FILED

Aug 16 1988
CLERK
U.S. BANKRUPTCY
By _____
Deputy Clerk

ADMINISTRATIVE ORDER # 88-003

ACCEPTANCE OF TELEFAX COPIES OF PLEADINGS

A pleading, complaint or petition may be accepted as timely filed by transmission to the court telefax machine on time critical matters under the following criteria:

1) The pleading must be authorized to be received for filing by the judge, law clerk, clerk of the court, chief deputy, estate administrator or other person in charge of the clerk's office. such authorization must be obtained, based on a showing of time critical need, prior to the sending of the pleading or complaint or petition. No telefaxed pleading will be accepted without prior approval.

2) The telefax copy must include a cover sheet which includes a brief statement of the time critical status of the pleading, complaint or petition, reason an original cannot be filed and the identification of the court individual authorizing its receipt. This cover sheet will be filed with the pleading in the case file. The party sending the telefax is solely responsible for ensuring it is fully and accurately received.

3) The telefaxed copy will be docketed and assigned a docket number. The docket entry will reflect "Telefax copy of (name of pleading) authorized by (name of court person) (name of attorney and who he represents) ."

4) Fees due for telefax acceptance will be $15.00 plus the $.50 per page copy fee for each page received, or other fees which may be due under the miscellaneous fee schedule.

5) The original of the pleading, complaint or petition submitted by telefax plus any fees which may be due, must be filed with the court immediately and in no event longer than five days of the date of authorization of the telefax, or the pleading will be stricken under Bankruptcy Rule 9011.

DATED: August 12, 1988

Herbert A. Ross
Bankruptcy Judge

cc Wayne
Jamilia
Kate
Intake

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA
U. S. Courthouse and Federal Bldg.
701 "C" Street, Box 47
Anchorage, Alaska 99513

HERBERT A. ROSS
Bankruptcy Judge

Phone (907) 271-5489
Room A-115

RECEIVED
AUG 08 1988
U.S. BANKRUPTCY COURT CLERK
By
Deputy Clerk

August 7, 1988

Wayne W. Wolfe
Clerk of the Bankruptcy Court

Re: Use of FAX Documents for Filing

Dear Wayne:

In a recent newsletter from the Court Administration Division of the Administrative Office it was suggested that FAXed pleadingss not be accepted by a bankruptcy court pending further study by the AO. I do not believe we should deprive parties access to speedy filing of pleadings by FAX, subject to being striken if they are not promptly supplemented with the originally signed copies.

I will draft a proposed order providing for:

1- Filing pleadings by FAXed copies;

2- Providing for a form message or order to be mailed to the filer that the documents have been accepted provisionally, and will be striken if not followed by the originally signed copies (the order could be sent by the clerk under a "ministerial act" grant of authority.

Please pass a copy of this letter to the Court Administration Division. There are cases providing for the filing of technicalliy deficient pleadings or pleadings without the required filing fee. See, for example, In re Boothe, 84 Bankr. 636 (Bankr. Neb. 1988).

Very truly yours,

Herbert A. Ross

HAR/mot

cc Jamila
Kate
Doug
Intake

$250.00 for one dependent) which again may be applied to any property in the nine categories. Summarizing then, debtors may apply up to $2,000.00 in value to their household goods, $1,000.00 in value to their jewelry, and $1,900.00 to any property so long as it falls within one of the nine categories. If there is excess value over those amounts, the lien may not be avoided except as to the extent outlined. Further, if there is property not included within the nine categories, the lien may not be avoided as to it.

In this particular case, it appears that the dollar amounts of exemption available cover all of the personal property. If Beneficial Missouri disagrees, it may move for a valuation hearing. However, one set of golf clubs and one exercise bike appear not to be encompassed within the nine categories. Unless a request for valuation is made, the lien will be avoided as to all the property listed except for the set of golf clubs and the exercise bike.

KEY NUMBER SYSTEM

In the Matter of William BOOTHE, Debtor.

PHOENIX FEDERAL SAVINGS, Plaintiff,

v.

William BOOTHE, Debtor, Defendant.

Bankruptcy No. BK87-666.
Adv. No. A87-0381.

United States Bankruptcy Court, D. Nebraska.

April 14, 1988.

Creditor filed complaint objecting to dischargeability of debt, and Chapter 7 debtor moved to dismiss complaint as untimely. The Bankruptcy Court granted debtor's motion, and creditor moved for rehearing. The Bankruptcy Court, John C. Minahan, Jr., J., held that complaint objecting to dischargeability of debt was timely filed, as of date it was file-stamped by clerk's office, notwithstanding more than three-week delay in processing complaint as result of creditor's failure to include necessary filing fee.

So ordered.

Bankruptcy ⇐3382

Complaint objecting to dischargeability of debt was timely filed, as of date it was file-stamped by clerk's office, notwithstanding more than three-week delay in processing complaint as result of creditor's failure to include necessary filing fee. Rules Bankr.Proc.Rule 9006(a), 11 U.S.C.A.

John C. Hahn of Jeffrey, Hahn, Hemmerlinger & Wade, P.C., Lincoln, Neb., for debtor.

Robert B. Creager of Berry, Anderson, Creager & Wittstruck, P.C., Lincoln, Neb., for creditor-plaintiff, Phoenix Federal Sav

MEMORANDUM AND ORDER

JOHN C. MINAHAN, Jr., Bankruptcy Judge.

THIS MATTER comes before the Court on Motion for Rehearing by Creditor-Plaintiff (Fil. # 7, January 26, 1988), and Order of this Court (Fil. # 24, in BK87-666) dated January 15, 1988, which sustained Debtor's Defendant's Motion to Dismiss (Fil. # November 12, 1987).

FACTS

The issue presented involves whether the filing of a complaint without paying the filing fee is effective for purposes of commencing an action within the time limit specified by the Court for filing a complaint to bar discharge.

The facts in this case are undisputed. Debtor, William Boothe, III filed a petition under Chapter 7 of the Bankruptcy Code on March 5, 1987 (BK87-666). On June 1, 1987, Creditor, Phoenix Federal Savings filed a Motion for Extension of Time to file a complaint objecting to the dischargeability of a debt under 11 U.S.C. § 523(a)(2)(

pursuant to Rule 4004(b). (Fil. # 14, BK87-666). At a hearing before Judge Mahoney on August 6, 1987, Creditor was granted 30 days in which to file its complaint. The Journal Entry (BK87-666, Fil. # 18) of Judge Mahoney further stated, "Failure to so file within 30 days will result in a bar to further seek filing and debtor shall be scheduled for discharge/reaffirmation hearing." This order was filed August 7, 1987. The Creditor's complaint was mailed September 4, 1987, and was received by the Clerk's Office on September 8, 1987, after the Labor Day holiday. Since the filing fee remitted with the complaint was insufficient, the Clerk's Office did not open the adversary proceeding file (A87-381) until September 30, 1987. Debtor filed a motion on September 29, 1987, in the bankruptcy case requesting that a discharge/reaffirmation hearing be held, because the filing of Creditor's objection to the discharge was late (BK87-666, Fil. # 19). Creditor objected (Fil. # 20) on January 15, 1988, the Court sustained Debtor's motion, over-ruled Creditor's objection and ordered that a discharge/reaffirmation be set (Fil. # 24). In making this order, the Court found that the complaint was filed late.

In the adversary proceeding, Creditor's complaint was dated as filed on September 1987. Debtor moved to dismiss the complaint in (Fil. # 4), November 12, 1987. After the hearing on January 15, 1988 in the bankruptcy case (BK87-666), Debtor renewed his motion to dismiss in the adversary case (A87-381) on January 26, 1988 (Fil. # 6). Creditor moved for a rehearing of the Court's order of January 15, 1988 in BK87-666 (Fil. # 7, January 26, 1988). At a status hearing in A87-381 on January 28, 1988, the Court took the motion for rehearing under advisement (Fil. # 8).

CONCLUSION

The Court now finds that the complaint of Creditor, Phoenix Federal Savings was timely filed. In calculating time under Bankruptcy Rule 9006(a), the day of the act from which the time begins to run is not included and "[t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday ... in which event the period runs until the end of the next day which is not one of the aforementioned days."

Creditor timely requested and was granted a 30 day extension of time in which to file its complaint. If the 30 days are counted from the date of the hearing, August 6, 1987, the date of the 30th day of the period in which the complaint could be filed was September 5, 1987. September 5, 1987 was a Saturday. Monday, September 7, 1987 was a legal holiday, Labor Day. Thus, the last day the complaint could be filed was September 8, 1987, and this is the date the Clerk's Office received the complaint and file-stamped it. The complaint did arrive within the time alloted by the Court order, as calculated according to Rule 9006(a).

In his brief, Debtor also argues that the failure of Plaintiff to pay the filing fee by September 8, 1987 renders the filing of the complaint late. The case of *In re Michael Spearman*, 68 B.R. 25 (Bankr.E.D.N.Y. 1987) is instructive. The complaint in *Spearman* was filed on the last day of the allowed time, but not docketed until the fee was paid later. The Court held that the complaint was timely filed. "The critical act was the filing of the complaint, not the filing of the fee. Payment of filing fees is not jurisdictional." *Id.* at 26. Other courts have reached similar conclusions, *In re Elijah Whitfield*, 41 B.R. 734 (Bankr.W.D. Ark.1984); *In re Norman*, 49 B.R. 796 (Bankr.W.D.La.1985). This conclusion is also supported by Fed.R.Civ.P. 3, which states that a "civil action is commenced by filing a complaint with the court." (See, *e.g.*, 2 Moore's Federal Practice ¶ 3.04 at 3-18). Under Bankruptcy Rule 7003, Fed. R.Civ.P. 3 applies to this adversary proceeding.

Thus, the complaint was properly filed in this case on September 8, 1987. The delay in completing the processing of the complaint until September 30, 1987 by the Clerk's Office has no affect on the substantive rights of creditor to pursue its remedies under the Bankruptcy Code.

IT IS ORDERED, that the motion by Phoenix Federal Savings for reconsideration in A87-381 (Fil. # 7) is sustained, and the Court's Order of January 15, 1981 (Fil.

24 in BK87-666) is vacated. Debtor's Motions to Dismiss in A87-381, (Fil. # 4 and Fil. # 6) are overruled. Debtor shall file an answer in twenty (20) days of this date under Rule 7012(a).

LOWER BRULE CONSTRUCTION CO., Plaintiff,

v.

SHEESLEY'S PLUMBING & HEATING CO., INC.; Standing Rock Housing Authority; West River Telephone; Eva's Self Service: Nebs; Rosebud Mfg.; Midcon Equipment Co.; Northwest Pipe Fittings, Inc.; Acme Welding; Todd's Service; East Side Motel; Polar Gas; Atlas Concrete; McLaughlin Cenex; Stan Houston Equipment Co.; Mid-West Equipment Co.; B & D Supply; Mid America Steel; Tim's Service; Lampy Concrete; Hoff Ready Mix; Hogg Restaurant Supply; McLaughlin Coast To Coast; Mor-Gran-Sioux Electric; Dakota, Inc.; Bosch; Skelly; West River Lumber; Larson Lumber Company; Valley Gas & Equipment Rental; Triad, Inc.; Keller Excavation; Twin City Roofing; Western Wall and Ceiling; Dakota Fence; McGee Landscaping; Siegel Construction; Laib Realty; Wayne Perman; Ted Denks, d/b/a Eagle Nest Construction; Jensen Rock and Sand; Krider Equipment Co.; Farmer's Union; Al's Diesel Repair; Anderson Tire Co.; Fisher Sand and Gravel; Sweeney Brothers; State of North Dakota; Tri-County State Bank, Inc.; and United States of America, Housing and Urban Development, Defendants.

Civ. Nos. 87-3040, 87-3030.

United States District Court,
D. South Dakota, C.D.

March 30, 1988.

Action arose out of construction contract entered into between tribal Housing Authority and construction company for renovation of housing project on Indian reservation. Following hearing on debtor's application for preliminary injunction, the Bankruptcy Court ordered that each action in district court be enjoined from further proceedings, enjoined payment under letter of credit obtained by debtor to insure its performance under construction contract and remanded adversary proceeding to district court. The District Court, Donald J. Porter, Chief Judge, held that bankruptcy court did not have authority to enjoin payment under letter of credit.

Order accordingly.

1. Indians ⇐32(7)

Civil jurisdiction of tribal courts does not extend to bankruptcy proceedings.

2. Indians ⇐32(7)

Jurisdiction of tribal courts is unlimited only in relation to matters of Indian self-government.

3. Bankruptcy ⇐2051
Indians ⇐32(4)

Requirement of exhaustion of available tribal remedies before instituting suit in federal courts is inapplicable to adversary proceedings in bankruptcy.

4. Bankruptcy ⇐2374

Requirement that tribal remedies be exhausted before instituting suit in federal court did not deprive bankruptcy court of jurisdiction to issue preliminary injunction prohibiting payment under letter of credit obtained by debtor in connection with construction project.

5. Bankruptcy ⇐2049

Adversary proceedings based on allegations that Housing Authority had breached construction contract with debtor by making demand for payment under letter of creditor when debtor had substantially performed contract was "related proceeding," being matter of state contract law. 28 U.S.C.A. §§ 157, 157(b)(3).

See publication Words and Phrases for other judicial constructions and definitions.

6. Bankruptcy ⇐2368

While bankruptcy court has authority in some circumstances to enjoin parties from proceeding with actions in state court, bankruptcy court is not authorized to enjoin parties from proceeding in federal district court. Bankr.Code 11 U.S.C.A. § 105.

7. Bankruptcy ⇐2536

Proceeds of letter of credit held by creditor of estate for benefit of third party are not "property of debtor's estate."

See publication Words and Phrases for other judicial constructions and definitions.

8. Bankruptcy ⇐2394

Automatic stay does not operate to stay payment under letter of credit held by creditor's estate for benefit of third party. Bankr.Code, 11 U.S.C.A. § 362(a)(3).

9. Bankruptcy ⇐2396

Bankruptcy courts may enjoin proceedings by creditors against third parties that will adversely affect debtor's estate. Bankr.Code, 11 U.S.C.A. § 105(a).

10. Bankruptcy ⇐2367

Bankruptcy court did not have authority to enjoin payment on letter of credit obtained by debtor to guaranty its performance according to terms of construction contract.

David L. Bergren, Bergren & Duffy Law Offices, Fort Pierre, S.D., for plaintiff.

Randall R. Hodge, Rapid City, S.D., for defendant Sheesley's Plumbing & Heating Co., Inc.

Mary Maywalt, James Wagenlander, Wagenlander & Associates, Denver, Colo., Terry L. Pechota, Finch & Viken Law Offices, Rapid City, S.D., for defendant Standing Rock Housing Authority.

Thomas E. Lee, Poches & Lee, Fort Pierre, S.D., for defendant McGee Landscaping, Inc.

C.J. Bormann, Mobridge, S.D., for defendant West River Lumber.

Ray P. Murley, Office of United States Attorney Sioux Falls, S.D., for defendant U.S. Housing and Urban Development.

Gary F. Colwill, Schmidt, Schroyer, Colwill & Barnett, Pierre, S.D., for Fischer Sand.

Paul O. Godtland, Chamberlain, S.D., for defendant Farmers Union Oil Co.

Brent A. Wilbur, May, Adam, Gerdes & Thompson, Pierre, S.D., for defendant Valley Gas & Equipment Rental.

David J. Larson, Chamberlain, S.D., for defendant Tri-County State Bank.

David R. Vrooman, Sioux Falls, S.D., for defendant Stan Houston Equipment.

Mary T. Wynne, Rapid City, S.D., for Lower Brule Housing Authority.

Thomas F. Kelsch, Mandan, N.D., for Siegel Construction & Twin City Roofing.

MEMORANDUM OPINION

DONALD J. PORTER, Chief Judge.

This action was commenced as an adversary proceeding in bankruptcy court. The bankruptcy court remanded the adversary proceeding to this Court by an interlocutory order of June 18, 1987. The defendants, Sheesley's Plumbing and Heating Co., Inc. (Sheesley's) and Standing Rock Housing Authority (Housing Authority) filed motions for leave to appeal the interlocutory order. On July 21, 1987, this Court granted those motions. This opinion will address the issues on appeal.

FACTS

This action arose out of a construction contract entered into between the Housing Authority and the plaintiff, Lower Brule Construction Co. (Lower Brule), for the renovation of a housing project known as the Douglas Skye Complex on the Standing Rock Sioux Indian Reservation in Fort Yates, North Dakota. Two other actions are pending before this Court on this matter, which shall be referred to only as they relate to this action. To guarantee Lower Brule's performance according to the terms of the contract, an irrevocable standby letter of credit was obtained by Lower Brule in the amount of $188,000 from Tri-County State Bank (Tri-Co.) with the Housing Authority as the beneficiary. The letter pro-