

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 09-02140

ORDER GRANTING MOTION OF LEISHA CROOKS

The relief set forth on the following pages, for a total of 12 pages including this page, is hereby ORDERED.

FILED BY THE COURT
02/01/2010



Entered: 02/01/2010

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re: BI-LO, LLC <i>et al.</i>, Debtors.¹	§ § § § § § §	Case No. 09-02140 (HB) Chapter 11 (Joint Administration)
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ORDER GRANTING MOTION OF LEISHA CROOKS

This matter comes before the Court for hearing on Leisha Crooks’ Motion to Allow Late Filed Claim to be Deemed Timely Filed and Memorandum in Support [Docket Entry 1894]. Ms. Crooks filed a proof of claim in the amount of \$63,282.96. At the hearing, George B. Cauthen and Frank B. B. Knowlton appeared on behalf of the Debtors (“BI-LO”). Jane H. Downey and Jason L. Sturkie appeared on behalf of Ms. Crooks, and Ms. Crooks and Christina Branyon, Mr. Sturkie’s paralegal, were also present at the hearing. Enid N. Stuart appeared on behalf of the Official Unsecured Creditors Committee. Counsel for Ms. Crooks provided various exhibits to the Court and testimony was received from Mr. Sturkie, Ms. Branyon, and Ms. Crooks. BI-LO’s bankruptcy counsel called the Court’s attention to various facts and documents in the Court’s records, and proffered the testimony of BI-LO’s Chief Restructuring Officer, Michael A. Feder, who was also present. The Court finds as follows:

¹ The Debtors and the last four digits of their respective tax identification numbers are: BI-LO, LLC (0130); BI-LO Holding, LLC (5011); BG Cards, LLC (4159); ARP Ballentine LLC (6936); ARP James Island LLC (9163); ARP Moonville LLC (0930); ARP Chickamauga LLC (9515); ARP Morganton LLC (4010); ARP Hartsville LLC (7906); and ARP Winston Salem LLC (2540).

FACTS

1. Ms. Crooks claims that she was injured at a BI-LO store on or about March 4, 2008. Ms. Crooks retained the firm of McCravy, Newlon, & Sturkie, P.A. in Greenwood, South Carolina to represent her in her action against BI-LO. On January 9, 2009, Mr. Sturkie sent a letter to BI-LO's Claims adjuster, Broadspire, making a demand on BI-LO for Ms. Crooks' damages and providing an accident report, medical bills and a medical report, and requesting that BI-LO consider settlement prior to the filing of a lawsuit.

2. On March 12, 2009, Broadspire replied to Mr. Sturkie contesting liability and offering a settlement of \$2,000.00 for the "nuisance value" of the lawsuit.

3. BI-LO filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on March 23, 2009. BI-LO listed this claimant's claim as contingent, unliquidated, and disputed in an undetermined amount.

4. The Certificate of Mailing filed in this bankruptcy case on May 29, 2009 [Docket Entry 678], indicates that Ms. Crooks was mailed a copy of the "Notice of Proof of Claim Deadline" ("Notice") [Docket Entry 619] on May 8, 2009. The Notice was mailed by BI-LO's noticing and balloting agent, Kurtzman Carson Consultants LLC ("KCC").²

5. The Notice advised potential claimants that August 13, 2009, was established as the deadline for filing a proof of claim form. Although claims in this Court are usually filed in the Court's records by a claimant either by mail or electronically, in this case the independent claims agent, KCC, is charged with the duty of handling receipt of claims and claims records.

² The Court approved Bi-Lo's application to employ KCC as claims, noticing and balloting agent on March 25, 2009. See Order Authorizing the Debtors to Employ Kurtzman Carson Consultants LLC as Claims, Noticing and Balloting Agent, *In re BI-LO, LLC*, C/A No. 09-02140-hb (Bankr. D.S.C. March 25, 2009) [Docket Entry 57].

The Notice provides that claims cannot be received electronically from a claimant and instead must be mailed to KCC.

6. At the hearing, Ms. Crooks testified that she received the Notice, that she promptly forwarded it to Mr. Sturkie, and that she was informed several weeks later by Ms. Branyon that a claim had been submitted on her behalf. Mr. Sturkie testified that he received the Notice from Ms. Crooks, told her that his firm would take whatever steps were needed to comply with the Notice and that he instructed his paralegal to file a proof of claim. He testified that his paralegal informed him thereafter that the proof of claim had been promptly filed, and that in his experience Ms. Branyon was reliable as an employee and truthful. Ms. Branyon's testimony further corroborated the testimony of Ms. Crooks and Mr. Sturkie, and set forth the steps Ms. Branyon took to transmit the proof of claim with KCC in advance of the bar date. Specifically, Ms. Branyon testified that she remembered preparing the proof of claim and printing it for Mr. Sturkie to sign and date because this was an unusual event for her and she did not have experience doing this type of work. She then testified that she believed she mailed the proof of claim after making a copy, placing the proof of claim into an envelope, sliding the envelope through a stamp machine, and placing the stamped envelope into the outgoing mail at her office, and that was her normal practice for outgoing mail.

7. Mr. Sturkie provided the following copy of the signed proof of claim form dated May 29, 2009, from his files:

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B 10 (Official Form 10) (12/08)	
UNITED STATES BANKRUPTCY COURT	PROOF OF CLAIM
Name of Debtor: BI-LO, LLC	Case Number: 09-2140-hb
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.	
Name of Creditor (the person or other entity to whom the debtor owes money or property): LEISHA WILLIAM CROOKS	Check this box to indicate that this claim amends a previously filed claim.
Name and address where notices should be sent: LEISHA WILLIAM CROOKS C/O McCRAVY NEWLON & STURKIE LAW FIRM 1629 BYPASS 72 NE, GREENWOOD, SC 29649 Telephone number: (864) 388-9100	Court Claim Number: (If known)
Name and address where payment should be sent (if different from above):	Filed on:
Telephone number:	Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
1. Amount of Claim as of Date Case Filed: \$ 63,282.96	Check this box if you are the debtor or trustee in this case.
If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.	5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.
If all or part of your claim is entitled to priority, complete item 5.	Specify the priority of the claim.
Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.	Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).
2. Basis for Claim: PERSONAL INJURY (See instruction #2 on reverse side.)	Wages, salaries, or commissions (up to \$10,950*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(4).
3. Last four digits of any number by which creditor identifies debtor: 0122	Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(5).
3a. Debtor may have scheduled account as: (See instruction #3a on reverse side.)	Up to \$2,125* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(7).
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.	Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
Nature of property or right of setoff: Real Estate Motor Vehicle Other	Other - Specify applicable paragraph of 11 U.S.C. § 507(a)().
Describe:	Amount entitled to priority:
Value of Property: \$ Annual Interest Rate: %	\$
Amount of arrearage and other charges as of time case filed included in secured claim.	
If any: \$ Basis for perfection:	
Amount of Secured Claim: \$ Amount Unsecured: \$	
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.	
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.)	
DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.	
If the documents are not available, please explain:	
Date: 5/29/2009	FOR COURT USE ONLY
Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.	
Jason L. Sturkie, Esq.	

Penalty for intentional false statement: Fine of not to \$20,000 or imprisonment for not to 5 years, or both 18 U.S.C. §§ 1593 and 1592

8. Mr. Sturkie testified that after his office prepared and allegedly mailed the proof of claim on behalf of Ms. Crooks he received a copy of this Court's Interim Order Extending Time for Removal of Court Actions Pursuant to Bankruptcy Rule 9006(b) [Docket Entry 809] on July 6, 2009, which was mailed to him by KCC on behalf of BI-LO. Mr. Sturkie testified that receipt of this document, when previously he had not received any correspondence from BI-LO or KCC, supported his belief that KCC had timely received the proof of claim listing him as the person to contact regarding Ms. Crooks' claim.

9. Mr. Sturkie did not make further attempts to confirm that the proof of claim had been filed until early or mid-November 2009—after the bar date had passed. At that time he contacted Broadspire to inquire about the claim and was informed that their file regarding Ms. Crooks had been closed because no proof of claim had been filed. Mr. Sturkie then took the necessary steps to file a late proof of claim and this Motion. Mr. Sturkie and Ms. Branyon both testified that they believed that they had taken all of the necessary steps to file a proof of claim with KCC per the instructions in the Notice and as Ms. Crooks requested, and that they did not realize that this was not the case until after the bar date had passed. Ms. Crooks' testimony indicated that she thought the proof of claim had been filed because she had promptly delivered the Notice to her counsel and received assurances that the matter would be handled on her behalf.

10. On cross examination and through argument, BI-LO raised some doubt that the proof of claim form was actually mailed because the claimant's witnesses freely admitted that the copy in Mr. Sturkie's file included an original signature. Further, Mr. Sturkie admitted that he could not produce a copy of any transmittal or cover letter. However, this doubt was not sufficient to overcome the testimony of Mr. Sturkie and Ms. Branyon, under oath, that to the best of their recollection they took all steps necessary to ensure that a proof of claim for Ms. Crooks

was prepared and properly mailed. Mr. Sturkie and Ms. Branyon testified that they are not often involved in bankruptcy matters and, therefore, they intended to exercise care in handling Ms. Crooks' request that they file a proof of claim and that the matter was memorable because it was an unusual event for both of them.

11. No testimony was offered regarding KCC's procedures for handling claims received to ensure that they are properly processed.

12. Bankruptcy counsel for BI-LO proffered the testimony of Michael Feder, Chief Restructuring Officer for BI-LO. The proffer of Mr. Feder's testimony provided that BI-LO would be prejudiced by the potential precedent set by allowing Ms. Crooks' late claim. He further testified that, as of the hearing date, several hundred late filed claims had been received and that allowance of Ms. Crooks' claim would likely result in the filing of additional late filed claims, which would further dilute the recovery to unsecured creditors.

13. A hearing to consider the approval of two competing Disclosure Statements filed with the Court in this matter was scheduled for the same date as the hearing on this Motion, but the hearing was continued at the requests of parties in interest.

DISCUSSION AND CONCLUSIONS OF LAW

Excusable Neglect

Ms. Crooks asserts that her failure to file her proof of claim prior to the deadline resulted from excusable neglect and, therefore, she should be permitted to have her late claim deemed timely filed.³ Rule 9006(b)(1) provides the basis for the relief sought by Ms. Crooks:

³ At the hearing, Ms. Crooks' bankruptcy counsel's first argument was that BI-LO failed to comply with the notice requirements of 11 U.S.C. § 342(c)(2). Ms. Crooks' counsel was asked to point out the facts showing that two correspondences were received by BI-LO within the time required by the statute. Ms. Crooks' counsel conceded that such facts were not present; therefore, the Court need not address the merits of Ms. Crooks' § 342(c)(2) argument.

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 (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (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*.

(emphasis added). The Supreme Court has addressed excusable neglect, stating the following:

Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. This context suggests that Rule 9006's allowance for late filings due to 'excusable neglect' entails a correspondingly equitable inquiry.

Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U.S. 380, 389 (U.S. 1993) (citations omitted). The *Pioneer* Court further discussed Rule 9006(b)(1), providing that “Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party’s control.” *Id.* at 388.⁴ Finally, the *Pioneer* Court explained that the following factors were relevant in determining whether excusable neglect was present: “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.” *Id.* at 395. Other courts have found that an excusable neglect inquiry involves weighing the *Pioneer* factors, but “that not

⁴ This Court notes that a review of the decisions of other bankruptcy courts since *Pioneer* suggests that allowing late filed claims as a result of excusable neglect appears to be the exception, not the rule. *See In re Gardenhire*, 209 F.3d 1145 (9th Cir. 2000) (holding that “a bankruptcy court lacks equitable discretion to enlarge the time to file proofs of claim; rather, it may only enlarge the filing time pursuant to the exceptions set forth in the Bankruptcy Code and Rules.”); *see also Jones v. Chemetron Corp.*, 212 F.3d 199 (3rd Cir. 2000); *see also In re American Classic Voyages Co.*, 405 F.3d 127 (3rd Cir. 2005); *see also In re Enron Corp.*, 419 F.3d 115 (2nd Cir. 2005); *see also In re Kmart Corp.*, 381 F.3d 709 (7th Cir. 2004).

all factors need to favor the moving party.” *In re XO Communications, Inc.*, 301 B.R. 782, 796 (Bankr. S.D.N.Y. 2003) (finding that the majority of the *Pioneer* factors weighed in favor of the debtor despite the fact that there was little prejudice to the debtor due to the small size of the movant’s claim). “Instead, courts are to look for a synergy of several factors that conspire to push the analysis one way or the other.” *In re 50-Off Stores, Inc.*, 220 B.R. 897, 901 (Bankr. W.D. Tex. 1998) (finding that excusable neglect was not present where creditors received notice of the bar date from the court and supplemental notice from the debtors; that allowing the claims would not create significant problems in delaying or complicating the judicial proceedings, nor were the claims large enough to interfere with the case’s administration; that allowance of one claim could result in the filing of many other claims, which would be prejudicial to the debtor; and that the notice given to claimants was not ambiguous).

After considering all of the factors the Court finds that they weigh in favor of Ms. Crooks and that her Motion should be granted. The factors are discussed separately below.

The danger of prejudice to the Debtors, the length of the delay and its potential impact on judicial proceedings

The bar date in Chapter 11 cases functions as a statute of limitations that excludes late claims “in order to provide the Debtor and its creditors with finality to the claims process and permit the Debtor to make swift distributions under the Plan.” *XO Communications*, 301 B.R. at 797-98; *see also Berger v. TWA (In re TWA)*, 96 F.3d 687, 690 (3d Cir. Del. 1996); *see also Grand Union*, 204 B.R. 864 (finding that excusable neglect was not present to warrant allowing the late filed proofs of claims). BI-LO argued that it would be prejudiced if this claim is allowed and finality denied. BI-LO argued, and the record in this case reflects, that it has made progress in analyzing timely filed claims that will be impeded if this and additional claims are added. Allowing a late filed claim on these facts would certainly risk opening the floodgates to allow

others. Furthermore, this Court should hesitate before it acts to allow the claim and dilute the return to those similarly situated creditors who received similar notice, yet managed to file a proof of claim in a timely fashion.

Representatives of BI-LO were aware that Ms. Crooks' claim was being asserted and, therefore, BI-LO cannot argue that it was not aware of the possibility that a claim may be presented for payment in this case on her behalf. However, this is true with any and all claims listed on a debtor's schedules as contingent, disputed, or unliquidated, yet applicable authorities require the affirmative filing of a timely proof of claim in the bankruptcy records for such creditors to participate in the Chapter 11 distribution. The evidence does not indicate that BI-LO was aware that the creditor intended to pursue a claim for distribution in this bankruptcy and BI-LO rightfully proceeded with its work towards reorganization without including this claim.

The evidence presented to the Court indicates that there is a danger that BI-LO will suffer some prejudice and a negative impact on these proceedings may occur if the late claim is allowed. The Court notes that the magnitude of the prejudice and impact that can result from the assertion of a late claim increases each day that the bankruptcy case progresses, and notes that this Motion was filed on December 1, 2009, nearly four months after the bar date and shortly before the Disclosure Statement hearings were to be held. The delay is therefore considerable.

**The reason for the delay, including whether it was
within the reasonable control of the movant**

When deciding whether excusable neglect is present, numerous courts emphasize "the reason for the delay" factor. *In re PT-1 Communications, Inc.*, 403 B.R. 250, 260 (Bankr. E.D.N.Y. 2009); *In re Enron Corp.*, 419 F.3d. 115, 122 (2nd Cir. 2005) ("We noted, though, that 'we and other circuits have focused on the third factor: "the reason for the delay, including whether it was within the reasonable control of the movant.""); *Lowry v. McDonnell Douglas*

Corp., 211 F.3d 457, 463 (8th Cir. 2000) (“While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.”); *In re Musicland Holding Corp.*, 356 B.R. 603, 607 (Bankr. S.D.N.Y. 2006) (“Consequently, the Second Circuit, as well as other Circuits, focus on the third factor—the reason for the delay—as the predominant factor.”). “Courts generally do not rule in favor of claimants . . . who have neglected to timely file proofs of claim as a result of their failure to communicate with counsel regarding a legal notice or their own or their counsel's disregard of the relevant substantive law governing their claim.” *In re Agway, Inc.*, 313 B.R. 31, 40 (Bankr. N.D.N.Y. 2004); *see also Brunswick*, 2007 WL 160749, at *5.

From the testimony at the hearing, the Court concludes that Ms. Crooks acted promptly in responding to the Notice by calling it to the attention of her attorney and requesting that he take whatever action was necessary to protect her rights. Thereafter, the testimony indicates that her counsel took steps to file a timely claim on her behalf. The only evidence before the Court is that it is more likely than not that a proof of claim form was in fact properly mailed on behalf of Ms. Crooks. There is no evidence before the Court regarding how mailed claims are handled by KCC upon receipt.

After attempting to file the claim, there are no facts that suggest Ms. Crooks or her counsel had any reason to believe a proof of claim had not been filed. To the contrary, Mr. Sturkie believed that his receipt of mailings regarding the case confirmed receipt of the proof of claim with his contact information. When he discovered that the claim had not been filed on Ms. Crooks' behalf in KCC's records, he informed Ms. Crooks and took immediate remedial action. The reason for the delay is understandable and has been sufficiently explained and it appears that the delay was beyond the reasonable control of Ms. Crooks and her counsel. Therefore, this factor weighs in favor of Ms. Crooks.

Whether the Movant Acted in Good Faith

In cases addressing motions to allow late filed claims based upon excusable neglect, it is rarely found that the movants acted without good faith; therefore, courts often give little weight to the good faith factor in an excusable neglect analysis. *BOUSA, Inc. v. United States (In re Bulk Oil (USA) Inc.)*, 2007 WL 1121739, n. 6 (S.D.N.Y. Apr. 11, 2007). However, courts have found that inaction during the time period allotted for the filing of claims is an example of a lack of good faith. *In re J.S. II, L.L.C.*, 397 B.R. 383, 389 (Bankr. N.D. Ill. 2008). In courts' examinations of the good faith factor in excusable neglect analyses, the inquiry as to whether good faith is present focuses on a subjective review of the specific facts of a given case. *See In re Garden Ridge Corp.*, 348 B.R. 642 (Bankr. D. Del. 2006); *see also In re Smidth & Co.*, 413 B.R. 161 (Bankr. D. Del. 2009); *see also In re J.S. II, L.L.C.*, 397 B.R. 383.

Ms. Crooks acted in good faith. Specifically, she promptly contacted her counsel upon receipt of the Notice so that a proof of claim could be filed. Counsel then took reasonable steps to file a proof of claim within the deadline set forth in the Notice. After discovering that a proof of claim had not been received by KCC, Ms. Crooks' counsel immediately filed a late proof of claim. The Court finds that Ms. Crooks' counsel, on her behalf, also acted in good faith. The good faith factor weighs in favor of Ms. Crooks.

After considering the factors necessary to a finding of excusable neglect, the Court finds that they weigh in favor of Ms. Crooks.

THEREFORE, IT IS ORDERED, that Leisha Crooks' Motion to Allow Late Filed Claim to be Deemed Timely Filed is **GRANTED**.

AND IT IS SO ORDERED.