UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re:	:	Chapter 11
	:	
ENRON CORP., *et al.*,	:	Case No. 01-16034 (AJG)
	:	(Jointly Administered)
Debtors.	:	(Confirmed)

OPINION GRANTING DEBTORS' OBJECTION TO PROOF OF CLAIM NO. 25251 FILED BY THE STATE OF MONTANA

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ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The State of Montana ("Montana") filed a proof of claim after the applicable bar date and after the order confirming the Debtors' plan of reorganization. The Debtors objected and requested the Court to disallow and expunge the proof of claim as untimely. Montana claims damages from the Debtors' alleged manipulation of the western power markets, offering two arguments in support of its late-filed claim. First, Montana argues that it was a known creditor and entitled to actual notice. Second, Montana asserts that it failed to file the claim timely because of excusable neglect under Bankruptcy Rule 9006(b)(1).[1] After reviewing the parties' briefs, affidavits and the record compiled at the hearings, the Court holds that the confirmation order bars Montana's claim. Even if the confirmation order does not preclude the claim, the Debtors gave Montana notice of the bar date in a form sufficient to satisfy due process requirements and Montana's failure to file a timely proof of claim was not the result of excusable neglect. Therefore, Montana's claim must be disallowed and expunged.

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[1] The relevant part of Rule 9006(b)(1) provides the following:

> [W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion…(2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1).

JURISDICTION

The Court has subject matter jurisdiction under sections 1334(b) and 157(a) of title 28 of the United States Code and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York (Ward, Acting C.J.). This is a core proceeding pursuant to section 157(b)(2)(A), (B) and (O) of title 28 of the United States Code.

FACTS AND PROCEDURAL BACKGROUND

Debtors' Background

Commencing on December 2, 2001, and from time to time continuing thereafter, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code ("the Bankruptcy Code"). The Court set October 15, 2002 as the bar date for filing proofs of claims. On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan ("the Plan"), which became effective on November 17, 2004 ("the Effective Date").

Montana's Claim

Montana filed a claim on March 22, 2005, about two and a half years after October 15, 2002, the applicable bar date. The filing of the claim also occurred about eight months after the Court entered the confirmation order and about four months after the Effective Date. The Debtors objected because the claim was filed after the bar date and the confirmation order. A hearing was held on August 4, 2005.

During the hearing, Montana requested to provide an additional brief to the Court. The Court told Montana to file a motion for leave to file the brief. Montana did file such

a motion with a copy of the supplemental brief. The Debtors objected to the motion. Another hearing was held on November 17, 2005.

The Court grants Montana's request for leave. The November 17, 2005 hearing, along with any associated briefs, are considered part of the record upon which this opinion is based.

FERC Investigation

On February 13, 2002 the Federal Energy Regulatory Commission ("FERC") launched an investigation into the alleged manipulation of the western power markets. Montana filed a motion to intervene in the FERC proceedings on March 3, 2003 and the motion was granted on May 12, 2004. On March 26, 2003, after FERC completed its final report regarding the alleged price manipulation, it issued an order to the Debtors directing them to show cause why their authority to sell power in the western markets should not be revoked.

After further investigation, on June 25, 2003, FERC issued three related orders regarding price manipulation in the western markets. One order (the "Revocation Order") revoked the Debtors' licenses to sell power in various western state markets on the basis that the Debtors engaged in illegal "gaming" in the form of unfair trading strategies. FERC issued an order on January 22, 2004 that denied the Debtors' request for rehearing on the Revocation Order. In the companion orders issued the same day, FERC found that the Debtors also engaged in certain "gaming and/or anomalous market behavior" within the California power market that constituted a violation of certain FERC approved tariffs between January 1, 2000 and June 20, 2001. FERC further ordered that the Debtors participate in an evidentiary hearing and show cause as to whether they

conducted alleged “gaming” activities. The order also authorized an Administrative Law Judge to recommend various remedies for the Debtors’ violation of the tariffs.

State Court Lawsuit

On June 30, 2003, Montana filed a lawsuit in state court that named the Debtors, among others, as defendants. The complaint was never served upon the Debtors. Debtors’ counsel sent a letter to the Montana Attorney General indicating that the lawsuit violated the automatic stay imposed when the Debtors filed their bankruptcy petitions. After receipt of the letter, Montana dismissed the Debtors from the suit without prejudice.

DISCUSSION

Confirmation Order

Montana asserts that its failure to file a proof of claim before the bar date is the result of excusable neglect under Bankruptcy Rule 9006(b)(1), but fails to take into account that it filed the claim after the confirmation order was entered. Paragraph 37 of the confirmation order states:

> All Persons and Entities are hereby precluded from asserting against the Debtors, the Debtors in Possession, their successors or assigns, including, without limitation, the Reorganized Debtors, or their respective assets, properties or interest in property, any other or further Claims based upon any act, omission, transaction or other activity of any kind or nature that occurred prior to the Confirmation Date, whether or not the facts or legal bases therefor were known or existed prior to the Confirmation Date, regardless of whether a proof of Claim or Equity Interest was filed, whether the holder thereof voted to accept or reject the Plan or whether the Claim or Equity Interest is an Allowed Claim or Allowed Equity Interest.

In re Enron Corp., No. 01-16034 (Bankr. S.D.N.Y. July 15, 2004) (order confirming Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors)

An order confirming a chapter 11 plan is the equivalent of a final judgment. *In re Chipwich*, *Inc.*, 64 B.R. 670, 678 (Bankr. S.D.N.Y. 1986) (citing *Bizzell v. Hemingway*, 548 F.2d 505, 507 (4th Cir. 1977)).

The Bankruptcy Code allows for the revocation of a confirmation order when the party opposing the order files a motion within 180 days of entry of the order and demonstrates the order was procured by fraud. 11 U.S.C. § 1144 (2006). The case law is split as to whether section 1144 provides the sole basis to revoke a confirmation order. Some courts have held that it does. *Chipwich*, 64 B.R. at 678 (citing *Hotel Corp. of the South v. Rampart 920 Inc.*, 46 B.R. 758, 770-71 (E.D. La. 1985) *aff'd* 781 F. 2d 901 (5th Cir. 1986) ("[F]raud in the procurement of a confirmed Chapter 11 Plan of reorganization is the sole ground for revoking the confirmation order . . . ."); *In re Emergency Beacon Corp.*, 48 B.R. 356, 360 (S.D.N.Y. 1985) ("[F]raud in the procurement is the only recognizable ground for setting aside or modifying the confirmed arrangement."). Some other courts have held that Rule 60(b) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Bankruptcy Rule 9024, also provides a basis for the revocation of a confirmation order. *In re 401 E. 89th St. Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998) (citing *Carter v. People's Bank and Trust Co.* (*In re BNW Inc.*), 201 B.R. 838, 846 (Bankr. S.D. Ala. 1996)); *United States v. Poteet Constr. Co.* (*In re Poteet Constr. Co.*), 122 B.R. 616 (Bankr. S.D. Ga. 1990) ("Rule 60(b) has been used to grant relief from confirmation orders."). This split, however, is not relevant in the current case, because Montana has not filed a motion within the time frames contained in either Federal Rule 60(b) or section 1144 of the Bankruptcy Code.

Under section 1144 of the Bankruptcy Code, Montana had 180 days to file a motion to set aside the confirmation order. The Court entered the order on July 15, 2004. Montana did not file its claim until March 22, 2005 and, as of this date, has failed yet to file a motion to set aside the confirmation order. As a result, section 1144 no longer

provides Montana a potential basis to set aside the confirmation order because the 180-day time limit to file a motion has expired.[2]

In addition, any motion filed under Federal Rule 60(b) is untimely, as the Rule requires that a litigant using excusable neglect as a basis to set aside an order file a motion within one year of entry of the order. In the instant case, the confirmation order was signed well over a year ago and any motion under Federal Rule 60(b) is now untimely.[3] As a result, the confirmation order prevents Montana from asserting its claim against the Debtors and, based upon the fact that the Court signed the confirmation order over a year ago, no remedy is available to Montana to set the order aside.

Notice

Montana argues that it did not receive sufficient notice of the bar date. The Court has previously addressed the issue of notice of the bar date to known and unknown creditors in *In re XO Commc'ns. Inc.*, 301 B.R. 782, 791-95 (Bankr. S.D.N.Y. 2003). The Due Process Clause in the Fifth Amendment to the United States Constitution requires that creditors receive notice of the filing of the bankruptcy case and the bar date in order to afford creditors the opportunity to file a proof of claim. *Id.* at 791-92 (citing *In re Drexel Burnham Lambert Group Inc.*, 151 B.R. 674, 679 (Bankr. S.D.N.Y. 1993) ("A . . . claim against the [bankruptcy] estate [ ] constitutes property within the meaning of the Amendment[ ] and cannot be forfeited through proceedings lacking in due process.").

[2] Under section 1144 of the Bankruptcy Code, fraud in the procurement of the order is the sole basis to set aside a confirmation order. Montana has not advanced any argument relating to fraud, and therefore, even if Montana filed a timely motion to set aside the confirmation order, section 1144 still does not provide a basis to set aside the order.
[3] Even if time did exist under Federal Rule 60(b) for Montana to file a motion, there are no facts on the record that support such relief.

In *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court made it apparent that not just any notice is sufficient to satisfy due process requirements, stating that, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The *Mullane* opinion dealt with constitutionally required notice due to beneficiaries of a trust, but was later applied by courts in cases involving disputes over notice of the bar date in chapter 11 proceedings. *See In re Drexel Burnham*, 151 B.R. at 679; *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 n.1 (3d Cir. 1995) (citing *In re Pettibone Corp.*, 162 B.R. 791, 806 (Bankr. N.D. Ill. 1994); *In re R.H. Macy & Co.*, 161 B.R. 355, 359 (Bankr. S.D.N.Y. 1993)).

In addition, a chapter 11 debtor is required to provide "reasonable notice" of the initial filing and subsequent bar date to creditors in order to allow for a discharge of a debt under the Fifth Amendment. *In re XO Commc'ns*., 301 B.R. at 792 (citing *Grant v. U.S. Home Corp.*, (*In re U.S.H. Corp. of N.Y.*), 223 B.R. 654, 658 (Bankr. S.D.N.Y. 1998)). Whether notice is reasonable or adequate depends on whether a creditor is known or unknown to the debtor. *Id.* A debtor must send actual notice of the bar date to any known creditor, while constructive notice is generally sufficient with an unknown creditor. *Id.* (citing *Chemetron*, 72 F.3d at 346); *City of New York v. N. Y., New Haven & Hartford R.R.* Co., 344 U.S. 293, 296 (1953); *see also Tulsa Prof'l. Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1982) ("For creditors who are not 'reasonably ascertainable,' publication notice can suffice."). In addition, actual notice of the bar date, when a creditor is already aware of the bankruptcy filing is adequate to satisfy due

process requirements for a known creditor. *Bordsorf v. Fairchild Aircraft Corp.* (*In re Fairchild Aircraft Corp.*), 128 B.R. 976, 986 (Bankr. W.D. Tex. 1991).

Whether Montana Is a Known or Unknown Creditor

Several basic principles guide a court's determination as to whether a creditor is known or unknown to a debtor. *In re XO Commc'ns*., 301 B.R. at 793 (citing *In re Drexel Burnham*, 151 B.R. at 680). A known creditor includes any claimant whose identity is actually known by the debtor and any claimant whose identity is "reasonably ascertainable." *In re XO Commc'ns*., 301 B.R. at 793 (citing *Chemetron*, 72 F.3d at 346) (noting that claimants must be "reasonably ascertainable", and not "reasonably foreseeable"). If a creditor, through "reasonably diligent efforts" is able to discover a creditor, that creditor is "reasonably ascertainable" and therefore considered a "known" creditor. *In re XO Commc'ns.*, 301 B.R. at 793 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 n. 4 (1983)); *see also In re Charter Co.*, 125 B.R. 650, 654 (M.D. Fla. 1991); *Chemetron*, 72 F.3d at 347 ("[W]hat is required is not a vast, open-ended investigation . . . The requisite search . . . focuses on the debtor's own books and records. Efforts beyond a careful examination of these documents are generally not required."). In contrast, an unknown claimant is one whose claim is merely, "conceivable, conjectural or speculative." *In re XO Commc'ns.*, 301 B.R. at 793 (citing *In re Thomson McKinnon Sec., Inc.*, 130 B.R. 717, 720 (Bankr. S.D.N.Y. 1991)).

In the instant case, the facts reveal that Montana's claim stemming from the FERC proceedings was, "conceivable, conjectural or speculative" at the time the bar date notice was sent to creditors, thus making Montana an unknown creditor. At the time the Debtors sent the bar date notice to creditors, FERC was simply investigating the alleged

price manipulation in the western markets. FERC did not release any documents that indicated Montana was a potential claimant in the Debtors' bankruptcy until after the Debtors sent the bar date notice. In addition, there is nothing in the record showing that an investigation by the Debtors of their business records would have demonstrated Montana held a claim. Although the FERC investigation into the Debtors' dealings in the western power markets indicated that Montana may hold a potential claim, it does not establish that the Debtors could readily ascertain the existence of the claim at the time they sent the bar date notice. Therefore, at the time of the bar date notice, Montana's claim was still "conceivable, conjectural or speculative" and Montana was an unknown creditor. In sum, as applied to Montana, the notice of the bar date, which the Debtors published in various national newspapers, was adequate.

Moreover, even if Montana were a known creditor, it still received actual notice of the bar date. First, the Montana Attorney General's office received an email on August 5, 2002 from the National Association of Attorneys General, and attached was a copy of the bar date notice. Mr. Tweeten, an attorney for Montana, who in an affidavit identifies himself as the supervisor of civil matters, including bankruptcy, for Montana received the email. Further, in the same affidavit, Mr. Tweeten acknowledges that Mr. Screnar, an Assistant Attorney General, who is representing Montana in the instant matter, also had actual notice of the bar date as a result of his role in monitoring a claim for the Montana Board of Investments. Thus, at least two attorneys for Montana were aware of the bar date before it passed.[4] This type of actual notice of the bar date, when a

[4] In addition, the bar date notice was also sent to other Montana state agencies, including the Montana Department of Revenue and the Montana Department of State. The Court notes that the record is not complete enough regarding the role and administrative hierarchy within the state government to determine whether notice to the other agencies constituted notice to the State.

creditor is already aware of the bankruptcy filing, is adequate to satisfy due process requirements for a known creditor. *Bordsorf*, 128 B.R. at 986. As a result, regardless of whether Montana is considered a known or unknown creditor, its claims are subject to the bar date.

Excusable Neglect

Even if the confirmation order did not prevent Montana from asserting its claim, its failure to file it before the bar date provides a separate basis to disallow it. As previously stated, Montana received adequate notice of the bar date as an unknown creditor. Montana's claim was filed more than two and a half years after October 15, 2002. Montana argues that the Court should allow the claim because its failure to file it timely is the result of excusable neglect under Bankruptcy Rule 9006(b)(1).

The determination of whether a failure to act constitutes excusable neglect is equitable in nature. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 392 (1993). The *Pioneer* court outlined several factors that lower courts may consider when determining whether a failure to act constitutes excusable neglect including, (1) the danger of prejudice to the debtor, (2) the length of delay and its potential impact on the judicial proceedings, (3) the reason for the delay, including whether it was in the reasonable control of the movant, and (4) whether the movant acted in good faith. *Id.* at 395; *see also Midland Cogeneration Venture Ltd. P'ship. v. Enron Corp.* (*In re Enron*), 419 F.3d 115, 134 (2d Cir. 2005) (barring an additional or amended proof of claim filed six months after the bar date where counsel incorrectly assumed that separate bankruptcies would be substantively consolidated therefore alleviating the need to file separate proofs of claim in each case).

The Second Circuit has focused its inquiry into excusable neglect on the third *Pioneer* factor, the reason for the delay and whether that reason was within the control of the movant. *Midland*, 419 F.3d at 122 (citing *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 368 (2d Cir. 2003)). "[T]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a close[] case, the reason-for-delay factor will always be critical to the inquiry." *Midland,* 419 F.3d at 123 (quoting *Graphic Commc'ns. Int'l Union v. Quebecor Printing Providence, Inc.*, 270 F.3d 1, 5-6 (1st Cir. 2001)). In cases where, "a party's or counsel's misunderstanding of clear law or misreading of an unambiguous judicial decree is the reason for the delay . . . we have continued to uphold findings of no 'excusable neglect' where the court cited a lack of unique or ordinary circumstances." *Midland*, 419 F.3d at 124-25 (quoting *Graphic Commc'ns. Int'l Union*, 270 F.3d at 5-6).

In the instant case, Montana argues that it filed the claim as soon as it became aware of the damages it suffered from the Debtors' conduct in the western power markets. The facts, however, do not support this assertion. At the August 4, 2005 hearing regarding Montana's claim, Montana's counsel stated that the proof of claim at the center of the dispute represented the potential damages stemming from the FERC proceedings.[5] In addition, Montana's counsel said that before filing the claim Montana assumed that FERC filed a proof of claim on its behalf to protect Montana's interests in the bankruptcy proceedings. This assumption dates back to March 2003 when Montana

[5] Montana attached a copy of its state court complaint against the Debtor as support for its proof of claim, but said at the August 4, 2005 hearing that the claim was not based upon damages stemming from the state court suit.

sought to intervene in the FERC proceedings and demonstrates that as of March 2003 Montana thought it held a claim in bankruptcy.

Thus, Montana's fault in this case is not that it did not think it held a claim in bankruptcy until 2005, but that it incorrectly assumed that FERC protected its claim by filing a proof of claim for any damage award stemming from the FERC proceedings. If Montana had chosen to investigate whether FERC filed a claim on its behalf in 2003 and subsequently realized FERC did not, then at that time Montana would have arguably filed its own proof of claim to protect any damage award ordered by FERC. It was not until February of 2005 that Montana discovered FERC did not file a proof of claim on its behalf and, at that point, Montana chose to file its own proof of claim. Montana simply made a mistake in believing that FERC was protecting its interests in the bankruptcy proceedings. The case law is quite clear that mistake or inadvertence on the part of counsel is generally not sufficient to constitute excusable neglect. *Pioneer*, 507 U.S. at 392. As a result, Montana's failure to file a timely proof of claim does not constitute excusable neglect.

CONCLUSION

The Court grants Montana's request for leave to submit an additional brief. The Court holds that Montana's claim is precluded by the July 15, 2004 confirmation order. Moreover, Montana received adequate notice of the bar date and its mistake in failing to file a timely proof of claim does not constitute excusable neglect.

Debtors' objection to Montana's claim is granted in all respects. Proof of claim no. 25251 is therefore disallowed and expunged.

The Debtors shall settle an order consistent with this opinion.

Dated: New York, New York
March 29, 2006

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE