UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE

In re: MONTREAL MAINE & ATLANTIC RAILWAY, LTD. Debtor.	Bk. No. 13-10670 Chapter 11

TRUSTEE'S OBJECTION TO MOTION FOR EXTENSION OF TIME TO FILE PROOF OF CLAIM BY CREDITOR TAFISA CANADA, INC.

Robert J. Keach, the chapter 11 trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. ("MMA" or the "Debtor"), hereby objects (the "Objection")[1] to the *Motion for Extension of Time to File Proof of Claim by Creditor Tafisa Canada, Inc.* [D.E. 1820] (the "Motion") filed by Tafisa Canada, Inc. ("Tafisa"). In support of this Objection, the Trustee states as follows:

JURISDICTION, VENUE AND BASES FOR RELIEF

1. The United States District Court for the District of Maine (the "District Court") has original, but not exclusive, jurisdiction over this chapter 11 case pursuant to 28 U.S.C. § 1334(a) and over this Objection pursuant to 28 U.S.C. § 1334(b). Pursuant to 28 U.S.C. § 157(a) and Rule 83.6 of the District Court's local rules, the District Court has authority to refer and has referred this chapter 11 case, and, accordingly, this Objection, to this Court.

2. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has constitutional authority to enter judgment in this action.

[1] The Trustee requests a waiver of Rule 9013-1(f) of the Local Rules of the Bankruptcy Court for the District of Maine. In light of the compound nature of the allegations and legal conclusions set forth in each paragraph of the Motion, a simple "admit/deny" response is impractical and, in any event, each of the allegations set forth in the Motion is addressed in the body of this Objection.

3. Venue over this chapter 11 case is proper in this district pursuant to 28 U.S.C. § 1408, and venue over this proceeding is proper in this district pursuant to 28 U.S.C. § 1409.

BACKGROUND

A. The Derailment and the Debtor's Bankruptcy Filing

4. On July 6, 2013, an unmanned eastbound MMA train with 72 carloads of crude oil, a buffer car, and 5 locomotive units derailed in Lac-Mégantic, Québec (the "Derailment"). The transportation of the crude oil had begun in New Town, North Dakota by the Canadian Pacific Railway ("CP") and MMA Canada later accepted the rail cars from CP at Saint-Jean, Québec. The crude oil was to be transported via the Saint-Jean-Lac-Mégantic line through Maine to its ultimate destination in Saint John, New Brunswick.

5. The Derailment set off several massive explosions, destroyed part of downtown Lac-Mégantic, and is presumed to have killed 47 people. A large quantity of oil was released into the environment, necessitating an extensive cleanup effort. As a result of the Derailment and the related injuries, deaths, and property damage, lawsuits were filed against the Debtor in both the United States and Canada. After the Derailment, Canadian train activity was temporarily halted between Maine and Québec on the MMA Canada line, resulting in the Debtor losing much of its freight business. These effects of the Derailment caused the Debtor's aggregate gross revenues to fall drastically to approximately $1 million per month.

6. On August 7, 2013, the Debtor filed a voluntary petition for relief commencing a case under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Maine (the "Case"). Simultaneously, MMA Canada filed for protection under Canada's Companies' Creditors Arrangement Act (Court File No. 450-11-000167-134). On August 21, 2013, the Office of the United States Trustee (the "U.S. Trustee") appointed the Trustee to serve as trustee in the Debtor's Case pursuant to 11 U.S.C. § 1163 [D.E. No. 64].

B. Confirmation of the Plan, the Bar Date, and Tafisa's Filing of the Motion

7. On March 20, 2014, the Court entered the *Order Pursuant to 11 U.S.C. Sections 105(a) and 502(b)(9), Fed. R. Bankr. P. 3002 and 3003(c)(3), and D. Me. LBR 3003-1 Establishing Deadline for Filing Proofs of Claim and Procedures Relating Thereto and Approving Form and Manner of Notice Thereof* [D.E. 783] (the "Bar Date Order"), and a similar order was entered in the CCAA Case. The Bar Date Order set June 13, 2014 as the deadline to file proofs of claim (the "Bar Date").[2]

8. On July 15, 2015, the Trustee filed the *Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015* [D.E. 1534].

9. On October 9, 2015, the Bankruptcy Court confirmed the Trustee's Revised First Amended Plan of Liquidation Dated July 15, 2015 (as Amended October 8, 2015) [D.E. 1801] (the "Confirmation Order," and the plan confirmed thereby and attached thereto, the "Plan").

10. On October 14, 2015—in the week following the Plan's confirmation and sixteen months after the Bar Date, Tafisa filed the Motion.

11. On October 24, 2015, the Confirmation Order became a final, non-appealable order.

OBJECTION

A. The Legal Standard for Relief from Bar Date Order

12. The purpose of a claims bar date "is to provide the debtor and its creditors with finality and to ensure the swift distribution" of assets of the estate. In re Aboody, 223 B.R. 36, 38 (B.A.P. 1st Cir. 1998) (quoting Mercado-Boneta v. Administracion del Fondo de Compensacion Al Paciente through the Ins. Com'r of Puerto Rico, 125 F.3d 9, 17 (1st Cir. 1997)). Indeed, a claims bar date is "necessary to the efficient functioning of the bankruptcy

[2] On June 13, 2014, the Court entered the *Order Amending the Deadline for Filing Wrongful Death Proofs of Claim* [D.E. 974], extending the deadline to file proofs of claim for wrongful death until July 14, 2014.

system." In re Brooks, 370 B.R. 194, 203 (Bankr. C.D. Ill. 2007). Accordingly, under Federal Rule of Bankruptcy Procedure 9006(b), the failure to file a proof of claim by the claims bar date requires a showing that "the failure to act was the result of excusable neglect." Fed. R. Bankr. P. 9006(b). The burden of proving the existence of excusable neglect is on the party seeking relief from the bar date, and the movant must prove it by a preponderance of the evidence. *See* In re Wrenn Associates, Inc., No. 04-11408, 2005 WL 3369272, *3 (Bankr. D.N.H. Nov. 29, 2005); In re Engage, Inc., 315 B.R. 217, 223 (Bankr. D. Mass. 2004).

13. A showing of excusable neglect is a two-part process. ***First***, the movant must show that the delay in filing is a result of neglect. *See* In re SPR Corp., 45 F.3d 70, 72 (4th Cir. 1995); Engage, 315 B.R. at 223. To "neglect" means "to give little attention or respect to a matter, or, closer to the point for our purposes, to leave undone or unattended to especially through carelessness." Pioneer Invest. Servs.. Co. v. Brunswick L.P., 507 U.S. 380, 388 (1993) (internal quotations and citations omitted). A creditor's deliberate, conscious decision not to file a proof of claim does not constitute neglect (let alone excusable neglect). *See, e.g.*, In re Mahoney Hawkes, LLP, 272 B.R. 19, 20 (B.A.P. 1st Cir. 2002) (finding that a creditor's deliberate decision to withhold filing a proof of claim "was borne of calculation rather than neglect").[3]

14. ***Second***, the movant must show that such neglect was "excusable." The determination of whether neglect is excusable "is at bottom an equitable one, taking account of

[3] *See also* In re Banco Latino Int'l, 310 B.R. 780, 785 (S.D. Fla. 2004) (finding that conscious disregard of the bar date and decision not to file timely proof of claim could not constitute excusable neglect for the purposes of Fed. Bankr. R. 9006(b)(1)); In re The Celotex Corp., 232 B.R. 493, 495-96 (M.D. Fla. 1999) (collecting cases, and holding that appellants' conscious decision not to file proofs of claim, after receiving sufficient notice of the bar date, did not constitute neglect and affirming disallowance of creditors' untimely claims); In re The Montaldo Corp., 209 B.R. 40, 48 (Bankr. M.D.N.C. 1997) ("Merely because a claim was filed late does not establish that such late filing occurred because of inadvertence, mistake, carelessness, or intervening circumstances beyond the party's control. For example, a party may make a conscious decision initially not to file a proof of claim and then decide later that it wishes to do so. . . . In such a situation, there simply is no neglect involved and relief based upon the concept of excusable neglect is not appropriate.").

all relevant circumstances surrounding the party's omission." Pioneer, 507 U.S. at 395. The "relevant circumstances" include (collectively, the "Pioneer Factors"): (a) the danger of prejudice to the debtor; (b) the length of the delay and its potential impact on judicial proceedings; (c) the reason for the delay, including whether it was within the reasonable control of the movant; and (d) whether the movant acted in good faith. Id.

15. Although a court may consider all of the Pioneer Factors, the third—the reason for the delay, and whether it was within the movant's reasonable control—is often considered the most important factor. *See, e.g.*, Graphic Commc'ns Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5 (1st Cir. 2001) (stating that "the four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry.") (internal quotations omitted); In re Musicland Holding Corp., 356 B.R. 603, 607 (Bankr. S.D.N.Y. 2006) (stating that "[t]he other factors are relevant in close cases" and listing cases that focus primarily on the third Pioneer Factor). In focusing on the third Pioneer Factor, courts have held that it is the creditor's responsibility to "explore and identify any potential claims" it might have against the debtor in a timely manner. *See* In re Nat'l Steel Corp., 316 B.R. 510, 518 (Bankr. N.D. Ill. 2004) (holding that creditor was not entitled to late file proof of claim, in part because failing to recognize existence of claim under applicable statute was within the creditor's reasonable control).

16. Significantly, ignorance of the Bankruptcy Code, bankruptcy law or the Bankruptcy Rules does not excuse a creditor's failure to file a claim. *See* Graphic Commc'ns, 270 F.3d at 6 ("Even in the wake of *Pioneer* . . . when a party's or counsel's misunderstanding of clear law . . . is the reason for the delay in filing the notice of appeal, we have continued to

uphold findings of 'no excusable neglect' where the court cited the absence of unique or extraordinary circumstances.").[4] In particular, a creditor's failure to understand that a contingent claim (which would have matured if creditor were found liable for injuries sustained by a third party) was a claim for which proof should have been filed does not justify a late filing of the claim. In re Agway, Inc., 313 B.R. 22, 30 (Bankr. N.D.N.Y. 2003).

B. Tafisa Has Not Satisfied the Standards for Relief from the Bar Date

17. In order to satisfy the standards set forth in Bankruptcy Rule 9006(b)(1), a party seeking an extension of a deadline must demonstrate, by a preponderance of the evidence, "excusable neglect." Fed. R. Bankr. P. 9006(b), Wrenn Assocs., 2005 WL 3369272, at *3; Engage, 315 B.R. at 223. But a conscious decision not to act does not constitute neglect, and even if it did, a failure to comply with a deadline due to ignorance of the law is not excusable as a matter of law. In addition, the first and second factors relevant to the analysis—prejudice to the debtor and length of delay—all weigh against an extension of the Bar Date for Tafisa. The Motion should thus be denied.

i. Tafisa Consciously Determined Not to File a Proof of Claim

18. Because Tafisa's failure to timely file a proof of claim was a conscious decision and did not constitute neglect, the Motion should be denied. As an initial matter, Tafisa does not allege that it did not receive notice of the Bar Date. Indeed, the Certificate of Service filed in relation to the Bar Date Order on April 3, 2014 [D.E. 810] (the "CoS") indicates that Tafisa received the Bar Date Order. CoS, Ex. C at 2. Instead, as justification for its failure to timely file a proof of claim, Tafisa states that it "did not know that it had *additional costs and expenses over and above the [$500,000 in] Federal Government assistance* until after June, 2014." Mot.

[4] *See also* Jefferson v. Hicks, 364 Fed. Appx. 281, 283 (8th Cir. 2010) (stating that "*Pioneer* 'did not alter the traditional rule that mistakes of law do not constitute excusable neglect'") (quoting Ceridian Corp. v. SCSC Corp., 212 F.3d 398, 404 (8th Cir. 2000)).

¶ 5 (emphasis added). But that statement infers that prior to the Bar Date, Tafisa knew that it *did have some* costs and expenses. Moreover, in the *Affidavit of Louis Brassard on Behalf of Tafisa Canada Inc.*, attached to the Motion as Exhibit 1 (the "Affidavit"), Tafisa affirms that the MMA train that had serviced Tafisa's industrial park "did not return to even a limited service until December 18, 2013," and "[f]ull [s]ervice was not restored before July/August of 2014," Aff. ¶ 3. Tafisa thus knew (a) by December 18, 2013, it might have suffered at least *some* damage due to MMA's complete cessation of rail service from the date of the Derailment through December 18, 2013 and (b) by the Bar Date, it might have suffered at least *some additional* damage due to the fact that rail service had only been partially restored during the period from December 18, 2013 through the Bar Date. Despite this knowledge (and knowledge of the Bar Date), Tafisa *consciously declined* to file a proof of claim, ostensibly because it was not certain that its damages would exceed the maximum aid offered by the Canadian Federal Government. *See* Mot. ¶ 5. But the fact that Tafisa has proffered a justification for its decision does not render that decision an omission constituting "neglect." As Bankruptcy Rule 9006 does not permit Tafisa to unwind a conscious decision, the Motion should be denied.

ii. The Pioneer Factors—Especially the Reason for the Late Filing—Weigh Against Granting the Motion for a Late Filed Claim

19. Even if Tafisa's decision not to file a proof of claim could be construed as neglect (and it should not be), such neglect was not excusable, and the Motion should be denied for that reason as well. As set forth above, in assessing whether neglect is "excusable" under Bankruptcy Rule 9006, courts consider the four Pioneer Factors, weighing the third most heavily.

20. Starting with the most important Pioneer Factor, the third—the reason for the delay, including whether it was within the reasonable control of the movant, weighs strongly in favor of disallowing the Motion. As set forth above, Tafisa knew in advance of the Bar Date

that it had suffered at least some damage from the Derailment, and it had actual notice of the Bar Date. It is irrelevant that Tafisa did not know the magnitude of its potential damages prior to the Bar Date; that Tafisa was aware that it might have *any* claim against MMA, in *any* amount, mandated the filing of a proof of claim, even if contingent and unliquidated, to preserve Tafisa's rights. At best, then, Tafisa was ignorant of applicable law. But such ignorance does not constitute excusable neglect under Bankruptcy Rule 9006. *See* Graphic Commc'ns, 270 F.3d at 6; Jefferson, 364 Fed. Appx. at 283 ("*Pioneer* did not alter the traditional rule that mistakes of law do not constitute excusable neglect.") (internal quotations omitted).[5]

21. In a similar situation, where a creditor failed to understand that it had to file a proof of claim to protect its rights, a bankruptcy court declined to permit the late filing of a claim. In In re Agway, Inc., an employee of Agway, Inc., a feed mill (the "Feed Mill"), had sued the manufacturer of a conveyor belt (the "Manufacturer") from which the employee had fallen during the course of his employ (the "Lawsuit"). 313 B.R. 22, 25 (Bankr. N.D.N.Y. 2003). The Manufacturer impleaded the Feed Mill, and the Feed Mill subsequently filed for chapter 11 protection. Id. at 26. The Lawsuit was stayed upon the chapter 11 filing, and the Feed Mill scheduled an unsecured claim for the Manufacturer of $0 value. Id. The Feed Mill served the Manufacturer with a notice of the bar date, which indicated that the Manufacturer may wish to contact an attorney, and a copy of a proof of claim evidencing the $0 claim and providing that the Manufacturer need not file a proof of claim if it agreed with the amount scheduled. *See* id. After reviewing its books and records, the Manufacturer determined that the

[5] Tafisa also asserts that it did not file a claim by the Bar Date because it was "continuing to deal with the tragedy and drama that affected [its] business, [its] employees and [its] town through 2013, 2014 and 2015." Aff. ¶ 5. The Trustee does not dispute that the Derailment was a tragedy that caused a great deal of damage and disruption to the town of Lac-Mégantic and its surroundings. But hundreds of other creditors affected by the Derailment were able to take the modest time required to file a proof of claim by the Bar Date, which was nearly one full year after the Derailment. The Trustee thus discounts this justification for neglect as disingenuous.

Feed Mill had a zero balance in the Manufacturer's accounts receivable, and decided not to contact an attorney or file a proof of claim. Id. Approximately three months after the bar date, the Manufacturer sought leave to file a claim to preserve its ability to recover from the Feed Mill on in connection with the Lawsuit. The Feed Mill opposed the motion, arguing that the Manufacturer's failure to timely file a claim was inexcusable because the Manufacturer had received actual notice of the bar date and had had plenty of time to file a claim. Id. at 27. In applying the Pioneer Factors, the bankruptcy court found, in relevant part, that the Manufacturer's lack of understanding that "a potential judgment in a pending lawsuit was a claim for bankruptcy purposes and that failing to file a proof of claim listing the potential judgment would nullify any present or future right [ ] to collect any portion of the judgment" did not constitute "excusable neglect" because the Manufacturer's understanding of its rights, even if that required consulting an attorney, was in the Manufacturer's reasonable control. Id. at 29-30. Finding that the balance of the Pioneer Factors did not counteract this conclusion, the bankruptcy court denied the Manufacturer's motion. Id. at 31.

22. Similarly, Tafisa's argument is essentially that it did not understand that it needed to file a proof of claim by the Bar Date in order to preserve its ability to prosecute a claim for damages arising from the Derailment, once the magnitude of those damages was known.[6] But like the Manufacturer in Agway, Tafisa's ignorance of the law (and/or its failure to timely consult counsel to assess what actions it needed to take to protect its rights) is insufficient to demonstrate excusable neglect. *See also* Nat'l Steel, 316 B.R. at 518 (creditor not entitled to late file proof of claim, in part because failing to recognize existence of claim under applicable statute was within the creditor's reasonable control).

[6] The Trustee reserves the right to contest any claim asserted by Tafisa should the Motion be granted.

23. The rest of the Pioneer Factors do not cure this insufficiency, as at least the first and second Pioneer Factors also weigh against Tafisa. With regard to the first factor—prejudice to the debtor, courts have held that prejudice to a debtor is greater when the creditor's delay in filing its claim "extends into the period in which the plan of reorganization is being negotiated, drafted, filed or confirmed." In re Kmart Corp., 315 B.R. 718, 722 (N.D. Ill. 2004) (internal quotations omitted). This is because at that point in a debtor's case, the trustee has already relied on the claims pool reflected by timely filed claims and negotiated a plan to treat those claims. The prejudice is exacerbated in this case, where this Court has already entered the Confirmation Order, and that order has become a final order. In voting on the Plan, parties relied on the estimated claims pool sizes, and determined their support for the Plan—at least in part—in accordance with same. The potential for a material enlargement of the amount of claims at this point would necessarily negatively impact the other constituents sharing in the affected pools—an outcome that would be unjust, given that the debtor's other creditors timely filed proofs of claim and facilitated the plan negotiation process.[7] Accordingly, the Debtor and its estate will be prejudiced by the grant of the Motion at this late stage in the case.

24. With regard to the second Pioneer Factor—the length of the delay and the potential impact on the proceedings, the Motion was filed sixteen months after the Bar Date, after the confirmation hearing, when the Trustee is in the process of administering the Plan.[8] The delay is undeniably significant, and intrudes upon Plan consummation and the claims administration process. *See, e.g.*, Kmart, 315 B.R. at 722 (finding the fact that claimant filed its

[7] In addition, Tafisa has asserted that $2,000,000 of its asserted claim (if permitted to be filed) would be entitled to priority treatment. Mot., Ex. C. If valid, which the Trustee reserves all rights to contest, such a large priority claim would have a meaningful impact on general unsecured creditors, and not simply dilute recoveries in a modest amount, as Tafisa asserts. *See* Mot. ¶ 6.

[8] Presumably as justification for this lengthy delay, the Motion states that "Tafisa was unaware that it was able to file a claim after June, 2014." Motion, ¶ 2. The Trustee contests that Tafisa can, indeed, file a claim under these circumstances, but in any event, ignorance of the law should not weigh in Tafisa's favor. *See, e.g.*, Graphic Commc'ns, 270 F.3d at 6; Jefferson, 364 Fed. Appx. at 283.

motion for leave to file a late claim seven months after the bar date, such that the motion was not heard until after confirmation of the plan, supported finding of no excusable neglect). The length of the delay accordingly weighs against granting the Motion.

25. The Trustee takes no position on whether Tafisa's sixteen-month late claim was filed in good faith, but even if it were, such good faith would not overcome the weight of the other Pioneer Factors, each of which weigh against granting the relief requested by Tafisa.

26. For all these reasons, the Trustee submits that the Motion should be denied.

RESERVATION OF RIGHTS

27. Nothing contained herein is or should be construed as: (i) an admission as to the validity or extent of any claim against the Debtor, (ii) a waiver of the Trustee's right to dispute any claim on any grounds, or (iii) a promise to pay any claim.

NOTICE

28. Notice of this Objection was served on the following parties on the date and in the manner set forth in the certificate of service: (a) Debtor's counsel; (b) United States. Trustee; (c) counsel to the Official Committee of Victims; and (d) counsel to Tafisa. The Trustee submits that no other or further notice need be provided.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Trustee requests that the Court: (i) sustain this Objection; (ii) deny the Motion in its entirety; and (iii) grant such other and further relief as may be just.

Dated: November 10, 2015

ROBERT J. KEACH,
CHAPTER 11 TRUSTEE OF MONTREAL MAINE & ATLANTIC RAILWAY, LTD.

By his attorneys:

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