

DEC 02 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-10-1155-PaKiL
)
RONALD R. WELLS and CANDY L.) Bk. No. 09-14304-RR
WELLS, d/b/a HERITAGE)
LENDING, INC.,)
)
Debtors.)

JAMES SHULL; VALINDA)
GALLEA,)
)
Appellants,)

v.) **M E M O R A N D U M**¹
)

RONALD R. WELLS, d/b/a CIS)
Inspection, and CANDY L.)
WELLS d/b/a HERITAGE)
LENDING, INC., d/b/a HL)
Foreclosure Services, LLC,)
d/b/a HL Services,)
)
Appellees.)

Argued and Submitted on November 17, 2010
at Pasadena, California

Filed - December 2, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Robin L. Riblet, Bankruptcy Judge, Presiding

Appearances: David L. Hagan argued for appellants.
William Charles Beall of Beall & Burkhardt argued
for appellees.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Before: PAPPAS, KIRSCHER and LYNCH,² Bankruptcy Judges.

2 Appellants James Shull and Valinda Gallea ("Creditors")
3 appeal the bankruptcy court's Order Denying Motion to Extend Time
4 to File Objection to Discharge. We AFFIRM.

5
6 **FACTS**

7 Creditors invested \$309,200 with Heritage Lending, Inc.
8 ("Heritage") on September 29, 2009, in connection with a program
9 whereby Heritage made "hard money" loans on real estate
10 projects.³ The following day, Candy L. Wells, the principal of
11 Heritage, and her husband, Ronald R. Wells ("Debtors"), consulted
12 with a bankruptcy attorney, William C. Beall. On October 16,
13 2009, they filed a joint chapter 7⁴ bankruptcy petition, in which
14 the debtors named were Ronald R. Wells, d/b/a CIS Inspection and
15 Candy L. Wells, d/b/a Heritage Lending, Inc., d/b/a HL
16 Foreclosure Services, LLC, d/b/a HL Services. Debtors listed
17 their interest in Heritage on schedule B, and valued it at \$1.
18 Debtors did not initially list Creditors on their schedules of
19 debt.

20 _____
21 ² The Honorable Brian D. Lynch, United States Bankruptcy
22 Judge for the Western District of Washington, sitting by
23 designation.

24 ³ Although it appears that the funds were invested by
25 Mr. Shull only, Mr. Shull's wife, Ms. Gallea, also characterizes
26 herself as a creditor. Whether there is any distinction in their
27 statuses is not relevant to the issues at hand, and the Panel
28 therefore refers to Mr. Shull and Ms. Gallea collectively as
creditors in this decision.

⁴ Unless specified otherwise, all references are to the
Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules
of Bankruptcy Procedure, Rules 1001-9037.

1 The bankruptcy case proceeded uneventfully and the § 341(a)
2 meeting of creditors was conducted on November 16, 2009. The
3 following day, Debtors filed an amended schedule F, which listed
4 Creditors' claim with Heritage, and valued it at \$309,200. On
5 November 17, 2009, Debtors' attorney mailed a Notice of Amendment
6 to Creditors, advising them that they had been added as creditors
7 in Debtors' bankruptcy case. The notice included the name of the
8 bankruptcy court, the case number, and Debtors' attorney's name
9 and contact information. The notice provided that Creditors
10 "will receive all future notices directly from the Bankruptcy
11 Court." (emphasis in original).

12 Based upon the date of the meeting of creditors, the
13 deadline for creditors to file a complaint to determine the
14 dischargeability of a debt of the type specified in § 523(c) was
15 January 15, 2010. Rule 4007(c). Shortly after receiving the
16 notice, Creditors contacted Debtor's counsel by phone at least
17 once, and possibly up to three times. Creditors inquired whether
18 they needed to retain a lawyer, to which Debtors' counsel
19 responded that they did not have to retain a lawyer. Whatever
20 else may have been discussed, it appears undisputed that Debtors'
21 counsel did not specifically inform Creditors of the upcoming
22 deadline to file a § 523(c) complaint. Additionally, Creditors
23 received no notice of that deadline from the bankruptcy court.

24 On November 18, 2009, the chapter 7 trustee filed a report
25 of no distribution in the case. In the meantime, Creditors
26 apparently contacted the California real estate board, as well as
27 the local district attorney's office, concerning Ms. Wells'
28 conduct. On January 15, 2010, the last day to timely file a

1 complaint under § 523(c), Creditors met with attorney Robert E.
2 Hurlbett, who informed Creditors that the deadline was that very
3 day, and that they were too late to file anything at that point.⁵
4 On January 21, 2010, Debtors' discharge was entered. Creditors
5 contacted the bankruptcy court, by mail, concerning their
6 interest in the bankruptcy case on January 25, 2010.⁶

7 Thereafter, Creditors retained counsel who filed an Ex Parte
8 Motion for Extension of Time to File Complaint for
9 Nondischarg[e]ability and Other Actions on February 11, 2010.
10 Debtors filed an opposition to the motion. The motion was denied
11 by the bankruptcy court because it determined that it was
12 inappropriate to consider it ex parte.

13 On March 4, 2010, Creditors filed a Motion to Extend Time to
14 File an Objection to Discharge and Other Adversary Actions, as
15 well as a supporting brief, and set the motion for hearing. The
16 motion was fully briefed by the parties and came on for hearing
17 on April 14, 2010. After considering the arguments, the
18 bankruptcy court orally ruled that Creditors' motion would be
19 denied. An order was entered denying the motion on April 16,
20 2010.

21 On April 27, 2010, Creditors filed a timely notice of
22 appeal.

23 _____
24 ⁵ Apparently, another attorney in Mr. Hurlbett's office,
25 John D. Faucher, represented another of Debtors' creditors. On
26 behalf of that client, Mr. Faucher had negotiated a stipulation
27 with Debtors' counsel to extend the deadline for filing discharge
28 complaints, which was filed on January 15, 2010. However, there
is nothing in the record to show that Creditors retained either
Mr. Hurlbett or Mr. Faucher to represent them.

⁶ The letter is dated January 20, 2010, but was not
received by the bankruptcy court until January 25, 2010.

1 legal standard was (1) illogical, (2) implausible, or (3) without
2 support in inferences that may be drawn from the facts in the
3 record." Id. Only in the event that one of these three apply are
4 we then able to find that the lower court abused its discretion.
5 Id.

6 7 **DISCUSSION**

8 The bankruptcy court addressed and denied Creditor's motion
9 on the merits. As a threshold matter, however, we first consider
10 whether the bankruptcy court correctly assumed that it had
11 discretion to extend the deadline within which to file a
12 complaint to determine the dischargeability of a debt under
13 § 523(c) under these circumstances. We conclude that it did not.

14 Generally speaking, under § 727(b), a chapter 7 debtor's
15 prepetition debts will be discharged. However, that discharge
16 will not impact those debts excepted in § 523(a). Section 523(c)
17 provides that, except as set forth in § 523(a)(3), a debt of the
18 kind described in § 523(a)(2), (4) or (6) will be discharged
19 unless, at the creditor's request, the bankruptcy court
20 determines such debt should be excepted from discharge.⁷ And a
21 creditor's request for a determination of dischargeability under
22 § 523(c) requires the commencement of an adversary proceeding.
23 Rule 7001(6).

24
25 ⁷ Section 523(a)(2) describes debts that were obtained
26 through "false pretenses, a false representation, or actual
27 fraud"; § 523(a)(4) debts are those involving fraud while acting
28 in a fiduciary capacity, or embezzlement or larceny; and
§ 523(a)(6) involves those debts "for willful and malicious
injury by the debtor."

1 Rule 4007(c) prescribes the deadline for requesting a
2 § 523(c) determination. It provides that "a complaint to
3 determine the dischargeability of a debt under § 523(c) shall be
4 filed no later than 60 days after the first date set for the
5 meeting of creditors under § 341(a)"; that "the court shall give
6 all creditors no less than 30 days' notice of the time so fixed
7 in the manner provided in Rule 2002"; and, most importantly in
8 the context of this appeal, that "[o]n motion of a party in
9 interest, after hearing on notice, the court may for cause extend
10 the time fixed under this subdivision. The motion shall be filed
11 before the time has expired." Rule 4007(c)(emphasis added).

12 Rule 9006(b) is a general rule allowing the bankruptcy court to
13 enlarge many time periods provided in the Code and Rules.
14 However, Rule 9006(b)(3) makes clear that "the court may enlarge
15 the time for taking action under [Rule 4007(c)] . . . , only to
16 the extent and under the conditions stated in those rules." When
17 read together, then, the Bankruptcy Rules constrain the ability
18 of a bankruptcy court to consider requests to extend the Rule
19 4007(c) deadline for filing § 523(c) dischargeability complaints
20 to only those situations where the request is made before the
21 deadline passes.

22 Prior bankruptcy rules were not nearly so strict regarding
23 the deadline to file dischargeability complaints. Effective
24 August 1, 1983, however, the Rules were amended as provided
25 above, and since that time, the law in the Ninth Circuit has been
26 well settled that the bankruptcy court has "no discretion to
27 enlarge the time for filing a complaint to determine
28 dischargeability if the request is made after the deadline for

1 filing the complaint." DeLesk v. Rhodes (In re Rhodes), 61 B.R.
2 626, 629 (9th Cir. BAP 1986); see also Jones v. Hill (In re
3 Hill), 811 F.2d 484, 486 (9th Cir. 1987); Leisure Dev. Inc. v.
4 Burke (In re Burke), 95 B.R. 716, 717 (9th Cir. BAP 1989); Loma
5 Linda Univ. Med. Ctr. v. Neese (In re Neese), 87 B.R. 609, 612
6 (9th Cir. BAP 1988); Kugler v. Harten (In re Harten), 78 B.R.
7 252, 254 (9th Cir. BAP 1987). In supporting this bright-line
8 rule, this Panel has explained that this approach "allows debtors
9 and creditors to determine relatively soon which debts may be
10 excepted from discharge pursuant to § 523(c), and protects the
11 'fresh start' policy from being weakened by dischargeability
12 litigation long after bankruptcy." Cont'l Cas. Co. v. Albert (In
13 re Albert), 113 B.R. 617, 618 (9th Cir. BAP 1990).

14 Indeed, Rule 4007(c) has been construed such that, even in
15 so-called "unique or extraordinary circumstances," there is no
16 exception to the strict rule prohibiting extensions of the
17 complaint filing deadline. See Classic Auto Refinishing, Inc. v.
18 Marino (In re Marino), 37 F.3d 1354, 1358 (9th Cir. 1994)
19 (quoting Allred v. Kennerley (In re Kennerley), 995 F.2d 145, 147
20 (9th Cir. 1993)) ("although courts within the Ninth Circuit have
21 indicated in dicta that there is an exception to Rule 4007(c)'s
22 time limit for 'unique' or 'extraordinary' circumstances, the
23 validity of the doctrine remains doubtful."); Slimick v. Silva
24 (In re Slimick), 928 F.2d 304, 309 n.7 (9th Cir. 1990) (the
25 validity of the unique circumstances doctrine is open to
26 question).

27 In addition, the concept of "excusable neglect" justifying
28 relief under Fed. R. Civ. P. 60(b)(1), applicable in bankruptcy

1 cases pursuant to Rule 9024, is not available to enlarge the
2 § 523(c) time limits when the request is made after the deadline
3 has passed. Schunck v. Santos (In re Santos), 112 B.R. 1001,
4 1008 (9th Cir. BAP 1990) (citing Osborn v. Ricketts (In re
5 Ricketts), 80 B.R. 495, 496-97 (9th Cir. BAP 1987); see also In
6 re Hill, 811 F.2d at 486; Buckeye Gas Prods. Co. v. Rhodes (In re
7 Rhodes), 71 B.R. 206, 208 (9th Cir. BAP 1987).

8 Perhaps because of the potential harshness of strict
9 adherence to Rule 4007(c), there are a few decisions holding that
10 where the bankruptcy court contributed to misleading a creditor
11 regarding the deadline for filing § 523(c) complaints, the
12 bankruptcy court may, through its equitable powers under
13 § 105(a), afford a creditor relief from the time limit. See In
14 re Kennerley, 995 F.2d at 148 (the unique circumstances exception
15 to the strict construction of Rule 4007(c) "would appear to be
16 limited to situations where a court explicitly misleads a party")
17 (emphasis in original); see also Anwiler v. Patchett (In re
18 Anwiler), 958 F.2d 925, 929 (9th Cir. 1992); Sam Michael
19 Schreiber, MD., Inc. v. Halstead (In re Halstead), 158 B.R. 485
20 (9th Cir. BAP 1993); In re Burke, 95 B.R. at 718. Moreover, the
21 bankruptcy court may have discretion to intervene if a creditor
22 was wholly unaware of Debtors' bankruptcy filing. See Wilborn v.
23 Gallagher (In re Wilborn), 205 B.R. 202, 208 (9th Cir. BAP 1996)
24 ("When a debtor fails to schedule a creditor and the limitations
25 period expires, he waives or is equitably estopped from asserting
26 the passing of the 60-day deadline as a defense to a creditor's
27 complaint for a dischargeability determination. The bankruptcy
28 court can resort to its § 105 equitable powers by providing a new

1 deadline for the nondischargeability complaint.") (internal
2 citations omitted).

3 The facts of this case demonstrate, though, that this is not
4 one of those rare cases where the bankruptcy court could
5 intervene to save Creditors by extending the deadline for filing
6 a § 523(c) complaint. There is no dispute that Creditors were
7 informed by Debtors' counsel about the bankruptcy filing almost
8 two months prior to the January 15, 2010 deadline to file either
9 a complaint to determine the dischargeability of their debt, or
10 to request an extension of time in which to file such a
11 complaint. Creditors can show they did little to preserve their
12 rights. Their first motion to extend the time for filing a
13 complaint, the ex parte motion, was filed in the bankruptcy court
14 on February 11, 2010, nearly a month after the deadline. Indeed,
15 a properly-noticed motion was not filed until March 4, 2010. In
16 addition, there is no suggestion that the bankruptcy court misled
17 or confused Creditors as to the relevant deadlines in any way.⁸
18 Surely, had Creditors consulted the bankruptcy court's docket,
19 the deadline to file their § 523(c) complaint would have been
20 evident.

21 On this record, because Creditors' motion to extend the time
22 to commence an adversary proceeding against Debtors was filed
23 after the January 15, 2010, deadline had passed, the interplay

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25 ⁸ Rule 1009 provides that when a debtor amends a list, the
26 "debtor shall give notice of the amendment to the trustee and to
27 any entity affected thereby." The Central District of California
28 bankruptcy court has no local rule prescribing the content of
such a notice, by, for example, requiring that a copy of the
notice of the § 341(a) creditors' meeting be included in the
information sent to an omitted creditor.

1 between § 523(c), Rule 4007(c), and Rule 9006(b) deprived the
2 bankruptcy court of any discretion or equitable power to grant
3 that motion. For this reason, the bankruptcy court's decision to
4 deny the motion should be affirmed, albeit on different grounds
5 than those stated by the bankruptcy court. United States v.
6 Hemen, 51 F.3d 883, 891 (9th Cir. 1995) (panel may affirm on any
7 basis supported in the record); Leavitt v. Soto (In re Leavitt),
8 209 B.R. 935, 940 (9th Cir. BAP 1997) (same).

9 **CONCLUSION⁹**

10 Because we conclude the bankruptcy court lacked any
11 discretion to grant Creditors relief, the order of the bankruptcy
12 court denying Creditors' Motion to Extend Time to File an
13 Objection to Discharge and Other Adversary Actions is AFFIRMED.

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⁹ While the bankruptcy court expressed its doubts, and the
26 parties argued the point, because no adversary proceeding
27 requesting such relief was filed by Creditors and the issue is
28 thus not before us, the Panel expresses no opinion concerning
whether Creditors could establish that their debt is excepted
from discharge in Debtor's bankruptcy case under § 523(a)(3)(B).