UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:	)	Bankr. No. 98-50422
	)	
RONALD EDWARD TIDWELL	)	Chapter 7
Soc. Sec. No. [redacted]-4654	)	
	)	
Debtor.	)	
	)	
HOLLY HAYDEN	)	Adv. No. 00-5016
	)	
Plaintiff,	)	
	)	INTERIM DECISION RE:
-vs-	)	TIMELINESS OF THE COMPLAINT
	)	UNDER 11 U.S.C. § 523(a)(15)
RONALD EDWARD TIDWELL	)	
	)	
Defendant.	)	

The matter before the Court is the timeliness of Plaintiff Holly Hayden's complaint under 11 U.S.C. § 523(a)(15). This is a core proceeding under 28 U.S.C. § 157(b)(2). This Interim Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that the complaint under § 523(a)(15) is not timely and must be dismissed to the extent that relief is sought under that section.

I.

Robert E. Tidwell ("Tidwell") and Holly Hayden ("Hayden") were divorced in May 1996. As part of the divorce, the parties entered into an agreement, approved by the divorce court, regarding their property and debts. Part of the agreement provided that Tidwell would assume a certain credit card debt, known presently as the Fleet credit card debt, of about $7,500. Hayden and Tidwell also agreed to indemnify the other as to the debts each had assumed. In early August 1997, the divorce court held Tidwell in contempt for

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failing to pay the Fleet credit card debt.[1] The court ordered that Tidwell could purge himself from the contempt by meeting certain conditions. He did. At a subsequent hearing in September 1997, the divorce court further ordered Tidwell to apply proceeds from the sale of a pickup to the Fleet credit card debt, to apply his 1997 and 1998 income tax refunds to the debt, and to pay the debt in full within 18 months. The divorce court order also provided that Tidwell would be relieved of the terms of the order if he were able to get Hayden's name removed from the debt. Tidwell's last payment on the debt, before filing bankruptcy, was in May 1998.

Tidwell (hereafter "Debtor") filed a Chapter 7 petition on July 31, 1998. The last date to file a complaint objecting to the dischargeability of a debt under 11 U.S.C. § 523(a)(15) was November 2, 1998. Timely notice of the case and the pending November 2, 1998 deadline was given to creditor Hayden by the Bankruptcy Clerk. At the September 3, 1998 meeting of creditors, Debtor acknowledged the credit card debt he owed to Fleet and he acknowledged the divorce court contempt orders.

Hayden obtained an order permitting her to conduct an examination of Debtor under Fed.R.Bankr.P. 2004.[2] During the examination on October 13, 1998, Debtor and Hayden reached an

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[1] Attorney Catherine Mattson represented Hayden in the contempt proceedings.

[2] Attorney James P. Hurley represented Hayden at the meeting of creditors, at the 2004 examination, and through the several months following when he and Debtor's counsel were trying to memorialize the oral agreement reached at the 2004 examination.

"agreement in principle," as described by Hayden's counsel, that the Fleet credit card debt would be non dischargeable. As the parties were entering the agreement on the record, Debtor's counsel stated, "I think we're past -- Well, we might not be past the time for reaffirmation, but it eliminates the problem if we just revive it by conduct." In reply, Hayden's counsel acknowledged that the parties were still within the deadline to file a "complaint for discharge and so forth." Debtor's counsel affirmatively acknowledged that and stated, "That's part of the consideration for entering into this agreement. . . what you're relying on and so forth and so on."

Hayden's counsel replied to Debtor and his counsel,

> Yes. In view of this agreement -- And when I get done setting out these terms, I'll ask you if you do agree. But if you do agree with these terms, then, of course [Hayden] would not file an adversary complaint, there would be no further litigation in bankruptcy court over this and, probably more important, there wouldn't be any further litigation before [the divorce court].
>
> And [Debtor's] counsel suggests the term revive the debt by payment. We can actually use both terms, revive and reaffirm.

Hayden's counsel assumed the responsibility of putting the agreement into writing and forwarding it to Debtor's counsel. Debtor and his counsel were to make any changes. The agreement was then to be forwarded to this Court as a reaffirmation agreement. At the 2004 examination, Debtor acknowledged the agreement as being like the other reaffirmation agreements he had already made.

The deadline to file a non dischargeability complaint under § 523(a)(15), which is provided by Fed.R.Bankr.P. 4007(c), and the

deadline to make a reaffirmation agreement, which is provided by 11 U.S.C. § 524(c)(1), both expired on November 2, 1998. However, a written agreement between Hayden and Debtor was never signed and filed. Hayden also did not file a motion to extend the time to file a non dischargeability complaint before the deadline for doing so passed. Debtor received his discharge of debts on November 3, 1998. The case was closed as a "no asset" case on November 17, 1998.

On November 17, 1998, Hayden's attorney mailed a written agreement to Debtor's counsel for signatures. Over the next several months, the parties' attorneys exchanged sporadic correspondence trying to reach an accord. Debtor made payments on the Fleet credit card debt into August 1999. An apparent agreement was reached in October 1999 between the attorneys. Debtor's counsel forwarded the agreement to Debtor for his signature. Debtor did not return it. In February 2000, Hayden's attorney again wrote Debtor's counsel because the agreement had not been returned to him. On March 1, 2000, Debtor's counsel advised Hayden's counsel that Debtor demanded several more changes. In April 2000, Hayden brought Debtor back before the divorce court and the divorce court entered another contempt order. Debtor asked for a reconsideration and argued that the subject debt had been discharged in bankruptcy. The divorce court vacated its contempt order in May 2000.

On August 8, 2000, Hayden[3] filed a motion asking the Court to reopen the case so that: (1) Debtor could be ordered to "reaffirm" the Fleet credit card debt; (2) Hayden could be reimbursed for payments she has or will make to the credit card company; and (3) Debtor could be ordered to pay Hayden's attorneys' fees, sales tax, and costs. The Court denied her motion to reopen and held:

> The time for entering an enforceable reaffirmation agreement has passed. *See* 11 U.S.C. § 524(c). The agreement would have had to have been memorialized before November 2, 1998 to be enforceable. Since the parties do not have a reaffirmation agreement that was signed before November 2, 1998, there is no need for this Court to reopen the case to file an unenforceable reaffirmation agreement. Therefore, Hayden's motion will be denied.
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> It appears that the real relief sought by Hayden is an order declaring the subject credit card debt and companion hold harmless agreement non dischargeable. Under Local Bankr. R. 5010-1, a bankruptcy case does not need to be reopened to permit a party to file a dischargeability complaint.

In re Ronald E. Tidwell, Jr., Bankr. No. 98-50422, slip op. at 3-4 (Bankr. D.S.D. August 16, 2000). The Court also noted in its decision that

> the time for filing a complaint under § 523(a)(15) has passed. *See* 11 U.S.C. § 523(c) and Fed.R.Bankr.P. 4007(c). There is no deadline for filing a complaint under § 523(a)(5). If Hayden intends to commence an action under § 523(a)(15), or under both § 523(a)(5) and (a)(15), the timeliness of her (a)(15) complaint will have to be resolved first. This Court has not yet ruled on whether the deadline established by Rule 4007(c) can be extended for equitable reasons.

Id. at 4.

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[3] From this pleading forward, Attorney Mattson has represented Hayden before this Court.

Hayden filed her non dischargeability complaint on September 8, 2000. She sought a declaration that the Fleet credit card debt was non dischargeable under both § 523(a)(5) and § 523(a)(15). Debtor answered on October 4, 2000. Regarding Hayden's complaint under § 523(a)(15), Debtor said that subsection does not except the Fleet credit card debt from discharge because the benefit to him in declaring this debt discharged outweighs the detriments to Hayden if she must pay it. Debtor also argued that Hayden's complaint under § 523(a)(15) was untimely because it was filed after the November 2, 1998 deadline.

The Court ordered the parties to file briefs on whether the deadline imposed by Fed.R.Bankr.P. 4007(c) for filing a complaint under § 523(a)(15) may be extended for equitable reasons. The Court also ordered the parties to file joint stipulated facts if they needed to add to or correct the Court's statement of material facts in its August 16, 2000 letter decision regarding Hayden's motion to reopen case.[4]

Hayden asked the Court to add the fact that Debtor made several payments on the Fleet credit card debt after he agreed orally to reaffirm the debt. Debtor, in his statement of facts, acknowledged that he had made these payments.

In his brief, Debtor argued that Rule 4007(c) does not give

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[4] From the main case, Bankr. No. 98-50422, the Court has incorporated the state court documents and the transcripts that Hayden attached to her motion to reopen the case. Neither party had "re"-attached them to their pleadings in this adversary proceeding.

the Court any discretion in extending the deadline for filing a § 523(a)(15) complaint unless a motion to extend is timely filed. He relied on three cases that followed this strict interpretation.

In her brief, Hayden cited the Court to decisions by two Courts of Appeals where the Rule 4007(c) deadline was extended for equitable reasons: *European American Bank v. Benedict (In re Benedict)*, 90 F.3d 50, 54 (2nd Cir. 1996), where the Court held that the deadline under Rule 4007(c) for filing a § 523(c) complaint, which encompasses § 523(a)(15), is not jurisdictional and is subject to waiver, estoppel, and equitable tolling; and *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629, 632 (6th Cir. 1994), in which the Court held that a bankruptcy court, relying on its equitable powers under § 105(a), could allow an extension of time for filing a § 523(c) complaint where the bankruptcy court had mislead creditors by giving notice of an erroneous second deadline after a change of venue and where the creditor's reliance on that deadline was reasonable. The Court in *Isaacman* relied on *Anwiler v. Patchett (In re Anwiler)*, 958 F.2d 925 (9th Cir. 1992), and *Themy v. Yu (In re Themy)*, 6 F.3d 688 (10th Cir. 1993).

Hayden also cited this Court to several decisions by other bankruptcy courts. In *Huntington National Bank v. Lewis (In re Lewis)*, 224 B.R. 619 (Bankr. S.D. Ohio 1997), the issue presented was whether cause existed to grant a timely-filed motion to extend the deadline. It is not applicable here. In *Handler v. Steiner*

(In re Steiner), 209 B.R. 281, 285 (Bankr. E.D.N.Y. 1996), the court allowed an extension of the Rule 4007(c) deadline because the debtor had signed a stipulation for an extension of the deadline although the stipulation had not been filed with the court. *Id.* at 285-86. In *Cablevision Systems Corp. v. Malandra (In re Malandra)*, 206 B.R. 667, (Bankr. E.D.N.Y. 1997), the court held that it could equitably extend the Rule 4007(c) deadline, but declined to do so because the creditor did not allege any facts supporting waiver, estoppel, or equitable tolling.

Hayden argued that the equitable reasons that justify an extension of time for her to file her § 523(a)(15) complaint are that Debtor and Hayden had reached an oral agreement and had tried thereafter to memorialize it and that Debtor had acknowledged the oral agreement by making payments on the credit card debt thereafter.

Debtor filed a reply brief on November 6, 2000 and distinguished the cases cited by Hayden from the facts presented here.

II.

Under 11 U.S.C. § 523(c) and Fed.R.Bankr.P. 4007(c), the deadline to file a complaint objecting to the dischargeability of a particular debt under §§ 523(a)(15) is sixty days after the first date set for the meeting of creditors. The deadline in Rule 4007(c) must be strictly construed. *KBHS Broadcasting Co. v. Sanders (In re Bozeman)*, 226 B.R. 627, 630 (B.A.P. 8th Cir. 1998);

In re Walgamuth, 144 B.R. 465, 467-68 (Bankr. D.S.D. 1992) (citing several cases therein). Under Fed.R.Bankr.P. 9006(b)(3), an extension may be granted "only to the extent and under the conditions" stated in Rule 4007(c). Consequently, once the deadline has passed, it cannot be extended for excusable neglect. *Kelly v. Gordon (In re Gordon)*, 988 F.2d 1000, 1001 (9th Cir. 1993)(citing *Jones v. Hill (In re Hill)*, 811 F.2d 484, 485-87 (9th Cir. 1987)); *KBHS Broadcasting Co. v. Sanders (In re Bozeman)*, 223 B.R. 707, 708-09 n.2 (Bankr. W.D. Ark. 1998), *aff'd on related grounds*, 226 B.R. 627 (B.A.P. 8th Cir. 1998); *In re Swanson*, 2000 WL 193105, slip op. (Bankr. D. Minn. Feb. 15, 2000).

As noted above, some courts have recognized an exception if the Bankruptcy Clerk's notice of the deadline was deficient. *See 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)(Ecker, J.). Others, some are noted above, have extended the Rule 4007(c) deadline for equitable reasons. *First Deposit National Bank v. Glover (In re Glover)*, 212 B.R. 860, 862 (Bankr. S.D. Ohio 1997)(citing cases that have adopted the competing positions on whether the Rule 4007(c) deadline may be extended on equitable grounds). The Court of Appeals for this Circuit has not clearly ruled on whether the Rule 4007(c) deadline may be extended

for equitable reasons.[5]

III.

Having considered the many decisions on whether the deadline in Rule 4007(c) for filing a non dischargeability complaint may be extended for equitable reasons, this Court joins those courts that have concluded that the deadline may be extended only as provided within the rule, and generally not for equitable reasons after the deadline passes. This conclusion recognizes the plain meaning of both Rule 4007(c) and the limitation on an enlargement of the time that is imposed by Rule 9006(b)(3). *Fugate v. Pack (In re Pack)*, 252 B.R. 701, 705 (Bankr. E.D. Tenn. 2000)(cites therein); *Gebhardt v. Thomas (In re Thomas)*, 203 B.R. 64, 66-69 (Bankr. E.D. Tex. 1996); *see Gardenhire v. I.R.S. (In re Gardenhire)*, 209 F.3d 1145, 1147-51 (9th Cir. 2000)(discussion of the impact of Rule 9006(b)(3) limitation on other deadlines). This conclusion reflects the related decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), where the Court held that the deadline for filing objections to claimed exempt property under Fed.R.Bankr.P. 4003(b) is finite unless a timely extension is requested. This conclusion is in accord with other decisions in this Circuit regarding the

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[5] In the unpublished decision of *First Cantebury Securities, Inv. v. Gibbons (In re Gibbons)*, 141 F.3d 1168, 1998 WL 133793 (8th Cir. 1998), the Court affirmed a bankruptcy court decision dismissing an untimely complaint because it was filed after the Rule 4007(c) deadline. The Court concluded that it involved only a routine application of the plain meaning of the bankruptcy rules.

strict application of Rule 4007(c). *KWHK Broadcasting Co. v. Sanders (In re Bozeman)*, 219 B.R. 252, 255 (Bankr. W.D. Ark. 1998); *In re Swanson*, 2000 WL 193105, slip op. at 1. And this conclusion is consistent with the legislative history. *Glover*, 212 B.R. at 862.

> Bankruptcy law is very time oriented. Delay or lack of certainty undermines the legitimate expectation of debtors for a "fresh start" and creditors for a reasonably prompt determination of distributions. . . .

Glover, 212 B.R. at 863. As the Supreme Court stated in *Taylor*, "Deadlines [in bankruptcy cases] may lead to unwelcome results, but they prompt parties to act and they produce finality." *Taylor*, 503 U.S. at 644.

Further, there are no procedural irregularities that would cause the Court to extend the deadline under 11 U.S.C. § 105(a). Debtor properly scheduled Hayden as a creditor and included her on the mailing list of creditors. *See Schoenhorn v. Corbin (In re Corbin)*, 254 B.R. 61, 62 (Bankr. D. Conn. 2000). The Rule 4007(c) deadline was never changed, *State Bank & Trust v. Dunlap (In re Dunlap)*, 217 F.3d 311, 313-14 (5th Cir. 2000); *Anwiler*, 958 F.2d at 928-29, nor was there a need to change it. *See Dunlap*, 217 F.3d at 314-17. The Clerk did not make an error in giving notice of the date. *Classic Auto Refinishing, Inc. v. Marino (In re Marino)*, 37 F.3d 1354, 1358 (9th Cir. 1994); *Isaacman*, 26 F.3d at 632-36;

Anwiler, 958 F.2d at 927-29; *Themy*, 6 F.3d at 689-90.

Finally, even if the Rule 4007(c) deadline could be extended for equitable reasons, the facts presented do not support their application here. For "equitable tolling" to apply, Hayden would have to show that despite all due diligence, circumstances outside her control prevented her from timely filing or preserving her claim under § 523(a)(15). *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447, 451-52 (8th Cir. 1998)(briefly discussed in *Redman v. U.S. West Business Resources, Inc.*, 153 F.3d 691, 695 n.5 (8th Cir. 1998)); *Bell v. Fowler*, 99 F.3d 262, 266 n.2 (8th Cir. 1996); *see Gardenhire*, 209 F.3d at 1150; *Pack*, 252 B.R. at 707 (citing *Graham-Humphreys v. Memphis Brooks Museum of Act, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000)). *Compare Dunlap*, 217 F.3d at 316-17 ("[A] tolling rule finds no support in the Bankruptcy Code and holds little promise of providing an efficient and certain procedural rule of law."). Hayden has not alleged that her failure to meet the deadline arose from circumstances outside her control. *Airlines Report Corp. v. Mascoll (In re Mascoll)*, 246 B.R. 697, 703-06 (Bankr. D.D.C. 2000); *Pack*, 252 B.R. at 707; *see Zotos v. Lindbergh School District*, 121 F.3d 356, 361 (8th Cir. 1997)(a party who fails to act diligently cannot invoke equitable principles to excuse the lack of diligence)(cites therein).

For "equitable estoppel" to apply, Hayden would have to show

that Debtor engaged in affirmative conduct that was designed to mislead or was unmistakably likely to mislead her. *Bell*, 90 F.3d at 268-69. Hayden has not alleged any facts to support that conclusion either.

Debtor also did not expressly waive the Rule 4007(c) deadline. Debtor and Hayden did not have a signed, written agreement before the deadline passed. *See Dombroff v. Greene (In re Dombroff)*, 192 B.R. 615, 622 (Bankr. S.D.N.Y. 1996)(case trustee could not rely on stipulation regarding an extension of time to file a complaint where the stipulation had not been approved by the court); *compare Steiner*, 209 B.R. at 285-86 (debtor estopped from asserting the Rule 4007(c) deadline where the creditor reasonably relied on a signed but not filed stipulation in which the debtor agreed to an extension of the deadline). Further, the agreement, as drafted by Hayden's counsel did not contain an express waiver of the Rule 4007(c) deadline. *Benedict*, 90 F.3d at 55; *Mascoll*, 246 B.R. at 706.

Whether Debtor waived the deadline by his conduct after the oral agreement was made is a closer question. A waiver implied by conduct must be so consistent with and indicative on an intention to relinquish a particular right and so clear and unequivocal that no other reasonable explanation of the conduct is possible. *Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016, 1021 (8th Cir. 1991). From the 2004 examination in October 1998 until

April 2000, Debtor did not raise the Rule 2004(c) deadline as a defense to Hayden's attempt to get the reaffirmation agreement finalized or to Hayden's collection efforts back before the divorce court. Also, Debtor clearly acknowledged the oral agreement, both at the 2004 examination and in later correspondence by his counsel, and Debtor abided by the oral agreement for several months by making payments to Fleet. Not until April 2000, when he was again before the divorce court, did Debtor assert his discharge of the Fleet credit card debt. Is this conduct so "clear and unequivocal" that no other reasonable explanation of it is possible? No. The more reasonable explanation is simply that Debtor's attorney was slow to recognize that Debtor could assert the Rule 4007(c) deadline.[6] Forbearance alone does not constitute a waiver. *Id.* Neither does silence. *Garfield v. J.C. Nichol's Real Estate*, 57 F.3d 662, 666 (8th Cir. 1995); *Mascoll*, 246 B.R. at 708.

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[6] Debtor's attorney's delay in raising the Rule 4007(c) deadline as a defense is not the only miscue in this case. Both attorneys were snared by technical requirements in the Code and Federal Rules. Neither attorney seemed to recognize that a reaffirmation agreement must, among other requirements, be "made" timely -- before the entry of the discharge order -- and filed with the Court to be enforceable against Debtor. 11 U.S.C. § 524(c); *BankBoston v. Nanton*, 239 B.R. 419, 422-23 (D. Mass. 1999). Further, Hayden may have avoided the loss of her cause of action under § 523(a)(15) if a non dischargeability stipulation or a reaffirmation agreement had been filed before the deadline or if an extension of the deadline for filing a § 523(c) complaint had been obtained.

An order dismissing Hayden's complaint to the extent that relief is sought under § 523(a)(15) shall be entered. The Court will also schedule a pre-trial conference on the balance of Hayden's complaint under § 523(a)(5).

So ordered this 29 day of November, 2000.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: Juanita Lewis
Deputy Clerk

UNITED STATES BANKRUPTCY COURT (SEAL) SEAL

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U.S. Bankruptcy Court
District of South Dakota

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