

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:

LEWIS ROBERT ISAACSON

Debtor

FEDERAL DEPOSIT INSURANCE
CORPORATION, as Receiver
for Hilton Head Bank &
Trust Company, N.A.

Movant

v.

LEWIS ROBERT ISAACSON

Respondent

Chapter 11 Case

Number 91-41512

FILED

at 9 O'clock & 45 min. AM

Date 10-5-92

MARY C. BERTON, CLERK *CB*
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

On February 5, 1992, the Federal Deposit Insurance Corporation, as Receiver for Hilton Head Bank & Trust Company, N.A., filed a Motion to Allow a Late Proof of Claim. Upon consideration of the evidence adduced at the hearings,

the affidavits and other documentation submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtor, Lewis Robert Isaacson, filed for protection under Chapter 11 of the Bankruptcy Code on July 29, 1991. At the time Debtor filed bankruptcy, Hilton Head Bank & Trust Company, N.A. ("Hilton Head Bank") was a creditor of the Debtor pursuant to a guaranty he had executed to secure a debt owed by Austin's, one of the Debtor's restaurants.

The Bankruptcy Court issued a Notice and Order fixing December 5, 1991, as the bar date for filing claims. Neither Hilton Head Bank nor Federal Deposit Insurance Corporation ("FDIC") filed a timely proof of claim, despite the fact that the debt owed the Hilton Head Bank was scheduled as a contingent, unliquidated debt. The Hilton Head Bank received notice of the Debtor's bankruptcy filing; however, the bank failed to file a claim, establish a separate bankruptcy file for the Debtor (as an individual), or refer the case to outside counsel. See Affidavit of Tom Menz, paragraphs 10, 11 and 12 attached as Exhibit "A" to the FDIC's Amended Motion filed July 6, 1992. Instead, the Hilton Head Bank filed the bankruptcy notice in the

credit file for Austin's, the Debtor's corporation.

On August 30, 1991, the Office of the Comptroller of the Currency appointed the FDIC as Receiver for the Hilton Head Bank. At the time the bank was placed in receivership, FDIC representatives visited the bank's premises and removed all "legal files" for immediate review. Additionally, the FDIC obtained legal files maintained by the bank's outside counsel. *See* Affidavit of James E. Blackmon attached to FDIC's Amended Motion as Exhibit "C". No separate file for the Debtor's bankruptcy case was transferred to FDIC. No one specifically informed FDIC of Debtor's bankruptcy filing. *See* Affidavit of James E. Blackmon.

The FDIC and Anchor Bank ("Anchor") entered into a purchase and assumption agreement, in which Anchor was to assume assets of Hilton Head Bank, including the loan to Austin's. *See* Affidavit of Donna Teague, paragraphs 7 and 8 attached to FDIC's Amended Motion as Exhibit "D". This agreement provided that Anchor could "put back" or return certain assets to FDIC within a limited period of time after assumption. *See* Affidavit of Donna Teague. On September 30, 1991, Anchor returned 486 assets to the FDIC, including the Austin's loans guaranteed by the Debtor. On October 10, 1991, FDIC repurchased the assets from Anchor. *See* Affidavit of Donna Teague.

After the repurchase, the loans were converted to the FDIC's loan accounting system. This process was completed on November 18, 1991. *See* Affidavit of Donna Teague. On November 23, 1991, the Austin's loans guaranteed by the Debtor were assigned to Howard Mason, a credit specialist with the FDIC. Mr. Mason was also assigned a new portfolio with 485 assets, which were not ranked in priority for review. On December 3, 1991, Mr. Mason reviewed the FDIC file for Austin's, which contained promissory notes and collateral documents copied from the bank's original file. Notice of Debtor's bankruptcy was not in the FDIC file, although it was in the bank's file.

After reviewing the file, Mr. Mason concluded that the loan to Austin's had been guaranteed by the Small Business Administration ("SBA") and not the Debtor. *See* Affidavit of Howard Mason, paragraph 8, attached to FDIC's Amended Motion as Exhibit "E". Isaacson's name does not appear on the front page of the agreement. The guaranty agreement provides that "the undersigned hereby unconditionally guarantees to Lender . . . punctual payment . . ." *See* Guaranty attached to FDIC's Amended Motion. Isaacson's signature appears on the back of the agreement with two other signatures. Only the names of the three individuals are typed below their signatures; no reference to their position or representative capacity is mentioned. A cursory glance at the agreement would indicate that this was a

guaranty by the SBA. However, the third paragraph on the second page provides:

The undersigned acknowledges and understands that if the Small Business Administration (SBA) enters into, has entered into, or will enter into, a Guaranty Agreement . . . the undersigned agrees that it is not a co-guarantor with SBA and shall have no right of contribution against SBA.

Thus, this paragraph clarifies that the signatures belong to individuals additionally guaranteeing the debt rather than SBA officials. Mr. Mason, believing the SBA to have guaranteed the loan, forwarded the file to Arthur Boynton, an FDIC credit specialist that handles SBA loans.

Mr. Boynton received the FDIC's file for Austin's on or about December 19, 1991. In order to prepare the SBA's required quarterly report, Mr. Boynton obtained the bank's original file with all documents regarding Austin's. Upon review of the bank's file, Boynton realized that the Debtor had filed bankruptcy. Boynton requested the FDIC's legal division to obtain information concerning the status of the Debtor's bankruptcy case, including the proof of claim bar date. *See* Affidavit of Arthur Boynton attached to FDIC's Amended Motion as Exhibit "F".

On January 8, 1992, Mr. Boynton was informed by the legal division that the bar date of December 5, 1991, had passed and that no proof of claim had been filed. On February 3, 1992, FDIC filed a Motion to Allow a Late Proof of Claim. FDIC argues that the failure to file the claim was the result of excusable neglect and due to circumstances beyond its reasonable control. *See* Bankruptcy Rules 3003(c)(3) and 9006(b)(1). *See also* In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985).

CONCLUSIONS OF LAW

In a Chapter 11 case, the Court fixes the time for filing proofs of claim. Bankruptcy Rule 3003(c)(3). However, the courts may, for cause shown, extend the time within which proofs of claim may be filed. Bankruptcy Rule 3003(c)(3). In the Eleventh Circuit, Bankruptcy Rule 3003(c)(3) must be read in conjunction with Bankruptcy Rule 9006(b). In re South Atlantic Financial Corp., 767 F.2d 814 (11th Cir. 1985) cert. denied 475 U.S. 1015, 106 S.Ct. 1197, 89 L.Ed.2d 311 (1986); In re Analytical Systems, Inc., 933 F.2d 939 (11th Cir. 1991). When a motion to extend time for filing a claim is made after the bar date, the bankruptcy court may in its discretion allow the late claim if the delay was caused by the movant's "excusable neglect." Bankruptcy Rule 9006(b). South Atlantic, 767 F.2d at 817; Analytical Systems, 933

F.2d at 942; In re Vertientes, Ltd., 845 F.2d 57 (3rd Cir. 1988); In re Poor, 127 B.R. 787 (Bankr. M.D.La. 1991).

Excusable neglect has been defined as "the failure to timely perform a duty due to circumstances which were beyond the reasonable control of the person whose duty it was to perform." Manson v. First Bank of South Dakota, 828 F.2d 1310, 1314 (8th Cir. 1987) (other citations omitted). *See also* South Atlantic, 767 F.2d at 817; Poor, 127 B.R. at 792.

To show excusable neglect, a creditor should present "circumstances that are unique or extraordinary." Maryland Casualty Company v. Conner, 382 F.2d 13, 17 (10th Cir. 1967). *See also* In re Gem Rail Corp., 12 B.R. 929, 931 (Bankr. E.D.Pa. 1981). Courts are more inclined to find excusable neglect "where the movant failed to comply with the bar date because, through no fault of its own, it had no notice of that date." South Atlantic, 767 F.2d at 818. *See also* In re Loveridge, 2 B.C.D. 1597 (Bankr. D.Conn. 1977); Gem Rail, 12 B.R. at 931.

The court must determine excusable neglect without regard to the issue of prejudice to the parties. According to the Eleventh Circuit:

[S]uch a construction would do violence to the plain meaning of the language of both Rule 9006(b) and Fed.R.Civ.P. 6(b)(2). Both rules extend the time for the doing of an act where 'the failure to act was the result of excusable neglect.' It is clear from this language that the focus of these rules is on the movant's actions and the reasons for those actions, not the effect that an extension might have on the other parties' positions.

South Atlantic, 767 F.2d at 818-19.

Several courts have refused to find excusable neglect where a party had actual notice of the claims bar date but was negligent in filing a timely claim. See In re Analytical Systems, Inc., 933 F.2d 939 (11th Cir. 1991) (Creditor did not show excusable neglect where she failed to verify the accuracy of her claim as scheduled, but relied on her husband's representations); In re Underground Utility Construction Co., 35 B.R. 588 (Bankr. S.D.Fla. 1983) (Creditor did not show excusable neglect where claim was late due to being mailed to the wrong address). In re Oakton Beach & Tennis Club Real Estate Limited Partnership, 9 B.R. 201 (Bankr. E.D. Wisc. 1981) (Creditor's reliance on misinformation from a bankruptcy court clerk regarding his duty to file a proof of claim did not constitute excusable neglect).

However, if a creditor can demonstrate that the failure to timely file

a claim was because it had no notice, through no fault of its own, then the court should find excusable neglect. South Atlantic, 767 F.2d at 818. The burden is upon the moving party to show that the failure to timely file a proof of claim resulted from excusable neglect. Poor, 127 B.R. at 792.

Here, the FDIC claims that it did not have actual knowledge of the bar date and that it would have filed a claim if notice had been given. The FDIC further argues that it did everything in its "reasonable control" to determine the status of cases and files it obtained from Hilton Head Bank.

Hilton Head Bank received notice of Debtor's bankruptcy filing and should have realized that a claim needed to be filed. However, the FDIC took over the bank on August 30, 1991, approximately one month after Debtor filed bankruptcy. Thus, FDIC had approximately three months in which to file a claim before the bar date. During those three months, Anchor purchased the loan, then returned it to FDIC on October 10, 1991. Thus, FDIC began to process the Austin's file, among others, sometime after October 10, 1991. The files were given to the credit specialist for review on or about November 23, 1991. Hilton Head Bank did not bring the notice of Debtor's individual bankruptcy to FDIC's attention, and no one at FDIC realized the need to file a claim until after the bar date passed.

The issue is whether or not FDIC's failure to file a proof of claim is the result of its excusable neglect. Bankruptcy Rule 9006(b). I conclude that excusable neglect has been established under these limited circumstances.

FDIC did not have knowledge or actual notice of Debtor's bankruptcy filing before the bar date passed. The bankruptcy notice was in the bank's Austin's file, but that was not sufficient notice of the bar date or the existence of Debtor's individual case to require FDIC to file a claim.

I conclude that the FDIC failed to file a claim due to circumstances beyond its reasonable control. At the time Debtor's case was filed FDIC had no control over Hilton Head Bank. After its takeover, FDIC worked diligently with bank personnel and outside counsel to determine any deadlines or obligations the FDIC needed to meet. FDIC did everything in its reasonable control to promptly determine the existence of litigation and bankruptcy cases that would affect the bank and require a response.

FDIC had several hundred cases to process and it is not reasonable to expect the FDIC to instantly survey each and every file. I further note FDIC's quick response once it realized that a claim needed to be filed in the Debtor's case.

I conclude that the FDIC has met its burden in this case. The FDIC's failure to timely file its claim was due to circumstances beyond its reasonable control. Thus, the FDIC's Amended Motion to File a Late Proof of Claim is granted.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law. IT IS HEREBY THE ORDER OF THIS COURT that the Motion of the Federal Deposit Insurance Corporation, as Receiver for Hilton Head Bank & Trust Company, N.A., is granted. Federal Deposit Insurance Corporation has 30 (thirty) days from the entry of this Order to file a proof of claim in Debtor's bankruptcy case.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 2nd day of October, 1992.