

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re : Case No. 04-64527  
Robert Lee Miller, : Chapter 7  
Debtor. : (Judge Caldwell)

**ORDER DENYING OBJECTION TO DISCHARGE OF CHEUGH & SCHLEGEL,  
INC. AND WITHHOLDING DISCHARGE PENDING  
PROOF OF NOTICE**

On December 20, 2004, a letter that was described as an “Objection to Discharge” was filed by Cheugh & Schlegel, Inc. (“Creditor”). A response was filed on behalf of Robert Lee Miller (“Debtor”) on March 29, 2005. The Court has concluded that the purported Objection to Discharge should be denied, because the Creditor failed to satisfy the timely filing requirements of Rule 4004(a) of the Federal Rules of Bankruptcy Procedure. Furthermore, the Court does not have sufficient information to apply the doctrine of equitable tolling. A brief history will illustrate the bases for this decision.

The Debtor filed a chapter 7 petition on September 14, 2004. The Debtor listed the Creditor on his Schedules and Verification of Creditor Matrix, utilizing a Henderson Road address, in Columbus, Ohio. On September 17, 2004, the Court issued a notice setting the Section 341 Meeting of Creditors for October 18, 2004. The deadline for filing complaints objecting to discharge or for the determination of dischargeability of debts was December 17, 2004. On November 3, 2004, a Notice of Rescheduled Meeting of Creditors was filed on

behalf of the Debtor. The 341 meeting was continued to November 29, 2004. It does not appear, however, that all creditors were given notice of the continued meeting.

On December 17, 2004, the Creditor addressed a letter to the Court that purported to object to the Debtor's discharge. The Court received the letter on December 20, 2004, and docketed it as an Objection to Discharge on December 29, 2004. It is not clear from the letter however, whether the Creditor intended to proceed under Section 523 or 727 of the United States Bankruptcy Code.

In the December 17, 2004, letter, the Creditor asserted that the Debtor's former company owed \$7,137.00 for two construction projects that the Creditor performed for the Debtor, and for materials the Creditor provided for a third project during 2003. The Creditor alleged that the Debtor submitted false documents to the owners of the construction projects stating that the subcontractors and material men were paid. Furthermore, the Creditor maintained that it forfeited mechanic's lien rights, after multiple contacts with the Debtor regarding payment. It is alleged that the Debtor requested that the Creditor refrain from filing liens that could jeopardize his ability to receive payment.

On February 22, 2005, a hearing was held on the Creditor's Objection, with Marshall D. Cohen, appearing as counsel for the Debtor, and John B. Hubbard, Vice-President of Cheugh & Schlegel, Inc., appearing for the Creditor. The Court took the matter under advisement. On March 1, 2005, the Court entered a Scheduling Order for the parties to file post-hearing memoranda within thirty days, on the issue of whether the Creditor was time barred to oppose the Debtor's discharge. The Court also advised that the Creditor could obtain counsel to assist

in the preparation of a memorandum.

On March 29, 2005, the Debtor filed a Response, pursuant to the terms of the Scheduling Order. The Debtor asserted that the Creditor's Objection to Discharge should be dismissed, because the Creditor failed to timely file a complaint objecting to discharge, or move the Court for an extension, pursuant to Rule 4004(a) and (b) of the Federal Rules of Bankruptcy Procedure. Moreover, the Debtor asserted that the Creditor's claim that it misunderstood the filing deadline, did not satisfy the test for equitable tolling. The Creditor did not file a post-hearing memorandum.

Based upon a review of the pleadings, the Court concludes that the Creditor's purported Objection to Discharge is denied, because the Creditor has not satisfied the timely filing requirements of Rule 4004(a) of the Federal Rules of Bankruptcy Procedure, or established the elements of the doctrine of equitable tolling.

Rule 4004(a) of the Federal Rules of Bankruptcy Procedure, provides that, "[i]n a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." (emphasis added). Rule 4004(b) of the Federal Rules of Bankruptcy Procedure, provides for an extension of time to file a complaint objecting to discharge, for cause, when the motion is filed before time has expired.

The Supreme Court has held that Rule 4004 is not jurisdictional. Kontrick v. Ryan, 540 U.S. 443, 447 (2004). The Sixth Circuit has held that under certain circumstances, a creditor's

untimely challenge may be equitably tolled. Nardei v. Maughan (In re Maughan), 340 F.3d 337, 344 (6th Cir. 2004). The burden, however, is on the claimant, “to plead and prove facts supporting equitable avoidance of a timeliness defense.” Hampton v. Caldera, 58 Fed. Appx. 158, 160 (6th Cir. 2003).

In Maughan, the Sixth Circuit considered five factors to determine whether the doctrine of equitable tolling should apply to a creditor’s untimely discharge challenge. Maughan, 340 F.3d at 344. The five factors include: (1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one’s rights; (4) absence of prejudice to the defendant; and (5) a plaintiff’s reasonableness in remaining ignorant of the notice requirement.

The Creditor did not file a post-hearing memorandum or obtain counsel. On this basis the Court does not have sufficient information to apply the doctrine of equitable tolling. Accordingly, the Creditor’s Objection to Discharge is denied as untimely.

It is further ordered, however, that a discharge shall not be issued until the Debtor provides proof that all creditors were given notice of the continued meeting of creditors.

**IT IS SO ORDERED.**

Date: \_\_\_\_\_

\_\_\_\_\_  
Charles M. Caldwell  
United States Bankruptcy Judge

Copies to:

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