

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

Donald D. and Patricia J. Smithey, Debtors
Bankruptcy Case No. 98-34970-7

United States Bankruptcy Court
W.D. Wisconsin

September 7, 2000

Kim Dunn, Landye Bennett Blumstein LLP, Anchorage, AK, for Baranof Island Housing Authority.

Timothy J. Peyton, Kepler & Peyton, Madison, WI, for Trustee.

Robert D. Martin, United States Bankruptcy Judge.

MEMORANDUM DECISION

At a June 12, 2000 preliminary hearing on the trustee's objection to claim #25 filed in the above-entitled matter by Baranoff Island Housing Authority (hereinafter "Baranoff"), I sustained the objection subject to submission of briefs, which have since been filed. The facts are simple. A notice of the claims bar date, October 12, 1999, was sent to all interested parties, including Baranoff. Baranoff received the notice of the claims bar date. Baranoff placed its claim in regular U.S. mail at Anchorage, Alaska on October 5, 1999. The bankruptcy court received the claim and it was filed on October 14, 1999, two days after the claims bar date.

The trustee argues that the claim should be allowed only as a tardily filed claim pursuant to 11 U.S.C. §726(a)(3). Counsel for Baranoff argues that the claim should be treated as timely filed. According to counsel for Baranoff, in the normal course of business, the claim would have been received in Wisconsin no later than Monday, October 11, 1999. Baranoff argues that the "mailbox rule" should apply.

Under the mailbox rule, "proof that a letter properly directed was placed in a post office creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed." *See In re Pyle*, 201 B.R. 547 (Bankr. E.D. Cal. 1996). The Seventh Circuit in *In the Matter of Nimz Transportation, Inc.*, 505 F.2d 177, 179 (7th Cir. 1974) has adopted the mailbox rule. In *Nimz*, the Seventh Circuit held that "a timely and accurate mailing raises a rebuttable presumption that the mailed material was received and thereby filed." The Seventh Circuit did point out, however, that "mailing alone does not constitute filing, but that filing requires delivery and receipt by the proper party." In *Nimz*, the wage claimants mailed proofs of claim to the clerk's office, but the clerk's file did not contain the proofs of claim. The claimants testified that they used normal mailing procedures for mailing the claims, and it could be shown that the envelope was properly addressed and bore the correct return address. The Seventh Circuit applied the "mailbox rule" and found that the lack of these proofs of claim in the clerk's file was not by itself enough to rebut the presumption of receipt.

However, in our case, the mailbox rule should not apply. Unlike Nimz, there was actual receipt of the proof of claim by the bankruptcy clerk's office on October 14, 1999. Because the clerk's office actually received Baranoff's proof of claim, and there was no allegation that the claim was lost in the mail, there is no reason to apply the mailbox rule. Delivery and receipt occurred on October 14, 1999, two days after the claims bar date, and the claim should be treated as a tardily filed claim.

By treating Baranoff's claim as a tardily filed claim, the outcome of this case would be similar to the Ninth Circuit's ruling in In re Coastal Alaska Lines, Inc., 920 F.2d 1428 (9th Cir. 1990). ⁽²⁾ In Coastal Alaska, an unlisted creditor failed to file a claim until he received notice of the final account. The trustee filed an objection to this claim on the ground that it was not timely filed. The Ninth Circuit found that the creditor had actual notice of the debtor's bankruptcy, and that the 90-day claims bar date could not be enlarged under Bankruptcy Rule 9006(b) because none of the five exceptions found in Bankruptcy Rule 3002(c) were applicable. Under Rule 3002, the 90-day claims bar date may be extended for: (1) a claim filed by a governmental unit; (2) a claim of an infant or incompetent person; (3) an unsecured claim that becomes allowable as a result of a judgment; (4) a claim arising from the rejection of an executory contract; and (5) if notice of insufficient assets was given to creditors, and the trustee subsequently notifies the court that there will be a dividend. Bankruptcy Rule 3002(c). As in Coastal Alaska, Baranoff cannot show that any of the exceptions found in Rule 3002(c) are applicable. Because Baranoff's claim was filed on October 14, 1999, two days after the October 12, 1999 claims bar date, it should be allowed only as a tardily filed claim under 11 U.S.C. §726(a)(3).

For the reasons stated herein the objection of the trustee is sustained.

END NOTES:

1. All the cases cited by Baranoff involve cases where the mailbox rule was invoked because there was no evidence of receipt of the proofs of claim by the clerk's office. *See In re Pyle*, 201 B.R. 547 (Bankr. E.D. Cal. 1996); Matter of Kero-Sun, Inc., 63 B.R. 50 (Bankr. D. Conn. 1986). No case has been cited where the clerk's office actually received the proof of claim.

2. *See also In re Thomas*, 181 B.R. 674 (Bankr. S.D. Ga. 1995) (late filed claim in a Chapter 13 case would not be allowed where the creditor mailed the proof of claim five days before the claims bar date, but the claim was not received by the court until ten days later).