UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

SUSAN J. NEAL — Case No. 99-10444-MAM-13

Debtor

SUSAN J. NEAL, on behalf of herself and all others similarly situated

Plaintiff

vs. — Adv. No. 03-01190

CHASE MANHATTAN BANK, N.A.

Defendant

ORDER DENYING DEFENDANT'S MOTION TO DISMISS AND PARTIALLY GRANTING DEFENDANT'S MOTION TO STAY

Steve Olen, Steven L. Nicolas, and Royce Ray, Attorneys for the Plaintiff, Mobile, AL
Sara Anne Ford and James F. Hughey, III, Attorneys for the Defendant, Birmingham, AL
Eric J. Breithaupt and Daniel D. Sparks, Attorneys for the Defendant, Birmingham, AL

This case is before the Court on the defendant's motion to dismiss the case pursuant to Fed. R. Bankr. P. 7012(b) and Fed. R. Civ. P. 12(b)(6) and (7). This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § § 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons given below, the Court is denying the motion of Chase Manhattan Bank to dismiss the case.

FACTS

Susan Neal filed a chapter 13 case on February 4, 1999. She confirmed a plan on March 26, 1999. The plan, as confirmed, pays 100 % to all unsecured creditors. One of her unsecured creditors is Chase Manhattan Bank. She owed it for debts on three credit card accounts.[1] Chase filed proofs of claim before confirmation of Ms. Neal's plan for two of the accounts but not the third. On one of the proofs of claim, Chase included in the total some amount of postpetition interest charges. The proof of claim does not disclose the fact that postpetition charges are included. It does state that the claim amount was incurred on "various pre-petition dates." Ms. Neal did not object to Chase's claim at any time before the filing of this adversary case.

The debtor in this adversary case seeks to enjoin Chase from collecting the postpetition charges and from claiming them at any time, to have the Court declare the practice of adding these charges to proofs of claim illegal and improper, to require Chase to credit or pay any illegal charges to the debtor, to disgorge any profits received from the illegal charges and to award actual damages, attorneys fees, costs and punitive damages or sanctions from Chase. The plaintiff requests that a nationwide class be certified for relief.

LAW

Chase Manhattan Bank seeks dismissal of this case on five different grounds: (1) res judicata effect of the confirmed plan; (2) laches; (3) no private right of action under 11 U.S.C.§ 105; (4) failure to join an indispensable party; and (5) incorporation of all of the

[1]Ms. Neal's owed over $11,700 to Chase. Chase filed proofs of claim for only $4,328.79. Chase did not file a claim for the third debt of over $7,300.

arguments made in a motion to dismiss made in a similar suit, *Corner v. First USA Bank*. The plaintiff asserts that the defendant is incorrect in its arguments.

The defendant seeks dismissal of this complaint pursuant to Fed. R. Bankr. P. 7012(b) which incorporates Fed. R. Civ. P. 12(b)(6) and (7). Chase bears the burden of proving that, based upon the facts stated in the complaint, it is entitled to a dismissal. Under Fed. R.Civ. P. 12(b)(6), dismissal of a complaint is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Blackston v. Alabama*, 30 F. 3d 117, 120 (11th Cir. 1994) (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984)). "On a motion to dismiss the court must accept as true all facts alleged and draw all inferences therefrom in the light most favorable to the plaintiffs." *Hornfield v. City of North Miami Beach*, 29 F. Supp. 2d 1357, 1361 (S.D. Fla. 1998). A very low threshold must be reached for a complaint to survive a motion to dismiss. *Id*. at 1361 (citing to *Ancata v. Prison Health Servs., Inc.*, 769 F. 2d 700, 703 (11th Cir. 1985)).

Pursuant to Fed. R. Civ. P.12(b)(7), a complaint may be dismissed for failure to join a party under Rule 19 of the Federal Rules. "[T]he movant bears the burden of:(1) producing evidence showing the nature of the interest possessed by an absent party; and (2) that the protection of that interest will be impaired if the party is not joined." *Swartz v. Beach*, 229 F. Supp. 2d 1239, 1250 (D. Wyo. 2002).

The Court will address each issue raised by the defendant in turn.

I.

The first issue raised by Chase is the res judicata effect of Ms. Neal's confirmed plan. Chase argues that once the plan was confirmed, all issues between the debtor and Chase in regard to its claim were resolved. A debtor like Ms. Neal cannot postconfirmation object to the claim of any creditor, at least any creditor who filed its claim before confirmation. Chase cites two cases in particular as support for this proposition, *Wallis v. Justice Oaks II, Ltd. (In re Justice Oaks II, Ltd.)*, 898 F. 2d 1544 (11th Cir.), cert. denied, 498 U.S. 959 (1990) and *Universal Amer. Mtge. Co. v. Bateman (In re Bateman)*, 331 F. 3d 821 (11th Cir. 2003).

The Court does not need to consider the res judicata argument of Chase in this case. Even if *Bateman* or *Justice Oaks* would give preclusive effect to the confirmation in this case, and with it Chase's claim, they do not preclude Ms. Neal's cause of action. Section 502(j) allows her to object to Chase's claim even if the confirmation order did have claim preclusive effect. Section 502(j) allows a court to reconsider allowance or disallowance of a claim based upon the "equities of the case." The court must decide this motion assuming the facts stated in the complaint are true. The facts alleged, if true, state sufficient grounds for reconsideration.

In this case, the creditor filed a proof of claim that stated that the claim was incurred on "various prepetition dates." The debtor had a right to rely on the creditor's disclosures in the proof of claim. Not only did the claim state that it was based on prepetition charges only, it did not contain an itemization indicating it contained any postpetition elements. Unsecured prepetition claims are never allowed to include postpetition interest. 11 U.S.C. § 502(b)(2). Therefore, with the creditor's statements in the claim and the undisclosed postpetition charges, there are ample grounds for reconsideration. Failure to disclose a charge which would be

objectionable if itemized provides an equitable ground for reconsideration. Plaintiff asserts a similar postpetition charge was added to proofs of claim in numerous debtors' cases. A motion to dismiss is due to be denied on these facts. Ms. Neal has established a ground for reconsideration based upon her complaint.

II.

The second issue raised by Chase is laches. Chase asserts that Ms. Neal did not file an objection to Chase's claim until four years after her plan was confirmed. Chase argues that this should result in dismissal of this claim and a denial of reconsideration. The debtor asserts that laches does not apply because Chase has unclean hands, the delay of the debtor was not unreasonable, and the delay has not been shown to cause any prejudice to Chase.

The doctrine of laches is an equitable doctrine. It usually is "not appropriately raised in a motion to dismiss" because it is a fact driven defense and a motion to dismiss relies on legal principles for success. *Lennon v. Seaman*, 63 F. Supp. 2d 428, 439 (S.D.N.Y. 1999). The Court will consider the argument now because the Court believes that the complaint and documents that the parties have asked the Court to look at in conjunction with the motion are sufficient to resolve the matter.

Laches, as an equitable remedy, does require the invoker to have clean hands. *E.T. Manufacturing Company, Inc. v. Xomed, Inc.*, 679 F. Supp. 1082 (M.D. Fla. 1987). In 1999, Chase filed a claim that did not disclose that it contained unallowable charges. The claim form stated that the claim was incurred on "various pre-petition dates." If, as the complaint alleges, Chase repeatedly placed postpetition charges on proofs of claim, Chase has unclean hands. The U.S. Supreme Court has stated that a party seeking equity "shall have acted fairly and without

fraud or deceit as to the controversy in issue." *Precision Instrument Mfg. Co.. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814-15, 65 S. Ct. 993, 997, 89 L. Ed. 1381 (1945). At least as alleged in the complaint, Chase does not have clean hands since it added postpetition charges to numerous claims.

For laches to be invoked, a court must weigh the equities of the situation. Laches requires "a showing of both unreasonable delay and prejudice to the party who raises the defense." *Flournoy v. Century Finance Company (In re Henderson)*. 577 F. 2d 997, 1001 (5th Cir. 1978): *Shook v. CBIC (In re Shook)*, 278 B.R. 815 (B.A.P. 9th Cir. 2002). Neither has been shown here.

