

**This opinion is not intended for publication**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re: ) Case No. 03-15956  
)  
Neil J. O'Donnell, ) Chapter 7  
)  
Debtor. ) Judge Arthur I. Harris

EVIDENTIARY HEARING SCHEDULING ORDER

The last date for filing complaints objecting to discharge or to determine the dischargeability of debts in this case was August 18, 2003. On August 22, 2003, Mary Ann Rabin filed a motion to extend the time for filing a complaint objecting to discharge and to determine the dischargeability of debts (Docket #31). On August 26, 2003, the debtor filed an amended objection to the motion (Docket #33) arguing: (1) that the motion for an extension of time is itself untimely under Bankruptcy Rules 4004(b) and 4007(c),<sup>1</sup> and (2) that the facts do not warrant the application of equitable tolling, waiver, or estoppel permitted under the Sixth Circuit's recent decision in *In re Maughan*, \_\_\_ F.3d \_\_\_ (6th Cir. Aug. 14, 2003) Case No. 01-4151, 2003 WL 21939481.

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<sup>1</sup> Bankruptcy Rules 4004(b) and 4007(c) both provide in pertinent part that the motion requesting an extension of time "shall be filed before the time has expired." In addition, under Bankruptcy Rule 9006(b)(3), "The court may enlarge the time for taking action . . . only to the extent and under the conditions stated in those rules."

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The Court's decision in this matter is governed by the Sixth Circuit's opinion in *Maughan*, at least until the Supreme Court issues its own opinion involving the availability of equitable tolling, waiver, or estoppel under Bankruptcy Rules 4004(b) and 4007(c) in *Kontrick v. Ryan*, No. 02-819, *cert. granted*, 123 S. Ct. 1899 (2003). The Court will therefore conduct an evidentiary hearing and oral argument, at which time counsel should be prepared to address the application to this case of the five factors that should be considered when deciding to apply the doctrine of equitable tolling.<sup>2</sup>

“The five factors are: (1) lack of actual notice of filing requirement; (2) lack of constructive knowledge of 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.”

*Maughan*, slip op. at 12 (quoting *Andrews v. Orr*, 851 F.2d 146, 151 (6th Cir. 1988)). Alternatively, if the parties agree to submit this matter on stipulated facts, the Court will proceed with oral argument only.

In order to secure the just, speedy, and inexpensive determination of this motion, the parties are directed to comply with the following deadlines:

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<sup>2</sup> It does not appear that Ms. Rabin's motion is based upon either estoppel or waiver; however, to the extent that the facts warrant it, the Court will permit evidence and argument on these additional grounds.

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**(1) EVIDENTIARY HEARING. An evidentiary hearing on Mary Ann Rabin's motion to extend the time for filing a complaint objecting to discharge and to determine the dischargeability of debts (Docket #31) and the debtor's amended objection (Docket #33) will be held at the U.S. Bankruptcy Court, Room 3102, 127 Public Square, Cleveland, Ohio, on September 23, 2003, after the end of that day's 10:00 a.m. Chapters 7 & 11 docket.**

(2) WITNESS LISTS AND EXHIBITS. No later than September 16, 2003, each party will file with the Court and provide opposing counsel with a list of (i) the witnesses the party intends to call along with a statement of the issues about which each witness is expected to testify and (ii) the exhibits the party intends to introduce at the evidentiary hearing.

(3) STIPULATIONS. No later than September 16, 2003, the parties are to file Stipulations of Fact or, in the alternative, a Joint Statement that all material facts are disputed.

(4) ADDITIONAL BRIEFING. Any party wishing to submit additional briefing should do so no later than September 16, 2003.

(5) EXPERT TESTIMONY. No later than September 16, 2003, any party intending to present expert testimony shall comply with the disclosure

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requirements of Fed. R. Civ. P. 26(a)(2), made applicable to this matter under Bankruptcy Rules 7026 and 9014.

If any date indicated above creates a scheduling conflict, any party with such a conflict shall be responsible for conferring with the remaining counsel and the Courtroom Deputy, Ms. Stephanie Zelman, [(216) 522-4373, ext. 3015] no later than September 5, 2003, to schedule an acceptable alternate date.

IT IS SO ORDERED.

/s/ Arthur I. Harris      08/29/2003  
Arthur I. Harris  
United States Bankruptcy Judge