

**United States Bankruptcy Court  
Northern District of Illinois  
Eastern Division**

**Transmittal Sheet for Opinions for Posting**

**Will this opinion be published?** No

**Bankruptcy Caption:** In re Pericles S. Couchell

**Bankruptcy Number:** 19 B 7328

**Adversary Caption:** NA

**Adversary Number:** NA

**Date of Issuance:** March 31, 2020

**Judge:** David D. Cleary

**Appearance of Counsel:**

**Attorney for Pericles S. Couchell:** Constantine Dean Matsas, C. Dean Matsas & Associates, PC, 5441 North Lincoln Avenue, Chicago, Illinois

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**United States Bankruptcy Court, Northern District of Illinois**

Name of Assigned Judge	David D. Cleary	<b>CASE NO.</b>	19 B 7328
<b>DATE</b>	March 31, 2020		
<b>CASE TITLE</b>	In re Pericles S. Couchell		
<b>TITLE OF ORDER</b>	Order Denying Motion to Excuse Late Filing		

**DOCKET ENTRY TEXT**

The motion of Stephen Georgoules to excuse late filing of his adversary complaint is denied. Status on the complaint and on the motion of Pericles S. Couchell to dismiss the complaint is set for April 22, 2020 at 10:30 a.m.

[For further details see text below.]

**STATEMENT**

This matter comes before the court on the motion of Stephen Georgoules to excuse late filing of his adversary complaint objecting to discharge and dischargeability. Georgoules asks the court to invoke the doctrine of equitable tolling and to allow his complaint as timely, even though it was filed the day after the deadline expired. Having read the memoranda of law and heard the arguments of the parties, the court denies the motion.

**BACKGROUND**

Pericles Couchell filed his voluntary petition for relief under Chapter 7 on March 15, 2019. A few days later, the court sent out notice that July 8, 2019, was the deadline for filing objections to dischargeability under 11 U.S.C. §§ 523(a)(2), (4), or (6), and to discharge under 11 U.S.C. § 727.

Couchell's case trustee held the meeting of creditors on May 9, and continued the meeting to July 11, 2019. Georgoules attended through his attorney. He also filed a proof of claim in the amount of \$1,200,000.

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A week before the July 8 deadline, Georgoules filed a motion to extend time to file an objection to Couchell's discharge or to dischargeability of a debt. He also sought leave to take the examination of Couchell, several individuals, and related entities under Fed. R. Bankr. P. 2004. The court granted both motions, extending Georgoules' discharge/dischargeability deadline to October 9, 2019, and allowing the examinations.

In the middle of September, Georgoules filed another motion to extend time to object to discharge/dischargeability. He asserted that Couchell and his spouse were not cooperating with his requests under Rule 2004. At the same time, Georgoules filed a motion to compel their cooperation.

The motion to compel was withdrawn at the court hearing; the motion to extend time was granted. The court extended the discharge/dischargeability deadline to November 15, 2019. Although only Georgoules brought the motion to extend time, the order extended the deadline for both Georgoules "and/or STGT, Inc."

Less than a week later, Georgoules brought another motion under Rule 2004 for leave to issue subpoenas and conduct examinations of a different individual as well as a related entity. The court granted this motion as well.

Shortly before the November 15 deadline, Georgoules again sought an extension of time to object to discharge/dischargeability. Once again, although only Georgoules brought the motion to extend time, the order extended the deadline to December 20, 2019, for both Georgoules "and/or STGT, Inc."

Counsel for Georgoules and Couchell agreed on the dates of November 25 for Couchell's examination and of December 9, 2019, for his spouse's examination.

After those examinations were completed, counsel discussed whether an additional extension of the discharge/dischargeability deadline would be necessary. According to Georgoules' attorney Anthony D'Agostino, Couchell's lawyer stated that he had no objection to another extension, given how recently the examinations had been completed. D'Agostino acknowledged the courtesy. He told Couchell's lawyer Constantine Matsas, however, that due to the unlikelihood of settlement he intended to prepare and file an adversary complaint on or before the December 20 deadline.

D'Agostino prepared the complaint in Microsoft Word and gathered all exhibits to the complaint in Portable Document Format ("PDF").

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In the early afternoon of December 19, D'Agostino had an unanticipated family emergency. He left the office immediately and went to Advocate Good Shepherd Hospital in Barrington, Illinois, where his father had been admitted for a medical emergency.

D'Agostino believed it would take only a short period of time to file the already-drafted complaint objecting to Couchell's discharge and to dischargeability of his debt. D'Agostino did not return to a computer until late in the evening of December 20, in order to finalize and file the complaint. He had not cut his family obligations short because he anticipated that he would be able to file the complaint before the midnight deadline.

During the online filing process, however, D'Agostino learned that the software license for his PDF converter program, Workshare, had expired. D'Agostino emailed the complaint to his personal email and saved it to his personal laptop, where he was able to convert it to PDF. He logged back into his work desktop, saved the converted complaint, and filed it via the court's ECF system on December 21, 2019 at 12:19 a.m., nineteen minutes after the deadline had passed.

## LEGAL ANALYSIS

In his motion to excuse late filing, Georgoules originally requested relief pursuant to Fed. R. Bankr. P. 9006(b)(1). This Rule permits the court to enlarge the time to take an action "on motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect." Rule 9006(b)(3), however, provides exceptions to this grant of authority. It states that extensions of time for acting under certain other Federal Rules of Bankruptcy Procedure, including Rules 4004(a) and 4007(c), can only be granted "to the extent and under the conditions stated in those rules." Rule 4004(a) applies to complaints brought under § 727 and Rule 4007(c) applies to complaints seeking relief under § 523(c). Since Georgoules seeks an extension of time to file his complaint objecting to discharge under § 727 and to dischargeability under § 523(c), the excusable neglect standard of Rule 9006(b)(1) does not apply.

Complaints seeking relief under either § 727 or § 523(c) must be filed within 60 days of the first date set for the § 341 meeting. While that time period can be extended by motion (and was extended three times in this case), Rules 4004 and 4007 provide that "[t]he motion [to extend time] shall be filed before the time has expired."

Our Circuit held (and the Supreme Court affirmed) that the timeliness provisions of Rules 4004 and 4007 are not jurisdictional. *In re Kontrick*, 295 F. 3<sup>rd</sup> 724, 733 (7<sup>th</sup> Cir 2002), *aff'd sub nom. Kontrick v. Ryan*, 540 U.S. 443 (2004). As a result, they are subject to equitable defenses. *Id.*; see *In re Sven*, 2006 WL 3691160, \*6 (C.D. Ill. Dec. 13, 2006). "[T]hose defenses must be applied in a manner consistent with the manifest goals of Congress to resolve the matter of dischargeability promptly and definitively in order to ensure that the debtor receives a fresh start

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unobstructed by lingering doubts about the finality of the bankruptcy decree.” *Kontrick*, 295 F. 3<sup>rd</sup> at 733 (footnote omitted).

Does Georgoules have an equitable defense to the conclusion that his complaint is time-barred? He argues that equitable tolling applies.

The court finds first that even if equitable tolling applies, it does not apply to STGT, Inc., the other plaintiff named in the adversary complaint. The first request for extension of the discharge/dischargeability deadline, made in the summer of 2019, was filed only as to Georgoules. The court never extended the July 8, 2019, deadline for STGT to file an adversary complaint objecting to discharge or dischargeability.

The court next turns to the question of whether Georgoules can successfully invoke equitable tolling as a defense. Equitable tolling requires the party raising it to satisfy a two-prong test: (1) he pursued his rights diligently; and (2) an extraordinary circumstance stood in the way of timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010); *In re Lee*, 2015 WL 251992, \*3 (Bankr. N.D. Ill. Jan. 21, 2015).

The realm of equitable tolling is a highly fact-dependent area in which courts are expected to employ flexible standards on a case-by-case basis. That said, tolling is rare; it is reserved for extraordinary circumstances far beyond the litigant’s control that prevented timely filing. . . . [I]ts availability depends on the facts.

*Socha v. Boughton*, 763 F. 3<sup>rd</sup> 674, 684 (7<sup>th</sup> Cir. 2014) (quotations omitted). *See Modrowski v. Mote*, 322 F. 3<sup>rd</sup> 965, 967 (7<sup>th</sup> Cir.) (“[w]e rarely deem equitable tolling appropriate”), *cert. denied*, 540 U.S. 925 (2003).

As to the first element, diligent pursuit of rights, Georgoules attended Couchell’s § 341 meeting, filed a proof of claim, issued 2004 subpoenas, conducted examinations and compelled production of documents. He sought extensions to the discharge/dischargeability deadline three times, “extensions made necessary by Debtor’s delay and/or refusal to turn over documents and information.” Sur-Reply in Support of Motion of Stephen Georgoules to Excuse Late Filing, EOD 66 at 3. Georgoules also advised Couchell’s lawyer that a complaint would be filed.

Couchell does not dispute that Georgoules pursued his rights diligently, and the court agrees. The first element required for an equitable tolling defense is satisfied.

The more difficult question is whether extraordinary circumstances stood in the way of timely filing. Georgoules’ attorney Anthony D’Agostino had a family emergency on December 19 because his father was admitted to the hospital. When D’Agostino returned to a computer on the evening of December 20, he thought it would be a quick task to file the already-drafted

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complaint. He then discovered that a software license for the PDF converter program had expired, and he had to use a more complicated procedure to convert the complaint to PDF.

Georgoules cited no case in which an attorney's family medical emergency constituted extraordinary circumstances that warranted equitable tolling. In its own research, the court found only one case in which an unanticipated medical emergency rose to the level of an extraordinary circumstance. In that case, it was the attorney himself who was medically incapacitated and "unable to function during the latter half of the thirty-day application period." *Lane v. Colvin*, 2016 WL 5936866, \*2 (D. Mont. Oct. 12, 2016). "Although counsel is expected to arrange for the handling of cases during periods of incapacity, it appears that this was an unanticipated medical emergency." *Id.*

By contrast, several other cases held that hospitalization or a relative's illness was not an extraordinary circumstance. *Osorio v. Robert Packer Guthrie Hospital*, 2016 WL 5122028, \*3 (W.D. Pa. July 22, 2016) ("[c]ourts have not considered illness, even when it requires hospitalization, to be an extraordinary circumstance that merits equitable tolling," following the line of case law that equitable tolling is appropriate only when health problems cover the entire limitations period) (citations omitted), *adopted*, 2016 WL 5122547 (W.D. Pa. Sept. 20, 2016), *appeal dismissed*, 2017 WL 5514645 (3<sup>rd</sup> Cir. Jan. 26, 2017) (lack of appellate jurisdiction); *Blakes v. Gruenberg*, 2015 WL 9274919 (E.D. Va. Dec. 18, 2015) (attorney's sister's need for hospitalization, alone, was insufficient).

Plaintiff argues that his attorney's hospitalization the afternoon the 90-day statute of limitations expired amounted to extraordinary circumstances. However, I find that this merely constitutes a "garden variety" claim of excusable neglect which does not justify application of equitable tolling in this case. Plaintiff's counsel knew well in advance of the 90-day time limit that Plaintiff had received the right to sue notice and chose to wait until the 90<sup>th</sup> day of the filing period before attempting to file the Complaint in this Court. In fact, Plaintiff's briefing specifically points out that Plaintiff was diligent in pursuing his claim and had retained counsel long in advance of the filing deadline.

*Mesquida v. Whole Foods Market Rocky Mountain/Southwest, L.P.*, 2013 WL 6168844, \*3 (D. Col. Nov. 25, 2013).

Neither did Georgoules cite a case in which a computer problem constituted extraordinary circumstances. To the contrary, the weight of authority indicates the opposite.

[C]omputer problems are not grounds for equitable tolling of a prescriptive period, particularly when encountered on the last day to file. *See Johnson v. Quarterman*, 483 F. 3<sup>rd</sup> 278, 287 (5<sup>th</sup> Cir.), *cert. denied*, 552 U.S. 1064 (2007) (declining to find equitable tolling where the petitioner's attorney waited until the

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last possible day and then experienced computer problems which prevented timely filing); *Schmitt v. Zeller*, 354 Fed. Appx. 950, 951 (5<sup>th</sup> Cir. 2009) (“We have recognized that a component of the obligation to pursue rights diligently is not to wait until near a deadline to make a filing, then seek equitable tolling when something goes awry”).

*Lovely v. Smith*, 2019 WL 6719799, \*2 (W.D. La. Nov. 25, 2019), *adopted*, 2019 WL 6724341 (W.D. La. Dec. 10, 2019). *See Tamburri v. Berryhill*, 2018 WL 1175141, \*2 (E.D.N.Y. March 5, 2018) (“The Second Circuit has not addressed the issue of whether an attorney’s computer malfunction on the final day of the 30-day window under the EAJA is sufficient grounds to apply the doctrine of equitable tolling . . . . [T]he court finds that Plaintiff does not qualify for equitable tolling in the particular circumstances present here.”). *See also DePippo v. Chertoff*, 453 F. Supp. 2<sup>nd</sup> 30, 34 (D.D.C. 2006) (“While unfortunate, a frozen computer is by no means a significant enough reason to equitably toll the filing deadline in question.”) (footnote omitted).

There is no question that D’Agostino's situation engenders sympathy. Yet D’Agostino admits that he could have returned to the office sooner, writing in the Supplement that he “did not cut his family obligations short because he anticipated that the filing of the Adversary Complaint would only take a short period of time.” Supplement to Motion of Stephen Georgoules to Excuse Late Filing, EOD 61, at 5 ¶ 25.

The court must be mindful of the Seventh Circuit’s direction that “tolling is rare; it is reserved for extraordinary circumstances far beyond the litigant’s control.” *Socha*, 763 F. 3<sup>rd</sup> at 684 (quotation omitted); *see also Gray v. Zatecky*, 865 F. 3<sup>rd</sup> 909, 912 (7<sup>th</sup> Cir. 2017) (“[t]his is a demanding standard”), *cert. denied*, 138 S. Ct. 1301 (2018). While the case law tells us that the circumstances should be evaluated based on “the entire hand that the petitioner was dealt,” *Socha*, 763 F. 3<sup>rd</sup> at 686, the hospitalization and the computer problems combined do not rise to the level of the extraordinary circumstances required to support a claim of equitable tolling, *see also U.S. v. Marcello*, 212 F. 3<sup>rd</sup> 1005, 1010 (7<sup>th</sup> Cir.), *cert. denied*, 531 U.S. 878 (2000) (denying a request for equitable tolling where petitioners “missed the deadline by a day . . . [claiming that] the law was unclear, the delay was minimal, the prosecution was not prejudiced, and [the] attorney’s father died 2 weeks before the deadline”).

This outcome may appear severe, but it

is the nature of deadlines. . . . The decision here is no more harsh than others on the subject. Some are harsher. *See, e.g., United Community Bank v. Harper (In re Harper)*, 489 B.R. 251, 254-260 (Bankr. N.D. Ga. 2013) (dismissing as untimely complaint filed two minutes and forty-four seconds past the deadline).

*Lee*, 2015 WL 251992, \*5 (citations omitted).

**STATEMENT**

For all of the reasons stated above, **IT IS HEREBY ORDERED THAT** the motion to excuse late filing is **DENIED**.

Date: March 31, 2020

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DAVID D. CLEARY  
United States Bankruptcy Judge