United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Caesars Entertainment Operating Co., Inc., *et al.*

Bankruptcy No.: 15 B 1145

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Judge: A. Benjamin Goldgar

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 11
	)	
CAESARS ENTERTAINMENT	)	No. 15 B 1145
OPERATING CO., INC., *et al.*,	)	(Jointly administered)
	)	
Debtors.	)	Judge Goldgar

MEMORANDUM OPINION

Before the court for ruling is the motion of creditor South Jersey Energy Co. ("SJE") to excuse the late filing of one of its proofs of claim. For the following reasons, the motion will be denied.

1. Background

The facts are taken from the parties' papers and the court's docket. No facts are in dispute.

The claims bar date in these chapter 11 cases was set in an order dated March 25, 2015. (Dkt. 1005). The order established a bar date of May 25, 2015, by which non-governmental claims had to be filed. (*Id.*). There is no dispute that SJE had notice of the bar date: its counsel received a copy of the order shortly after its entry. But rather than write on his calendar the correct May 25, 2015 date, he wrote July 14, 2015, the bar date for governmental claims. When SJE noticed the mistake, it notified counsel, and he filed the proof of claim on June 5, 2015, eleven days late.

SJE amended the late proof of claim twice after it was filed: once on August 28, 2015, and again April 18, 2016. Based on the last amendment, the amount of the claim is $62,332.22.

On June 15, 2016, more than a year after the proof of claim was filed late, SJE moved under Bankruptcy Rule 9006(b)(1), Fed. R. Bankr. P. 9006(b)(1), for an order excusing the late filing. In its motion, SJE cites and relies on the standard for "excusable neglect" adopted in *Pioneer Inv. Servs. Co. v. Brunswick Assocs., L.P.*, 507 U.S. 380 (1993), arguing that the standard has been met here. The debtors disagree and object to the motion.[1/]

2. Discussion

The debtors have the better of the argument.

As an initial matter, there was plainly neglect in not filing the claim by the bar date, and SJE does not deny it. Neglect, *Pioneer* explained, ordinarily means "to give little attention or respect to a matter, or . . . to leave undone or unattended to especially through carelessness." *Id.* at 388 (internal quotation omitted). SJE's proof of claim was filed late because counsel for SJE carelessly mis-calendared the bar date, using the date for governmental claims rather than the date for other claims. Since under standard agency principles the actions of the lawyer are attributable to the client, *see Wade v. Soo Line RR.*, 500 F.3d 559, 564 (7th Cir. 2007) (citing *Pioneer*), that carelessness belonged to SJE.

So there was neglect. Was it excusable? *Pioneer* establishes an equitable test for making that determination. The test takes into account "all relevant circumstances" surrounding the late claim, including the following four: "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

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[1/] Both sides say the bar date was May 26 rather than May 25. The order provided for a bar date "sixty (60) days after entry of this Order." (*Id.* ¶ 3). The order was entered on the docket on March 26, 2015. Since March has thirty-one days and April only thirty, sixty days after March 26, 2015, was May 25, 2015.

good faith." *Id.* at 395. Application of these factors rests with the bankruptcy court's discretion. *In re Kmart Corp.*, 381 F.3d 709, 712 (7th Cir. 2004). Its decision will be overturned only in "extreme cases." *Id.*

Under these factors, SJE's neglect was not excusable. The motion to excuse it will be denied.

a. Danger of Prejudice

First, the danger of prejudice to the debtors. As the debtors point out, SJE bears the burden of proving a *lack* of prejudice, not the other way around. *Kmart*, 381 F.3d at 714. That burden has not been met. In attempting to meet it, SJE contends the debtors knew of the claim, no plan has been confirmed yet, and the claim itself is small ("minuscule" is SJE's term). But the potential prejudice arises from the risk that allowing this claim to be filed late could induce other claimants to file late claims. In that event, the debtors might find themselves "faced with a mountain of such claims." *Id.* As the debtors argue, an influx of late unsecured claims would produce "administrative inefficiency." The debtors note elsewhere that 5,800 proofs of claim have already been filed in these cases, claims asserting more than $29 billion in aggregate liabilities. (*See* Dkt. No. 4455 at 3).

As the debtors also note, an influx of late unsecured claims could jeopardize confirmation of the current proposed plan, since it is a condition precedent to consummation of the plan that the Unsecured Creditors Committee agree in writing that the aggregate amount of allowed unsecured claims in Classes I through L is reasonably expected to be equal to or less than $350 million. In stressing the "minuscule" size of its claim (which falls in Class K), SJE ignores the potential "mountain" of similarly minuscule claims if motions like the one here are granted.

Kmart, 381 F.3d at 714.[2/]

It is true that the debtors predict the aggregate amount of claims in Classes I through L will range from $253.4 million to $294.9 million. (*See* Dkt. No. 4220, Ex. 1 at 107). Even assuming the high end of that range, more than $55 million in unexpected claims would have to come in before the $350 million limit would be exceeded. That might seem like a lot of room to maneuver. But $55 million is in fact only 18-21% of the unsecured claims the disclosure statement anticipates, and it is only 3.4% of the total claims that have already been filed in these cases. If the risk of exceeding the $350 million limit is insignificant, again it was incumbent on SJE to demonstrate as much. *Kmart*, 381 F.3d at 714. SJE has not done so.

b. Length of the Delay

Second, although the length of SJE's delay in filing the claim was just over a week, the delay in filing the current motion was considerable – more than a year. *Kmart* makes plain that the delay in requesting judicial relief is relevant. *Id.* at 714. The circumstances here (a claim late by eleven days and no motion for more than a year) are substantially more aggravated than the circumstances in *Kmart* (a claim late by only one day and a motion two and a half months after that). If it was reasonable for the bankruptcy court in *Kmart* to refuse the late filing, it is *a fortiori* so in this case.

SJE suggests in its reply that its long delay in filing the current motion should be ignored. But SJE offers no reason why, and under *Kmart* it is "well within [the bankruptcy court's]

[2/] In its motion, SJE asserts that this "floodgates" point is "not an appropriate consideration" under *Pioneer*. (Mot. at 6 n.5). In *Kmart*, the Seventh Circuit concluded otherwise. *Kmart* is binding authority here. If SJE believes the decision is wrong, it must take that up with the court of appeals. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004) (reminding trial judges in this circuit that in a hierarchical court system they "must follow decisions of this court").

province" to consider the claimant's delay in seeking relief. *Id.* (noting that under *Pioneer* the court may consider "all relevant circumstances" (internal quotation omitted)). SJE also tries to blame the debtors for the delay. SJE says it "reached out" to them this past April, hearing nothing until June. But by the time April 2016 rolled around, eleven months had passed since the bar date, ten months since SJE filed its late proof of claim. SJE's inaction over those many months cannot be laid at the debtors' feet.[3/]

c. Reason for the Delay

Third, the reason for the delay – the *Pioneer* factor several circuits call "preeminent," *see Kmart*, 381 F.3d at 715 – was the error of counsel in mis-calendaring the bar date. That error was SJE's alone; in no sense was it brought on by the debtors. SJE suggests that the wording of the bar date order, which fixed the bar date as a date sixty days after the order's entry rather than as a date certain, was in some way to blame, but the suggestion is not plausible. Calculating the bar date based on the order required only the abilities to read a calendar and the court's docket and to count to sixty. Counsel, a licensed attorney, was more than up to those tasks. And the mis-calendaring explains only SJE's lateness in filing the claim itself. It does not explain why SJE waited more than a year to ask to have the untimely filing excused.

[3/] SJE makes the additional argument that its delay is irrelevant because the Bankruptcy Code does not disallow late proofs of claim automatically, and the debtors have chosen to address late claims with a plan provision that disallows them. Therefore, SJE asserts, its motion was filed "well before the time" the debtors intend to deal with late claims in these cases. SJE is mistaken. The March 25 bar date order provides that a party who fails to file a timely proof of claim is "forever barred, estopped, and enjoined from asserting such claim against the Debtors (or filing a Proof of Claim with respect to that claim) . . . ." (*See* Dkt. No. 1005 at ¶ 12). The order does not "disallow" late claims; it does more, barring their filing in the first place.

d. Good Faith

The fourth factor, good faith, is at best neutral. In *Kmart*, the court found good faith neutral where the creditor had tried to file her proof of claim on time, but her lawyer had left the task until the last minute, failed to follow up with the third-party claims agent, and then waited another month before seeking relief from the court. *Id.* at 716.

In this case, SJE filed its claim later than the creditor did in *Kmart*, waited considerably longer to move for relief, and the delay is even harder to understand. (The late proof of claim is only one of several SJE filed; the others were all timely.) The late proof of claim, moreover, was amended twice in the months after it was filed, but still SJE did not seek relief. It would not be hard from these facts to conclude that SJE acted in something less than good faith. But given that SJE not only sought to file but did file its other claims on time, the good faith question is best left alone.

* * * *

In a decision more recent than *Kmart*, the Seventh Circuit distilled the *Pioneer* factors into a single balancing test. *See C.F.T.C. v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401, 405 (7th Cir. 2011). The court in *Lake Shore* said that a judge asked to waive or extend a deadline should "evaluate the excuse offered by the party seeking the waiver or extension and the consequences to all persons affected by the granting or denying of it. The stronger the excuse and the graver the adverse consequences of rejecting it relative to the adverse consequences to the opposing party if the excuse is allowed, the more the balance leans toward granting." *Id.* at 405.

Not surprisingly, the *Lake Shore* version of the *Pioneer* test yields the same result in this case as the four factors examined above. SJE's excuse for the late filing of its claim is

exceptionally weak, and the potential adverse consequences to the debtors from accepting the excuse are graver than the adverse consequences to SJE from rejecting it.

In short, the record shows neglect but not excusable neglect. Errors of this kind are not excusable. *See, e.g., United States v. Guy*, 140 F.3d 735, 736 (7th Cir. 1998) (refusing to find excusable counsel's miscalculation of appeal period based on his misreading of the applicable rules, even though the notice of appeal was only two days late).

3. Conclusion

For these reasons, the motion of South Jersey Energy Co. to excuse the late filing of one of its proofs of claim is denied. The status hearing set for August 17, 2016, is stricken.

Dated: August 9, 2016

A. Benjamin Goldgar
United States Bankruptcy Judge