

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

PATRICK L. OOT

CASE NO. 97-63788

Debtor

Chapter 7

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court has before it the motion filed on June 19, 1998, on behalf of William and Beverly Kendrat (“Kendrats”) seeking an extension of time to file a complaint objecting to the discharge of Patrick L. Oot (“Debtor”) pursuant to § 727 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) (“Code”) and seeking a determination that the debt owed to them by the Debtor is nondischargeable pursuant to Code § 523. The Kendrats request that the relief be granted on a *nunc pro tunc* basis, “commensurate with that afforded to those parties who appeared at the September 23, 1997 hearing or, alternatively, permit the [Kendrats] to obtain the benefit of the extensions granted to the trustee as a representative of all unsecured creditors” *See*

Kendratts' Memorandum of Law, filed August 28, 1998, at 5. Opposition to the motion was filed by the Debtor on June 24, 1998.

The motion was initially heard at the Court's regular motion term in Syracuse, New York, on July 14, 1998, and adjourned to August 4, 1998, to allow the Kendratts an opportunity to provide the Court with case law in support of their request. On August 4, 1998, Kendratts' counsel indicated a willingness to present the Court with an oral summary of his findings; however, the Court indicated that it would adjourn the motion to September 1, 1998, in order for both parties to have an opportunity to submit written briefs.

At the hearing on September 1, 1998, the Court heard further oral argument, which included the request by the Kendratts' counsel that the Court consider his affirmation, filed on September 24, 1997, as an informal motion for an extension of time to file a complaint pursuant to Code §§ 523 and 727. The matter was submitted for decision on October 1, 1998.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1) and (b)(2)(O).

FACTS

On June 18, 1997, the Debtor filed a voluntary petition pursuant to chapter 7 of the Code. The Notice of Commencement of the Case indicates a deadline for filing of complaints objecting

to the Debtor's discharge and objecting to the dischargeability of particular debts of September 26, 1997. William Kendrat is listed in the Debtor's schedules as holding a disputed unsecured claim of \$50,000. Mr. Kendrat's address is listed as 146 Osborne Street, Minoa, New York 13116.

On September 12, 1997, the Court signed an Order to Show Cause presented by Samuel Costa, Esq. ("Costa") on behalf of Minfelt Wholesale Company ("Minfelt Wholesale") and Billinson, Weinshenker & Balducci ("BW&B") which sought to extend the time for Minfelt Wholesale and BW&B, as well as **all creditors**, to file said complaints pursuant to Code 105 and Rules 4007 and 9006 of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."). Costa's affidavit of service indicates that William Kendrat was served by first class mail at 145 Osborne Street, Minoa, NY 13116, on September 12, 1997.

At the hearing on September 23, 1997, Debtor's counsel appeared and opposed granting an extension to any party except Minfelt Wholesale and BW&B. The Court in its discretion agreed to allow Minfelt Wholesale and BW&B, as well as all those who appeared at the hearing on the motion, to have an extension until December 26, 1997.¹ This was memorialized in an order which was received in Chambers on September 25, 1997, and signed on October 3, 1997. The Order makes specific reference to those parties being granted the extension.²

¹ Appearing at the hearing in support of Costa's motion were Kevin Newman, Esq. on behalf of the Savings Bank of Utica ("SBU"), and Michael Shor, Esq. on behalf of Niagara Mohawk Power Corporation ("NiMo"), as well as Michael Balanoff, Esq., the chapter 7 trustee ("Trustee").

² Based on stipulations executed by parties referenced in the Order, subsequent orders have been signed extending the deadline to March 27, 1998, June 5, 1998, August 31, 1998 and November 15, 1998, with specific reference to Minfelt Wholesale, BW&B, SBU, NiMo and the Trustee.

According to the papers filed in regard to the Order to Show Cause, Mr. Kendrat was served with the responses of both NiMo's counsel and SBU's counsel. Counsel for the Kendrats indicated at the hearing on September 1, 1998, that his office had not been served with a copy of the Order to Show Cause but became aware of the pending motion when his clients forwarded a copy of the responses filed on behalf of NiMo and SBU. He did not indicate whether his clients had received a copy of the Order to Show Cause although the affidavit of service filed by Costa indicates that they were served.

The affirmation ("Affirmation") filed by Alan Burstein, Esq. ("Burstein") on behalf of the Kendrats is dated and signed September 23, 1997, the date of the hearing, but it was not filed with the Court until September 24, 1997, the day after the hearing. In his Affirmation, Burstein asserts that "William Kendrat and Beverly Kendrat join in the request heretofore made that the time to object to discharge and to object to the dischargeability of any debts should be extended for a period of 90 days from the conclusion of the Section 341 Hearing in this case or for a three month period as the Court determines. WHEREFORE, William Kendrat and Beverly Kendrat respectfully request the entry of an Order granting the motion heretofore made" *See* Affirmation at ¶ 5. Nowhere in the Affirmation, or Burstein's letter accompanying the Affirmation, is there any reference to the motion filed by Costa on behalf of his clients, although the letter was apparently copied to those served by Costa in connection with his motion. Burstein does state that "I submit this affirmation in support of a motion for an order extending the time in which creditors may file complaints" *See id.* at ¶ 1. No one appeared at the hearing on September 23, 1997, on behalf of the Kendrats. Furthermore, the Kendrats are not parties to any of the stipulations executed subsequent to the issuance of the Order on October 3, 1997,

extending the deadline for the filing of complaints.

DISCUSSION

The Code places “a heavy burden on a creditor to protect his rights.” *See Neeley v. Murchison*, 815 F.2d 345, 347 (5th Cir. 1987). While Kendrats’ counsel argues that pursuant to Code § 105, the Court should allow it an extension on a *nunc pro tunc* basis, Code § 105 “does not permit the court to ignore, supersede, suspend or even misconstrue the statute itself or the rules.” *In re Wolverine Radio Co.*, 930 F.2d 1132, 1140-41 n. 13 (6th Cir. 1991) (quoting 2 COLLIER ON BANKRUPTCY ¶ 105.02 (15th ed. 1990)). Case law supports the fact that a court has no discretion to enlarge the time for filing a complaint or for seeking an extension for “cause” as set forth in Fed.R.Bankr.P. 4004(a), (b) and 4007(c). *See In re White*, 133 B.R. 206, 208 (Bankr. S.D. Ind. 1990); Fed.R.Civ.P. 9006(b)(3) (stating that “The court may enlarge the time for taking action under Rules . . . 4004(a), 4007 (c) . . . only to the extent and under the conditions stated in those rules.”); *see also In re Dombroff*³, 192 B.R. 615, 621 (indicating that “the grant of an extension *nunc pro tunc* after the deadline for requesting an extension had passed was unauthorized.”(citation omitted)).

In *Dombroff*, the chapter 7 trustee had been granted several extensions between January 21, 1987 and November 28, 1988 to file a complaint objecting to the debtor’s discharge. On or about November 17, 1988, the trustee’s counsel forwarded a signed stipulation to debtor’s

³ The court in *Dombroff* did an extensive review of cases addressing a court’s authority to grant an extension for filing a complaint objecting to discharge sought after the deadline had passed. *See Dombroff*, 192 B.R. at 619 n. 11.

counsel requesting that he execute the stipulation and submit it to the court for approval, extending the deadline until March 14, 1989. *See id.* at 617. Apparently, the stipulation was never submitted to the court and on March 14, 1989, the trustee sought a further extension through July 12, 1989. The bankruptcy court allowed the extension on a *nunc pro tunc* basis from November 28, 1988. *Id.* On appeal the district court concluded that the extension was unauthorized and that the complaint filed by the trustee on April 26, 1990, objecting to the debtor's discharge, was untimely. *Id.* at 618. The court reversed the decision of the bankruptcy court and dismissed the trustee's complaint. *Id.* at 623.

In support of their motion, the Kendrats direct the Court to *In re Demos*, 57 F.3d 1037 (11th Cir. 1995) in which the court granted the trustee's motion seeking an extension of time to file complaints objecting to the debtor's discharge and to the dischargeability of debts. The order, which was issued with the consent of the debtor, applied to all creditors involved in the case. In the matter before this Court, the Debtor objected to extending the deadline to all creditors and, as a result, the Order limited the relief to Costa's clients and those creditors appearing on the motion, as well as the Trustee.

The Kendrats are correct in the assertion that the Trustee serves as a representative of all unsecured creditors. In this case, the Trustee, as a party to the stipulations approved extending the time, is entitled to file a complaint objecting to the Debtor's discharge pursuant to Code § 727. However, he has no authority to seek a determination of the nondischargeability of a particular debt owed to any individual creditors, including the Kendrats, pursuant to Code § 523.

In explaining the delay in filing the Affirmation with the Court, Kendrats' counsel contends that his firm received no notice of Costa's motion until it was served with a copy of

other responsive papers on behalf of NiMo and SBU. Whether or not the Kendrats received a copy of Costa's motion is not clear. It does appear that a copy of Costa's motion was mailed to them at an incorrect address, namely 145 Osborne Street, rather than 146 Osborne Street, in Minoa, New York.

While some courts hold that the time limits found in Fed.R.Bankr.P. 4004 and 4007 are subject to equitable considerations under certain circumstances, *see Dombroff*, 192 B.R. at 619 n. 9, this Court finds that such is not the case herein. Nothing precluded the Kendrats from filing their own motion seeking an extension to file a complaint objecting to the Debtor's discharge. In addition, it appears that no inquiry was made on their behalf to determine the outcome of the hearing on September 23, 1998, once they became aware of Costa's motion. Had such inquiry been made, the Kendrats would have learned that they had not been granted an extension and would have had time to file a motion of their own. Instead, they elected to file a motion almost nine months after issuance of the Order requesting an extension. Therefore, the Court is without authority to grant their request.

In the alternative, the Kendrats ask that the Court consider the Affirmation, which was filed on September 24, 1997, prior to the deadline for filing complaints objecting to discharge, as an informal motion seeking an extension of time for them to file a complaint. In this regard, they cite to one of the Court's own cases, *In re Valley Park Group, Inc.*, 96 B.R. 16 (Bankr. N.D.N.Y. 1989), in which the Court stated that it might be "inclined in certain situations to treat informal requests as motions" *Id.* at 21. In *Valley Park Group* one of the creditors requested conversion of the case from chapter 11 to chapter 7 in its objection to the debtor's confirmation. Only the Court, the debtor and the objectant knew of the request. No notice was

provided to the other eighteen creditors or the United States Trustee that the issue of conversion was before the Court. The Court denied the request to treat it as an informal motion on the basis of a lack of due process.

The Kendrats argue that the various parties had notice of the Kendrats' request after the hearing had been held. They also assert that treating the Affirmation as an informal motion will not prejudice the Debtor since, as yet, no adversary proceedings have been commenced against the Debtor pursuant to Code §§ 523 and 727. At the time of the hearing on September 1, 1998, the 2004 examination of the Debtor was scheduled to continue on September 16, 1998. Kendrats' counsel indicated that he did not intend to request a 2004 examination of the debtor and would rely on the transcript of those already conducted. Even without a 2004 examination, he felt the Kendrats had sufficient information to file a complaint.

Debtor's counsel asserts that it has been over a year since the Debtor filed his petition. It has also been over a year since the original deadline to file complaints was first extended. It is the Debtor's position that up to this point he has known what he is up against and has made his preparations accordingly and to grant the Kendrats' motion would be prejudicial.

It appears that any prejudice to the Debtor would be minimal. While there are equities weighing in favor of both sides, the Court is reluctant to allow the Kendrats to reap the benefits of the other creditors who have been diligent in their efforts to protect their rights over the past year. They neither appeared at the original hearing on September 23, 1997, nor offered any explanation for their failure to pursue the relief sought herein in a more timely manner. Therefore, the Court concludes that under these circumstances, the Affirmation should not be considered as an informal motion.

The Court would also point out that even if it were to consider the Affirmation as an informal motion, the extension sought in the Affirmation was limited to three months. It has been approximately nine months since the Order was granted and during that time a number of orders have been entered extending the time to file complaints. None of those orders make any reference to the Kendrats. Arguably, even if the Court were to grant the motion now before it, the extension would have long since lapsed.

Based on the foregoing, it is hereby

ORDERED that the Kendrats' motion seeking an Order on a *nunc pro tunc* basis granting them an extension of time to file a complaint objecting to the Debtor's discharge and objecting to the dischargeability of their debt is denied.

Dated at Utica, New York

this 22nd day of October 1998

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge