UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re: No. 00-12712
Chapter 7

MARY GREEN HARTMAN

Debtor

MEMORANDUM

On February 1, 2002, the court entered an order granting the debtor, Mary Green Hartman, a discharge of her debts. 11 U.S.C. §§ 524 & 727; Fed. R. Bankr. P. 4004. A creditor, Dale F. Cook, has filed a motion to extend the time to appeal the discharge. The motion states that it is filed as a precautionary measure in the event the discharge is treated as a final order.

A creditor or debtor who loses an objection to discharge under § 727 will have standing to appeal the judgment in the adversary proceeding, but Mrs. Hartman's discharge was routinely entered when there was no reason for withholding it. 11 U.S.C. § 727; Fed. R. Bankr. P. 7001(4) & 4004(c)(1). Nevertheless, the questions of whether the discharge is appealable and whether Mr. Cook has standing to appeal should be left to the district court. If this court denied the motion for extension on either ground, it would unnecessarily complicate and delay matters. For the purpose of ruling on Mr. Cook's motion, the court assumes the discharge is appealable and Mr. Cook has standing to appeal.

As a general rule, the court can extend the appeal period only if the motion to extend is filed before the end of the original appeal period, which is ten days after entry of the order or judgment to be appealed. Fed. R. Bankr. P. 8002(a), (c). Mr. Cook did not file his motion to extend within the ten days after the discharge was entered. He filed the motion on the eleventh day, February 12, 2002.

The court can still grant the motion if Mr. Cook shows that his failure to file the appeal within ten days resulted from excusable neglect. Fed. R. Bankr. P. 8002(c). Mr. Cook's motion asserts excusable neglect on the ground that he did not receive notice of the discharge in time to allow proper preparation and timely filing of a notice of appeal. The motion does not state exactly when Mr. Cook received notice of the discharge. It states that before Mr. Cook received the discharge, he received two pieces of mail that were both postmarked February 6. Presumably Mr. Cook received those two pieces of mail no earlier than February 7. Thus, Mr. Cook would have received notice of the discharge no earlier than February 8. That would have allowed Mr. Cook a maximum of three days to decide whether to appeal, to prepare the notice of appeal, and to file the notice of appeal.

Courts rely on bankruptcy rule 9022 as support for the proposition that failure to receive notice of an order is not, by itself, sufficient to prove excusable neglect. Fed. R. Bankr. P. 9022(a); *In re Mayhew*, 223 B.R. 849 (D. R. I. 1998); *Gravel and Shea v. Vermont National Bank*, 162 B.R. 969 (D. Ver. 1993); *In re Wright Air Lines, Inc.*, 60 B.R.

15 (Bankr. N. D. Ohio 1986). The last sentence of Rule 9022(a) states the following rule:

> Lack of notice of the entry of an order:
> (1) does not prevent the time to appeal from running;
> (2) does not automatically relieve a party from the effect of failure to appeal within the time allowed; and
> (3) does not authorize the court to relieve a party from the effect of failure to appeal within the time allowed;
> except as permitted by Rule 8002(c).

This rule leads to the argument that Rule 8002(c) does not authorize the court to extend the time to appeal by treating lack of notice as sufficient to prove excusable neglect. In other words, since Rule 9022 provides that lack of notice is not a sufficient ground for extending the time to appeal, then the court cannot extend the time under Rule 8002(c) on the ground that lack of notice by itself proves excusable neglect. *In re Pabon Rodriguez*, 233 B.R. 212 (Bankr. D. P. R. 1999).

The logic can be questioned because the last sentence of Rule 9022(a) expressly refers to Rule 8002 as an exception. This leads to the argument that lack of notice can be sufficient to prove excusable neglect under Rule 8002(c), since the opposite result would mean that Rule 8002 is not an exception from Rule 9022(a). The problem with this reasoning is that it makes the exception swallow the rule. If lack of notice is sufficient to prove excusable neglect under Rule 8002(c), then lack of notice does authorize the court to extend the time to appeal, despite the general rule stated in the last sentence of Rule 9022(a).

To counter this problem, one might argue that treating lack of notice as sufficient to prove excusable neglect under Rule 8002(c) does not contradict Rule 9022(a) because excusable neglect is a different concept from lack of notice, even if lack of notice is the only evidence of excusable neglect. This elevates terminology over substance. A court's conclusion that lack of notice is sufficient to prove excusable neglect still amounts to extending the time to appeal solely due to lack of notice, and that is contrary to Rule 9022(a).

The court concludes that lack of notice by itself cannot prove excusable neglect under Rule 8002(c) because that would contradict Rule 9022(a). Of course, this does not make lack of notice irrelevant to excusable neglect under Rule 8002(c). Rule 9022(a) still refers to Rule 8002 as an exception. For this exception to have any meaning, it must mean that lack of notice is relevant to excusable neglect under Rule 8002(c). So long as proof of excusable neglect under Rule 8002(c) requires more proof than lack of notice, then treating lack of notice as relevant to excusable neglect makes the exception work exactly as it should.

The supreme court's decision in *Pioneer Investment* does not speak directly to this issue. The supreme court treated inadequate notice as a major factor in proving excusable neglect. But since the decision did not involve an appeal, Rule 9022(a) did not apply and did not raise the question of whether inadequate notice should be a factor in proving excusable neglect. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).

Of course, the last sentence of Rule 9022(a) leaves no doubt that lack of notice should be a factor in determining excusable neglect under Rule 8002(c), but how much of a factor should it be? At least one court has held that Rule 9022(a) requires the court to treat lack of notice as a weak factor in attempting to prove excusable neglect. *In re Taylor*, 217 B.R. 465 (Bankr. E. D. Pa. 1998). The last sentence of Rule 9022(a) makes lack of notice a factor in determining excusable neglect under Rule 8002(c); the court fails to see how or why Rule 9022(a) also requires lack of notice to be discounted compared to other factors.

The courts have relied on an additional line of reasoning to discount notice problems as a factor in excusable neglect. The courts have reasoned that a party has a duty to monitor a case so that it will know when an order is entered. *See, e.g., Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.)*, 896 F.2d 1189 (9th Cir. 1990); *Hall v. Community Health Center*, 772 F.2d 42 (3d Cir. 1985); *Prior Products, Inc. v. Southwest Wheel-NCL Co.*, 805 F.2d 543 (5th Cir. 1986); *Wechsler v. Equitable Life Assurance Society (In re Wechsler)*, 246 B.R. 490 (S. D. N. Y. 2000); *In re Taylor*, 217 B.R. 465 (Bankr. E. D. Pa. 1998) *aff'd* 220 B.R. 854 (E. D. Pa. 1998).

This reasoning makes more sense when the party did not receive notice of an order deciding a particular issue or dispute than it does when the party did not receive notice of a deadline and bankruptcy law required notice of the deadline for the fair administration of the bankruptcy case.

Consider the supreme court's decision in *Pioneer Investment*. *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). The case involved a creditor who failed to file a proof of claim before the claims bar date in a chapter 11 case. Notice of the claims bar date was included in the notice of the meeting of creditors, a notice the creditor received. In chapter 7 asset cases and chapter 13 cases, the notice of the meeting of creditors is the normal place for notice of the claims bar date. Fed. R. Bankr. P. 2002(a)(7), 2002(e) & 3002(c); Official Forms 9A, 9C, 9I. In chapter 11 cases, however, the claims bar date is usually set later in the case because a claim can be allowed without a filed proof of claim, and allowance or disallowance of claims becomes relevant only with regard to a proposed chapter 11 plan. 11 U.S.C. §§ 1111(a) & 1126(a).

The claims bar date may be set early in a chapter 11 case if the debtor elects treatment as a small business, which is supposed to shorten the time until confirmation of a plan, but that was not the situation in *Pioneer Investment*. 11 U.S.C. §§ 1121(e) & 1125(f); Fed. R. Bankr. P. 3003(c); Official Forms 9E & 9F. In *Pioneer Investment* the creditor and its lawyer both expected a claims bar date to be set. They had notice of the claims bar date in hand – in the notice of the meeting of creditors – but they failed to understand it. Nevertheless, the supreme court held that failure file a proof of claim before the bar date was the result of excusable neglect. The supreme court reasoned that the notice of the claims bar date was inadequate because it came at an unexpected time, in an unexpected place, and without any emphasis. Furthermore, as to excusable neglect,

the case had not progressed to the point that allowing the claim after the bar date adversely affected the administration of the chapter 11 case.

