Dated: December 23 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 02-37161
	)	
Medi-Care Orthopedic and Hospital Equipment, Inc.,	)	Chapter 11
	)	
Debtor.	)	JUDGE MARY ANN WHIPPLE

ORDER SUSTAINING OBJECTION TO CLAIM

The matter before the court is Debtor's Motion Objecting to Claim #123 of Custom Staffing, Inc., ("Objection") [Doc. # 936], and the Response and Supplemental Response (collectively, "Response") filed by Custom Staffing, Inc. [Doc. ## 946 & 954]. After reviewing the Objection, the Response, and the documents submitted in support thereof, and considering the arguments of counsel made at the hearing, the court will sustain Debtor's Objection.

FACTUAL BACKGROUND

Except as otherwise indicated, the following facts are not in dispute. On March 10, 2000, the Common Pleas Court of Hancock County, Ohio, entered a default judgment in favor of Custom Staffing and against Debtor in the amount of $6,128.41 plus interest and court costs. The default judgment was obtained after Custom Staffing and Debtor had exchanged correspondence in which Custom Staffing had demanded payment of a debt that it believed Debtor owed to it and Debtor disputed part of the debt. [Doc. # 954, Supp. Response, Ex. A & B].

On October 21, 2002, Debtor filed a voluntary petition for relief under Chapter 11 of the

Bankruptcy Code. On December 12, 2002, the court entered an order establishing March 14, 2003, as the deadline by which creditors were required to file proofs of claim in this case. However, Debtor did not list Custom Staffing as a creditor in its original schedules or creditors' mailing matrix. As a result, Custom Staffing did not receive notice of the bankruptcy filing or of the bar date for filing proofs of claim.

According to Debtor, it first became aware of an alleged obligation to Custom Staffing in May 2004 when it received an Order for Examination of Judgment Debtor issued by the state court. On May 28, 2004, in response to that order, Debtor filed a Notice of Stay in the state court case and attached thereto the Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines ("Notice of Meeting of Creditors"), which states under "Deadline to File a Proof of Claim" that "Notice of deadline will be sent at a later time." [*See* Doc. # 936, Objection, Ex. B]. Custom Staffing admits that it had actual knowledge of Debtor's bankruptcy case on May 28, 2004.

Debtor did not, however, amend its schedules for nearly five months. On October 12, 2004, it amended Schedule F to include Custom Staffing as an unsecured creditor for a debt that Debtor indicated as "disputed." [Doc. # 721]. The amendment's Certificate of Service indicates that on that date a copy of the amendment together with a copy of the Notice of Meeting of Creditors was sent to Custom Staffing. [*Id.*]. Custom Staffing does not dispute that it received the amended Schedule F but claims that it did not receive the Notice of Meeting of Creditors. Debtor likewise does not claim that it notified Custom Staffing of the expired bar date at that time.

On December 30, 2004, after Custom Staffing was added as a creditor on Debtor's schedules, Debtor filed a Second Amended Disclosure Statement ("Disclosure Statement"), indicating, among other things, that it had current assets totaling $981,000 and contingent assets that could become available in the amount of $660,000. The court approved the Disclosure Statement on February 15, 2005, and scheduled a confirmation hearing for April 5, 2005. [Doc. # 810]. In addition, the court ordered Debtor to serve the scheduling order, the Disclosure Statement and an Amended Plan of Reorganization on all creditors required or permitted to vote on the plan. [Doc. # 810]. The Certificate of Service filed by Debtor shows that it did not serve Custom Staffing with the court's scheduling order, the Disclosure Statement or the Amended Plan. [*See* Doc. # 820].

