

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

**FILED**  
at 2 O'clock & 21 min P M  
Date February 24, 2003

MICHAEL F. McHUGH, CLERK  
United States Bankruptcy Court  
Savannah, Georgia *cl*

In the matter of:	)	
	)	Chapter 13 Case
LAWANNA MORAN	)	
	)	Number <u>99-43102</u>
<i>Debtor</i>	)	

**ORDER ON MOTION TO ALLOW LATE CLAIM**

Debtor filed the instant case seeking relief under Chapter 13 on November 5, 1999. At the time of filing, she listed Select Acceptance Corporation ("Select") as a general unsecured creditor. Select did not file a proof of claim by the deadline of March, 9, 2000. On April 11, 2000, this Court confirmed Debtor's plan. Since that time, Debtor has successfully completed the payments necessary to fund her plan. On May 11, 2002, Select filed a Motion to Allow Late Filing of a Proof of Claim on the grounds that it did not receive notice of the bankruptcy when it was originally filed because Debtor listed Select at an incorrect address.

This Court has jurisdiction in this core proceeding pursuant to 28 U.S.C. §§157(a) and 157(b)(1). Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

cc: Debtor *Moran*  
Debtor's Atty. *Brazel*  
Creditor  
Creditor's Atty. *Robin*  
Trustee *Brown* 2/24/03  
U.S. Trustee *cl*

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## FINDINGS OF FACT

Debtor filed a Chapter 13 case in 1995. In 1997 she filed a motion to incur debt and subsequently purchased a 1995 Hyundai Sonata, GL from Select. Her case was later dismissed. Debtor then defaulted on payment of her obligations to Select. Select repossessed the vehicle, sold it and a deficiency judgment of over \$10,000 resulted.

Select changed the location of its business in 1999 and on September 25, 1999 sent notice to its active account holders, including Debtor, of its new location. Select also filed a change of address request with the United States Post Office. In October 1999, Select sent a second notice of its new address to all account holders, including Debtor.

In November 1999 Debtor again sought relief under Chapter 13 and properly listed Select as a creditor; however, she listed Select at its pre-September 25 address. As a result, and despite the fact that Select had filed a change of address form with the post office, it never received a copy of the Debtor's petition or any other pleadings in this case. Accordingly, in May of 2001 Select hired counsel, filed suit against Debtor, obtained a judgment and was engaged in collection activity when notified early in 2002 that Debtor was in bankruptcy. Upon learning of Debtor's bankruptcy, Select immediately moved to vacate its judgment and filed this Motion.

Select contends that it received no notice of Debtor's November 5, 1999 bankruptcy filing even though Debtor presumably received notice of its address change; therefore, it should be entitled to file a claim now which Debtor would fund by an extension of her plan beyond three years. The basis of Select's contention is that notice is required before there can be a judicial denial of rights pursuant to the Due Process Clause of the Fifth Amendment of the Constitution.

Debtor argues, however, that Select received statutory notice, that she scheduled Select at its old address, and that if Select had its mail properly forwarded, Select would have received timely notice of the bankruptcy. Thus, she asserts that she "provided for" the debt of Select in her bankruptcy plan. Debtor also asserts that the Court should not enlarge the time period for filing a proof of claim under the circumstances of this case.

#### CONCLUSIONS OF LAW

The Bankruptcy Code and Rules generally disallow claims that are untimely filed. Section 502(b)(9) of the Code states in pertinent part, that claims are disallowed if "proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure." 11 U.S.C. §726(a) clearly affords no relief in this Chapter 13 case.

Rules 3002(c) and 9006(b)(3) likewise provide no exception. Rule 3002(c) states that, “a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of the creditors.” Rule 9006(b) allows for enlargement of the period for filing, “if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order.” Rule 9006(b) does not apply to this case. Select is not asking for an enlargement of the period for filing while still within such period. Instead, Select is asking for retroactive enlargement of the period for filing. 9006(b)(3) goes on to say that, “the court may enlarge the time for taking action under [Rule 3002(c)] only to the extent and under the condition stated in those rules.” None of the exceptions to Rule 3002 apply to this case. Here, Rule 3002 sets a rigid deadline unless a request for extension is filed before the deadline expires. Thus, the language of the statute and rules do not allow for the filing of this late claim.

Select’s claim is untimely, and there is no specific provision for enlarging the filing period. *See In re Gardenhire*, 209 F.3d 1145, 1148 (9<sup>th</sup> Cir. 2000) (noting that request to expand must be made prior to the expiration of the filing period); *In re Brogden*, 274 B.R. 287, 294 (Bankr. M.D. Tenn. 2001) (Section 502(b)(9) as implemented by Bankruptcy Rules 3002(c) and 9006 plainly provides that an untimely claim is disallowed in a Chapter 13 case without regard to why the claim was untimely). This is not to say, however, that the debt will be discharged.

*Debtor required by Statute to List Creditors*

11 U.S.C. §521(1) provides that, “debtor shall file a list of creditors,” and Bankruptcy Rule 1007 provides specifics regarding the listing of creditors. Failing to list a creditor as required by §521(1) and Rule 1007 means that the debt was not “provided for” by the plan. See In re Hairopoulos, 118 F.3d 1240, 1246 (8<sup>th</sup> Cir. 1997); In re Greenburgh, 151 B.R. 709, 715 (Bankr. E.D. Pa. 1993); In re Ryan, 78 B.R. 175, 177 (Bankr. E.D. Tenn. 1987). “The burden is on the debtor to insure that all creditors have been properly notified.” In re Avery, 134 B.R. 447, 448 (Bankr. N.D. Ga. 1991).

*Select Has a Due Process Right to Notice of Bankruptcy*

At the heart of the notice requirement is Select’s constitutional entitlement to due process of law. See In re Spring Valley Farms, Inc., 863 F.2d. 832, 834 (11<sup>th</sup> Cir. 1989) (considerable support exists for assertion that due process prevents confirmation of plan from extinguishing claims when no notice has been sent) (*citing* City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333 (1953)); In re First American Health Care of Ga., Inc., 220 B.R. 720, 723 (Bankr. S.D. Ga. 1998) (discharge presumes all creditors bound by plan have been given notice sufficient to satisfy due process (addressing Chapter 11 discharge)); In re Curenton, 205 B.R. 967, 971 (Bankr. M.D. Ala. 1995) (noting that Chapter 13, like Chapter 11, has very broad discharge provision, which acts to relieve debtor of unscheduled debt; however, to do so prevents a creditor’s due

process rights and opportunity to be heard). Because “the statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party’s claimed rights,” City of New York, 344 U.S. at 297, due process rights clearly cannot be abridged by provisions of the Bankruptcy Code or Rules.

*Debtor Failed Due Process Requirements by Not Giving Notice Reasonably Calculated To Reach Select*

Due process mandates that Select be granted an exception to discharge if it was not provided with “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). “Process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Id. at 315. Ultimately, “[t]he Court must determine whether the notice given was fair and reasonable under the circumstances.” In re Anderson, 159 B.R. 830, 838 (Bankr. N.D. Ill.1989). I conclude, for the reasons that follow, that Debtor’s attempt at notice was not “reasonably calculated” to give Select an opportunity to protect its property interest.

Proof that a letter properly directed was placed in a U.S. Post Office mail

receptacle creates a presumption that it reached its destination in the usual time and was actually received by the person to whom it was addressed. See Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.), 62 F.3d 730, 735-36 (5<sup>th</sup> Cir. 1995). Debtor has not rebutted the presumption of delivery of the address change. Although she denied seeing the change of address notice, that denial does not rebut the postal service presumption that the notice was received - her mailing address was at her parents' home, her parents customarily left her mail on a table for her to pick up from time-to-time, and if she never saw the mail, it occurred because the mail was mishandled in her parents' home, not by Select. Select sent notice of its address change to Debtor's proper address. In contrast, Select's direct testimony of nonreceipt of the bankruptcy notice sent to the wrong address, in combination with the fact that this Court presumes Debtor was previously made aware of Select's new address, is sufficient to show that the bankruptcy notice was not received. See In re Prescott, 285 B.R. 763,768 (Bankr. S.D. Ga. 2001) (direct testimony with other evidence enough to rebut presumption of receipt).

Because Debtor failed to satisfy her burden to notify Select of the filing of her case, Select would arguably be granted an exception from discharge on due process grounds. However, in this case, it has merely asked for allowance of its claim.

*Court Can Exercise its Equitable Powers to Grant Late Filing*

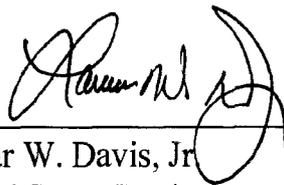
11 U.S.C. §105(a) states that, “no provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.” Utilizing the Court’s equitable power as embodied in §105 to allow late claims when a creditor has not received proper notice is appropriate. See In re Anderson, 159 B.R. 830, 839 (Bankr. N.D. Ill. 1993) (general rule against allowing late claims must yield to principle that creditors are entitled to due process); In re Cole, 146 B.R. 837, 843 (Bankr. D. Col. 1992) (strict limits on extensions of time for filing proofs of claim do not apply to situation where the creditor had no effective notice of proceedings or bar date); Avery, 134 B.R. at 449 (requirements of due process provide adequate grounds for court’s exercise of equitable discretion to permit late claim).

ORDER

Because discharging Select’s debt would be an abrogation of its due process rights and allowing Select’s late claim will cure the constitutional defect and is the only relief sought, it is appropriate to utilize the Court’s equitable powers under §105 and allow Select’s late claim. Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that Select may file a proof of claim within thirty (30) days from the entry of this order. The debtor will

resume making payments to the Chapter 13 Trustee until such time that Select receives the same pro-rata dividend as other unsecured creditors have already received.

IT IS SO ORDERED.



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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 24<sup>th</sup> day of February, 2003.