

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
IOWA

IN RE:)

) Chapter 7

KEVIN HARBAUGH)

) Bankruptcy No. 02-04484

Debtor.)

ORDER RE REQUEST FOR ENLARGMENT OF TIME

This matter came before the undersigned for telephonic hearing on April 24, 2003. Debtor Kevin Harbaugh appeared by Attorney Brian Peters. Attorney Jean Curtis represented Shelly Le Grand as next friend for Taryn Le Grand. The matter before the Court is Ms. Le Grand's Request for Enlargement of Time. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), (J) or (K).

STATEMENT OF THE CASE

Debtor filed his Chapter 7 petition on December 19, 2002. The following day, the Iowa District Court in Dubuque County entered an Order of Judgment pursuant to a Confession of Judgment filed by Debtor on December 18, 2002 in Ms. Le Grand's action as next friend for Taryn Le Grand. The lawsuit is based upon intentional infliction of emotional distress arising from Debtor's sexual abuse of his daughter, Taryn, who is now eight years old. The parties agree that the Order of Judgment is ineffective as it was entered postpetition in violation of the automatic stay.

The deadline to file a dischargeability complaint in this Chapter 7 case was Friday, April 11, 2003. On that date, Attorney Curtis faxed a document to the Bankruptcy Clerk's office entitled "Plaintiff Judgment Creditor's Objection to Discharge." Although not captioned as an adversary complaint, the document asserts the Dubuque County judgment is excepted from discharge based on § 523(a)(6), which excepts from discharge debts from willful and malicious injury. It also asserts Debtor has failed to disclose all his income in his schedules, which can be interpreted as an objection to discharge under § 727(a).

When the fax was received on April 11, 2003, the Court directed the Clerk's office to inform Attorney Curtis that faxed documents are not accepted for filing and that the document was improperly captioned. Attorney Curtis was tied up in court the remainder of that day and was unable to cure the deficiencies and file an acceptable dischargeability complaint in time to meet the deadline. On April 16, 2003, Ms. Le Grand filed the instant request for enlargement of time. She requests the Court enlarge the time to allow her to file and serve an adversary complaint objecting to the discharge of her claim.

Debtor lists Shelly Le Grand as an unsecured creditor with a "judgment in personal injury case" incurred in 2002 in the amount of \$25,000. Ms. Le Grand is listed on the mailing matrix with Attorney Curtis' address. Taryn Le Grand is not listed as a creditor or on the matrix. Debtor failed to list the Iowa District Court lawsuit in his Statement of Affairs at paragraph 4. The scheduled claim of \$25,000 for Ms. Le Grand is the largest unsecured claim listed in Debtor's schedules. Total unsecured claims scheduled equal \$53,049.

CONCLUSIONS OF LAW

This Court's local rule addressing fax filing is Rule 5005- 4(b), which states:

- (1) Filing papers by FAX is not permitted. Material for filing may be sent to the clerk by facsimile transmission in limited emergency situations only after express authorization by the court.

The Federal Rules of Civil Procedure authorize courts to adopt local rules to allow electronic filing provided the method of doing so is consistent with the Federal Judicial Conference's technical standards. See Fed. R. Civ. P. 5(e). The Conference has authorized courts to accept facsimile filings in compelling circumstances. See Reports of Proceedings of the Judicial Conference of the U.S. 52-53 (1991); Beal Bank v. Waters Edge Ltd. Partnership, 248 B.R. 668, 698 (D. Mass. 2000); 8th Cir. R. 25A(c).

Debt of the kind specified in § 523(a)(2), (4), (6) or (15) is discharged unless a creditor brings an adversary action to determine such debt is excepted from discharge. 11 U.S.C.

§ 523(c)(1). The adversary complaint must be filed not later than 60 days following the first date set for the § 341 meeting of creditors. Fed. R. Bankr. P. 4007(c). Rule 4007(c) requires any motion for enlargement of time to be filed before the deadline has expired. These mandates are also applicable to complaints objecting to the discharge of the debtor under § 727(a) pursuant to Rule 4004. Thus, a party objecting to the discharge of the debtor or seeking to except a debt from discharge must file a complaint within 60 days after the first date set for the meeting of creditors. Any extension of time must be by motion filed before the expiration of the 60 day period.

In this case, the final date to file a complaint or request an extension was April 11, 2003. Attorney Curtis faxed the document entitled "Plaintiff Judgment Creditor's Objection to Discharge" on that date. The Request for Enlargement of time was filed April 16, 2003.

Rules 4007(c) and 4004 are analogous to statutes of limitations and strictly construed. In re Marino, 37 F.3d 1354, 1358 (9th Cir. 1994); In re Bozeman, 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998). The principle is well established that the bankruptcy court has no discretion under Rule 4007(c) to enlarge the time for filing a dischargeability complaint if the request to enlarge time is made after the deadline for filing the complaint. In re Hunt, 209 B.R. 127, 128 (Bankr. W.D. Ark. 1997); In re Maher, 51 B.R. 848, 852 (Bankr. N.D. Iowa 1985).

The foregoing deadlines do not apply with respect to adversary actions by creditors who do not timely receive actual notice of the bankruptcy case. In re Wilborn, 205 B.R. 202, 207 (B.A.P. 9th Cir. 1996). Generally, a debtor may schedule a creditor in care of the creditor's attorney for the purpose of providing notice of the case, provided that the attorney is the creditor's agent in matters related to the Chapter 7 case. In re Schicke, 290 B.R. 792, 801 (B.A.P. 10th Cir. 2003). Such notice to the attorney is imputed to the client. Id.

There are exceptions to this general rule. Notice sent to a creditor's attorney on behalf of another client creditor is not deemed sufficient notice of the bankruptcy filing. See Maldonado v. Ramirez, 757 F.2d 48 (3d Cir. 1985). Additionally, an attorney who has represented a creditor in a state court proceeding does not, by virtue of that relationship alone, represent that creditor with respect to the same debt in bankruptcy court. In re Poole, 242 B.R. 104, 111 (Bankr. N.D. Ga. 1999); In re Fauchier, 71 B.R. 212, 215 (B.A.P. 9th Cir. 1987) (finding notice to attorney who had represented creditors in state court two years earlier was not sufficient notice to creditors).

Under Section 523(a)(3)(B), creditors who are not listed or scheduled in a bankruptcy case may file a dischargeability complaint after the time limitation of Rule 4004 or 4007. In re Schicke, 290 B.R. 792, 7979 (B.A.P. 10th Cir. 2003). This section applies if the creditor did not receive formal notice of the case, unless the creditor actually knows of the case and fails to timely protect its rights. Id. at 801. Notice must be reasonably calculated to apprise creditors of the pendency of the case and afford them an opportunity to present objections to discharge. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The Court

must look at the totality of the circumstances in determining whether notice was reasonable. In re O'Shaughnessy,

252 B.R. 722, 730 (Bankr. N.D. Ill. 2000). One circumstance to consider is whether alleged inadequacies in the notice prejudiced the creditor. Id.

An alternate source of authority for allowing an untimely complaint is the court's equitable power under § 105(a). Wilborn, 205 B.R. at 208. These powers, of course, must be exercised within the confines of the Bankruptcy Code. Norwest Bank v. Ahlers, 485 U.S. 197, 206 (1988).

ANALYSIS

Attorney Curtis failed to obtain express authorization to fax Ms. Le Grand's objection to discharge as required by Local Rule 5005-4(b)(1). The document was not captioned as an adversary proceeding. Filing papers by FAX is not permitted. The Court finds the document faxed to the Clerk's office on April 11, 2003 was not properly filed and is inadequate to constitute a timely adversary complaint.

Ms. Le Grand as next friend to Taryn Le Grand received formal notice of Debtor's bankruptcy case through her attorney. Her claim is scheduled as an unsecured claim. She is listed on the matrix to receive notice at Attorney Curtis' address. Attorney Curtis is Ms. Le Grand's attorney in matters related to the Iowa District Court action against Debtor. Sending Ms. Le Grand's notice of the case in care of Attorney Curtis was reasonable and proper in these circumstances.

Attorney Curtis was served initial notice of the case by first class mail on December 22, 2002 as shown by the certificate of service docketed in Debtor's case. The parties offered no evidence to refute this. Ms. Le Grand is imputed with the notice served on her attorney. She had 60 days after the meeting of creditors to file a dischargeability complaint.

Ms. Le Grand asserts she did not know her claim was included in the case until early April when her attorney requested copies of the schedules from Debtor's attorney. Debtor's attorney acknowledges that Attorney Curtis requested copies on April 1, 2003. However, the initial formal notice to Attorney Curtis is imputed to her client, Ms. Le Grand. Thus, the Court finds that she had sufficient notice of the case to file an adversary complaint before the April 11 deadline, but failed to timely protect her rights. The Court has no discretion to enlarge the time to file a dischargeability complaint or to allow Ms. Le Grand to file an untimely complaint. Equitable powers under § 105(a) or any other theory may not be applied to override the strict mandates of the Bankruptcy Code regarding deadlines for dischargeability complaints.

WHEREFORE, the Request for Enlargement of time on behalf of Creditor Shelly Le Grand as next friend for Taryn Le Grand is DENIED.

FURTHER, the claim of Shelly Le Grand as next friend for Taryn Le Grand is included in Debtor's discharge.

SO ORDERED this 8th day of May, 2003.

CHIEF BANKRUPTCY JUDGE

PAUL J. KILBURG