United States Bankruptcy Court
Western District of Wisconsin

Cite as: [Unpublished]

In re Brandt, Inc., Debtor
Bankruptcy Case No. 92-33559-11

United States Bankruptcy Court
W.D. Wisconsin

October 14, 1993

Michael B. Van Sicklen, Foley & Lardner, Madison, WI, for debtor.
Christa A. Reisterer, Asst. U.S. Attorney, Madison, WI, for General Services Administration.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

On a motion by the debtor, Brandt, Inc. ("Brandt"), filed January 20, 1993, the court established March 26, 1993 as a bar date for filing proofs of claim. General Services Administration (GSA), scheduled as an unliquidated creditor, filed its claim on May 3, 1993. Brandt objected to the claim, and thereby commenced this contested matter. After a preliminary hearing, the objection was set for decision on affidavits pursuant to FRCP 43(e) (BR 9017). Each party has submitted affidavits and briefs.

General Services Administration Region 5 and the U.S. Attorney are listed on the abbreviated service list. An affidavit of mailing shows GSA Region 5 and the U.S. Attorney's Office were served with notice of the claims bar date on February 19, 1993. Brandt's attorney, Michael Van Sicklen, swears that he personally inspected the notice to GSA to assure that it included the notice, order, and a highlighted excerpt from the schedule designating the claim as "unliquidated." Notice of the claims bar date was published in national and regional news publications, including the Wall Street Journal (national edition), the Milwaukee Journal, the Buck Courier Times (Bensalem, Pennsylvania), and the Watertown Daily Times. No mail addressed to GSA or the U.S. Attorney has been returned to the attorney for the debtor.

GSA contends that notice was never received. Mr. Harvey G. Florian, the GSA Region 5 Inspector General for Investigations and Joseph G. Vlasaty, GSA Region 5 Inspector General for Auditing, both state that they review all mail coming into their division and they never received any notice or other information regarding the Brandt bankruptcy. Ms. Kathleen S. Tighe, Assistant Counsel to the Inspector General at GSA Region 5, states that on November 30, 1992, she was informed by Special Agent John C. Singler that Brandt had filed bankruptcy. Mr. Singler swears that he was informed of Brandt's bankruptcy by an auditor in the Office of Audits of Region 5 of Inspectors General. The auditor read about Brandt's bankruptcy in Numismatic News, December, 1992. Ms. Tighe ordered Mr. Singler to periodically call the bankruptcy court to determine the claims bar date. Mr. Singler called the bankruptcy court once on December 1, 1992. He was informed that no bar date had been established. On January 13, 1993, Mr. Singler

called Ms. Sheree Dandurand of the U.S. Trustee's Office and was informed that no bar date had been established. On April 27, 1993, Mr. Singler called Ms. Dandurand's office and was again informed of no established bar date. On April 28, 1993, Ms. Dandurand contacted Mr. Singler and informed him that the bar date, March 26, 1993, had passed.

Assistant U.S. Attorney Christa Reisterer states that the first time she knew of GSA's claim was when Ms. Tighe called her on April 28, 1993. Before that time, Ms. Reisterer had received notice of the bar date. She sent a courtesy copy of that notice to the IRS, whom she knew was a creditor.

Rule 3003(c) of the Federal Rules of Bankruptcy Procedure states the requirement for filing proofs of claim in Chapter 11 cases. Bankruptcy Rule 3003(c), in relevant part provides:

(c) FILING PROOF OF CLAIM.

(1) Who may file. Any creditor or indenture trustee may file a proof of claim within the time prescribed by subdivision (c)(3) of this rule.

(2) Who must file. Any creditor or equity security holder whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.

(3) Time for filing. The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

Bankruptcy Rule 9006 governs the computation, enlargement, and reduction of time periods prescribed in other bankruptcy rules. Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline "was the result of excusable neglect."

The leading case interpreting excusable neglect is Pioneer Investment Services, Inc. v. Brunswick Associates, 113 S Ct 1489, 123 L Ed 2d (1993). The Supreme Court in Pioneer expanded the concept of "excusable neglect" by stating 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 1495. Pioneer departs from prior cases under Rule 9006(b)(1), which allowed late claims only if intervening circumstances beyond the party's control caused the late filing. In re South Atlantic Financial Corp., 767 F2d 814, 817 (11th Cir 1985), cert. denied sub nom. Biscayne 21 Condominium Associates, Inc. v. South Atlantic Financial Corp., 475 US 1015, 106 S Ct 1197, 89 L Ed 2d 311 (1986).

Pioneer was a Chapter 11 case. The schedules listed various creditors with contingent, unliquidated, or disputed claims. A short passage giving notice of a bar date and instructions for filing a proof of claim was included in the "Notice of Meeting of Creditors". The respondents filed proofs of claim 20 days late and argued inadequacy of bar date notice and upheaval in the creditor attorney's firm as causes for the lateness. The debtor continued to list the disputed claim in its amended reorganization plan.

The Supreme Court analyzed all relevant circumstances surrounding the party's omission and considered the following factors to determine whether an extension

should be granted:

1. The danger of prejudice to the debtor;

2. The length of delay and the potential impact on judicial proceedings.

3. The reason for the delay, including whether it was within the reasonable control of the movant; and

4. Whether the movant acted in good faith.

The Supreme Court deemed the creditor's neglect excusable and affirmed the district court's extension of time. The debtor was found not prejudiced since it continued to include the claim in its plan. The creditor and its counsel were found to have acted in good faith. The reason for the delay was determined to be predominantly the lack of adequate notice not the upheaval in the attorney's firm.

Applying the four part test endorsed by the Supreme Court to the facts of the present case yields the following analysis:

1. The danger of prejudice to the debtor.

After the bar date the debtor negotiated extensively with its creditors to arrive at terms of a consensual plan. The Order approving the Debtor's Amended Disclosure Statement, commencing the voting on the proposed plan and fixing the deadlines for confirmation was entered on March 29, 1993. The order set May 3, 1993 as the last day for filing written acceptances or rejections of the Plan. GSA filed its claim on May 3, 1993, but cast no vote.

Brandt's Third Amended Plan of Reorganization was confirmed on September 14, 1993. In Article IV, it provides that disputed claims[(1)], when resolved, will share in an escrowed fund pro rata. Throughout the period that creditors could vote for or against the plan, the amount of the escrow was expected to be the total filed claims subject to dispute. Presumably the favorable vote of members of the class of disputed claims was predicated in large part on the sufficiency of the escrow to pay all claims in full even if Brandt lost all disputes and on the ability of Brandt to fund the escrow. However, when the Plan was voted upon, GSA's claim had not been filed and was not considered a part of the class of disputed claims. To include the amount of the GSA claim in the calculation of the escrow would require the commitment of $322,082.00 by the debtor according to the terms of the plan. There is no evidence that funds in that amount are available, and if they are not the plan may not be feasible. The allowance of GSA's claim would undermine the premise of other claimants' votes and might undo confirmation of the plan. In re New York Trap Rock Corp., 153 BR 648 (Bankr SD NY, May 3, 1993) (holding that a debtor would be prejudiced because the debtor previously negotiated with its creditors committee and its equity holders committee and proposed a plan and disclosure statement on that basis, without factoring in the potential late claim); In re R.H. Macy & Co., Inc., 1993 Bankr LEXIS 855, 24 Bankr Ct Dec 493 (Bankr SD NY, May 12, 1993) (holding that the debtor would be prejudiced by a late filed claim that would deplete assets which would otherwise be distributed to other creditors).

2. Length of the delay and its potential impact on judicial proceedings.

GSA's claim was 38 days late. During those 38 days, active negotiation resulted in many compromises on plan terms. An order was entered approving an amended disclosure statement which reflected the timely filed claims. Voting on the proposed

plan was all but completed. In short, the process toward orderly confirmation of a reorganization plan, which resulted in a swift confirmation, advanced on a strict schedule. Had the claims filing deadline borne a less central role in the timely confirmation of a plan, its importance under the second element of the Pioneer test may have been different. see Pioneer, 113 S Ct at 1499-1500. Even though the delay in this case was not long, it was very serious.

3. Reason for the delay, including whether it was within the reasonable control of the movant.

GSA admits it had notice of Brandt's bankruptcy filing. Even a cursory review of the schedules would apprise GSA of the need to file a claim if it wished to participate in the case, since its claim was listed as "unliquidated". The claim could have been filed at any time. What GSA contends is not that the need to file a claim was unknown or that there was inadequate time to file a claim, but rather that the last day for doing so was unknown.

All available evidence, except GSA's employees' protestations that they never received it, supports the inference that GSA had notice of the claims filing deadline from several separate sources. Notice was mailed. Notice was published. All other creditors appear to have learned of the deadline. GSA knew they needed bar date information, but they telephoned the bankruptcy court only once and made no contact with the debtor's attorney. The most plausible inference is that GSA's internal procedures in dealing with this sort of bankruptcy notice are ineffective. Those procedures are in the control of GSA and need not be especially accommodated by the debtor or other parties in the bankruptcy case.

An item which is mailed to the correct address is presumed to be received by the addressee. Hagner v. United States, 285 US 427, 430, 52 S Ct 417, 419, 76 L Ed 861 (1932). The presumption is recognized in a long line of bankruptcy cases, and denial of receipt is not sufficient rebuttal. In re Longardner & Assoc., Inc., 855 F2d 455 (7th Cir 1988), cert. denied 489 US 1015, 109 S Ct 1130, 103 L Ed 2d 191 (1989); American Family Insurance Group v. Gumieny (In re Gumieny), 8 BR 602 (Bankr ED Wis 1981). Notice was also published in national and regional newspapers. Nothing more is, or should be, required to make notice of the claims bar effective.

4. Whether the movants acted in good faith.

GSA acted in good faith. There is no evidence that it did not. Ignoring court deadlines does not by itself constitute bad faith. Nor can I imagine any tactical advantage to GSA following from its failure to timely file. GSA made a mistake. The mistake was apparently innocent. But that does not suggest that GSA should be shielded from its consequences. See generally, In re New York Trap Rock Corp., 153 BR 648, 653 (Bankr SD NY 1993); In re R.H. Macy & Co., Inc., 1993 Bankr LEXIS 855 (Bankr. SD NY 1993); In re Trump Taj Mahal Associates, Inc., 1993 Bankr LEXIS 1143, Bankr L Rptr (CCH) Paragraph 75,393 (Bankr D NJ 1993).

CONCLUSION:

Application of the test prescribed for determining whether a late filed claim should be treated as timely filed in this case provides a negative answer. The claim of GSA is barred, and it shall be so ordered.

END NOTE:

1. Although scheduled as "unliquidated" rather than as "disputed," GSA's claim falls

within the plan's definition of "disputed claims" by virtue of the objection to it filed by Brandt.