The Disclosure Statement and the Amended Plan set forth various classes of claims, their estimated amounts, and the proposed treatment of such claims. The Amended Plan proposed distributions in payment of claims in the following order: 100% payment of Class I administrative

claims in the estimated amount of $150,000, Class II priority wage claims in the amount of $4,600, and Class III priority tax claims in the approximate amount of $97,000; 70% initial payment of Class IV unsecured claims (except for unsecured claims set forth in Classes V and VI) that total approximately $756,000 (which total does not include the claim of Custom Staffing) and an additional payment of 50% of the Contingent Assets if they become available; and, after paying all of the above, payment of any current assets remaining and 50% of any Contingent Assets that may become available, to the U.S. Department of Health and Human Services ("HHS"), holder of claims in Class V, to the extent that an order allowing such claims becomes final. HHS' claims consist of general unsecured claims in the asserted amount of $1,461,935.66 and an administrative claim in the asserted amount of $16,844.08.[1] HHS objected to confirmation of the Amended Plan based on the fact that the plan subordinated its unsecured claim to all other unsecured claims and lumped both its administrative claim and unsecured claim together. [Doc. # 835]. At the April 5, 2005, confirmation hearing, the court ordered Debtor to file a Second Amended Plan and continued the hearing for an evidentiary hearing on May 23, 2005. Although there is no certificate of service indicating that the Second Amended Plan, filed on April 26, 2005, was served on Custom Staffing, on April 8, 2005, the court served it with its order for evidentiary hearing. [*See* Doc. # 875].

Thereafter, Debtor withdrew its objection to HHS' claims, indicating that the claims had been resolved by the compromise set forth in the Second Amended Liquidating Plan ("the Plan"), and HHS did not object to the Plan. [*See* Doc. # & 910]. On May 23, 2005, the court entered an order confirming the Plan. Under the Plan, HHS' claims remain subordinated to the Class IV unsecured claims, however, as a result of its compromise with Debtor, payment is not contingent upon a final order allowing its claim as previously provided in the first Amended Plan.

Custom Staffing did not attend the confirmation hearing on May 23, 2005, and did not file its proof of claim until August 1, 2005. It asserts an unsecured claim in the amount of $10,535. Debtor had previously resolved all claim objections and, as indicated above, reached agreement as to Plan treatment with its largest unsecured creditor, HHS, based upon the total allowed general unsecured claims, which total did not include the Custom Staffing claim.

LAW AND ANALYSIS

The basis of Debtor's objection to Custom Staffing's claim is that it was not timely filed.

[1] The Amended Plan also provides that the Class VI general unsecured claims and interest of Debtor's principal, J. Michael Frantz, be paid solely by transfer of stock in Debtor. [Doc. # 819, p. 12].

Rule 3003(c) of the Federal Rules of Bankruptcy Procedure establishes the requirements for filing a proof of claim in a Chapter 11 case. That Rule provides in relevant part as follows:

> (2) *Who Must File.* Any creditor . . . whose claim or interest is not scheduled or scheduled as disputed, contingent, or unliquidated shall file a proof of claim or interest within the time prescribed by subdivision (c)(3) of this rule; any creditor who fails to do so shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution.
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> (3) *Time For Filing.* The court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed. Notwithstanding the expiration of such time, a proof of claim may be filed to the extent and under the conditions stated in Rule 3002(c)(2), (c)(3), and (c)(4).

Fed. R. Bankr. P. 3003(c)(2) and (3). In addition, "Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure to comply with an earlier deadline 'was the result of excusable neglect.'" *Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 382 (1993). The burden of proving excusable neglect is on the party seeking enlargement of time under Rule 9006(b). *In re Enron Corp.*, 419 F.3d 115, 121 (2nd Cir. 2005); *In re Velker*, 145 B.R. 30, 32 (Bankr. N.D. Ohio 1992).

Because Custom Staffing's claim was originally not scheduled and then was scheduled as "disputed," Custom Staffing was required to file a proof of claim in accordance with Rule 3003(c)(2) and (3). In this case, the claims bar date fixed by the court was March 14, 2003. Custom Staffing did not file its claim until August 1, 2005. Thus, the court may permit the late filing only if it was the result of excusable neglect. In construing the "excusable neglect" provision of Rule 9006(b), the Supreme Court has emphasized that it is not limited to errors caused by circumstances beyond the late-filing party's control but also may extend to errors caused by "inadvertence, mistake or carelessness." *Pioneer Inv. Servs. Co.*, 507 U.S. at 388. The Court explained that a determination of whether a party's neglect is 'excusable' is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," including "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395, 113 S.C. at 1498.

In this case, Custom Staffing clearly was unable to file a timely proof of claim since it did not even have knowledge of Debtor's bankruptcy until May 28, 2004, when Debtor filed the Notice of Stay in the state court proceeding. Furthermore, neither the Notice of Stay nor Debtor's Amended

Schedule F and Notice of Meeting of Creditors provided notice of the claims bar date or, more specifically, notice that the claims bar date had already expired.[2] Rule 2002(a) requires that "all creditors" receive notice of "the time fixed for filing proofs of claim pursuant to Rule 3003(c)." Fed. R. Bankr. P. 2002(a)(8). "The term 'all creditors' has no qualifications or limitations" and must be given to satisfy due process requirements before a creditor's claim may be extinguished. *Sheftelman v. Standard Metals Corp.*, 839 F.2d 1383, 1386 (10th Cir. 1987). "A creditor's knowledge that a reorganization of the debtor is taking place does not substitute for mailing notice of a bar date." *Bratton v. Yoder Co. (In re Yoder Co.)*, 758 F.2d 1114, 1116 (6th Cir. 1985) (citing *City of New York v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293 (1953) (finding that "even creditors who have knowledge of a reorganization have a right to assume that the statutory 'reasonable notice' will be given them before their claims are forever barred")); *Spring Valley Farms, Inc. v. Crow (In re Spring Valley Farms, Inc.)*, 863 F.2d 832, 835 (11th Cir. 1989) (holding that the claims of a creditor who did not receive mandatory notice of claims bar date were not discharged upon confirmation of Chapter 11 plan even if the creditor had actual knowledge of the bankruptcy proceeding); *In re CRC Wireline, Inc.*, 103 B.R. 804, 808 (Bankr. N.D. Tex. 1989) (permitting late filed claim of creditor who did not receive notice of the claims bar date since "[s]uch persons, even after receiving actual notice of the bankruptcy, have no duty to inquire about further court action."). *But see* 11 U.S.C. § 523(a)(3) (making actual knowledge of the bankruptcy case sufficient to impose a duty to inquire on a creditor in an *individual* debtor's bankruptcy case).

Thus, in determining whether Custom Staffing's neglect in failing to file a timely proof of claim is "excusable," the court considers the length of the delay in filing after learning that it was required to file a claim, not the delay after it simply received notice of Debtor's bankruptcy.[3] It is not until such notice was received that Custom Staffing had a duty to assert its interest in the bankruptcy estate by filing a proof of claim.

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[2] Custom Staffing disputes even having received the Notice of Meeting of Creditors. That fact, however, is not material since the notice did not inform creditors of the claims bar date, stating only that "Notice of deadline [to file proofs of claim] will be sent at a later time." [*See* Doc. # 936, Objection, Ex. B].

[3] The court rejects Debtor's argument to the extent it contends that the proof of claim's clock starts ticking against a creditor once it receives notice of the bankruptcy rather than after receiving notice of the need to file a claim and finds the cases cited by Debtor unpersuasive on this issue. *See IRS v. Century Boat Co. (In re Century Boat Co.)*, 986 F.2d 154, 156 (6th Cir. 1993) (indicating that the IRS received a letter notifying it that the debtor was in bankruptcy *and* that the bar date for filing claims had passed); *United States v. Cardinal Mine Supply, Inc.*, 916 F.2d 1087, 1090-91 (6th Cir. 1990) (citing with approval the reasoning in *City of New York* and *Sheftelman*, both requiring notice of the claims bar date before a creditor's claim may be extinguished).

By letter dated April 6, 2005, Debtor informed Custom Staffing's attorney that because Custom Staffing's claim was listed in the Schedules as disputed, it was required to file a proof of claim and that because no claim had been filed, the disputed claim would not be paid. In addition, on April 8, 2005, the court notified Custom Staffing of an evidentiary hearing on confirmation of Debtor's Second Amended Liquidating Plan to be held on May 23, 2005. Although Custom Staffing had not been served with notice of the actual claims bar date, the court finds that the April 6 letter, together with notification of the confirmation hearing, would put a reasonable creditor on notice that the claims bar date had expired. Notwithstanding such notice, Custom Staffing did not attend the confirmation hearing nor did it take any action whatsoever, even after being served on June 2, 2005,with the order confirming the Second Amended Plan, until August 1, 2005, when it filed its proof of claim. Custom Staffing offers no reason for this nearly four month delay in filing its proof of claim, and the court concludes on the facts before it that it was within the reasonable control of Custom Staffing to file its proof of claim at least before the evidentiary confirmation hearing on May 23, 2005.[4] This delay, however, did not cause any delay in the judicial proceedings of this case, i.e., it was not the cause of any delay in confirmation of Debtor's Chapter 11 plan since the proof of claim was filed after confirmation of the plan. And Debtor does not argue that assets have been distributed under the plan to such an extent that no assets remain for distribution on late-filed claims.

Debtor also does not suggest, nor is there any evidence, that Custom Staffing has not acted in good faith. Nevertheless, the court must still consider any prejudice that may result due to the delay in filing its proof of claim. In *Pioneer*, the Court listed the danger of prejudice to the debtor as one factor to be considered in the "excusable neglect" analysis. In this case, there is little or no danger of prejudice to Debtor since its Chapter 11 plan is a liquidating plan. If Custom Staffing's claim is permitted to be filed late, Debtor's position will be no better and no worse than it would have been had the proof of claim been timely filed. But the court's consideration of prejudice is not limited to prejudice to Debtor. The court's excusable neglect determination is an equitable one in which the court must "tak[e] account of *all* relevant circumstances surrounding the party's omission. . . ." *Pioneer Inv. Servs.*, 507 U.S. at 395 (emphasis added).

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[4] The only arguments offered by Custom Staffing in response to Debtor's Objection are that (1) Debtor's search of its records should have disclosed Custom Staffing's claim, (2) because Custom Staffing's claim was based on a court's judgment entry, Debtor should not have listed the claim as disputed; and (3) Debtor did not amend its schedules for five months after learning of Custom Staffing's claim. None of these arguments, however, address any factors relevant to the excusable neglect analysis under *Pioneer*.

Debtor argues that it reached an agreement with HHS as to treatment under its Chapter 11 plan before the final confirmation hearing based upon the total allowed general unsecured claims, which did not include Custom Staffing's claim as it had not filed a proof of claim and was required to do so. HHS agreed to be subordinated to all other general unsecured creditors, who are to be paid 70% of their allowed claim under the Plan. Debtor argues that HHS will be prejudiced by now allowing the untimely claim of Custom Staffing to be paid a 70% distribution along with other timely filed claims.

Because nearly every late-filed claim allowed will result in some prejudice to general unsecured creditors in that they will receive less under the plan than would be received if the claim is not allowed, something more must be shown to demonstrate prejudice under the excusable neglect analysis of *Pioneer*. *Cf. Gens v. Resolution Trust Corp*., 112 F.3d 569, 575 (1st Cir1997) (finding "unfair" prejudice must be shown to preclude a creditor from amending its proof of claim and requiring that something more than mere creditor disappointment be shown). In this case, the court finds that Debtor has demonstrated "something more" with respect to prejudice to HHS if Custom Staffing's claim is allowed.

As a general unsecured creditor, HHS initially objected to its claims being subordinated under Debtor's plan to claims of other unsecured creditors and to lumping its administrative claim with its general unsecured claim. After Debtor had resolved all claim objections, and before Custom Staffing filed its proof of claim, HHS compromised its position by agreeing to its claim being subordinated to other general unsecured claims, knowing at that time the total of all such claims. The court cannot conclude that a 70% payment on Custom Staffing's $10,535 claim does not constitute a substantial difference that HHS should have been at liberty to consider before compromising its position in connection with the confirmation hearing on May 23, 2005. However, Custom Staffing sat on its rights for nearly four months, knowing that confirmation proceedings were taking place and failing to take any action until well after Debtor's Second Amended Liquidating Plan was confirmed. Considering all of the factors discussed above, including specifically the lack of any explanation for the four month delay in filing, the court finds that such delay was not the result of excusable neglect as contemplated in Rule 9006(b)(1).

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Debtor's Objection to Claim #123 of Custom Staffing, Inc., [Doc. # 936] be, and hereby is, **SUSTAINED.**