UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

IN RE:	)	
	)	
Roland H. Jones, Jr.,	)	Case No. 99-13086C-13G
d/b/a Payroll Productions,	)	
	)	
Debtor.	)	
	)	

ORDER

This case came before the court on July 18, 2000, for hearing upon a motion by First-Citizens Bank and Trust Company ("First-Citizens") for reconsideration of an order entered on April 26, 2000, confirming the Debtor's plan. Appearing at the hearing were Daniel C. Bruton, attorney for First-Citizens, Bruce H. Connors, attorney for Carolina Bank, and the Chapter 13 Trustee, Anita Jo Kinlaw Troxler. Having considered the motion for reconsideration, the evidence offered at the hearing, the confirmation order and the other matters of record in this case, and having heard the arguments of counsel, the court finds and concludes as follows:

FACTS

1. This case was filed on December 29, 1999.

2. In the schedules filed by the Debtor, both First-Citizens and Carolina Bank were listed as secured creditors and each was shown as being secured by "recording equipment" without any further

description of the collateral. Debtor's Schedule B listed the fair market value of the equipment securing First-Citizens at $20,000.00 and the equipment securing Carolina Bank at $8,000.00.

3. On March 24, 2000, Debtor's proposed plan was mailed out to creditors, along with a notice that gave creditors twenty-five (25) days within which to object to the plan as proposed by Debtor. Pursuant to this notice, creditors had until April 18, 2000, within which to object to the plan. There is no dispute regarding First-Citizens having received the proposed plan and this notice.

4. The proposed plan listed Carolina Bank as having a fully secured claim of $15,508.55 and First-Citizens as being partially secured with the secured portion of the First-Citizens' claim being $12,500.00. The plan did not describe the collateral for either the Carolina Bank or First-Citizen other than stating that each creditor's claim was secured by the collateral listed in the financing statements of First-Citizens and Carolina Bank.

5. Neither First-Citizens nor Carolina Bank filed any objection to the plan proposed by the Debtor and, on April 26, 2000, an order was entered in this case confirming the plan as proposed by the Debtor.

6. On May 3, 2000, First-Citizens filed its motion for reconsideration of the order confirming the plan. The grounds for the motion are that First-Citizens mailed a timely objection to the plan which was lost in the mail. The motion for reconsideration asserts that the objection was mailed to the court on April 5, 2000, but was never received by the court because of "difficulties with the U.S. Postal Service, as many items sent from this office were lost or delayed during this time frame." On July 3, 2000, First-Citizens filed an amendment to its motion for re-consideration. The amendment expands First-Citizens' argument on why the valuation of its second claim should be changed but does not state any additional grounds for granting reconsideration.

ANALYSIS

7. Although not stated in the motion, First-Citizens apparently seeks reconsideration pursuant to Bankruptcy Rule 3008 since it seeks relief from the portion of the confirmation order allowing its secured claim. Bankruptcy Rule 3008 provides that a party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The rule requires that the court enter an "appropriate order" after a hearing on a motion for reconsideration.

8. A motion for reconsideration brings into play § 502(j) of the Bankruptcy Code which provides that a claim that has been allowed or disallowed may be reconsidered "for cause." If the court decides to reconsider an allowed or disallowed claim, § 502(j) provides that the reconsidered claim may be allowed or disallowed "according to the equities of the case." Section 502(j) thus appears to contemplate a two-step process. The court first decides whether the party seeking reconsideration has shown "cause." If so, and the court decides to reconsider the claim, then the second step contemplated under § 502(j) is that the court decide whether the reconsidered claim should be allowed or disallowed.

9. The court first will consider whether to reconsider the confirmation order. As the party seeking reconsideration, First-Citizens has the burden of showing that reconsideration should be granted, i.e., it is incumbent on First-Citizens to show "cause" for reconsideration. Absent a showing of "cause", a motion for re-consideration should not be granted. See In re Lambeth Corp., 227 B.R. 1, 7 n.10 (B.A.P. 1st Cir. 1998); In re Chattanooga Wholesale Antiques, Inc., 930 F.2d 458, 463 (6th Cir. 1991); Cassell v. Shawsville Farm Supply, Inc., 208 B.R. 380, 382 (W.D. Va. 1996).

10. Neither the Bankruptcy Code nor the Bankruptcy Rules define the meaning of "cause" as used in § 502(j). As a result, the courts have been required to develop their own standard or test for determining "cause" under § 502(j). There is considerable variation in the cases concerning the test or standard which should be used.[1]

11. A reading of the cases involving § 502(j) suggests that an important consideration in deciding the standard to be applied under § 502(j) is the manner in which the claim was initially resolved. In some instances, a motion for reconsideration is filed after a full blown hearing in which the movant appeared and

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[1]Some courts have concluded that if a motion to reconsider is filed within 10 days of the entry of the order allowing or disallowing the claim, then the motion should be governed by Bankruptcy Rule 9023 and Federal Rule 59. See In re Consolidated Pioneer Mortgage, 178 B.R. 222, 227 (B.A.P. 9th Cir. 1995); In re Martinez, 179 B.R. 90 (Bankr. N.D. Ill. 1994). Where the motion for reconsideration is filed more than ten days after the order disallowing or allowing the claim, some courts have concluded that Bankruptcy Rule 9024 and Federal Rule 60(b)(1) should govern the determination of cause. See In re Levoy, 182 B.R. 827 (B.A.P. 9th Cir. 1995); In re W.F. Hurley Inc., 612 F.2d 392, 396 (8th Cir. 1980); and see generally 17 Am. Bankr. Inst. J. 22 (1998). Without relying solely upon the timing of the motion for reconsideration, many of the cases have debated whether the "for cause" standard under § 502(j) is different from the "excusable neglect" standard of Rule 60(b)(1) and have reached differing conclusions. See In re Lambeth Corp., 227 B.R. 1, 8 n.11 (B.A.P. 1st Cir. 1998), for an extensive review of such cases.

participated. In these cases, the record should be reopened and reconsideration granted only upon a showing of either newly-discovered evidence or of manifest error in the initial decision. See In re Giordano, 1999 WL 527717, 2 (Bankr. E.D. Pa. 1999); Olson v. United States, 162 B.R. 831, 833 (D. Neb. 1993)(motions to reconsider contested orders granted where (1) the court has patently misunderstood a party, (2) the court has made a decision outside the adversarial issues presented by the parties, (3) the court has made an error not of reasoning but of apprehension, or (4) there is a controlling or significant change in the law or facts since the submission of the issue to the court).

12. In other instances, claims are disallowed or modified as the result of hearings at which the claimant failed to respond to an objection or failed to appear or produce any evidence. The present case involves this type of situation. First-Citizens received the proposed plan and notice of the deadline for objecting to the proposed plan. First-Citizens did not file a timely objection and the confirmation order was then entered valuing its secured claim at $12,500.00. In its motion, First-Citizens is now seeking to be relieved of its failure to file a timely objection. In such a situation, the appropriate test for determining whether

reconsideration under § 502(j) should be granted is whether the movant has shown excusable neglect, which is to be determined in accordance with the decision of the Supreme Court in Pioneer Investment Services Co. v. Brunswick Associates, Ltd., 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed.2d 74 (1993).

13. In Pioneer, the Supreme Court adopted a two-prong test for determining whether relief should be granted based upon "excusable neglect." First, the court must determine whether the movant's failure to act constitutes neglect or is the result of neglect. Second, the court must determine whether such neglect is excusable. In reliance upon the "ordinary meaning" of the word, the Court in Pioneer defined "neglect" as encompassing "late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." Id. at 388, 113 S. Ct. at 1494-95.

14. The evidence in the present case reflects that on April 5, 2000, counsel for First-Citizens mailed an objection to the proposed plan to the Clerk. The letter and enclosed objection were never received by the Clerk. The letter forwarding the objection to the Clerk contained a copy of the objection and a self-addressed envelope and requested that a "filed" copy of the

objection be mailed back to counsel. Even though no copy was mailed back to counsel for First-Citizens, there is no evidence that any effort was made prior to the filing deadline to determine whether the objection had been received by the Clerk. It thus appears that while an objection was mailed in a timely manner, no further efforts were made to ensure that a timely objection would be filed. These facts are sufficient to show that the failure to file a timely objection was the result of "neglect" within the definition contained in the Pioneer case. This leaves the question of whether the neglect was excusable which, in turn, requires that the court make the equitable determination called for in the Pioneer case as to whether the neglect is excusable.

15. The determination of when neglect is excusable "is at bottom an equitable one, taking into account the relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395, 113 S. Ct. at 1498. The circumstances which should be considered in making such determination include: (a) the danger of prejudice to the debtor; (b) the length of the delay and its potential impact on judicial proceedings; (c) the reason for the delay, including whether it was within the reasonable control of the movant; and (d) whether the movant acted in good faith. Under

Pioneer, excusable neglect is an "elastic concept" and is not limited to situations in which the failure to file is due to circumstances beyond the control of the filer. However, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute excusable neglect . . . ." 507 U.S. at 392, 113 S. Ct. at 1496. Also, under Pioneer, the client is held accountable for the mistakes or omissions of counsel. 507 U.S. at 396-97, 113 S. Ct. at 1499. Moreover, a party seeking relief based upon excusable neglect bears the burden of proving excusable neglect by a preponderance of the evidence. See In re Bulic, 997 F.2d 299, 302 (7th Cir. 1993); In re Houbigant, Inc., 188 B.R. 347, 354 (Bankr. S.D.N.Y. 1995).

16. A number of the relevant circumstances weigh in favor of First-Citizens in the present case. First-Citizens and its counsel have acted in good faith and there was no delay in filing the motion for reconsideration once it was learned that the confirmation order had been entered. Further, the record does not show that the Debtor or any other party in interest will be prejudiced, taking into account that losing the benefit of a default order or default judgment and having to litigate a matter

on the merits does not constitute prejudice.[2] However, the reason for the failure to make a timely filing, including whether it was within the reasonable control of First-Citizens, weighs heavily against First-Citizens in this case. "The most important of the factors identified in Pioneer for determining whether 'neglect' is 'excusable' is the reason for the failure to file . . . ." Thompson v. E.I. DuPont de Nemours & Co., Inc., 76 F.3d 530, 534 (4th Cir. 1996). The Thompson case involved a situation very similar to the present case in that a notice of appeal was not received by the appellate court even though mailed in a timely manner by the movant. In upholding a ruling that excusable neglect had not been shown, the court stated that "the unincarcerated litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period." Id. at 533. In the present case, the objection was mailed some thirteen days before the deadline with a letter that requested that a filed copy of the

[2]See Hawkins v. Landmark Finance Co., 727 F.2d 324, 327 (4th Cir. 1984)(reopening of case and loss of "accidental benefit" to creditor which arose when the debtor, through oversight, failed to avoid an avoidable lien before the case was closed did not constitute prejudice).

objection be mailed back to counsel. Even though no copy was mailed back to counsel, there is no evidence that any further efforts were made to check on the status of the filing. These circumstances place First-Citizens squarely within the dictates of the Thompson case, where the Fourth Circuit stated:

> Simply put, a non-prisoner litigant who entrusts his filing with the postal processes, without taking further steps to ensure that the notice of appeal is timely "filed" with the district court, cannot establish excusable neglect.

Id. at 534. The court concludes, therefore, that First-Citizens has not established excusable neglect and hence, has not shown "cause" for reconsideration under § 502(j). The motion for reconsideration therefore must be denied.

IT IS SO ORDERED.

This 28th day of August, 2000.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge