(Cite as: 1990 WL 106717 (Bankr.D.Vt.))
<RED FLAG>

In re KELTON MOTORS, INC., Debtor.

Bankruptcy No. 88-00255.

United States Bankruptcy Court, D. Vermont.

June 14, 1990.

A. Field, Montpelier, Vermont, for Lyndonville Savings Bank & Trust Co. (Lyndonville).

J. Fitzhugh, Sheehey, Brue, Gray & Furlong, Burlington, Vermont, for Celtic Life Insurance Co.

J. Harrington, Sulloway, Hollis & Soden, Concord, New Hampshire, for City Bank & Trust (City Bank).

J. Kennelly, Caroll, George & Pratt, Rutland, Vermont, for Mercedes-Benz Credit Corp. (MBCC).

R. Lang, Wilson, Powell, Lang & Faris, Burlington, Vermont, for General Motors Acceptance Corp. (GMAC).

M. Palmer, Glinka and Palmer, Middlebury, Vermont, for G. Glinka, Esq., Chapter 7 Trustee (Trustee).

MEMORANDUM OF DECISION ON MOTION TO FILE LATE PROOF OF CLAIM

FRANCIS G. CONRAD, Bankruptcy Judge.

***1** This contested matter is before us on City Bank's motion to file a proof of claim late. [FN1] We allow City Bank to file its claim under § 726(a)(3). The parties stipulated to the relevant facts and agree the matter may be decided on the stipulation and pleadings filed with the Court.

The underlying case was commenced with the filing of an involuntary Chapter 7 petition on October 27, 1988, 11 USC §§ 101, et seq. Kelton Motors voluntarily converted to a Chapter 11 case on February 17, 1989 and later reconverted to a Chapter 7 case.

Kelton Motors' Schedule A-3 "Creditors Having Unsecured Claims Without Priority" does not list City Bank. City Bank was missing from the require mailing matrix. VLBR 1002(d).

On June 2, 1989, the § 341(a) meeting notice was issued and a November 1, 1989 proof of claim bar date was set.

City Bank filed its proof of claim on January 17, 1990, some seventy-seven days after the bar claim date.

City Bank admits that its general counsel knew about the commencement of the involuntary case in October, 1988. It denies that its general counsel, any other officer, or any attorney was aware, until the middle of December 1989, that the case had been reconverted to Chapter 7, or that any first meeting of creditors or bar date for the filing of proofs of claim had been set.

City Bank acknowledges that Rules of Practice and Procedure in Bankruptcy Rule 2002(f) requires the Bankruptcy Clerk give notice to creditors of the time allowed for filing claims under Rules of Practice and Procedure in Bankruptcy Rule 3002. Rule 2002(f) also requires notice of the entry of an order directing the conversion of a case to one under Chapter 7. Notice was provided under the rule, but if City Bank was not on the matrix it would not have received the notice directly. City Bank also acknowledges Rule 3002(c) provides no express exception in the case of failure to give notice of the bar date.

Relying on City of New York v. New York N.H. & H.R. Co., 344 US 293, 297, 73 S.Ct. 299, 301, 97 L.Ed.2d 333, 337 (1953), City Bank argues that no claim may be barred unless reasonable notice complying with statutory requirements is given to the creditors beforehand. [FN2] "Even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are barred." Id., 73 S. Ct. at 301, 97 L.Ed.2d at 337. Moreover, City Bank argues in a case where no Court notice about the bar date is received due process requires that a late filed claim be treated on a par with those of other creditors. City Bank also points out that Rule 3002(c) does not expressly provide for discretionary allowance of late filed claims, but similar Rule 4007(c) for nondischargeability complaints has been so interpreted. In re Schwartz & Meyers, 64 BR 948, 955 (Bkrtcy.S.D.N.Y.1980). Finally, City Bank refers to several cases, including some we have written, which hold that a proof of claim may not be disallowed or subordinated if the creditor had no notice or actual knowledge of the bar date.

***2** Needless to say City Bank's motion is opposed by several of Kelton Motors' creditors. Their argument can be summarized quite simply: City Bank filed late and is thus barred by Rules of Practice and Procedure in Bankruptcy Rule 3000(2)(c). No Rule 3002(c) exception applies to allow its late filing.

If this argument is not sufficient, several creditors and Trustee have raised the issue of "actual notice." Trustee claims he corresponded with City Bank, and they with him, during the pendency of the claims filing period. Trustee produces a November 1, 1989 letter from K. William Clauson, City Bank's general counsel, which acknowledges Trustee's prior correspondence.

City Bank's motion to allow its proof of claim be filed nunc pro tunc was set for an evidentiary hearing. At the scheduled time for hearing, Trustee's counsel produced a stipulation that said no party intended to submit any evidence raising any disputed issue of fact. All parties stipulated that an evidentiary hearing was unnecessary. Stipulation, filed May 30, 1990, pg. 1.

The stipulation places us in the position of having to decide whether the parties have asked for judgment on the pleadings, a F.R.Civ.P. 12(c) motion, [FN3] or have cross-moved for summary judgment under F.R.Civ.P. 56 because the parties have not told us what rule of procedure they are moving under.

The parties have submitted a carefully worded stipulation for our use in deciding this contested matter. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in F.R.Civ.P. 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by F.R. Civ.P. 56. F.R.Civ.P. 12(c). The filed stipulation appears to allow all parties to be fully submitted.

It is within our discretion to accept extra pleading matter on a motion for judgment on the pleadings and treat it as one for summary judgment. M.L. Lee & Co. v. American Cardboard & Packaging Corp., 36 F.R.D. 27 (D.Pa.1964), citing, Wright & Miller, Federal Practice and Procedure, 1371. In practice, and as indicated by Wright & Miller, id., at 1372, the great majority of Rule 12(c) motions are eventually converted to Rule 56 motions because of the introduction of supporting affidavits or documents to show no triable issues of fact are in dispute. We exercise our discretion and treat the parties' requests as cross-motions for summary judgment because the pleadings and stipulation indicate there are no material issues of fact in dispute and the matter is one of law.

We recite again the findings of fact which are necessary to our adjudication:

1) Kelton Motors is a Chapter 7 debtor before this Court.

2) City Bank had actual notice of Kelton Motors' bankruptcy filing.

3) The bar claim date under Rules of Practice and Procedure in Bankruptcy Rule 3002(c) was

November 1, 1989.

***3** 4) City Bank received no notice of the Rule 3002(c) November 1, 1989 date.

5) City Bank had no actual notice of the November 1, 1989 date.

6) City Bank filed its proof of claim after November 1, 1989 and is considered a late-filed proof of claim.

7) Kelton Motors' case is presently administered by this Court.

Under F.R.Civ.P. 56, summary judgment may be rendered if the pleadings, admissions on file, and affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law. In this contested matter there is no genuine issue about any material fact.

City Bank's motion must be denied in part and granted in part, and the motions of the various creditors must be denied in part and granted in part because City Bank filed its proof of claim after the Rule 3002(c) bar date but before the estate is completely administered. The fact situation presented allows City Bank's proof of claim to be filed, not nunc pro tunc, but in the subordinated position of an 11 USC § 726(a)(3) claim. [FN4] It remains to be seen after the marshaling of the estate's assets if there will be sufficient funds to pay a dividend on City Bank's claim.

As we said in In re Roberts:

The Rules of Practice and Procedure in Bankruptcy provide us with the initial framework for an analysis of this dispute. Bankruptcy Rule 3002(c) [FN5] governs the time within which proofs of claims must be filed in Chapter 7, Chapter 12, [FN6] and Chapter 13 cases. The case law in this Circuit consistently regards the prescribed time period allowed for the filing of proofs of claims set forth in Rule 3002(c) as a statute of limitations barring late filing. [FN7] In re Nohle, 93 BR 13, 15 (Bkrtcy.N.D.N.Y.1988) (citing cases). Accord, Associated Container Transportation (Australia) Ltd. (In re Black & Geddes, Inc.), 58 BR 547, 552- 553 (S.D.N. Y.1984). 'This ... filing requirement is a mandatory nondiscretionary statute of limitations, and may not, therefore, be extended by the courts once it has expired.' Lazar v. Sullivan (In re Sullivan), 36 BR 771, 772 (Bkrtcy.E.D.N.Y.1984). See, In re Alstead Automotive Warehouse, Inc., 16 BR 924 (Bkrtcy.E.D.N.Y.1982).

In In re Valley Fair Corp., 4 BR 564 (Bkrtcy.S.D.N.Y.1980), a Chapter XI Act case involving a dispute whether the period of time Ordered by the Court for the filing of a claim by the creditor constitutes a statute of limitations, Judge Babitt held:

It is no longer a litigable issue, and needs no citation of abundant authority, that the period fixed by statute for the filing of claims against the assets of an estate is a statute of limitations, mandatory and inexorable, peremptory and unyielding even to the exercise of some equitable power.... Internal proof that no deviation was contemplated (by Congress) is found in ... (former) Rule 906(b)....

Id., at 566-67. (parentheticals supplied for clarity). These Courts have found that the rule is to be strictly construed 'because the purpose of a claims bar date is to provide the debtor and its creditors with finality and to insure the swift distribution of the bankruptcy estate.' In re Nohle, supra, at 15, citing, In re Johnson, 84 BR 492, 494 (Bkrtcy.N.D.Ohio 1988) and In re Good News Publishers, Inc., 33 BR 125, 126 (M.D.Tenn.1983). We agree. Furthermore, implicit in Rule 3002(c) is the restriction that the ninety (90) day time period for filing proofs of claims cannot be enlarged unless one of six exceptions are germane. The terms of Rule 3002(c) permit an enlargement of the time within which to file a proof of claim only in the presence of certain very narrowly constructed situations such as for the filing of a claim by an infant or incompetent person, or in the event there remains a surplus after all other allowed claims have been satisfied.

