

11 USC §521(1)
11 USC §523(a)(3)
11 USC §523(c)
FRBP 4007(c)

Pension Benefit Guaranty Corp v. Hanna 91-3458-S

In re Hanna Case NO. 390-33990-S11

2/21/92

DDS

Unpublished

The PBGC filed a complaint to determine that its claim was not dischargeable because the debtor had breached a fiduciary obligation when he made loans from the pension plan to his related financing corporation. The complaint was filed 10 months after the expiration of the deadline imposed by FRBP 4007(c).

The PBGC and US Attorney were both listed as a precaution in the debtor's schedules, and were both included on the clerk's certificate of mailing of the order for meeting of creditors. The court rejected the PBGC's argument that it was not properly scheduled because it was only listed as a precautionary creditor, since the exception to the deadline found in §523(a)(3) only applies if a creditor is neither listed or scheduled. The creditor was properly listed.

The court also rejected the argument that the address was inadequate because it lacked the room number in the building to which the notice was sent. The complaint was dismissed as untimely.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	390-33990-S11,
DANIEL C. HANNA, et al,)	390-34210-S11, 390-34211-S11
)	(Administratively
Debtor,)	Consolidated)
)	
PENSION BENEFIT GUARANTY)	Adversary Proceeding No.
CORP.,)	91-3458-S
)	
Plaintiff,)	MEMORANDUM IN SUPPORT OF
)	ORDER DISMISSING CASE
v.)	
)	
DANIEL C. HANNA,)	
)	
Defendant.)	

The Pension Benefit Guaranty Corporation (PBGC) filed this complaint to obtain a judgment against Daniel C. Hanna (Hanna) for its losses and a determination that the judgment is not dischargeable. Hanna moved for judgment on the pleadings because the time set by 11 U.S.C. § 523(c) and Fed. R. Bankr. P. 4007(c) for objecting to the dischargeability of a debt had expired before PBGC filed its complaint. To the extent factual

matters were raised, the court treated the motion as a motion for summary judgment under Fed. R. Civ. P. 16(c), (Fed. R. Bankr. P. 7016). For the following reasons, Hanna's motion should be granted and this adversary proceeding should be dismissed.

Hanna is a contributing sponsor of the Hanna Employees Retirement Plan (Plan) which is guaranteed by the PBGC. PBGC claims that Hanna breached a fiduciary duty when he authorized \$800,000 in loans from the Plan to Hanna Acceptance Corporation (HAC). Hanna owned most of the stock in HAC.

The loans were made in December of 1989. Hanna filed chapter 11 on July 27, 1990 and HAC filed on August 10, 1990. The PBGC was listed on Hanna's supplemental schedules filed on August 16, 1990, under the heading "Debtor does not believe it owes money to the following but would like them listed as a precaution." Number 753 of the supplemental creditors lists:

PENSION BENEFIT GUARANTEE CORP
2020 "K" STREET, N W
WASHINGTON D C 20006-1806

Number 889 of the supplemental creditors lists:

TURNER, CHARLES
U.S. ATTORNEY - DIST. OF OR
620 S.W. MAIN ST. #312
PORTLAND, OR 97205

Both the PBGC and Charles Turner were included on the clerk's certificate of service which declares that PBGC and Turner were served on September 18, 1990 with a copy of the

Order for Meeting of Creditors, combined with notice thereof and automatic stay. Paragraph seven of the notice warned creditors that complaints objecting to the dischargeability of a debt under 11 USC §523(c) had to be filed within sixty days of October 11, 1990. The PBGC filed this complaint on September 19, 1991.

While admitting that the complaint was filed long after the deadline expired, the PBGC raises three defenses to the motion for judgment on the pleadings. PBGC claims that the address was inadequate, that others may not have received the notice, and that it was not a scheduled creditor, so it is not bound by the deadline to file a nondischargeability complaint.

None of these arguments are persuasive. The debtor followed all of the rules and is entitled to the benefit of those rules. National rule sets forth the notice requirements to the United States in Fed. R. Bankr. P. 2002(j)(4). That rule requires that notices be sent to the United States attorney for the district in which the case is pending and to the department, agency or instrumentality of the United States through which the debtor became indebted. The agency address on the clerk's certificate is the same address which is listed on all pleadings the PBGC has filed in this case. The PBGC complains that the address was inadequate because it was not directed to Office of Program Operations Room 5300A. PBGC

argues that since it is a large operation, it should be excused from deadlines unless the debtor designates a specific room in the address.

The PBGC memorandum in opposition to Hanna's motion states on page five that "in 1991 (PBGC) received notice of hundreds of bankruptcy filings and currently has almost 700 active bankruptcy cases outstanding." Under those circumstances it is logical to conclude that the PBGC's mail room personnel should know where to direct bankruptcy related notices. In addition, the PBGC admits that the address was sufficient to get the plan, disclosures statement and ballot to the proper person. The problem appears to be an internal inefficiency at PBGC rather than an inadequate address. I find that the address in Hanna's schedules was sufficient to provide notice of the bankruptcy and corresponding deadlines to the PBGC.

The next argument is that other creditors may not have received the notice of the bankruptcy. The PBGC then cites several cases in which the deadline to file a dischargeability complaint was waived due to an error by the bankruptcy court clerk. PBGC provided no evidence of any error by the court or that the notice was not mailed as certified.

In a footnote to it's memoranda, the PBGC "reserves the right to make a factual showing, if necessary, that notice was in fact not received by all parties in this action." At the

hearing on this motion, PBGC sought additional time for discovery. Assuming relevance, the PBGC is not entitled to any more time to provide factual support for this speculative contention. It has already had over two months to do the minimal discovery that would be needed to determine whether the notice was sent. That fact could be easily established by a minimal attendance at the §341(a) meeting of creditors or the lack of claims filed with the court on the computer generated claim form included on the notice. Plaintiff has not excused its lack of effort.

The clerk's certificate of service creates a presumption of receipt of a notice. Moody v. Bucknum (In re Bucknum), 951 F.2d 204 (9th Cir. 1991). Mr. Harbarchewski's affidavit does not rebut the presumption. It merely states that the notice does not appear in the PBGC data base, so he concludes the notice was not received.

The PBGC contends it was not a "scheduled" creditor because it was listed as a precautionary creditor, so that the deadline imposed by 11 USC §523(c) and FRBP 4007(c) do not apply. The exception to the deadline created by 11 USC §523(a)(3) only applies if a creditor is neither listed nor scheduled under section 521(1). Even though Hanna's schedules did not contain an amount owed to the PBGC, the agency was listed among the precautionary creditors. Such creditors

receive the same notice of the bankruptcy as a creditor with a scheduled debt. This argument must also fail.

PBGC was listed with a correct address and is presumed to have received the notice of the deadline to file a dischargeability complaint in this case. The complaint filed was not timely. Hanna is entitled to judgment on the pleadings. A separate judgment will be entered.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Jeffrey S. Hops
Jean Marie Breen
Charles M. Zennache
Leon Simson