

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

HUMPHREY RAY COX and
MARY T. COX

Bankruptcy No. X90-01377S

Debtor(s).

Chapter 7

ORDER RE: OBJECTION TO TRUSTEE'S FINAL REPORT

The matter before the court is an objection to trustee's final report on claims and distribution. Creditor Florine Cox (COX) asserts that she did not receive notice of the deadline for filing claims against the estate. She asks that the court deny approval of the trustee's final report which does not provide a dividend to her. She asks also that the court permit her additional time to file a proof of claim. Hearing was held in Sioux City on January 7, 1992. This is a core proceeding under 28 U.S.C. § § 157 (b) (2) (B) and (A).

FINDINGS OF FACT

Florine Cox has been previously involved in this case. She is the mother of Humphrey Ray Cox. On December 24, 1990, trustee Wil L. Forker (TRUSTEE) sued Florine Cox to recover an allegedly preferential transfer of an interest in real estate. Cox was represented by Donald H. Molstad (MOLSTAD), a Sioux City attorney. Molstad filed an appearance on Cox's behalf, and his name and address were added to the case's mailing matrix. By order dated March 18, 1991, the court approved a motion to compromise the preference claim, and Florine Cox paid \$2,500.00 into the estate. This payment constitutes the entire fund from which the trustee proposes to make distribution.

Prior to this settlement, the clerk's office had given notice to all creditors that there would likely be no dividend in the case and thus claims need not be filed. As a result of Cox's payment, the clerk, on May 15, 1991, mailed to creditors and parties-in-interest an order setting a bar date of August 13, 1991 for filing claims. The order was served pursuant to Fed. R. Bankr. P. 3002(c) (5) and 2002(e). According to the certificate of service executed by a deputy clerk, the notice was mailed to attorney Molstad at 224 Davidson Building, Sioux City, Iowa 51101. That was and is Molstad's correct office address. Cox had never requested that her name and address be added to the case's mailing matrix; no notice of the claims deadline was mailed to her. She maintains that she had no personal knowledge of the notice.

Three proofs of claim were filed. On November 5, 1991, the trustee filed his Final Report and Account proposing dividends to the creditors with allowed unsecured claims. Molstad received notice of the proposed distribution, and on Cox's behalf, objected. Cox now asks that the Final Report and

Account not be approved as it provides no dividend to her; she complains that she did not receive notice of the deadline for filing her claim.

A search by Molstad of his legal files revealed no indication that Molstad or his firm had received the clerk's order fixing the bar date. Molstad presented two affidavits to the court, one by himself and the other by his secretary, Mona Kelly (KELLY). Both affidavits state that Molstad's office files had been reviewed and that no notice of the bar date for filing claims in the Cox case had been found. The affidavits also stated that to the best of their knowledge, Molstad and Kelly had not received the notice. Molstad also offered a detailed, oral professional statement describing the regular practices of his office in handling daily mail. All mail received by Molstad's office is delivered to the front desk where a secretary opens it; it is then separated into piles or baskets for each attorney. Each attorney's secretary (in this case, Kelly) picks up the mail, writes relevant dates on the attorney's docket calendar, and leaves all documents on the attorney's desk for review. A separate card index is also maintained by Molstad's office which "calendarizes" each entry. A date at least ten days prior to a bar date, or other significant date, is entered on a blue index card. Each day an attorney's secretary brings that card to the attorney's attention, advising him of the relevant upcoming matter. Molstad stated that notice of the bar date was not found in his file on the case, on any of the docket calendars, or in the index card system.

DISCUSSION

The court will sustain Cox's objection to trustee's final report. It will do so because although the notice of bar date was mailed to Cox's attorney, it was not received. Cox had no notice of the time for filing, and without such notice, she should not be deprived of her opportunity to preserve her claim against the estate.

Fed. R.Bankr. P. 2002 permits service of notices by first class mail. There is a strong presumption at law that mail handled by the U.S. Postal Service, which is properly addressed and stamped, will be received by the addressee. Hagner v. United States, 285 U.S. 427, 430, 52 S.Ct. 417, 418, 76 L.Ed. 861 (1932). *See also*, Fed. R.Bankr. P. 9006(e). In the Eighth Circuit, this is a "very strong presumption." Arkansas Motor Coaches v. Commissioner of Int. Rev., 198 F.2d 189, 191 (8th Cir. 1952). ("While the presumption is a rebuttable one it is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption.") This presumption is further reinforced when the mailing party, like the clerk's office, is a governmental agency which follows carefully regulated procedures governed by bankruptcy law. A "mere assertion" that a party did not receive a mailing is insufficient to overcome the presumption of a received mailing. Moody v. Bucknum (In re Bucknum), F.2d, 1991 W.L. 256184, *2 (9th Cir., Dec. 9, 1991). ("Where the bankruptcy court record shows a certificate of mailing and a complaining party submits an affidavit declaring notice was not received, the weight of the evidence favors the court's certificate. If a party were permitted to defeat the presumption of receipt of notice resulting from the certificate of mailing by a simple affidavit to the contrary, the scheme of deadlines and bar dates under the Bankruptcy Code would come unraveled. For this reason, an allegation that no notice was received does not, by itself, rebut the presumption of proper notice." Quoting Osborn v. Ricketts (In re Ricketts), 80 B.R. 495, 497 (9th Cir. BAP 1987). The presumption is not irrebuttable, however, and may be overcome by evidence to the contrary. Courts have accepted that an affidavit of non-receipt, if accompanied by a statement of regular and standardized office procedures which the allegedly non-receiving party engages in when receiving mail, would be sufficient to overcome the presumption of proper receipt under Fed. R.Evid. 301. Currell v. Taylor (In re Taylor), Bankr. No. 87-01882C, slip op. at 9 (Bankr. N.D. Iowa, July 22, 1988), *citing Merrill, Lynch, Pierce, Fenner Smith, Inc. v. Dodd (In re Dodd)*, 82

B.R. 924, 928 (N.D. Ill. 1987).

Standing alone, the affidavits offered by attorney Molstad would be insufficient to overcome the presumption of receipt. In the present case, however, Molstad has offered sufficient evidence of a regular and standardized office procedure for dealing with incoming mail which, coupled with affidavits testifying to the absence of the bar date notice in any of his office files, is sufficient to overcome the presumption of receipt. "Where the right to a day in court is at stake, the judicial approach should be one of attempt to accord the right, if this can legitimately and reasonably be done, and not one of attempt to deny it through unnecessary resolution, unless such a denial is either legally or equitably compelled." Arkansas Motor Coaches, 198 F.2d at 194 (J. Johnsen, concurring).

ORDER

Cox's objection to trustee's final report is sustained. The claims report and proposed distribution are not approved. Cox shall have 15 days from the entry of this order to file her proof of claim pursuant to Fed. R.Bankr. P. 9006(b) (1). Trustee shall thereafter file an amended report and account.

SO ORDERED ON THIS 9th DAY OF JANUARY, 1992.

William L. Edmonds
Bankruptcy Judge