UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Central Division

In re:	Bankr. No. 97-30005
WILLIAM P. KIRWAN Soc. Sec. No. 505-17-3469 Debtor.	Chapter 12
HARRY VANDERWERF, BETTY VANDERWERF, & DAVID VANDERWERF Plaintiffs,	Adv. No. 97-3010 MEMORANDUM OF DECISION RE: DISMISSAL OF COMPLAINT
-vs-	
WILLIAM P. KIRWAN Defendant.	

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.

William P. 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 creditors, 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. Debtor's objection to the Vanderwerfs' amended proof of claim was sustained

1.

by order entered May 30, 1997. The Vanderwerfs obtained relief from the automatic stay on July 17, 1997 to continue litigation against Debtor in state court. Debtor appealed that order. The Order was not stayed by the Bankruptcy Court. The District Court affirmed on January 6, 1998 and Debtor appealed to the 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 Debtor 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. Defendant-Debtor 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), (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 concludes 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'[1] claim 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 Debtor's 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: M. Kay Rees
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT ★ SEAL

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. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: M. Kay Rees
Date: 04-06-98

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

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[1] After Debtor's 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 on whether Plaintiffs' original proof of claim is valid.

Case: 97-03010 Form id: 122 Ntc Date: 04/06/98 Off: 3 Page : 1
Total notices mailed: 3

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