

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(at Greenbelt)

In re:

Case No. 00-13624-PM
Chapter 7

TAINIKA MARIA DAVIS,

Debtor.

MEMORANDUM OF DECISION

This cause came before the court upon a “Motion for an Extension of Time to File a Complaint to Determine the Dischargeability of a Debt under 11 U.S.C. § 523(c)” filed by First Union National Bank (“First Union”) and Debtor’s opposition thereto. The issue presented is whether counsel for First Union properly relied upon a bankruptcy court telephone operator’s answer to a question posed by his law clerk as to the meaning of this court’s order extending the deadline for filing complaints objecting to discharge. The court must determine whether to use its inherent power in the interest of justice to entertain this untimely request to extend the time for filing a complaint to determine the dischargeability of debt.¹ For the reasons set forth more fully below, the court declines to grant the extension and finds that First Union, with ample notice of the bar date for filing a timely complaint, elected to rely on the legal advice of a telephone attendant for an interpretation of an unambiguous order that had been in First Union’s possession for over seven weeks. Accordingly, First Union’s motion is denied.

¹ See Themy v. Yu (In re Themy), 6 F.3d 688 (CA10 1993); cf. Neeley v. Murchison, 815 F.2d 345 (CA5 1987); Durham Ritz, Inc. v. Williamson (In re Williamson), 15 F.3d 1037 (CA11 1994).

Facts

The Debtor, Taineka Maria Davis, filed a bankruptcy case under Chapter 7 on March 31, 2000. The Debtor scheduled First Union as the holder of an unsecured, non-priority claim totaling \$195,770.03. In April 2000, the clerk of this court served a “Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines,” Official Bankruptcy Form B9A. At the top of the page, the notice provided:

You may be a creditor of the debtor. This notice lists important deadlines. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk’s office at the address listed below.
NOTE: The staff of the bankruptcy clerk’s office cannot give legal advice.
(Emphasis added).

The notice further established that a “Meeting of Creditors” would be held on May 3, 2000 at 9:30 a.m. and set forth the following deadlines in bold print:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts: 07/03/00.

The notice was served upon First Union, in care of its counsel, Daniel Fiore, Esquire.

The Debtor sought a continuance of the scheduled creditors’ meeting. On May 1, 2000, a “Consent Motion to Extend Deadline to File Complaints Objecting to Discharge” was filed. The motion provided that the Debtor consented to extending the deadline for parties to file complaints objecting to discharge in exchange for the Trustee’s agreement to continue the 11 U.S.C. § 341(a) meeting of the creditors. An “Order Granting Debtor(s)’ Consent Motion to Extend Deadline to File Complaints Objecting to Discharge,” entered on May 2, 2000, followed. The order provided that: “[t]he deadline for all parties-in-interest to file complaints objecting to

the discharge of the Debtor(s) is extended for an additional sixty (60) days.” The deadline for the filing of complaints objecting to discharge, therefore, was enlarged to September 1, 2000.

On August 31, 2000, First Union filed a “Motion for an Extension of Time to File a Complaint to Determine the Dischargeability of a Debt under § 523(c).” First Union alleged that its motion for an enlargement of the bar date was timely as the deadline for filing a complaint to determine the dischargeability of debt was September 1, 2000. The Debtor opposed the relief sought contending that the time for seeking an enlargement had expired as the bar date established by the court, July 3, 2000, had passed. The Debtor further noted that the court’s order of May 2, 2000 extended only the deadline for filing an objection to discharge. The Debtor argued that, pursuant to Rules 4007(c) and 9006(b)(3) of the Federal Rules of Bankruptcy Procedure (“F.R.B.P.”), the court must deny the motion.

In further support of its motion for enlargement of the bar date, First Union contended that it had relied upon the bankruptcy clerk’s office with regard to the deadline for filing complaints to determine the dischargeability of debt under 11 U.S.C. § 523(c). According to First Union, on June 28, 2000, a law clerk employed at the law office of Daniel S. Fiore, counsel for First Union, was asked by counsel to call the bankruptcy clerk and get an interpretation of the order entered May 2, 2000 and to confirm the deadline for the filing of complaints to determine dischargeability. The law clerk testified that a representative of the clerk’s office advised him that the only deadline established in the case was September 1, 2000 and referenced the “Order Granting Debtor(s)’ Consent Motion to Extend Deadline to File Complaints Objecting to Discharge,” entered on May 2, 2000. The law clerk stated by affidavit:

[I] then asked her [the person answering the telephone in clerk's office] if I had understood her correctly, . . . that the Order Granting Debtor(s)' Consent Motion to Extend Deadline to File Complaints Objecting to Discharge entered on May 2, 2000, had extended the filing deadline from July 3, 2000 to September 1, 2000 for both the complaint to determine dischargeability of certain debts and the complaint objecting to discharge of the debtor. She informed me that was in fact what she had said and that I was correct.

Based upon statements said to have been made by a person in the clerk's office to the law clerk and passed on to his superior, First Union contends that it rightly believed that it had filed a timely motion for enlargement of the bar date for filing a complaint objecting to the dischargeability of a debt.

Discussion

Section 727(a) of the Bankruptcy Code provides that a debtor's discharge may be denied if one of nine conditions is met. Section 523(a) of the Bankruptcy Code addresses eighteen exceptions to the discharge of certain debt granted under 11 U.S.C. § 727. Section 523(c) of the Bankruptcy Code provides, with respect to subsections (2), (4), (6) and (15) of 11 U.S.C. § 523(a), that the debt is discharged unless, on request of the creditor, the bankruptcy court determines the debt to be excepted from discharge. It is a complaint seeking a determination of the dischargeability of certain debt under 11 U.S.C. § 523(c) that is the subject of this dispute.

F.R.B.P. Rule 7001(6) provides that a dischargeability complaint be made in the form of an adversary proceeding. F.R.B.P. Rule 4007(c) mandates the time within which a complaint to determine the dischargeability of debt under 11 U.S.C. § 523(c) must be filed. Such a complaint cannot be filed later than 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341(a) unless, "[o]n motion of a party in interest, after hearing on notice, the court may

for cause extend the time fixed under this subdivision.” The motion must be filed before the time has expired. The enlargement of the time to file a complaint to determine the dischargeability of debt is specifically limited by F.R.B.P. Rule 9006(b)(3) to the conditions provided in F.R.B.P. Rule 4007(c). Therefore, pursuant to F.R.B.P. Rule 4007(c), because First Union did not move the court for an enlargement of the time to file a complaint to determine the dischargeability of debt before the bar date of July 3, 2000, the court need not determine whether cause existed to enlarge the deadline. First Union’s motion cannot be granted.

Even though First Union’s motion was untimely and precluded by application of F.R.B.P. Rule 4007(c), First Union contends that the motion should nevertheless be granted by use of the court’s 11 U.S.C. § 105(a) equitable powers.² Section 105(a) of the Bankruptcy Code provides that: “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

First Union relies predominantly upon J.E. Nicholson v. Isaacman (In re Isaacman), 26 F.3d 629 (CA6 1994), as well as upon a string of cited cases³, in support of its contention that

² The use of 11 U.S.C. § 105(a) has been questioned as a source of authority for deviation from statutory provisions. See Steve H. Nickles and David G. Epstein, Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law under the Bankruptcy Code, 3 CHAP. L. REV. 7 (2000).

³ All of the cited cases are distinguishable from the circumstances of this case. Farouki v. Emirates Bank Int’l, Ltd., 14 F.3d 244 (CA4 1994), is clearly distinguishable in that the creditor had filed a timely motion for enlargement to file its complaint. Anwiler v. Patchett (In re Anwiler), 958 F.2d 925 (CA9 1992), and Themy v. Yu (In re Themy), 6 F.3d 688 (CA10 1993), like J.E. Nicholson v. Isaacman (In re Isaacman), are cases where the bankruptcy courts issued two conflicting notices establishing schedules and deadlines. In Allied Materials Corp. v. Superior Products Co. Inc., 620 F.2d 224 (CA10 1980), the Tenth Circuit held that the court has the inherent power to correct inadvertent mistakes where a district court judge had inadvertently ordered a party to pay \$1,200 rather than \$12,000. In Jusino v. Zayas, 875 F.2d 986 (CA1 1989), the First Circuit found that the trial court had the power to correct, within a reasonable time, a

where the court has erred, and a party relied upon such error, the court should invoke its equitable powers to remedy the situation.

The Sixth Circuit in J.E. Nicholson v. Isaacman held that:

[W]here a bankruptcy court erroneously sets a second bar date for the filing of complaints to determine the dischargeability of a debt before the first bar date has expired and where a creditor, reasonably relying on that second date, files a complaint before the expiration of the second bar date, the bankruptcy court abuses its discretion if it fails to exercise its equitable powers and permit the complaint to proceed.

In the J.E. Nicholson v. Isaacman case, the debtor filed a petition in the Northern District of Georgia. The bankruptcy court for that jurisdiction issued a notice advising parties-in-interest of deadlines, including the deadline for the filing of a complaint to determine the dischargeability of debt under Rule 4007(c). Thereafter, the case was transferred to the Western District of Tennessee. The clerk's office, after receiving the transferred case, issued another notice, which established a different schedule.⁴ A creditor's attorney, who had been sent notices from both jurisdictions, telephoned the clerk of the Western District of Tennessee to inquire whether a new bar date had been established. The attorney was advised that a new bar date had been set, which was the date established by the latter of the two notices. Relying upon the second notice, the creditor filed a complaint to determine dischargeability within the time period established by the Western District of Tennessee.

manifest error in its own interlocutory order. This court does not find any of the cited cases relevant to this decision.

⁴ The Northern District of Georgia set a meeting of creditors for April 28, 1992. The initial bar date for filing dischargeability complaints was June 29, 1992. The Tennessee court set another meeting of creditors for July 22, 1992 and a bar date of September 21, 1992 for the filing of dischargeability complaints.

This court finds that the J.E. Nicholson v. Isaacman case is distinguishable from the subject case and does not support the invocation of its equitable powers to enlarge the bar date for the filing of First Union's dischargeability complaint. First, the "Order Granting Debtor(s)' Consent Motion to Extend Deadline to File Complaints Objecting to Discharge" is completely unambiguous, unlike the conflicting notices sent to interested parties in the J.E. Nicholson v. Isaacman case. This court's order of May 2, 2000 specifically provided, in both the title and the text, that the bar date for the filing of complaints objecting to discharge was extended. There is no reference anywhere in the order that the deadline for the filing of a complaint to determine the dischargeability of debt also was enlarged.

Second, the Tennessee clerk's office in the J.E. Nicholson v. Isaacman case created confusion by issuing the second official notice with a brand new set of deadlines. In the subject case, the clerk's office made no such error. Only one notice was issued by the clerk. It set the date for the filing of discharge complaints or the filing of complaints to determine dischargeability. Were there any doubt as to the effect of the court's order, a motion to enlarge the period should have been filed.

Third, the Sixth Circuit specifically stated that the court's equitable powers should be used where the bankruptcy court erroneously sets a second bar date for the filing of complaints to determine the dischargeability of debt and the creditor, reasonably relying on that second date, files a complaint before the expiration of the second bar date. In this case, the court did not erroneously set a second bar date. Even if First Union relied upon the order of May 2, 2000, it did not file its complaint before the expiration of the second bar date. It merely sought an enlargement of time to do so.

Finally, while parties are entitled to rely upon information issued by bankruptcy courts, such reliance should be reasonable, which was not the case here. A licensed attorney and a law clerk, a law student, had before them for seven weeks an order issued by this court that provided, in both the title and the text, that the bar date for the filing of complaints objecting to discharge was extended. The notice issued by the bankruptcy clerk's office provides that the clerk cannot give legal advice. Notwithstanding that notice, legal advice is exactly what counsel for First Union sought. It was unreasonable for counsel to seek and then rely upon an interpretation of the court's order from a non-lawyer employee of the clerk's office.

Had First Union's motion for enlargement of time been filed at the time of counsel's doubts, it would have been timely and within this court's discretion to determine if cause existed to grant the motion. This not being done, counsel for First Union unreasonably relied upon unauthorized legal advice from the clerk's office. Such decision was not prudent. The use of this court's powers under 11 U.S.C. § 105(a) is not warranted because granting the relief sought by First Union is not appropriate in this case.

An appropriate order will be entered.

Date

PAUL MANNES, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

cc: George M. Sonnett, Jr.
Rand L. Gelber
Janet M. Nesse

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
(at Greenbelt)

In re:

Case No. 00-13624-PM
Chapter 7

TAINIKA MARIA DAVIS,

Debtor.

**ORDER DENYING MOTION FOR AN EXTENSION OF TIME TO FILE A
COMPLAINT TO DETERMINE THE DISCHARGEABILITY OF
A DEBT UNDER 11 U.S.C. § 523(c)**

For the reasons set forth in a separate Memorandum of Decision entered on even date herewith, it is by the United States Bankruptcy Court for the District of Maryland,

ORDERED that the “Motion for an Extension of Time to File a Complaint to Determine the Dischargeability of a Debt under 11 U.S.C. § 523(c),” filed by First Union National Bank, is DENIED.

Date

PAUL MANNES, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

cc: George M. Sonnett, Jr.
Rand L. Gelber
Janet M. Nesse