger filed a chapter 13 case on May 20, 1980. Creditors were given notice that in order to have a claim allowed and to share in any distribution of the estate, proof of claim must be filed within six months of the date set for the meeting of creditors. FmHA timely filed a proof of claim in the amount of $155,016.69 claiming a security interest in some property of the estate.

Debtors filed a plan to which FmHA and others objected. Debtors could not obtain confirmation of a plan, and in April, 1981, on their motion, the case was converted to a case under chapter 7 of the Code. On May 4, 1981, the court entered an order setting meeting of creditors which contained the following statement:

> It appears from the schedules of the debtor that there are no assets from which any dividend can be paid to creditors. It is unnecessary for any creditor to file his claim at this time in order to share in any distributions from the estate. If it subsequently appears that there are assets from which a dividend may be paid, creditors will be so notified and given an opportunity to file their claims, and supplied a claim form.

(Emphasis in the original.)

At the time of the conversion of the case, the chapter 13 trustee had in his possession in excess of $33,000.00. The money was turned over to the chapter 7 trustee, Edward F. Samore (SAMORE). On April 22, 1983, the court issued an order fixing the time for filing claims and directing notice to creditors. The order fixed the claims deadline as June 22, 1983. Creditors were informed that it appeared that there would be funds available for distribution. The notice also told creditors that "if you have previously filed a claim, there is no need to file again." FmHA filed a proof of claim in the

amount of $137,325.31 on June 23, 1983. This was proof of FmHA's unsecured claim, following FmHA's liquidation of debtors' property pledged to it as security.

The United States Attorney's Office for the Northern District of Iowa was the legal representative of FmHA in the bankruptcy case. The U. S. Attorney made an effort to keep abreast of developments in the case, and particularly any distribution to creditors. Assistant United States Attorney Lester A. Paff wrote to the trustee on March 17, 1986 seeking the trustee's thoughts on two cases including Krieger's. Paff referenced an order entered in an adversary proceeding which led him to believe that trustee held funds in the amount of $18,355.58. Samore responded to Paff's letter informing him that in the Krieger matter, the accountant was still working on the fiduciary tax returns. Paff again wrote to Samore asking for the specific amount in the Krieger estate so that "we may agree on a final settlement." Samore answered by returning a copy of Paff's letter upon which was typed the following:

"DONALD KRIEGER CHECKING ACCOUNT $ 1,729.14

SAVINGS ACCOUNT 32,414.32 (as of 12-31-85)"

Perhaps as a result of this response, FmHA filed a "Motion for Distribution of Proceeds" claiming an interest in the monies being held by the trustee and seeking distribution of those funds to FmHA. Notice of the motion was given to creditors and parties-in-interest; the motion was resisted by both the trustee and his attorney. on June 20, 1986, FmHA withdrew its motion in a terse withdrawal which stated:

> "Comes now creditor, Farmers Home Administration (FmHA) and withdraws its Motion for Distribution of Proceeds filed April 7, 1986 and asks that it receive its pro-rata share upon resolution of this case."

The withdrawal was granted by the court shortly thereafter. On October 16, 1986, the U. S. Attorney inquired by letter of Samore "whether the trustee would disburse any funds available for the unsecured claims" in Krieger. Samore answered by letter that he would "not know about disbursement of funds until the court issues the Order." (Exhibit 18) In December, 1986, Paff wrote Samore asking to be advised when proceeds would be distributed to unsecured creditors. Samore responded that an amended final report had been filed with the court on September 26, 1989. No information was given as to when any distribution would be made nor as to whether Samore would recommend allowance or disallowance of the FmHA claim. Paff was sedulous in his inquiries and on March 24, 1987, again wrote Samore. He said FmHA was still awaiting distribution and he requested information on the file. Samore wrote to Paff saying that an amended claims report had been filed March 16, 1987 and that he was awaiting an "order of distribution." In June of 1987, Paff wrote Samore and requested that the $34,143.46 being held by Samore be forwarded to FmHA. This letter is at odds with previous correspondence requesting a pro rata distribution as an unsecured creditor. Samore answered by letter that a final report on claims had been filed and an amendment to the claims report had also been filed. He also told Paff that according to the clerk's office that office would be moving forward with disposing of the case. Samore gave Paff no indication as to what action, if any, Samore had taken on the FmHA unsecured claim. As of the date of Samorels letter to Paff (June 26, 1987), Samore had filed an amendment to a claims report but had not filed any claims report which could be amended. The report on claims was not filed by the trustee until July 20, 1987. It was at that time that Samore showed disallowance of FmHA's initial claim (# 13) on the ground that it was secured by property not administered by the estate and showed disallowance of the second FmHA claim (# 29) on the ground that it had been filed late. Samore served a copy of this claims report upon the U. S. Attorney in Cedar

Rapids and upon James H. Reynolds, U. S. Attorney, in Sioux City. Based on the certificate of service filed July 16, 1987, the service list did not include FmHA at either its Spencer or Des Moines offices. FmHA did receive a copy of the claims report, and Chris Beyerhelm, an FmHA representative in Des Moines, testified that it was not objected to at that time because no deadline had yet been set for filing objection. He said that it was his experience that a premature objection would be denied.

It was not until March 17, 1989 that notice was issued to all creditors and parties-in-interest which related particulars of the trustee's final report and claims report. This notice (entered March 17, 1989) clearly set out that the trustee held $34,875.62 in the estate. The notice showed court costs and administrative expenses which had been applied for. The total of these costs and expenses was $8,657.28. More importantly, the notice to creditors specifically set out those claims which the trustee recommended be disallowed. It identified FmHA's secured and unsecured claims. Creditors were notified that any objections to the final report and accounting, the claims report and the applications for administrative expenses must be filed with the clerk of court by no later than April 5. 1989. Hearing on timely filed objections would come before the court on April la, 1989. The foregoing notice was served upon FmHA at its correct address in Des Moines and at its office in Spencer; it was also served upon the U. S. Attorney in Sioux City. FmHA did not object to the final report or claims report. Other matters relating to the final report came before the court, and following resolution or disposition of those matters, the court entered its September 25, 1989 order on claims disallowing the secured and unsecured claims of FmHA. The court's order was docketed on September 25, 1989 and thereafter FmHA filed its motion to reconsider.

Kimberly A. Smith has been FmHA county supervisor for Clay and Dickinson Counties since September 1, 1985. Her office is in Spencer. Her duties include making and supervising loans within her geographic area. When a borrower under her supervision files a bankruptcy petition, it is her responsibility to compile certain information and to make copies of certain documents and to forward these to the state office. These materials include copies of loan and security documents and copies of appraisals of collateral, whether personalty or realty. Ms. Smith testified that the FmHA county file on Krieger was destroyed on approximately October 1, 1988. Thereafter, any documents sent to her by the bankruptcy court which related to the Krieger case were destroyed or discarded by her upon receipt.

FmHA has procedures leading to the destruction of a loan file by the county office. Once it is determined by the county office that a debtor has been discharged and that there are no assets in which FmHA has a security interest and no estate funds available for distribution, the county office recommends to the state office that the loan be charged off or canceled and the loan file closed. The state office responds to the recommendation and if it is approved, gives further instructions as to disposition of the original notes. After closing, a file will remain intact for the remainder of the fiscal year in which it is closed and for one additional fiscal year. In this case, the state office instructed that the original notes be placed in the file. It was understood between the state and county offices that the Krieger file would be destroyed. Smith followed FmHA procedures in the destruction of the county file. According to Smith, the destruction of the file was based on the erroneous belief that there were no assets available for distribution. Smith testified that her recommendation to the state that the file be destroyed was based upon the notification she received from the trustee that the FmHA claim had been denied as untimely. The document referred to was trustee's claims report.

Christopher Beyerhelm is a farm programs specialist with FmHA in its Des Moines office, a position he has held for the past four years. His duties include the supervision of borrower bankruptcies including the referral of such matters to the office of General Counsel in Kansas City or to the U. S. Attorney. Since 1985, he estimates that between 600 and 800 bankruptcies had been filed affecting

the FmHA state office in Des Moines. FmHA generally refers bankruptcy cases to the U. S. Attorney's office for legal representation, but normally the U. S. Attorney's office takes no action on a case unless requested by FmHA.

The state office's Krieger loan file was destroyed during the pendency of this bankruptcy case. Beyerhelm does not know whether he personally received the notice of final report and claims report. He believes had he seen it at the time it was served, he would have taken action to object to the disallowance of FmHA's unsecured claim. However, he cannot say that the notice was not received by FmHA. The court finds that FmHA in Des Moines did receive the notice. At the time the notice was received, there was no longer an FmHA file on the Krieger case in the Des Moines office. Beyerhelm recalled that the state office file was destroyed sometime in July or August of 1987. Once destroyed, Beyerhelm said that FmHA could no longer "track" the bankruptcy. Such files are destroyed, according to Beyerhelm, once discharge is entered in a bankruptcy case, and all assets have been accounted for. According to Beyerhelm, until the last two years, FmHA has not been well equipped to determine whether the trustee was holding funds which were not FmHA's collateral. This administrative problem, he says, has now been corrected. However, someone at FmHA would have been aware at the end of 1985 that there were funds in the Krieger estate.

Beyerhelm says that the decision to close the Krieger loan file and destroy it in this case was an uninformed decision, based on a lack of information which was exacerbated by the length of time that the case was pending and by FmHA's heavy bankruptcy case load.

DISCUSSION

The sum and substance of the evidence is that despite information here to the contrary, FmHA thought that there were no funds available for distribution in this case. As a result, FmHA destroyed its loan file at both the county and state levels. When the notice of final report and claims report was served upon the FmHA state and county offices, the county discarded the notice and the state office took no action, being unable to match the notice with a file. The FmHA, therefore, let pass an April 5, 1989 deadline to object to the disallowance of its claim. It was the Assistant U. S. Attorney, following the order disallowing the claim, which alerted FmHA to its loss. FmHA now seeks reconsideration of the disallowance of its claim under Bankr. R. 3008.

The reconsideration of claims is governed by 11 U.S.C. 502(j) and Bankr. R. 3008. Because this bankruptcy case was filed in 1980, it is governed by S 502(j) as it existed prior to its amendment by the Bankruptcy Amendments and Federal Judgeship Act of 1984. In re Kelderman, 75 B.R. 69, 70 (Bankr. S.D. Iowa 1987). That Code section stated: "Before a case is closed, a claim that has been allowed may be reconsidered for cause, and reallowed or disallowed according to the equities of the case." While the language of the pre-amended section does not provide on its face for the reconsideration of disallowed claims, it has been interpreted to permit such reconsideration by the court. in re Washington County Broadcasting, Inc., 39 B.R. 77, 78-79 (Bankr. D. Me. 1984).

The court's order disallowing FmHA's claim was entered September 25, 1989 and docketed that same date. A motion to reconsider was filed October 4, 1989. There is no assertion that FmHA's motion was not timely, and whether filed within the constraints of Bankr. R. 3008, 9024, or even 9023 (about which there may be some argument), the court concludes that FmHA's motion is timely. Employment Security Division, Arkansas Depart. of Labor v. W. F. Hurley, Inc. (In re Hurlev), 612 F.2d 392, 394 (8th Cir. 1980).

The effective Code provision provides that claims may be reconsidered for cause. cause is not defined by section 502(j). Application and interpretation are therefore the province of the court. In re Yagow, 62 B.R. 73, 78 (Bankr. D. N.D. 1986). This court believes that the standards of Fed.R.Civ.P. 60(b), as incorporated bank Bankr. R. 9024, may be considered in proving "cause." Bankr. R. 9024, Fed.R.Civ.P. 60(b), In re Excello Press, Inc., 83 B.R. 539, 541 (Bankr. N.D. Ill. 1988), aff'd. 90 B.R.335 (N.D. Ill. 1988). But note that the application of Rule 60 standards in determining "cause" may only be required where the allowance or disallowance of a claim had been contested.

In its motion to reconsider, FmHA does not use as grounds, "excusable neglect" but in conformance with 11 U.S.C. 502(j), argues that there is "cause" for reconsidering its claim. In considering the facts of this case, however, if the court were to reconsider the disallowance of FmHA's claim, its needs must be because FmHA's failure to object to its claim treatment was the result of excusable neglect. Interpretation of the "excusable neglect" standard often varies depending on the procedural context in which it is applied. Fasson v. Magouirk (In re Magouirk, 693 F.2d 948, 950 (9th Cir. 1982). "Excusable neglect" may be liberally construed, especially in those cases where the court's order precludes trial on the merits of the claim. Id. at 951.

It has also been said that when considered as part of Rule 3008 motions, the term should be construed broadly but in light of the contrary policy of "encouraging prompt, final dispositions of objections to proofs of claims." United States v. Motor Freight Express (In re Motor Freight Express), 91 B.R. 705, 710711 (Bankr. E.D. Pa. 1988).

Courts have considered various factors in determining whether to reconsider a claim under Bankr. R. 3008 or to take some other requested action under Fed.R.Civ.P. 60(b). These include whether other creditors or parties-in-interest will be prejudiced, the length of the delay occasioned by reconsideration and its impact on court administration, whether disallowance of a potentially just claim would result in an undeserved windfall to other creditors, and whether dividends have already been paid. Fasson v. Magouirk (In re Magouirk), 693 F.2d 948, 951 (9th Cir. 1982) ; In re Washington County Broadcasting, Inc., 39 B.R. 77, 79 (Bankr. D. Me. 1984).