***4** In re Roberts, 98 BR 664, 665-666 (Bkrtcy.D.Vt.1989). (Footnotes in original).

To our knowledge none of Rule 3002(c)'s exceptions are germane here with the exception of Rule 3002(c)(6) on surplus. Any thoughts about that exception would be speculative on our part in the present posture of this case. Thus, if City Bank is to succeed it needs to escape the structure of Rule 3002(c). We hold it does not escape Rule 3002(c) but that it comes under the forgiveness of § 726(a)(2)(C).

City Bank points to In re Roberts, supra, at 666-667 where we said:

We note that inherent in the strict time requirements of the Bankruptcy Rules is the assumption that a creditor has received notice. If notice is given as required by Bankruptcy Rule 2002, save circumstances which fall under the enlargement provisos of Rule 3002(c), the time prescribed for the filing of a Rule 3002 proof of claim is quite simply an absolute bar date.

In re Roberts involved a creditor who received notice of a bar claims date after assets were discovered and who filed its proof of claim three days after the bar claim date. Under the facts and circumstances of Roberts, our statement just quoted is a correct statement of the law. But the fact situation is different here. In the instant case, City Bank was not on the mailing matrix and did not receive actual notice of the bar claim date. Thus, Rule 3002(c) is not an absolute bar date to the filing of its claim. But, § 726(a)(2)(C) prevents City Bank from partaking with timely filed creditors in any estate dividends disbursed under § 727(a)(2)(A) and (B).

The scope of our inquiry in this matter is limited and narrow. We need to ask: Was the proof of claim filed late, and did City Bank have notice or actual knowledge of the bankruptcy case in time to timely file a proof of claim? The answer to both these questions is yes. Thus, City Bank is entitled to the subordinated status established for tardy claims under § 726(a)(3).

An appropriate Order will be entered.

FN1. We have jurisdiction to determine this matter under 28 USC § 1334(b) and the General Reference to this Court under Part V of the Local District Court Rules for the District of Vermont. This matter is core under 28 USC § 157(b)(2)(B). Our Memorandum of Decision constitutes conclusions of law and findings of fact under F.R. Civ.P. 52 as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FN2. Although it is not necessary to address the City of New York case in this Decision, we footnote it here for completeness. The rationale of City of New York does not apply in the instant matter. Under the 1898 Act, Courts issued notices of bar dates. The setting of the bar date was discretionary with the Court. This discretion placed on creditors the difficult, if not impossible, burden of constantly inquiring with the Court about possible bar dates. City of New York 's rationale is inapplicable today because under the 1978 Act and Rule 3002(c), all discretion is removed. It is a simple matter to read a rule.

FN3. F.R.Civ.P. 12(c) provides:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. In this matter, Part VII of the Rules of Practice and Procedure in Bankruptcy apply.

FN4. 11 USC § 726(a)(3), Distribution of property of the estate, provides:

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

(3) third, in payment of any allowed unsecured claim of proof of which is tardily filed under section 510(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection.

FN5. Rules of Practice and Procedure in Bankruptcy Rule 3002(c) provides:

(c) Time for Filing. In a chapter 7 liquidation or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

(1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of a person or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that person or denies or avoids the person's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract of the debtor may be filed within the time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed.

FN6. Chapter 12 cases are governed by Rule 3002(c) as well, although the rule does not so specify. See, In re Wharry, 91 BR 31 (Bkrtcy.N.D.Ohio 1988); In re King, 90 BR 155 (Bkrtcy.E.D.N.C.1988). See also, VLBR 3002.

FN7. We make a clear distinction between the Rule 3002(c) provisions for the time within which one must file a proof of claim in a Chapter 7, 12, or 13 case and Rule 3003 (c)(3). Under Rule 3003(c)(3), the Court fixes the time within which proofs of claims may be filed in a Chapter 11 reorganization case. Additionally, Rule 3003(c)(3)

provides that "for cause shown," the Court may extend the time within which proofs of claims may be filed. The District Court for the District of Vermont, in reversing our denial of a Chapter 11 creditor's motion to enlarge time for filing of a proof of claim under Rule 3003(c)(3), commented on the statute of limitations analogy:

"Although courts have ascribed statute of limitations characteristics to the claims bar, the claims bar departs from a statute of limitations in one essential fashion. Unlike the finality of a statute of limitations, the claims bar is subject to statutory and equitable extension. ... Rule 3003(c)(3) orders lack the finality contemplated by Bankruptcy Rule 9024 and F.R.Civ.P. 60(b)." In re STN Enterprises, Inc., Slip Op., dated July 28, 1988, Billings, D.J. (now Chief Judge).

The instant issue, however, is a late-filed Chapter 7 proof of claim upon which Rule 3003(c)(3) has no application. Unlike Rule 3003(c)(3), Rule 3002(c) creates a statute of limitations barring statutory or equitable extension. Rule 3002(c) subsections (1) through (6) provide specific exceptions to the 90 day time frame within which to file proofs of claim, but which are in themselves strictly controlled and limited by Rule 3002. See, Rules of Practice and Procedure in Bankruptcy Rule 9006(b)(3).

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