

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION**

IN RE:	:	CASE NO. G12-21179-REB
	:	
TIM ANTHONY WEISHEIPL,	:	
	:	
Debtor.	:	
_____	:	
	:	CONTESTED MATTER
TIM ANTHONY WEISHEIPL,	:	
	:	
Movant,	:	
	:	
v.	:	
	:	CHAPTER 13
JULIE SANDSTROM,	:	
	:	
Respondent.	:	JUDGE BRIZENDINE

ORDER SUSTAINING OBJECTION TO CLAIM

Before the Court is the objection of Debtor named above, filed on August 3, 2012, to the proof of claim of Julie Sandstrom filed on July 27, 2012 and designated as Claim No. 5. Debtor contends this claim is untimely since Sandstrom filed it after the claims filing deadline of July 25, 2012 as set in this case, and, therefore, the claim must be disallowed on that basis under 11 U.S.C. § 502(b)(9). *See also* Fed.R.Bankr.P. 3002(c). In response, Sandstrom offers several grounds for dismissing Debtor's objection and accepting her claim as properly filed. Based on a review of the record, including the legal briefs and authority cited therein, as well as the argument of counsel and testimony as presented at a hearing on this matter, the Court concludes that Debtor's objection should be sustained and Sandstrom's claim disallowed.

The parties filed a Stipulation of Facts on May 28, 2013 that is summarized as follows. Sandstrom asserts a claim against the above-named bankruptcy estate in the amount of

\$94,000.00 based on a certain settlement agreement and confession of judgment signed by Debtor. Copies of these documents are attached to a proof of claim filed electronically with the Clerk of this Court by Sandstrom on July 27, 2012. As mentioned above, the official deadline for filing claims in this Chapter 13 case was fixed as July 25, 2012. It is undisputed that Sandstrom was properly scheduled as a creditor and timely noticed of the bar date herein. On that same date, Michael D. Schwartz, as counsel for Sandstrom, filed an application for CM/ECF registration with this Court though it was not approved until after the deadline.¹ Counsel also transmitted to both Debtor's counsel and the Chapter 13 Trustee via facsimile on July 25, 2012 a letter along with a copy of an unfiled proof of claim, which was received after 5:00 p.m. local time. The next day, July 26, 2012, Schwartz sent a second letter to Debtor's counsel stating in part that the proof of claim as sent to counsel "was not filed with the Bankruptcy Court." See Exhibit "C," attached to Stipulation.² The alleged untimeliness of the claim is the sole basis of Debtor's objection. Debtor's plan, which is not yet confirmed, proposes a 100% pay out to unsecured creditors.

Among her responses to the objection, Sandstrom states through her attorney that counsel faxed the proof of claim to Debtor's attorney and the Chapter 13 Trustee on July 25, 2012 because he feared that his registration would not be completed in time to permit him to file the claim by said date. Sandstrom further contends, based on Eleventh Circuit case authority in *The*

¹ CM/ECF refers to the Case Management/Electronic Case Files (CM/ECF) initiative used by the federal judiciary.

² Sandstrom's counsel, however, now states that this second letter was sent in error because he had been misinformed regarding the necessity of filing such a claim. See Affidavit of Michael D. Schwartz, attached to Hearing Brief filed on May 28, 2013 (Docket Entry No. 45).

Charter Co. v. Dioxin Claimants (In re The Charter Co.), 876 F.2d 861, 863 (11th Cir. 1989), that the documents as submitted to these persons on July 25, 2013 constitute an informal proof of claim since they apprised the recipients of the “existence, nature, and amount” of the claim and Sandstrom’s intent to enforce it. As such, the claim filed with the Court on her behalf two days later on July 27, 2013, after counsel completed his registration, relates back to this informal claim as a matter of equity. Sandstrom also maintains that allowing her claim will not prejudice the Debtor or the other unsecured creditors, and that Debtor’s own schedules recognize her claim.

Sandstrom further argues that this Court should allow her claim under the principle of “excusable neglect” as discussed by the United States Supreme Court in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. P’ship*, 507 U.S. 380, 383, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993). Such rationale is applicable here, Sandstrom insists, because counsel’s failure to file a timely claim resulted from technical difficulties encountered as an out-of-state attorney, which rendered him unable to obtain the necessary registration in time to file the claim by the claims deadline. But for these circumstances, the claim, which is based on an obligation Debtor does not otherwise dispute, would have been filed on time. Based on an assessment of the determining factors set forth in *Pioneer*, 507 U.S. at 395, such as the danger of prejudice to the Debtor, the length of the delay and potential effect on the case, the reason the delay occurred, and the good faith of the party seeking relief, Sandstrom contends her claim should be allowed as a matter of equity as its late-filing occurred due to the excusable neglect of her attorney.

Sandstrom further insists that her claim should be allowed under Federal Rule of Bankruptcy Procedure 5005(c) since she transmitted the proof of claim to the Trustee and

Debtor's attorney with the intent that it be treated as part of the bankruptcy court proceedings.³ In the interest of justice and as a matter of equity, given her good faith efforts to file her proof of claim and at the very least, make known to all interested parties her intent to hold Debtor accountable for same, Sandstrom asks that her claim be allowed so that she may participate in any distributions under Debtor's plan. *See* Hearing Brief (Docket Entry No. 45).⁴

Debtor counters these arguments maintaining that this Court lacks discretionary authority to extend the claims filing bar date under Section 502(b)(9) and Fed.R.Bankr.P. 3002(c). *See In re Middlebrooks*, 2006 WL 6591835, * 2 (Bankr. N.D.Ga. Jan. 17, 2006). Further, since *Pioneer* addressed the effect of Federal Rules of Bankruptcy Procedure 3003 and 9006 in a case under Chapter 11, its rationale does not apply in this Chapter 13 case. Here, the time for filing claims is instead governed by Rule 3002, which differs from Rule 3003(c)(3) in that the former does not contain authority to extend the bar date as explicitly granted in the latter.

Debtor also challenges Sandstrom's reliance on *Charter*, *supra*, arguing that the letter and claim she contends constitute an informal proof of claim failed to inform the Court of the claim

³ This Rule provides in pertinent part as follows:

A paper intended to be filed with the clerk but erroneously delivered to the United States trustee, the trustee, [or] the attorney for the trustee...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....as of the date of its original delivery.

Fed.R.Bankr.P. 5005(c).

⁴ Sandstrom states that Debtor is fully solvent, and that even if her claim is allowed, it is expected that the plan should be sufficiently funded to pay all unsecured claims.

prior to the bar date, and, in any event, these documents were not received by the Trustee or Debtor's attorney before the hour when the Clerk's Office closed. Moreover, Debtor states it is incredible for Sandstrom to assert her counsel believed that he was filing her claim with the Court when he faxed it to the Trustee and Debtor's attorney such that her claim should now be considered in reliance upon Rule 5005(c). In conclusion, Debtor contends that no equitable basis exists to allow the claim since Sandstrom knew about the bar date well in advance and slept on her rights by waiting until the last day to attempt to file the claim.

* * * *

Under Rule 3002, the holder of an unsecured claim must file a proof of claim for it to be allowed and in a case under Chapter 13, a claim is "timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors...." Fed.R.Bankr.P. 3002(a); see Notice filed March 29, 2012 (Docket Entry No. 4-1). Upon review of the case authority cited by Sandstrom, the Court concludes for the reasons stated below that it does not have authority in this instance to allow her late-filed claim.

As an initial matter, the Court does not find that Sandstrom has established grounds for applying excusable neglect with respect to her claim. As observed by the Supreme Court in *Pioneer, supra*, clients are accountable for the acts and omissions of their lawyer, so the inquiry must center on whether the neglect of both the client and her attorney is excusable. 507 U.S. at 397, 113 S.Ct. at 1499. Here, the record contains no intimation that Sandstrom's attorney did not know about the bar date ahead of time, and no question has been raised regarding any ambiguity regarding the content of its notice to all creditors. Rather, it would appear that counsel made the choice not to act until that day arrived and it was discovered that the registration

procedure for filing claims would take time to be completed. While steps were admirably taken in an evident attempt to ameliorate this reality, the record does not support a finding of excusable neglect under the standard of *Pioneer* and the applicability of same under the facts in this Chapter 13 case. See Fed.R.Bankr.P. 3002(c) and 9006(b)(3).

Likewise, in *Charter*, the claimant had filed a motion for relief from stay with the court in a Chapter 11 case before the claims deadline that the circuit court held constituted sufficient evidence of, and notice of intent regarding, a demand against the estate. In the present case, however, Sandstrom did not file her claim documentation with the Court prior to the expiration of the bar date, but instead submitted same to Debtor's counsel and the Trustee on that date. As such, the rationale in *Charter* does not lend legal support to the recognition of Sandstrom's claim herein as an allowed claim despite its untimely filing using an informal proof of claim theory. In other words, the issue in that case centers on an evaluation of the content of certain documents that were undisputedly filed with the court before a bar date. The question there concerned whether those documents contained ambiguity in relation to a creditor's intent to assert a claim. 876 F.2d at 866. Notwithstanding the confusion created by the second letter sent by Sandstrom's lawyer, however, manifestation of creditor intent to assert a claim is not really an issue herein. The court in *Charter* did not have to examine the legal effect of serving claim-related documents on certain parties before expiration of a subject deadline, that are subsequently filed with the clerk after such time, which is the issue confronted by this Court.

This latter fact pattern is addressed in *Anderson-Walker Indus., Inc. v. Lafayette Metals, Inc.* (*In re Anderson-Walker Indus., Inc.*), 798 F.2d 1285, 1288 (9th Cir. 1986), and leads into a consideration of the effect of Fed.R.Bankr.P. 5005. In that case, the Ninth U.S. Circuit Court

of Appeals first concluded that a letter sent by a claimant to the trustee's attorney was sufficient to constitute an amendable informal proof of claim. Next, the court determined that these documents satisfied the misdelivery exception under the predecessor to Rule 5005(b) (current version at 5005(c)) as the claimant intended to file the letter, but was in error in sending it to a court-appointed trustee since the paper should have been filed with the court. The court emphasized that in its view, application of the exception contained in the Rule does not depend on the creditor sending its claim to the trustee by mistake.

Rather, the claimant must have intended to file the document and that it become part of the bankruptcy proceeding, but make an error in sending it to the trustee. In other words, according to the circuit court the error contemplated by the Rule lies in the judgment of whom to serve with the paper and the legal effect resulting from same—operating under a misapprehension that the claimant had filed its claim with the court—as distinguished from a factual mistake in transmitting it to someone other than that intended. 798 F.2d at 1288. Sandstrom cites *Anderson* in support of the exception's application in the present case because, again, she intended to file the claim expecting an official response when her attorney faxed it to the Trustee and counsel for the Debtor. Under the authority of *Anderson*, Sandstrom maintains, to benefit from the exception provided in the Rule, she does *not* have to also show that the documents were mistakenly sent to the trustee instead of the clerk.

This Court, however, finds the construction adopted in *Anderson* and urged by Sandstrom somewhat strained based on the language of the Rule. Instead, the Court's reading is more in agreement with the construction offered in *First Nat'l Bank of Lincolnwood v. Levine (In re Evanston Motor Co.)*, 735 F.2d 1029 (7th Cir. 1984). In that case, the Seventh U.S. Circuit Court

of Appeals interpreted application of the exception as dependent on an "erroneous delivery," characterized in terms of a mistaken transmission of the letter as opposed to an error in judgment regarding the expected legal consequence of an intended addressee's receipt. 735 F.2d at 1032. As such, the exception does not apply in the present case because Sandstrom sent the letter and claim documents to the parties she intended to receive them. They were not misdelivered.⁵

In sum, while the Court acknowledges the harshness of its ruling in terms of effect, it does not conclude that Sandstrom has provided a sufficient legal or equitable basis for the Court to allow her late-filed claim herein under the facts presented.⁶ Accordingly, based upon the foregoing analysis and discussion, it is

ORDERED that Debtor's objection to the proof of claim of Julie Sandstrom filed herein on July 27, 2012 and designated as Claim No. 5 in the claims register, be, and the same hereby is, **sustained**; and, it is

FURTHER ORDERED that the proof of claim of Julie Sandstrom, be, and the same hereby is, **disallowed**.

The Clerk is directed to serve a copy of this Order upon counsel for the Debtor, counsel

⁵ This construction finds further support as the more natural and intended reading of the sentence at issue by considering the very next sentence in the Rule that addresses the reverse situation as in intending to transmit a paper to the U.S. Trustee, "but erroneously delivering it to the clerk." Fed.R.Bankr.P. 5005(c). It is this Court's view that the error the Rule seeks to address lies in sending a paper to the wrong entity, as opposed to sending it to a specific entity expecting it to be equivalent to filing it with another, which, in this case, is the clerk of the Court.

⁶ Sandstrom's final argument is that since her attorney may be liable to her for legal malpractice as suggested by Debtor, he is "an entity that is or may be liable with the debtor" to her such that he could file a claim under Fed.R.Bankr.P. 3005(a) within 30 days of the bar date. The Court finds this argument unavailing as it seeks to enable Sandstrom to benefit from her attorney's act in faxing the claim documents to counsel, which created the issue in the first place.

for Julie Sandstrom, and the Chapter 13 Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 6th day of September, 2013.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE