

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 22-40224
) Chapter 11
TOTAL FIRE PROTECTION, INC.)
Tax ID/EIN 46-0393069) DECISION RE: TYCO FIRE
) PROTECTION PRODUCTS'S
Debtor.) MOTION TO REOPEN THE TIME
) TO FILE LATE PROOF OF CLAIM

The matter before the Court is Tyco Fire Protection Products's Motion to Reopen the Time to File Late Proof of Claim (doc. 81). This is a core proceeding under 28 U.S.C. § 157(b)(2). The Court enters these findings and conclusions pursuant to Fed.Rs.Bankr.P. 7052 and 9014(c). For the reasons discussed below, the Court will deny the motion.

I.

Debtor Total Fire Protection, Inc. filed its chapter 11 petition on August 15, 2022. That same day, the Bankruptcy Clerk earmarked Tyco Fire Protection Products ("Tyco") in CM/ECF as a "party" because Tyco is a creditor holding one of the ten largest unsecured claims. See Fed.R.Bankr.P. 1007(d) and Bankr. D.S.D. R. 9001-1(7)(E).

The Bankruptcy Clerk prepared a Notice of Chapter 11 Bankruptcy Case (doc. 12). It advised creditors and other parties in interest that October 12, 2022 was the deadline to file a proof of claim if a creditor's claim was not scheduled or if the claim was designated on Debtor's schedules as "*disputed, contingent, or unliquidated*[" On August 18, 2022, the Bankruptcy Noticing Center served a copy of the Notice of Chapter 11 Bankruptcy Case on, among others, Tyco at "Tyco Fire

Protection Products, c/o Dal Inc., 300 E. Madison Avenue, Clifton Heights, PA 19018-2622." The Bankruptcy Noticing Center also served the notice on "Breit & Boomsma, P.C., Glenn J. Boomsma, 606 E. Tan Tara Circle, Sioux Falls, SD 57108-4686[.]" and "Breit & Boomsma, P.C., Robert Breit, 606 E. Tan Tara Circle, Sioux Falls, SD 57108-4686[.]"

Debtor filed its schedule E/F on August 29, 2022 and listed Tyco in Part 2 as holding a "Disputed" general unsecured claim for \$432,476.02. On schedule E/F in Part 2, Debtor also listed Breit & Boomsma, P.C. twice, once associated with Glenn J. Boomsma and once associated with Robert Breit, as holding a claim for "\$0.00[.]" Debtor did *not* identify these two claims held by Breit & Boomsma, P.C. as contingent, unliquidated, or disputed. Debtor did not list Breit & Boomsma, P.C. in Part 3 of schedule E/F as attorneys for an unsecured creditor listed in Part 1 or Part 2 of schedule E/F.

Debtor amended its schedule E/F and its statement of financial affairs on September 12, 2022. The amendments did not involve Tyco, but as a party to the case, Tyco was served with the Late Notice arising from the amended schedule E/F at "Tyco Fire Protection Products, c/o Dal Inc., 300 E[.] Madison Ave[.], Clifton Heights, PA 19018-2622[.]" The Late Notice had attached to it a copy of the Notice of Chapter 11 Bankruptcy Case, which included the October 12, 2022 deadline for filing a proof of claim, as noted above. Tyco did not file a proof of claim on or before October 12, 2022.

On November 17, 2022, under Fed.R.Bankr.P. 9006(b)(1), Tyco filed a Motion to Reopen the Time to File Late Proof of Claim based on excusable neglect arising from its attorneys' office's failure to properly process the Notice of Chapter 11 Bankruptcy Case when it was received. In its motion, Tyco identified Robert Breit of Breit & Boomsma, P.C. as its attorney. In its motion, Tyco stated it was added as a creditor pursuant to the Late Notice filed on September 15, 2022, though the record, as set forth above, does not support that statement. Debtor timely filed a response to Tyco's motion and argued neither *Pioneer Investment Services Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380 (1993), nor *Harlow Fay, Inc. v. Fed. Land Bank of St. Louis (In re Harlow Fay, Inc.)*, 993 F.2d 1351 (8th Cir. 1993), support Tyco's argument that errors and staffing issues in Tyco's attorneys' office constitute excusable neglect. Tyco filed a supplement to its motion, arguing Debtor had no basis to schedule its claim as disputed since Tyco holds a final state court judgment. Without recitation of authority, Tyco asked the Court to issue an order declaring its "claim is not validly disputed and that TYCO is not required to file a proof of claim[.]" Debtor filed a reply arguing the state court matter was not "actually litigated," as required for *res judicata* to apply, because Debtor merely chose to not respond to Tyco's summary judgment motion in state court. Debtor indicated it scheduled Tyco's claim as "disputed" because it believed it had a right to ask for relief from the state court judgment pursuant to S.D.C.L. § 15-6-60(b)(6)¹ and because there were

¹ Section 15-6-60(b)(6) of the South Dakota Codified Laws and a concluding

unresolved issues between the parties regarding the application of some pre-judgment payments, the correct calculation of interest, and the imposition of attorney fees.

The Court, by order, asked the parties to advise the Court whether they wanted an evidentiary hearing on Tyco's motion. Both Tyco and Debtor declined the opportunity to present evidence. The matter was taken under advisement.

II.

After a deadline for a party to take some action has expired "the court for cause shown may at any time in its discretion[,] . . . on motion . . . permit the act to be done where the failure to act was the result of excusable neglect." Fed.R.Bankr.P. 9006(b)(1) (in pertinent part). Neglect under Fed.R.Bankr.P. 9006(b)(1) encompasses both simple, faultless omissions to act and, more commonly, omissions caused by

hanging paragraph provide:

Relief on ground of mistake--Inadvertence--Excusable neglect--Newly discovered evidence--Fraud.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

. . . .

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Section 15-6-60 does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided by statute or to set aside a judgment for fraud upon the court.

carelessness. *Pioneer Inv.*, 507 U.S. at 388. Under the rule, the Supreme Court found "Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id.*

The determination of whether a party's neglect is *excusable* "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. Factors to consider include "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* The moving party is bound by the acts of its attorney, so the "proper focus is upon whether the neglect [of the movant] and [its] counsel was excusable." *Id.* at 397; accord *Harlow Fay, Inc. v. Fed. Land Bank of St. Louis (In re Harlow Fay, Inc.)*, 993 F.2d 1351, 1352 (8th Cir. 1993). Little weight, however, is placed on the fact the attorney for the movant may have been experiencing upheaval in his law practice. *Pioneer Inv.*, 507 U.S. at 398. Further,

[w]hereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors. See *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 2312-2313, 76 L.Ed.2d 515 (1983). In overseeing this latter process, the bankruptcy courts are necessarily entrusted with broad equitable powers to balance the interests of the affected parties, guided by the overriding goal of ensuring the success of the reorganization. See *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-528, 104 S.Ct. 1188, 1197, 79 L.Ed.2d 482 (1984). This context suggests that Rule 9006's allowance for late filings due to "excusable neglect"

entails a correspondingly equitable inquiry.

Pioneer Inv., 507 U.S. at 389.

When applying *Pioneer*, the Court of Appeals for the Eighth Circuit has found "[t]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000). The Court of Appeals has also found an attorney's busyness alone does not constitute excusable neglect. *Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1048 (8th Cir. 2010); *Nora v. Internal Revenue Serv.*, Case No. 18-cv-0682 (WMW), 2018 WL 4520881, at *2 (D. Minn. Aug. 29, 2018), *aff'd*, 782 F. App'x 512 (8th Cir. 2019), citing *Pioneer Inv.*, 507 U.S. at 398, and *Harlow Fay*, 993 F.2d at 1352-53 ("[A]n attorney's professional upheaval or taxing schedule does not constitute excusable neglect."). The misapplication or misreading of the plain language of a rule does not establish excusable neglect, *Kaubisch v. Weber*, 408 F.3d 540, 543 (8th Cir. 2005), nor does an attorney's failure to review the docket and apply the plain language of a rule to the plain text of a docket entry. *Lennartson v. Cristofono*, No. 21-1979, 2022 WL 245527, at *1 (8th Cir. Jan. 27, 2022). Further, a party's failure to make adequate plans to receive mail for two months weighs against his failure to timely respond to a motion for summary judgment being considered excusable neglect. *Feeney v. AT & E, Inc.*, 472 F.3d 560, 563 (8th Cir. 2006). Finally, "excusable neglect" generally does not cover an intentional or contumacious disregard for a deadline. See *Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 784-85 (8th Cir. 1998) (considering excusable neglect as used in Fed.R.Civ.P. 60(b)), cited

in *Atmosphere Hospitality Management, LLC v. Shiba Investments, Inc.*, 2015 WL 6872551, at *9 (D.S.D. Nov. 9, 2015) (citations therein omitted).

III.

There appears to be no dispute Tyco missed the proof of claim deadline due to neglect, as defined by *Pioneer*. Thus, the Court next considers the four *Pioneer* factors to determine whether Tyco's neglect was excusable.

For "prejudice to the other party" to weigh against the movant, there must be a showing of a loss of evidence, increased difficulties in discovery, or a greater opportunity for fraud or collusion. *Vucurevich v. First Midwest Bank*, 2015 WL 632101, at *8 (D.S.D. Feb. 13, 2015). The prejudice may not be found from the delay alone or from the fact the movant will be permitted to proceed on the merits. *Id.* This factor weighs in Tyco's favor. It does not appear allowing Tyco to file a proof of claim will result in Debtor's facing any loss of evidence, any increased difficulty in discovery, or a greater opportunity for fraud or collusion.

Regarding the most important factor, "the reason for the delay," Tyco advanced its attorneys' staffing and staff training issues as the root cause of Tyco's failure to timely file a proof of claim. Such internal issues in an attorney's office, however, generally do not form the basis for excusable neglect. *Vucurevich*, 2015 WL 632101, at *5 (citations therein omitted). Such "garden-variety attorney inattention" weighs against relief. *Id.* The record does not indicate any other proceedings were pending, such as settlement negotiations with Debtor, that would have lead Tyco to believe it did not need to meet the proof of claim deadline. *Id.* The Notice of Chapter 11

Bankruptcy Case and the proof of claim deadline therein were clear. *See Pioneer Inv.*, 507 U.S. at 398; *In re T & R Service Co.*, Bankr. No. 21-40007, slip op. at 9-10 (Bankr. D.S.D. Nov. 9, 2021). Moreover, Tyco received two copies of the Notice of Chapter 11 Bankruptcy Case and the law firm that represented Tyco in state court received two copies of the Notice of Chapter 11 Bankruptcy Case before the proof of claim deadline expired.

Just as important, in its Motion to Reopen the Time to File Late Proof of Claim, Tyco offered no explanation regarding why its own principals did not read the Notice of Chapter 11 Bankruptcy Case and timely file a proof of claim or contact its attorneys to file a proof of claim for Tyco before the deadline. Both Tyco's actions and its attorneys' actions must be considered, *Pioneer Inv.*, 507 U.S. at 396-97, and there is no record establishing what, if anything, Tyco did in response to receiving the Notice of Chapter 11 Bankruptcy Case. Accordingly, when all the circumstances are considered, this factor weighs strongly against Tyco.

The "length of delay and its impact on judicial proceedings" factor does not favor either party. The proof of claim deadline Tyco failed to meet was October 12, 2022. Tyco says its state court attorneys learned of Debtor's bankruptcy case on October 31, 2022, though no evidence was offered to support this statement. Tyco filed the instant motion on November 17, 2022, just over a month after the deadline and over two weeks after learning of the missed deadline. If Tyco is permitted to file a proof of claim, it does not appear Tyco's large general unsecured claim will alter the terms of Debtor's proposed plan because Debtor proposes paying a fixed sum to the

class in which Tyco's claim would fall. Confirmation may be delayed because Tyco has objected to the plan. If Tyco is permitted to file a proof of claim and thus create standing for it to object to the plan, confirmation may be delayed while the objection is resolved.² Weighing equally, however, is the fact Debtor has indicated it may seek relief from Tyco's state court judgment. If Tyco is permitted to file a proof of claim and Debtor objects to Tyco's claim, confirmation may not be delayed, but the post-confirmation administration of the case may be extended while Tyco's claim is litigated. Accordingly, this factor does not favor either Tyco or Debtor.

Regarding Tyco's good faith, the fourth factor, the Court considers Tyco's intent and its attempts, if any, to meet the deadline, *Atmosphere Hospitality*, 2015 WL 6872551, at *12, including whether Tyco's failure to file a proof of claim by the deadline was the product of a contumacious or an intentional delay or a disregard for the deadline versus a marginal failure to meet the deadline. *Gaydos v. Guidant Corp. (In re Guidant Corp. Implantable Defibrillators Products Liability Litigation)*, 496 F.3d 863, 867 (8th Cir. 2007). This factor weighs against Tyco. Tyco received two Notices of Chapter 11 Bankruptcy Case; each provided the deadline for filing a proof of claim. There is, however, nothing in the record regarding what Tyco did or did not do between when it received the two notices and the proof of claim deadline. See *Bricklayers and Allied Craftworkers Service Corp. v. Archithority United L.L.C.*, Case No. 19-cv-2588 (MJD/ECW), 2020 WL 7249860, at *19, which references back to

² Tyco has objected to Debtor's plan on the grounds its claim was not validly scheduled as disputed and because it does not specifically propose to pay Tyco's claim.

section II.C.3. of the decision (D. Minn. Nov. 3, 2020). Accordingly, the Court cannot find Tyco's failure to file a proof of claim by the deadline was not contumacious or intentional and that Tyco otherwise acted in good faith.

Finally, "if a party's reason for its neglect is not satisfactory, 'relief may be required where other equitable considerations weigh strongly in favor of [granting relief]." *Atmosphere Hospitality*, 2015 WL 6872551, at *10 (quoting *Feeney v. AT & E, Inc.*, 472 F.3d 560, 563 (8th Cir. 2006)). Tyco's reason for its neglect is not satisfactory, as noted above, because Tyco did not address why *it* did not timely comply with the proof of claim deadline, and the only reason for the delay Tyco offered—its attorneys' staffing-related issues—is generally not considered excusable. Of the other equitable considerations, one weighed against Tyco, one was neutral, and one weighed in Tyco's favor, as discussed above. Thus, the other factors do not overcome the principal factor of the reason for the delay, which heavily weighs against Tyco. Accordingly, Tyco's request for relief under Fed.R.Bankr.P. 9006(b)(1) due to excusable neglect must be denied.

An appropriate order will be entered.

Dated: December 29, 2022.

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

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

In re:) Bankr. No. 22-40224
) Chapter 11
TOTAL FIRE PROTECTION, INC.)
Tax ID/EIN 46-0393069) ORDER DENYING MOTION TO REOPEN
) THE TIME TO FILE LATE PROOF OF CLAIM
Debtor.)

In recognition of and compliance with the decision entered this day; now,
therefore,

IT IS HEREBY ORDERED Tyco Fire Protection Products's Motion to Reopen the
Time to File Late Proof of Claim (doc. 81) is denied.

So ordered: December 29, 2022.

BY THE COURT:



Charles L. Nail, Jr.
Bankruptcy Judge

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

This order/judgment was entered
on the date shown above.

Frederick M. Entwistle
Clerk, U.S. Bankruptcy Court
District of South Dakota