

## Bankruptcy Newsletter January, 2017

### **Violations of Automatic Stay and Debtor Attorney Best Practices**

In the case of *In re Roberson*, 2016 (Bankr. N.D. Ohio) the court was asked to determine if a creditor landlord violated the automatic stay when it sought back rent payments from the debtors. Following 11 U.S.C. 362, the court may impose damages for violations of an automatic stay when there is any act by the creditor to “obtain possession of the property of the estate...or to exercise control over property of the estate...[or] to collect assets, or recover a claim against the debtor that arose before the commencement of the case. In order to collect damages for violations of the automatic stay, the debtor has the burden of proving beyond a preponderance of the evidence that following three elements: 1) the actions [by the creditor] were in violation of the automatic stay; (2) the violation was willful; (3) the violation caused actual damages.

Here, on no less than five occasions the creditor contacted the debtor trying to collect the debt owed by the debtors and/or sent notices to leave the premises. Two of the five attempts to recover occurred via email. One argument presented by the creditor was that notice of the bankruptcy was sent to a different address than was identified in the original agreement between the two parties. This argument was rejected out of hand by the court on the basis that the notice was sent to the main reception desk of the creditor company, and as a result, has still received valid notice even where the creditor’s agent [fails] to forward the information to the appropriate personnel. Otherwise, a creditor could avoid or at least delay its obligations under automatic stay simply by being difficult to reach or by filing to make sure that notice of the debtor’s bankruptcy reaches the appropriate personnel.”

In this case, the debtor was able to show all three elements for violations of the automatic stay. However, when it came to damages, the debtor was only entitled to attorney fees and not punitive damages or non-economic damages. Neither punitive damages, nor non-economic damages were awarded because the debtor failed to plead these damages with specificity and certainty. To avoid this in the future, the court offered the following advice to attorneys: where a debtor renter has filed for bankruptcy for the primary reasons of failure to pay rent, the bankruptcy attorney needs to immediately call, text, or email the landlords so that stay violations can be avoided entirely. When a landlord persists in collection activities such as those involved in this case after such conduct from debtor’s attorney, punitive damages, and non-economic damages are more easily established.

### **The Name of the Game is Disclosure**

It is often the case that clients believe they can game the system and fool the Trustee in bankruptcy. In the case of *In re Salazar*, (Bankr. W.D. Mo. 2016), the court was asked to review the record and determine if the Chapter 7 trustee’s call for a denial of discharge was warranted.

The debtor had a gambling loss that he did not claim on his schedules. Four days before filing for bankruptcy the debtor withdrew \$9,500 from a joint account, originally claiming that this money was used for living expenses. The debtor was only able to produce one receipt totaling \$1,950 (the

attorney fee for bankruptcy). The remaining \$7,550 was unaccounted for. After doing some digging, the trustee uncovered that the debtor had large cash withdrawals from ATMs in casinos during the 60 days prepetition. This discovery was made prior to the Sect. 341 meeting of creditors. Following this meeting the debtor agreed to a compromise calling for repayment of \$5,750 over nine months. However, before the first payment was made under this plan the debtor sought to have his Chapter 7 converted to a Chapter 13. The conversion was denied and the trustee sought a denial of the debtors Chapter 7 bankruptcy discharge.

The court agreed with the Trustee and denied discharge under 11 U.S.C. 727. As a result, the Court issued an order against the debtor, allowing the trustee to collect under the previous agreement, and authorized the Trustee to initiate collection efforts should the debtor fail to make payment under the plan.

### **Timing Filing for Creditors in Chapter 13**

In the case of *In re Tench*, 2016 Bank. Lexis 1989 (6<sup>th</sup> Cir. May, 2016), the appeals court was asked to determine if the court correctly permitted a creditor to file a late claim under a theory of excusable neglect.

The creditor argued that rule 9006 (b) allowed for a late creditor filing in the interest of fairness and equity. This argument won the day with the court finding that the circumstances around the late filing constituted excusable neglect. The creditor was a credit union, and raised several equitable considerations. Three issues were raised. 1.) It was not known by when or by whom the bar date for filing was received, in part because the notice was not mailed to a specific person and there was a personnel change during this time. 2.) After the new collection manager for creditor was hired, she contacted debtor's counsel who told her that the plan was confirmed and paperwork would be sent over, but no communication occurred after the fact. 3.) After learning that the bar date had passed, creditor filed only eight days after the deadline. The bankruptcy court agreed with these considerations and found that the creditor's actions constituted excusable neglect and permitted the creditor's claim under rule 9006(b).

However, the debtor maintained that the court did not have authority to grant a motion to allow the late-filed claims. Excusable neglect is not available as one of the six exceptions to this bar date per rule 3002(c). See *In re Chavis*, 47 F.3d 818 (6<sup>th</sup> Cir. 1995).

Ultimately, the appeals court found in favor of the debtor and concluded that Bankruptcy Rule 3002(c) provides a deadline for the filing of proofs of claim in Chapter 13 cases and section 502(b)(9) of the Bankruptcy Code provides for disallowance of claims not timely filed, with certain exceptions not applicable to this case. The bankruptcy court did not have the authority to extend that deadline under either its equitable powers or the doctrine of equitable tolling. Therefore, the decision of the bankruptcy court to allow the creditor's late-filed claims was reversed.

Sincerely,

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