Chase has not shown any prejudice to it due to Ms. Neal's action. "Classic elements of undue prejudice, for purposes of determining the applicability of the doctrine of laches, include the unavailability of witnesses, changed personnel, and the loss of pertinent records." *Homewood City Board of Education v. Ala. State Tenure Comm'n*, 716 So. 2d 1208, 1212 (Ala. Civ. App. 1998 (quoting the dissent in *Ex parte Grubbs*, 542 So. 2d 927, 928 (Ala. 1989)). Chase has not alleged that facts are unavailable to it due to passage of time or that witnesses are unavailable. Chase argues that prejudice is presumed and the debtor must rebut the presumption. It cites to the *Shook* case, *supra*. at p. 830, for this proposition. The Court disagrees. The party asserting laches must prove prejudice and unreasonable delay. *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 420, 102 S.Ct. 1137, 1148, 71 L. Ed. 2d 250 (1982) (stating "laches . . . requires the defendant to prove inexcusable delay and prejudice"); *Keefe v. Bahama Cruise Line, Inc* , 867 F. 2d 1318 (11th Cir. 1989) (same); *Clark Construction Co., Inc. v. Pena*, 930 F. Supp. 1470 (M.D. Ala. 1996) (same); *Chafran v. Ala. Bd. of Chiropractic Examiners*, 647 So. 2d 759, 762 (Ala.

Civ. App. 1994) (same). However, regardless of to whom the burden of proof falls, the facts support the debtor's position. Chase's argument that it is prejudiced because it would have amended the claim promptly if asked to do so 4 years ago does not establish prejudice.[2] It can make that offer now if it feels that curing the defect will aid its case. However, the issue in this case is not just Ms. Neal's claim, but Chase's pattern of claims filing over numerous years and numerous cases.

The second prong of the laches test is that Ms. Neal must not have acted after an unreasonable delay. Ms. Neal did wait four years to lodge her objection, but that was due to her lack of notice of the claim until that time. As stated by the Alabama Court of Civil Appeals, "[a] person cannot be said to be guilty of laches until he has knowledge of the facts which entitles(sic) him to relief and thereafter manifests a want of diligence in asserting his rights . . . or unless he has knowledge of his rights or the claim of the opposing party or was possessed of such information as would put a person of ordinary prudence and diligence on inquiry." *Oliver v. Hayes Int'l Corp*., 456 So. 2d 802, 806 (Ala. Civ. App. 1984) (cites omitted). Ms. Neal alleges that she did not know that Chase had included postpetition charges. The complaint states that Chase had a practice of including the charges in claims in numerous bankruptcy cases. These facts, as alleged, do not establish unreasonable delay by Ms. Neal. She had a right to presume that creditors filing claims under penalty of perjury were not including unallowable amounts in the claim, particularly when the claim said it was incurred on "various pre-petition dates."

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[2]The fact that Chase would have filed a proof of claim for the debt it never filed a claim for is not the type of prejudice weighed by the courts. The prejudice is only as to whether a party can defend itself now as well as it would have in the past.

III.

Chase asserts that there is no private right of action under section 105 of the Bankruptcy Code. For the same reasons that were explained in the opinion recently rendered in *Corner v. First Bank, N.A. (In re Corner),* Order Partially Granting and Partially Denying Defendant's Motion to Dismiss, Adv. No. 03-01034, Case No. 02-13156 (Bankr. S.D. Ala. July 3, 2003), this Court concludes that there is a possible ground for relief under section 105 stated in the complaint. That opinion is incorporated by reference.

IV.

Chase asserts that Ms. Neal failed to include an indispensable party in her suit--the chapter 13 trustee in her case as well as the chapter 13 trustees of all the potential debtor class members. Again, the Court addressed this issue in its opinion in *Corner* concluding that section 105 relief did not require joinder of any chapter 13 trustees. *Id.* The *Corner* decision is incorporated by reference.

V.

Lastly, Chase incorporates all of the other applicable arguments made by First Bank in the *Corner* case that have not been addressed specifically in this opinion. The *Corner* opinion is the Court's response to those arguments and is incorporated by reference.

VI.

Chase also filed a motion to stay discovery until resolution of the motion to dismiss. The Court concludes that it is appropriate to grant the motion to the extent of staying discovery for the period of time the motion to dismiss is under advisement.

IT IS ORDERED that:

1. The Motion of Chase Manhattan Bank to dismiss the complaint is DENIED; and

2. The Motion of Chase Manhattan Bank to stay discovery is GRANTED to the extent of staying discovery until the entry of this order.

Dated: September 25, 2003

Margaret A. Mahoney

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE