

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In the matter of : Case No. 06-15875/JHW

Romona E. Berry :

Debtor :

Romona E. Berry :

Plaintiff :

v.

Triad Financial Corporation;
Specialized Recovery, and Robert _____
Roe (a fictitious name) _____

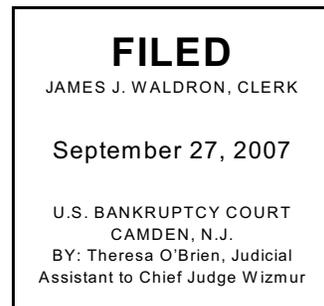
Defendants :

**OPINION RE MOTION TO
WITHDRAW THE REFERENCE;
FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
MOTION TO FILE NOTICE OF
TORT CLAIM OUT OF TIME
AND MOTION TO AMEND
ANSWER**

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In this adversary proceeding, the Chapter 13 debtor filed a three-count complaint on July 11, 2006 against Triad Financial Corporation, Specialized Recovery and Robert Roe (a fictitious name referring to the tow truck driver), alleging a wrongful repossession of her vehicle. In Count I of her complaint, the debtor seeks damages against the three defendants for “willfully, spitefully and intentionally” repossessing her vehicle on June 17, 2006 over her objections and while she was inside the vehicle. In Count II, the plaintiff seeks damages against the three defendants for the injuries she sustained during the episode. In Count III, the debtor alleges that Triad Financial Corporation and Specialized Recovery violated the automatic stay, which was effected on June 28, 2006, when the debtor filed her Chapter 13 petition, by failing to return the vehicle that was repossessed.

A joint scheduling order was entered on November 16, 2006 providing for

the completion of discovery by March 30, 2007, and listing the matter for trial on June 30, 2007. The plaintiff sought extension of the discovery period, which was granted without objection through May 31, 2007.

On May 15, 2007, the debtor filed a motion to file a notice of tort claim, as required under the New Jersey Tort Claims Act, N.J.S.A. 59:8-1 et seq., out of time against the Borough of Chesilhurst and the Borough of Chesilhurst Police Department. The respondents filed a cross motion for abstention. At the hearing on July 23, 2007, the abstention motion was denied, while the motion to file a tort claim out of time against the named public entities was reserved.

On July 20, 2007, defendant Specialized Recovery moved for an order to withdraw the personal injury tort claim (Count II of the complaint) from the bankruptcy court to the district court. The motion came on to be heard without objection on August 20, 2007. No order was entered in connection with the withdrawal motion.

On August 17, 2007, Triad Financial Corporation filed a motion for leave to file an amended answer pursuant to Rule 7015. The matter was returnable on September 10, 2007. No objection was received.

Clarification is needed regarding the procedural posture of the case, particularly the three open matters, including the motion to withdraw the reference to the district court, the motion to file a notice of tort claim out of time, and the motion for leave to file an amended answer. As to the motion for withdrawal of the case to the district court, the applicable statutory provision is 28 U.S.C. § 157(d). That section provides in pertinent part that “[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” Under Fed.R.Bankr.P. 5011, “[a] motion for withdrawal of a case or proceeding shall be heard by a district judge.” Under our local bankruptcy rules, a motion for withdrawal of the reference of a proceeding shall be filed in the bankruptcy court in the form and manner prescribed by the local District Court Rules, and shall then be immediately transmitted to the district court. D.N.J. LBR 5011-1. The motion filed by Specialized Recovery to withdraw the reference of the personal injury tort claim to the district court should have been forwarded to the district court, rather than marked “granted” on the docket. The docket shall be corrected and the motion will now be transmitted to the district court for resolution.

As to the other two pretrial matters remaining to be resolved, including the motion to file a notice of tort claim out of time and the motion for leave to

file an amended answer, I note first that the bankruptcy court may not try the personal injury tort claims asserted in this complaint. Under 28 U.S.C. § 157(b)(5), the “district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.” By operation of this section, a personal injury tort claim must be tried in the district court. The question becomes whether the bankruptcy court may hear and determine the open pretrial matters here, before the trial of the personal injury tort claims in the district court.

It has been held that pretrial consideration of personal injury claims by a bankruptcy court is permissible. In the UAL Corporation case, Judge Wedoff focused on the “personal injury” exception to the “core” jurisdiction accorded to bankruptcy courts to adjudicate claims, 28 U.S.C. § 157(b)(2)(B)¹, determining

¹ Section 157(b) provides in pertinent part that:

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

• • •

(B) allowance or disallowance of claims against the estate or

that the bankruptcy court may not determine the amount of a personal injury claim, but may determine the validity of such a claim. In re UAL Corp., 310 B.R. 373, 381 (Bankr. N.D. Ill. 2004). The court held that section 157(b)(5) does not affect pretrial proceedings of personal injury claims, which may continue in the bankruptcy court until trial by the district court.

By directing that the order of transfer come from the district court, this section [§157(b)(5)] effectively allows a personal injury claim to remain subject to bankruptcy court jurisdiction until a party seeks withdrawal of the reference from the district court. And even then, it requires transfer of a claim objection only for trial. Both of these aspects of the provision allow for *pretrial* consideration of personal injury tort claims by the bankruptcy court, including a determination that such a claim is legally unenforceable.

Id. In this case, we are not asked to determine the validity of a claim against the estate. Rather, we are asked to determine the validity of a claim by the debtor against third parties. Nevertheless, Judge Wedoff's analysis regarding § 157(b)(5) may be applied here to conclude that pretrial proceedings, including the matters pending in this matter, may be resolved by the bankruptcy court.

exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11.

28 U.S.C. § 157(b).

In deciding the open motions in this matter, a determination must be made about whether the proceeding is core or non-core.

[A] bankruptcy judge has jurisdiction of two different types. First, as to “core” proceedings within the case, a bankruptcy judge has jurisdiction under 28 U.S.C. § 157(b) to enter final orders and judgments. Second, as to non-core proceedings that are “related to” the bankruptcy case, a bankruptcy judge has a more limited jurisdiction under 28 U.S.C. § 157(c) – unless all of the parties to the proceeding consent to the bankruptcy judge entering a final order or judgment, the judge must submit proposed findings of fact and conclusions of law to the district court for that court’s entry of a final order or judgment after de novo review.

Id. at 378.

Under 28 U.S.C. § 157(b)(3), a determination about whether a matter is core or non-core is made by the bankruptcy judge. A “core proceeding” is one which invokes a substantive right provided by Title 11 or which, by its nature, could arise only in the context of a bankruptcy case. In re Guild and Gallery Plus, Inc., 72 F.3d 1171, 1178 (3d Cir. 1996). A non-core proceeding is an action that is related to the bankruptcy case in a way that the outcome could alter the debtor’s rights or liabilities, either positively or negatively. Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984).

Here, the personal injury tort claims asserted by the plaintiff/debtor constitute a related non-core proceeding. The debtor’s claims do not arise

under Title 11 or in a Title 11 case. Nevertheless, the claims are related to the debtor and to the bankruptcy estate, in that success by the debtor in prosecuting these claims could augment the recovery of creditors of the bankruptcy estate. In the absence of the consent of all parties to the entry of final decisions in a non-core matter under 28 U.S.C. § 157(c)(2)², this court will issue Proposed Findings of Fact and Conclusions of Law regarding the open issues.

1. Motion to File Tort Claim Out of Time.

Through this adversary proceeding, the debtor seeks leave to file a tort claim out of time against the Borough of Chesilhurst and the Chesilhurst Police Department. The debtor contends that even though the underlying incident occurred on June 17, 2006, she did not learn that she had a possible cause of action against Chesilhurst until depositions were taken of the defendants on February 26, 2007. Chesilhurst objects to the late notice and contends that the debtor has failed to show the “extraordinary circumstances” required under the statute to justify extending the notice period. I propose that the debtor has failed to substantiate the contention that her cause of action accrued on

² The defendants Specialized Recovery and Triad have raised jurisdictional defenses.

February 26, 2007, that she has failed to offer evidence of any extraordinary circumstances that would justify not filing a notice of claim within the time period prescribed by N.J.S.A. 59:8-8, and that she has not shown support for her failure to file a motion seeking relief to file a late notice of claim within a reasonable time thereafter, as required by N.J.S.A. 59:8-9. Accordingly, I propose that the debtor's motion be denied.

A. Proposed Findings of Fact.

In 2001, the plaintiff purchased a 1998 Ford Expedition, with financing provided by defendant Triad Financial Corporation ("Triad"). At some point, the plaintiff fell behind in her payments and was in default on the loan. She explained that she reached out to Triad, on or about June 13, 2006, and made arrangements to cure the arrears on her account. She was told to make payments on June 13, June 27 and July 6, 2006. She claims that she was advised by the Triad representative that if she adhered to the new arrangements, her vehicle would not be repossessed.

The plaintiff contends that she complied with the payment arrangements, making the first payment on June 13, 2006. Nonetheless, four days later, during the early morning of June 17, 2006, defendant Specialized Recovery

arrived at the plaintiff's home to repossess her vehicle on behalf of Triad Financial. The tow truck driver loaded the plaintiff's vehicle onto a flatbed truck, despite her objections to the repossession. After her vehicle was loaded, the plaintiff climbed up onto the flatbed to retrieve her personal belongings from the vehicle. Once in her vehicle, the plaintiff refused to leave the vehicle. Several Chesilhurst police officers appeared at the scene. Both the tow truck driver and the police attempted unsuccessfully to talk the debtor into leaving the vehicle. Ultimately, the tow truck driver drove away with the plaintiff's vehicle anchored on the flatbed truck, while the plaintiff was still in the vehicle.³ When he stopped at some point down the road, the Chesilhurst police officers were able to convince the plaintiff to leave her vehicle and they assisted her out of the truck. The debtor contends that she was injured while climbing into and out of her vehicle.

Approximately two weeks later, the plaintiff filed her Chapter 13 bankruptcy petition and then commenced this adversary proceeding. An Order to Show Cause to compel the return of the debtor's vehicle was filed by the

³ At his deposition, the driver for Specialized Recovery testified that after the plaintiff climbed on to the flatbed and refused to come down, the police officer on the scene called his lieutenant. The lieutenant spoke with the driver, and instructed him to "take off" with the plaintiff in the vehicle, which he did. This instruction appears to be the basis for the plaintiff's quest to amend her complaint to include the Chesilhurst Police Department as a defendant in the case.

debtor but was withdrawn before resolution. In both her complaint and her certification in support of the Order to Show Cause, the debtor references the presence of Chesilhurst police officers at the scene, although she does not mention that they took any particular action.

Approximately seven months after filing her complaint, the debtor conducted depositions of the defendants on February 26, 2007.⁴ Approximately three months later, on May 15, 2007, ten months after filing her adversary complaint, the debtor moved before this court to file a notice of tort claim out of time with the Borough of Chesilhurst and the Chesilhurst Police Department. In her motion papers, the debtor recognized that in order to add the municipality as a defendant, she must first file a notice of her tort claim. N.J.S.A. 59:8-3. She claimed that during the February 2007 depositions,

testimony revealed that the Chesilhurst Police Department through its officers at the scene of the altercation that resulted in the complaint, committed acts which compel [sic] the plaintiff to amend complaint to name the Borough of Chesilhurst and its police as defendants.

Cert. in Support of Motion. Significantly, neither the Borough nor the Police

⁴ All of the pleadings submitted by the parties reflect that the depositions occurred on February 26, 2007. However, the transcript of the deposition of the tow truck driver, Nicky Spina, relied upon by the debtor is dated April 26, 2007. I propose to accept the date noted in the pleadings, February 26, 2007, as the date of the depositions.

Department were served with the motion.⁵ On June 18, 2007, one year and one day after the original incident, the debtor served the Borough and the Police Department with notices of her tort claims.

The Borough of Chesilhurst and the Borough of Chesilhurst Police Department have responded by contending that the debtor has failed to provide the requisite “extraordinary circumstances” to allow the late service of a notice of tort claim under the New Jersey Tort Claims Act, and that the lengthy delay in filing the notice, and its impact upon their ability to investigate the matter, substantially prejudice them.

B. Proposed Conclusions of Law.

The debtor seeks here to file a notice of tort claim out of time. Under the New Jersey Tort Claims Act, N.J.S.A. 59:8-1 et seq., a plaintiff has 90 days after the accrual of a cause of action to file a claim. N.J.S.A. 59:8-8.⁶ The date of the

⁵ The debtor sought 30 days from June 18, 2007 within which to file her tort claim notice pursuant to N.J.S.A. 59:8-9. The motion was originally scheduled for hearing on June 18, 2007, but was rescheduled several times, for unknown reasons, and was heard on July 23, 2007.

⁶ N.J.S.A. 59:8-8 provides in relevant part:

A claim relating to a cause of action for death or for injury or damage to person or to property shall be presented as provided in

accrual of the cause of action is generally accepted to “be the date of the incident on which the negligent act or omission took place.” Beauchamp v. Amedio, 164 N.J. 111, 117, 751 A.2d 1047, 1050 (2000). See also Monteagudo v. Town of Morristown, No. A-6113-05T1, 2007 WL 837186, *5 (N.J. App. Div. Mar. 21, 2007). “The only exception to that well established notion of accrual is the case where the victim either is unaware that he has been injured or, although aware of an injury, does not know that a third party is responsible.” Id. See also Monteagudo, supra, 2007 WL 837186 (cause of action did not accrue until plaintiff learned that the defendant was not a doctor or licensed to provide counseling).

In this case, the original cause of action accrued on the date of the repossession, June 17, 2006. Ninety days from that date expired on September 15, 2006. The debtor did not file a notice of tort claim within that time period.

this chapter not later than the ninetieth day after accrual of the cause of action. After the expiration of six months from the date notice of claim is received, the claimant may file suit in an appropriate court of law. The claimant shall be forever barred from recovering against a public entity or public employee if:

- a. He failed to file his claim with the public entity within 90 days of accrual of his claim except as otherwise provided in section 59:8-9; or
- b. Two years have elapsed since the accrual of the claim; or
- c. The claimant or his authorized representative entered into a settlement agreement with respect to the claim.

Although the debtor never actually states that she seeks a determination that her cause of action against Chesilhurst should be tolled until February 26, 2007, the date of the depositions, that representation is implied. She contends in her certification that she did not learn that the police department “committed acts” that would subject them to liability until those depositions. I propose that the debtor’s contention in this regard should be rejected.

The record is clear that the plaintiff knew that the police were on the scene and were involved to a certain degree. There is no recitation to explain why the debtor or debtor’s counsel took no action to investigate the incident earlier or to question the police or to ascertain their involvement within the 90 day period. See, e.g., Blank v. City of Elizabeth, 318 N.J. Super. 106, 111-12, 723 A.2d 75, 77-78 (App.Div.), aff’d in part and modified in part, 162 N.J. 150, 742 A.2d 540 (1999) (questioning whether counsel reasonably investigated identity of possible defendant). The police report itself noted a discussion between the police officers and the plaintiff, including “talking” her into exiting the vehicle. Their involvement was always known to the plaintiff. The plaintiff took no action to investigate further.

If the plaintiff fails to timely file the claim, she is barred from recovering against a public entity or public employee, except as otherwise provided for in

the Act. A judge has discretion to allow a late filed claim, defined as any claim filed after the 90 day period but within one year of the accrual of the cause of action. N.J.S.A. 59:8-9.⁷ The debtor's cause of action accrued on June 17, 2006. The debtor filed a Notice of Claim on June 18, 2007, without permission to do so out of time. The notice was statutorily barred under N.J.S.A. 59:8-9.

Alternatively, if we determine that the debtor's cause of action did not accrue until February 26, 2007, because she was unaware of the potential liability of the Chesilhurst Police Department until the depositions were taken on that date, then I propose that her quest to file a Notice of Claim out of time must still fail. The 90 days to file a Notice of Claim would have expired on or about May 27, 2007. The notice was filed on June 18, 2007.

⁷ N.J.S.A. 59:8-9 provides:

A claimant who fails to file notice of his claim within 90 days as provided in section 59:8-8 of this act, may, in the discretion of a judge of the Superior Court, be permitted to file such notice at any time within one year after the accrual of his claim provided that the public entity or the public employee has not been substantially prejudiced thereby. Application to the court for permission to file a late notice of claim shall be made upon motion supported by affidavits based upon personal knowledge of the affiant showing sufficient reasons constituting extraordinary circumstances for his failure to file notice of claim within the period of time prescribed by section 59:8-8 of this act or to file a motion seeking leave to file a late notice of claim within a reasonable time thereafter; provided that in no event may any suit against a public entity or a public employee arising under this act be filed later than two years from the time of the accrual of the claim.

To support a late filed claim, the plaintiff must file affidavits “showing sufficient reasons constituting extraordinary circumstances” for failing to file a timely notice of claim. N.J.S.A. 59:8-9. The “extraordinary circumstances” exception was added “to raise the bar for the filing of late notice from a ‘fairly permissive standard’ to a ‘more demanding’ one.” Beauchamp, 164 N.J. at 118, 751 A.2d at 1051. Here, the debtor makes no attempt to provide any support to show “extraordinary circumstances.”

“Extraordinary circumstances” is not defined under the Act, but is left to the discretion of the court to determine on a case by case basis. Ventola v. New Jersey Veteran's Memorial Home, 164 N.J. 74, 77, 751 A.2d 559, 560-61 (2000); Lowe v. Zarghami, 158 N.J. 606, 626, 731 A.2d 14, 25 (1999); Corliss v. City of Hammonton, No. A-0245-06T2, 2007 WL 1387957, *3 (N.J. App. Div. May 14, 2007) (“The decision permitting or denying the filing of a late notice of claim is left to the sound discretion of the motion judge and will not be disturbed absent a clear abuse.”). Courts have declined to accept ignorance of the statutory deadline, or apathy in pursuing the claim, as sufficient cause to allow a late notice of claim. See, e.g., Delucca v. State, No. A-1850-05T3, 2006 WL 2621050, *3 (N.J. App. Div. Sept. 14, 2006); Escalante v. Township of Cinnaminson, Cinnaminson Memorial Park, 283 N.J. Super. 244, 252, 661 A.2d 837, 841 (App. Div. 1995). “The word ‘extraordinary’ means ‘going far beyond

the ordinary degree, measure, limit; ... very unusual; exceptional; remarkable.”
Wagenhoffer v. State, No. A-0216-06T5, 2007 WL 2323440 (N.J. App. Div. Aug. 16, 2007) (quoting Webster's New World College Dictionary 504 (4th ed.2001)).
The court must consider the totality of the circumstances in reaching its decision. See, e.g., Wagenhoffer, supra (plaintiff's incarceration for 28 days did not constitute extraordinary circumstances); Maher v. County Of Mercer, 384 N.J. Super. 182, 189, 894 A.2d 100, 104 (App. Div. 2006) (severe personal injuries constituted extraordinary circumstances); Delucca v. State, 2006 WL 2621050, *3 (N.J. App. Div. Sept. 14, 2006) (court disagreed that ongoing therapy constituted extraordinary circumstances).

In this case, we have no evidence of extraordinary circumstances. The debtor has shown no support for her failure to submit a Notice of Claim to the police department within the 90 day period and no extraordinary circumstances to justify extending that deadline. It is proposed that the debtor's motion be denied.

2. Motion for Leave to File an Amended Answer.

The motion for leave to file an amended answer by Triad Financial Corporation was filed to set forth Triad's denial of the alleged agency

relationship between the vehicle reposessor, codefendant Specialized Recovery, and Triad. Affirmative defenses are also added, including the contention that this court lacks jurisdiction over the plaintiff's complaint in this adversary proceeding. No opposition to the motion was filed.

Fed.R.Bankr.P. 7015 makes F.R.Civ.P. 15 applicable to adversary proceedings. Rule 15 provides that after responsive pleadings are served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Here, where a motion to withdraw the reference by the district court is pending, as are other pretrial matters, there is no impediment to allow Triad to amend its answer.

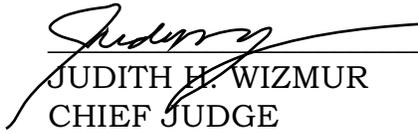
The following matters are determined herein:

1. The motion of defendant Specialized Recovery to withdraw the reference shall be transmitted to the district court for resolution forthwith.
2. It is proposed that the plaintiff's motion to file a Notice of Tort Claim out of time be denied.

3. It is proposed that the motion of defendant Triad Financial Services for leave to file an amended answer be granted.

An order has been entered.

Dated: September 27, 2007



JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT