

INFORMAL BUT ACTUAL NOTICE OF BANKRUPTCY: WHAT DIFFERENCE DOES IT MAKE?

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On January 3, 2021, in *In re Ditech Holding Corporation*, Case No. 19-10412 (JLG), an unpublished opinion, Bankruptcy Judge James L. Garrity, Jr., discussed an important distinction for creditors of a non-individual chapter 11 debtor versus those of an individual debtor.

The essential facts are that prepetition, a creditor, Dr. Nassar, sued Reverse Mortgage Solutions, Inc. (“RMS”), as mortgage servicer, in Texas, on various legal theories including breach of contract and fraud. Several months later, RMS filed bankruptcy in New York and later confirmed a plan which took effect. Under the plan, Reorganized RMS, as successor to RMS, is now the servicer of Dr. Nassar’s mortgage.

The problem arose when, post-confirmation, Dr. Nassar continued his lawsuit despite an injunction in the plan prohibiting continuation of prepetition lawsuits like his. Debtor filed a motion to enforce the plan injunction and Dr. Nassar defended, *inter alia*, based on an alleged violation of due process because, as a known creditor, he was entitled to service of actual notice of the material events in the bankruptcy but was never served with notice of the commencement of the case, the claims bar date, the confirmation hearing or the confirmation order. Debtor had filed notice of the commencement of the bankruptcy and imposition of the automatic stay in the Texas lawsuit but had not served Dr. Nassar. Nonetheless, Dr. Nassar conceded that he knew of the bankruptcy filing before the extended claims bar date and Debtor argued that Dr. Nassar’s knowledge imposed on him the duty to ascertain the relevant dates and protect his interest in the bankruptcy case. Debtor also had published notice of the confirmation hearing but did not serve Dr. Nassar with actual notice. Debtor did not publish notice of the commencement of the case, the general claims bar date or the confirmation order.

After determining that the court had post-confirmation jurisdiction as the motion to enforce the plan provided a sufficiently close nexus to the plan itself, the court looked at the record. Judge Garrity found that although Dr. Nassar was listed as a creditor with a contingent, disputed and unliquidated litigation claim of an unknown amount, no address was listed and no proof of service of any type was filed listing Dr. Nassar’s address. Thus, the issue arose of whether Dr. Nassar’s actual knowledge of the bankruptcy was sufficient to discharge his claim and make him subject to the plan injunction even though he had never been served with formal notice.

Judge Garrity first determined that reasonable notice of the bankruptcy is a required element of due process for a known creditor and that no such notice had been provided to Dr. Nassar. The judge next examined the cases that find informal notice is sufficient to require a creditor to stay informed and comply with deadlines such as filing a claim. However, those cases involve *individual* debtors, not corporate debtors. Citing *Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.)*, 863 F.2d 832 (11th Cir. 1989), Judge Garrity followed the rationale of the Eleventh Circuit: “Section 523(a)(3) places a burden of inquiry upon a creditor only when the debtor is an ‘individual debtor.’ A corporate debtor is not an individual debtor for the purposes of Section 523.” *Id.* at 834.

There is another aspect to the court’s analysis. In large part, the distinction between the burden imposed on a creditor with actual notice of a bankruptcy obtained from a source other than actual service of that notice by a debtor when the debtor is an individual versus a non-individual is based on the Federal Rules of Bankruptcy and how specific they are

regarding the due dates for filing proofs of claim. In chapters 7 and 13, the Rules enable a creditor to calculate the approximate date when a proof of claim is due, simply from the date the bankruptcy was filed, by piecing together a combination of Rules. But in chapter 11, Rule 3003(c)(3) requires the court to set the bar date, which occurs after a motion requesting that a date be set. In that circumstance, general knowledge of the bankruptcy filing is not sufficient information to counteract the requirement that a known creditor be provided formal notice prior to barring the creditor's claim. The court's ruling is in accord with decisions of the Courts of Appeals in the First, Third, Seventh, Ninth and Eleventh Circuits. Note, however, that the Fifth Circuit ruled otherwise in *Robbins v. Amoco Prod. Co.*, 952 F.2d 901, 908 (5th Cir. 1992) (creditor with both actual and inquiry notice of the bankruptcy proceedings but who failed to take any action to avoid discharge of her claims bound by chapter 11 plan). Accordingly, the Court refused to enforce the discharge injunction against Dr. Nasser.

Practice Point: When representing a creditor who did not receive formal notice of the bankruptcy, be sure to investigate the law in the jurisdiction where the bankruptcy was filed to ascertain your client's right to pursue the claim post-confirmation. If you have questions regarding bankruptcy, please contact Judith K. Fitzgerald.