UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 02-74974
CENTENNIAL HEALTHCARE CORPORATION, et al.,	
	CHAPTER 11
Debtors	JUDGE MASSEY
GLORIA CANDELARIO AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GENARA CANDELARIO,	
Movant,	
v.	CONTESTED MATTER
CENTENNIAL HEALTHCARE CORPORATION, et al.,	
Respondents.	

ORDER GRANTING MOTION TO EXTEND TIME TO FILE ADMINISTRATIVE EXPENSE CLAIM AND FOR RELIEF FROM DISCHARGE INJUNCTION

Centennial HealthCare Corporation and 34 other companies filed petitions under Chapter 11 in this Court on December 20, 2002, and their cases were jointly administered in Centennial HealthCare Corporation's case. Centennial and its affiliates leased and managed numerous nursing homes in several states. On June 22, 2004, the Court entered an order confirming the Third Amended Joint Plan of Reorganization of these Debtors (the "Confirmation Order"). The Reorganized Debtors now manage their businesses without court supervision. The only

remaining matters in this Court involve the resolutions of disputes concerning claims, of which this contested matter is one.

The Confirmation Order set the deadline for filing non-professional administrative expense claims at 90 days after the date on which notice of entry of the Confirmation Order was served as provided therein. Bankruptcy Rule 9006(f) requires the addition of three days if a notice is served by mail. On June 25, 2004, The Trumbull Group, LLC, Debtors' claims agent, mailed to creditors and other parties in interest the notice of entry of the confirmation order and notice of the deadline for filing non-professional administrative expense claims (the "Notice"). Thus, the deadline was September 26, 2004.

On April 12, 2005, Gloria Candelario in her capacity as representative of the estate of her mother, Genara Candelario, filed a late "Administrative Claim Request" with Trumbull, contending that Genara Candelario's death was attributable to negligent care while she was a patient in a nursing home in 2003. On May 10, 2005, Gloria Candelario filed a Motion to Extend Time to File Administrative Claim and for Relief From Discharge Injunction, seeking allowance of her late request for payment of an administrative expense claim and a declaration that she may proceed nominally against Debtors in state court with respect to insurance coverage, if any. Movant asserts that she never received the Notice (Movant's Exhibit M-1). The Reorganized Debtors contend that Movant should be presumed to have received the Notice and that her claim should be denied as untimely.

The Court held an evidentiary hearing on Gloria Candelario's motion on October 7, 2005, at which both Ms. Candelario and the Reorganized Debtors presented evidence.

Other than the issue of whether Gloria Candelario had notice of the bar date for requesting payment of an administrative expense, the facts are not in dispute. In March 2003, Genara Candelario, having suffered from pneumonia and breathing difficulty, was admitted to Terra Vista Rehabilitation and Health Center ("Terra Vista"), a nursing home located in Florida, pursuant to a contract between Terra Vista and Gloria Candelario. Debtors' Exhibit R-1. Genara Candelario apparently suffered a fall on April 4, 2003 and died on June 16, 2003.

In April 2003, Gloria Candelario retained Carlos R. Diez-Arguelles, a personal injury lawyer, who began an investigation of the treatment and care of Mrs. Candelario. In December 2003, Mr. Diez-Arguelles gave to Terra Vista a formal notice of intent to initiate litigation. He and attorneys for Terra Vista exchanged a series of letters in 2004 concerning the tort claim asserted by Gloria Candelario.

At the hearing, Ms. Candelario credibly testified that she never received the Notice and that she first learned from her attorney in early 2005 that there was a deadline for filing her claim. She stated that Mr. Diez-Arguelles asked her in a letter whether she had ever received such a notice and that she called him to tell him that she had not. Ms. Candelario also testified that her attorney keeps her advised about her case and sends her information about the case.

Mr. Diez-Arguelles testified that he has never practiced bankruptcy law and has practiced exclusively as a personal injury lawyer. In February 2004, attorneys for Terra Vista informed him by letter that "Centennial" was in bankruptcy. Debtors' attorney argued at the hearing that this letter, attached as an exhibit to the motion, shows that Mr. Diez-Argulles had specific notice of all of these bankruptcy cases. Having been invited to examine that letter, the Court observes that the letter in question informed Mr. Diez-Argulles that "Centennial HealthCare Corporation" was in

bankruptcy. Prior to 2005, however, Terra Vista's defense counsel never informed Mr. Diez-Argulles that Ms. Candelario's claim against any entity other than Centennial HealthCare Corporation was stayed.

In December 2004, Mr. Diez-Arguelles filed a tort action with respect to Ms. Candelario's claim and served standard interrogatories with the complaint. Defendants in that action moved to dismiss the action based on the filing of the Centennial bankruptcy cases, but they also responded to discovery. The motion to dismiss the tort action prompted Mr. Diez-Arguelles to consult bankruptcy counsel, who provided him with the Notice in January 2005. That bankruptcy attorney informed him for the first time that a bar date had been imposed for the filing of administrative expense claims. Mr. Diez-Argulles testified that he was positive that he had never received the Notice prior to 2005 and that after obtaining a copy of the Notice from the bankruptcy attorney he consulted, he sent a letter to Movant with the copy of the Notice enclosed, asking if she had received the Notice. He testified that Ms. Candelario informed him that she had not received the Notice.

The attorneys for the parties referred simply to "Centennial" in many questions posed at the hearing, as if a company called "Centennial" were the only entity in bankruptcy. As indicated, these jointly administered cases involved 35 Debtors. Not until the entry of the Confirmation Order were most, though not all, of the cases substantively consolidated pursuant to the Third Amended Joint Plan of Reorganization.

The one fact that the parties failed to discuss or otherwise address at the hearing was the identity of the entity that owned and/or operated Terra Vista during 2003 and 2004. The evidence in this contested matter does not show that Centennial HealthCare Corporation owned, leased,

managed or operated Terra Vista at any time or that it had potential liability on Ms. Candelario's claim. The disclosure to Mr. Diez-Argulles in early 2004 that Centennial HealthCare Corporation was in bankruptcy did not constitute notice to him that an entity or entities actually involved with the operation and management of Terra Vista in 2003 were also in bankruptcy.

In response to the testimony offered by Movant, Debtors sought to introduce into evidence two affidavits of Brendan Halley, the Notice Coordinator with The Trumbull Group, concerning the alleged mailing of notices to Movant. Movant's counsel objected to the admission of the affidavits on the ground that they are inadmissible hearsay. The Court does not agree, and the objections are overruled.

Federal Rule of Civil Procedure 43(e), made applicable to bankruptcy cases by Bankruptcy Rule 9017, allows courts to consider affidavits in deciding on motions and works as an exception to the hearsay rule for evidence on motions. *In re Garner*, 246 B.R. 617, 625 (9th Cir. B.A.P. 2000) ("Thus, in bankruptcy contested matters, affidavit testimony that is based on personal knowledge of the witness is *admissible hearsay* on the authority of Federal Rule of Evidence 802 and Civil Rule 43(e)") (emphasis in original). The notice of the hearing on October 7, 2005 did not restrict the use of affidavits. Admitting the affidavits as evidence does not, however, answer the question of how much weight to give them.

A properly mailed document is presumed to be received by the addressee. *Hagner v. U.S.*, 285 U.S. 427, 430 (1932). For the presumption to arise, it must be shown that: (1) the envelope containing the document was properly addressed, (2) proper postage was affixed to the envelope, and (3) the envelope was in fact mailed. *In re East Coast Brokers and Packers, Inc.*, 961 F.2d 1543, 1545 (11th Cir. 1992). Moreover, for the presumption of receipt to arise, the "evidence

must consist of more than unsupported conclusory statements[.]" *See Id*.; *Godfrey v. United States*, 997 F.2d 335, 338 (7th Cir. 1993) ("To invoke the presumption of delivery, [a party] could either present evidence of actual mailing such as an affidavit from the employee who mailed the [document], or present proof of procedures followed in the regular course of operations which give rise to a strong inference that the [document] was properly addressed and mailed.").

In his affidavit sworn to on June 28, 2004 (Respondents' Exhibit R-2), Brendan Halley identifies himself as "the Notice Coordinator" for Trumbull and states that he has "personal knowledge of the facts" in his affidavit. Mr. Halley further states:

> 4. On Friday, June 25, 2004, I caused to be served via the United States Postal Service, by first class mail, postage prepaid, the Notice of Confirmation of Plan, Permanent Injunction, and Various Deadlines (the "Notice"), attached hereto as Exhibit A, and Administrative Claim Request Form, attached hereto as Exhibit B, on all parties listed on Exhibit C.

Debtors contend that there were some 89,000 names on the mailing list used to mail the Notice. Mr. Halley could not possibly have personally attended to handling each task associated with stuffing, addressing and stamping all of the envelopes containing the notice of the bar date for filing administrative expense claims on one day, assuming that 89,000 envelopes were in fact mailed on June 25, 2004. There is no evidence that he handled any envelope, and certainly not the one allegedly sent to Gloria Candelario or that he had any personal knowledge about whether anyone else mailed such an envelope.

Mr. Halley may have knowledge of the facts stated in his affidavit, but he does not aver that an envelope properly stamped and properly addressed to Gloria Candelario containing the proper notice was actually mailed to her by another person he supervised. His affidavit fails to show that Trumbull has a regular business practice that insures the names and addresses of all

parties on a mailing list will inevitably find their way to envelopes that will contain the correct notice, will bear the proper postage and will be delivered to the Postal Service. All that Mr. Halley says is that "he caused" the Notice to be "served" on the parties listed on exhibit C. As suggested by the argument of Movant's counsel at the hearing, Mr. Halley's statement would be literally true if he had hired a subcontractor that hired another subcontractor to stuff, address, stamp and mail envelopes and had relied on the subcontractors to do what he asked them to do. His testimony is conclusory and falls far short of averring that he has personal knowledge that an envelope containing the Notice properly addressed to Gloria Candelario with adequate postage was placed in the United States Mail or that the persons who actually performed the work of mailing the Notice followed a reliable, regular business practice.

There is another problem with Exhibit R-2. A document identical in all respects to the first two pages of the affidavit was filed in this case on June 30, 2004 as document no. 2034. Document no. 2034 has a third page that reads: "ALL EXHIBITS AVAILABLE ON C/D." Debtors apparently did not file that C/D because the Clerk's Office has no record of having received it. Exhibit R-2 has attached paper exhibits, and exhibit C to Exhibit R-2 is a one page list of names and addresses that includes a line beginning with "Genara Candelario." Thus, it is unclear what exhibits were attached to or were a part of Mr. Halley's affidavit when he signed it. Exhibit R-2 has Mr. Halley saying one thing, while document no. 2034 seems to have him saying something else.

On exhibit C to Debtors' Exhibit R-2 is this line: "Genara Candelario Gloria Candelario, 6028 Nashua Avenue, Orlando, Florida, 32809." As of the date of the mailing, Genara Candelario was deceased. There is no evidence in the record that shows that Genara Candelario

ever resided at the Nashua Avenue address. A prerequisite of the presumption of delivery of mail to a particular recipient is that the envelope was properly addressed to the recipient. *In re Hobbs,* 141 B.R. 466, 468 (Bank. N.D.Ga. 1992). Mr. Halley's affidavit shows that Gloria Candelario was not the primary addressee. Hence, Debtors have failed to show that an envelope addressed first to Genara Candelario was properly addressed to Gloria Candelario, i.e, that the probability that the Postal Service would have delivered an envelope so addressed was as high as one addressed only to Gloria Candelario.

For the foregoing reasons, Exhibit R-2 fails to prove that an envelope containing the Notice properly addressed to Gloria Candelario with adequate postage attached was ever placed in the U. S. Mail, and consequently, there is no presumption that such an envelope was ever delivered to Gloria Candelario.

Debtors also sought to introduce into evidence as Exhibit R-3, a second affidavit of Brendan Halley dated August 9, 2004, to prove that on August 6, 2004, Debtors mailed to Movant a notice which allegedly would have put Movant on notice of Debtors' bankruptcy. Debtors filed a similar affidavit in the bankruptcy case (document no. 2278), which like document no. 2034, has an exhibit that refers to a "CD." Thus, Exhibit R-3, which was not an original, is not in all respects the same document as document no. 2278. In Exhibit R-3, Mr. Halley apparently swears that he coordinated the mailing of a notice of the effective date of the confirmed plan. This affidavit is also conclusory and suffers from the same defects identified above with respect to Exhibit R-2 in failing to show that Mr. Halley had any personal knowledge with respect to any mail sent to Gloria Candelario or that it was addressed to her. Hence, no

presumption of delivery of the notice referred to in Exhibit R-3 to Ms. Candelario arises from that affidavit.

Even if there were a presumption of delivery of the Notice to Ms. Candelario, she presented more than a bare denial of receipt. She had no apparent motive not to communicate about the Notice with her attorney, had she received it. Ms. Candelario's attorney also had no knowledge of the Notice. Had she told him that she received the Notice, he would have been bound to say so. When he asked her in early 2005 whether she received it, she told him she had not. Debtors have contended in connection with the introduction of Exhibit R-3 that even a notice of plan confirmation would have tipped off Ms. Candelario that the owner of Terra Vista was in bankruptcy. The evidence shows, however, that had she been tipped off that the Notice concerned her claim against Terra Vista, she would have discussed it with her attorney. In short, her attorney's testimony corroborates her testimony. The Court finds that Ms. Candelario did not receive the Notice.

Movant contends that the Notice, even if received by Ms. Candelario, would not have put her on notice that she was facing a deadline that would have barred her wrongful death claim. The Court agrees, though not necessarily for the reason given by her counsel at the hearing.

Movant argues that the Notice failed to define the term "administrative expense" (except by reference to the Bankruptcy Code) and did not tell recipients that an administrative expense or claim included a personal injury claim. For these reasons, Movant contends that the Notice was not effective to communicate to her (and presumably all other post-petition tort claimants) that it was necessary to file an administrative expense claim for tort claims by the September 26, 2004 deadline.

The Court need not decide this issue because the Notice was inadequate as to Ms. Candelario alone for another reason. That reason is the absence of any evidence to show that she knew of a connection between the Centennial Healthcare Debtors and Terra Vista Rehab and Health Center. The contract she signed when her Mother was admitted to Terra Vista, Respondents' Exhibit R-1, is with Terra Vista Rehab and Health Center, not with any entity named Centennial. That contract does not mention a Centennial company. The Notice did not mention Terra Vista. There is no evidence to show that Debtors informed either Gloria Candelario or Mr. Diez-Arguelles prior to September 24, 2004, who the owner or manager of Terra Vista was. There is no evidence that Mr. Diez-Arguelles ever mentioned Centennial or a bankruptcy case to Gloria Candelario prior to January 2005.

The only dot of information that Ms. Candelario had was that her mother died at Terra Vista under circumstances that made her think she might have a claim for damages against Terra Vista. The only dot of information that Mr. Diez-Argulles had was that the attorneys defending Terra Vista had asserted that the claim could not be asserted against Centennial HealthCare Corporation because it was in bankruptcy. Even assuming that Ms. Candelario can be charged with the dot of information that her attorney had, she cannot be charged with connecting those dots with the critical dot, which Debtors chose not to disclose to her or to her attorney, that a company or companies other than Centennial HealthCare Corporation owned or managed or in some other way had potential liability for acts or omissions related to the care of Genara Candelario and that one or more of such other companies was in bankruptcy.

Even if it assumed that Movant received the Notice, she is entitled to an extension of the deadline for filing an administrative expense claim pursuant to Bankruptcy Rule 9006(b)(1), which provides in relevant part:

> . . . [W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

The "determination [of excusable neglect] is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 395 (1993). Among the factors that may be considered by a court are: "[1] the danger of prejudice to the debtor, [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id*. All of these factors weigh in Movant's favor.

Debtors would suffer prejudice if the delay in filing the claim put them at a material disadvantage in defending against Movant's claim or if the delay added significant expense to defense of the claim or to the administration of these cases chargeable to Debtors. The party opposing a late filing is always prejudiced in the sense that it has to defend what would otherwise be barred, but this is not the kind of prejudice to which the Supreme Court was referring in *Pioneer*. Debtors have not contended that the delay would adversely affect their ability to defend against Ms. Candelario's claim, would add significant additional expense to the defense or would in any other way prejudice them. Their argument that allowing Ms. Candelario's claim might open the flood gates to claims by other claimants is mere speculation. It misses the point that in evaluating excusable neglect, the focus is on the facts relevant to what Ms. Candelario knew and

did or did not do and not on what any other person might contend as to his or her claims if Ms. Candelario's claim is allowed.

Deeming Movant's application for payment of an administrative expense claim to be timely would have little, if any, impact on Debtors' Chapter 11 cases. Debtors' reorganization is virtually completed. Movant's claim is similar to other claims that the reorganized Debtors have geared up to defend. There has been no suggestion that payment of the claim would adversely affect any other claimant or otherwise give rise to additional litigation in this Court.

Mr. Diez-Arguelles first became aware of missing the deadline in January 2005 (the actual date appears to have been January 24, though the evidence is not entirely clear). The Trumbull Group received Movant's "Administrative Claim Request" on April 12, 2005, which is 78 days after January 24, 2005. The Confirmation Order required 90 days' notice of the bar date to which three days were added by Bankruptcy Rule 9006(f). Movant filed her claim in less time after learning of the bar date than claimants were allowed by the Confirmation Order. She filed her motion seeking allowance of a late request on May 10, 2005, 28 days after she filed her request with Trumbull. Movant filed her claim and her motion in a reasonable period of time after learning of the deadline.

Debtors are far more to blame for the delay in the filing of Ms. Candelario's administrative claim than she is. The primary reason for this dispute and for the delay is Debtors' failure to take adequate care in notifying Ms. Candelario of the deadline. First, they did not add Mr. Diez-Argulles to the list of persons to whom notice should be sent, even though Terra Vista's attorneys had been engaged in evaluating the claim with him for over a year. Second, after informing Mr. Diez-Argulles that Centennial HealthCare Corporation was in bankruptcy, Terra

Vista's defense attorneys apparently continued to deal with him over a period of many months as if there were no automatic stay in place for any other entity connected to Terra Vista. Third, Debtors failed to inform Ms. Candelario that Terra Vista was owned, managed by, leased to, or operated by one or more of the Debtors other than Centennial HealthCare Corporation so that she would have recognized that the Notice was referring to Terra Vista had she received it. (These first three points assume that a Centennial company was so connected to Terra Vista as to have such potential liability, a fact both parties assumed but neither proved at the hearing.) Finally, they failed to make it clear to Ms. Candelario that a post-petition personal injury or a wrongful death claim against a Chapter 11 debtor is a type of administrative expense, a disclosure that might have caused her to realize the Notice was about her claim against Terra Vista. This last omission might not have made the notice completely ineffective, but its ambiguity is a factor that may be considered in determining whether excusable neglect exists. *See Pioneer Inv. Services Co.*, 507 U.S. at 398-9.

Debtors' reliance on *Midland Cogeneration Venture LP v. Enron Corp. (In re Enron Corp.)*, 419F.ed 115 (2nd Cir. 2005) to support their contention that the Court should not find excusable neglect is misplaced. In that case, the Second Circuit affirmed an order of the district court affirming the bankruptcy court's refusal to extend the time for Midland to file a late proof of claim on the basis of excusable neglect. Midland's lawyers understood the import of the deadline but claimed that they had inadvertently missed the deadline because they were busy with other matters. The Second Circuit agreed that the bankruptcy court did not abuse its discretion in determining that Midland had not satisfactorily explained why it did not timely file a claim. Here, by contrast, Debtors made it extremely difficult, if not impossible, for Ms. Candelario, a

seamstress – not a contributor to *Collier on Bankruptcy*, to appreciate what the Notice meant, assuming for the sake of argument that she received it.

Finally, Debtors do not contend, and there is no evidence, that Movant acted in bad faith in not requesting payment of administrative expenses in a timely manner. Doing nothing was not in her interest. She had nothing to gain and everything to lose by ignoring the Notice.

For the foregoing reasons, it is

ORDERED that Gloria Candelario's Motion to Extend Time to File Administrative Claim and for Relief From Discharge Injunction (document no. 2627) is GRANTED. Ms. Candelario's request for payment of an administrative expense is deemed timely. The discharge of Debtors does not limit Debtors' liability or otherwise limit the liability of any insurance carrier under a policy that covers Ms. Candelario's claim based on the discharge, and she may proceed with her lawsuit in state court.

Dated: December 28, 2005.

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE