UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:
Yvonne L. Rendina,
Debtor.

Chapter 13 Case
 # 03-10554

ORDER
GRANTING CREDITOR LIMITED RELIEF
AND APPROVING TRUSTEE'S FINAL REPORT

On April 11, 2003, the Debtor filed a petition commencing this chapter 13 bankruptcy case (doc. # 1). In her Schedule F, she indicated that she owed Robert Northrop a general unsecured debt in the amount of $1950 for back rent due in 2003. She also disclosed in Schedule G the residential real property lease she had with Mr. Northrop. Id. Both the certificate of service notifying creditors of the Debtor's chapter 13 plan, as well as the certificate of service giving creditors notice of the meeting of creditors (doc. ## 4, 5), included Mr. Northrop at the Underhill address listed in the schedules. The Findings and Order Confirming Plan listed a total of $31,694.67 in unsecured claims, with $3,000 available to pay them, and thus projected a 9.47% dividend to general unsecured creditors (doc. # 11). Mr. Northrop did not file a proof of claim and hence did not share in the distribution under the Plan.

On March 3, 2008, the Trustee filed and served his Final Report and that report reflected that, based on the proofs of claim filed, the actual distribution to general unsecured creditors was 9.93% (doc. # 18). Mr. Northrop did not receive a copy of the Trustee's Final Report because he had not filed a proof of claim. Also on March 3rd, the Court issued an Order Discharging Debtor (doc. # 19), which was served on Mr. Northrop as one of the creditors listed in the case.

On April 14, 2008, Mr. Northrop and his wife filed an "Objection to Debtor's Discharge" (doc. # 21) (the "Objection"). They stated that the Order Discharging Debtor was "the first notice of this bankruptcy proceeding that [they] have ever received. They have never received any other notice of this proceeding." Id. The Objection went on to say that the Debtor had rented an apartment from them for $650 per month, beginning in September 2002; they received the last rent payment (of $325) from the Debtor in June 2003; the Debtor had an outstanding balance due them of $2,599; and she moved out of the apartment at a time when Mr. Northrop was receiving chemotherapy. Id. The Northrops also contended that they had been surprised to receive notice of the discharge, which indicated that the Debtor was still residing in Vermont, as they had been attempting to locate the Debtor without success. Id. They stated that if they had received notice of the bankruptcy case, they would have participated in it. Id.

On May 8, 2008, the Court held a hearing on the Trustee's Final Report and the Northrops' Objection. The Northrops appeared *pro se* and specified that the sole basis for their objection was their claim that they had never received notice of the case. The Court deemed this to be a question of fact and continued the hearing to June 12, 2008 to take testimony.

At the June 12th hearing, Mr. Northrop testified that, in April 2003, the Debtor had assured him that she would pay him in full but that she never mentioned that she was in bankruptcy. At the time the first notice concerning the bankruptcy filing was sent out – also in April 2003 – he was in the hospital. He claimed that the Debtor had full access to his mailbox, as their mailboxes were next to each other, and while he had no evidence that she removed the bankruptcy notice from his mailbox, he inferred that this is why he did not receive the notices the Court had sent, particularly because he had never had an experience in the past where he failed to receive any item of mail. He stated that the Debtor owed him $2,559.30, $1,100 of which was incurred prior to the Debtor filing bankruptcy on April 11, 2003, with the balance incurred between the date of filing and June 16, 2003 when she vacated the apartment.

The chapter 13 Trustee pointed out, and the Court has confirmed, that the certificates of service for the initial three documents (the plan, the notice of case and meeting of creditors, and the notice of confirmation hearing) all show Mr. Northrop's name and likely would have been served in a single envelope. The Debtor did not appear at the evidentiary hearing as she now apparently resides out of state. The Court took the matter under advisement and authorized the Debtor, Mr. Northrop, and the Trustee to file supplemental papers, if they so desired, by July 3, 2008.

The Debtor filed an affidavit in which she stated, "I am over the age of 18 years and hereby truthfully swear that I did not remove any documents, mail or other items from the private mailbox or property of Robert or Julia Northrop" (doc. # 26). Neither the Northrops nor the Trustee submitted any additional filings. The matter is now ready for disposition.

