

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:)	Bankr. No. 97-30003
)	
JAMES T. KIRWAN)	Chapter 12
aka Jim Kirwan)	
Soc. Sec. No. 503-46-8134)	
)	MEMORANDUM OF DECISION RE:
and)	DISMISSAL OF COMPLAINT
)	
SHIRLEY M. KIRWAN)	
Soc. Sec. No. 503-56-8497)	
)	
Debtors.)	
)	
)	
HARRY VANDERWERF, BETTY)	Adv. No. 97-3011
VANDERWERF, & DAVID VANDERWERF)	
)	
Plaintiffs,)	
)	
-vs-)	
)	
JAMES T. KIRWAN)	
SHIRLEY M. KIRWAN)	
)	
Defendants.)	

The matter before the Court is Plaintiffs' dischargeability complaint. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiffs' complaint must be dismissed because it was not filed timely.

I.

James T. and Shirley M. Kirwan filed a Chapter 12 petition on January 17, 1997. By Notice of Commencement of Case filed January 21, 1997 and served January 23, 1997, all listed creditors,

11.

including Harry Vanderwerf, Betty Vanderwerf, and David Vanderwerf, were notified that the last date to file a dischargeability complaint under 11 U.S.C. §523(a)(2), (4), (6), or (15) was April 21, 1997.

During 1997, there was limited progress in the case. Debtors' objection to the Vanderwerfs' amended proof of claim was sustained by order entered May 30, 1997. The Vanderwerfs obtained relief from the automatic stay by order entered July 17, 1997 to continue litigation against Debtors in state court. Debtors appealed that order. The Order was not stayed by the Bankruptcy Court. The United States District Court for the District of South Dakota affirmed on January 6, 1998 and Debtors appealed to the United States Court of Appeals for the Eighth Circuit on February 5, 1998. That appeal is pending. Litigation in state court continues with appeals pending before the South Dakota Supreme Court.

On December 24, 1997, Harry Vanderwerf, Betty Vanderwerf, and David Vanderwerf filed a dischargeability complaint against Debtors alleging fraud. While the specific Bankruptcy Code section was not cited, it is presumed that relief was sought under either 11 U.S.C. §§ 523(a)(2), (4), or (6), the fraud-based exceptions to discharge. Defendants-Debtors filed an Answer March 6, 1998 and the matter was presented to the Court for a pre-trial review.

II.

The deadline for filing a dischargeability complaint under §§ 523(a)(2), (4), and (6) [the "fraud" and willful and malicious injury subsections] or (a)(15) [the new subsection on divorce related debts] is established by Federal Rule of Bankruptcy Procedure 4007(c). Under Rule 4007(c), a complaint objecting to the dischargeability of a particular debt under §§ 523(a)(2), (4), (6), or (15) must be filed within sixty days after the date originally set for the § 341 meeting of creditors unless an extension is requested before the original deadline passes. The deadline corresponds to the date that the debtor's discharge is entered, which, in this District, is generally the first business day following the expiration of the deadline. F.R.Bankr.P. 4004(c). The deadline is not subject to an extension on other conditions pursuant to F.R.Bankr.P. 9006(b)(3).

While the Court of Appeals for the Eighth Circuit has not ruled on this issue, this Court has joined that line of cases, including some from other Bankruptcy Courts in this Circuit, which conclude that the deadline in Rule 4007(c) for filing dischargeability complaints under § 523(a)(2), (4), or (6) must be strictly enforced unless a timely extension of time to file is obtained under Rule 4007(c). *In re Walgamuth*, 144 B.R. 465, 467-68 (Bankr. D.S.D. 1992) (citing several cases therein). See also *F&M Marquette National Bank v. Richards*, 780 F.2d 24 (8th Cir.

1985) (conversion from Chapter 11 to Chapter 7 proceeding creates new sixty-day period to file dischargeability complaints under Rule 4007(c)); *Industrial Financial Corp. v. Falk (In re Falk)*, 96 B.R. 901, 905-06 (Bankr. D. Minn. 1989) (local rule extending time to file dischargeability complaint is invalid).

Some courts have recognized an exception if the Bankruptcy Clerk's notice of the deadline was deficient. *South Dakota Cement Plant v. Jimco Ready Mix Co.*, 57 B.R. 396 (D.S.D. 1986) (clerk must give creditor notice of dischargeability complaint deadline before sixty day objection period begins to run). The Circuits are not in agreement on that exception and the Eighth Circuit has not ruled on it. See *Walker v. Wilde (In re Walker)*, 927 F.2d 1138 (10th Cir. 1991) (actual, not formal, notice of dischargeability complaint deadline is sufficient); *Sanchez Ramos v. Compton (In re Compton)*, 891 F.2d 1180 (5th Cir. 1990) (actual, not formal, notice of dischargeability complaint deadline is sufficient). Although a few courts have considered other equitable reasons for extending a missed deadline, see, e.g., *European American Bank v. Benedict (In re Benedict)*, 90 F.3d 50 (2nd Cir. 1996), the doctrine of "excusable neglect" is not applicable. *In re Ichinose*, 946 F.2d 1169, 1176 (5th Cir. 1991) (citing *Neeley v. Murchison*, 815 F.2d 345, 346 (5th Cir. 1987)).

III.

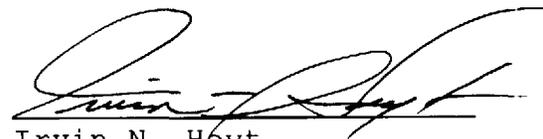
The facts presented show that Plaintiffs' complaint was untimely. The first scheduled § 341 meeting of creditors was February 20, 1997. The dischargeability complaint deadline, which followed sixty days thereafter, was April 21, 1997. Plaintiffs did not seek or obtain an extension of that deadline from this Court. Accordingly, Plaintiffs' complaint must be dismissed as untimely under F.R.Bankr.P. 4007(c).

A determination that Plaintiffs' claim¹ cannot be rendered non dischargeable under 11 U.S.C. § 523(a)(2), (4), or (6), however, does not mean that their claim will not be paid through the Chapter 12 process. Any provision in Debtors' plan must comply with 11 U.S.C. § 1225, which governs how claims in Chapter 12 cases must be treated.

An appropriate order will be entered.

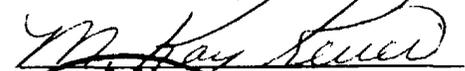
Dated this 6th day of April, 1998.

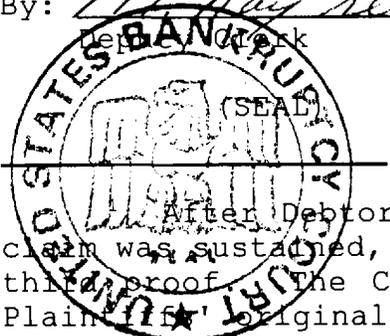
BY THE COURT:



Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: 
Clerk



NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

APR 06 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

After Debtors' objection to Plaintiffs' amended proof of claim was sustained, Plaintiffs did not appeal the order or file a third proof. The Court offers no opinion at this time whether Plaintiffs' original proof of claim is valid.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Neil, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: *M. Kay Reilly*
Date: 04-06-98

Case: 97-03011 Form id: 122 Ntc Date: 04/06/98 Off: 3 Page : 1
Total notices mailed: 3

Aty Harmelink, John E. PO Box 18, Yankton, SD 57078

Aty Johnson, Rick PO Box 149, Gregory, SD 57533

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