



IT IS ORDERED as set forth below:

Date: April 28, 2015

A handwritten signature in black ink, appearing to be "Barbara Ellis-Monro", is written over a horizontal line.

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

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

IN RE:

STEVEN MARKOWITZ and MARILYN
MARKOWITZ,

Debtors.

CASE NO. 14-68061-BEM

CHAPTER 7

ORDER

This matter comes before the Court on The Shoppes at Monarch, LLC's ("Monarch") "Motion to Extend Time to Object to Discharge or Dischargeability of Debt" (doc. no. 43) and Debtors' "Response to Motion to Extend Time to Object to Discharge or Dischargeability of Debt" (doc. no. 50). This is a core matter pursuant to 28 U.S.C. 157(b)(2)(J).

Findings of Fact

The facts in this case are undisputed. Debtors filed a Chapter 7 petition on September 15, 2014. The Clerk's office issued a notice setting the date for the meeting of creditors as October 21, 2014, and the deadline for objecting to discharge or challenging dischargeability of certain debts as December 22, 2014 (doc. no. 8). On December 10, 2014,

Monarch filed a motion to extend the time to object to discharge or dischargeability of a debt (doc. no. 15). The deadline was extended to February 16, 2015 by consent order entered December 22, 2014. (doc. no. 20). The Chapter 7 Trustee also filed a motion to extend the time to file an objection to discharge. (doc. no. 23). The deadline for the Trustee was extended to March 23, 2015 by consent order entered December 24, 2014 (doc. no. 24). Monarch filed a motion for a 2004 examination of Debtors' son with the examination to be taken on February 16, 2015, the last day of the extension of Monarch's time to file a discharge complaint (doc. no. 28). The motion for 2004 examination was granted but, at Debtors' request, the examination was delayed until March 4, 2015 (doc. 30). The examination went forward and Debtors did not object to the examination going forward based on the expiration of Monarch's time to file a discharge complaint.

An email exchange between counsel for Monarch and counsel for Debtors on January 5, 2015 included some discussion of an extension of the deadline for objecting to discharge or dischargeability of a debt. (doc. no. 43, Ex. A). An assistant to Monarch's counsel wrote: "[Monarch's counsel] would also like to go ahead and agree to extend the deadline for the dischargeability. The extended date is February 16th. Recently, the trustee, Jordan Lubin, filed a Motion for Extension to March 23rd. If March 23rd is agreeable, I will advise Mr. Lubin and prepare a consent order to this effect." *Id.* Counsel for Debtors responded: "I am okay with extending the deadline to March 23." *Id.* Counsel for Monarch did not submit a consent order. At the hearing, Counsel stated that the failure to do so was an oversight.

On March 20, 2015, the Chapter 7 Trustee filed a second motion to extend the time to object to discharge (doc. 39). The motion was granted by consent order, and the deadline for the Trustee to object to discharge was extended to June 22, 2015 (doc. 41). Monarch filed its

second motion to extend the deadline to object to discharge and to dischargeability of a debt on March 23, 2015 (doc. no. 43). Debtors objected to the extension because the motion was not timely filed. The Court heard the motion and objection on April 15, 2015. At the hearing, Monarch abandoned its request for an extension of the deadline to file a complaint to determine dischargeability of a debt, thereby limiting its motion to the deadline for objecting to discharge.

Federal Rule of Bankruptcy Procedure 4004(a) provides that “[i]n a chapter 7 case, a complaint ... objecting to the debtor’s discharge shall be filed not later than 60 days after the first date set for the meeting of creditors under § 341(a).” Rule 4004(b)(1) provides that the court “may” extend the deadline for cause “[o]n motion of any party in interest.” With an exception not applicable here, “the motion shall be filed before the time has expired.” Fed. R. Bankr. P. 4004(b)(1).¹ Rule 9006(b)(3) provides that, “[t]he court may enlarge the time for taking action under Rules ... 4004(a) ... only to the extent and under the conditions stated in those rules.”

Neither Monarch nor Debtors cited any cases in their papers or at the hearing, rather the Court raised the issue whether the email correspondence indicating that an extension was acceptable amounted to waiver of the deadline given the deadline is not jurisdictional and, therefore, can be forfeited. *Kontrick v. Ryan*, 540 U.S. 443, at 447, 124 S. Ct. 906 at 910 (2004).² In *Kontrick*, the creditor filed an untimely complaint objecting to the debtor’s discharge. The

¹ The exception provides: “A motion to extend the time to object to discharge may be filed after the time for objection has expired and before discharge is granted if (A) the objection is based on facts that, if learned after the discharge, would provide a basis for revocation under § 727(d) of the Code, and (B) the movant did not have knowledge of those facts in time to permit an objection. The motion shall be filed promptly after the movant discovers the facts on which the objection is based.” Fed. R. Bankr. P. 4004(b)(2). Monarch did not contend that this exception to timeliness applies to its motion, nor did it allege any facts from which the Court could conclude that this exception applies to its motion.

² The Court distinguished the concepts of forfeiture and waiver. “[F]orfeiture is the failure to make the timely assertion of a right[;] waiver is the intentional relinquishment or abandonment of a known right.” 540 U.S. at 457 n.13, 124 S. Ct. at 917 n.13 (internal quotation marks and citations omitted). In *Kontrick*, the debtor forfeited rather than waived his right to object on timeliness grounds. *Id.*

debtor did not object on timeliness grounds until after the court had reached a decision on the merits in favor of the creditor. *Id.* at 446, 124 S. Ct. at 910. The Court held that Rules 4004(a), (b) and 9006(b)(3) were claims processing rules that can “be forfeited if the party asserting the rule waits too long to raise the point” and that debtor had waited too long to object on timeliness grounds *Id.* at 456, 124 S. Ct. at 916. The Court expressly stated that it did not reach the question of “[w]hether the Rules, despite their strict limitations, could be softened on equitable grounds” *Id.* at 457, 124 S. Ct. at 917.

The Eleventh Circuit Court of Appeals, however, has rejected equitable exceptions to the deadlines contained in Rule 4004(a) and (b). In *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11th Cir. 1988), an unlisted creditor filed an untimely motion to extend the time to file a complaint to determine the dischargeability of a debt.³ *Id.* at 458. The creditor received actual notice of the bankruptcy filing but did not receive notice of the deadline for filing dischargeability complaints. *Id.* The court rejected the creditor’s equitable arguments for the extension while acknowledging that it was “troubled” by the debtor’s conduct toward the creditor. *Id.* The court stated that “[d]espite the misleading actions, inadvertent or intentional, of debtor Alton, the time specifications set out in the Bankruptcy Code are sufficiently clear to have placed an obligation on creditor Byrd to follow the case and to take the timely action necessary to pursue his claim.” *Id.* at 459.

The district court in *Choi v. Promax Invs., LLC*, 486 B.R. 541 (N.D. Ga. 2012), noted that in *Alton* and two post-*Alton* cases considering the deadlines in Rules 4004 and 4007, the 11th Circuit rejected the creditors’ equity arguments on the merits but did not say that equity could never justify an untimely extension. *Id.* at 545 (citing *In re Williamson*, 15 F.3d 1037,

³ The time to file a complaint objecting to dischargeability of a debt under 11 U.S.C. § 523(c) is governed by Rule 4007(c), with nearly identical language to Rule 4004. Extensions of the time to file such a complaint are governed by Rule 9006(b)(3).

1040 (11th Cir. 1994) and *Alabama Dep't of Econ. & Cmty. Affairs v. Lett*, 368 Fed. Appx. 975, 979 (11th Cir. 2010)). In *Alton*, *Williamson*, and *Lett*, the circuit court “found that the deadlines in the bankruptcy code were clear and the record showed ... that the creditors had actual notice of the bankruptcy case and were not prevented from complying with the deadlines set forth in the code.” *Id.* at 546.

Further, the Eleventh Circuit recently affirmed the continuing viability of *Alton* and the breadth of its authority, stating that “*Alton* is still good law for the general rule that the bankruptcy court has no discretion to grant a late-filed motion to extend time to file a dischargeability complaint, at least where the debtor has properly raised untimeliness as an issue.” *Stuart v. Mendenhall (In re Mendenhall)*, 572 Fed. Appx. 858, 862 n.2 (11th Cir. 2014) (unpublished).

In more extraordinary and limited circumstances, bankruptcy courts in this district have shown a willingness to apply equity to allow untimely motions to extend deadlines to object to discharge or dischargeability of a debt. The court in *United Community Bank v. Harper (In re Harper)*, 489 B.R. 251 (Bankr. N.D. Ga. 2013) (Drake, J.), grouped those limited circumstances into four categories: (1) the creditor “was prevented from making a timely filing due to extraordinary circumstances beyond its control”;⁴ (2) the creditor missed the deadline as a result of “the debtor’s conscious culpability”; (3) the late filing was due to an affirmative error by the clerk’s office, such as issuing an incorrect deadline; and (4) the creditor failed to receive actual notice of the bankruptcy filing prior to expiration of the deadline. *Id.* at 258-59 (citations omitted). None of those circumstances are present here.

⁴ The bankruptcy court decision cited for this category, *Choi v. Promax Invs., LLC (In re Choi)*, No. 10-90403, 2012 Bankr. LEXIS 1732 (Bankr. N.D. Ga., Apr. 2, 2012), was reversed by the district court. *Choi*, 486 B.R. at 546.

Here, Monarch had notice of the bankruptcy case and the deadlines for filing a dischargeability complaint and merely failed to timely file a second motion to extend time. While this may constitute excusable neglect, and could therefore constitute grounds to extend other types of deadlines, it does not provide a basis to extend the time to file a dischargeability complaint. *See Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848, 850 11th Cir. 1996) (quoting *Pioneer Inv. Srvs Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993) (“‘excusable neglect’ is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence.”); Fed. R. Bankr. P. 9006(b)(1), (b)(3); *Mendenhall*, 572 Fed. Appx. at 862. The law in the Eleventh Circuit, which this Court must follow, does not allow for an equitable exception to the time period contained in Rule 4004(b) in this case. Further, this case is distinguishable from *Kontrick* because Debtors are not belatedly attempting to use the deadline as a means of voiding an adverse ruling on the merits; they are raising a timeliness objection contemporaneously with Monarch’s motion to extend. As a result, the Court must deny Monarch’s motion. Accordingly, it is now

ORDERED that Monarch’s motion is DENIED.

END OF ORDER

Distribution List

Steven Markowitz
3561 Wennington Trace
Alpharetta, GA 30004

Marilyn Markowitz
3561 Wennington Trace
Alpharetta, GA 30004

E. L. Clark
Clark & Washington, P.C.
Bldg. 3
3300 Northeast Expwy.
Atlanta, GA 30341

Angelo Vasilescu
Clark & Washington, LLC
3300 Northeast Expressway
Atlanta, Georgia 30341
Building 3

Jordan E. Lubin
Building 2
8325 Dunwoody Place
Atlanta, GA 30350-3307