

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-31860

JUNIOR DALE SUTTON
BETTY JO SUTTON

Debtors

**MEMORANDUM ON WRITTEN EXCEPTIONS
TO PARTIAL DISALLOWANCE OF CLAIMS**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This contested matter is before the court upon the Written Exceptions to Partial Disallowance of Claims (Exceptions) filed by The Community Bank of East Tennessee (Community Bank) on October 28, 2004, asking the court to reconsider the partial disallowance of two unsecured claims. The hearing on the Exceptions was held on November 24, 2004, and the Exceptions were overruled orally from the bench. For clarification purposes, the court is issuing this Memorandum to accompany the Order emanating from the hearing.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(B) (West 2004).

I

The Debtors filed the Voluntary Petition commencing their Chapter 13 bankruptcy case on April 2, 2004, within which they listed two automobile loans with Community Bank, one secured by a 1999 Dodge Intrepid automobile (Intrepid) and the other by a 1997 Ford F-150 truck (Ford). In their proposed sixty-month Chapter 13 Plan, the Debtors valued the Intrepid at \$5,000.00, to be paid in monthly payments of \$175.00 plus 10.5% interest. The Debtors valued the Ford at \$5,112.00 and proposed payments of \$175.00 per month, together with 10.5% interest. Following the resolution of objections to confirmation filed by the Chapter 13 Trustee and Pioneer Credit Company, the Order Confirming Chapter 13 Plan was entered on August 19, 2004. The deadline for non-governmental entities to file proofs of claim was August 4, 2004. On August 9, 2004, Community Bank filed a Proof of Claim in

the amount of \$5,472.15 for the Intrepid loan and a Proof of Claim in the amount of \$5,392.56 for the Ford loan (collectively, Proofs of Claim).¹

On October 19, 2004, the Chapter 13 Trustee submitted two Orders Partially Disallowing Late Filed Claim (collectively, Orders), asking the court to disallow the unsecured portion of Community Bank's Proofs of Claim.² The Orders, which were entered by the court on October 25, 2004, provided that Community Bank could file written exceptions within thirty days of entry. Community Bank filed its Exceptions on October 28, 2004, arguing that its Proofs of Claim were filed late due to excusable neglect and asking the court to overrule the Orders disallowing its unsecured claims.

II

Community Bank's Proofs of Claim were filed on August 9, 2004, five days after the August 4, 2004 deadline. Thus, they were not timely filed, so the unsecured portions of the claims, in the amounts of \$472.15 and \$280.56, must be disallowed.³ Section 502 of the Bankruptcy Code states, in material part:

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects.

¹ On August 9, 2004, Community Bank also filed a Motion to Permit Late Filing of Proof of Claim, asking the court to allow the Proofs of Claim, in spite of their being filed beyond the bar date. This Motion, which was scheduled for hearing on September 1, 2004, was withdrawn, and the hearing stricken.

² The unsecured portion of the Intrepid claim is \$472.15, and the unsecured portion of the Ford claim is \$280.56.

³ No objection was raised by the Chapter 13 Trustee to the allowance of the secured portion of Community Bank's claims.

(b) . . . [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim in such amount, except to the extent that—

. . . .

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title⁴ or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide.

11 U.S.C.A. § 502 (West 2004). Additionally, Federal Rule of Bankruptcy Procedure 3002(c) governs the time for filing proofs of claim, stating that “[i]n a . . . chapter 13 individual’s debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors” FED. R. BANKR. P. 3002(c).⁵ “Together, § 502(a) and Rule 3002(c) operate as a ‘strict statute of limitations’” concerning the filing of claims. *In re Windom*, 284 B.R. 644, 646 (Bankr. E.D. Tenn. 2002) (quoting *SouthTrust Bankcard Ctr. v. Curenton (In re Curenton)*, 205 B.R. 967, 970 (Bankr. M.D. Ala. 1995)).

This is an uncompromising deadline, as evidenced by Rule 9006, which states that “[t]he court may enlarge the time for taking action under Rule[] . . . 3002(c) . . . *only* to the extent and under the conditions stated in [that] rule.” FED. R. BANKR. P. 9006(b)(3) (emphasis added). Accordingly, under the express terms of Rule 9006(b)(3), the court may

⁴ This statutory exception to discharge applies only to Chapter 7 cases, not Chapter 13 cases. See 11 U.S.C.A. § 103(b) (West 2004); *United States v. Chavis (In re Chavis)*, 47 F.3d 818, 823-24 (6th Cir. 1995); *In re Husmann*, 276 B.R. 596, 598 (Bankr. N.D. Ill. 2002); *In re Brogden*, 274 B.R. 287, 290 (Bankr. M.D. Tenn. 2001); *In re Lang*, 196 B.R. 528, 530 (D. Ariz. 1996).

⁵ Rule 3002(c) also sets forth five exceptions to this time limit, none of which is applicable in this case.

not extend the time for filing proofs of claim after the fact. *See In re Brogden*, 274 B.R. 287, 289-90 (Bankr. M.D. Tenn. 2001); *In re Nyeste*, 273 B.R. 148, 149 (Bankr. S.D. Ohio 2001). Additionally, bankruptcy courts do not possess the authority to extend the deadline and allow untimely filed proofs of claim over objections, based upon legal or equitable grounds, even if the creditor did not receive proper notice of the bankruptcy filing or the bar date for filing claims. *Windom*, 284 B.R. at 646-47 (citing *In re Miranda*, 269 B.R. 737, 740 (Bankr. S.D. Tex. 2001); *In re Bennett*, 278 B.R. 764, 765 (Bankr. M.D. Tenn. 2001); *In re Johnson*, 262 B.R. 831, 845 (D. Idaho 2001); *In re Kristiniak*, 208 B.R. 132, 135 (Bankr. E.D. Pa. 1997); 4 KEITH M. LUNDIN CHAPTER 13 BANKRUPTCY §§ 283.1, 290.1 (3d ed. 2000)).

Community Bank argues that its Proofs of Claim should be allowed in full because they were late-filed due to excusable neglect. The notion of excusable neglect is derived from Rule 9006(b)(1), which states, in material part, that “[e]xcept as provided in paragraph[] . . . (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules . . . the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.” FED. R. BANKR. P. 9006(b)(1). In discerning whether excusable neglect applies, the Supreme Court has set forth the following determinative factors: (1) danger of prejudice to the debtor; (2) length of the delay and its potential impact on the judicial proceedings; (3) the reason for the delay and whether it was in the movant’s reasonable control; and (4) the movant’s good faith. *Pioneer Investment Servs. Co. v. Brunswick Assocs., Ltd.*, 113 S. Ct. 1489, 1498 (1993).

Community Bank's argument must fail, however, because based upon the clear wording of Rule 9006(b)(1), the court gets to the excusable neglect analysis only when subsections (b)(2) and (b)(3) do not apply. Therefore, the excusable neglect defense found in Rule 9006(b)(1) does not apply to late-filed claims in Chapter 13 cases. *See, e.g., In re Griggs*, 306 B.R. 660, 664 (Bankr. W.D. Mo. 2004); *In re Bourgin*, 306 B.R. 442, 444 (Bankr. D. Conn. 2004); *In re Namusyule*, 300 B.R. 100, 104 (Bankr. D.C. 2003); *In re McLarry*, 273 B.R. 753, 754-55 (Bankr. S.D. Tex. 2002); *Nyeste*, 273 B.R. at 149; *Aboody v. United States (In re Aboody)*, 223 B.R. 36, 39 (B.A.P. 1st Cir. 1998). Accordingly, because Community Bank's Proofs of Claim were filed beyond the bar date, and the Chapter 13 Trustee objected to the unsecured portions thereof, the unsecured portions must be disallowed, irrespective of the reason for the late filing.

An order consistent with this Memorandum will be entered.

FILED: December 1, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
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In re

Case No. 04-31860

JUNIOR DALE SUTTON
BETTY JO SUTTON

Debtors

ORDER

For the reasons set forth in the Memorandum on Written Exceptions to Partial Disallowance of Claims filed this date, the court directs that the two Written Exception[s] to Partial Disallowance of Claim filed by The Community Bank of East Tennessee on October 28, 2004, requesting that the court vacate its October 25, 2004 Orders disallowing the unsecured portions of its \$5,472.15 and \$5,392.56 claims filed on August 9, 2004, are OVERRULED.

SO ORDERED.

ENTER: December 1, 2004

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE