UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

In re:

JOSEPH P. MANAUSA,

CASE NO.: 13-40282-KKS
CHAPTER: 7

Debtor.
_________________________________/

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO OBJECT TO DISCHARGE OF DEBTOR (Doc. 23)

THIS MATTER is before the Court upon the *Motion for Extension of Time to Object to Discharge of Debtor* (the "Motion to Extend," Doc. 23) filed on behalf of Cadence Bank, N.A. ("Cadence"), the Debtor's Response in Opposition (Doc. 32), and the Affidavits filed in support of the Motion to Extend (Doc. 33). At a duly noticed hearing on September 12, 2013, the Court heard argument of counsel for Cadence and the Debtor and took the matter under advisement. After reviewing the applicable case law, the record and the pleadings, including Cadence's Notice of Filing Supplemental Authority (Doc. 39), this Court finds that the Motion to Extend should be granted.

FINDINGS OF FACT

At the hearing the parties acknowledged that the following facts material to the matter before the Court are not in dispute:

1. Cadence holds an unsecured claim against the Debtor based on the Debtor's personal guaranty of a debt of Manausa Holdings, LLC. As of June 2, 2013, the amount Cadence claimed due was approximately $5,598,523.75. Cadence filed suit against the Debtor, Manausa Holdings, LLC and others in federal district court on January 23, 2012, seeking a money judgment against the Debtor and to foreclose its mortgage against property

owned by the LLC (the "Federal Action") (Doc. 23).[1] When Cadence filed the Federal Action it was represented by attorney Michael Bist. On May 23, 2012, Cadence changed attorneys in the Federal Action; attorney Bist withdrew and attorney John Anthony was substituted in his place.

2. The Debtor filed his Chapter 7 petition, Schedules and Statement of Financial Affairs (Doc. 1), including the Verification of Creditor Matrix, on May 3, 2013 (Doc. 1-1). The Debtor listed Cadence as a creditor on his Schedule F and also on Schedule H where he listed co-debtors. In both places Cadence's name and address are shown as: "Cadence Bank, N.A., as successor by merger with Superior Bank, N.A. c/o Michael P. Bist, Esq.," with Mr. Bist's address listed below. The Debtor listed the Federal Suit in answer to Question 4 of the SOFA which requires listing all suits or proceedings pending as of the date of the petition, but neither Mr. Bist nor Mr. Anthony are listed there, nor are there any addresses for them or Cadence.

3. Cadence's address does not appear anywhere on the Schedules, Matrix or SOFA.

4. The Debtor did not list Cadence's then attorney in the Federal Action, John Anthony, anywhere in his Schedules or Statement of Financial Affairs. Mr. Anthony's name is on the Debtor's Matrix as: "John Anthony, Esq., Anthony and Partners," with Mr. Anthony's office address listed below. There is nothing on the Matrix or in any of the Debtor's other bankruptcy papers linking Mr. Anthony to Cadence.

5. On June 23, 2013, almost two months post-petition, Cadence filed a motion in the Federal Action seeking summary judgment against the Debtor on his personal guaranty, as well as against the LLC on its mortgage.

---

[1] United States District Court for the Northern District of Florida, Case No, 4:12-cv-00038-WS-CAS.

6. The § 341 meeting notice was issued on May 4, 2013 and mailed on May 8, 2013 by the Bankruptcy Noticing Center (BNC) to all parties, including attorneys Anthony and Bist, at the addresses listed for them on the Matrix. (Doc. 8). That notice advised of the August 2, 2013 deadline for filing complaints objecting to the Debtor's discharge. (Doc. 6). Because he no longer represented Cadence Mr. Bist apparently paid no attention to this notice, even if he received it. Mr. Anthony, his associate and their legal assistants swore in their Affidavits that none of them received any notices sent by the BNC. These Affidavits further state that the four individuals at the Anthony law firm who would have received mail and notice of the filing, did not. (Doc. 33).

7. Apparently due to an oversight, the Debtor did not file a Suggestion of Bankruptcy in the Federal Action when he filed his Chapter 7 petition. Even after Cadence filed its summary judgment motion the Debtor did not file or serve a Suggestion of Bankruptcy or immediately contact Cadence or its attorneys to advise that the motion was in violation of the automatic stay as to the Debtor. The only response to Cadence's motion for summary judgment came in the form of an email from Kyle Shaw, counsel for Michelle Manausa in the Federal Action, to Mr. Anthony's associate, Ms. Doucette, on August 1, 2013, at 12:53 p.m. requesting an extension of time to respond to the motion for summary judgment, "indicating that they believed the Federal Action was stayed by the Debtor's bankruptcy case. ..." (Doc.23). This email was the first notice to Cadence that the Debtor had filed bankruptcy.

8. This series of events left Cadence and its attorneys less than thirty-six hours within which to timely file a complaint objecting to the Debtor's discharge. Cadence, through Mr. Anthony's firm, filed its Motion to Extend the following Monday, August 5, 2013, one business day after the August 2, 2013 deadline.

9. The BNC sent at least three notices addressed to Cadence, care of Mr. Bist, whose address on those notices was correct. The BNC also sent the same three notices to Mr. Anthony, at the correct address for his firm, with no reference to Cadence.

CONCLUSIONS OF LAW

Cadence argues that it did not receive notice because its name was not associated with Mr. Anthony, its attorney at the time, and the only notices to which its name was attached went to its prior counsel, Mr. Bist. Cadence argues further that it would be inequitable to allow the Debtor to have an automatic discharge when he did not provide Cadence with actual notice of the bankruptcy case; he did not properly list Cadence in his bankruptcy papers or on the Matrix, nor did he give Cadence actual notice of the bankruptcy until the day before the relevant deadline expired. The Debtor argues that he properly sent notices to both Mr. Anthony and Mr. Bist, that this Court does not have the ability to extend the deadline to object to the discharge under the doctrine of equitable tolling, and that Cadence's Motion to Extend was filed too late because it was not filed before the expiration of the deadline.

Notice

The Debtor did not strictly comply with the pertinent noticing rules.

Bankruptcy Rule 1007(a) requires debtors in voluntary cases to file with the petition a list "containing the name and address of each entity included or to be included on Schedules D, E, F, G and H as prescribed by the Official Forms."[2] Official Bankruptcy Form 6, prescribed by the Judicial Conference of the United States, calls for the "name, mailing address, including zip code, and last four digits of any account number of all entities holding unsecured claims without priority against the debtor… as of the date of filing of the petition."[3]

---

[2] *See In re Barnes,* 326 B.R. 832, 838 (Bankr. M.D. Ala. 2005).
[3] *Id.*

The Debtor did not list Cadence's address or last four digits of any account number anywhere on its Schedules, SOFA or Matrix. The only way the Debtor listed Cadence was "c/o" Cadence's prior lawyer in the Federal Action, Mr. Bist.

The Debtor ultimately failed to sufficiently provide notice to Cadence as required under Bankruptcy Rule 1007(a) when it listed Cadence care of its prior attorney, and only listed Mr. Anthony on the Matrix without identifying the creditor-client on whose behalf the notices were sent to Mr. Anthony's firm by the BNC.

"Listing an attorney's name and address does not meet the requirements of Rule 1007. Moreover, courts which have considered this question have found that listing an attorney but not the creditor does not comply with the rules."[4] In *In re Greater Southeast Community. Hosp. Corp. I,* the debtor listed the attorney representing a creditor, but listed the attorney under the name of the wrong creditor. [5] As a result, the first creditor did not file a timely proof of claim. In granting that creditor's motion to file a late claim the bankruptcy court, citing to a decision out of the Third Circuit Court of Appeals, stated: "Notice sent to an authorized attorney or agent must at least signify the client for whom it is intended so that the attorney can know whom to advise to assert a claim in the bankruptcy."[6] The court held that the debtors, not the creditor, should bear the risk that the notice's failure to identify the creditor might lead to the law firm's failing to realize that the notice pertained to the creditor's claim.[7]

In *Maldonado v. Ramirez*, that court found notice to an attorney was insufficient to impute notice to a creditor where the notice *did not* reference the client at hand or the specific

---

[4] *In re Barnes,* 326 B.R. at 838 (citing *Carpet Services, Inc. v. Hutchison (In re Hutchison),* 187 B.R. 533, 536 (Bankr. S.D. Tex. 1995)); *In re Szczepanik,* 146 B.R. 905, 912 (Bankr. E.D.N.Y. 1992); *In re Meek v. Sharp (In re Meek),* 126 B.R. 1021, 1022-23 (Bankr. E.D.Ark. 1991).
[5] *In re Greater Southeast Cmty. Hosp. Corp. I*, 324 B.R. 162, 163 (Bankr. D.D.C. 2005).
[6] *Id.* (citing *Maldonado v. Ramirez*, 757 F.2d 48, 51 (3d Cir. 1985)).
[7] *Id.*

attorney involved.[8] The court in *In re Johnson,* faced with a similar situation, stated that "[n]otice sent to an attorney on behalf of a client is generally not reasonably calculated to inform a creditor of a bankruptcy case if the notice does not give any indication as to the identity of the real party in interest."[9] Because all notices directed to John Anthony and his firm failed to identify Cadence as the party represented, the notices were insufficient under Rule 1007(a).

In a recent ruling on an analogous issue, the Sixth Circuit Court of Appeals reversed decisions by the bankruptcy and district courts, and held that notice to a lawyer who had represented a creditor eight years earlier, but no longer represented her, was not sufficient due process to result in the discharge of the creditor's judgment claim.[10] In its ruling, the Sixth Circuit stated:

> Another way to think about it is to ask how someone "desirous of actually informing" the creditor would go about reaching him. *Jones v. Flowers,* 547 U.S. 220, 229 (2006). Would he choose the roundabout of notifying a law firm that worked for the creditor eight years ago, hoping it would forward the message? Doubtful, particularly when a more direct option remains untried: looking up the creditor's address and sending the notice there.[11]

The notice to Mr. Anthony on August 1 gave Cadence insufficient time within which to file an objection to discharge.

Notice of the Debtor's bankruptcy filing approximately thirty-six hours before the deadline to file complaints objecting to the Debtor's discharge was insufficient to satisfy

---

[8] *Maldonado v. Ramirez*, 757 F.2d at 51 (stating that notice sent to an authorized attorney must at least signify the client for whom it is intended so that the attorney can know whom to advise to assert a claim in the bankruptcy).

[9] *In re Johnson,* 02-18777-WHD, 2009 WL 6499334, at *2 (citing *In re Osman*¸ 164 B.R. 709, 715 (Bankr. S.D. Ga. 1993)).

[10] *Stephanie Lampe v. Kirk Kash,* 735 F.3d 942 (6th Cir. 2013).

[11] *Id.* at 943.

requirements of due process. It certainly did not give the twenty-eight days' notice required by the Bankruptcy Rules.[12]

Neither the Debtor nor Cadence cited any cases dealing with extensions of time to file § 727 complaints under Rule 4004(a). Several courts have considered how much notice a creditor needs in order to timely file an objection to dischargeability, which is governed by Rule 4007(a). In *Douglas Cnty. Bd. of Comm'rs v. Quarterman,* the court found four days' notice to be insufficient.[13] The court in *Tidwell v. Smith,* found notice given sixteen days before the deadline for dischargeability complaints and during the holiday season insufficient.[14] *In Mfrs. Hanover v. Dewalt*, actual notice of the bankruptcy filing given to an unscheduled creditor only seven days before the bar date for dischargeability complaints was insufficient.[15] In *Sophir Co. v. Heiney*, the court found eighteen days' notice was inadequate under bankruptcy rules and due process principles.[16] In *In re Walker*, an unrepresented creditor received notice of the debtor's bankruptcy through a conversation with a police detective twenty days before the bar date; the court found the twenty days inadequate notice for filing § 523 complaints.[17]

In *In re Bateman*, the Creditor received less than thirty days' notice of the deadline to file § 523 complaints.[18] There the creditor received twenty-six days actual notice and did not file a motion before the bar date passed.[19] The court held twenty-six days of actual notice was

[12] Rule 4004(a) pertaining to the time for objecting to discharge states, "[a]t least 28 days' notice of the time so fixed shall be given to the United States trustee and all creditors."
[13] *Douglas Cnty. Bd. of Comm'rs v. Quarterman (In re Quarterman),*BR 09-65818-MGD, 2010 WL 4642471 (Bankr. N.D. Ga., Aug. 23, 2010).
[14] *Tidwell v. Smith (In re Smith),* 582 F.3d 767, 779–80 (7th. Cir. 2009).
[15] *Mfrs Hanover v. Dewalt (In re Dewalt),* 961 F.2d 848, 851 (9th Cir. 1992).
[16] *Sophir Co. v. Heiney (In re Heiney),* 194 B.R. 898, 902–03 (D. Colo. 1996) (finding 30 days' notice necessary).
[17] *In re Walker,* 149 B.R. 511, 515–17 (Bankr. N.D. Ill. 1992).
[18] *In re Bateman*, 254 B.R. 866, 870 (Bankr. D. MD. 2000) (holding the sixty day deadline applies regardless of the thirty day notice if the creditor has actual notice of a bankruptcy proceeding).
[19] *Id.*

enough and denied the motion for extension.[20] But twenty-six days is obviously a far cry from the thirty-six hours Cadence received prior to the August 2, 2013 bar date.

The notices mailed to Mr. Anthony and his firm.

John Anthony and his firm filed four affidavits denying ever receiving any notice of the bankruptcy filing. The common law and this Court have long recognized the presumption that an item properly mailed was received by the addressee.[21] The presumption of receipt is rebuttable "by producing evidence which would support a finding of the non-existence of the presumed fact."[22]

Because the Debtor did not list Cadence on its Schedules or Matrix in accordance with Rule 1007(a), and the BNC notices were not addressed to Cadence care of Mr. Anthony, it is not necessary to determine whether the Affidavits filed by Mr. Anthony and his firm are sufficient to rebut the presumption that the notices mailed to Mr. Anthony were received.

Equitable Tolling

Both parties argued the issue of equitable tolling. Pursuant to Bankruptcy Rule 4004(a), a complaint, or a motion to extend time for filing a complaint, objecting to a debtor's discharge must be filed no later than 60 days after the first date set for the § 341 meeting of creditors, which in this case was August 2, 2013. Rule 9006(b)(3) expressly limits the circumstances under which courts may enlarge the time to file § 727 complaints to those exceptions listed in Rule 4004(a).[23]

Case law has been evolving in the Eleventh Circuit on the issue of whether equitable tolling applies to an extension of time within which to file nondischargeability complaints

[20] *Id.* at 873.
[21] *In re Woods*, 260 B.R. 41, 44 (Bankr. N.D. Fla. 2001) (holding that a creditor is presumed to have received notice when notices were mailed by the Bankruptcy Noticing Center). *See also In re Euston*, 120 B.R. 228, 230 (Bankr. M.D. Fla. 1990); *In re Hobbs*, 141 B.R. 466, 468 (Bankr. N.D. Ga. 1992).
[22] *In re Hobbs*, 141 B.R. at 468.
[23] *In re Vercher*, 8:12-BK-17176-KRM, 2013 WL 3782937, at *1 (Bankr. M.D. Fla. July 18, 2013).

under § 523 since the Supreme Court ruled, in *Kontrick v. Ryan,* that the time limit in Rule 4004(a) is not jurisdictional.[24] Although these cases do not deal with filing complaints objecting to discharge under § 727, the legal theory is essentially the same.[25] Courts in other circuits have reached the same result.[26] In the cases cited, including the Eleventh Circuit's opinion in *Byrd v. Alton*, the creditors had received actual notice of the bankruptcy filings but nonetheless missed the deadlines for filing their complaints. In those cases, equitable tolling was the only avenue left.[27] Here, because Cadence did not receive notice of the Debtor's bankruptcy in time to file a timely § 727 complaint, or to file a motion for an extension of time before the deadline, it is unnecessary to determine whether equitable tolling should apply. For the reasons stated, it is

ORDERED:

1. The Motion for Extension of Time to Object to Discharge of Debtor filed by Cadence Bank, N.A. (Doc. 23) is GRANTED.

2. Cadence shall have fourteen (14) days from the date of this Order to file a complaint objecting to the Debtor's discharge.

DONE and ORDERED in Tallahassee, Florida this 12th day of December, 2013.

KAREN K. SPECIE
United States Bankruptcy Judge

cc: all parties in interest

[24] *Kontrick v. Ryan*, 540 U.S. 443, 124 S.CT. 906, 157 L.Ed.2d 867 (2004).

[25] *See, e.g., Donaghy, et. al. v. Vercher (In re Vercher)*, 2013 WL 3782937, at *1 ("[D]eadline in Rules 4004 and 4007 is not jurisdictional and is therefore subject to equitable considerations"); *United Cmty. Bank v. Harper (In re Harper),* 489 B.R. 251, 255-59 (Bankr. N.D. Ga. 2013) (discussing and comparing the Eleventh Circuit's opinion in *Byrd v. Alton,* 837 F.2d 457 (11th Cir. 1988) with the U.S. Supreme Court's later ruling in *Kontrick v Ryan); In re Moseley,* 470 B.R. 223 (Bankr. M.D. Fla. 2012). (holding that the deadline for filing complaint objecting to dischargeability is not subject to equitable tolling).

[26] *See, e.g., Anwar v. Johnson*, 720 F.3d 1183, 1187 (9th Cir. 2013); *In re Calinoiu,* 431 B.R. 121, 123-24 (Bankr. M.D. Pa. 2010).

[27] *See Byrd v. Alton*, 837 F.2d 457 (11th Cir. 1988); *See also, Anwar v. Johnson*, 720 F.3d 1183 (9th Cir. 2013).