

UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

IN RE)
)
CLARENCE EDWIN MAXWELL) NO. 93-12234
)
Debtor) Chapter 13
)

MEMORANDUM OPINION

This Chapter 13 case is before the Court upon debtor's objection to the claim of Chattanooga Funeral Home. The voluntary petition, together with the required schedules and statements, and the proposed Chapter 13 Plan were filed June 17, 1993. Essentially, the debtor had only two creditors. A secured creditor held a first mortgage on the debtor's residence. The obligation secured by the mortgage was substantially in arrears at the time this case was commenced. The other creditor was Chattanooga Funeral Home, holding an unsecured claim in the amount of \$5,400.00, according to the debtor's schedules. The Chapter 13 Plan proposed payment in full to both of these creditors.

Although the proof was somewhat lacking on this point, the evidence is convincing that notice of the bankruptcy was mailed to Chattanooga Funeral Home at its correct street address on June 23, 1993. The meeting of creditors called pursuant to 11 U.S.C. §341 occurred on July 21, 1993, as scheduled.

Bankruptcy Rule 3002 provides that a proof of claim in a Chapter 13 case shall be filed within ninety (90) days after the first date set for the meeting of creditors with certain enumerated

exceptions, none of which are applicable in the present case. Of course, the Bankruptcy Rules, particularly Rule 3002, contemplate that proper and timely notices are sent and received. *Merrill, Lynch, Pierce, Fenner & Smith v. Dodd*, 82 B.R. 924 (N.D. Ill. 1987).

Chattanooga Funeral Home did not file a proof of claim until April 28, 1994. Thus, the proof of claim was clearly not filed within the time allowed by Bankruptcy Rule 3002(c).

Subsequent to the filing of the petition, the debtor has sold his real property pursuant to 11 U.S.C. §362, conditioned upon the Chapter 13 Trustee reserving sufficient proceeds from the sale to pay the disputed claim of Chattanooga Funeral Home.

According to the debtor's Motion to Sell Real Estate, the debtor had substantial equity in the property over and above the first mortgage and the exemptions which the debtor could lawfully claim in the property.

As previously stated, the evidence is convincing that proper notice was sent to Chattanooga Funeral Home. The evidence is equally convincing that Chattanooga Funeral Home did not receive notice of this case until early March of 1994. Mr. George Tucker, the general manager of Chattanooga Funeral Home, testified that during the relevant time period, one of his functions was to open the mail received by Chattanooga Funeral Home and to review the correspondence received. He testified that during the last two weeks of June, 1993 and the first week of July, 1993, he was not

absent from work for vacation or illness. He further testified that during that time he conducted his regular duties, including his duties with respect to the mail, on a daily basis, except for Saturday and Sunday. He testified that during that time he did not see any notice of this bankruptcy proceeding in the mail addressed to Chattanooga Funeral Home and that he would have recognized any such notice.

It is relevant to note that prior to the petition having been filed in this Court, Chattanooga Funeral Home had sued the debtor in Hamilton County Circuit Court. Chattanooga Funeral Home, a Tennessee corporation, was represented in the state proceeding, as in these proceedings, by Attorney Jes Beard. There is no suggestion that Attorney Beard had knowledge of the bankruptcy case prior to March, 1994.

Under Federal common law, proof of mailing to the correct address with sufficient postage affixed creates a presumption of receipt. *Rosenthal v. Walker*, 111 U.S. 185, 4 S.Ct. 382, 28 L.Ed. 395 (1884). However, the presumption has no probative effect once it is rebutted. *Bratton v. Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114 (6th Cir. 1985), FED. R. EVID. 301.

Both parties have cited Bankruptcy Rule 9006 for the proposition that the time limitations of Rule 3002(c) may be enlarged if the failure to timely file was a result of excusable neglect. Non receipt of notice would clearly constitute excusable neglect. *Yoder, supra* at 1118. It would appear that the Court's power to enlarge the time for filing a proof of claim in a Chapter

13 case is limited by Bankruptcy Rule 9006(b)(3). Indeed, if Chattanooga Funeral Home had not adequately rebutted the presumption of receipt, its claim would be disallowed and the debt discharged. *In re Morelock*, 151 B.R. 121 (Bankr. N. D. Ohio 1992); *In re Euston*, 120 B.R. 228 (Bankr. M. D. Fla. 1990)

Nevertheless, equitable principles as well as due process permit the Court to examine the facts and circumstances of the relationship between this debtor and this creditor. *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087 (6th Cir. 1990); *In re Cole*, 146 B.R. 837 (D. Colo., 1992); *In re Anderson*, 159 B.R. 830 (Bkrtcy. N.D. Ill. 1993). Thus, the Court concludes that the creditor's claim may be allowed despite the late filing of the proof of claim.

Of course, the debtor can object to a filed claim on numerous grounds other than late filing. Bankruptcy Code §§ 501 & 502; *Blackburn-Bliss Trust v. Hudson Shipbuilders, Inc.* (*In re Hudson Shipbuilders, Inc.*), 794 F.2d 1051 (5th Cir. 1986). The creditor has filed a proof of claim, thus consenting to the jurisdiction of this Court to determine the claim. The debtor requested the Court to disallow the claim as late filed or to determine the amount of the claim. Without an adjudication on this claim at this time, the debtor would not receive his fresh start in this proceeding. He would undoubtedly be faced with garnishment proceedings from the Circuit Court action, or, at the very least, would be required to answer and defend the state court action. Similarly, the creditor would incur additional expense and

frustrating delays in attempting to recover the debt owed by a debtor with the means to pay.

Chattanooga Funeral Home obtained a judgment against Mr. Maxwell after he filed this chapter 13 case and in violation of automatic stay imposed by Bankruptcy Code § 362. The automatic stay applied without regard to whether Chattanooga Funeral Home had notice of Mr. Maxwell's chapter 13 case.

A judgment obtained in violation of the automatic stay is voidable. *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993); *Smith v. First America Bank (In re Smith)*, 876 F.2d 524 (6th Cir. 1989). Mr. Maxwell had the right to assume that the funeral home would not continue proceedings against him and thus have every right not to expect to have to appear for any notices to state court. Mr. Maxwell should not have a judgment of record against him that appears to be enforceable and the Court holds that the Circuit Court judgment of March 2, 1994, is void and unenforceable and directs the creditor to take such action as to indicate that on the record of that court.

From the proof in this record, the Court finds that as of the date of this petition the debtor was indebted to Chattanooga Funeral Home in the amount of \$5,264.88.

The contract between the parties provides that if the principal balance has not been paid in full within seven (7) days after the date indicated, which is thirty (30) days after the date of the contract, then a one-time default charge of ten percent

(10%) of the unpaid balance of the principal will be imposed. The Court finds that without any basis for the reasonableness of such a one-time charge that that charge is unenforceable. Further, there having been no proof as to the reasonableness of such a one-time charge, the Court would hold that, in this case, it is not appropriate.

Instead, the funeral home has taken the position that it is entitled to pre-petition interest on this account. Because of the suggestion in the contract that ten percent (10%) is payable immediately, the Court exercises its discretion and does not award pre-petition interest. Tenn. Code Ann. §47-14-123; *Howard G. Lewis Constr. Co. v. Lee*, 830 S.W.2d 60 (Tenn. App. 1991).

The contract between the parties allows Chattanooga Funeral Home reasonable attorneys' fees from the debtor in this case. Because of the unique circumstances of this case relating to notice and lack of receipt of notice, the Court finds that Chattanooga Funeral Home is entitled to recover from the debtor the amount of \$750.00 as reasonable attorneys' fees. The Court recognizes that Chattanooga Funeral Home may actually have incurred or will incur a greater attorneys' fee because of the contingency fee agreement with its attorney.

As Mr. Beard has indicated, perhaps this contingency fee allows him to recover more in one case than he might recover in another case based upon the Lodestar approach, but the contract between Chattanooga Funeral Home and the debtor requires the debtor to pay a reasonable fee for services rendered in the collection of

this case and does not contemplate that the debtor will make up the shortfall in some other case.

Obliquely, the debtor has seemed to request of this Court some reduction in the claim of Chattanooga Funeral Home against the debtor because of some ill-defined agreement, not particularly well stated and not before this Court, between the conservator of Mr. Maxwell and a former wife.

As was pointed out during the proof, Chattanooga Funeral Home was not a party to that agreement. Chattanooga Funeral Home's contract is with Mr. Maxwell. If Mr. Maxwell or his conservator is entitled to recover back against his former wife, this judgment will not preclude him from doing so, but neither will it reduce the claim of Chattanooga Funeral Home.

The foregoing constitutes findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

An order will be entered allowing the claim of Chattanooga Funeral Home in the amount of \$6,014.88, and directing the Chapter 13 trustee to pay said claim out of the funds on hand, and further directing the Chapter 13 trustee to proceed with the closing of the case. As was also indicated, the order will direct the Chattanooga Funeral Home to take such action as would be necessary in the state court to expunge the post-petition state judgment.

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 7/6/94]

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ORDER

For the reasons stated in a Memorandum Opinion filed contemporaneously herewith,

It is ORDERED that the claim of Chattanooga Funeral Home shall be allowed in the amount of \$6,014.88;

It is further ORDERED that the Chapter 13 trustee is directed to pay said claim out of the funds on hand from the sale of the debtor's residence;

It is further ORDERED that the Chapter 13 trustee is directed to proceed with the closing of this case; and

It is further ORDERED that Chattanooga Funeral Home take such action as may be necessary to expunge the Circuit Court Judgment entered against the debtor on or about March 2, 1994.

ENTER:

BY THE COURT

[entered 7/6/94]

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE