UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

MURRAY D. STALL and
PATRICIA KAY STALL,

Debtors.
_____/

Case No. ST 00-03398
Chapter 7

SARA STALL,

Plaintiff,

v.

MURRAY D. STALL and
PATRICIA STALL,

Defendants.
_____/

Adversary Proceeding
No. 01-88023

NOT FOR PUBLICATION

OPINION REGARDING DEBTORS' MOTION TO DISMISS ADVERSARY PROCEEDING

The Debtors filed their Chapter 7 bankruptcy on April 26, 2000. Pursuant to the Notice of First Meeting, August 5, 2000 was the last day to file a complaint objecting to dischargeability under 11 U.S.C. § 523 (a)(2), (4), (6) and (15). The Debtors admit that the Plaintiff was not listed on the original matrix and so did not receive notice. However, Debtors contend and the record supports that the Plaintiff was listed on a corrected matrix filed on May 24, 2000 at which time Attorney James J.

Goulooze was properly served with notice of the filed bankruptcy. Mr. Goulooze testified that he never received that notice. Rather, the first time he learned that the Defendants had filed bankruptcy was November 6, 2000.

Under common law, a presumption of receipt by the addressee arises when an item was properly mailed. Hagner v. United States, 285 U.S. 427, 52 S.Ct. 417, 76 L.Ed. 861 (1932). The presumption is rebutted "upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact." 10 Moore's Federal Practice 301.04[2] (2d ed.). As the Honorable Cornelia G. Kennedy concluded in Bratton v. Yoder Company (In re Yoder Company), 758 F.2d 1114, 1118 (6th Cir. 1985):

> Testimony of non-receipt, standing alone, would be sufficient to support a finding of non-receipt: such testimony is therefore sufficient to rebut the presumption of receipt.

Accordingly, based on the testimony and evidence presented, we conclude that Attorney Goulooze did not receive notice of the Debtors' bankruptcy until November 6, 2000. The Plaintiff did not file her nondischargeability complaint, however, until January 26, 2001. Left to be decided is whether this filing was timely, requiring the Court to deny Defendant's Motion to Dismiss.

Plaintiff argues that she was never supplied with the required notice of the 60 day time period in which to file a nondischargeability complaint because the Court did not have the correct address of either the Plaintiff or her attorney. The Court was also required to give her 30 days notice of the bar date. The Plaintiff did not receive notice until after the bar date had expired. The Plaintiff argues that according to In re Klein, 64 B.R. 372 (Bankr. E.D.N.Y. 1986) an enlargement of time limitation by the Court may be warranted if actual notice is not given.

However, the Court has found that actual notice was received by the Plaintiff and her attorney on November 6, 2000. This effectively started the running of the filing period as to the Plaintiff, giving her a reasonable amount of time in which to file her complaint. She failed to do so. Plaintiff also failed to file a motion to enlarge the time to file a complaint for nondischargeability within the same reasonable time period.

Under Fed. R. Civ. P. 4007(c) the time for filing a complaint to determine dischargeability of any debt pursuant to §523(c) shall be filed not later than 60 days following the first meeting of creditors but on motion of a party in interest and after a hearing, the court may extend the time. The motion must be made before the time period has elapsed.

Fed. R. Bankr. P. 9006(b) says enlargement is limited for Fed. R. Bankr. P. 4007(c) only to the extent and under the conditions stated in the rules. Therefore, the enlargement of time to file a complaint to determine dischargeability must be made within 60 days following the first meeting of creditors. All other motions to enlarge the time period are precluded.

We find that a reasonable amount of time in which to file a complaint to determine dischargeability is certainly no longer than the amount of time a scheduled creditor receives upon notice of the bankruptcy, that being, 60 days. Likewise, the request to extend the time period for filing the complaint must also be filed within the same 60 days.

We further find that the judicial prerogative to extend the time for filing complaints relating to dischargeability under 11 U.S.C. §523(c) when the party has actual notice and when the request for an extension is made after the expiration of the time limitations provided in Fed. R. Bankr. P. 4007(c) has been eliminated by Bankruptcy Rule 9006(b)(3).

The Plaintiff also argues that 11 U.S.C. §523(c) and Fed. R. Bankr. P. 2002 (notice to creditors) are in place to effectuate a creditors due process rights of notice and opportunity to object. She asserts that the 60 day deadline of Fed. R. Bankr. P. 4007(c) does not apply to her because the Bankruptcy Court did not give her 30 days notice as provided in Fed. R. Bankr. P. 4007(c).

Reading §4007(c) to require a bankruptcy court to provide formal notice of the bar date in all cases would render the language about "actual knowledge" under §523(a)(3)(B) a nullity. GAC Entertainment, Inc. v. Medaglia (In re Medaglia), 52 F.3d 451, 454 (2nd Cir. 1995). Under the Plaintiff's construction of the law, there would be no date by which a creditor with actual notice, but no formal notice, would be required to file a nondischargeability complaint. Such a finding would clearly fly in the face of Congressional intent that nondischargeability actions found under Sections 523(a)(2), (4), (6) and (15) should be expeditiously filed and resolved. Rowe v. Steinberg, 253 B.R. 524 (E.D. Mich. 2000); Frankina v. Frankina; 29 B.R. 983 (Bankr. E.D. Mich. 1983).

Several Circuit Courts have concluded that the actual notice provisions of §523 do not offend the Due Process Clause of the Fifth Amendment. Grossie v. Sam (In re Sam), 894 F.2d 778 (5th Cir. 1990); Yukon Self Storage Fund v.Green (In re Green), 876 F.2d 854 (10th Cir. 1989); Lompa v. Price (In re Price), 871 F.2d 97 (9th Cir. 1989); Byrd v. Alton (In re Alton), 837 F.2d 457 (11th Cir. 1988); See also Rowe v. Steinberg, 253 B.R. 524 (E.D. Mich 2000). We find that the Plaintiff's Fourth and Fifth Amendment rights were protected due to the extended filing deadline once the Plaintiff had actual notice of the bankruptcy.

Because there is no time limit for filing a complaint for nondischargeability under 11 U.S.C. §523(a)(5), the Plaintiff may proceed under that Code Section.

Dated: June 18, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

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SARA STALL,

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Defendants.
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ORDER

At a session of said Court, held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 18 day of June, 2001.

PRESENT: HONORABLE JO ANN C. STEVENSON
United States Bankruptcy Judge

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. Debtors' Motion to Dismiss is GRANTED as to 11 U.S.C. §523(a)(2), (3) and (15).

2. Debtors' Motion to Dismiss is DENIED as to 11 U.S.C. §523(a)(5).

IT IS FURTHER ORDERED that a copy of this order shall be served by first-class, United States mail, postage prepaid upon Murray and Patricia Stall, Sara Stall, Jeffrey C. Alandt, Esq. and James J. Goulooze, Esq.

Dated: June 18, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

Served as ordered: