UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

O.W. HUBBELL & SONS, INC.	CASE NO. 90-02053
Debtor	Chapter 11

APPEARANCES:

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STEPHEN D. GERLING, Chief U.S. Bankruptcy Judge

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

Presently before the Court is a motion filed by Syro, Inc., f/k/a Syro Steel Company ("Syro"), on April 25, 1994, seeking reconsideration of its claim pursuant to §502(j) of the United States Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") and Rule 3008 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.), and upon reconsideration, that its claim be allowed in the sum of $1.5 million. Opposition to the motion was filed by O.W. Hubbell & Sons, Inc. ("Debtor"), as well as Mellon Bank ("Mellon") on May 6, 1994.[1]

[1]As set forth in the Order of Confirmation and pursuant to a settlement between the Debtor and Mellon for the withdrawal of Mellon's Objection to Confirmation of the Plan, Mellon holds both a secured claim in the sum of $75,000 and an allowed unsecured claim against the Debtor in the sum of $100,000.

The motion was heard at a regular motion term of the Court on May 10, 1994, at Syracuse, New York. The parties having previously filed memoranda of law, the matter was submitted for decision on that date.

JURISDICTIONAL STATEMENT

The Court has jurisdiction of this core proceeding pursuant to 28 U.S.C. §1334(b) and 157(a), (b)(1) and (b)(2)(A), (B) and (O).

FACTS

An involuntary Chapter 7 proceeding was commenced pursuant to Code §303 against the Debtor on or about August 22, 1990. On September 26, 1990, the Debtor consented to its adjudication as a debtor but converted the case to one under Chapter 11 of the Code.

The Debtor is involved in the manufacture, sale and installation of guardrails made of galvanized steel. During 1989-1990 the Debtor and Syro entered into more than sixty separate contracts pursuant to which Syro supplied steel products to the Debtor in connection with public construction projects in the State of New York. In its Petition, the Debtor lists a disputed debt owed to Syro in the amount of $1,695,293.44.[2] As one of the largest unsecured creditors in the case, Syro was appointed to the Official Committee of Unsecured Creditors ("Creditors' Committee") on October 19, 1990.

The Debtor filed its Second Amended Plan ("Amended Plan") on January 15, 1993 which was confirmed by Order of this Court on July 1, 1993 ("Order of Confirmation"). On July 12, 1993, the Debtor filed a motion to expunge or reduce approximately forty claims, including that of Syro. The Debtor indicated in its papers in support of the motion that "Debtor is suing

[2]On October 25, 1990, Syro filed a proof of claim in the amount of $1,861,733.82.

claimant in court for $20,000,000. Additionally, claim reduced to approximately $870,000 by claimant." See Exhibit "B" of Syro's Motion for Reconsideration. In addition, there were also seven other claims of creditors that the Debtor sought to expunge by asserting that the "Basis of claim is potential liability to Syro Steel Co. and there is no such liability." Id. According to the Affidavit of Service filed with the Debtor's motion, Syro had been mailed copies of the motion on or about July 8, 1993, at the address listed in its proof of claim, namely, 1170 N. State Street, Girard, Ohio 44420. See Exhibit "J" of Syro's Motion for Reconsideration.

According to the Affidavit of Harry A. Syak ("Syak"), President of Syro, the company had been acquired by Trinity Industries, Inc. in late 1992 and as a result of the acquisition, there was a reduction in Syro's staff at its headquarters in Girard, Ohio. See ¶5 of Exhibit "D" of Syro's Motion for Reconsideration. Syro's credit manager, John Frei ("Frei"), had had primary responsibility for monitoring Debtor's case until he left Syro's employ in early 1993. Frei had filed the proof of claim on behalf of Syro, served as Chairman of the Creditors' Committee on Syro's behalf, and allegedly had traveled from Ohio to Utica, New York, to attend various meetings of creditors.

The Debtor's motion seeking to reduce or expunge Syro's claim was heard at a regular motion term of this Court on August 24, 1993, at Utica, New York. Syro did not file any objection to the Debtor's motion and did not appear. An Order expunging Syro's claim was signed on September 13, 1993. Syro was not provided with a copy of the Order due to its default. Pursuant to the Amended Plan, an initial distribution of $100,000 was paid to the unsecured creditors in December, 1993, and additional installments totalling $400,000 are to be made over the next four years. As its claim had been expunged, Syro did not share in the initial distribution.

As referenced in the Debtor's motion to expunge Syro's claim, the Debtor on or about August 7, 1992, had commenced a lawsuit in New York State Supreme Court, Oneida County, against Syro, alleging inter alia breach of contract, as well as violation of §340 of the New York

State General Business Law. See Exhibit "G" of Syro's Motion for Reconsideration. Syro filed an Answer and Counterclaim on or about September 11, 1992. See Exhibit "H" of Syro's Motion for Reconsideration.

Syro alleges that sometime after May, 1993, it commenced a separate action in New York State Supreme Court, Oneida County, against Debtor's Chief Executive Officer, Allen W. Hubbell ("Hubbell"), and Mellon Bank, alleging violations of Article 3-A of the New York State Lien Law based on the argument that the Debtor had received payment from the prime contractors on various construction projects, funds of which were allegedly used to reduce Debtor's indebtedness to Mellon. See ¶16 and ¶17 of Syro's Motion for Reconsideration. On or about April 5, 1994, Hubbell filed a memorandum in opposition to Syro's motion to certify a class and in support of its cross-motion to dismiss Syro's complaint. See Exhibit "F" of Syro's Motion for Reconsideration. As a basis for dismissal, Hubbell asserted that "the United States Bankruptcy Court for the Northern District of New York has made a ruling, on the merits, that O.W. Hubbell owed no amounts to plaintiff, including specifically the amounts that are claimed by plaintiff in the present proceeding." Id. at 2. It was on or about April 6, 1994, that Syro contends it first learned of the Order expunging its claim, causing it to file the motion herein.

ARGUMENTS

Syro makes several arguments in support of its motion for reconsideration of its claim. Syro asserts that it has vigorously pursued recovery on its claim, citing to the approximately sixty bond lawsuits filed in state court, as well as inter alia the action filed in state court against Hubbell sometime after May, 1993, and its defense of the action brought against it by the Debtor in state court in August, 1992. Syro contends that it did not receive notice of the Debtor's motion to expunge its claim in July, 1993, and even if it did, its failure to respond and/or appeal was inadvertent or an honest mistake at most. Pursuant to Rule 60 of the Federal Rules of Civil

Procedure ("Fed.R.Civ.P."), incorporated by reference in Fed.R.Bankr.P. 9024, Syro argues that its claim should be reinstated on the basis of excusable neglect. Relying on the Supreme Court's decision in Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S.Ct. 1489 (1993), Syro argues that it should be relieved from its default based on the alleged inconspicuous listing of its claim among approximately forty others which it contends did not provide sufficient notice of the proposed treatment of its claim. Syro asks the Court to consider the fact that it did not receive a copy of the Order expunging its claim, and as soon as it learned of the expungement of its claim on or about April 6, 1994, it filed the motion presently before the Court.

In response to Syro's arguments, the Debtor asserts that as chairman of the Creditors' Committee, Syro had a heightened obligation to keep abreast of activities in the case. Debtor asserts that Syro received copies of the Amended Plan and Amended Disclosure Statement and should have been aware that unsecured creditors, including Syro, were to share in the initial distribution of $100,000 in December, 1993. Therefore, the Debtor asserts that having failed to receive any distribution in December, Syro should have made inquiry as to the status of its claim prior to April 25, 1994, the date of the motion now before the Court. Debtor, as well as Mellon, alleges that Syro has made a conscious decision not to participate in the bankruptcy proceedings despite the fact the Debtor's schedules provided Syro with notice that its claim was disputed.

With respect to Syro's argument that its claim was inconspicuously listed in the Debtor's motion papers among approximately forty other claims which the Debtor was seeking to reduce or expunge, Debtor contends as to seven of those forty claims it made specific reference to an alleged lack of liability to Syro. Furthermore, the Debtor makes the argument that the standard for excusable neglect set forth in Pioneer, supra, is not applicable to the matter herein. Debtor argues that Syro has failed to satisfy the heightened standard for establishing excusable neglect, namely that unique or extraordinary circumstances exist. Debtor asserts that conjecture and simple neglect are insufficient to establish "cause" pursuant to Code §502(j).

Debtor also points out that even if the Court were to apply the more liberal standard of

Pioneer, it should also consider the prejudice to the Debtor and other parties in interest, as well as Syro's delay in seeking reconsideration. The Debtor refers the Court to the policy encouraging the prompt disposition of objections to claims, the fact that the Debtor's plan has already been confirmed, and the fact that the initial distribution to unsecured creditors has already been made.

DISCUSSION

Fed.R.Bankr.P. 3008, which implements Code §502(j), permits a party in interest to seek reconsideration of a prior order of the bankruptcy court allowing or disallowing a claim. Olson v. United States, 162 B.R. 831, 833 (D.Neb. 1993). While not intended to abrogate finality as to allowance and disallowance of claims, Code §502(j) is intended to "provide the flexibility to address the equities." In re Gold & Silversmiths, Inc., d/b/a Schopp's Jewelry Shoppe, _ B.R. , 1994 WL 448667 at 6 (Bankr. W.D.N.Y. 1994). Whether or not to reconsider its prior order is within the sound discretion of the court. In re Flagstaff Foodservice Corp., 56 B.R. 910, 913 (Bankr. S.D.N.Y. 1986) (citation omitted); see also In re Bicoastal Corp., 126 B.R. 613, 614-615 (Bankr. M.D. Fla. 1991). In making the determination, the courts apply the standards set forth in Rule 60(b) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), incorporated by reference in Fed.R.Bankr.P. 9024.[3] Id. at 615; In re F/S Communications Corp., 59 B.R. 824, 825 (Bankr. N.D.Ga. 1986) (citations omitted). It too is not intended to abrogate the finality of judgments. Instead, Fed.R.Civ.P. 60(b) is to be applied in striking a balance between serving the ends of justice and preserving the finality of judgments. Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986) (citation omitted). Fed.R.Civ.P. 60(b)(1) provides that a court may relieve a party from a final judgment or order based on mistake, inadvertence, or excusable neglect (emphasis added). In addition, Fed.R.Civ.P. 60(b)(6) provides for the same relief for "any other reason justifying

[3]Fed.R.Civ.P. 55, which addresses the setting aside of a judgment by default, also provides that any consideration be in accordance with Fed.R.Civ.P. 60(b).

relief from the operation of the judgment." However, relief from a prior judgment pursuant to Fed.R.Civ.P. 60(b)(6) is only to be granted if the party is able to show "extraordinary circumstances" that the party is faultless. Pioneer Investment, supra, 113 S.Ct. at 1497 (citations omitted). Otherwise, if the party is partly to blame, then relief must be based on a showing of "excusable neglect" pursuant to Fed.R.Civ.P. 60(b)(1). Id. There is no evidence that extraordinary circumstances existed rendering Syro without fault in failing to object to the Debtor's motion to expunge its claim. Admittedly, Syro has suggested that the postal service may not have even delivered the Debtor's motion. However, in the absence of any evidence to the contrary, mailing of a notice raises a presumption that the addressee received it and thus acquired notice of its contents. Bicoastal, supra, 126 B.R. at 615 (citations omitted). Therefore, the Court's analysis will focus on whether Syro has established "cause" pursuant to Code §502(j) on the basis of excusable neglect under the standards to be applied for Fed.R.Civ.P. 60(b)(1).

"[E]xcusable neglect is generally liberally construed 'in those instances where the order or judgment forecloses trial on the merits of a claim,' such as a motion to set aside a default judgment under Fed.R.Civ.P. 60(b)." In re Dix, 95 B.R. 134, 137-138 (9th Cir. BAP 1988) (citation omitted). The Supreme Court in Pioneer Investment considered cases construing Fed.R.Civ.P. 60(b) in its analysis and concluded that a flexible standard was also to be applied in the context of enlarging the time for filing a proof of claim under Fed.R.Bankr.P. 9006(b)(1). Pioneer Investment, supra, 113 S.Ct. at 1497-1498, inquiry requiring that there be a determination made concerning whether there had been negligence and then whether it was excusable in light of all the relevant circumstances. In re King, 165 B.R. 296, 298 (Bankr. M.D.Fla. 1994). With respect to the latter inquiry, the court in Pioneer Investment examined certain equitable factors including the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. Pioneer Investment, supra, 113 S.Ct. at 1498.

Under this more flexible approach, Syro asserts that its failure to object to the Debtor's motion seeking to reduce or expunge its claim was inadvertent and allegedly occurred as a result of the company having been acquired by another entity, the resultant downsizing of staff and the departure of the company's credit manager, Frei, who had responsibility for monitoring the Debtor's case. According to the affidavit of Syak, Syro had undergone corporate restructuring in late 1992, some 6-7 months prior to the Debtor filing its motion seeking to reduce or expunge Syro's claim. Furthermore, the changes in corporate structure apparently did not prevent Syro from protecting its interests by commencing a lawsuit in state court against both the Debtor's principal, Hubbell, and Mellon Bank sometime after May, 1993, as well as continuing prosecution of the payment bond lawsuits.

Syro also argues that its claim was inconspicuously listed in the Debtor's motion papers as one of approximately forty other claims which the Debtor was seeking to reduce or expunge. It is evident to the Court, upon reviewing the Debtor's motion papers, that even if Syro had not found its claim listed, it should have been put on notice that the Debtor was taking the position that it had no liability whatsoever to Syro since there were seven other claims also listed in the Debtor's motion papers which it expressly sought to expunge on that same basis. In the view of this Court, Syro, in reviewing the papers, had an obligation to make further inquiry if it wished to protect its interests. See Exhibit "B" of Syro's Motion for Reconsideration (Claims Nos. 91, 92, 110, 146-149).

Based on the facts before it, the Court concludes that Syro was negligent in its failure to object to the Debtor's motion's seeking to expunge its claim. The question then remains whether its negligence was excusable based on an equitable analysis of all the relevant circumstances.

The fact that Frei, who had assumed the responsibility for filing Syro's proof of claim and monitoring the Debtor's bankruptcy case, had left Syro's employ early in 1993 does not relieve Syro from taking steps to insure that appropriate office procedures were in place to see that pleadings were brought to the attention of counsel once received in the office. Such matters were

not beyond Syro's control and its failure to take such steps is not a basis for excusable neglect. In re Schlosser, 100 B.R. 348, 350 (Bankr. S.D.Ohio 1989). Furthermore having received a copy of the Debtor's Amended Plan and Disclosure Statement, Syro should have been on notice that as an unsecured creditor it could expect to share in the initial distribution of $100,000 in December, 1993. Yet, it apparently made no further inquiry until April, 1994, when, in conjunction with its lawsuit against Hubbell and Mellon in state court, it learned that is claim had been expunged. Approximately seven months elapsed between the time the Order was entered by this Court on September 13, 1993, expunging Syro's claim and Syro's motion to reconsider was filed on April 25, 1994. Syro attributes its delay to the fact that it was not provided with a copy of the Order. However, as the Debtor correctly points out, the Debtor was not required to give notice to Syro because of its default. Any delay between disallowance and reconsideration is certainly a factor to be considered in weighing the potential for prejudice to other parties. See generally Schopp's Jewelry, supra, 1994 WL 448667 at 4; In re Resources Reclamation Corp. of America, 34 B.R. 771, 773 (9th Cir. BAP 1983). Conversely, the Court is cognizant of the fact that the Debtor's Amended Plan had already been confirmed when it filed its motion to expunge Syro's claim and Debtor should have provided for the contingency that its motion might subsequently be denied. Also, while there was an initial distribution of $100,000 to the unsecured creditors in December, 1993, there are still four additional annual installments to be made for which Code §502(j) makes express provision in the event that the Court were to agree to reconsider its prior Order. Therefore, it cannot be said that there would be any prejudice to either the Debtor or other creditors should the Court agree to reconsider Syro's claim since Syro's claim, while disputed, was deemed allowed pursuant to Code §502(a) at the time the Amended Plan was confirmed. However, on balance, the Court must consider whether Syro's actions have been entirely in good faith. Both the Debtor and Syro elected to pursue their rights in state court. Now that Syro finds that it may be prejudiced in the state court proceedings, it comes to this Court seeking relief. Its very indifference to the bankruptcy process, apparently since Frei's departure

early in 1993, is inexcusable under the circumstances. See generally Pioneer Investment, supra, 113 S.Ct. at 1505 (5-4 decision) (O'Connor, J., dissenting). Whether or not said indifference was the result of a conscious decision on the part of Syro, as alleged by both the Debtor and Mellon, is a question the Court cannot answer based on the facts before it. However, having weighed the various equitable considerations set forth by the Supreme Court in Pioneer Investment in the context of the facts presented herein, and in light of the overriding goal of ensuring the success of reorganization, the Court concludes that Syro's failure to object to the Debtor's motion seeking to expunge its claim was not a matter of excusable neglect. As "reconsideration must be for cause according to the equities of the case" (Flagstaff, supra, 56 B.R. at 913; see also In re Barrett, 136 B.R. 387, 391 (Bankr. E.D. Pa. 1992) (citing In re Motor Freight Express, 91 B.R. 705, 709-711 (Bankr. E.D. Pa.), appeal dismissed 94 B.R. 346 (E.D. Pa. 1988)), and no cause having been shown, the Court in its discretion concludes that reconsideration of Syro's claim is not warranted.

For the reasons discussed above, it is hereby

ORDERED that Syro's motion seeking reconsideration of its claim pursuant to Code §502(j) and Fed.R.Bankr.P. 3008 be denied.

Dated at Utica, New York
this 22nd day of September 1994

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge