

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

In re

RODNEY MIKE WARD,
Debtor.

No. 96-20809
Chapter 13

MEMORANDUM AND ORDER

APPEARANCES:

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Attorney for Deanna L. Ward

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This case is before the court on the debtor's motion filed July 1, 1996, to reconsider order extending the time for creditor to amend objection to confirmation of debtor's chapter 13 plan. As set forth below, the motion is granted in part and denied in part. The following constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a), as incorporated by Fed. R. Bankr. P. 7052. This is a core proceeding. 11 U.S.C. § 157(b)(2)(L).

I.

The debtor filed a petition initiating this case on April 22, 1996. The notice of commencement of case was served by the clerk upon all listed creditors on April 26, 1996, which advised that the 11 U.S.C. § 341(a) meeting of creditors would be held on June 11, 1996, and that a hearing on confirmation would be held on June 25, 1996, in the event timely objections to confirmation were filed pursuant to Local Bankr. R. 13(g).¹ The

¹Local Bankr. R. 13(g) provides that "[o]bjections to confirmation of chapter 13 plans ... shall be filed prior to the conclusion of the initial meeting of creditors held pursuant to 11 U.S.C. § 341(a) provided, however, that the Chapter 13 trustee and any creditor attending and participating in the meeting of creditors will be allowed until the close of business on the third business day following the conclusion of the meeting in which to file an objection. Objections filed beyond the dates fixed herein will not be considered unless the court, for cause, extends the time. Objections must be in writing, must set forth with specificity the grounds relied upon by the

debtor's ex-wife, Deanna L. Ward, was listed on the debtor's creditor matrix and the certificate of mailing accompanying the notice indicates that Ms. Ward was mailed a copy of the notice on April 26, 1996.

On June 6, 1996, prior to the meeting of creditors, Ms. Ward's former counsel, Keith A. Hopson, timely filed an objection to confirmation. The stated grounds for the objection were that the debtor was obligated under a divorce decree to pay an outstanding indebtedness to Eastman Chemical Credit Union and indemnify and hold Deanna Ward harmless therefrom; and "that discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to her." In conclusion, Ms. Ward requested that the court "decline to discharge this debt in accordance with 11 U.S.C. § 523(a)(15)(B)."

The meeting of creditors took place on June 11 as scheduled, with neither Ms. Ward nor Mr. Hopson being in attendance. On June 20, 1996, five days prior to the upcoming hearing on Ms. Ward's objection to confirmation, a motion to extend time to file an amended objection to confirmation of debtor's chapter 13 plan was filed on Ms. Ward's behalf by attorney Dean Greer. The

objecting party, and must contain a certificate of service on the debtor, debtor's counsel, chapter 13 trustee, and any other party affected by the objection."

motion recited that Ms. Ward had been advised by Mr. Hopson that he could no longer represent her in this matter; that Mr. Greer was unable to meet with Ms. Ward until June 14; that Ms. Ward was unaware of the deadline for filing objections to confirmation; that there was insufficient time to prepare and timely file an objection to confirmation; that the late filing of an amended objection is due to excusable neglect due to the lack of knowledge as to the deadline to file an objection; that by allowing an amended objection, the debtor would not be prejudiced; and that cause exists to enlarge the time to file an amendment to her objection pursuant to Fed. R. Bankr. P. § 9006(b)(1). By order entered June 20, 1996, the motion to extend time was granted.

The debtor seeks a reconsideration of the June 20 order, arguing that Ms. Ward's conduct does not meet the showing required for excusable neglect and that Ms. Ward is not seeking to amend her original objection, but is seeking to add new objections while abandoning her original objection. There is no question that since neither Ms. Ward nor her representative attended the meeting of creditors, June 11 was her deadline for filing an objection to confirmation.

Fed. R. Bankr. P. 9006(b)(1) provides in pertinent part that:

when an act is required or allowed to be done at or

within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion ... (2) 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.

Although not specifically mentioned therein, the "excusable neglect" standard of Rule 9006(b)(1) has been applied by courts where a party has failed to perform an act required by local rules. See, e.g., *Nunez v. Nunez (In re Nunez)*, 196 B.R. 150, 156-57 (9th Cir. BAP 1996). In this case, both parties have asserted that the appropriate standard is that of "excusable neglect." Nonetheless, the bankruptcy court has broad discretion to apply its local rules strictly or to overlook transgressions. *Id.* at 157, citing *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995). Notwithstanding this discretion, the court agrees that the application of the "excusable neglect" standard should be applied when a party seeks to enlarge the time for performing an act required by Local Bankr. R. 13(g) after the time for taking such act has expired. The court reaches this conclusion because Rule 13(g) itself requires "cause" to extend the time after the deadline for filing objections to confirmation has passed. Therefore, the initial issue is whether Ms. Ward has shown "excusable neglect" as required by Fed. R. Bankr. P. 9006(b)(1) so as to

justify granting her June 20 motion to extend the time for filing an amended objection.

II.

Excusable neglect is a somewhat "elastic concept." *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 392, 113 S. Ct. 1489, 1496 (1993). To find excusable neglect, a two-step inquiry is necessary. The court must first determine whether the failure to timely file resulted from neglect and then evaluate the neglect and determine whether it is excusable. See *In re Nickels Performance Systems, Inc.*, 169 B.R. 647, 651 (Bankr. E.D. Tenn. 1994), citing *Pioneer Investment Services Co.*, 507 U.S. at 393-95, 113 S. Ct. at 1497-98.

Mr. Greer avers in the motion to extend time that he was not able to meet with Ms. Ward until June 14 and that he was not aware of the facts of this case prior to that time. He erroneously states that the deadline to object to confirmation was June 14, when actually the deadline was June 11, and that Ms. Ward was unaware of the deadline. However, as noted above, Ms. Ward was listed as a creditor by the debtor and she was

timely² mailed a copy of the notice of commencement of the case which referenced the deadline for filing objections to confirmation. There is no evidence or even the assertion that this notice was not received by Ms. Ward in sufficient time to file an objection. To the contrary, Ms. Ward did timely file her first objection. Thus, it cannot be said that Ms. Ward was not provided notice of the deadline for filing objections to confirmation. Presumably, her counsel was also aware of the deadline (there being no assertion to the contrary) and this knowledge is imputed to Ms. Ward. See *In re Marino*, 195 B.R. 886, 895 (Bankr. N.D. Ill. 1996)(attorney's actual knowledge of pendency of bankruptcy may be imputed to client if it occurs within the scope of attorney-client relationship). Accordingly, the court finds that the failure to timely file the present amended objection to confirmation was due to neglect of Ms. Ward and her attorney or attorneys.

The second inquiry of determining what sort of neglect is excusable is an equitable one, taking account of all relevant circumstances surrounding the party's omission, which include

²Fed. R. Bankr. P. 2002(b) provides in pertinent part that "the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 25 days notice by mail of ... (2) the time fixed for filing objections and the hearing to consider confirmation of a ... chapter 13 plan."

the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *In re Nickels Performance Systems, Inc.*, 169 B.R. at 650, citing *Pioneer Investment Services Co.*, 507 U.S. at 395-96, 113 S. Ct. at 1498. Good faith and the reason for the delay should be accorded considerable weight. *In re Nickels Performance Systems, Inc.*, 169 B.R. at 650.

Applying these factors, the court finds that the impact upon this proceeding by allowing Ms. Ward's amendment to the objection to confirmation will be insubstantial, and the potential prejudice to the debtor will be minimal because the debtor's plan has not been confirmed. The delay between the deadline for filing objections to confirmation and Ms. Ward's motion to extend time to file the amended objection was less than ten days. As Judge Stair noted in the *Nickels Performance* decision, however, the inquiry is not strictly a balancing test such that if three of the five factors weigh in favor of the party neglecting the deadline, excusable neglect has been established. Rather, the focus must ultimately be on the reason for the delay and the good faith of the party neglecting the deadline. *Id.* at 651.

The reason for the delay in not timely including in the original objection the grounds now asserted in the amended objection is unexplained. Ms. Ward chose Mr. Hopson to represent her initially, and no excuse is offered as to why he did not include these additional grounds in the timely filed original objection. Parties are accountable for the acts and omissions of their attorneys. *Id.* at 652. The lack of any excuse renders it practically impossible for the court to evaluate the good faith in this regard. In light of the fact that Mr. Hopson and Ms. Ward both had notice of the deadline for filing objections to confirmation, these factors weigh most heavily against finding excusable neglect. In short, the court holds that the unexplained failure of Ms. Ward's former counsel to include the grounds now sought to be added by the amended objection to plan is the sort of neglect that could and should have been avoided and cannot be characterized as excusable.

III.

The court will now examine the additional grounds included in the amended objection to confirmation to determine if they are sufficiently related to the grounds contained in the original objection such that the new grounds may relate back to the timely filed objection. See Fed. R. Civ. P. 15(c)(2),

incorporated by Fed. R. Bankr. P. 7015. Rule 15(c)(2) provides that:

[a]n amendment of a pleading relates back to the date of the original pleading when ... (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The additional grounds in Ms. Ward's amended objection include (1) lack of good faith in proposing the plan in violation of 11 U.S.C. § 1325(a)(3) based upon the allegation that debtor negotiated a favorable property settlement involving his agreement to pay the parties' outstanding indebtedness owed to Eastman Credit Union and Lowe's and to hold Ms. Ward harmless therefrom with the intention of filing bankruptcy; and (2) that the debtor is not paying all of his projected disposable income into the plan in violation of 11 U.S.C. § 1325(b)(1) based upon the allegation that the debtor has more income and resources, and less expenditures, than are reported in his schedules. As noted above, the original objection to confirmation alleged that the debtor was obligated under a divorce decree to pay an outstanding indebtedness to Eastman Chemical Credit Union and indemnify and hold Deanna Ward harmless therefrom; and "that discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to her." Ms. Ward requested that the court "decline to discharge this debt in

accordance with 11 U.S.C. § 523(a)(15)(B)."

Ms. Ward's claim in the amended objection of lack of good faith in negotiating the settlement agreement to assume the Eastman Credit Union indebtedness with the intent of filing this chapter 13 bankruptcy is sufficiently related to the allegations in the original objection despite the fact that Ms. Ward's attorney needlessly challenged the nondischargeability of the Eastman Credit Union obligation. "The basic test of relation back is whether the evidence with respect to the second set of allegations could have been introduced under the original [pleading] liberally construed." *Municipal Employees Credit Union v. Graham (In re Graham)*, No. 96-2014, memo. opin. at p. 17 (Bankr. E.D. Tenn., J. Parsons, May 6, 1996)(amendment adding new claim may relate back to original facts which set forth basis for another improperly pled claim). The factual allegations in the original objection regarding the parties' marital dissolution agreement and the "assume and hold harmless" provision therein suggest an assertion of bad faith. Therefore, the portion of the amended objection which "merely change[s] the legal theory of relief" from one of nondischargeability to bad faith based on these same facts is allowable. *Id.* No factual allegations, however, are made in the original objection concerning Ms. Ward's additional claim under § 1325(b)(1) that

the debtor is not paying all of his projected income into the plan. Accordingly, there is no basis for this new claim to relate back to the original objection to confirmation.

IV.

In summary, the court hereby grants the motion by debtor to reconsider the court's order entered June 20, 1996, and for the reasons stated above, vacates that order. Ms. Ward will be permitted to amend her original objection to include lack of good faith based upon the alleged facts that debtor negotiated the settlement agreement to assume the Eastman Credit Union indebtedness with the intent of filing bankruptcy. In all other aspects, Ms. Ward's motion to extend time to file an amended objection to confirmation of debtor's chapter 13 plan is denied. SO ORDERED.

FILED AND ENTERED: July 26, 1996

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE