

UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re

KENNETH J. REILLY and
SANDRA L. REILLY,

Debtors.

**Bankruptcy Case
No. 07-40499-JDP**

MEMORANDUM OF DECISION

Appearances:

Bradley E. Rice, Twin Falls, Idaho, Attorney for Debtors.

Richard J. Hayden, Spokane, Washington, Attorney for AmeriCredit
Financial Services, Inc.

In this decision, the Court concludes that the chapter 13¹ debtors' objection to a creditor's proof of claim should be sustained, and the claim

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 - 1532, and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001 - 9037.

disallowed. But while the debtors have won this battle, the victory will not likely be a satisfying one.

Background and Facts

On June 29, 2007, Kenneth J. and Sandra L. Reilly (“Debtors”) filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code.

Among the unsecured creditors listed in Debtors’ schedule F are

AmeriCredit Corp² and Pinnacle Financial Group (“Pinnacle”). The

mailing address listed for both of these creditors was the same: 7825

Washington Ave S Ste 310, Minneapolis, MN 55439-2430. Debtors listed

the AmeriCredit account number, reported the amount of the claim as

\$13,373.65, and indicated the creditor’s claim was for the balance due on a

loan for a vehicle which they surrendered in 2003. Debtors did not list an

account number or amount due for the Pinnacle claim, but described it as

being “Assignee or other notification for: AmeriCredit Corp.”

² The name for the creditor listed by Debtors in their schedules is “AmeriCredit Corp”; the actual name of the creditor, apparently, is “AmeriCredit Financial Services, Inc.” (hereafter “AmeriCredit”). This defect in the schedules is not material.

Debtors' proposed chapter 13 plan was filed with their petition. The plan contemplates monthly payments to the trustee in the amount of \$1,075 for a term not exceeding 60 months. With respect to unsecured claims, the plan provided that upon confirmation, the trustee was to pay pro-rata dividends to all creditors who have filed timely allowed unsecured claims, from funds available after payment of priority and secured claims.

Notice of the § 341(a) meeting of creditors and the plan was mailed by the Bankruptcy Noticing Center ("BNC") on July 1, 2007. The BNC's certificate of service indicates that notice was mailed to AmeriCredit and Pinnacle at 7825 Washington Ave S Ste 310, Minneapolis, MN 55439-2424. Both entries were marked with a "+" which indicates that the addresses were "corrected [by BNC] by inserting the ZIP or replacing an incorrect ZIP." Docket No. 19.

Debtors' chapter 13 plan was confirmed, without objection, on September 29, 2007.

On July 23, 2008, AmeriCredit filed a proof of claim in the amount of \$11,481.01. On August 22, 2008, Debtors objected to the proof of claim on the grounds that it was not timely filed. Docket No. 31. After receiving AmeriCredit's response, Debtors filed an amended objection, which cited two additional grounds for disallowance of the claim: 1) the claim was unenforceable under the applicable statute of limitations; and 2) AmeriCredit lacked standing to file the proof of claim because it was no longer the real party in interest. Docket No. 36.

The Court conducted an evidentiary hearing concerning the amended objection on November 19, 2008. At the hearing, Debtors conceded that their argument based upon the statute of limitations lacked merit, but insisted that the claim should be disallowed because AmeriCredit does not have standing or, alternatively, because the proof of claim was not timely filed.

After careful consideration of the record, evidence and arguments of the parties, the Court concludes that Debtors' objection to AmeriCredit's claim should be sustained.³

Discussion

I.

Debtors argue that prior to the filing of their bankruptcy petition, AmeriCredit had assigned its claim (or at least the right to payment) to Pinnacle, thereby relinquishing their standing to enforce the claim or to file a proof of claim in this case. They argue that Pinnacle, and not AmeriCredit, is the real party in interest and the entity with standing to file a proof of claim.

Of course, AmeriCredit disagrees. AmeriCredit argues that Debtors' account was merely "placed" with Pinnacle for purposes of collection, and that AmeriCredit retained all ownership rights with respect

³ This Memorandum constitutes the Court's findings of fact and conclusions of law. Rules 9014, 7052.

to the account. As a result, AmeriCredit contends it remains the real party in interest with standing to file a proof of claim.

Based upon the evidence in the record, the Court agrees with AmeriCredit. On August 17, 2006, Pinnacle and AmeriCredit apparently entered into an "Agreement for Collection of Accounts" (hereafter "Agreement"). Ex. 1. The Agreement recites that Pinnacle is a collection services company, and that "[Pinnacle] shall use its best efforts to collect the accounts placed by [AmeriCredit] in an efficient, expeditious, and courteous manner." Ex. 1 at ¶ 1. Under this contract, any amounts collected by Pinnacle were to be remitted to AmeriCredit, along with an invoice itemizing the fees due to Pinnacle based upon an agreed fee schedule. Ex. 1 at ¶ 3.

This Agreement does not constitute an absolute assignment of Debtors' account with AmeriCredit to Pinnacle. It merely grants Pinnacle the authority to collect payments from Debtors on the account in exchange for a fee. It appears that AmeriCredit did not transfer ownership of the account, and is therefore a creditor with standing to assert a claim in this

case. *See* 11 U.S.C. § 501(a) (“A creditor or an indenture trustee may file a proof of claim.”). Debtors’ objection to the proof of claim based on standing is overruled.

II.

In the alternative, Debtors argue that AmeriCredit’s proof of claim was not timely filed, and therefore should be disallowed in its entirety. AmeriCredit contends that it did not receive actual or other effective notice of Debtors’ bankruptcy case in time to file a timely proof of claim, such that disallowance of its claim would deprive it of due process.

In general, a proof of claim is timely if filed not later than ninety (90) days after the first date set for the meeting of creditors under § 341(a). Rule 3002(c). In this case, the meeting of creditors was set for August 6, 2007. AmeriCredit did not file its proof of claim until July 23, 2008, nearly a full year late. Notice of the meeting of creditors was sent to all of Debtors’ creditors at the addresses listed in the mailing matrix by the BNC. As previously indicated, the BNC certificate of service confirms that two separate notices were sent to 7825 Washington Ave S Ste 310, Minneapolis,

MN 55439-2424. The first was addressed to “AmeriCredit Corp.” and the second was addressed to Pinnacle.

At the hearing, Joseph M. Lopez, a representative for AmeriCredit, testified that the address listed in the BNC certificate of service is not an AmeriCredit address, and that AmeriCredit did not receive the notice sent by the BNC regarding the meeting of creditors. However, according to Lopez, AmeriCredit became aware of Debtors’ bankruptcy case when one of its electronic vendors performed a data “scrub” which revealed the filing. That vendor then notified AmeriCredit of Debtors’ bankruptcy. Lopez testified that while AmeriCredit filed its proof of claim six days after receiving this information about Debtors’ case, by this time, the deadline to file proofs of claims had long since passed.

The Court has limited authority under the Rules to extend the time within which to file a proof of claim. *In re Johnson*, 262 B.R. 831, 845 (Bankr. D. Idaho 2001). As the Court explained:

[w]hile the Court is generally granted authority under Rule 9006(b)(2) to enlarge the time for taking certain acts, subsection (b)(3) of the Rule

specifically limits this ability with regard to the time limits established by Rule 3002 to the extent and under the conditions stated in [that rule].

Id. (citing Rule 9006(b)(3)). None of the circumstances described in Rule 3002(c) that permit the Court to extend the time for filing a proof of claim apply in this case. Given the unambiguous language of Rule 9006(b)(3), the Court concludes it is simply not permitted to equitably enlarge the time period for filing proofs of claims under these circumstances.

Gardenhire v. IRS (In re Gardenhire), 209 F.3d 1145, 1148 (9th Cir. 2000); *In re Johnson*, 262 B.R. at 845; *In re Downey*, 00.1 I.B.C.R. 34, 35 (Bankr. D. Idaho 2000).

AmeriCredit's proof of claim must be disallowed for purposes of sharing in distributions under Debtors' confirmed chapter 13 plan because it was not timely filed. *See* 11 U.S.C. § 502(b)(9). However, AmeriCredit is not without a remedy. As the Ninth Circuit has explained, "[a] debtor who completes his payments under a Chapter 13 plan is entitled to a broad discharge of 'all debts provided for by the plan.'" *Ellett v. Stanislaus*, 506 F.3d 774, 777 (9th Cir. 2007) (quoting 11 U.S.C. § 1328(a)). But in order for

a plan to “provide for” a claim, “the plan must ‘make a provision for it,’ *i.e.*, it must deal with it or refer to it.” *Lawrence Tractor Co. v. Gregory (In re Gregory)*, 705 F.2d 1118, 1122 (9th Cir. 1983). “[A] claim cannot be considered to have been provided for by the plan if a creditor does not receive proper notice of the proceedings.” *Ellett*, 506 F.3d at 777 (quoting *IRS v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240, 1244 (8th Cir. 1997)).

Here, the evidence shows that Debtors listed an incorrect address for AmeriCredit in their schedules and mailing matrix, and thus proper notice of the bankruptcy proceedings was never sent to AmeriCredit by the BNC. Because AmeriCredit was not given “proper notice” of the bankruptcy filing, under the controlling case law, Debtors’ chapter 13 plan did not “provide for” AmeriCredit’s claim. Therefore, AmeriCredit’s claim will not be discharged assuming Debtors successfully complete their confirmed plan. *See In re Stone*, 97.3 I.B.C.R. 74, 74 (Bankr. D. Idaho 1997).

Conclusion

Debtors’ amended objection to AmeriCredit’s proof of claim will be sustained, and AmeriCredit’s claim will be disallowed. However, because

AmeriCredit was not given proper notice of the bankruptcy proceedings, its claim will not be subject to discharge if Debtors complete their chapter 13 plan. A separate order will be entered.

Dated: January 9, 2009



Honorable Jim D. Pappas
United States Bankruptcy Judge