In this case, the Northrups did not file a proof of claim by the deadline, September 10, 2003. They claim the reason for their failure to file is that they never received notice of the Debtor's bankruptcy filing, her chapter 13 plan, or the confirmation hearing. They assert that the first notice they received was the notice of discharge, and that they promptly interposed an objection upon receipt of that notice.

Section 523(a)(3) of the Bankruptcy Code provides that a bankruptcy discharge does not discharge an individual debtor from a debt that the debtor failed to list in his or her case. However, there is no statutory provision specifically addressing whether a debt is discharged when the debtor lists the claim but the creditor does not receive the notice. The quandary is whether the claim should be discharged because the debtor fulfilled her statutory duty by listing it, or excepted from discharge because the creditor, by no fault of his own, did not receive notice. This is quite distinct from those cases where a debtor intentionally fails to include a creditor on his or her schedules, or where a creditor fails to file a claim after receiving notice of a bankruptcy. Neither party has provided any case law to resolve this quandary.

Proper mailing of a document creates a presumption of delivery. See Hagner v. United States, 285 U.S. 427, 430 (1932) ("The rule is well settled that 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."). Since the certificates of service affirm that the notice was sent to Mr. Northrop at his correct address, the presumption is that he received the notices. Numerous courts, however, have found a party's testimony, by itself, may be sufficient to overcome the presumption of delivery. See, e.g., Stutzka v. McCarville, 420 F.3d 757, 762 (8th Cir.2005) (borrower's testimony sufficiently rebuts the presumption of delivery to raise a trial worthy issue of fact); Williams v. BankOne, N.A. (In re Williams), 291 B.R. 636, 648 (Bankr.E.D.Pa.2003) (debtor's trial testimony sufficiently credible to rebut the presumption of delivery); see also Williams v. First Gov't Mortgage & Investors Corp., 225 F.3d 738, 751 (D.C. Cir. 2000) (borrower's testimony too incredible to rebut presumption).

The Court finds the testimony of Mr. Northrop that he did not receive notice that the Debtor filed her bankruptcy case to be credible and therefore treats the presumption of delivery of the notices to have been rebutted. Moreover, the Court also believes that if Mr. Northrop had received notice of this bankruptcy case he would have taken steps to file a timely proof of claim.

This brings the Court to the question of the proper remedy. There is no statutory basis to grant Mr. Northrop an exception from discharge under these circumstances, where the Debtor did all that was required to ensure that he receive proper notice. On the other hand, there is also no basis for discharging the debt since Mr. Northrop did not have an opportunity to file a proof of claim and share in the distribution. Therefore, the Court deems it appropriate to fashion an equitable remedy that takes into account that neither party failed to meet their duty under the Bankruptcy Code, and looks to the treatment Mr. Northrop would have received if he had received notice.

At the hearing, Mr. Northrop stated that his only objection was the lack of notice. He neither filed an adversary proceeding nor asserted any facts or circumstances giving rise to a dischargeability cause of action under § 523 or an actual objection to discharge under § 727 (notwithstanding the caption of his filing). The Court deems it appropriate to limit the relief granted to Mr. Northrop to the treatment he would have obtained if he had received notice and was found to hold an allowed general unsecured claim for pre-petition rent.

Accordingly, pursuant to this Court's equitable powers under 11 U.S.C. § 105,

IT IS HEREBY ORDERED that Mr. Northrop's "objection to discharge" is sustained to the extent it will be deemed a proof of claim for an unsecured claim in the amount of $1,100,[1] and 9.93% of that claim (or $109.23) is excepted from discharge in order to provide him access to the same payment his claim would have gotten if he had received notice and had filed a proof of claim in this bankruptcy case.

[1] This is the amount Mr. Northrop testified was due him and is lower than the $1,950 the Debtor listed in her Schedule F.

IT IS FURTHER ORDERED that Mr. Northrop's "objection to discharge" is overruled in all other respects.

IT IS FURTHER ORDERED that the Trustee's Final Report is hereby approved; and

IT IS FURTHER ORDERED that the case may be closed when the appeal period on this Order has expired, or any appeal of this decision is finally entered, whichever is later.

SO ORDERED.

August 5, 2008
Rutland, Vermont

Hon. Colleen A. Brown
U.S. Bankruptcy Judge