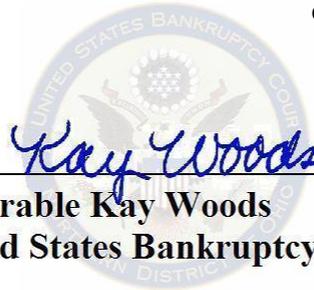


IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
ROBERT HOWARD VANSICKLE,	*	CASE NUMBER 07-43255
	*	
	*	
Debtor.	*	CHAPTER 7
	*	
*****		
	*	
ELAINE LAWSON,	*	
Administratrix of the Estate of	*	
Stephen A. Lawson,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	
ROBERT VANSICKLE,	*	
	*	HONORABLE KAY WOODS
Defendant.	*	
	*	

\*\*\*\*\*  
MEMORANDUM OPINION REGARDING MOTION TO RECONSIDER  
\*\*\*\*\*

On June 12, 2008, the Court held a hearing ("June 12 Hearing")  
on Motion for Leave to File Adversarial Complaint ("Motion for

Leave") (Doc. # 61) filed by Elaine Lawson, Administratrix of the Estate of Stephen A. Lawson ("Lawson"), on May 22, 2008. The Motion for Leave sought authority to commence an adversary proceeding and file *instanter* Complaint Objecting to Dischargeability of Indebtedness ("Complaint") against Debtor Robert Howard VanSickle ("Debtor"). At the June 12 Hearing, Debtor's counsel, Donald DeSanto, Esquire, represented, without contradiction, that Lawson was not a known creditor at the time Debtor filed his bankruptcy petition. As a consequence, this Court denied the Motion for Leave. On June 17, 2008, the Court entered (i) Memorandum Opinion Regarding Motion for Leave to File Adversary Complaint ("First Memorandum Opinion") (Doc. # 64), and (ii) Order Denying Leave to File Adversary Complaint ("Denial Order") (Doc. # 65).

On June 26, 2008, Lawson, through James Gentile, Esquire, filed Motion to Reconsider/Relief From Judgment Filed on June 17, 2008 Disallowing Elaine Lawson's Motion for Leave to File an Adversary Complaint ("Motion to Reconsider") (Doc. # 67). Because the Motion to Reconsider asserted - without supporting evidence - facts different from those presented at the June 12 Hearing, the Court entered Order Setting Evidentiary Hearing (Doc. # 68), which set the Motion to Reconsider for evidentiary hearing on September 23, 2008 ("Evidentiary Hearing"). On September 15, 2008, Debtor filed Debtor's Response in Opposition to Motion to Reconsider/Relief from Judgment Disallowing Motion for Relief [sic] to File an Adversary Complaint ("Debtor's Response") (Doc. # 88). On September 17,

2008, Debtor and Lawson filed Joint Stipulation of the Parties as to Admissibility of Evidence and Exhibits for September 23, 2008 Evidentiary Hearing ("Stipulation") (Doc. # 90). Each party also provided the Court with two copies of their proposed exhibits prior to the Evidentiary Hearing.

Based upon the Evidentiary Hearing, this Court finds that it is appropriate to vacate the First Memorandum Opinion and Denial Order. This Memorandum Opinion supersedes and supplants the First Memorandum Opinion. For the following reasons, however, the Court finds that the Motion for Leave should be denied.

#### **I. FACTS**

The following facts are not in dispute:

1. Debtor filed the instant chapter 7 case on December 21, 2007 ("Petition Date").
2. Lawson was not listed as a creditor on Debtor's schedules.
3. The first meeting of creditors, pursuant to 11 U.S.C. § 341, was scheduled for February 19, 2008, making April 21, 2008, the last date to file a complaint to determine the dischargeability of a debt.
4. Lawson is the administratrix of the estate of Stephen Lawson, who died on March 11, 2007, while he was a resident of Illinois Manor.
5. Mr. Gentile sent a letter, dated July 5, 2007 ("July 5 Letter"), to "Robert Van Sickle, Illinois Manor, 135 Illinois Avenue, Youngstown, Ohio 44505."

6. On March 10, 2008, Lawson filed a Complaint for wrongful death in the Mahoning County Court of Common Pleas, Case No. 50 2008 CV 00973 ("State Court Case"), against Debtor and other defendants.
7. The earliest date any defendant in the State Court Case was served was March 21, 2008.
8. On April 17, 2008, Debtor amended Schedule F (Doc. # 58), to list Lawson as an unsecured creditor in an unknown amount based on "survivor action and wrongful death action for the death of Stephen Lawson."
9. On April 17, 2008, Debtor filed Notice of Filing Amended Summary of Schedules, Schedule F & Declaration of Debtor (Doc. # 59), which was served by "regular U.S. Mail" on Lawson that same date.
10. On April 17, 2008, Debtor served Lawson and her attorney, Mr. Gentile, Notice of Filing Bankruptcy in the State Court Action. The State Court docketed the Notice on April 18, 2008.
11. Debtor filed Answer in the State Court Case on April 22, 2008.
12. After several unsuccessful attempts to serve Debtor with the State Court Complaint, Lawson obtained service on Debtor on April 28, 2008.
13. Lawson filed Motion for Leave on May 22, 2008. The Adversary Complaint attached as an exhibit to the Motion for Leave is based on 11 U.S.C. § 523(c) and seeks a determination that an alleged debt arising from the wrongful death of Lawson's

decedent is not dischargeable.

**II. WAS LAWSON A CREDITOR KNOWN TO DEBTOR?**

At the Evidentiary Hearing, Mr. Gentile acknowledged that the issue before the Court was whether Lawson was a known creditor to Debtor as of the Petition Date. Lawson chose to present no witnesses and relied on the exhibits referenced in the Stipulation. Despite the parties' agreement that the documents referenced in the Stipulation were authentic and admissible, neither party moved for the admission of any exhibit. The only document used in the examination of Debtor - who was the sole witness - was Lawson's Exhibit 6. Despite the failure to move for the admission of the exhibits, the Court will deem all documents referenced in the Stipulation as admitted since that appears to have been the intent of the parties.

Lawson's argument that she was a known creditor to Debtor prior to the Petition Date is based solely on the July 5 Letter (Lawson's Ex. 6). Because the July 5 Letter is central to Lawson's argument, the Court will quote it in its entirety herein, as follows:

Please be advised that the undersigned, along with Attorney Ronald Yarwood, represent the Estate of Stephen Lawson. Enclosed is a copy of an entry appointing Elaine Lawson administratrix of Stephen's estate.

On March 11, 2007, while a resident of Illinois Manor, Mr. Lawson was killed by another resident at the home. The claim of Mr. Lawson's estate is that Illinois Manor was negligent and fell below the standard of care in many respects which resulted in Mr. Lawson's death.

The purpose of this letter is to place you on notice of this claim and that you transmit this notice to your insurance carrier, so that they may contact our office within the next ten (10) business days.

Thank you.

July 5 Letter (emphasis added).

Debtor testified that, at all times during 2007 and 2008, he lived at 4146 Sugarbush Drive, Canfield, Ohio 44406 (see also Stip. ¶ 5), and that he did not reside at the address to which the July 5 Letter was mailed. Debtor further testified that he had a stroke in June 2007, and he was in the Cleveland Clinic at the time the July 5 Letter was sent. Debtor claimed that he did not see the July 5 Letter until recently when his legal counsel showed it to him.

Debtor stated that he had no personal involvement with the operations of the adult care facility known as Illinois Manor nor was he ever personally at the facility. He identified Brian Femia as his employee who operated Illinois Manor. Although Debtor acknowledged that Mr. Femia did, from time to time, bring matters concerning Illinois Manor to his attention, he stated that Mr. Femia did not bring the July 5 Letter to his attention or discuss its contents.

Debtor stated that Columbiana Outpatient Rehabilitation, Inc. ("Columbiana Outpatient") was the owner of Illinois Manor, but he did not know if Illinois Manor was a separate corporation. The Stipulation provides that Columbiana Outpatient is an active corporation with its statutory agent as David A. Barton, 4780 Kirk

Road, Austintown, Ohio 44505. (Stip. ¶¶ 7 - 8.)

Debtor conceded that, in March 2007, Mr. Femia told him about the incident in which Stephen Lawson died. Debtor testified that he did not go to the premises of Illinois Manor after the incident and that he was never interviewed by (i) the police, (ii) anyone on behalf of the City of Youngstown, or (iii) anyone on behalf of the State of Ohio. He further testified that he was not cited for any violations concerning operation of Illinois Manor. Debtor said that he did not know when Illinois Manor closed its operations nor did he know whether it received any notices of violations.

Debtor stated that he may have received a copy of the State Court Complaint, but that he had not read it. Pursuant to the docket in the State Court Case (Debtor's Ex. D), which is deemed admitted per the Stipulation (Stip. ¶ 9), Debtor was served with a copy of the Complaint in the State Court Case on April 28, 2008.

Debtor stated that he and his former wife, Mary VanSickle, were the record owners of the real estate upon which Illinois Manor operated the adult care facility.

Lawson has the burden of proof to establish that the Estate of Stephen Lawson was a creditor of Debtor known to Debtor as of the Petition Date. Lawson has failed to carry this burden of proof. Indeed, all Lawson has established is that, pursuant to the July 5 Letter, Stephen Lawson's Estate asserted a claim against Illinois Manor for negligent operation of the adult care facility. The claim, as set forth in the July 5 Letter, did not assert that the

land owner was at fault and would be held responsible for Stephen Lawson's death. The July 5 Letter simply states that "Illinois Manor was negligent and fell below the standard of care in many respects which resulted in Mr. Lawson's death." Even if, *arguendo*, Debtor had seen the July 5 Letter and/or knowledge of its contents were imputed to him, there is no reasonable interpretation that would cause Debtor to understand that the Lawson Estate was asserting a claim against him personally.

Lawson contends that the instant case is nearly identical to *Zurich Am. Ins. Co. v. Tessler (In re J. A. Jones, Inc.)*, 492 F.3d 242 (4th Cir. 2007). The debtor in *In re Jones* was a construction company that had performed certain highway construction work where a nine vehicle accident occurred that resulted in two deaths. The *Jones* debtor had been extensively involved in the accident investigation, had put its insurance company on notice of the accident, and maintained a file on the accident. Although the debtor knew there was the possibility that it would be sued because of the accident, no lawsuit had been commenced prior to the bankruptcy filing. The *Jones* debtor did not believe it had any liability for the accident and it did not schedule as a creditor the estate of either decedent. The Fourth Circuit Court of Appeals held that the debtor construction company had "more than ample information and documents identifying the Dunnagan Estate as a known creditor." *Id.* at 252.

The *Jones* court held, "It is important to note that there is

no brightline rule to be applied in determining whether a particular creditor is known or unknown to a debtor for constitutional notice purposes. Rather, the known creditor analysis must properly focus on the totality of the circumstances in each case." *Id.* at 250. The Court noted that a debtor is not required to be clairvoyant, but is required to undertake more than a cursory review of its records and files to ascertain its known creditors. The Fourth Circuit cited *Louisiana Dep't. of Env'tl. Quality v. Crystal Oil Co. (In re Crystal Oil Co.)*, 158 F.3d 291 (5th Cir. 1998), for the proposition that "in order for a claim to be reasonably ascertainable, the debtor must have in his possession, at the very least, some specific information that reasonably suggests both the claim for which the debtor may be liable and the entity to whom he would be liable." *Id.* at 297.

The instant case is like *In re Jones* only in that there is a wrongful death claim. In all other respects it is inapposite. Even if Debtor had the July 5 Letter among his books and records (of which there is no evidence), the content of the July 5 Letter would not reasonably apprise Debtor that Lawson was asserting any type of claim against him personally. Unlike *In re Jones*, this Court can reach only one conclusion, which is that the Lawson Estate did not assert a claim against Debtor personally prior to the Petition Date and the Lawson Estate was not a known creditor of Debtor as of the Petition Date. The determination that Lawson was not a known creditor, however, does not end the inquiry about whether she should

be granted leave to file an adversary proceeding objecting to the dischargeability of her claim.

### III. NOTICE AND DUE PROCESS

Because Lawson was not a known creditor, she was not entitled to receive actual notice of Debtor's bankruptcy filing. However, due process requires that, before Lawson's claim can be discharged, she must receive some kind of notice - actual or constructive - in time to protect her rights. "[A] binding discharge in bankruptcy against a putative suitor necessarily requires that the suitor has been afforded due process in connection with the bar on any claims." *Grand Pier Center LLC v. ATC Group Serv. Inc.*, 2007 U.S. Dist. LEXIS 75672, at \*9-10 (N.D. Ill. Oct. 9, 2007). See *Chemtron Corp. v. Jones*, 72 F.3d 341, 346 (3rd Cir. 1995) (Holding that publication in major newspapers constituted adequate notice for unknown creditors. However, "[i]nadequate notice is a defect which precludes discharge of a claim in bankruptcy.")

Debtor must have acquired knowledge of the State Court Case prior to being served with the Complaint on April 28, 2008, because he amended Schedule F and filed the Notice of Bankruptcy on April 17, 2008; however, neither party presented any evidence to establish when Lawson's claim became known to Debtor. Mr. DeSanto claims that Debtor amended his schedules to include Lawson "immediately" after learning about the State Court Case. Lawson presented no evidence that Debtor or Debtor's counsel was aware that Lawson asserted any type of claim against Debtor personally prior to Debtor's amendment

of Schedule F on April 17, 2008.

Lawson argued in the Motion to Reconsider that neither she nor Mr. Gentile received notice of Debtor's bankruptcy in time to file a dischargeability complaint or a motion to extend time before April 21, 2008. Because the Adversary Complaint is based on exceptions to discharge in §§ 523(c)(4) and/or (6), Rule 4007 [Interim] of the Federal Rules of Bankruptcy Procedure applies. Rule 4007 provides that, in a chapter 7 case:

[A] complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a). . . . On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be filed before the time has expired.

FED. R. BANKR. P. 4007(c) [Interim] (West 2008) (emphasis added).

As set forth above, the first date set for the § 341 Meeting was February 19, 2008, making April 21, 2008, the last date to file a complaint to determine the dischargeability of a debt. Lawson's Motion for Leave was not filed before the expiration of the 60-day period. Accordingly, Lawson's Motion for Leave is untimely. The next question for the Court is whether it has the authority to extend the time to file a nondischargeability complaint despite the express language in Rule 4007(c).

The Sixth Circuit Court of Appeals has held that the time period in Rule 4007(c) is not jurisdictional and may, therefore, be extended pursuant to the equitable powers of the bankruptcy court. In *Nardei v. Maughan (In re Maughan)*, 340 F.3d 337 (6th Cir. 2003),

the Sixth Circuit extended the ruling in *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629 (6th Cir. 1994). In *Isaacman*, the Court ruled that FED. R. BANKR. P. 9006(b)(3) prohibits a court from *sua sponte* extending the time in which to file a dischargeability complaint, but the rule "does not prevent a bankruptcy court from exercising its equitable powers under 11 U.S.C. § 105(a) in accepting an untimely filed complaint." *Id.* at 632. The Sixth Circuit held in *Maughan* that:

The first question before us, then, boils down to whether *Isaacman's* narrow holding that the bankruptcy court could use its equitable power to circumvent the time limits required by Rule 4007(c) where an error of the court itself had caused the untimely filing, requires the legal conclusion that Rule 4007(c)'s time limits are not jurisdictional. We conclude that it does. By permitting equity to trump the filing deadline set by Rule 4007(c) in one particular circumstance, *Isaacman*, despite its explicitly narrow holding, compels the conclusion that the deadline is not jurisdictional, for to hold to the contrary would be to hold that equitable considerations can excuse jurisdictional defect. Since a "litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court," the filing deadline cannot be jurisdictional. Rather, the rule is a statute of limitation - or simply a deadline - that is generally subject to the defenses of waiver, estoppel, and equitable tolling.

*In re Maughan*, 340 F.3d at 343-44 (internal citations omitted).

The *Maughan* Court found five factors to consider when deciding whether to apply the doctrine of equitable tolling, as follows: "(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." *Id.* at 344. The Court will apply these factors to the instant case.

The first factor is actual notice. Lawson obtained actual notice of the bankruptcy filing at most four days prior to expiration of the date for filing dischargeability complaints. Despite argument in the Motion to Reconsider that neither Lawson nor Gentile received notice of Debtor's bankruptcy until after April 21, 2008, there is no evidence to support this contention. The State Court docketed the Notice of Bankruptcy on April 18, 2008. This Notice was mailed by Debtor's counsel on April 17, 2008. It is therefore logical to assume that Mr. Gentile also received Notice of Bankruptcy on April 18, 2008. Because three days are added when a document is served by regular mail, see FED. R. BANKR. P. 9006(f) [Interim] (West 2008), Mr. Gentile and Lawson are presumed to have received the Notice on April 20, 2008, which was one business day prior to the deadline to file nondischargeability complaints in Debtor's bankruptcy case.

There was no evidence regarding the second factor that Lawson had constructive notice of the bankruptcy prior to April 20, 2008; however, since Lawson received actual notice of Debtor's bankruptcy, constructive notice is irrelevant.

The third factor is whether Lawson diligently pursued her rights. It is clear that no later than April 20, 2008, Lawson and her legal counsel had actual notice of Debtor's bankruptcy filing.

They were, therefore, required to make inquiry concerning any dates to assert a claim and/or file complaints. Lawson waited for more than one month - until May 22, 2008 - before seeking leave of this Court to file the adversary complaint. Lawson presented no evidence whatsoever that she took any steps prior to filing the Motion for Leave to preserve her claim against Debtor.

The fourth factor is prejudice to Debtor. Here Debtor had no reason to know that Lawson had any claim against him when he filed his bankruptcy petition. The July 5 Letter makes clear that Lawson was asserting a claim only against Illinois Manor. Although there was no evidence concerning prejudice to Debtor, the "fresh start" to which every debtor is entitled would be put in peril if the Motion for Leave were to be granted.

The last factor is whether Lawson was reasonable in remaining ignorant of the notice requirements. Lawson presented no evidence that she and her legal counsel could not have ascertained that the last date to file dischargeability complaints was April 21, 2008. Lawson presented no evidence that she ever attempted to contact Debtor personally about this claim; doing so might have caused Debtor to (i) learn about her claim and, (ii) schedule Lawson as a creditor on the Petition Date. Lawson presented no evidence why she waited for more than one month after learning of Debtor's bankruptcy case to seek leave to file the adversary complaint.

In *Manufacturers Hanover v. DeWalt (In re DeWalt)*, 961 F.2d 848 (9th Cir. 1992), the Ninth Circuit Court of Appeals reversed a

bankruptcy court ruling that seven days' notice of a bankruptcy filing was sufficient to bar an untimely adversary proceeding. The Court held, "Guidance as to the time necessary for such action is provided, as Judge Russell noted, by Bankruptcy Rule 4007(c), which directs the court to give scheduled creditors at least 30 days notice of the impending bar date." *Id.* at 851. The Court noted that most creditors get more than 30 days' notice - often as much as 80 days - and held that in no event could the reasonable time period contemplated by § 523(a)(3)(B) be greater than 80 days. In the instant case, Lawson had actual notice of Debtor's bankruptcy at least 32 - and perhaps as long as 34 - days before filing the Motion for Leave. Rule 4007(c) requires a minimum of 30 days' notice.

Applying all of the factors, this Court finds that, although this is a close call, the factors favor Debtor. Lawson waited more than a month after receiving actual notice of Debtor's bankruptcy to file the Motion for Leave. The timing of notice to Lawson was caused, at least in part, by the several unsuccessful attempts to serve Debtor with the State Court Complaint. Debtor testified that he had lived at the same address in Canfield, Ohio, for approximately ten years. It appears that Lawson could have supplied a good address to the State Court to obtain service of the State Court Complaint before six weeks lapsed. The first defendant in the State Court Case was served on March 21, 2008 - approximately one month before expiration of the adversary complaint filing deadline and more than five weeks before Debtor was successfully served. The

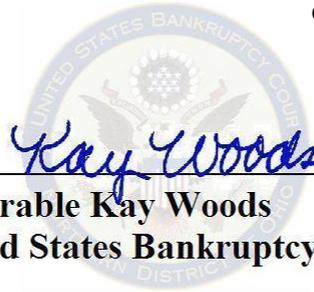
delay of service on Debtor was caused by the incorrect address that Lawson used in the State Court Case.

Accordingly, this Court finds that: (i) Lawson was not a creditor known to Debtor as of the Petition Date; (ii) Lawson and her legal counsel received actual notice of Debtor's bankruptcy no later than April 20, 2008; (iii) the time limit in Fed. R. Bankr. P. 4007(c) is not jurisdictional and can be modified by the equitable powers of this Court pursuant to 11 U.S.C. § 105; (iv) Lawson's delay of more than one month in filing the Motion for Leave was not reasonable or justified by any facts in the record; and (v) the five factors to determine if equitable tolling should apply favor Debtor. As a consequence, the Motion for Reconsideration having been granted and, based upon: (i) the Evidentiary Hearing, (ii) the testimony of the Debtor, (iii) the exhibits of the parties, (iv) the Stipulation, and (v) all relevant pleadings, this Court finds that the Motion for Leave should be denied.

An appropriate Order will follow.

# # #

IT IS SO ORDERED.



Honorable Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
ROBERT HOWARD VANSICKLE,	*	CASE NUMBER 07-43255
	*	
Debtor.	*	CHAPTER 7
	*	
*****		
	*	
ELAINE LAWSON,	*	
Administratrix of the Estate of	*	
Stephen A. Lawson,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	
	*	HONORABLE KAY WOODS
ROBERT VANSICKLE,	*	
	*	
Defendant.	*	
	*	

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ORDER DENYING LEAVE TO FILE ADVERSARY COMPLAINT  
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For the reasons set forth in the Court's Memorandum Opinion  
Regarding Motion to Reconsider entered this date, the Motion for

Leave to File Adversarial Complaint filed by Elaine Lawson,  
Administratrix of the Estate of Stephen A. Lawson, on May 22, 2008,  
is denied.

# # #