In the case sub judice there are factors which weigh for and against allowing reconsideration of the FmHA claim. Weighing in favor of FmHA are the following:

(1) Throughout the case, or at least until near its very end, the FmHA, through the Assistant U. S. Attorney, made a diligent effort to keep track of the allowance of its claim and the distribution to creditors;

(2) FmHA has a substantial unsecured claim and if allowed, it would receive a large portion of the monies to be distributed by the trustee. The disallowance of its claim, if its claim is valid, would result in a windfall to other creditors;

(3) The determination that the claim should be disallowed was essentially as a result of default. Defaults are generally not favored by the law;

(4) The trustee has made no distribution to creditors;

(5) No prejudice to creditors as a result of reconsideration, other than perhaps delay, has been alleged or argued. The delay in this case is minimal as the motion for reconsideration was filed promptly after the court's order on claims. The delay is also minimal when considered in the context of the total case.

Further, dilution of other creditors' dividends by allowance of FmHA's claim is not the kind of prejudice that should be considered as weighing against FmHA's motion for reconsideration;

(6) There is a strong likelihood that FmHA has a valid unsecured claim. The claim was disallowed on the grounds it was untimely. However, the trustee may have failed to consider that the "late-filed claim" was really an amendment of a timely filed claim.

Weighing against FmHA's motion for reconsideration is the fact that FmHA at all pertinent times had knowledge that there was money in the estate, and FmHA was given timely notice of the deadline for objecting to the disallowance of its claim.

FmHA puts forth three interrelated reasons as "cause" for its failure to object to the disallowance of its claim:

(1) The age of the case;

(2) That due to the protracted proceedings, FmHA destroyed its files and thus had no way to "track" its position in the case; and

(3) Its heavy bankruptcy case load made it difficult to keep tabs on its problems.

The extent of a party's business activities, so far as this court is concerned, would be an unworkable standard in determining whether that person should be permitted to miss court or statutory deadlines.

The Court of Appeals to the Eighth Circuit has said that Rule 60(b), because it provides for extraordinary relief, should only be granted upon an adequate showing of exceptional circumstances. Hoffman v. Celebrezze, 405 F.2d 833, 835 (8th Cir. 1969) ; Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F. 2d 509, 515 (1984) rehearing and rehearing en banc denied (1984) , certdenied 469 U.S. 1072 (1984). Excusable neglect under Rule 60(b) has been defined "to be that course of action which a reasonably prudent person would take under the same or similar circumstances." Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F.Supp. 1408, 1410 (N.D. Ill. 1984). "Excusable neglect" has also been said to be "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 Johnston, 37 B.R. 361, 364 (Bankr. D. Vt. 1984).

"Where a litigant's own internal procedures are the cause of a failure to comply with proper legal procedures, courts generally refuse to grant relief from the consequences of the lack of compliance." In re Robl, 16 B.R. 155, 157 (E.D. N.Y. 1981), quoting In re Biddy, 7 B.R. 50, 52 (Bankr. N.D. Ga. 1980).

"Excusable neglect" is not negligence or carelessness. in re Carr, 66 B.R. 429, 434 (Bankr. D. R.I. 1986).

The question before the court is, therefore, considering all the circumstances, did FmHA have a good excuse for failing to timely object to the disallowance of its claim?

As pointed out, there are arguments in favor of both sides of this issue. But, the most bothersome aspect of this matter is the length of time it took FmHA to muster its efforts in favor of its claim. This is not a case where the order denying the claim rapidly followed the passing of the deadline to object to the final report and the claims report. The notice of the deadline for objections was served on FmHA March 17, 1989. Because of intervening matters not related to FmHA, the order denying its

claim was not issued until September 25, 1989, some six months later. In the intervening time, FmHA did nothing to protect its claim. It was not until after the order of September 25, 1989 that FmHA brought its position to the fore. It did so quite quickly after the entry of the order denying its claim. There is no good reason why FmHA could not have made these efforts during the preceding six months. Its failure to do so was neglect, but it is not excusable. FmHA has shown that it could have acted promptly during the time it was given to object to the claims report. If there were no files then, there were no files in the period subsequent to the issuance of the September 25, 1989 order. The factors put forth by FmHA to support its argument of cause fail to persuade this court when considered in light of FmHA's ability to act once the order was issued denying its claim.

CONCLUSION OF LAW

FmHA has failed to show cause why its claim should be reconsidered.

ORDER

FmHA's motion to reconsider disallowance of its claim is denied.

SO ORDERED ON THIS 29 DAY OF DECEMBER, 1989.

William L. Edmonds
Bankruptcy Judge