

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

In re:

LARRY W. CONKLIN, JR. and
ALYSON F. CONKLIN,

Debtors.

Chapter 7

Case No. 99-00073-CH

ORDER - MOTION TO EXTEND TIME TO FILE COMPLAINT

Bilden Sav-Mor Drug's Motion to Extend Time for Filing Complaint to Dischargeability of Debt came on for hearing on June 10, 1999. Said creditor appeared by its attorney of record, August B. Landis, and the debtors appeared by their attorney of record, Gary R. Hassel. This matter was taken under advisement upon a briefing schedule.

The court has jurisdiction of this matter pursuant to 28 U.S.C. §157(b)(1) and §1334 and order of The United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. §157(a). This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A). The court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 7052.

FINDINGS OF FACTS

1. Debtors filed their voluntary Chapter 7 Petition on January 8, 1999.

2. Bildens Sav-Mor Drug (hereinafter Bilden) was scheduled as a creditor holding an unsecured nonpriority claim on Debtors' Schedule F in the amount of \$5,422.16. It was scheduled as a debt of the wife.

3. The Clerk of Court issued the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines on January 8, 1999. This notice stated that the meeting of creditors would be held on February 12, 1999.

4. Notice was also given that the deadline to file a complaint objecting to discharge of the debtors or to determine dischargeability of a debt was April 13, 1999.

5. Bilden filed its motion to extend time on April 13, 1999.

6. The basis for the motion to extend time is that this matter was originally referred to counsel in Boone, Iowa, who referred the matter to an attorney in Des Moines. This attorney declined the representation because of a conflict of interest and the matter was referred to present counsel for Bilden.

7. Bilden is in the pharmacy business operating in a county seat town in Iowa.

DISCUSSION

A. The Controlling Rules

Fed. R. Bankr. P. 9006(b)(3) provides in relevant part, as follows:

(3) Enlargement Limited. The court may enlarge the time for taking action under Rules... 4007(c)... only to the extent and under the conditions stated in those rules.

Fed. R. Bankr. P. 4007 governs the procedural issues in a bankruptcy court's determination of whether a particular debt is dischargeable under 11 U.S.C. § 523.

Specifically, Rule 4007(c) provides in pertinent part:

Rule 4007. Determination of Dischargeability of a Debt

- (c) Time for Filing Complaint Under § 523(c) in Chapter 7 Liquidation... Notice of Time Fixed. A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a) . . . On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

B. Timeliness of the Motion

The sixtieth day following the February 12, 1999 meeting of creditors in the instant case was April 13, 1999. The Clerk of Court's Notice of Commencement of Case correctly established April 13, 1999 as the last date for creditors to file complaints to determine the dischargeability of their particular debts. Bilden's motion was filed with the Clerk of Court and served on Debtor's counsel on April 13, 1999, in compliance with the requirement of Rule 4007(c) that such "motion(s) shall be made before the time has expired." See, In re Cirkinyan, 192 B.R. 643, 645-47 (D.N.J. 1996)(Reversing and remanding bankruptcy court's denial of creditor's motion to extend time for filing complaint objecting to dischargeability under 11 U.S.C. § 523 (a)(2), (4) and (6), where Complaint was served on debtor's counsel via telefax on final day of relevant time period, and filed complaint with clerk of court the following day.) As stated by the Cirkinyan court:

[T]hough this may appear to be a purely procedural controversy, hidden just below the surface are the merits: the rule adopted by the Bankruptcy Court assured that the debts in dispute would be discharged without an opportunity for challenge by the creditors. As a general matter, however, procedural rules should be interpreted in favor of permitting the merits of the claims to be heard. Cf. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"). The decisions of the

various courts which have addressed Rule 4007(c) reflect this idea, for regardless of the conclusion reached by each court, the creditor has prevailed and was afforded an opportunity to present his claim. *See, e.g., In re Adams*, 164 B.R. at 59 (“made” held to mean “served” where creditor served motion before the 60 day period had elapsed but filed it afterward); *In re Friscia*, 123 B.R. at 11 (same); *In re Coggin*, 30 F.3d at 1451 (“made” held to mean “filed” where creditor filed motion before 60 day period had elapsed but served it afterward).

In re Cirkinyan, 192 B.R. at 646. The fact that the filing occurred on the last day of the relevant time period does not render Bilden’s motion untimely. Bilden’s motion was timely filed.

C. Existence of Cause

As Bilden’s motion was timely filed, the remaining question is whether “cause” exists for the requested extension. The determination of whether “cause” exists in connection with a motion for extension of time under Federal Rule of Bankruptcy Procedure 4007(c) is within the discretion of the bankruptcy court in the first instance. In re Davis, 195 B.R. 422, 423-24 (Bankr. W.D. Mo. 1996) *citing* In re James, 187 B.R. 395, 396 (Bankr. N.D. Ga 1995) *and* In re Farhid, 171 B.R. 94, 96 (N.D. Cal. 1994).

Courts liberally construe what constitutes “cause” in the context of a motion seeking an extension of time, so long as the pertinent creditor has exhibited some minimum degree of diligence prior to seeking such an extension. *See* In re Davis, 195 B.R. at 424. As the term “cause” is not defined, courts have looked to various factors in determining whether “cause” is present in connection with a requested extension of time under Rule 4007(c):

[S]uch courts look at: (1) the adequacy of the notice provided; (2) the source of the delay and the sophistication of the creditor; (3) the prejudice, if any, that will inure to the debtor should the objection be allowed; (4) the

resultant burden upon efficient court administration; (5) whether the creditor acted in good faith; and (6) whether clients should be penalized for the mistakes of their counsel.

In re James, 187 B.R. at 397.

In the instant case, the “minimum degree of diligence” required of Bilden is present. Bilden does not challenge the adequacy of the notice in this matter; Bilden was properly scheduled and received notice of the commencement of the case in the ordinary course. As to the source of the delay, this matter was originally referred to an attorney in Boone, who in turn referred the matter to an attorney in Des Moines. This attorney declined to represent Bilden due to a conflict of interest, and the matter was then referred to counsel of record. By the time counsel of record was contacted, the meeting of creditors had long since taken place. That avenue of obtaining information relevant to the determination of whether the filing of a Complaint was therefore not available.

Bilden is engaged in the pharmacy business, and is not a sophisticated business in the bankruptcy context. Bilden is not attempting to manipulate this court, or to somehow subvert the judicial system.

The prejudice to the debtors is minimal, if prejudice exists at all. The complaint, Pete Bilden v. Alyson F. Conklin, Adversary Proceeding Number 99-99072, was filed on May 13, 1999. This complaint objects to the dischargeability of the debt only as to Alyson F. Conklin pursuant to 11 U.S.C. §523(a)(2) and is therefore limited in scope.

The burden on court administration is negligible. The trial time in this matter would likely be less than a full day.

Bilden appears to have acted in good faith. Bilden diligently sought counsel, and through no fault of his own a motion to extend the time for filing a complaint was

required. It was a time consuming process as the matter of legal representation moved from one legal firm to another.

Procedural rules should be interpreted in favor of permitting the merits of the claims to be heard. "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

Good cause has been shown and the motion to extend should be granted.

ORDER

IT IS ACCORDINGLY ORDERED, as follows:

(1) The motion to extend time for filing complaint filed by Bilden Sav-Mor Drug is sustained.

(2) The time within which said creditor may file a complaint objecting to the dischargeability of a debt is extended to and including May 13, 1999.

(3) The complaint filed on May 13, 1999 shall be regarded as having been filed on a timely basis.

Dated this _____ day of October, 1999

RUSSELL J. HILL, CHIEF JUDGE
U.S. BANKRUPTCY COURT