

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:)
)
CAROL J. ALBINI)
f/n/a CAROL J. PASSARO,)
)
)
DEBTOR.)

CHAPTER 7
CASE NO. 02-35821 (LMW)
RE: DOC. I.D. NOS. 13, 17

MEMORANDUM OF DECISION ON MOTION TO REOPEN CASE

I. Introduction

The matter before the Court presents a dispute concerning the efficacy and adequacy of a Notice of the deadline for the filing of a complaint to determine dischargeability of debt, which was served upon a creditor under highly unusual circumstances. That creditor, having failed to act before the deadline, requests the Court to reopen this case for the purpose of resetting the subject bar date, so that it may file and prosecute a complaint to determine dischargeability of its debt under Bankruptcy Section 523.

As explained in more detail hereafter, the Court finds the Debtor's conduct in connection with the Notice sufficiently troubling and misleading to invoke its equity jurisdiction to prevent an injustice to the creditor. Accordingly, the Court has reopened this bankruptcy case to, *inter alia*, equitably toll the subject deadline, so as to create a fresh window applicable to the creditor for the filing of a complaint objecting to the dischargeability of its debt.

II. Procedural Background

A. The Bankruptcy Case

On November, 27, 2002 (hereafter, the "Petition Date"), Carol J. Albini (hereafter, the "Debtor"), commenced this bankruptcy case through the filing of a voluntary petition (hereafter, the "Petition") under Chapter 7 of Title 11, United States Code, with the name-caption "Albini, Carol J." and "Passaro, Carol J."¹ In her accompanying Schedule F, the Debtor listed the Hartford Insurance Company (hereafter, "The Hartford") as a creditor holding an unsecured nonpriority claim in the amount of \$20,000.00 (hereafter, the "Claim"). The Claim represented approximately 60% of the Debtor's initially scheduled unsecured debt,² and was an obvious target of the Petition.³ The Debtor listed The Hartford's address on the bankruptcy mailing matrix, and on Schedule F, as follows:

Hartford Insurance Company
Hartford Plaza,
Hartford, CT 06115

(hereafter, the "Plaza Address").

On or about December 6, 2002, all scheduled creditors, including The Hartford, were served by the Court with a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (heretofore and hereafter, the "Notice"), Doc. I. D. No. 2, which

¹The Petition listed the last name *Albini* as the "Name of Debtor", followed by the last name *Passaro* in the category "All Other Names used by the Debtor in the last 6 years".

²Calculated as follows: the Claim (\$20,000.00) divided by \$33,767.92 (total unsecured claims of \$51,714.18 minus duplicate/triplicate claims of \$18,339.26) equals 59.2%.

³The Debtor argues that the Petition was primarily directed at obtaining a discharge order applicable to consumer debts other than the Claim, as she had been advised by her counsel to expect that The Hartford would file, and probably prevail on, a Complaint to Determine Dischargeability, rendering the Claim nondischargeable.

established, *inter alia*, March 10, 2003, as the "Deadline to File a Complaint . . . to Determine Dischargeability of Certain Debts" (hereafter, the "Deadline"). The Notice was issued in the names of "Debtor(s) . . . Carol J. Albini [and] Carol J. Passaro", with service certified upon The Hartford at the Plaza Address.⁴ See Doc. I. D. No. 3. The Hartford failed to file a debt dischargeability complaint prior to the Deadline, and on March 18, 2003, the Debtor received her discharge (hereafter, the "Discharge"), Doc. I. D. No. 9. The bankruptcy case was closed on April 2, 2003.

B. The Motion to Reopen

On July 23, 2003, The Hartford filed a Motion to Reopen Chapter 7 Case in Order to File an Adversary Proceeding, Doc. I. D. No. 13 (hereafter, the "Motion"). The Motion sought an order reopening this Chapter 7 bankruptcy case pursuant to Bankruptcy Code 350(b) to allow the filing and prosecution of a complaint to determine dischargeability of the Claim pursuant to Bankruptcy Code Section 523(a)(4).⁵ On August 25, 2003, the Debtor filed an Objection to Motion to Reopen, Doc. I. D. No. 17 (hereafter, the "Objection"). The Motion and the Objection came before the undersigned judge⁶ for hearing on September 3, and again on September 11, 2003 (hereafter, the "Hearing").

⁴The Clerk's Office followed its standard procedure of transmitting notices to creditors at the addresses listed on the debtor's mailing matrix.

⁵Under the terms of Code Section 523(a)(4), a debt is excepted from a debtor's general discharge if such debt is "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

⁶United States Bankruptcy Judge Lorraine Murphy Weil was not available to hear the Motion and Objection as scheduled. However, with her agreement and consent, the matter was heard and determined by the undersigned judge.

III. Factual Background

Prior to the Petition Date, The Hartford, as subrogee of Farmington Executive Services, Inc., d/b/a/ Business Quarters (hereafter, the "Insured"), commenced, and was prosecuting, a civil action in the Superior Court for the State of Connecticut, captioned The Hartford Insurance Company v. Carol J. Albini f/k/a/ Carol J. Passaro, D.N. CV-02-0818983-S (hereafter, the "Civil Action"). The claim of The Hartford in the Civil Action - co-extensive with the Claim in the instant bankruptcy case - arose from payments it, as insurer, made to the Insured on an employee dishonesty claim submitted by the Insured following the Debtor's alleged embezzlement of funds from the Insured. In the Civil Action, the address of record for The Hartford's counsel was:

Blackburn, Stuart G Law Offices
2 Concorde Way Bldg 3C
PO Box 608
Windsor Locks, Ct 06096

Attorney Blackburn's address was also listed, and appeared as above, on the State of Connecticut's Judicial Branch Web Page associated with the Civil Action (hereafter, the "Web Page").

On September 25, 2002, about two months prior to the Petition Date, the Debtor's bankruptcy counsel was advised by the Debtor of the existence of the Civil Action. The Debtor's counsel accessed the Civil Action on the Web Page, determined that Attorney Blackburn was The Hartford's counsel, and telephoned him for the "specific purpose of ascertaining the nature of the claim" (hereafter, the "Telephone Call"). Hearing Tr. 9/11/03 at 3:22:43. He was informed by Attorney Blackburn that the Civil Action "involved allegations of employee dishonesty." Id. Following the Telephone Call, and at some point

prior to the Petition Date, the Debtor was advised by her counsel to expect that The Hartford would file, and probably prevail in, an adversary proceeding seeking to have the Claim determined nondischargeable.

During the Telephone Call, counsel for the Debtor advised Attorney Blackburn that the Debtor would be filing for Chapter 7 bankruptcy relief "in the near future."⁷ See Objection, p. 2. Attorney Blackburn, however, first learned of the actual filing of the Petition, and of the Discharge, on May 2, 2003, almost two months after the Deadline, by his facsimile receipt from Debtor's counsel of a copy of the Discharge.⁸

IV. Discussion

A. *Standards for Case Reopening*

Section 350(b) of the Bankruptcy Code provides, *inter alia*, that a closed bankruptcy case may be reopened for "cause"; leaving the determination of such cause to the sound discretion of the bankruptcy court. See In re Chalasani, 92 F.3d 1300, 1308 (2d Cir. 1996). The stated purpose of The Hartford's reopening request is to establish the non-dischargeability of the Claim. Therefore, cause to reopen can only exist if The Hartford possesses a viable non-dischargeability cause of action. Because the Deadline has passed, the viability of that action turns on the question of whether grounds exist for an equitable tolling and/or resetting of the Deadline.

⁷Consequently, the Debtor argues that "The Hartford, by its attorney . . . had actual knowledge of the *coming* Chapter 7 Petition even before it was actually filed." *Objection* at p.2 (emphasis added).

⁸Counsel for the Debtor, upon learning from his client of post-petition activity in the Civil Action, assumed Attorney Blackburn was unaware of the Discharge. Consequently, he called Attorney Blackburn, advised him of the Debtor's Petition and Discharge, and faxed him a copy of the latter.

B. Equitable Tolling

Under ordinary circumstances the Notice, and presumptions concerning the adequacy of its service, would operate to bar the filing of a Section 523 dischargeability complaint after the Deadline.⁹ However, conceding for purposes of argument that the Notice was received at its Plaza Address,¹⁰ The Hartford asserts that under the unique circumstances of this case, service of the Notice was inadequate notice of the Deadline.

The applicable Federal Rules of Bankruptcy Procedure do not directly authorize a bankruptcy court to establish a new bar date for the filing of nondischargeability complaints once the original deadline has passed. The principal such Rule, Bankruptcy Rule 4007(c), provides as follows:

⁹As United States Bankruptcy Judge Robert L. Krechevsky noted in *In re Pratt*, 165 B.R. 759, 762 (Bankr. D. Conn. 1994):

Congress' intent to promote the expeditious and efficient administration of the bankruptcy process is revealed in its acceptance of the rules limiting the bankruptcy court's discretion to extend § 523(c) bar dates, notwithstanding that notices for unknown reasons may not have been received, so long as the process of noticing is constitutionally sound. *Cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 -15, 319, 70 S.Ct. 652, 657-58, 619-20, 94 L.Ed. 865 (1950) (holding that constitutional due process requirements are satisfied if the noticing procedure employed is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action," and that mailing is an appropriate means of notification for large numbers of interested parties where personal service is impracticable: "[R]easonable risks that notice might not actually reach every [interested party] are justifiable."). The noticing procedure employed by bankruptcy courts is deemed complete when the clerk's office certifies that notice was mailed to the appropriate parties. *See Fed. R. Bankr. P. 9006(e)* ("Service . . . of notice by mailing is complete on mailing.")

¹⁰The Hartford's argument that the Notice may not have been "matched" to the appropriate file because the Debtor "had a different last name [Passaro] at the time she embezzled funds . . ." is belied by the Civil Action's, the Petition's, and the Notice's listing of both names in their respective captions. Nevertheless, it is undisputed that the Notice was not forwarded to, or otherwise received by, Attorney Blackburn.

(c) *Time for Filing Complaint Under § 523(c) in Chapter 7 Liquidation* A complaint to determine the dischargeability of any debt pursuant to § 523 (c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors. . . . On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. *The motion shall be made before the time has expired.*

(emphasis added).

Despite the terms of Rule 4007(c), the United States Court of Appeals for the Second Circuit has determined that “the time period imposed by [the] Rule . . . is not jurisdictional and thus is subject to waiver, estoppel, and *equitable tolling*” In re Benedict, 90 F.3d 50, 54-55 (2d Cir. 1996) (quoting United States v. Locke, 471 U.S. 84, 94 fn.10 (1985)) (emphasis added). As the Benedict Panel noted, its conclusion was also “consistent with the line of cases that allow an extension of the time period when the creditor was affirmatively misled by the bankruptcy court as to the filing deadline.” Id. (citing In re Themy, 6 F.3d 688 (10th Cir. 1993)).¹¹

Equitable tolling permits courts to extend a limitation period on a case-by-case basis to prevent inequity, even when such period would otherwise have expired. See, e.g., United States v. All Funds Distributed to, or on Behalf of, Edward Weiss, et al., 345 F.3d 49 (2d Cir. 2003). Generally, equitable tolling is a remedy reserved for extraordinary or exceptional circumstances. Id. For instance, equitable tolling is appropriate where a party was unaware of his or her cause of action due to misleading conduct of the defendant. See, e.g., Zerilli-Edelglass v. New York City Transit Authority, et al., 333 F.3d 74, 80 (2d Cir. 2003). Thus, the critical question in this case is whether the conduct of the Debtor was

¹¹This Court has permitted a post-deadline extension of a filing bar date where the Court affirmatively misled a creditor. In re Ginsberg, 172 B.R. 167 (Bankr. D. Conn 1994).

sufficiently misleading so as to cause The Hartford to miss the Deadline.

C. Standards for Debtor Conduct

By the filing of her bankruptcy petition, the Debtor legitimately sought to prejudice creditors through discharge of her obligations to them. Such prejudice, of course, is an intended consequence of Bankruptcy Code provisions affording relief to honest debtors through a financial "fresh start". See Grogan v. Garner, 498 U.S. 279, 287 (1991). The entitlement of a debtor to a fresh start, however, is not absolute, but must be assessed in light of the circumstances before the court. See Cohen v. De La Cruz, 523 U.S. 213 (1998) (the Bankruptcy Code "has long prohibited debtors from discharging liabilities incurred on account of their fraud"). Embodying and animating this fundamental policy of extending relief *only* to honest but unfortunate debtors, the Bankruptcy Code facilitates challenges to a debtor's entitlement to a general discharge, see Section 727, and permits objections to the discharge of particular debts, see Section 523(a).

The balance between a debtor's presumptive entitlement to a discharge, and a creditor's right to challenge the same, is struck by the employment of important procedural rules. Bankruptcy Rule 1007(a)(1) - implementing Code Section 521(1) ("debtor shall . . . file a list of creditors . . . [and] a schedule of liabilities . . .") - instructs a debtor to "file with the petition a list containing the name and address of each creditor . . ." As an additional and more specific directive in this District, D. Conn. LBR 1007-2 (hereafter, the "Local Rule") provides, *inter alia*, that "[e]very petition shall be accompanied by a mailing matrix which complies with instructions available from the clerk". The relevant "instructions" provide, *inter alia*, that "[t]he debtor and the debtor's attorney shall be responsible for the

preparation of the matrix. *The debtor shall sign and verify the list attesting to the accuracy and completeness of the information to the best of the debtor's ability.* Public Notice - Clerk's Instructions on Filing a Matrix, ¶ 4 (emphasis added) (hereafter, the "Instructions"); see also D. Conn. Bankr. Standing Order 22, ¶ 4 (relevant language identical to Public Notice) (hereafter, the "Standing Order").

The required mailing matrix (hereafter, the "Matrix") is the principal vehicle used by the Clerk and others to provide fair notice and opportunity to be heard to creditors on a range of matters affecting their interests including, *inter alia*, bar dates or deadlines. The requisite debtor verification of the *accuracy and completeness* of the Matrix is intended to insure that such notices are reasonably calculated to reach all interested parties within a relevant time-frame. Disregard of the dictates of the Local Rule, Instructions, and/or Standing Order undermines the notice structure of the bankruptcy system, and thereby the rights of interested parties. Even unintentional failures to examine and/or verify the accuracy and completeness of the Matrix actuates a very real danger that parties in interest will not receive reasonable notice of opportunities to address adverse matters.

D. The Debtor's Conduct in this Case

The record of this matter supports a conclusion that the Debtor's conduct was sufficiently misleading to justify an equitable tolling of the Deadline in favor of The Hartford. Prior to the preparation and filing of her bankruptcy Petition, the Debtor was clearly aware of the nature of the Claim, and its relative size and significance compared to the claims of her other creditors. Moreover, she well appreciated the effect that a bankruptcy petition, and eventual discharge, *could* have on the Civil Action and the Claim, namely: (i) an

immediate stay of the prosecution of the Civil Action by operation of the automatic stay of Section 362(a);¹² and (ii) a discharge of the Claim pursuant to Sections 727(a) and 524(a). She also understood that the benefit of a discharge of the Claim would be denied her if The Hartford filed and prevailed on a complaint objecting to the dischargeability of the Claim. Moreover, she believed that The Hartford was inclined to file, and *had a good chance of prevailing upon*, such a complaint. Therefore, from the Debtor's perspective, the best case scenario was the unlikely event of The Hartford missing the Deadline.

One method by which a debtor can increase the chances of a creditor missing a deadline in a bankruptcy case is to provide inadequate creditor contact information for the Clerk's use in notifying creditors. This is one of the "evils" which the Local Rule, Instructions, and Standing Order are designed to prevent. In point of fact, the Debtor did not verify the accuracy and completeness of the Matrix; nor could she have, given the circumstances of the preparation of that Matrix and Schedule F.

At the Hearing, counsel for the Debtor explained that it was his firm's practice to obtain accurate and complete creditor addresses by contacting each and every creditor by telephone "*if in fact [the address] is not evident from other documents.*" Tr. 9/11/03 at 3:29:40 (emphasis added). Nonetheless, in listing and scheduling The Hartford by only its Plaza Address, the Debtor's counsel's firm uncharacteristically disregarded particularized contact information within its control. Specifically, the Debtor and/or her counsel were fully cognizant of the pendency of the Civil Action as well as the identity and record address of The Hartford's attorney in that case. Moreover, the Debtor's counsel had direct

¹²The Debtor listed the Civil Action as "Pending/Stayed". See *Statement of Financial Affairs*, ¶ 4. (emphasis added).

telephonic contact with that attorney prior to the Petition Date.

The idiosyncrasy of the Debtor's scheduling and listing of The Hartford is rendered even more troubling when one observes the stark contrast of the Debtor's noticing of certain other creditors, none of whom were expected to seek determinations of dischargeability. With regard to each such creditor, the Debtor made considerable, even special, effort to notice the creditor *and* its collection agent *and/or* attorney. See Schedule F and Matrix.¹³ There is no doubt in the Court's mind that had the Debtor filed an accurate and *complete* Matrix as required by the Local Rule, Instructions and Standing Order, Attorney Blackburn would have been included thereon.

The Debtor's conduct *following* the filing of her Petition is also supportive of a potentially conscious attempt to promote inaction by The Hartford. Upon the filing of a bankruptcy petition, it is customary for debtors previously involved in non-bankruptcy litigation to file in the non-bankruptcy forum some form of notice of the pendency of the bankruptcy case, so as to avail themselves of the benefits of the automatic stay of Section 362(a), see fn. 12, and the anticipated relief of a bankruptcy discharge. Oddly, no such notice, or other "suggestion" of bankruptcy, was filed by the Debtor in the Civil Action. And no other action was taken in connection with the Civil Action until the Deadline had passed.

¹³*E.g.*, Akron Billing Center, 2620 Ridgewood Road, Akron OH 044313-3527 and Litchfield Acute Care Services, P.O. Box 30774, Hartford, CT 06150 (Scheduled Claim Amount: \$125.00); Law Offices of Mitchell N. Kay, P.O. Box 9006, Smithtown, NY 11787-9006, Chase Auto Finance, P.O. Box 15594, Wilmington, DE 19886-5700, and Plaza Associates, P.O. Box 18008, Hauppauge, NY 11788-8808 (Scheduled Claim Amount: \$2,299.47); Trow & Sank, P.C., 30 Oak Street, Stamford, CT 06905, Household Bank, P.O. Box 88000, Baltimore, MD 21288-0001, and Midland Credit Management, 5775 Roscoe Court, San Diego, CA 92123 (Scheduled Claim Amount: \$6,807.66); and Cingular Wireless - SNET, 2612 N. Roan, Johnson City, TN 37604 and Nationwide Recovery Systems, 2304 Tarpley Drive # 134, Carrollton, TX 75006 (Scheduled Claim Amount: \$393.00).


Against the foregoing background of law and conduct, the scheduling and listing of The Hartford at only its Plaza address elevates the Court's level of suspicion that the Debtor may have hoped that the delay, and possible loss, associated with the investigation and routing of the Notice within a large institutional creditor such as The Hartford would produce the windfall of that creditor's ignorance of an important bankruptcy deadline.

V. CONCLUSION.

The Hartford has demonstrated Debtor conduct sufficiently troubling and misleading to compel the Court to reopen this bankruptcy case and equitably toll the Deadline.¹⁴ Even if the Court's suspicions regarding the Debtor's intentions are unfounded, the Debtor's conduct under the undisputed circumstances of this matter are sufficient to warrant equitable relief to the Hartford. Accordingly, by the Order Reopening Case and Establishing New Deadline for the Filing of a Complaint to Determine Dischargeability Pursuant to Bankruptcy Code Section 523, Doc. I.D. No. 18, entered February 13, 2004 (hereafter, the "Order"), and to accord appropriate relief to The Hartford, and for cause, the Motion was granted; Bankruptcy Case No. 02-35821 was reopened, and the deadline for The Hartford to file a dischargeability complaint pursuant to Section 523 extended to April 2, 2004.¹⁵

BY THE COURT

DATED: March 5, 2004


Honorable Albert S. Dabrowski *3/5/04*
Chief United States Bankruptcy Judge

¹⁴Given the Court's disposition of this matter on an equitable tolling theory founded on notice inadequacy, it is unnecessary to consider relief upon an assertion of "excusable neglect". Cf., e.g., *In re Leary*, 274 B.R. 314 (Bankr. D. Conn. 2002).

¹⁵Incident to record proceedings of February 13, 2004, the Court entered the written Order (i) granting the Motion, (ii) reopening Bankruptcy Case No. 02-35821, (iii) extending the Deadline for the Movant to file a dischargeability complaint pursuant to Section 523 to April 2, 2004, and (iv) retaining jurisdiction to issue this *Memorandum of Decision on Motion to Reopen*.

OPINION SERVICE LIST

In re Chapter 7
CAROL J. ALBINI, Case No. 02-35821 (LMW)
f/n/a CAROL J. PASSARO,
Debtor Doc. I.D. Nos.13, 17

Parties:

David A. Huntoon, Esq. : Attorney for Debtor
30 Mason Street :
Torrington, CT 06790 :

Stuart G. Blackburn, Esq. : Attorney for Hartford Insurance Company
Two Concorde Way, Building 3C :
P. O. Box 608 :
Windsor Locks, CT 06096 :


Barbara H. Katz, Esq. : Chapter 7 Trustee
57 Trumbull Street :
New Haven, CT 06510 :

Judges/Clerk of Court/Others :
Hon. Robert L. Krechevsky :
Hon. Alan H. W. Shiff :
Hon. Lorraine Murphy Weil :
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Dated: March 10, 2004


Cheryl D. Butler