

UNITED STATES BANKRUPTCY COURT United States Bankruptcy Court
FOR THE DISTRICT OF SOUTH CAROLINA Columbia, South Carolina (32)

IN RE:

James Edward Perkins and Jewell
Catherine Perkins,

Debtor(s).

C/A No. 10-03041-JW

Chapter 13

ORDER

This matter comes before the Court upon a Motion for Filing Late Proof of Claim ("Motion") filed pro se by Alan Wheeler ("Wheeler"). James Edward Perkins and Jewell Catherine Perkins ("Debtors") filed an Objection to the Motion. A hearing was held on January 27, 2011. Based upon the pleadings and evidence presented at the hearing, the Court makes the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

1. Debtors filed for chapter 13 bankruptcy relief on April 28, 2010. The Notice of Chapter 13 Bankruptcy ("Notice") indicates that the deadline for filing a proof of claim for a non-governmental unit was August 23, 2010. The certificate of notice filed by the Bankruptcy Noticing Center indicates that a copy of the Notice was sent to Wheeler at P.O. Box 1051, Georgetown, SC 29442 by first class mail on May 1, 2010.

2. Debtors listed Wheeler as an unsecured, non-priority creditor in their Schedules and Statements filed May 21, 2010. According to Schedule F, the claim arises from a personal loan to Mr. Perkins in the amount of \$15,000.00. Wheeler's address was listed as P.O. Box 1051, Georgetown, SC 29442.

¹ To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

3. Debtors filed an amended plan on July 26, 2010 in which they sought to avoid the judicial liens of Wheeler and Coastal Factors, Inc. secured by property located as 1541 Overlook, Mt. Pleasant, South Carolina (“Overlook”).

4. The certificate of service filed by Debtors’ attorney indicates that the amended plan was served July 26, 2010 on Wheeler via first class mail at 33 Bridgeview Rd. Georgetown, South Carolina, 29440.

5. Debtors filed amended schedules on July 27, 2010 moving Wheeler’s claim from Schedule F to Schedule D.

6. On July 29, 2010, Debtors filed a notice of change of address for Wheeler changing his address to 5098 Westview St., North Charleston, South Carolina 29418 (“Westview”) and filed a Supplemental Certificate of Service indicating the amended plan and a motion to sell were served by them on Wheeler via first class mail at the Westview address.

7. On July 30, 2010, Debtor filed an Application for Supplemental Attorney Fees and the certificate of service indicates that it was served on Wheeler at the Westview address.

8. On August 26, 2010, Debtors filed a Withdrawal of Motion to Sell Free and Clear and another Motion to Sell Free and Clear. The certificates of service for both indicate Wheeler was served via first class mail at the Westview address.

9. On August 27, 2010, the certificate of service filed by the Bankruptcy Noticing Center indicates the Order Confirming the Chapter 13 Plan dated July 27, 2010 was served on Wheeler at his Westview address via first class mail.

10. Wheeler attached to his Motion a proof of claim in the amount of \$18,000.00 and a Confession of Judgment in the amount of \$15,000.00 signed by Edward Perkins and dated February 29, 2008.

11. Wheeler testified at the hearing that he first learned of the bankruptcy case in December, 2010 when Tom Waring, a representative from First Federal, contacted him about signing a release of his judgment on Debtors' Overlook property.

12. According to Wheeler, Mr. Waring then emailed him the amended plan and the motion to sell filed on July 27, 2010.

13. Wheeler testified at the hearing that he agreed to and signed a release of his judgment lien on the Overlook property.

14. At the hearing, Wheeler explained to the Court that he moved from the house in Georgetown in December, 2008. He then lived in Texas for approximately a year where he rented two different places. Wheeler moved back to South Carolina in February, 2010 and lived with a friend until approximately June, 2010. He signed a one year lease at his current location on Westview St. in July, 2010 and has resided there ever since, considering it his legal residence.

15. On cross-examination, Wheeler acknowledged that he had previously personally filed bankruptcy in December, 2008 and received a discharge.

16. Debtors do not appear to dispute that Wheeler's claim would be based upon a valid judgment against Debtor, Edward Perkins, which was secured by the Overlook property.

CONCLUSIONS OF LAW

Chapter 13 claims are disallowed if filed late. See 11 U.S.C. § 502(b)(9) and Fed. R. Bankr. P. 3002(c). Courts have no authority or discretion to allow a late filed claim in Chapter 13 cases. See 9 Collier on Bankruptcy ¶ 3002.03[1] (Alan N. Resnick & Henry J. Sommer, eds, 16th ed.); In re Nwonwu, 362 B.R. 705, 707 (Bankr. E.D. Va. 2007). However, this Court has previously held that claims filed late in Chapter 13 due to a creditor receiving inadequate notice of the case, bar date, or plan while disallowed are nondischargeable. In re Brunson, C/A No. 04-08574-W (Bankr. D.S.C. Aug. 2, 2005); See also § 523(c)(3). Since Wheeler did not file his claim timely it cannot be allowed. Any relief may depend upon whether Wheeler received notice of the Debtors' bankruptcy case in time to file his claim.

Upon a showing that a creditor received sufficient notice, a creditor's claim can be barred as untimely. In re Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.), 62 F.3d 730, 735 (5th Cir. 1995). "Determining whether a creditor received adequate notice depends on the facts and circumstances of each case." Id.

Debtors agree that Wheeler did not likely receive notice of the bankruptcy case prior to July 29, 2010. However, Debtors argue that several bankruptcy-related documents were sent to the proper address after Wheeler's address was changed on the docket on July 29, 2010 to give Wheeler sufficient notice of the bankruptcy case in time for a claim to be filed. The Court agrees.

Pursuant to Fed. R. Bankr. P. 9006(e), "notice by mail is complete on mailing." Courts have generally held that mailing creates a presumption of receipt. See Id. (stating the "rule implies that correctly mailed notice creates a presumption of proper notice");

Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 207 (9th Cir. 1991) (indicating “mail that is properly addressed, stamped, and deposited into the mails is presumed to be received by the addressee)). Typically, a mere denial of receipt by the creditor does not rebut the presumption of proper notice. Moody, 951 F.2d at 207 (citing In re American Properties, 30 B.R. 247, 250 (Bankr. D. Kan. (1983))). The presumption created by mailing is only overcome by evidence that the mailing was not, in fact, accomplished. Greyhound, 62 F.3d at 735. Therefore, the focus is on whether the sender properly mailed the notice, not whether the intended recipient received it. Id. To determine whether mailing was accomplished, “courts may consider whether the notice was correctly addressed, whether proper postage was affixed, whether it was properly mailed, and whether a proper certificate of service was filed.” Id. (citing Osborn v. Ricketts (In re Ricketts), 80 B.R. 495, 498 (9th Cir. BAP 1987)).

Debtors’ attorney and the Bankruptcy Noticing Center filed certificates of service indicating that Wheeler was properly served at the Westview address after the Notice of Change of Address was filed on July 29, 2010. Although Wheeler did not receive the official Notice of bankruptcy case, which indicates the bar date for filing claims, the pleadings that were served on Wheeler at his current address gave Wheeler notice that Debtors were in bankruptcy. Therefore, he was under constructive or inquiry notice that his claim may be affected. See Matter of Gregory, 705 F.2d 1118, 1123 (9th Cir. 1983) (stating any notice from the bankruptcy court that a debtor has initiated bankruptcy proceedings gives the creditor constructive or inquiry notice that its claim may be affected and the creditor ignores the proceedings at its own peril); In re Moore, 2010 WL 358973 at *4 (Bankr. E.D.N.C. Jan. 12, 2010) (stating a creditor has a duty of

investigation to protect its interest after receiving any notice from the bankruptcy court). Moreover, Wheeler himself had previously filed personal bankruptcy and therefore should be familiar with the process and the deadlines involved in a bankruptcy case.

Apart from his testimony denying receipt of any notices or pleadings related to Debtors' bankruptcy case, Wheeler did not present any evidence to indicate that, subsequent to July 29, 2010, the bankruptcy pleadings were improperly mailed or included improper postage. Moreover, there is nothing in the record to indicate that any of the mailings were returned to either the Clerk's Office or Debtors' attorney. Therefore, the Court finds Wheeler's testimony that he did not receive notice of the bankruptcy until December 2010 is insufficient to overcome the presumption of mailing. Even though some of the bankruptcy filings cited by Debtors as giving Wheeler notice were served after the claims bar date, the Court finds that several of the Debtors' bankruptcy-related documents were served upon Wheeler prior to the bar date, giving Wheeler sufficient notice of the Debtors' bankruptcy case.

For the foregoing reasons, the Court finds Wheeler had sufficient notice of Debtors' bankruptcy case in time for him to file a timely claim. Thus, Wheeler's Motion is denied.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
February 8, 2011