In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DIRECT TRANSIT INC. Bankruptcy No. 96-52691XS
Debtor(s). Chapter 11

DECISION AND ORDER RE: TUNALEYS' MOTION TO FILE PROOF OF CLAIMS

Ann Tunaley and Martin Tunaley, individually and as parents and legal guardians of Noah and Cheyenne Tunaley, minors, (hereafter Tunaleys unless referred to individually) move for permission to file late proofs of claim pursuant to Fed.R.Bankr.P. 9006(b)(1). Direct Transit, Inc. (hereafter DTI) objects to the motion. The parties have agreed that this matter may be submitted to the court on a written record. This record includes the Tunaleys' motion with the documents attached thereto (docket no. 1235) and the briefs of the parties. Tunaleys filed a brief on May 28, 1999 (docket no. 1243). DTI's brief was part of its objection filed July 27, 1999 (docket no. 1267). Tunaleys filed a reply brief on August 1, 1999 (docket no. 1272). The court has jurisdiction of this matter under 28 U.S.C. § 1334 (a) and the district court's order of reference. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

The parties agree that the facts are not in dispute. Martin and Ann Tunaley are husband and wife. On March 20, 1995 in Oswego, New York, Ann Tunaley and Noah, the Tunaleys' minor son, were allegedly injured in a motor vehicle collision involving a truck owned by DTI. Mrs. Tunaley was pregnant at the time. Her baby girl, now named Cheyenne, was born May 8, 1995. Tunaleys claim that Ann, Noah, and Cheyenne were injured by the accident, which they say was caused by the negligence of the driver of the truck, an employee of DTI.

Tunaleys hired attorney Irwin Birnbaum to represent them in pursuing their claims against DTI. Birnbaum contacted DTI about the claims as early as March 1996. By early April 1996, the claims had been referred to DTI's motor vehicle liability insurer, Liberty Mutual Group (Liberty Mutual). Liberty Mutual provided liability coverage to DTI on the Tunaleys' claims. A representative of Liberty Mutual contacted Birnbaum and began requesting medical information on the injuries. Birnbaum and Liberty Mutual remained in contact on the claims. Then on October 21, 1996, DTI filed its chapter 11 bankruptcy petition in this court.

On October 24, 1996, the clerk of court issued a notice of commencement of case, the meeting of creditors, and the deadline for filing claims. The bar date for filing claims was set as December 6, 1996. I take judicial notice that none of the Tunaleys were scheduled as creditors in the schedules filed by DTI at the commencement of the case, nor were they scheduled when DTI submitted amended schedules on November 13, 1996. On May 5, 1997, DTI again amended its schedule of

creditors holding unsecured claims adding, among others, Ann, Noah, and Cheyenne Tunaley. Each of their claims was scheduled as "disputed" and as having a value of $1.00.

Shortly after amending its schedules to add the Tunaleys and others, DTI asked the court to set a supplemental bar date for filing claims by those creditors (docket no. 653). In response to the motion, the court set August 1, 1997 as the bar date for any claims to be filed by Tunaleys. Debtors served Tunaleys with notice of the filing of the case and of the deadline for filing claims. DTI also provided Tunaleys with a claim form.

Although they received the notice, neither Tunaleys nor their attorney filed proofs of claim. At the request of DTI, the court, on August 12, 1997, issued an order authorizing DTI to implement an alternative dispute resolution procedure to effectuate the resolution of tort claims (docket no. 851). The ADR procedure was to be coordinated by Liberty Mutual (Exhibit 1, Order, docket no. 851), which was required to serve a copy of the ADR order and the ADR procedure statement on all creditors whose tort claims were disputed (id.). The ADR order included the following three paragraphs:

> 3. As a condition to relief on a motion or other pleading filed by a Disputed Claimant seeking relief from this Order or the automatic stay to resolve a particular disputed Claim (as defined in the ADR Procedure), the Court may require the Disputed Claimant to comply with the ADR procedure.
>
> 4. The failure of a Disputed Claimant to participate in the ADR Procedure may result in the disallowance of all or a portion of the Disputed Claim.
>
> 5. Participation in the ADR Procedure shall not alter the requirement that Disputed Claimants also have timely filed proofs of claim in Debtor's chapter 11 case.

Order approving ADR, attachment (docket no. 851).

On or about February 6, 1998, Liberty Mutual sent attorney Birnbaum, by FAX transmission, a copy of the ADR procedure. On February 12, 1998, Liberty Mutual faxed to Birnbaum a copy of the August 12, 1997 order approving the procedure. On February 12, 1998, Birnbaum mailed to Liberty Mutual four confirmation of loss forms as part of Tunaleys' participation in the ADR procedure. Later in February, Birnbaum sent Liberty Mutual forms authorizing the insurer to obtain medical information directly from Tunaleys' medical providers. Through the end of November 1998, Birnbaum's office and Liberty Mutual continued to correspond regarding the Tunaleys' injury claims.

On December 21, 1998, Rosemary E. Hacker, of the Liberty Mutual claims department, notified Birnbaum that as a condition of participation in ADR, the claimants had to have filed proofs of claim. She told Birnbaum that she did not have copies of such, and she requested that Birnbaum forward them to her. On December 28, 1998, Hacker resisted Birnbaum's effort to obtain mediation under the ADR procedure on the ground that Tunaleys had not filed proofs of claim.

On March 12, 1999, Tunaleys filed their motion seeking leave to file their claims. They filed their amended motion on April 27, 1999 (docket no. 1235), and it is that motion that is before the court. Tunaleys ask that they be permitted to file late proofs of claim so that they may continue with the ADR procedure. The purpose of Tunaleys' motion, however, is to obtain leave to file claims and to have those claims be treated as timely under the Bankruptcy Code and the Federal Rules of Bankruptcy Procedure. The Tunaleys would not need court permission, in my view, to file tardy

claims, although those claims would be subject to disallowance. See 11 U.S.C. § 502(b)(9). Tunaleys say they want to file their claims so that they can continue with ADR and recover against the insurer on the insurance policy. They say that they do not seek a recovery from debtor's estate beyond the insurance coverage. Tunaleys argue that proofs were not timely filed due to the oversight of counsel. They contend that the failure to file was excusable neglect, and that the court should extend the time under Fed.R.Bankr.P. 9006(b)(1). DTI contends that the failure to file is not excusable, and that the failure to file timely now bars Tunaleys from the ADR process, from a recovery against the bankruptcy estate, from voting on any proposed plan, and from any recovery from Liberty Mutual.

Discussion

A creditor may file a proof of claim. 11 U.S.C. § 501(a). A claim filed under § 501 is deemed allowed unless a party in interest objects to the claim. 11 U.S.C. § 502(a). If an objection is filed, a claim may not be allowed to the extent that the "proof of such claim is not timely filed," 11 U.S.C. § 502(b)(9), except to the extent that tardily filed claims are permitted to receive distributions under § 726(a)(1), (2), or (3). The latter sections permit, in a chapter 7 case, the distribution of estate assets to creditors on account of tardily filed claims. If a creditor with a tardily filed claim would be entitled to a distribution in a chapter 7 case, the creditor will be entitled to the same distribution in a case under chapter 11. A plan not recognizing this principle may not be confirmed. See 11 U.S.C. § 1129(a)(7).

Who must file a claim in a chapter 11 case and the time for filing a claim is governed by Fed.R.Bankr.P. 3003(c). Subsection 2 of Rule 3003(c) provides that

> [a]ny creditor ... whose claim ... is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim ... within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

Subsection 3 of Rule 3003(c) provides that

> [t]he court shall fix and for cause shown may extend the time within which proofs of claim ... may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

Rule 3002(c)(2) provides that

> [i]n the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

The last relevant rule having to do with the enlargement of time periods is Fed.R.Bankr.P. 9006(b)(1). It permits the court, in its discretion, to enlarge the time for acting under a court order or rule, where the motion to enlarge is made after the expiration of the time period, but only if the failure to act was the result of excusable neglect.

Noah and Cheyenne Tunaley

Timely claims were not filed on behalf of Noah and Cheyenne Tunaley. Each is a minor. Much of the briefing has dealt with whether the neglect to file timely claims for these children was excusable. The

court need not reach this issue. As stated, Fed.R.Bankr.P. 3003(c)(3) by reference to Rule 3002(c)(2) permits the court to extend the time for filing timely claims by infants. The standard for granting the extension is not excusable neglect. The court, in its discretion, may grant the extension "in the interest of justice and if it will not unduly delay the administration of the case...." Fed.R.Bankr.P. 3002(c)(2).

It is in the interest of justice to extend the time for Noah and Cheyenne to file timely claims. The claims are covered by liability insurance. Tunaleys do not seek a recovery from other assets of the estate. The insurer has been carrying out the ADR program, and it has been dealing with the Tunaleys' lawyer at length. Liberty Mutual was aware of the claims; it was not surprised. Since shortly after the accident, and before the filing of the bankruptcy case, Liberty Mutual and the debtor were aware that Tunaleys intended to pursue the claims. The denial of participation in the ADR procedure for failure to file a claim was not mandatory in the order approving it. Generally, an insurer's liability is not affected by a claimant's failure to file a proof of claim in the case of the debtor-insured. Houston v. Edgeworth (Matter of Edgeworth), 993 F.2d 51, 53-54 (5th Cir. 1993).

Nor will extension of the deadline unduly delay the administration of the case. Tunaleys have already substantially participated in the ADR procedure. Allowing the claims to be timely filed will not result in their beginning the ADR procedure. Debtor has filed a plan. However, the disclosure statement has not yet been approved. It is likely that there are other tort claimants still involved in the ADR procedure, even though their claims were timely filed.

For these reasons, the court will extend the time for Noah and Cheyenne Tunaley to file timely proofs of claim. The time for such filing will be extended to September 15, 1999.

Ann Tunaley

The court may for cause extend the time during which a timely claim may be filed. Fed.R.Bankr.P. 3003(c)(3). Also, the court may permit Ann Tunaley to file her claim timely if she can show excusable neglect for her failure to file her claim prior to the deadline. Fed.R.Bankr.P. 9006(b)(1). To the extent these two rules have different standards, the court will deal with them separately. As to cause, cause may include excusable neglect, but it would seem that cause may also include the standard of Rule 3002(c)(2) - that the extension be in the interest of justice and not involve undue delay in the administration of the case. Therefore, for those reasons stated regarding Noah and Cheyenne, the court finds cause to extend the deadline for Ann Tunaley to file a timely claim.

Even if this were not so, the court would extend the deadline, finding excusable neglect for failing to meet the previously set August 1, 1997 deadline. Allowing a late filing, for the reason of "excusable neglect" under Rule 9006(b)(1), entails an "equitable inquiry." Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 389, 113 S.Ct. 1489, 1495 (1993). A determination of what neglect is excusable must take into consideration "all relevant circumstances surrounding the party's omission. These include ... the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." Id., 507 U.S. at 395, 113 S.Ct. at 1498.

There is little danger of prejudice to the debtor. Ann Tunaley does not seek to recover from assets of the estate other than the liability policy written by Liberty Mutual. Debtor contends that if the court allows Tunaley to file her claim late, there may be many more such creditors who will want to file late tort claims. This, says debtor, may affect distribution calculations already contemplated by debtor and Liberty Mutual. I agree with Tunaleys; each such motion must be considered on its own merits. Here,

Liberty Mutual was aware of the claims, was conducting ADR as to it, and apparently realized only recently that Tunaleys had not filed proof of claims. There is no delay occasioned by the extension.

The length of the delay in filing the motion for an extension of time is long, but I do not believe, in light of the Tunaleys' previous participation in the ADR process, and the length of time this case has been pending, that the length of the delay is critical to my determination. Debtor filed this case in October 1996. The court has permitted debtor's painstaking liquidation of assets without a plan. The debtor is still involved in the recovery of avoidable transfers. The debtor has only begun the claims allowance/disallowance procedure. Tunaleys' delay, in light of their participation in ADR, is not significant. It has not caused the debtor prejudice, nor has there been surprise, either to debtor or to Liberty Mutual. Thus, although there has been a long delay in the filing of the Tunaleys' claims, it has not significantly impacted the judicial proceedings.

The reason for the delay was given as oversight. Tunaleys' counsel apparently merely forgot to file the claims, as Tunaleys were not seeking a distribution from the estate, but were content to rely on a recovery under the liability insurance policy. Tunaleys' lawyer concentrated his efforts on the ADR process and did not create delay in that process. It is understandable and excusable that the attorney failed to file timely the claims forms. They did file proof of loss forms in the ADR process.

There is no indication from debtor that Tunaleys acted in bad faith. Based on the facts submitted to the court, I find that they did not.

I find that there was excusable neglect in Ann Tunaley's failure to file timely her claim and that her motion for extension should be granted under Fed.R.Bankr.P. 9006(b)(1).

IT IS ORDERED that the motion of Ann, Noah, and Cheyenne Tunaley for extension of the deadline by which to file timely proofs of claim is granted. Tunaleys, and each of them, shall have to and including September 15, 1999 to file proofs of claim in the case. If such claims are filed by such date, they will be considered timely filed claims.

SO ORDERED THIS 18th DAY OF AUGUST 1999.

William L. Edmonds
U.S. Bankruptcy Judge