

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 7
	)	
<b>TANGELA ROCHELL STILLWELL,</b>	)	<b>CASE NO. 12-71360 - MHM</b>
	)	
Debtor.	)	
	)	
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LAW OFFICES OF ADAM J. KLEIN,	)	
	)	
Plaintiff,	)	
v.	)	<b>ADVERSARY PROCEEDING</b>
	)	<b>NO. 12-5619</b>
TANGELA ROCHELL STILLWELL,	)	
	)	
Defendant.	)	

**DISMISSAL ORDER**

This adversary proceeding commenced November 26, 2012, when Plaintiff filed its complaint objecting to Debtor's discharge and seeking a determination that its claim against Debtor is not dischargeable under §523(a) (the "Complaint"). The Complaint was accompanied by a certificate of service showing service of the Complaint, but not the summons, upon Debtor's attorney but not upon Debtor.<sup>1</sup> No certificate of service of the summons has been filed, although Plaintiff's attorney avers in its motion for default judgment that a copy of the Complaint and summons were served upon Debtor and Debtor's attorney November 27, 2012.

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<sup>1</sup> Bankruptcy Rule 7004(a)(9) requires service upon Debtor.

The bar date in Debtor's bankruptcy case for filing complaints objecting to discharge or to determine dischargeability was November 23, 2012 (the day after Thanksgiving Day) (the "Bar Date"). The Complaint was filed three days after the Bar Date. With the Complaint, Plaintiff filed a *Notice of Inaccessibility of Clerk's Office on November 23, 2012* (Doc. No. 3) (the "Notice"). The Notice set forth that Plaintiff attempted to confirm the hours of operation of the Clerk by checking the website for the U.S. District Court for the Northern District of Georgia (the "District Court Website"), and ascertained that the [District Court] Clerk's office would be open until 4:45 p.m. on November 23, 2012. Plaintiff asserts that it thoroughly investigated the website for the U.S. Bankruptcy Court for the Northern District of Georgia (the "Bankruptcy Court Website") and found no notice to contradict the notice found on the District Court Website. In fact, the Bankruptcy Court Website does set forth that its regular business hours are 8:00 a.m. to 4:00 p.m. The main telephone number for the Bankruptcy Clerk, (404) 215-1000, also sets forth the Clerk's regular business hours are 8:00 a.m. to 4:00 p.m.<sup>2</sup>

Plaintiff appeared at the office of the Bankruptcy Clerk at approximately 4:15 p.m. to find it closed. Therefore, Plaintiff mailed the Complaint to the Bankruptcy Clerk by certified mail postmarked November 23, 2012. Plaintiff asserts that the closing of the Bankruptcy Clerk's office prior to the 4:45 closing time published on the District Court

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<sup>2</sup> The current version was posted on the Bankruptcy Court Website April 28, 2009.

Website rendered the Bankruptcy Clerk's office "inaccessible" under Bankruptcy Rule 9006(a)(3)(A), thus extending the filing deadlines to the first accessible day thereafter that is not a Saturday, Sunday, or legal holiday, *i.e.* November 26, 2012.

On December 31, 2012, Plaintiff filed a motion for default judgment (Doc. No. 6) (the "*Motion for Default Judgment*"). A notation on the docket shows that the Bankruptcy Clerk's office was unable to proceed with a Clerk's Entry of Default because the certificate of service attached to the Complaint showed service only upon Debtor's attorney. On January 10, 2013, Debtor filed a motion to dismiss the Complaint as untimely filed (Doc. No. 7) (the "*Motion to Dismiss*"), and a response to the motion for default judgment (Doc. No. 8). Plaintiff filed a response to the *Motion to Dismiss* (Doc. No. 9) and a reply to Debtor's response to the *Motion for Default Judgment* (Doc. No. 10).

The basis of Debtor's *Motion to Dismiss* and opposition to Plaintiff's *Motion for Default Judgment* is the untimely filing of the Complaint. As excuse for the untimely filing of the Complaint, Plaintiff relies on its allegation of inaccessibility of the Bankruptcy Clerk's office 15 minutes after its usual closing time. Although Plaintiff recognizes that the Bankruptcy Court and the District Court maintain separate websites, Plaintiff asserts that because of the relationship between the Bankruptcy Court and the District Court – the Bankruptcy Court is a unit of the District Court – and because of the specific day of the Bar Date – the Friday after Thanksgiving Day – Plaintiff should be

entitled to rely upon the closing time set forth on the District Court Website, rather than the closing set forth on the Bankruptcy Court Website.

Bankruptcy Rule 5001(a) provides:

**Courts always open.** The courts shall be deemed always open for the purpose of filing any pleading or other proper paper, issuing and returning process, and filing, making, or entering motions, orders and rules.

Bankruptcy Rule 5005(c) provides:

**Error in filing or transmittal.** A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court....In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

Plaintiff does not explain the decision to retreat from the courthouse and resort to the U.S. Postal Service rather than visit the U.S. District Court Clerk's office to discover whether timely filing may have been accomplished, or visiting a bankruptcy judge's chambers on the 12<sup>th</sup> or 14<sup>th</sup> floors to determine if any officer of the court was present. (Courtroom deputies in chambers are also deputy clerks and may receive such pleadings, as may the Clerk of Court in her office).

Although Bankruptcy Rule 9006(a)(3) does not define "inaccessibility," courts have considered the various obstacles that have resulted in late-filed complaints. The

most analogous to the facts in the instant case is *Schwartz v. Schwartz*, 2012 WL 4344544 (N.D. Cal. 2012). In *Schwartz*, the plaintiff filed a dischargeability complaint one day after the bar date. Plaintiff's counsel admitted that he did not normally practice in bankruptcy court but had consulted advisory counsel who incorrectly told Plaintiff's counsel that he could file the complaint by fax. Plaintiff's counsel also believed, incorrectly, that he could file the complaint electronically via the federal courts' PACER service, which is available only for viewing pleadings and dockets. On the bar date, at approximately 1:30 p.m., Plaintiff's counsel contacted the bankruptcy court and learned that he could file the complaint neither by fax nor electronically via PACER. At that point, Plaintiff's counsel left his office in Sacramento for the more than two-hour drive to the bankruptcy court in San Jose. He arrived at the courthouse at 4:42 but was refused entry to the building by security personnel. When he inquired about a drop box, which he believed existed because he had consulted the district court's website rather than the bankruptcy court's website, he was informed that the bankruptcy court had no drop box. Plaintiff's counsel returned to his office and sent the complaint to the bankruptcy court by express mail, so that the complaint was filed the day *after* the bar date.

The *Schwartz* court noted that although the bar date of Bankruptcy Rule 4007(c) is not jurisdictional, *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Ninth Circuit Court views the bar date as a "virtually inflexible filing limitation." *Schwartz*, 2012 WL 4344544, at page 3. The Eleventh Circuit has a similarly strict interpretation of the bar date.

*See Byrd v. Alton*, 837 F. 2d 457 (11<sup>th</sup> Cir. 1988); *Choi v. Promax Investments, LLC*, Civil Action File No. 1:12-cv-1560-TCB (N.D. Ga. 2012)<sup>3</sup>; *Agrawal Investments, LP v. Ladha*, 2011 WL 2516528 (Bankr. N.D. Ga. 2011) (J. Sacca). Exceptions to the Bankruptcy Rule 4007(c) bar date are extremely limited. In *dicta*, an exception may exist for “unique” or “extraordinary” circumstances. *Schwartz*, 2012 WL 4344544, at page 3. The *Schwartz* court found no such exception existed for the plaintiff’s attorney because the untimely filing had not been the result of any action or malfunction of the bankruptcy court, noting that the attorney’s decision to wait until the last minute to attempt to file the complaint was not something imposed by the bankruptcy court. The *Schwartz* court concluded that the untimely filing was simply the result of neglect, which, “even if excusable, has been consistently rejected as a basis to extend the bar date.”

As noted above, at 4:15 p.m. November 23, 2012, the Bankruptcy Clerk’s office was closed but not inaccessible within the intended meaning of Bankruptcy Rule 9006. Bankruptcy Rule 5001 discloses any court officer could have accepted the Complaint for filing on the Bar Date. After Plaintiff’s attorney arrived to find the Bankruptcy Clerk’s office closed, however, he apparently made no effort to discover some other means of getting the Complaint filed timely. The Bankruptcy Clerk’s business hours are clearly posted on the Bankruptcy Court Website and included in the information available on the main telephone number for the Bankruptcy Clerk. Plaintiff’s assumption that the business

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<sup>3</sup> This opinion may be accessed in Adv. Proc. No. 11-5104, Doc. No. 29.

hours for the U.S. District Court and the U.S. Bankruptcy Court would be the same was unjustified as well as incorrect.<sup>4</sup> As the failure to timely file the Complaint was due to Plaintiff's lack of action, not the inaccessibility of the Bankruptcy Clerk's office, it is hereby

ORDERED that Plaintiff's motion for default judgment is *denied* and Defendant's motion to dismiss is *granted*. This adversary proceeding is *dismissed* as untimely filed.

**The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.**

**IT IS SO ORDERED**, this the 13<sup>th</sup> day of February, 2013.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE

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<sup>4</sup> Apparently, Plaintiff's attorney failed to seek the assistance of the staff at the District Court Clerk's Office, which was still open for business at 4:15 p.m. November 23, 2012.