

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

March 20, 2003

Lee Ann Pierce, Esq.
Chapter 7 Trustee
Post Office Box 524
Brookings, South Dakota 57006

Jason M. Harris, Esq.
Counsel for Sioux Falls Bell Federal Credit Union
315 South Phillips Avenue
Sioux Falls, South Dakota 57104-6318

Subject: *In re Gehrig J. Maunders and JanaLee Peterson,*
Chapter 7; Bankr. No. 01-41291

Dear Trustee and Counsel:

The matter before the Court is the Final Report and Proposed Distribution filed by Trustee Lee Ann Pierce on January 29, 2003, and the objection thereto filed by Sioux Falls Bell Federal Credit Union on March 3, 2003. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Credit Union may file a proof of claim and that this tardily filed proof of claim shall be considered for payment under 11 U.S.C. § 726(a)(2)(C).

SUMMARY OF FACTS. Gehrig J. Maunders and JanaLee Peterson, husband and wife, ("Debtors") commenced a joint Chapter 7 bankruptcy case on November 13, 2001. They included on their mailing list of creditors Sioux Falls Bell Federal Credit Union ("Credit Union") at the address of 630 South Minnesota Avenue, Sioux Falls, South Dakota 57104. Debtors also listed the Credit Union on their schedule of general unsecured claim holders as holding two separate claims, one for \$10,000 and another for \$8,714.46.

During the course of the case, the Credit Union was served with several notices. These included: the Notice of Commencement of Case on November 15, 2001; notice of two other creditors'

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abandonment motions, one on February 5, 2002, and another on July 10, 2002; Debtors' general discharge order on February 15, 2002; two notices of proposed settlements by the Trustee Lee Ann Pierce, one on July 31, 2002, and another on August 28, 2002; notice of the need to file proofs of claim on August 25, 2002; and notice of the case trustee's final report and proposed distribution on February 1, 2003. In each instance, the Credit Union was served at its South Minnesota Avenue address.

On March 3, 2003, the Credit Union filed an objection to Trustee Pierce's final report and proposed distribution. The Credit Union stated that it had not received timely notice of need to file proofs of claim, and it asked that it now be allowed to file a proof of claim and to share in the Trustee's proposed distribution to unsecured claim holders.

A telephonic hearing with Trustee Pierce and Attorney Jason M. Harris, counsel for the Credit Union, was held March 10, 2003. The parties agreed that the material facts were not in dispute. The Credit Union moved to a new office in August 2001 that was located at 3809 South Kiwanis Circle in Sioux Falls. Thus, the address for the Credit Union that Debtors provided to the Bankruptcy Clerk was incorrect from the inception of the case. During the administration of the case, the Credit Union received some notices that had been mailed to it, but not the notice of need to file a proof of claim. The Credit Union did not advise the Bankruptcy Clerk that the address that was being used was incorrect. The Credit Union received the notice of the Trustee's final report and account only because the notice was returned to the Bankruptcy Clerk and the Clerk forwarded the notice to the Credit Union at its new address, which the Post Office had provided when it returned the original notice.

The Court reviewed Fed.R.Bankr.P. 2002(g)(1) and (2) with the parties. Trustee Pierce stated that the Credit Union's late claim should be allowed only for excusable neglect pursuant to Fed.R.Bankr.P. 9006. The Credit Union argued that Debtor had the initial obligation to provide a correct address pursuant Fed.R.Bankr.P. 1009. The matter was taken under advisement.

DISCUSSION. Section 726(a)(2)(C) of the Bankruptcy Code allows the Credit Union's untimely claim to be considered and paid. This subsection provides that a tardily filed unsecured claim may be paid with timely filed unsecured claims if the creditor holding the

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tardy claim did not have notice of the case in time to timely file its proof and if the claim is filed in time to permit payment by the case trustee. See *I.R.S. v. Century Boat Co. (In re Century Boat Co.)*, 986 F.2d 154, 157-58 (6th Cir. 1993). True, the Credit Union did receive notice of the case. That initial Notice of Commencement of Case, however, specifically advised the Credit Union and other claim holders *not* to file a proof of claim. The subsequent notice advising the Credit Union that assets had been recovered and that it should now file a proof of claim was not received by the Credit Union. Apparently, the Post Office neither forwarded this notice, as it had with earlier notices, nor did it return the notice to the Clerk's office with a corrected address, as it did with the notice of the Trustee's final report and account. Accordingly, since § 726(a)(2)(C) permits tardily filed claims such as the Credit Unions to be paid under these circumstances, the Court will allow the Credit Union to tardily file its claim and to participate in Trustee Pierce's distribution of assets.

Ideally, the Credit Union should have notified the Bankruptcy Clerk of its new address when it initially received incorrectly addressed mail from the Court. Fed.R.Bankr.P. 2002(g)(1) and (2). No specific penalty under the Bankruptcy Code or Federal Rules of Bankruptcy Procedure is imposed for that failure, however. The harshest penalty, which was almost imposed here, would have occurred if the Trustee had made her distribution before the Credit Union could have gotten its tardy claim filed.

The Court notes that Fed.R.Bankr.P. 3003(c) does not preclude the Credit Union's tardy claim. Subsection (c) of Rule 3003 identifies those claims that will be considered "timely filed" though they are filed outside the usual proof of claim deadline. Here, the Credit Union's claim is being considered tardily filed and then treated in accordance with § 726(a)(2)(C). The Court also notes that the excusable neglect standard discussed in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, (1993), does not apply in this Chapter 7 case. As stated by the Supreme Court:

The time-computation and time-extension provisions of [Fed.R.Bankr.P.] 9006, like those of Federal Rule of Procedure 6, are generally applicable in any time requirement found elsewhere in the rules unless expressly excepted. Subsections (b)(2) and (b)(3) of Rule 9006

First Premier Bank
PO Box 1348
Sioux Falls, SD 57101-1348

Keith A. Gauer
PO Box 1030
Sioux Falls, SD 57101-1030

Bruce J. Gering
Office of the U.S. Trustee
230 S Phillips Ave, Suite 502
Sioux Falls, SD 57104-6321

Clair R. Gerry
PO Box 966
Sioux Falls, SD 57101-0966

Jason M. Harris
315 S. Phillips Ave.
Sioux Falls, SD 57104

Gehrig Joseph Maunders
JanaLee Peterson
PO Box 536
Tea, SD 57064

Scott M. Perrenoud
PO Box 1157
Sioux Falls, SD 57101

Lee Ann Pierce
Trustee
PO Box 524
Brookings, SD 57006

Mark C. Vandelist
14569 Grand Avenue
Burnsville, MN 55306-5711