

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
ROBERT EUGENE ETZEL and)	Case No. 02-42963
KAREN LOUISE ETZEL,)	Chapter 7
)	
Debtors.)	
_____)	

MEMORANDUM AND ORDER

This matter is before the Court on Telecommunications Research Associates, L.L.C.’s (hereinafter “TRA”) Motion to File Proof of Claim Out of Time.¹ Robert Eugene Etzel and Karen Louise Etzel (hereinafter “Debtors”) and TRA have stipulated to the relevant facts and submitted briefs in support of their positions. The Court has jurisdiction to decide this matter,² and it is a core proceeding.³

I. FINDINGS OF FACT

1. Robert Eugene Eztel (hereinafter “Etzel”) was an employee of TRA from January 1991 to March 2003, and a contractor executive with TRA from March 2003 to August 2003.
2. Etzel served in several positions at TRA, including President. While President, Etzel received several salary advances and was responsible, under his employment agreement, to share in company losses.

¹ Doc. No. 35.

² 28 U.S.C. § 1334.

³ 28 U.S.C. § 157(b)(2)(A) and (B).

3. Debtors filed their voluntary petition for relief, pursuant to 11 U.S.C. Chapter 7, on November 8, 2002.
4. Debtors listed TRA in their schedules as an unsecured creditor.
5. On or about October 31, 2003, the Court entered its Order Fixing Time for Filing Claims (hereinafter “the Order”) and set February 9, 2004, as the deadline for filing proofs of claim in order to participate in late discovered assets.
6. The Order states:

IT IS ORDERED AND NOTICE IS HEREBY GIVEN that any creditors who have not heretofore filed claims herein may now file claims, with appropriate attachments on or before:

DEADLINE DATE: 02/09/04
For Governmental Units: 05/10/04

Claims filed after the deadline will not be considered for allowance.

The Proof of Claim form is enclosed with this Order. Claims must be filed in duplicate with the court. It may be filed by regular mail. If you wish to receive proof of its receipt by the Bankruptcy Court, enclose an additional photocopy of the Proof of Claim together with a self-addressed stamped envelope. There is no fee for filing the Proof of Claim.

(Emphasis in original)

7. TRA received the Order in the ordinary course of business sometime after October 31, 2003, and prior to February 9, 2004.
8. TRA mailed its unsecured, non-priority Proof of Claim in the amount of \$866,856.00, to the Court by regular mail on February 9, 2004, the established bar date.

9. The Proof of Claim was received, filed and docketed by the Court on February 10, 2004.
10. TRA received its file-stamped copy of the Proof of Claim from the Court on February 20, 2004, and realized it contained a February 10, 2004 filed date.
11. On February 24, 2004, TRA filed its Motion to File Proof of Claim Out of Time.

II. CONCLUSIONS OF LAW

TRA filed its Motion to File Proof of Claim Out of Time, requesting this Court use its equitable powers to “read the language in 11 U.S.C. § 105(a)⁴ generously” to allow its admittedly untimely claim. TRA asserts that it mistakenly believed that mailing the Proof of Claim on the bar date would constitute a timely filing, since the Notice reflected that claims could be mailed, and that the Court should use its equitable powers to allow the claim to be filed one day out of time. It further argues “[i]t is simply unfair to expect lay people to know that mailing does not complete filing, which would require them to do more than technically comply with a court order.” The Chapter 7 Trustee (hereinafter “the Trustee”) asserts that none of the exceptions set forth in Bankruptcy Rule 3002(c), which governs the time for filing a proof of claim, are applicable, and therefore the Court should not allow the claim to be filed out of time.

⁴ All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

A. Bankruptcy Rule 3002(c) does not allow the extension of the time to file proofs of claim under the facts of this case.

Extensions of time in bankruptcy cases are generally governed by Fed. R. Bankr. P. 9006(b).

Pursuant to Rule 9006(b)(3), the Court may enlarge the time for taking action under Fed. R. Bankr. P. 3002(c), which governs the time for filing proofs of claim, but “only to the extent and under the conditions” stated in that rule.⁵

Rule 3002(c) allows extension of the filing date only in the following circumstances:

- (1) A proof of claim filed by a governmental unit is timely if it is filed not later than 180 days after the date of the order for relief.
- (2) The court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.
- (3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final.
- (4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor.
- (5) If late discovered assets make payment of a dividend appear possible, creditors may file proofs of claim within 90 days after the mailing of notice from the clerk.⁶

Only subsection (c)(5) is pertinent, but because TRA filed its claim 91 days after the discovered asset notice, it is also inapplicable.

⁵ Fed. R. Bankr. P. 9006(b). *Cf. Bank of Cushing v. Vaughan (In re Vaughan)*, ___ B.R. ___ (10th Cir. BAP July 7, 2004) (holding that the maxim *expressio unius est exclusio alterius* is a canon of statutory construction holding that to express or include one thing implies the exclusion of the other or of the alternative).

⁶ Fed. R. Bankr. P. 3002(c).

The seminal Tenth Circuit Court of Appeals decision on this issue is *Jones v. Arross*.⁷ In that case, a Chapter 12 creditor who had not received notice of the bankruptcy filing was allowed to file a late claim by the bankruptcy court, which decision was affirmed by the District Court. The Tenth Circuit reversed this decision, however, holding that Rules 9006(b) and 3002(c) govern, and that there is no excusable neglect exception in those rules for Chapter 12 (and in dicta, Chapter 7) cases.⁸ In overruling the courts that had allowed the claim, the Tenth Circuit specifically noted “the seeming harshness of this result” in barring the claim.⁹

TRA, which neither cites to nor tries to distinguish *Jones v. Arross*, instead argues that this Court should follow *Pioneer Investment Servs. v. Brunswick Assoc. Ltd.*,¹⁰ and suggests the Tenth Circuit would adopt a “flexible analysis” in analyzing “excusable neglect.” TRA’s argument ignores language in *Jones v. Arross*, decided soon after *Pioneer Investment*, which specifically rejected this argument in Chapter 7 cases by stating “... the ‘excusable neglect’ standard for filing proofs of claim applies only to cases brought under Chapter 11 [because of the operation of Rule 9006(b)(3)].”¹¹

This Court is bound by *Jones v. Arross* and its interpretation of Rules 9006(b) and 3002(c). Thus, despite harsh results, filing dates may only be extended under the specifically itemized exceptions

⁷ 9 F.3d 79, 81 (10th Cir. 1993).

⁸ *Id.* at 81 (citing numerous cases so holding).

⁹ *Id.*

¹⁰ 507 U.S. 380 (1993).

¹¹ *Jones v. Arross*, 9 F.3d at 81.

listed in 3002(c). Because the facts of this case do not fit within any of those exceptions, there is no legal basis under the pertinent rules to extend the deadline for filing proofs of claim in this case.

B. The Court cannot use its equitable powers under § 105(a) to circumvent the plain language of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

TRA urges the Court to use the broad equitable powers contained in § 105(a) to nevertheless extend the bar date and deem the Proof of Claim timely filed, even though these facts do not fall within the five itemized exceptions contained in Fed. R. Bankr. P. 3002(c). Section 105(a) provides that:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.¹²

Although § 105(a) gives the Court the power to take action to enforce or implement court orders or to prevent an abuse of process, “whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.”¹³ “The court has no discretion to grant an extension simply because no prejudice would result, or for any other equitable reason.”¹⁴

TRA has not provided any legal authority that would allow the Court to utilize its equitable powers under § 105(a) to allow an extension of the bar date for filing proofs of claim on the basis that it misunderstood the legal significance of the filing requirements in the notice. The United States District

¹² 11 U.S.C. § 105(a).

¹³ *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

¹⁴ *In re Analytical Systems, Inc.*, 933 F.2d 939 (11th Cir. 1991) (quoting *Vertientes, Ltd., v. Interior Trade Inc. (In re Vertientes)*, 845 F.2d 57, 60 (3rd Cir. 1988)).

Court for the District of Kansas generally addressed the issue of extending bar dates through use of the court's equitable powers in *H.T. Paul Co. v. Atteberry*. In *Atteberry*,¹⁵ albeit in a different context than late filed proofs of claim, the District Court discussed two exceptions created by the Tenth Circuit when a court may extend deadlines for reasons not otherwise authorized by the Bankruptcy Rules.

The first exception discussed in *Atteberry* involved the use of equitable powers under § 105(a) when a bankruptcy court actively misleads a litigant. In *In re Themy*,¹⁶ the Tenth Circuit affirmed the bankruptcy court's use of its equitable power to allow a late filed complaint, because the court was itself responsible for affirmatively misleading a complainant because it had issued an order that contained an incorrect deadline for filing objections to discharge.¹⁷

The District Court in *Atteberry* also stated that untimely objections or complaints may be allowed where there has been a lack of notice of the bankruptcy proceedings to the creditor.¹⁸ Although this exception appears inapplicable in the context of late filed claims, because of the specific provisions of Rule 3002(c),¹⁹ it is unhelpful to TRA in any event, because TRA forthrightly admits it received timely notice of the bar date.

¹⁵ 194 B.R. 521 (D. Kan. 1996).

¹⁶ 6 F.3d 688 (10th Cir. 1993).

¹⁷ *Id.* at 690.

¹⁸ *In re Atteberry*, 194 B.R. at 524 (citing *In re Walker*, 927 F.2d 1138 (10th Cir. 1991)); See also *In re Anderson*, 159 B.R. 830, 835 (Bankr. N.D. Ill. 1993) (“A Bankruptcy Judge may use equitable power to allow the filing of a late proof of claim when a creditor has not received proper notice of a bankruptcy through no fault of its own.”)

¹⁹ *Jones v. Arross*, 9 F.3d at 81.

In *Atteberry*, the debtor had filed a petition under Chapter 11 for his company and a separate Chapter 7 for himself. A creditor sought extension of the filing date for objections to discharge in the Chapter 7 case, but mistakenly filed its motion in the Chapter 11 proceeding. The District Court found that the bankruptcy court had not misled the creditor and that the creditor had notice of the bankruptcy proceeding. The District Court affirmed the bankruptcy court's finding that the court did not have the power under § 105(a) to extend the filing date under those facts.²⁰

The Court finds that TRA has failed to show that the Court has the authority to use its § 105 equitable powers under the facts of this case. TRA admits it received notice of the bar date along with the other creditors. TRA's failure to timely file its proof of claim was solely caused by its own misunderstanding of the Court's order and applicable law, not as a result of some affirmative act by the Court that was misleading.²¹

TRA also argues that because it was proceeding pro se at the time it mailed its proof of claim, it should be excused from knowing that "mailing does not complete filing." TRA does not cite authority for the proposition that a pro se litigant, because of its own choice to not hire an attorney, can somehow be excused from filing requirements, and this Court could find no authority. TRA's pro se status does not give rise to a special circumstance that relaxes filing rules.²² TRA was on notice of the date the

²⁰ *Id.* at 524-25.

²¹ The Trustee points out that 28 other creditors were not confused by the notice to file claims, and filed their claims timely.

²² See *United States v. Gibson*, 832 F. Supp. 324, 327-28 (D. Kan. 1993) ("[D]efendant's pro se status in this case does not create a special circumstance that would take this case out of the general rule that ignorance or mistake of the law does not constitute excusable neglect. ... Defendant's mistaken belief as to the proper calculation of days to file his notice of appeal in no way arose out of a

claim was due, but simply misunderstood the requirements of the Order. The Court's Order did nothing to affirmatively mislead TRA into believing that mailing constituted filing, and there has been no abuse of process that would warrant use of § 105(a) powers to allow the late claim as timely.

III. CONCLUSION

The Court finds that TRA's Motion to File Proof of Claim Out of Time must be denied. The Proof of Claim was not filed by the bar date set by the Court, and no circumstances exist under Rule 3002(c) to extend the bar date under these facts. The Court's use of its equitable powers under § 105(a) to allow the late filed claim would be improper under the facts of this case, as doing so would circumvent the clear language contained in Rule 3002(c).

IT IS, THEREFORE, BY THIS COURT ORDERED that Telecommunications Research Associates, L.L.C.'s Motion to File Proof of Claim Out of Time is denied.

Dated this _____ day of July, 2004.

JANICE MILLER KARLIN
United States Bankruptcy Judge
District of Kansas

unique circumstance that was beyond defendant's control as a result of his pro se status. Rather, defendant's failure to timely file was a result of defendant's failure to take even minimal steps to verify whether his belief of the law was correct.").

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the Memorandum and Order was deposited in the United States mail, postage prepaid on this _____ day of July, 2004, to the following:

Mark W. Neis
NEIS & MICHAUX, P.A.
400 South Kansas Avenue, Suite 201
P.O. Box 2487
Topeka, Kansas 66601-2487

Joseph I. Wittman
Columbian Building
112 SW 6th, Suite 508
Topeka, Kansas 66603

Cailin Farrell Ringelman
WONER, GLENN REEDER,
GIRARD & RIORDAN, P.A.
5611 SW Barrington Ct. South
P.O. Box 67689
Topeka, Kansas 66667-0689

DEBRA C. GOODRICH
Judicial Assistant to:
The Honorable Janice Miller Karlin
Bankruptcy Judge