

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

Direct Transit Inc.
Debtor(s).

Bankruptcy No. 96-52691XS
Chapter 11
Contested No. 7054

MEMORANDUM ORDER RE: MOTION OF LOPEZ TO ENLARGE TIME FOR FILING PROOF OF CLAIM

On April 16, 1997, Antonio Lopez filed a motion to enlarge the time for filing a proof of claim or, in the alternative, to deem his proof of claim timely filed. Lopez bases his claim on personal injuries sustained in an accident involving one of the trucks of Direct Transit, Inc. (DTI). DTI resists the motion, arguing that Lopez was a scheduled creditor who received notice of the bankruptcy case and the bar date for filing claims.

A telephonic hearing on the matter was held May 13, 1997. Geoffrey A. Richards and A. Frank Baron appeared for DTI. Howard I. Bushin appeared for Lopez. The parties raised various fact issues relating to the building where Lopez resides and the other tenants in the building. Bushin also argued that employees of DTI were aware that he represented Lopez. These issues may be relevant to whether there is cause to extend the claims deadline as permitted by Fed.R.Bankr.P. 3003(c)(3). The parties did not, however, submit evidence on the issue of cause.

By telephone conference with the court on June 24, 1997, counsel requested the court to rule first on the narrow issue whether DTI was required to serve notice of the claims bar date on attorney Bushin. The court agrees with DTI that it was not required to serve Bushin with the notice. Because resolution of this issue does not dispose of the matter, the court will allow the parties time for discovery on the issue of cause.

Discussion

Failure to serve Lopez's attorney was not failure of service of the notice on Lopez, and is not per se cause for extension of the time for filing a claim. Notice of the bar date for filing proofs of claim in a Chapter 11 case is governed by Fed.R.Bankr.P. 2002(a)(7), which provides that all creditors are entitled to 20 days' notice of the "time fixed" for filing claims. Rule 2002(g) provides:

Addresses of Notices. All notices required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as such entity or an authorized agent may direct in a filed request; otherwise, to the address shown in the list of creditors or the schedule whichever is filed later.

Service of the notice is properly made directly on a creditor. Absent a "filed request" to send notices to a creditor's attorney, failure to send a bar date notice to the attorney is not a basis for extending the time to file a claim. In re R.H. Macy & Co., Inc., 161 B.R. 355, 360 (Bankr. S.D.N.Y. 1993); Matter of Mansfield Tire & Rubber Co., Inc., 73 B.R. 735, 739-40 (Bankr. N.D. Ohio 1987); In re Solvation, Inc., 48 B.R. 670, 673-74 (Bankr. D. Mass. 1985).

Lopez does not claim that a Rule 2002(g) request was filed. He argues, rather, that because DTI knew Bushin was representing him, DTI should have sent the bar date notice to Bushin. Lopez urges the court to follow In re The Grand Union Co., 204 B.R. 864 (Bankr. D. Del. 1997), which placed special emphasis on the pre-petition communications between an agent for the debtor and the creditors' attorneys. The supplemental brief filed by DTI includes a helpful criticism of Grand Union. Document 788 at 6-11. This court agrees with DTI's assessment of the case, and briefly notes two particular aspects of the decision which seem incorrect.

The court in Grand Union construed the term "filed request" in Rule 2002(g) to include a pre-petition letter from the creditor's attorney to the debtor's claims adjuster. 204 B.R. at 874. This construction is contrary to the Bankruptcy Rules. Reference in the Rules to "filing" papers means filing with the bankruptcy clerk of court. Fed.R.Bankr.P. 5005(a)(1), 9001(3).

The Grand Union court also appeared to assume that an attorney's relationship with his client-creditor continues unchanged when the debtor files a bankruptcy petition. This assumption is incorrect as a basis for requiring service on the attorney. The rules for service in contested matters and adversary proceedings provide for personal service upon the creditor. Fed.R.Bankr.P. 7004(b)(1), 9014. Service on an attorney representing a party in separate litigation does not constitute sufficient service on the creditor in subsequent litigation unless there is evidence of the appointment of the attorney for the purpose of accepting service of process. In re Sanow, No. 92-51890XS, slip op. at 2 (Bankr. N.D. Iowa Jan. 29, 1993); accord, Midatlantic National Bank v. Kouterick (In re Kouterick), 161 B.R. 755, 758-59 (Bankr. D. N.J. 1993). As the court stated in Kouterick, it is instructive to compare Rule 7004 (b)(9). Service upon the debtor requires service on the debtor's attorney as well, and that fact is expressly stated. 161 B.R. at 759. No such requirement can be read into the rules governing service of the bar date notice.

The conclusion that DTI's failure to serve the notice on attorney Bushin was not itself cause for an extension of the claims deadline is not affected by this court's Local Rule 8(D)(6). That rule provides:

Creditor Schedules. In each schedule of creditors, the creditors' names shall be listed alphabetically and the listing shall include the full and complete post office address of each creditor, including post office box or street number, ZIP code and the city or town and state. If an assignment of the account or debt is known to the person verifying such schedules, or if such person has knowledge that the debt is in the hands of an attorney or other agent for collection, that fact shall be stated immediately following the name of the original creditor and the full names and addresses of both the original creditor and assignee or agent shall be set forth, but without twice extending the dollar amount of the debt. Each entry required by this subsection shall be separated by two spaces from the next succeeding entry.

L.R. 8(D)(6), Bankr. N.D. Iowa (emphasis added).

On its face, Local Rule 8(D)(6) concerns the form and content of the schedules of creditors. Because the schedules are commonly used to create the mailing matrix, which in turn is used to send notices

going to all creditors, the effect of compliance with the local rule is that a creditor's attorney included in the schedules would normally receive notice of any bar date for filing claims.

The rule does not purport to prescribe what would be necessary or sufficient service upon a creditor in regard to any matter. Because the national rules provide for service of notices on creditors, the local rule would be inconsistent with the national rules, and therefore invalid, if it were construed to require service on creditors' attorneys. See Industrial Financial Corp. v. Falk (In re Falk), 96 B.R. 901, 904 (Bankr. D. Minn. 1989) (a local rule may neither "abridge, enlarge, or modify any substantive right" and must be consistent with the Bankruptcy Code and Rules). If a local rule can be construed to avoid such conflict, it should be so construed. John v. State of Louisiana, 757 F.2d 698, 707 (5th Cir. 1985). Local Rule 8(D)(6) has other effects which do not conflict with Rule 2002. The rule ensures notice to the current holder of a claim without having to determine precisely whether a claim has been assigned absolutely or is being collected by an agent. The rule provides debt collectors notice of the automatic stay. Notice to a creditor's state court attorney provides the "courtesy" referred to by the court in Kouterick, 161 B.R. at 759. The notice is not necessary for effective service on the creditor because, as discussed above, the attorney in prior litigation will not necessarily continue representation of the creditor in bankruptcy proceedings. Id.

Accordingly, the court concludes that failure to serve attorney Bushin with a copy of the notice of the bar date for filing claims is not itself cause for extension of the time to file a claim. The clerk will set a telephonic conference for the purpose of discussing discovery matters and selecting a trial date.

SO ORDERED THIS 18th DAY OF JULY 1997.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to counsel for debtor, counsel for unsecured creditors committees, Howard Bushin, and U.S. Trustee.