

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>92-10877</u>
DAVID CRAIG LEECH)	
d/b/a NEW LIFE SERVICE)	
)	
Debtor)	
_____))	
ACME BUSINESS PRODUCTS, INC.)	FILED
)	at 3 O'clock & 56 min P.M.
Movant)	Date: 2-2-93
)	
vs.)	
)	
DAVID CRAIG LEECH)	
d/b/a NEW LIFE SERVICE)	
)	
Respondent)	

ORDER

Acme Business Products, Inc. ("Acme") by motion seeks the allowance of its late filed claim in this Chapter 13 petition, seeks relief from the automatic stay of 11 U.S.C. §362(a) in order to foreclose its security interest in property of the debtor, one (1) Ricoh copier 4000L, serial No. R330100243 with related accessories, and objects to confirmation of the debtor's proposed plan. The debtor filed a pro se petition for relief under Chapter 13 of title 11, United States Code, on May 7, 1992. Acme was a listed creditor and received notice of the filing of this Chapter 13 petition, the

meeting of creditors and the bar date for filing claims, August 31, 1992. Acme failed to timely file a proof of claim. By motion filed November 19, 1992 Acme sought leave to file its secured claim of Six Thousand Three Hundred Fifty-Six and 04/100 (\$6,356.04) Dollars. The basis for allowing the late filed claim is "to

prevent manifest injustice and causes no harm or delay to the estate or the proceeding." The motion to allow late claim is controlled by Bankruptcy Rules 3008¹ and 9024². The bar date established pursuant

to Bankruptcy Rule 3002(c) has the force of law and "means just what it says."

First State Bank Wrens, Georgia v. Harris, CV No. MS 19002 slip op. p.2 (S.D. Ga. March 5, 1990 Bowen, J.), aff'g, First State Bank, Wrens, Georgia v. Harris (In re: Harris), Ch., 13 case No. 88-11440 (Bankr. S.D. Ga. Jan. 5, 1990 Dalis, J.). The party seeking reconsideration, or allowance of the late claim, bears the burden of proof by a preponderance of the evidence to establish grounds under FRCP 60 establishing either mistake, inadvertence, surprise, excusable neglect, or some

¹Bankruptcy Rule 3008 provides:

A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

²Bankruptcy Rule 9024 provides in pertinent part:

Rule 60 FR Civ P applies in cases under the [Bankruptcy] Code except that (1) a motion . . . for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b) .

Federal Rule of Civil Procedure (FRCP) 60(b) provides:

Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

other reason justifying relief from the operation of the bar date. See USA v. O'Neal Farms (O'Neal Farms), Ch. 12 Case No. 91-30080 slip op. at 3 (Bankr. S.D. Ga. Dalis, J. Aug. 9, 1991). The debtor has failed to establish any grounds under FRCP 60(b) for the allowance of a late filed claim.

In addition to seeking allowance of its late filed claim, Acme seeks relief from the stay of 11 U.S.C. §362(a) in order to continue foreclosure of its security interest in the above referenced property of the debtor. Bankruptcy Code §362(d)(1)³

establishes as a "for cause" basis for relief a lack of adequate protection of an interest of a creditor in property securing its claim. In this case, the debtor's proposed plan, confirmed by separate order of this court, relative to secured claims provides:

(b) Secured creditors shall retain liens securing their claims. Creditors who file claims and whose claims are allowed as secured claims shall be paid the lesser of (1) the amount of their claim, or (2) the value of their collateral as set forth

In this case, Acme the holder of a secured claim, failed to timely file a claim and therefore its claim was disallowed and will not be paid under the plan as confirmed. Bankruptcy Code §361⁴ establishes of such party in interest. . . .

³11 U.S.C. §362(d)(1) provides:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property

⁴11 U.S.C. §361 provides:

When adequate protection is required under section 362, 363, or 364 of this title

the means for providing adequate protection required under §362. Under the confirmed plan Acme receives nothing. Clearly, its interest is not adequately protected. Therefore, relief from the stay of §362(a) is appropriate. 11 U.S.C. §362(d)(1).

Regarding Acme's objection to confirmation of the debtor's plan, Acme does not hold an allowed claim in this case and is granted relief from stay by this order to foreclose its security interest. It therefore lacks standing to object. See In re: Kreisher Group, Inc., 648 F.2d 86 (2d Cir. 1981); In re: Westgate California Corp., 634 F.2d 459 (9th Cir. 1980); In re: Southold Development Corp., 136 B.R. 40 (E.D. N.Y. 1992). A secured creditor may timely file a proof of claim, have its claim allowed in the case and participate in distributions under the plan, or may elect to ignore the debtor's filing and simply await either discharge of the debtor or relief from stay to pursue its collateral only. In re: Thomas, 883 F.2d 991 (11th Cir. 1989), cert. denied, 497 U.S. 1007, 110 S.Ct. 3245, 111 L.Ed.2d 756 (1990).

It is therefore ORDERED that the motion of Acme Business

[11] of an interest of an entity in property, such adequate protection may be provided by -

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Products, Inc. for the allowance of its late filed claim is denied;
further ORDERED that the motion of Acme Business Products, Inc. for
modification of the stay of 11 U.S.C. §362(a) in order to allow it to pursue
foreclosure of its security interest in one (1)

Ricoh copier 4000L serial No. R330100243 and related accessories is granted subject
to the right of the debtor to assert any defense or counterclaim available under
nonbankruptcy law in any State court proceeding; and further ORDERED that the
objection to confirmation of the debtor's plan filed by Acme Business Products is
overruled.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 2nd day of February, 1993.