Pioneer Investment leaves no doubt that inadequate notice can be a major factor in finding excusable neglect in similar situations. The court is not saying that an interested party can ignore a deadline included in a required notice simply because the notice was not received, was received late, or was defective in some way. That would be a dangerous practice. *See* 11 U.S.C. § 523(a)(3); Fed. R. Bankr. P. 9006(b). The court's point relates to the importance of lack of notice as evidence of excusable neglect – when excusable neglect is relevant. In *Pioneer Investment* the supreme court treated failure to receive adequate notice as strong evidence of excusable neglect, despite the duty of a party to monitor events in the bankruptcy case, but the case involved a required notice of an important deadline in the administration of the bankruptcy case.

One might argue that the failure to monitor the docket was irrelevant in *Pioneer Investment* because the notice of the meeting of creditors came early in the bankruptcy case, before there was anything to monitor. The facts do not agree with this argument. The creditor and its lawyer immediately began wondering about deadlines, but the notice was confusing. The supreme court based its decision largely on this confusion.

In summary, when bankruptcy law requires notice of a deadline, and a party entitled to notice does not receive adequate notice of the deadline, the party's duty to

monitor events in the bankruptcy case may be entitled to little weight as an argument against excusable neglect (assuming excusable neglect is a ground for relief from the deadline).

The discharge order is not notice of a deadline. Deadlines set by rule or by statute apply to the discharge, but the discharge order does not expressly set deadlines and is not intended to give notice of deadlines. 11 U.S.C. § 727(d), (e); Fed. R. Bankr. P. 4004(g) & Official Form 18. Nevertheless, the discharge is the primary event in rearranging the debtor's legal relationships with his or her creditors. It ends the rights of most creditors to collect their debts from the debtor, and it replaces the automatic stay with the discharge injunction (except for property that remains in the bankruptcy estate). 11 U.S.C. §§ 362(c) & 524. Creditors expect to receive notice that a discharge has been granted, denied, or waived, and the law requires notice to all creditors. Fed. R. Bankr. P. 4004(g), 4006 & 2002.

Furthermore, most unsecured creditors have little reason to monitor a bankruptcy case to find out when the discharge is entered. The replacement of the automatic stay with the discharge injunction is important to creditors with liens on abandoned property and to unsecured creditors with non-dischargeable claims. 11 U.S.C. §§ 362(c), 524(a) & 554. The change is not important to unsecured creditors who do not have liens and whose claims are dischargeable. Of course, they are interested in the entry of the discharge, and they expect to be notified, but the exact timing is not critical.

This brings the court to the ultimate question of whether it should extend the appeal deadline on the basis of excusable neglect. In *Pioneer Investment* the supreme court set out general factors the courts should consider in deciding whether there was excusable neglect: (1) the causes of the delay; (2) whether the movant had reasonable control over the causes of the delay; (3) whether the movant acted in good faith; (4) the length of the delay; (5) the impact of the delay on the judicial proceedings; and (6) the prejudice to other parties. *Pioneer Investment*, 113 S.Ct. 1489, 1498.

Factors (3) through (4) do not show any reason for denying the extension. The court sees no prejudice to other parties as a result of the delay and little or no impact on the administration of the bankruptcy case. Mr. Cook has several other motions pending. Allowing Mr. Cook the opportunity to appeal the discharge order is not likely to delay the administration of the bankruptcy case any more than it will be delayed by other appeals. If there is any prejudice to Mrs. Hartman or creditors, it may be confusion regarding the effect of an appeal on the discharge. The court can deal with that problem when and if it arises.

Mr. Cook apparently acted in good faith; at least, there is no evidence to show otherwise. Finally, the delay was only one day. The court fails to see how a delay of one day can prejudice anyone. The time limits on appeal are not for the purpose of protecting appellate court from having to decide appeals on the merits.

Mr. Cook asserts only one cause of the delay, the delay in receiving notice of the discharge. The delay in receiving notice is relevant to excusable neglect, though it is not sufficient by itself to prove excusable neglect under Rule 8002(c). In light of the other relevant facts, however, the court finds the delay in filing the notice of appeal resulted from excusable neglect.

The court will enter an order extending the time to file a notice of appeal from the discharge.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 4/8/02]