

July 16, 2004

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Re: Robert R. Shirer
Case No. 04-60558

LETTER DECISION AND ORDER

On April 26, 2004, a Notice of Motion was filed on behalf of Frontier Insurance Company (“Frontier”) seeking an “order to trustee to examine acts and conduct of debtor to determine whether grounds exist for denial of discharge” pursuant to § 727(c)(2) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”).¹ In the declaration of David A. Bagley, Esq., he asserts on behalf of Frontier that there may be grounds for denying Robert Shirer (“Debtor”) a discharge pursuant to Code §§

¹ “Under § 727(c)(2) of the Bankruptcy Code a trustee can only be compelled to investigate ‘acts and conduct’ of a debtor which may give rise to a ‘denial’ of a discharge.” *In re Benson*, 180 B.R. 28, 30 (Bankr. D. Conn. 1995). As of this date, the Debtor has not received a discharge.

727(a)(3), (4)(D) and (5) sufficient to warrant an examination by the chapter 7 trustee. On April 30, 2004, Frontier filed an Amended Notice of Motion requesting that the order not only direct the trustee to examine the acts and conduct of the Debtor, but that it also extend the time for commencing an adversary proceeding objecting to the Debtor's discharge. On May 20, 2004, the Debtor filed an affidavit opposing the motion in which he defends/explains some of the acts and/or conduct referenced in Bagley's declaration in support of Frontier's motion. In his opposition, the Debtor makes no mention of the timeliness of the Amended Notice of Motion.

DISCUSSION

The Debtor filed a petition pursuant to chapter 7 of the Bankruptcy Code on February 2, 2004. His schedules, however, were not filed until March 17, 2004. The first meeting of creditors was scheduled to be held on February 26, 2004, and the deadline for filing a complaint objecting to the Debtor's discharge was set for April 26, 2004. The Debtor did not appear at the meeting of creditors on February 26, 2004; nor did he appear at the adjourned meeting on March 4, 2004. He did, however, appear at the meeting of creditors held on March 18, 2004, as well as the adjourned meeting held on April 1, 2004.

Rule 4004(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") requires that objections pursuant to Code § 727(a) be filed within sixty days of the date set for the initial creditors' meeting. However, pursuant to Fed.R.Bankr.P. 4004(b), a party in interest has the ability to seek an extension of the deadline provided that the request is filed within the sixty day period. "This deadline is an inflexible and mandatory rule, one not subject to a court's discretion." *In reChalasan*,

92 F.3d 1300, 1310 (2d Cir. 1996).

In this case, Frontier's original motion was filed prior to the deadline imposed by Fed.R.Bankr.P. 4004(a); however, the amended motion was filed four days after the deadline. Frontier's counsel makes the argument that the request for an extension of time to file a complaint objecting to discharge was implicit in its motion seeking to have the chapter 7 trustee ("Trustee") examine the acts and conduct of the Debtor to determine whether a basis existed for objecting to his discharge.

In support of its request, Frontier relies on *In re Greene*, 103 B.R. 83 (S.D.N.Y. 1989), *aff'd* 904 F.2d 34 (2d Cir. 1990) for the premise that this Court has the authority to grant its request in the interest of preventing abuse of the bankruptcy process. In *Greene* the creditor had not been listed in the debtor's schedules. Subsequent to the deadline for filing a complaint objecting to the debtor's discharge, the creditor learned of the bankruptcy filing and filed a motion seeking to be added as a creditor. The court granted the creditor's motion and also extended the deadline for filing a complaint by the creditor, as well as the trustee, pursuant to Code § 727(a). The debtor argued that since the creditor was protected from the discharge of his debt under Code § 523(a)(3)², the court had no authority to provide the creditor with an additional right to object to the debtor's overall discharge and to allow the trustee to "piggyback" on that right to file a late objection to the debtor's discharge. *Id.* at 87. The district court concluded that the bankruptcy court had not abused its discretion in allowing the creditor, as well as the trustee, to object to the debtor's discharge based on suspicions that the debtor had not filed his petition in good faith. *Id.* at 88. The court pointed out

² Pursuant to Code § 523(a)(3), the chapter 7 discharge did not discharge the debtor from the creditor's debt since it was not listed in his schedules.

that

in exercising its equitable authority [pursuant to Code § 105(a)] to extend the deadlines set by Bankruptcy Rules 4004 and 4007, the court must remain sensitive to dual concerns that in our view are neither competing nor incompatible: the need to ensure the integrity and fairness of the process while at the same time providing assurance to the debtor that the fresh-start goal will be reasonably and timely realized barring complications, if the process is utilized in good faith.

Id. at 89.

The facts of *Greene* are clearly distinguishable from the matter before this Court. Frontier was listed in the Debtor's schedules and certainly had notice of the proceedings in the case. While there are questions raised concerning the sufficiency of the Debtor's explanation regarding his assets and the loss/deficiency of them to meet his liabilities, at this point in the case, there is no proof to support any suspicions that the Debtor intended to abuse the bankruptcy process. Indeed, it is those questions that Frontier seeks to have answered by means of an examination pursuant to Fed.R.Bankr.P. 2004 by the Trustee.

However, the *Greene* case does provide something of a backdrop for this Court to examine the facts of this case and determine whether the equitable power provided for pursuant to Code § 105(a) allows this Court to provide a remedy to Frontier. Certainly, this Court is always reluctant to rely on Code § 105(a) without due consideration being given to the rights of all parties. *See In re The Float, Inc.*, 163 B.R. 18, 21 (Bankr. N.D.N.Y. 1993).

In *Float* the Court was asked to determine whether to allow a late filed proof of claim and to grant the request by the creditor to be allowed an extension of time to file its claim *nunc pro tunc*. *Id.* at 19. Pursuant to Code § 105(a), the Court *sua sponte* raised the issue of whether an earlier objection by the same creditor to the sale of certain real property by the chapter 7 trustee, filed prior

to the bar date for filing proofs of claim, constituted an informal proof of claim. *Id.* at 20. The Court, relying on the Second Circuit's recognition of the validity of informal proofs of claims, examined whether the objection was in writing and filed with the Court and whether the nature and amount of the claim, as well as the intent to hold the debtor liable for it, had been set forth in the filed documents. *Id.* The Court ultimately concluded that the objection to the sale constituted an informal proof of claim that was subject to amendment after the bar date. *Id.* at 21.

The matter *sub judice* does not involve the filing of a proof of claim. Rather, it involves the filing of a request on behalf of Frontier for an extension to commence an adversary proceeding pursuant to Code § 727(a). The Court has reviewed the original motion, filed on April 26, 2004, and concludes that it constitutes an informal request by Frontier for an extension to file a complaint which, under the circumstances of this case, the Court will deem timely filed. It was filed with the Court on the last day to file a complaint objecting to the discharge of the Debtor and certainly provided notice to the Debtor that Frontier intended to commence an adversary proceeding pursuant to Code §§ 727(a)(3), (4)(D) and/or (5). The Court also notes that in its objection filed on May 20, 2004, the Debtor failed to assert the issue of timeliness of Frontier's original motion or its amended notice of motion, filed on April 30, 2004. The Court perceives no prejudice to the Debtor in finding that the request for an extension of time for Frontier to file a complaint pursuant to Code § 727(a)(3), (4)(D) and (5) was timely under these circumstances.

Having so concluded, the Court must also address whether Frontier has established cause for granting an extension. In this case, the Debtor delayed over a month before filing his schedules, causing the Trustee to file a motion seeking the dismissal of his case. He failed to appear at either meeting of creditors scheduled for February 26, 2004 and March 4, 2004. It was not until March 18,

2004, the day after he filed his schedules and Statement of Financial Affairs, that he appeared at the meeting of creditors. That meeting was adjourned to April 1, 2004, less than a month prior to the deadline for filing a complaint by either the Trustee or the creditors objecting to his discharge. The Court finds that these delays constitute cause for granting the extension requested by Frontier. *See In re Rodriguez*, 255 B.R. 118, 120 (Bankr. S.D.N.Y. 2000) (*dicta*). However, the Court wishes to make it clear that in granting the extension it is only doing so with respect to any complaint Frontier might file pursuant to Code §§ 727(a)(3), (4)(D) and (5). The extension does not apply to the Trustee, who has made no such request prior to the deadline set forth in Fed.R.Bankr.P. 4004(b). *See In re Parker*, 186 B.R. 208, 210 (Bankr. E.D. Va . 1995). In addition, the Court will deny Frontier's motion to the extent that it seeks to compel the Trustee to conduct an examination of the acts and conduct of the Debtor since the Trustee as indicated made no motion seeking an extension of the time to commence an adversary proceeding prior to the bar date of April 26, 2004. *See Benson*, 180 B.R. at 30 (denying creditor's request for investigation by the trustee given that the trustee had failed to object to the debtor's discharge or to requests an extension of the bar date).

Based on the foregoing, it is hereby

ORDERED that Frontier's motion seeking to compel the Trustee to examine the acts and conduct of the Debtor is denied; however, Frontier shall have thirty (30) days from the date of this Order to conduct such an examination if it so chooses; it is further

ORDERED that Frontier's motion, filed on April 26, 2004, and amended on April 30, 2004, seeking an extension of time to file a complaint pursuant to Code §§ 727(a)(3), (4)(D) and/or (5) is granted; and it is finally

ORDERED that Frontier may file a complaint pursuant to Code §§ 727(a)(3), (4)(D) and/or (5) within sixty (60) days of the date of this Order.

Dated at Utica, New York

this 16th day of July 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge