NOT FOR PUBLICATION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. WELLS, d/b/a HERITAGE LENDING, INC.,	Bk. No. 09-14304-RR
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.

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[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.

Before: PAPPAS, KIRSCHER and LYNCH,[2] Bankruptcy Judges.

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

FACTS

Creditors invested $309,200 with Heritage Lending, Inc. ("Heritage") on September 29, 2009, in connection with a program whereby Heritage made "hard money" loans on real estate projects.[3] The following day, Candy L. Wells, the principal of Heritage, and her husband, Ronald R. Wells ("Debtors"), consulted with a bankruptcy attorney, William C. Beall. On October 16, 2009, they filed a joint chapter 7[4] bankruptcy petition, in which the debtors named were 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. Debtors listed their interest in Heritage on schedule B, and valued it at $1. Debtors did not initially list Creditors on their schedules of debt.

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[2] The Honorable Brian D. Lynch, United States Bankruptcy Judge for the Western District of Washington, sitting by designation.

[3] Although it appears that the funds were invested by Mr. Shull only, Mr. Shull's wife, Ms. Gallea, also characterizes herself as a creditor. Whether there is any distinction in their statuses is not relevant to the issues at hand, and the Panel 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.

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

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

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

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

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

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

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

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[5] Apparently, another attorney in Mr. Hurlbett's office, John D. Faucher, represented another of Debtors' creditors. On behalf of that client, Mr. Faucher had negotiated a stipulation with Debtors' counsel to extend the deadline for filing discharge 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.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and § 157(b)(2)(A) and (I). We have jurisdiction pursuant to 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court erred in denying Creditors' motion to extend time to file a complaint to determine the dischargeability of a debt under § 523(c).

STANDARDS OF REVIEW

We review the bankruptcy court's interpretation of Rule 4007(c), a question of law, de novo. The bankruptcy court's findings of fact affecting the notice of bar dates are reviewed under the clearly erroneous standard. Wilzig v. Lopez (In re Lopez), 192 B.R. 539, 543 (9th Cir. BAP 1996) (citing Herndon v. De la Cruz (In re De la Cruz), 176 B.R. 19, 22 (9th Cir. BAP 1994)).

The bankruptcy court's denial of a request for an extension of time under Rule 9006 is reviewed for abuse of discretion. Nunez v. Nunez (In re Nunez), 196 B.R. 150, 155 (9th Cir. BAP 1996) (citing Zidell, Inc. v. Forsch (In re Coastal Ak. Lines, Inc.), 920 F.2d 1428, 1431 (9th Cir. 1990)). In applying the abuse of discretion standard, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the correct legal rule was applied, we then consider whether its "application of the correct

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

DISCUSSION

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

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

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

Rule 4007(c) prescribes the deadline for requesting a § 523(c) determination. It provides that "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)"; that "the court shall give all creditors no less than 30 days' notice of the time so fixed in the manner provided in Rule 2002"; and, most importantly in the context of this appeal, that "[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 shall be filed before the time has expired." Rule 4007(c)(emphasis added). Rule 9006(b) is a general rule allowing the bankruptcy court to enlarge many time periods provided in the Code and Rules. However, Rule 9006(b)(3) makes clear that "the court may enlarge the time for taking action under [Rule 4007(c)] . . . , only to the extent and under the conditions stated in those rules." When read together, then, the Bankruptcy Rules constrain the ability of a bankruptcy court to consider requests to extend the Rule 4007(c) deadline for filing § 523(c) dischargeability complaints to only those situations where the request is made before the deadline passes.

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

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

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

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

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

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

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

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

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

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[8] Rule 1009 provides that when a debtor amends a list, the "debtor shall give notice of the amendment to the trustee and to any entity affected thereby." The Central District of California 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.

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

CONCLUSION[9]

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

[9] While the bankruptcy court expressed its doubts, and the parties argued the point, because no adversary proceeding requesting such relief was filed by Creditors and the issue is 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).