

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

THOMAS JAZAYERI, *dba* EAGLES NEST
APARTMENTS, *dba* PERSEPOLIS AUTO
SALES, and TONYA JAZAYERI,

Case No. DK 11-10107
Chapter 13
Hon. Scott W. Dales

Debtors.

ORDER REGARDING OBJECTION TO CLAIM

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

Thomas and Tonya Jazayeri (the “Debtors”) filed a petition for relief under Chapter 13 with this court on October 3, 2011, and the court confirmed their plan which, among things, proposed to pay unsecured creditors holding allowed claims 100%, plus 2% interest. Unfortunately, the Debtors failed to list DePerno Law Office, PLLC (“DePerno”) as a creditor on their schedules or matrix in time for that entity to file a timely proof of claim.

On August 11, 2011, after the claims bar date had passed, DePerno filed a proof of claim in the amount of \$3,126.68. In response, the Debtors filed a claim objection under 11 U.S.C. § 502(b)(9) (the “Objection,” DN 56). The court held a hearing on September 26, 2012 in Kalamazoo, Michigan to consider the Objection. At the hearing, the Debtors and DePerno appeared through counsel.

The parties agree that (1) DePerno did not receive notice of the Debtors’ bankruptcy in time to file a timely proof of claim; and (2) DePerno’s claim is not timely. At the hearing, the Debtors conceded, and the court finds, that under 11 U.S.C. § 523(a)(3), DePerno’s claim will survive any discharge entered in the Debtors’ case.

Nevertheless, DePerno urges the court to allow its admittedly untimely claim under the Due Process Clause and a judicially created equitable exception to 11 U.S.C. § 502(b)(9) and Fed. R. Bankr. P. 3002(c). DePerno contends that it is not fair to deprive it of its right to participate in the distribution of 100% plus 2% interest under the plan because it lacked notice. However, DePerno acknowledges that it may prosecute its claim in state court after the bankruptcy. The Debtors counter by arguing that they have reasons for objecting to the claim on the merits, reasons other than tardiness under 11

U.S.C. § 502(b)(9). In addition, the Debtors are within a month or two of completing their plan and therefore prejudice to DePerno, in the form of delay in commencing any state court action, would be minimal. The court took the matter under advisement.

After carefully considering the arguments and authorities of the parties, the court will sustain the Objection. First, there is no dispute that the claim is untimely and it falls squarely within 11 U.S.C. § 502(b)(9) and second, there is no available exception under Fed. R. Bankr. P. 3002(c)(2).

Third, although some courts may regard it as unfair to deprive an omitted creditor of the opportunity to participate in a plan distribution, and some have suggested that there is a gap in the Bankruptcy Code that the courts must fill using equitable powers, the court perceives neither gap nor unfairness. Indeed, in two Code provisions Congress has addressed the possibility of omitted creditors. *See* 11 U.S.C. §§ 523(a)(3) & 1328(a). In other words, either because DePerno did not have timely notice of the bankruptcy, or because the Debtors' plan does not "provide for" DePerno's claim (through omission or otherwise), its claim will be unaffected. There is no statutory gap to fill with an equitable solution, and there is nothing unfair about remitting a creditor to its state law rights, unaffected by the bankruptcy.¹

NOW, THEREFORE, IT IS HEREBY ORDERED that the Objection (DN 56) is SUSTAINED and Claim No. 9 is DISALLOWED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Thomas Jazayeri and Tonya Jazayeri, Kerry D. Hettinger, Esq., Barbara P. Foley, Esq., the Chapter 13 trustee, and Matthew S. DePerno, Esq.

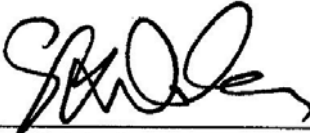
END OF ORDER

1. The court assumes, but does not decide, that the automatic stay presently prevents DePerno from enforcing its rights in state court, but it would not be a stretch to argue that the Debtors' omission may suffice as "cause" to lift the stay under 11 U.S.C. § 362(d)(1).

IT IS SO ORDERED.

Dated September 27, 2012





Scott W. Dales
United States Bankruptcy Judge