UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In Re: PAZZO PAZZO, INC., Debtor.	Chapter 11 Judge: Hon. John K. Sherwood Case No.:18-13516 (JKS)

DECISION AND ORDER REGARDING DEBTOR'S MOTION TO EXPUNGE CLAIM OF FEDWAY ASSOCIATES, INC. (DOC. 341)

The relief set forth on the following pages, numbered two (2) through ten (10), is hereby **ORDERED**.

HONORABLE JOHN K. SHERWOOD
UNITED STATES BANKRUPTCY JUDGE

Dated: November 6, 2020

INTRODUCTION

On February 23, 2018, Pazzo Pazzo, Inc. ("Pazzo") filed a voluntary petition under Chapter 11 of the Bankruptcy Code. On July 9, 2020, the Court entered an Order confirming Pazzo's Chapter 11 Plan. This matter is before the Court upon the Motion by Pazzo (Doc. 341) to disallow an untimely proof of claim filed by Fedway Associates, Inc. ("Fedway").

JURISDICTION AND VENUE

The Court has jurisdiction over this matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended September 18, 2012, referring all bankruptcy cases to the Bankruptcy Court. The matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(B). Venue is proper in this Court pursuant to 28 U.S.C. § 1408 and § 1409.

FACTS AND PROCEDURAL HISTORY

Fedway's proof of claim was filed on November 9, 2018 in the amount of $23,340.83 (Claim 12-1). The bar date for the filing of claims in this matter was June 26, 2018. Fedway's claim was untimely and Pazzo objected on that basis and on the grounds that the claim was not supported by sufficient documentation.

Pazzo's bankruptcy petition was one that is described in bankruptcy practice as a "bare bones petition" – a petition that omits all or many of the detailed schedules, statements and creditor lists that a debtor must complete at the beginning of a case. (*See* Bankruptcy Rule 1007). Because of this, the Court entered an Order to Show Cause for dismissal of the case on February 23, 2018

(Doc. 6). On February 26, 2018, a Notice of Chapter 11 Bankruptcy Case was entered by the Court (Doc. 4). This Notice established the proof of claim bar date (June 26, 2018) and other important dates. Since Pazzo had not filed its lists of creditors, the Notice was not circulated by the Court to creditors. On March 8, 2020, Pazzo amended its creditor lists (Doc. 11). As a result, the Court entered an Order (Doc. 14) directing Pazzo to serve the amended lists and the Notice of Chapter 11 Bankruptcy Case (which included the bar date) on the newly added creditors. Pazzo was also directed to file a certificate of service setting forth its compliance with this Order. The docket does not reflect that a certificate of service of the Notice of Chapter 11 Bankruptcy Case and creditor lists by Pazzo was filed. This failure to serve the Notice as directed by the Court is not helpful to Pazzo.

It is clear that Fedway had a liquidated claim against Pazzo that could not be disputed in good faith. Attached to Fedway's proof of claim (Claim 12-1) is an Order Confirming Arbitrator's Award dated January 31, 2014 that fixes Fedway's claim as a judgment against Pazzo in the amount of $23,340.83. Despite the existence of this judgment, Pazzo never listed Fedway as a creditor in its bankruptcy petition even though it had an obligation to do so. Pazzo's explanation was that the failure to list Fedway was an oversight that should be excused. Also, Pazzo contended that it did not do business with Fedway but with an affiliated entity, Gateway-Perrone, a division of Fedway, in Basking Ridge, New Jersey (Doc. 351-2). Pazzo's list of creditors (Doc. 11) does list Gateway-Perrone as a creditor with a mailing address in Kearny, New Jersey. But, as set forth above, there is no evidence in the record showing that notice of the bar date was mailed by Pazzo to Gateway-Perrone or any other creditor.

Despite its own oversights, Pazzo argues that Fedway's counsel had constructive notice of the bankruptcy case. Fedway's proof of claim was filed by Raff & Masone, PA (Michael Masone, Esq.). Mr. Masone was counsel to Fedway in State Court litigation, *Fedway Associates, Inc. and Ultimate Foods, Inc. v. Pazzo Pazzo, Inc.*, Docket No. C-00051-17. On April 3, 2018, a letter was submitted to the State Court in that action, copying Mr. Masone, advising the State Court of Pazzo's bankruptcy. (Doc. 351-1). This letter establishes that Mr. Masone knew of the Pazzo bankruptcy on April 3, 2018. This was approximately ten (10) weeks prior to the June 26, 2018 bar date. Pazzo argues that Mr. Masone had a duty to review the bankruptcy case docket, find the bar date and file a timely proof of claim. This argument is supported by the fact that Fedway's co-plaintiff in the State Court action, Ultimate Foods, Inc., who was virtually in the same situation as Fedway, managed to file its proof of claim (Claim 9) on the bar date. Pazzo also argues that because Mr. Masone did not file a certification in opposition to the motion, Fedway has not met its burden of proof in this case of "excusable neglect."[1] But Fedway did file a Certification on this issue (Doc. 346-4) stating, among other things, that Fedway did not receive notice of the bar date.

DISCUSSION

The Court in this matter considers (1) whether Fedway's actual notice of Pazzo's bankruptcy filing satisfies the "due process" requirement of notice of the bar date, and (2) whether Fedway met its burden to establish "excusable neglect" for the untimely proof of claim.[2]

The Bankruptcy Rules provide that all creditors must receive at least 21 days' notice by mail of the time for filing claims in a chapter 11 case. *See* Bankruptcy Rule 2002(a)(7). There is

[1] *In re Enron Corp.*, 419 F.3d. 115, 121 (2d Cir. 2005).
[2] Pazzo's Motion (Doc. 341) suggested that Fedway's proof of claim lacked support and was without basis. Since the proof of claim attached the State Court judgment, this argument is easily rejected.

no doubt here that Fedway did not receive any notice of the bar date by mail because it was not scheduled as a creditor by Pazzo and Pazzo did not serve the bar date notice on its creditors as directed by the Court. Thus, Pazzo is forced to rely on Mr. Masone's knowledge of the bankruptcy case and its argument that Mr. Masone had a duty to review the bankruptcy case docket for the proof of claim deadline.

There is some support for this argument. For example, the 11th Circuit Court of Appeals held that the bar date for filing non-dischargeability complaints was binding on a creditor with actual knowledge of an individual debtor's bankruptcy even if the creditor does not receive formal notice of the bar date. *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11th Cir. 1988). The Court reasoned that once the creditor had knowledge of the bankruptcy case, it had a duty to make the effort to determine the deadline for non-dischargeability complaints. *Id.* at 461. But, the 11th Circuit has also held that a creditor with actual knowledge of a corporate debtor's bankruptcy is not required to timely file a proof of claim to avoid having its claim discharged if it does not receive formal notice of the bar date. *Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.)*, 863 F.2d 832 (11th Cir. 1989). The Court distinguished its prior holding in *Alton* by the fact that its prior decision involved an individual debtor. With individual debtors, § 523(a)(3) of the Bankruptcy Code places a burden of inquiry on creditors with knowledge of the bankruptcy case to protect their rights. *Id*. at 834. In corporate debtor cases, due process requires that creditors receive notice of the bar date – notice of the fact that the case has been filed is not enough. *Id*. at 834-35. The *Spring Valley* court did caution in a footnote, however, that its holding "might be different if [the creditor] had actual knowledge of the bar date itself rather than merely a general knowledge of the initiation of bankruptcy proceedings." *Id.* at 835 n.2.

In re Arch Wireless, Inc., 534 F.3d 76 (1st Cir. 2008), also addresses the due process notice requirements owed to creditors in corporate Chapter 11 proceedings. The creditor in *Arch* (Nationwide) was not listed by the debtor as a creditor and did not receive any notices from the debtor or the court regarding the bankruptcy proceedings. The bankruptcy court issued an order setting a bar date for filing proofs of claims and ordered the debtor to notify its creditors of the bar date. After the debtor confirmed its reorganization plan, Nationwide pursued claims against the debtor in state court. The debtor sought to hold Nationwide in contempt because its Chapter 11 plan enjoined claims based on acts or omissions that occurred before confirmation of the plan. The debtor also argued that Nationwide had actual knowledge of the bankruptcy case and thus due process requirements had been satisfied. The Court held that the debtor was bound by the rule that a "known creditor's general awareness of a pending Chapter 11 reorganization proceeding is insufficient to satisfy the requirements of due process and render the discharge injunction applicable to the creditor's claims." *Id*. at 87.[3]

In this case, Fedway's "notice" is premised on one letter in which its attorney was copied referring to Pazzo's bankruptcy proceeding. As a creditor whose claim was reasonably ascertainable by Pazzo, Fedway should have gotten direct notice of the bar date. Pazzo did not give such notice to Fedway or its affiliate, Gateway-Perrone. Because Pazzo is a corporate debtor, the decisions in *Arch Wireless* and *Spring Valley* above support the conclusion that Fedway was denied due process.

[3] In a late filing (Doc. 362), Pazzo cited *In Re: Poskanzer*, 146 B.R. 125 (D.N.J. 1992), in further support of the proposition that a creditor with knowledge of the bankruptcy case should be deemed to have knowledge of all deadlines within the case. That is not a general proposition. It is a specific proposition with respect to non-dischargeability claims against individual debtors under § 523 of the Bankruptcy Code. Section 523(a)(3)(B) specifically refers to claimholders who had actual knowledge of the case in time to file a claim under § 523.

Furthermore, the Bankruptcy Rules permit late filed claims in a chapter 11 case if the creditor's failure to timely file the claim "was the result of excusable neglect." Bankruptcy Rule 9006(b)(1). The leading case on the application of the excusable neglect standard to a late proof of claim is the Supreme Court's decision, *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, et al.*, 507 U.S. 380 (1993). In *Pioneer*, a creditor's attorney received notice of a creditors meeting from the bankruptcy court shortly after the debtor filed its chapter 11 case. The notice also contained the bar date for filing claims in the case. The creditor's attorney claimed that because he was in the middle of withdrawing from his law firm, he did not file his client's proof of claim until 20 days after the bar date. *Id.* at 383-84. The Supreme Court found that "[b]ecause Congress has provided no other guideposts for determining what sorts of neglect will be considered 'excusable,' . . . the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id*. at 395. It then identified four relevant circumstances that courts should consider: (1) the danger of prejudice to the debtor; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay (including whether it was within the reasonable control of the movant); and (4) whether the movant acted in good faith. *Id.*

Considering the circumstances of this case, the Court finds that Fedway's failure to file a timely proof of claim was the result of excusable neglect. This conclusion is based on the following considerations.

1. Pazzo never provided Fedway (or any of its creditors) with notice of the bar date as it was directed to by the Court. Pazzo wants the Court to strictly enforce the bar date while

overlooking Pazzo's "neglect" in failing to list Fedway as a creditor and failing to serve the bar date notice on any of its creditors.

2. Pazzo was fully aware of Fedway's claim when its Chapter 11 Plan was confirmed. The Fedway claim was filed in November 2018. The hearing on confirmation of the Plan occurred in May 2020. Pazzo had more than a year after the claim was filed to try to expunge it and get the matter resolved before it proceeded to confirmation. Instead, Pazzo recognized that the claim was filed in its Disclosure Statement (Doc. 210-2, Ex. B) and indicated that it was untimely. Pazzo knew there was a risk that the claim would be allowed and proceeded to confirm its Plan anyway. Pazzo cannot claim to be prejudiced by having to pay a claim that it was fully aware of.
3. On the merits, Pazzo did not have grounds to object to Fedway's claim – it was memorialized by a State Court judgment (Doc. 346-6). The claim should have been scheduled by Pazzo as undisputed, and thus Fedway would not have had to file a proof of claim in the Chapter 11 case at all. (*See* Bankruptcy Rule 3003(c)(2)).
4. There is no evidence of bad faith on the part of Fedway. Arguably, a seasoned bankruptcy lawyer would know to look up the proof of claim bar date once he/she becomes aware of a bankruptcy case. But the law also requires a debtor to list all its creditors and to serve them directly with the bar date notice. Fedway's assertion that it did not receive notice of the bar date (Doc. 346-4) is uncontested.

Finally, Pazzo relies on *Ragguette v. Premier Wine & Spirits*, 691 F.3d 315, 332 (3d Cir. 2012), which analyzed the concept of "excusable neglect" under Federal Rule of Appellate Procedure 4(a)(5). Since *Ragguette* involved an untimely appeal and *Pioneer* discussed excusable

neglect in the late-proof-of-claim context, *Pioneer* is more on point here. But, *Ragguette* is important Third Circuit precedent which applied *Pioneer's* four factors (set forth above) to consider in evaluating whether a party has shown excusable neglect. *Id*. at 327. Thus, cases analyzing excusable neglect under one federal rule are relevant to the analysis under a different federal rule. In *Ragguette*, the plaintiff whose claims were dismissed on summary judgment failed to appeal the decision within the applicable 30-day period. Plaintiff's counsel argued that it was her intent to appeal the decision but due to oversights and miscommunications within her firm, the deadline was missed. The Court focused on the "reason for the delay" factor from *Pioneer*. Specifically, in cases where the delay is due to the inadvertence of counsel, the Court drew a distinction between cases where counsel made affirmative efforts to comply with a deadline but failed and cases where the failure was due to a lack of diligence. *Id*. at 325-26. After an extensive analysis of the evidence in the record, the Court found that plaintiff's counsel had not exercised reasonable diligence and thus concluded that the "reason for delay" factor weighed heavily against a finding of excusable neglect. The Court also found that the reason for delay factor outweighed the combined weight of the other *Pioneer* factors. *Id*. at 330-31.

Ragguette does not change this Court's finding that Fedway has demonstrated excusable neglect in this case. Plaintiff's counsel in *Ragguette* knew about the appeal deadline and did not diligently monitor the case to see that it was met. Here, Fedway contends that it was not aware of the proof of claim deadline because it never received the formal notice. Though this lack of awareness can be attributed to counsel's failure to review the docket once he learned that Pazzo had filed for bankruptcy protection, equal (if not more) blame falls on Pazzo for its failure to list Fedway as a creditor and serve the bar date notice on creditors as directed by the Court. This is a

very "relevant circumstance surrounding [Fedway's] omission" that the Court must consider. *See Pioneer*, 507 U.S. at 395.

CONCLUSION

For the above reasons, Pazzo's Motion to expunge Fedway's claim is denied.