

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (20)

IN RE:

Richard Joseph Condo,

Debtor.

C/A No. 04-12787-W

ORDER

ENTERED

JUL 8 2005

L.O.

This matter comes before the Court upon a Motion to Allow Late Filed Claim to be Deemed Timely Filed ("Motion to Allow") filed by James A. Guess, Jr. and Cheryl H. Guess (hereinafter Mr. Guess and Mrs. Guess shall collectively be referred to as "Creditors"). The Chapter 7 Trustee administering Richard Joseph Condo's ("Debtor") chapter 7 bankruptcy case filed an objection to Creditors' Motion to Allow. After conducting a hearing on the matter at issue, it appears that Creditors did not receive notice or have actual knowledge of Debtor's bankruptcy in time to file a timely proof of claim. Furthermore, although Creditors filed their claim after the expiration of the claims bar date for this case, they filed their claim before the Chapter 7 Trustee made distributions from Debtor's chapter 7 bankruptcy estate. In his objection, the Chapter 7 Trustee notes that Rule 3002(c) of the Federal Rules of Bankruptcy Procedure ("Rule 3002(c)") does not specifically provide for an extension of time to Creditors for the filing of a tardy claim in this chapter 7 case. During the hearing, the Chapter 7 Trustee also raised the issue of the priority of Creditors' claim with respect to other late filed unsecured claims from creditors who received notice of Debtor's bankruptcy.

11 U.S.C. § 726¹ addresses the issues raised. Despite the fact that Creditors are not entitled to an enlargement of time to file their untimely proof of claim as a timely

¹ Hereinafter internal references to the Bankruptcy Code 11 U.S.C. § 101 *et. seq.* shall be done by section number only.

proof of claim under Rule 3002(c), Creditors appear entitled to receive a distribution from Debtor's estate in parity with other timely filed allowed unsecured claims pursuant to § 726(a)(2)(C) because: (1) Creditors did not have notice or actual knowledge of Debtor's bankruptcy case in order to timely file their proof of claim; and (2) they filed their untimely claim before Debtor's chapter 7 estate had been distributed. 11 U.S.C. § 726(a)(2)(C).² See also Fogel v. Zell, 221 F.3d 955, 962 (7th Cir. 2000) (holding that when §§ 726(a)(2)(C)(i) & (ii) are satisfied, the late filer is entitled to parity with other unsecured creditors). Furthermore, § 726 establishes that Creditors' claim which is subject to the priority provided by § 726(a)(2) has priority over late filed allowed unsecured claims from creditors with notice of Debtor's bankruptcy because such claims are subject to § 726(a)(3). See 11 U.S.C. § 726(a)(3) (providing that tardily filed allowed unsecured claims subject to § 726(a)(3) are subordinate to tardily filed allowed unsecured claims subject to § 726(a)(2)(C)).

Accordingly, Creditors Motion to Allow is denied, but they shall be entitled to a distribution from Debtor's chapter 7 bankruptcy estate, and their claim shall have priority

² 11 U.S.C. § 726(a) in pertinent part provides as follows:

Except as provided in section 510 of this title, property of the estate shall be distributed-

* * *

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is-

* * *

(C) tardily filed under section 501(a) of this title, if-

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing such proof of claim under section 501(a) of this title, and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection

over the late filed allowed unsecured claims from creditors who had notice of Debtor's bankruptcy.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 8, 2005