

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KENDALL A. ELSOM, JR.,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	NO. 97-3578
	:	
WOODWARD & LOTHROP, INC.,	:	
Individually and d/b/a	:	
JOHN WANAMAKER'S,	:	
	:	
Defendant.	:	
	:	

MEMORANDUM

R.F. KELLY, J.

AUGUST 14, 1997

Kendall A. Elsom, Jr. ("Plaintiff") filed the instant action on May 22, 1997 against Woodward & Lothrop, Inc., individually and d/b/a John Wanamaker's, ("Defendants") alleging various tort claims and violation of the Debt Collections Practices Act¹ arising out of a suspected shoplifting incident that occurred on July 12, 1995. Defendants, who were operating under Chapter 11 when the incident occurred, have moved for Summary Judgment pursuant to Rule 56, claiming that Plaintiff's claim is barred because it was filed after the Claims Bar Date set by the Bankruptcy Court. For the reasons that follow, Defendant's Motion will be granted.

I. BACKGROUND

For many years, Defendants owned and operated a chain of retail department stores in the Philadelphia area. On January 17, 1994, Defendants filed a voluntary Chapter 11 Bankruptcy

¹ 15 U.S.C. § 1692 et seq.

Petition in the United States Bankruptcy Court for the Southern District of New York. Thereafter, Defendants continued normal business operations pursuant to Chapter 11.

On July 12, 1995, Plaintiff went shopping in Defendants' store located at 13th and Market Streets in Philadelphia. While there, store personal detained Plaintiff for suspicion of shoplifting. Defendants' employees notified the Philadelphia Police Department and Plaintiff was arrested for retail theft.²

On August 2, 1995, Plaintiff received from Defendants a letter demanding \$500.00 as a "civil penalty" under the Retail Theft Damages Act.³ In the letter, Defendants indicated that Plaintiff's failure to pay the demanded sum would result in a civil action being filed against Plaintiff. Plaintiff did not pay Defendant the sum demanded and no civil action was brought against Plaintiff.

After his release from custody, Plaintiff appeared for his first scheduled trial date on August 6, 1995. Representatives of Defendants failed to appear and the case was relisted. Plaintiff was required to appear three times for trial, however, because representatives of Defendants never appeared, the case was ultimately dismissed for lack of prosecution.

The Honorable Stuart M. Bernstein of the United States Bankruptcy Court for the Southern District of New York, by Order

² 18 Pa.C.S.A. § 3929.

³ 42 Pa.C.S.A. § 8308.

dated November 21, 1995 ("the Order"), set Defendants' Claims Bar Date as December 22, 1995. Copies of the Order were mailed to all "known" creditors of Defendants. The Order was also published in sixteen different publications, including the Philadelphia Inquirer, to provide notice to all "unknown creditors." Plaintiff was not informed of the Order either through the mail or through the newspaper.

Judge Bernstein's Order required holders of all claims entitled to first priority under section 507(a)(1) of the Bankruptcy Code to file a proof of claim with the court on or before December 22, 1995. Failure to file a proof of claim would result in the loss of the claim against Defendants. Plaintiff did not file proof of his claim against Defendants, therefore, Defendants argue, his claim is barred and Summary Judgment should be granted in their favor.

II. STANDARD

Summary Judgment is proper "if there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the initial burden of identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The non-moving party must then go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(c). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that

there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

Plaintiff offers two arguments to support his contention that he is not bound by the Order of the Bankruptcy Court. First, Plaintiff claims to be a "known" creditor entitled to actual written notice of the Claims Bar Date, the lack of which relieves him of compliance with the Bar Date. Second, Plaintiff claims that even if he was properly notified, the Order, on its face, does not apply to his claim because it is not an Administrative Expense under Section 507(a) of the Bankruptcy Code. Neither of Plaintiff's contentions have merit.

A. Notice of the Claims Bar Date.

Plaintiff's right to notice is dependant upon Plaintiff's status as a creditor of Defendant. To satisfy the requirements of due process, creditors, such as Plaintiff, must receive notice of a debtor's bankruptcy filing and of all Bar Dates. Chemetron Corp., v. Jones, 72 F.3d 341, 346 (3d Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 1424 (1996)(quoting Greyhound Lines Inc. v. Rogers, 62 F.3d 730, 735 (5th Cir. 1995)). Claimants who are improperly notified of the Bar Date are not bound by it, and may file late claims against the debtor. Brown v. Seaman Furniture Co., 171 B.R. 26, 27 (E.D. Pa. 1994).

The type of notice provided, depends on whether Plaintiff is a "known" or an "unknown" creditor. Chemetron, 72 F.3d at 346

(citing In re Charter Co., 125 B.R. 650, 654 (M.D. Fla. 1991)). "Known" creditors are entitled to actual written notice. Chemetron, 72 F.3d at 346 (citing City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 296 (1953)). "Unknown" creditors are entitled only to notice by publication. Chemetron, 72 F.3d at 346.

Plaintiff claims to be a "known" claimant who was entitled to actual written notice of the Bar Date. Plaintiff argues that because he did not receive actual written notice of the Bar Date, he is not bound by it. Plaintiff argues his receipt of Defendant's letter of August 2, 1995, proves he is a "known" claimant of Defendants. This position is incorrect.

A "known" claimant "is one whose identity is either known or 'reasonably ascertainable by the debtor.'" Chemetron, 72 F.3d at 346 (citing Tulsa Prof'l Collection Serv. Inc. v. Pope, 485 U.S. 478, 490 (1988)). The "reasonably ascertainable" standard requires only "reasonably diligent efforts." Chemetron, 72 F.3d at 346 (quoting Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798 n. 4 (1983)). "A debtor does not have a 'duty to search out each conceivable or possible creditor and urge that person or entity to make a claim against it.'" Chemetron, 72 F.3d at 346 (quoting In re Charter Co., 125 B.R. at 654).

In comparison, "an 'unknown' creditor is one whose 'interests are either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to knowledge [of the debtor].'" Chemetron, 72 F.3d at 346

(quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950)).

Clearly, Plaintiff was an "unknown" creditor of Defendants. In November 1995 Plaintiff's claim's were speculative in nature. Defendant could not "in the due course of business" become aware of Plaintiff's intent to file suit against them. Defendants' letter to Plaintiff, dated August 2, 1995, does not change this result. Plaintiff's name and address were available to Defendants through the company records, but Plaintiff was not yet a "creditor" of Defendants. The letter was not in the nature of a debt owed to Plaintiff. To the contrary, Defendant was attempting to collect money from Plaintiff. In essence, Defendant was a creditor of Plaintiff. For this reason, actual written notice was not required to be mailed to Plaintiff.

Plaintiff, as an "unknown" creditor, was entitled to notice of the Bar Date by publication. To satisfy due process, notice by publication must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Brown, 171 B.R. at 27 (quoting Mullane, 339 U.S. at 314)). Notice by publication is sufficient if notice of the Bar Date is published both nationally and locally in the area of the Debtor's place of business. Brown, 171 B.R. at 27. Defendants published the Order in both national and local newspapers, including the Philadelphia Inquirer. This is sufficient notice to satisfy the requirements of due process.

B. Administrative Expenses under 507(a)(1).

Judge Bernstein's Order setting the Claims Bar Date applies only to claims entitled to first priority under Section 507(a)(1) of the Bankruptcy Code. 11 U.S.C. § 507(a)(1). Section 507(a)(1) gives first priority to "administrative expenses" allowed under Section 503(b). 11 U.S.C. § 503(b). Section 503(b) lists various administrative expenses. Specifically, Subsection (1)(A) of 503(b) includes the "actual, necessary costs and expenses of preserving the estate." 11 U.S.C. § 503(b)(1)(A). Plaintiff's claims fall into this category of administrative expenses.

Section 503(b)(1)(A) has been broadly interpreted to include "actual, necessary costs and expenses" that benefit the debtor's estate both directly and indirectly. In re B. Cohen and Sons Caterers, Inc., 143 B.R. 27, 28 (E.D. Pa. 1992). "'Actual and necessary costs' should include costs ordinarily incident to operation of a business." Id. (quoting In re N.P. Mining Co., 963 F.2d 1449 (11th Cir. 1992)). Tort claims are "actual and necessary" in that they arise in the ordinary operation of business. In re B. Cohen and Sons, 143 B.R. at 29 (citing Reading Co. v. Brown, 391 U.S. 471, 482 (1968)). Debt collection claims also arise out of the ordinary operation of business, further, such claims directly benefit and preserve the estate. See, In re B. Cohen and Sons, 143 B.R. at 28-29 (citing Reading Co. v. Brown, 391 U.S. 471, 482 (1968)). Therefore, all Plaintiff's claims are administrative expenses under Section 507(a) of the Bankruptcy Code.

IV. CONCLUSION

Based on the foregoing discussion, this Court finds Defendants are entitled to judgment as a matter of law. Plaintiff, an "unknown" creditor of Defendants, was properly notified of the Claims Bar Date by publication. Plaintiff's claims are "administrative expenses" entitled to first priority under Section 507(a)(1) as allowed under Section 503(b)(1)(A) of the Bankruptcy Code, thus, the Order of the Bankruptcy Court is applicable. Because Plaintiff failed to file a Proof of Claim by the Claims Bar Date, Summary Judgment in Defendants favor is proper. An appropriate order follows:

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_____	:	
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KENDALL A. ELSOM, JR.,	:	CIVIL ACTION
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v.	:	NO. 97-3578
	:	
WOODWARD & LOTHROP, INC.,	:	
Individually and d/b/a	:	
JOHN WANAMAKER'S,	:	
	:	
Defendant.	:	
_____	:	

ORDER

AND NOW, this 14th day of August, 1997, upon consideration of the motion by Defendants, Woodward & Lothrop, Inc., individually and d/b/a John Wanamaker's, for Summary Judgment, and all responses thereto, it is hereby ORDERED that Defendants' motion is GRANTED.

BY THE COURT:

Robert F. Kelly, J.