UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re	:	Chapter 11
ENRON CREDITORS RECOVERY CORP., et. al.,	:	Case No. 01-16034 (AJG)
Reorganized Debtors.	:	

OPINION AND ORDER

Before the Court is a request by Lynn Anne Wright, as beneficiary and Independent Executrix of Estate for the Estate of Evelyn Rose Samaritan ("Claimant") for reconsideration of two (2) proofs of claim ("Motion") against Enron Creditors Recovery Corporation ("Enron") pursuant to Rule 3008 of the Federal Rules of Bankruptcy Procedure ("Rule 3008"). A response to the Motion (the "Response to Motion") was filed by the Debtor (as defined *infra*) on October 28, 2009.

Jurisdiction

The Court has subject matter jurisdiction over this matter under §§28 U.S.C. 1334(b) and 157(a) and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court of the Southern District of New York. This is a core proceeding within the meaning of §28 U.S.C. 157(b)(2).

General Procedural History

On December 2, 2001, (the "Petition Date"), Enron Corporation, Enron North America Corporation, and certain of Enron's direct and indirect subsidiaries (collectively, the "Debtors" or "Debtor," referencing a single entity) each filed voluntary petitions for

relief under chapter title 11 of the United States Code (the "Bankruptcy Code"). The Debtors' chapter 11 cases were procedurally consolidated for administrative purposes. During the chapter 11 cases, the Debtors operated their businesses and managed their properties as debtors in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004, and the Debtors emerged from chapter 11 as reorganized debtors (the "Reorganized Debtors"). Effective March 1, 2007, Enron changed its name to Enron Creditor Recovery Corporation. Thereafter, on April 4, 2007, an order was entered authorizing the change of the caption of the Reorganized Debtors' cases.[1]

On August 1, 2002, the Court entered an Order Pursuant to Bankruptcy Rules 2002(a)(7), 2002(1), and 3003(c)(3) Establishing Deadlines for Filing Proofs of Claim and Approving the Form and Matter of Providing Notice Thereof (the "Bar Date Order"), which set forth, among other things, the deadlines to file a proof of claim against Enron as October 15, 2002 (the "Bar Date"). On August 10, 2002, the Debtors mailed, *inter alias*, the notice of the Bar Date to potential creditors of the Debtors (the "Bar Date Notice").

Evelyn Rose Samaritan (the "Decedent") is alleged to be one of Enron's unsecured creditors. Upon receiving the Bar Date Notice, the Claimant states that the Decedent was gravely ill with pancreatic cancer and was receiving hospice care at home. As a result of her illness, the Decedent was unable to timely file her proof of claim

[1] For convenience, hereinafter, all references to Enron signify either Enron, the Debtors, the Reorganized Debtors, or Enron Creditors Recovery Corp., as the context requires.

against Enron. After her death, Coy O. Wright Jr. (the "Executor") was appointed as the Independent Executor of the Decedent's estate. The Claimant argues that the filing of proof of claim was further delayed as a result of the Executor's "misapplication of funds, and/or embezzlement actions or accounting improprieties on behalf of the Estate." Subsequently, the Claimant sought removal of the Executor in the Texas probate court. On March 6, 2008, the probate court removed the Executor and installed the Claimant as his successor.

On January 26, 2009, over six years after the Bar Date, the Claimant filed two proofs of claim on behalf of the Decedent's estate (the "Request") that include accrued, unsecured claims based upon (1) $4,650 in employee benefit entitlements, and (2) 6,052 shares of common stock in Enron Corporation (the "Claims"). The Debtor then filed an objection to the Claims (the "Objection"), arguing that the circumstances alleged by the Claimant do not constitute excusable neglect and the Claims should be expunged. On July 9, 2009, the Claimant filed a timely response to the Objection (the "Response") and on July 14, 2009, the Debtor filed a reply (the "Reply") to the Response. The Debtor also alleged that its counsel attempted to contact the Claimant by telephone several times on July 15, 2009 to find out whether she was planning to attend the hearing scheduled on July 16, 2009, but the Claimant did not respond to those calls.

As scheduled, a hearing on this matter was held on July 16, 2009 (the "Hearing"), at which the Claimant did not appear. Upon consideration of the pleadings and arguments of the parties, the Court entered an opinion dated August 4, 2009 (the "Opinion"), denying the Claimant's request for leave to file late proofs of claim and ordering the Claims expunged.

Allegedly unaware of the scheduled hearing and the fact that the Opinion had already been entered, the Claimant filed a supplemental response on August 11, 2009, requesting the Court to find excusable neglect under *Pioneer* due to circumstances beyond her control (the "Supplemental Response"). Among other things, the Claimant states that (1) she never received notice of the Hearing nor the Court's Opinion; (2) the Executor was not entirely at fault for mismanaging the Decedent's estate because counsel representing the estate, Joe Tamasy ("Counsel") did not respond to any pleadings filed by the Claimant as a result of grave illness; and (3) Counsel used an erroneous social security number in the Decedent's probate application.

Motion For Reconsideration

The Claimant is requesting the Court to reconsider the rulings of the Opinion with respect to the late filing of her Claims. Under Federal Rules of Bankruptcy Procedure 9024 ("Rule 9024"), which incorporates Federal Rules of Civil Procedure 60 ("Rule 60"), a party may move for relief from a judgment or order on various equitable grounds as set forth in Rule 60.[2]

Rule 9024 titled "Relief from Judgment or Order" states:

> Rule 60 F.R. Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a Chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

[2] Although the Claimant makes her request pursuant to Rule 3008, the Court will construe this matter as a request made pursuant to Rule 60(b), as it is the most applicable to the facts at bar.

Federal Rules of Bankruptcy Procedure 9024.

Since the Claimant is seeking reconsideration by the Court to file late proofs of the claim, exceptions (1)-(3) in Rule 9024 do not apply. Hence, the Court will consider relevant provisions in Rule 60, which provide:

> (b) Grounds for Relief from a Final Judgment, Order, or Proceeding.
>
> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Federal Rules of Civil Procedure 60.

The Second Circuit has explained that the standard of granting relief under Rule 60(b) is discretionary and that the rule "provides a mechanism for extraordinary judicial relief [available] only if the moving party demonstrates exceptional circumstances." *Motorola Credit Corp.* v. *Uzan*, 561 F. 3d 123-126 (2d Cir. 2009)(quoting *Ruototo v. City of New York*, 514 F.3d 184, 191 (2d Cir. 2008) (internal quotation marks omitted)); *Le Blanc v. Cleveland*, 248 F.3d 95, 100 (2d Cir. 2001)(holding that in order to obtain relief under Rule 60(b)(6), the moving party must demonstrate "extraordinary circumstances"

or "extreme and undue hardship"); *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986)(noting that Rule 60(b) aims to strike a balance between "serving the ends of justice and preserving the finality of judgments").

Moreover, a court's discretion is particularly broad under Rule 60(b)(6) as the catch-all provision gives courts a "grand reservoir of equitable power to do justice in a particular case." *See Int'l Controls Corp. v. Vesco,* 556 F.2d 665, 670 (2d Cir. 1977); *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963). The Second Circuit has held that courts have discretion to re-open a judgment under Rule 60(b)(6) where a party was not sent notice of a judgment by the court. *Id.* at 542-543. The *Radack* court continued that the "lack of notice does not ipso facto mean that a judgment must, can or should be reopened," but that relief under Rule 60(b)(6) should only be granted where the "lack of notice has operated to prejudice a substantial right or remedy that would otherwise have been available." *Id.* at 543.

In addition, *pro se* pleading are typically held "to less stringent standards than formal pleadings drafted by lawyers." *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980)(quoting *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972)). It has been held that courts should "read the pleadings of a *pro se* plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest.'" *Mcpherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999)(quoting *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994)). *Pro se* plaintiffs, however, are not exempted from "compliance with relevant rules of procedural and substantive law." *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)(quoting *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981)).

The Claimant does not allege specific grounds under Rule 60(b) that justifies relief sought, so the Court will consider each of the grounds for relief under Rule 60(b). First, subsections Rule 60(b)(1) does not apply because the Claimant did not allege mistakes, inadvertence, surprise, or excusable neglect with respect to any evidence, arguments, and issues put forth by her before the Court.

Second, Rule 60(b)(2) is not met because the Claimant did not put forth newly discovered evidence that could not have been discovered when she filed the Request. Although the Claimant did allege additional details surrounding the circumstances of the Executor's mismanagement of the Decedent's estate, including Counsel's illness and Counsel's mistake in filing the wrong social security number on Decedent's "Application for Probate of Will," these supplemental explanations do not constitute "newly discovered evidence" within the meaning of Rule 60(b)(2). They are facts that have been or should have been available to the Claimant when she first filed the Request.

Third, Rule 60(b)(3) does not apply because there is no indication of any alleged fraud, misrepresentation, or misconduct by the parties.

Fourth, Rule 60(b)(5) and (6) do not apply because the judgment at issue is not void and has not been satisfied, released, or discharged.

Finally, the Court will consider whether relief sought can be granted based on the "catch-all" provision of Rule 60(b)(6). Based on the record before the Court, it appears that the Claimant did not receive adequate notice of the Hearing. First, there is no certificate of notice on the docket so it is unclear what documents, if any, were served on the Claimant. When the Debtor first received a return date of July 16, 2009 from the Court, it was required by both Enron's Case Management Order Establishing, Among

Other Things, Noticing Electronic Procedures, Hearing Dates, Independent Website and Alternative Methods of Participation at Hearing (the "Case Management Order") and Local Rule 9004-2(b) ("Rule 9004-2(b)") to include the return date and time on the upper right-hand corner of the caption of the Objection filed on docket. The Debtor failed to comply with this procedural rule and did not serve the Claimant with a copy of its Objection that clearly states the return date and time. The Debtor correctly asserted in its Response to Motion that the electronic docket reflected the date and time for the Hearing. However, the Debtor knew that the Claimant is *pro se* and is unlikely to have access to the electronic docket. Thus, unless the Objection was properly served on the Claimant, with the return date and time stated on its first page as required by the Case Management Order and Rule 9004-2(b), the Claimant could not have known about the scheduled hearing. Under the circumstances, the Debtor's failed attempts to reach the Claimant by telephone one day before the Hearing do not exonerate its obligation to give adequate notice.

This Court will exercise its broad discretion under Rule 60(b)(6) and grant the Claimant's Motion because it appears that, as a result of the Debtor's failure to comply with procedural rules, the Claimant was deprived of adequate notice to present her case before the Court at the Hearing. Such lack of notice has operated to prejudice a substantial right to the Claimant that would otherwise have been available to her. In light of the insufficiency of notice given in this case, the Court finds that "extraordinary circumstances" have been established.

Conclusion

Accordingly, for the foregoing reasons, the Opinion is hereby VACATED and the Motion is hereby GRANTED.

A hearing shall be scheduled on December 10, 2009 at 9:30am with respect to the Claimant's request for leave to file late proofs of claim. The parties may appear in person or by telephone by contacting chambers for instructions.

SO ORDERED.

Dated: New York, New York
November 6, 2009

s/Arthur J. Gonzalez
ARTHUR J. GONZALEZ
UNITED STATES BANKRUPTCY JUDGE