

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**DREW R. HARPER,**

Debtor.

Case No. **10-60041-13**

**O R D E R**

At Butte in said District this 21<sup>st</sup> day of September, 2010.

In this Chapter 13 case, the Trustee filed on August 3, 2010, a notice of late-filed claim (Docket No. 64) objecting to Proof of Claim No. 18 filed by Town & Country Supply Association. After due notice, a hearing on the Trustee's notice of late-filed claim was held September 20, 2010, in Billings. The Chapter 13 Trustee, Robert G. Drummond of Great Falls, Montana, appeared at the hearing. Town & Country Supply Association was represented at the hearing by Margy Bonner of Billings, Montana.

Debtor's voluntary Chapter 13 bankruptcy petition was filed on January 12, 2010. In the "Notice of Commencement of Case" entered January 15, 2010, this Court set May 20, 2010, as the bar date for creditors to file proofs of claim. Town & Country Supply Association filed its proof of claim on July 27, 2010. Town & Country Supply Association asserts that Debtor did not list Town & Country Supply Association as a creditor in any of the schedules filed in this matter and that it discovered Debtor's bankruptcy while conducting a credit check on Debtor as part of the normal business operations of Town & Country Supply Association. Upon such discovery,

Town & Country Supply Association immediately filed its Proof of Claim claiming an unsecured claim in the amount of \$1,172.04 for goods sold.

This Court has long recognized that bankruptcy courts have no discretion to allow a late filed proof of claim in a Chapter 13 case because of the necessity to determine whether a Chapter 13 plan satisfies the standard of 11 U.S.C. § 1325(a)(4) for distribution to unsecured claims. *In re Quesnell*, 18 Mont. B.R. 80, 83 (Bankr. D. Mont. 1999); *In re Osborne*, 76 F.3d 306, 310-11 (9<sup>th</sup> Cir. 1996). Rule 3002(c) sets forth a claim bar date for timely filing a proof of claim.

In *In re Coastal Alaska Lines, Inc.*, 920 F.2d 1428, 1432 (9<sup>th</sup> Cir. 1990), the Ninth Circuit discussed whether a court has equitable power to extend time to file proofs of claim under F.R.B.P. 3002(c), and concluded that F.R.B.P. 9006(b)(3) allows an extension of time only under the six circumstances permitted by Rule 3002(c), not under the court's general equitable discretion or its equitable powers under 11 U.S.C. § 105(a). *See also In re Krenzelok*, 15 Mont. B.R. 391, 394 n.2 (Bankr. D. Mont. 1996); *Quesnell*, 18 Mont. B.R. at 84. More recently, the Ninth Circuit reiterated that the Bankruptcy Court does not have discretionary authority to enlarge the time after the filing period has expired except pursuant to the exceptions set forth in the rules, including under equitable tolling. *In re Gardenhire*, 209 F.3d 1145, 1148-50, 1152 (9<sup>th</sup> Cir. 2000). None of the enumerated exceptions in Rule 3002(c) are applicable in the instant case. Town & Country Supply Association filed its Proof of Claim after the claims bar date. Under controlling Ninth Circuit authority cited above and this Court's precedent in *Quesnell*, Town & Country Supply Association's late filed Proof of Claim may not be an allowed claim and the Trustee's objection must be sustained.

Turning to Town & Country Supply Association's oral request that its claim not be

subject to discharge because the Debtor did not schedule it in time to permit the timely filing of a proof of claim, this Court granted such relief in *Quesnell* when the debtors in that case manipulated their Schedules and failed their burden of showing reasonable diligence in completing their Schedules, and failed to comply with court orders to give the creditor additional notice, thus failing to afford the creditor fundamental due process. *Quesnell*, 18 Mont. B.R. at 85-87, quoting *In re Circle K Corp.*, 198 B.R. 784, 789 (Bankr. D. Ariz. 1996).

The Debtor has the burden to cause formal notice to be given to creditors in time to file Proofs of Claim. *Quesnell*, 18 Mont. B.R. at 85. The Debtor was not represented at the hearing on the Trustee's objection, in response to which Town & Country Supply Association requested that its claim be excepted from the Debtor's discharge. The Court finds that it does not have an adequate record to make the required findings of fact for the relief sought by Town & Country Supply Association. *Quesnell*, 18 Mont. B.R. at 84-87, 90.

A proceeding to determine dischargeability of a debt is an adversary proceeding. F.R.B.P. 7001(6). Town & Country Supply Association seeks a determination of nondischargeability without an adequate record or the Debtor's participation. The time for filing a complaint to determine dischargeability of a debt under § 523(a)(3) may be filed by Town & Country Supply Association at any time under F.R.B.P. 4007(b).

In conclusion, the Trustee's objection to Town & Country Supply Association's late filed claim must be sustained and Proof of Claim No. 18 filed by Town & Country Supply Association disallowed. Town & Country Supply Association's request that its claim be excepted from Debtor's discharge will be denied, but without prejudice to Town & Country Supply Association's right to seek exception from discharge of its claim under appropriate rules and

statutes. In accordance with the foregoing,

**IT IS ORDERED** the Chapter 13 Trustee's objection, filed August 3, 2010, to Town & Country Supply Association's late-filed claim is SUSTAINED and the allowance of Proof of Claim No. 18 is DENIED.

**IT IS FURTHER ORDERED** that Town & Country Supply Association's request that its claim be excepted from discharge is DENIED without prejudice.

BY THE COURT

A handwritten signature in cursive script, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER  
U.S. Bankruptcy Judge  
United States Bankruptcy Court  
District of Montana