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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

SAFWAT A. ABDEL-MALEK aka/dba
MALEK CONTRACTORS, INC.,

Debtor.

Case No. 92-5-8920-MM

Chapter 7

DEMAKAS PLUMBING & HEATING,
INC.,

Plaintiff,

Adversary No. 93-5-170

vs.

AMENDED MEMORANDUM OPINION

SAFWAT A. ABDEL-MALEK aka/dba
MALEK CONTRACTORS, INC.,

Defendant.

INTRODUCTION

Before the Court are the Defendant's Motion to Dismiss Complaint for Failure to State a Claim under Federal Rule 12(b)(6) and Plaintiff's Cross-Motion for Relief from Default filed under Federal Rule 60(b). For the following reasons, the motion to dismiss is granted, and the cross-motion for relief from default is denied.

FACTS

The debtor filed a Chapter 7 petition on December 29, 1992. On January 7, 1993, the clerk of the bankruptcy court mailed the Notice of Commencement of Case Under Chapter 7, Meeting of

1 Creditors, and Fixing of Dates (the "Notice") to the parties included in the debtor's list of creditors.
2 The Notice set forth that the deadline for filing complaints to determine the dischargeability of a debt
3 under 11 U.S.C. § 523(c) was March 29, 1993. The debtor scheduled the plaintiff, Demakas
4 Plumbing & Heating, Inc., as a creditor on its list of creditors.

5 The plaintiff filed a complaint under Section 523 to except from discharge a debt in the
6 amount of \$3,741.90 for plumbing services allegedly procured by false pretenses, false
7 representations, or actual fraud. Alternatively, the plaintiff asserts claims for defalcation,
8 embezzlement, or willful and malicious injury. Counsel for the plaintiff mailed the complaint from
9 counsel's offices in San Francisco on March 26, 1993. The clerk of the bankruptcy court file-
10 endorsed the complaint on March 31, 1993. The plaintiff never sought an extension of the bar date.

11 DISCUSSION

12 A. Time Limit Under B.R. 4007(c)

13
14 The debtor requests dismissal of the complaint on the basis that it was not timely filed before
15 the March 29, 1993 bar date for dischargeability complaints. The file stamp gives rise to the
16 presumption that the document was filed at the date and time indicated by the clerk's file
17 endorsement. In re Godfrey, 102 Bankr. 769, 771 (Bankr. 9th Cir. 1989). A Rule 12(b)(6) motion is
18 the proper procedure to raise a limitations problem. Ledesma v. Jack Steward Produce, Inc., 816
19 F.2d 482 (9th Cir. 1987). Bankruptcy Rule 4007(c) provides:

20 A complaint to determine the dischargeability of any debt pursuant
21 to § 523(c) of the Code shall be filed not later than 60 days
22 following the first date set for the meeting of creditors held
23 pursuant to § 341(a). . . . [T]he court may for cause extend the
time fixed under this subdivision. The motion shall be made before
the time has expired.

24 The time limits of Bankruptcy Rule 4007(c) are strictly construed in the Ninth Circuit. In
25 re Marino, 143 Bankr. 728, 732 (Bankr. 9th Cir. 1992). It is well settled that a creditor that fails
26 timely to file either a complaint or a motion for an extension of the bar date will not be permitted
27 to pursue a dischargeability action. Id. The only circumstances under which the time limit may be
28 extended after it has lapsed is if there are unique or extraordinary circumstances. In re Kennerley,

1 1993 WL 182653, 93 CDOS (6/3/93) 3979, 3980 (9th Cir. June 2, 1993). No unique
2 circumstances exist to permit an untimely dischargeability complaint where the creditor had notice
3 of the time limit. Id. Unique circumstances are limited to situations where a court explicitly
4 misleads a party. In re Anwiler, 958 F.2d 925 (9th Cir. 1992), cert. denied, 113 S. Ct. 236
5 (1992). In Anwiler, the Ninth Circuit held that dismissal of an untimely dischargeability complaint
6 is inappropriate where the bankruptcy court had inadvertently mailed two conflicting notices
7 containing bar dates. Demakas Plumbing & Heating had notice of the bar date, so no unique
8 circumstances are present to justify an untimely dischargeability complaint.

9 **B. Relief from Default Under F.R.C.P. 60(b)**

10 Citing Fed. R. Civ. P. 60(b), the plaintiff seeks relief from the default occasioned by the
11 failure to comply with the bar date for filing dischargeability complaints. Rule 60(b)(1) provides:

12 On motion and upon such terms as are just, the court may relieve a
13 party or party's legal representative from a final judgment, order, or
14 proceeding for . . . mistake, inadvertence, surprise, or excusable
neglect.

15 Demakas Plumbing argues, in effect, that its failure to file the complaint timely constitutes
16 excusable neglect. It further argues that excusable neglect is a basis for implicitly extending the
17 deadline. Bankruptcy Rule 9006(b) provides:

18 (1) [T]he court for cause shown may . . . on motion made after
19 the expiration of the specified period permit the act to be done
where the failure to act was the result of excusable neglect.

20 * * *

21 (3) The court may enlarge the time for taking action under
22 Rule[] . . . 4007(c) . . . only to the extent and under the conditions
stated in [that] rule[].

23 Rule 9006(b)(1) empowers a bankruptcy court to permit a late filing if the movant's failure
24 to comply with an earlier deadline was the result of excusable neglect. The rule contemplates that
25 courts are permitted, where appropriate, to accept late filings caused by inadvertence, mistake or
26 carelessness, as well as by intervening circumstances beyond the party's control. Pioneer
27 Investment Services Co. v. Brunswick Associates Ltd. Partnership, 113 S. Ct. 1489, 1495 (1993).
28 However, under subsection (b)(3), excusable neglect is not a sufficient basis to extend the time for

1 filing a dischargeability complaint after the deadline has passed. In re Dix, 95 Bankr. 134, 137 n.
2 (Bankr. 9th Cir. 1988); In re Hill, 811 F.2d 484, 486 (9th Cir. 1987).

3 In re Magouirk, 693 F.2d 948 (9th Cir. 1982), on which Demakas Plumbing relies, was
4 decided under the former bankruptcy rules, which did not provide a deadline within which a
5 creditor must file a motion for enlargement of time. In re Rhodes, 61 Bankr. 626, 629-30 (Bankr.
6 9th Cir. 1986). Fed. R. Civ. P. 60(b) no longer applies to the deadline for filing
7 nondischargeability complaints under Bankruptcy Rule 4007(c). In re Ricketts, 80 Bankr. 495,
8 496-97 (Bankr. 9th Cir. 1987). The bankruptcy court does not have discretion to enlarge the time
9 for filing a complaint to determine dischargeability if the request is made after the deadline for
10 filing the complaint. In re Santos, 112 Bankr. 1001, 1008 (Bankr. 9th Cir. 1990); In re Rhodes,
11 71 Bankr. 206, 207-08 (Bankr. 9th Cir. 1987). It also cannot extend Rule 4007(c)'s time limit
12 implicitly. Kennerley, *supra*.

13 Lastly, Demakas argues that Bankruptcy Rule 9006(f), the mailbox rule, applies in this
14 instance to add three days to the period for filing dischargeability complaints under Rule 4007(c).
15 However, pursuant to its plain meaning, Rule 9006(f) does not apply to Rule 4007(c) because it
16 does not require an act to be done within a prescribed period after service of a notice or paper. In
17 re Santos, 112 Bankr. at 1009. Rather, it requires an act to be done within a prescribed period
18 after the first date set for the meeting of creditors. Id.

19
20 **CONCLUSION**

21 Therefore, the motion to dismiss is granted, and the cross-motion for relief from default is
22 denied.