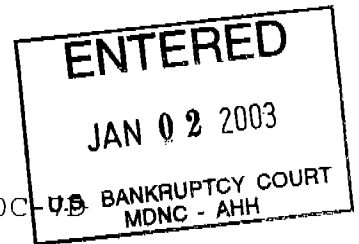


UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
DURHAM DIVISION



IN RE:

Gerald Blalock Denny and  
Martha Grace Shotwell Denny,  
  
Debtors.

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)  
) Case No. 01-81440C-  
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ORDER

This case came before the court on December 19, 2002, for hearing upon the Motion to Allow Late Filing of Claim that was filed on behalf of Currin Building Supply, Inc. Having considered the motion, the responses in opposition to the motion, the evidence offered by the parties, the matters of record in this case and the arguments of counsel, the court finds and concludes as follows:

FACTS

This Chapter 7 case was filed on May 18, 2001. Initially, creditors were notified not to file claims. However, after assets were recovered by the Trustee, a notice was issued and served on creditors which, among other things, stated that the deadline for creditors to file proofs of claim was January 24, 2002. The notice included the following language: "Creditors who do not file a proof of claim on or before this date will not share in any distribution from the debtor's estate." The record reflects that this notice was served by first class mail upon Currin Building Supply, Inc. on October 28, 2001. On November 1, 2002, the motion now before the court was filed on behalf of Currin Building Supply, Inc., along

with a proof of claim in the amount of \$59,094.25. The motion asserts that Currin did not receive the notice containing the January 24, 2002 deadline and seeks to have the proof of claim allowed as a timely filed claim.

#### LAW AND ANALYSIS

It is undisputed that the address to which the notice was mailed is the correct mailing address for Currin and that Currin received other items from the clerk's office that were mailed to that address. Because the record reflects that the notice was properly addressed, stamped and deposited in the United States mail, it is presumed to have been received by Currin in the ordinary course of the mail. See Hagner v. United States, 285 U.S. 427, 430, 52 S.Ct. 417, 419, 76 L.Ed. 861, 864 (1932); In re Eagle Bus. Mfg., Inc., 62 F.3d 730 (5th Cir. 1995). The evidence offered on behalf of Currin, consisting of an affidavit stating that to the best of the recollection of the affiant, the notice was never received, is insufficient to rebut the presumption that the notice was received by Currin. See In re Ms. Interpret, 222 B.R. 409, 414 (Bankr. S.D.N.Y. 1998). Accordingly, the court finds that timely notice of the filing deadline was received by Currin.

The question that remains is whether the court may extend the time for the filing of a proof of claim by Currin in light of Currin having received notice of the filing deadline. The deadline for filing claims in a Chapter 7 case derives from Bankruptcy

Rule 3002(c), which provides as follows:

TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit.

(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 an entity 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 entity or denies or avoids the entity'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 or unexpired lease of the debtor may be filed within such 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) [Abrogated].

The effect of filing a proof of claim after the expiration of the time prescribed in Bankruptcy Rule 3002(c) is governed by § 502(b)(9) of the Bankruptcy Code. This provision of the Code requires that a claim be disallowed if:

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedures may provide.

Bankruptcy Rule 9006 authorizes the extension of the bar date based upon excusable neglect under some circumstances. A careful reading of Bankruptcy Rule 9006, however, discloses it does not authorize any extension of the bar date in the present case, where the motion for extension was filed after the deadline. Bankruptcy Rule 9006(b)(1) provides that on motion made after the expiration of the specified period, the court may permit an act to be done where the failure to act was the result of excusable neglect. However, under Rule 9006(b)(3), there is an express limitation on the authority granted in Bankruptcy Rule 9006(b)(1) which provides as follows:

(3) ENLARGEMENT LIMITED. The court may enlarge the time for taking action

under Rules 1006(b)(2), 1017(e),  
3002(c), 4003(b), 4004(a), 4007(c),  
8002, and 9033, only to the extent  
and under the conditions stated in  
those rules. (Emphasis supplied).

Bankruptcy Rule 3002(c) thus is one of the rules subject to limitation imposed by subsection (b)(3) of Bankruptcy Rule 9006. As a result, the authority of the court to extend the deadline specified in Rule 3002(c) is limited to the authority contained in Rule 3002(c). Because of such limitation, Rule 9006 may not be used to expand such authority beyond the self-contained exceptions stated in Bankruptcy Rule 3002(c).<sup>1</sup>

Bankruptcy Rule 3002(c), which is quoted above, sets forth the five circumstances or exceptions in which the deadline contained in Bankruptcy Rule 3002(c) is not controlling. The situation presented in the present case does not fall within any of these exceptions. Therefore, even if it could be said that the failure of Currin was the result of excusable neglect, Currin nonetheless may not be granted relief under Rule 9006 because the limitation contained in Bankruptcy Rule 9006(b)(3) precludes the court from doing so. See In re S.A. Morris Paving Co., Inc., 92 B.R. 161 (Bankr. W.D. Va. 1988). Nor does the court have equitable power under § 105 to disregard provisions of the Bankruptcy Rules and grant an extension not permitted under the Rules. See In re

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<sup>1</sup> See generally, 10 L. King, Collier on Bankruptcy ¶ 9006.08 (15th ed. rev. 2002).

Coastal Alaska Lines, Inc., 920 F.2d 1428, 1432 (9th Cir. 1990).

It follows that Currin's motion to have its late filed claim treated as timely filed must be denied, such claim being a tardily filed claim eligible for distribution only under § 726(a)(3) of the Bankruptcy Code.

IT IS SO ORDERED.

This 27th day of December, 2002.

*William L. Stocks*

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WILLIAM L. STOCKS  
United States Bankruptcy Judge