

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

TERRY MURPHY

BK. NO. 92-20898

Debtor.

DECISION AND ORDER

BACKGROUND

On April 2, 1992, the Debtor, Terry K. Murphy, d/b/a Pfitzenmair Service Station, (the "Debtor") filed a petition initiating a Chapter 13 case. The petition was accompanied by a list of creditors in the form of a mailing matrix (the "Mailing Matrix"), but not by the other lists, schedules and statements required by Rule 1007 of the Rules of Bankruptcy Procedure. The petition showed the Debtor's name as Terry Murphy only and set forth his Social Security Number, a mailing address as 21 Maple Street, Canisteo, New York and a business address as Corner of Main & Depot Street, Canisteo, New York. The petition did not set forth the Debtor's assumed business name or any Employer Identification Number or Tax Account Number used in connection with the business.

The Mailing Matrix, which also showed the Debtor's name as Terry Murphy only, listed as creditors the New York State Department of Taxation & Finance at State Campus, Albany, New York and the New York State Department of Taxation & Finance, Sales Tax Processing, at P.O. Box 192, Albany, New York. On April 9, 1992 an Order for the Meeting of Creditors (the "First Meeting Order") was forwarded by the Chapter 13 Trustee's Office to the creditors listed on the Mailing Matrix. The case caption on the First Meeting Order was Terry Murphy only with an address at 21 Maple Street, Canisteo, New York and his Social Security Number. Each of the creditors receiving the First Meeting Order was shown as being an unsecured creditor with no dollar amount stated. The First Meeting Order also set forth the last day to file claims as August 27, 1992.

By motion returnable on May 29, 1992, the Chapter 13 Trustee requested that the case be dismissed for the failure of the Debtor to file a plan or the lists, schedules and statements required by Rule 1007. On the return date, the Trustee's Motion was withdrawn because the Debtor had filed the required lists, schedules and statements on May 28, 1992. Schedule E of the schedules listed "NYS Dept. of Tax & Fin. Sales Tax Processing" as a creditor holding an unsecured priority claim for sales taxes incurred in 1991 in the amount of \$4,629.19 and showed an Account Number as 10051690153. The schedule also listed "NYS Dept. of Tax & Fin." as a creditor holding an unsecured priority claim for taxes incurred in 1991 in the amount of \$1,244.19 and showed an Account Number as E0036033307. Schedule I listed the Debtor as self-employed at Pfitzenmair Service Station. The caption on all of the lists, schedules and statements filed by the Debtor on May 28, 1992 was Terry Murphy only, however, each of the declaration pages signed by the Debtor showed the Debtor as "Terry Murphy, d/b/a Pfitzenmair Service Station."

On June 4, 1992, a Notice of Confirmation Hearing was forwarded by the Chapter 13 Trustee to the creditors listed on the Mailing Matrix advising them of a June 26, 1992 Hearing on Confirmation. The case caption on the Notice of Confirmation Hearing was Terry Murphy only with an address at 21 Maple Street, Canisteo, New York. It also set forth his "Social Security" or Tax ID Number as #110-44-7914, which is the Debtor's Social Security Number.

By Motion dated July 29, 1992 and returnable August 10, 1992, the Debtor requested an extension of time to file a plan. An Affidavit of Service filed by the Attorney for the Debtor indicates that the Motion was served by mail on July 29, 1992 on the creditors set forth on the Mailing Matrix. The case caption on the Debtor's Motion was "Terry Murphy d/b/a Pfitzenmair Service Station."

On August 27, 1992, the last date to file claims, the Debtor filed various amended statements and schedules and a Chapter 13 Plan. These filings were accompanied by an Amendment Cover Sheet which set forth the case caption as "Terry Murphy d/b/a Pfitzenmair Service Station." However, the Debtor did not request that the case caption be amended. Therefore, the official case caption remains "Terry

Murphy." The Plan filed by the Debtor on August 27, 1992 proposed to pay all allowed priority tax claims in full.

After a series of adjournments, the Debtor's plan was confirmed on December 18, 1992.

By Motion returnable February 26, 1993, the Chapter 13 Trustee moved to disallow, as a late-filed claim, a proof of claim filed on September 14, 1992 by the New York State Commissioner of Taxation & Finance, Bankruptcy/Special Procedures Section, for unpaid withholding and sales taxes. The case caption on the Chapter 13 Trustee's motion was Terry Murphy only.

New York State opposed the Chapter 13 Trustee's motion and argued that the Debtor's failure to comply with the requirements of Rule 1005¹ by not listing on his petition his full name, assumed business name and New York State Tax Account Numbers, which the State argues are Employer Identification Numbers within the meaning of Rule 1005, deprived New York State of the full, proper and timely notice required by fundamental due process. Notice of the Debtor's full name, assumed business name or New York State Tax Account Numbers would have enabled New York State to determine that the Debtor was indebted to it by reason of his operation of the Pfitzenmair Service Station in time for it to file a proof of claim by the bar date. New York State points out that because the Debtor failed to comply with Rule 1005, all of the notices given in the case, prior to the Debtor's motion to extend the time to file a plan in August of 1992, failed to comply with Rule 2002(n).² As a result, by the time New York State received

¹ Rule 1005 provides:

The caption of a petition commencing a case under the Code shall contain the name of the court, the title of the case, and the docket number. The title of the case shall include the name, social security number and employer's tax identification number of the debtor and all other names used by the debtor within six years before the filing the petition.

The Advisory Committee Note to Rule 1005 reads, "[t]he title of the case should include all names used by the debtor, such as trade names, former married names and maiden name. . . . Additional names of the debtor are also required to appear in the caption of each notice to creditors."

² Rule 2002(n) states, "[t]he caption of every notice given under this rule shall comply with Rule 1005."

adequate notice of the true identity of the Debtor it was impossible for it to both confirm that the Debtor was indebted to it for unpaid withholding and sales taxes incurred in connection with his operation of Pfitzenmair Service Station and file a claim by the August 27, 1992 bar date. New York State advised that the original search which it performed against Terry Murphy when it received the First Meeting Order showed that no individual taxes were due (the State's computers apparently do not search variations of names). It was only upon New York State's receipt of the Debtor's motion for an extension of time to file a plan, which listed the Debtor's assumed business name, that it was able to effectively search its computer records and determine that the Debtor did have sales and withholding tax accounts in the name of Terry K. Murphy for Pfitzenmair Service Station. As soon as it was able to complete this search and determine that there were taxes due, New York State filed its proof of claim on September 14, 1992 (less than 50 days after receiving adequate and effective notice). New York State urges the Court to deny the Chapter 13 Trustee's objection to its claim, allow the claim as a priority tax claim and permit it to participate in the distributions under the confirmed plan.

DISCUSSION

In a Chapter 13 case, Rule 3002(c) of the Federal Rules of Bankruptcy Procedure, with certain stated exceptions, requires that a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to Section 341(a). The last day for filing proofs of claim under Rule 3002(c) in this case was August 27, 1992, the date set forth in the First Meeting Order which New York State received.³ New York State urges the Court to decide that, because of the Debtor's failure to comply with the requirements of Rule 1005, which resulted in all of the notices in this case failing to comply with the requirements of Rule 2002(n), as to New York State there was a lack of fundamental

³ New York State's receipt of notice of the bar date distinguishes this case from cases where the creditor received absolutely no notice of the bankruptcy case. In re Barnett, 42 B.R. 254, 256 (Bankr. S.D.N.Y. 1984); In re Chirillo, 84 B.R. 120, 122 (Bankr. N.D.Ill. 1988).

due process and the Court should extend the time period provided by Rule 3002(c) so as to allow the State's proof of claim.

This Court agrees with those Courts which hold that the time frame set forth by Rule 3002(c), applicable in Chapter 7, 12 and 13 cases, is a statute of limitations which is to be strictly construed. In re Duarte, 146 B.R. 958, 960 (Bankr. W.D.Tex. 1992); In re Chirillo, 84 B.R. 120, 122 (Bankr. N.D.Ill. 1988); Matter of Brown, 73 B.R. 740, 742 (Bankr. W.D.Wis. 1987). Unlike Bankruptcy Rule 3003(c), which applies in Chapter 9 and 11 cases and allows the Court to extend the time to file proofs of claim beyond the deadline for cause shown, such as excusable neglect,⁴ Rules 9006(b)(3) and 3002(c) limit the Court's ability to extend the deadline to the specific exceptions enumerated in the Rule 3002(c). One such exception under Rule 3002(c)(1) is that the Court may extend the time for the filing of a proof of claim on motion of a state made before the expiration of such period and for cause shown.⁵ However, in this case, New York State did not make a motion for an extension before the deadline. Therefore, the claim of New York State is disallowed since it was filed after the August 27, 1992 bar date established by the First Meeting Order in accordance with the provisions of Rule 3002(c).

However, for purposes of the Debtor's discharge under Section 1328, the disallowance of the claim of New York State is not a disallowance under Section 502. Further, the disallowance is without prejudice to any claim by New York State that the Debtor's obligations covered by the proof of claim are nondischargeable because of the Debtor's egregious failure to comply with Rule 1005, which on the facts and circumstances of this case resulted in New York State's failure to receive adequate notice of the complete identity of the Debtor in time for it to be able to timely file a proof of claim and participate in

⁴The Bankruptcy Court is empowered in a Chapter 11 or 9 case by Bankruptcy Rule 9006(b)(1) to permit a late filed claim if the failure to comply with the earlier deadline was the result of excusable neglect. See Pioneer Investment Services Co. v. Brunswick Assoc., -- U.S. --, 113 S.Ct. 1489, 123 L.Ed.2d. 74 (1993) for a further discussion of the excusable neglect standard for late filed claims in Chapter 11 cases.

⁵ An additional possibility is that the Debtor or Chapter 13 Trustee could move under certain circumstances for an extension of the time to file a proof of claim under Bankruptcy Rule 3004. In re Duarte, 146 B.R. 958, 960 (Bankr. W.D.Tex. 1992).

the distribution under the Debtor's confirmed Chapter 13 Plan. A similar argument was accepted by at least one Bankruptcy Court. The Bankruptcy Court for the Northern District of Alabama in the case of In re Gamble held that the debtor's noncompliance with Bankruptcy Rule 1005 by not listing all of her aliases, which resulted in the creditor's failure to receive adequate notice in time for that creditor to have a reasonable opportunity to file a proof of claim in the case within the time required by Rule 3002(c), would make the debt nondischargeable because it could not be reasonably said that it was a debt "provided for by the plan" under Section 1328. In re Gamble, 85 B.R. 150, 152 (Bankr. N.D.Ala. 1988)

Although a copy of the Trustee's motion to disallow the proof of claim of New York State was served upon the Debtor and his attorney, the Debtor has not appeared in connection with the motion. The issues of dischargeability and lack of fundamental due process raised by New York State must be decided in an Adversary Proceeding to which the Debtor is a party, not as part of a motion by the Chapter 13 Trustee objecting to New York State's proof of claim.

CONCLUSION

The September 14, 1992 proof of claim of New York State is disallowed as being filed after the August 27, 1992 bar date. The disallowance is not a disallowance under Section 502 of the Bankruptcy Code for purposes of Section 1328, and is without prejudice to any claim by New York State that the indebtedness due to it from Terry K. Murphy, d/b/a Pfitzenmair Service Station, covered by the proof of claim is not discharged by the Debtor's confirmed plan.

IT IS SO ORDERED.

/s/
HON. JOHN C. NINFO, II
UNITED STATES BANKRUPTCY JUDGE

Dated: June 23, 1993