

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

VIRGLE O. HERRIN, JR. and
LUCIA C. HERRIN,
Debtors.

No. 7-01-17119 SR

ORALIA B. FRANCO,
Plaintiff,
v.

Adv. No. 02-1060 S

VIRGLE O. HERRIN, Jr., et al.,
Defendants.

**MEMORANDUM OPINION ON DEFENDANTS'
MOTION TO DISMISS**

This matter is before the Court on the Motion to Dismiss filed by Virgle O. Herrin, Jr. and Lucia C. Herrin ("Defendants") and the objection thereto filed by Oralia B. Franco, Trustee of the Bankruptcy Estate of CompreCare, P.C. ("Plaintiff").

FACTS

1. Defendants filed a chapter 7 case on October 23, 2001. Linda Bloom was appointed interim trustee and became the permanent trustee pursuant to Section 702(d). The 341 notice fixed February 10, 2002 as the deadline for filing complaints objecting to discharge of debts.
2. Defendant Virgle O. Herrin, Jr. was a 50% owner and president of CompreCare, P.C. CompreCare, P.C. was not listed

as a creditor on the original schedules filed in Defendants' chapter 7 case.

3. On November 26, 2001, CompreCare, P.C. filed a chapter 7 case. Linda Bloom was appointed interim trustee and became the permanent trustee pursuant to Section 702(d).

4. On December 31, 2001, CompreCare, P.C. filed its Schedules and listed itself as a creditor of Herrin on its Schedule B: "NM Gross receipts tax refund taken by Dr. Herrin, \$2,100", "Furniture and equipment... Being used by Herrin..., \$40,000", and "Medical supplies... May have been consumed by Herrin, \$19,544".

5. On January 9, 2002, the Court entered a stipulated order between Linda Bloom, as Trustee of the Herrin bankruptcy, and defendants, extending the time within which she could file a complaint objecting to discharge pursuant to 11 U.S.C. § 727.

6. On January 14, 2002, Trustee Bloom conducted the first meeting of creditors of CompreCare, Inc.

7. The February 10, 2002, deadline for filing dischargeability complaints in the Defendants' chapter 7 case passed without any complaints being filed.

8. On February 13, 2002, Trustee Bloom filed a Form 1, Individual Estate Property Record and Report, for the

CompreCare, P.C. case listing, among other items, the corporate claims against Herrin.

9. On February 15, 2002, the Clerk gave notice to all creditors in the debtors' chapter 7 case that the last day for filing proofs of claim was May 16, 2002.

9. The docket sheet in the CompreCare, P.C. chapter 7 case shows that on February 20, 2002, Oralia Franco was appointed trustee due to a conflict of Linda Bloom. On March 25, 2002, the Court sent a Notice of Appointment of Successor Trustee.

10. On March 25, 2002, Defendants amended their Schedule F to add CompreCare, P.C. as a creditor in their chapter 7 case.

11. On April 10, 2002, Trustee Franco filed a complaint objecting to the discharge of defendants' debt to CompreCare, P.C. under 11 U.S.C. § 523(a)(4).

12. Defendants filed a motion to dismiss the dischargeability complaint as untimely.

CONCLUSIONS OF LAW

Bankruptcy Code Section 523(c) states that a:

debtor shall be discharged from a debt of a kind specified in paragraph ... 4 ... of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge.

Bankruptcy Rule 4007(c) sets time limits for taking action under section 523(c):

A complaint to determine the dischargeability of a debt under §523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). The court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002. On motion of a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

Bankruptcy Rule 9006(b)(3) states: "The court may enlarge the time for taking action under Rules ...4003(b),... 4007(c), ..., only to the extent and under the conditions stated in those rules."

Rule 9006(b)(3) restricts extensions for both Rule 4003(b) and Rule 4007(c), stating that extensions must be made pursuant to those rules rather than the general rule 9006(b)(1) which recognizes excusable neglect as a ground for

extension¹. See Bankruptcy Rule 9006(b)(1) ("... where the failure to act was the result of excusable neglect.")

Because the complaint in this case was filed after the 60 days and no motion was filed within the 60 days, the complaint is untimely. See Themy v. Yu (In re Themy), 6 F.3d 688, 689 (10th Cir. 1993). Plaintiff agrees that a literal application of the code and rules would indicate dismissal. She argues, however, that this case has exceptional circumstances such that the bar date should not be enforced. Compare Taylor v.

¹ In her brief, Plaintiff cites In re Overmyer, 30 B.R. 123 (Bankr. S.D. N.Y. 1983) for the proposition that a trustee should receive an extension to file a dischargeability complaint if the deadline expired before the trustee was appointed and there are equitable grounds for doing so. Overmyer, however, is basically an "excusable neglect" case. Id. at 126 ("Hence, all of the five factors ... for the application of the liberal definition of excusable neglect have been met in this case.") For this reason, Overmyer probably does not have much continuing vitality. See Ware Co-operative Bank v. Smith (In re Smith), 42 B.R. 927, 929-30 (Bankr. D. Ma. 1984):

Under the Bankruptcy Rules in effect prior to August 1, 1983, the standard to be applied in considering whether to permit prosecution of complaints objecting to the debtor's discharge and seeking to determine the dischargeability of a particular debt which were not timely filed was one of excusable neglect. Bankruptcy Rule 409 set forth time limitations while Bankruptcy Rule 906(b) provided for extensions of time, specifically incorporating the standard of "excusable neglect". (footnotes omitted.) "The new rules have now made clear that a court may only extend the time for filing a complaint seeking to have a debt declared nondischargeable if a motion to extend such time is filed prior to the expiration of the time set by the court." Id. at 930-31.

Freeland & Kronz, 503 U.S. 638, 645 (1992)(Supreme Court declines to consider § 105 arguments because they were raised for the first time on appeal.) See also They, 6 F.3d at 690 (Rules 4004 and 4007 are strictly enforced, but courts uniformly use equitable powers to allow out-of-time filings when the creditor relied upon an incorrect bankruptcy court notice.) But see Classic Auto Refinishing, Inc. v. Marino (In re Marino), 37 F.3d 1354, 1358 (9th Cir. 1994)(Doctrine of "unique" or "extraordinary" circumstances is limited to situations where a court explicitly misleads a party.) Plaintiff does not claim that the Court or Clerk mislead the trustee or prevented a timely filing.

Before addressing the Trustee's specific arguments, the Court notes that the situation in this case is similar to that in Taylor, 503 U.S. 638 (1992), where a trustee sought to object to exemptions after the deadline had passed. In Taylor, the United States Supreme Court interpreted Bankruptcy Code Section 522(1) and Bankruptcy Rule 4003(b), which provided in part:

The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) ... unless, within such period, further time is granted by the court.

In Taylor the trustee had not objected to exemptions or, within the 30 days allowed, applied for an extension. The Court applied the plain meaning of the Rule:

Rule 4003(b) gives the trustee and creditors 30 days from the initial creditors' meeting to object. By negative implication, the Rule indicates that creditors may not object after 30 days "unless, within such period, further time is granted by the court."

503 U.S. at 643. The Court noted that "Deadlines may lead to unwelcome results, but they prompt parties to act and they produce finality." Id. at 644. Because Bankruptcy Rule 9006(b)(3) specifically deals with both 4003(b) and 4007(c), there is no reason to assume the Court would take a less literal approach to Rule 4007(c).

In her response, first, Plaintiff argues that Rule 4007 is not jurisdictional. Due to the Court's rulings below, it does not need to address the jurisdictional arguments.²

Second, Plaintiff argues that it would be inequitable and unjust to bar her from filing the complaint because of her late appointment as successor trustee. This argument ignores

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But see First National Bank in Okeene v. Barnes, 956 F.2d 277 (10th Cir. 1992)(unpublished opinion)("We agree that the Rule 4007(c) filing requirements are jurisdictional.") Published Tenth Circuit opinions have not gone so far as to say that Rule 4007(c) is jurisdictional, but have commented that the Bankruptcy Rules' deadlines are "strictly construed", Themy, 6 F.3d at 689, and "strictly enforced", Id. at 690.

the fact that the prior trustee could have filed the complaint timely, or filed a timely motion for an extension of time. In fact, Ms. Bloom obtained an extension of time to object to discharge under section 727.

Generally, a trustee takes the case as it is. See, e.g., Jobin v. Boryla (In re M & L Business Machine Company, Inc.), 75 F.3d 586, 590 (10th Cir. 1996) ("Nothing in the statute suggests that the clock should be reset following the appointment of another trustee later in the proceeding.") (construing former 11 U.S.C. § 546(a)). It appears that Ms. Franco became trustee in the corporate case after the filing deadlines in the individual case had already passed, and must take the case as is.

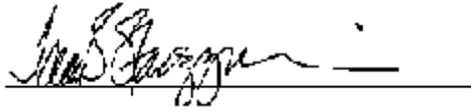
Third, Plaintiff argues that Defendants' failure to schedule the debt made it impossible for Ms. Bloom to file the complaint timely. This argument ignores the facts. Ms. Bloom was appointed trustee in the corporate case which listed the claims against Defendant in its original schedules which were filed on December 31, 2001. Ms. Bloom then conducted a creditors meeting in the corporate case on January 14, 2002. By late December or early January Ms. Bloom had actual notice that the corporation asserted a claim against the Debtor. Ms. Bloom also had timely notice of the Debtors' bankruptcy; she

was their trustee. The deadline for filing complaints was February 10, 2002. See Walker v. Wilde (In re Walker), 927 F.2d 1138, 1145 (10th Cir. 1991) (Creditor with actual knowledge of bankruptcy case in ample time to timely file 523 complaint is barred from filing complaint after the bar date); Yukon Self Storage Fund v. Green (In re Green), 876 F.2d 854, 856 (10th Cir. 1989)(same); Byrd v. Alton (In re Alton), 837 F.2d 457, 460 (11th Cir. 1988)(per curium) ("The statutory language clearly contemplates that mere knowledge of a pending bankruptcy proceeding is sufficient to bar the claim of a creditor who took no action, whether or not that creditor received official notice from the court of various pertinent dates.")

Fourth, Plaintiff argues that Ms. Bloom was ineligible to serve as trustee because she was not a disinterested person as required by Section 701(a)(1). Plaintiff claims that this put Ms. Bloom in a "Catch 22": a claim by CompreCare against Herrin diminishes the amount of assets available to other Herrin creditors, but failure to make a claim benefits Herrin's creditors at the expense of CompreCare's creditors. The Court disagrees with this analysis because it does not distinguish the existence of a claim from the dischargeable/nondischargeable nature of that claim.

CompreCare has an unsecured claim in the Herrin case whether or not a dischargeability complaint was filed and, assuming assets for distribution and a properly filed proof of claim, CompreCare would receive its pro-rata share of the estate whether it had a nondischargeable claim or not. If the claim were nondischargeable CompreCare would also have a claim remaining against Herrin after discharge for the remainder of its claim. This remaining claim has no effect on the claims or dividends of the other unsecured creditors and could be satisfied only from non-exempt post-bankruptcy property of the debtor. See Section 522(c). Therefore, filing a nondischargeability suit would not negatively impact on other unsecured creditors in the individual case, and there would have been no conflict. See Appeal of Maggio (In re BH & P Inc.), 949 F.2d 1300, 1308-1313 (3rd Cir. 1991)(Trustee is not automatically disqualified as disinterested person for taking action in a representative capacity.) However, even assuming all this were true, the Court does not find that this amounts to such an extraordinary circumstance to justify use of section 105 to extend Rule 4007(c)'s deadlines after the fact.

In summary, the Court will grant the motion to dismiss the complaint as untimely.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on August 9, 2002, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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