UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

FILED
FEB 23 2005
Denise H. Curtis, Clerk
U.S. Bankruptcy Court for D.C.

IN RE:

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION I, *et al.*,

Debtors.

Case No.: 02-2250
Jointly Administered
(Chapter 11)

FLORENCE MAY CHERRY,

Movant,

v.

GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION I, *et al.*,

Respondent

MOTION TO ALLOW LATE FILING OF CLAIM

Movant Florence May Cherry, by and through undersigned counsel, respectfully requests the Court allow the late filing of a proof of claim, and as reasons therefor states as follows:

1. These administratively consolidated cases were filed on or about November 20, 2002 by Greater Southeast Community Hospital Corporation I ("GSCH") and its affiliates (collectively the "Debtors").

2. By an Order entered March 3, 2003, this Court fixed May 30, 2003 as the bar date for the filing of proofs of claims by non-governmental entities. On or about April 2, 2004, this Court entered an Order (the "Confirmation Order"), confirming the Second Amended Joint Plan of Reorganization Under Chapter 11 of the United States Bankruptcy Code, dated

February 23, 2002 (the "Plan of Reorganization"), filed by the Debtors. Currently, this case remains open and the Court retains jurisdiction over matters arising in and related to the Chapter 11 case, as set forth in Article XI of the Plan of Reorganization and § 1142 of the Code.

3. Pursuant to § 6.2(e) of the Plan of Reorganization, as confirmed by the Confirmation Order, the Reorganized Debtors have assumed the "Retained Liabilities," which include "all Medical Malpractice Claims, whether arising pre-petition (except for any Tort Claims arising out of the Debtors' relationship and transactions with Boston Regional Medical Center).[1]

4. Section 4.6 of the Plan of Reorganization also provides for the assumption of "Retained Pre-petition Claims" by the Reorganized Debtors. "Retained Pre-petition Claims" are defined to include "all pre-petition Medical Malpractice Claims" and "all pre-petition Tort Claims, except for any Tort Claims arising out of the Debtors' relationship and transactions with Boston Regional Medical Center."

5. The Confirmation Order provides in pertinent part with respect to such claims that:

> Pursuant to Section 7.1(e) of the Plan, all Tort Claims and Medical Malpractice Claims are Disputed Claims. Any Tort Claim or Medical Malpractice Claim as to which a proof of claim was timely filed in these Chapter 11 Cases shall be determined and liquidated in the administrative or judicial tribunal in which it is pending on the Confirmation Date or, if no such action was pending on the Confirmation Date, in any administrative or judicial tribunal of appropriate jurisdiction. The Bankruptcy Court shall not retain jurisdiction over the Medical Malpractice Claims and Tort Claims that constitute Retained Liabilities.

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[1] Section 1.56 of the Plan of Reorganization defines a Medical Malpractice Claim as "any Claim, whether arising pre-petition or post-petition, relating to medical malpractice asserted against the Debtors and/or the Debtors' insurer(s). Similarly, § 1.102 of the Plan of Reorganization defines a Tort Claim as "any Claim, whether arising pre-petition or post-petition, other than a medical Malpractice Claim or WC Claim, relating to personal injury, property damage, or products liability or other similar Claims asserted against the Debtors that previously have not been compromised, settled or otherwise resolved."

6. The Confirmation Order further states:

> Unless otherwise provided, all injunctions or stays provided for in these Chapter 11 cases pursuant to sections 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the close of these Chapter 11 Cases; provided, however, that such injunctions or stays are not applicable to obligations of the Reorganized Debtors, including but not limited to obligations for Retained Liabilities or Retained Pre-petition Claims.

7. Florence May Cherry possesses a claim for medical malpractice against GSCH as a result of injuries she sustained in June 2000, and on October 26, 2001, Ms. Cherry filed a civil action against GSCH in the Superior Court of the District of Columbia (*Florence May Cherry v. Greater Southeast Community Hospital, et al.*, Case No. 01-8002). The parties conducted discovery and litigated the Superior Court medical malpractice action for some 13 months until GSCH, having filed for Chapter 11 protection, filed a Notice of Bankruptcy Stay in the Superior Court action on December 2, 2002.

8. Shortly thereafter, on January 10, 2003, Ms. Cherry moved to lift the stay in this Court, specifying in her motion the nature of her claim against GSCH, her intent to hold GSCH liable, the value of her claim and the fact that GSCH has liability insurance coverage exceeding the value of the claim. *See* Amended Motion to Lift Automatic Stay (Exhibit 1). In the ensuing months, a decision on the lift stay motion was repeatedly postponed, although Ms. Cherry's counsel regularly communicated with counsel for GSCH regarding lifting the stay. *See* "Stipulation" Docket Entries of Filer Florence May Cherry (Exhibit 2).

11. While the lift stay motion was pending, this Court set the proof of claims bar date for May 30, 2003. Unfortunately, due to GSCH's failure to list Ms. Cherry as an unsecured creditor on the Chapter 11 action mailing matrix, she did not receive notice of the claims bar date. GSCH presumably recognizes its failure to list Ms. Cherry on the mailing matrix, given

its unsupported assertion in the Superior Court action that the Notice of Bankruptcy Stay relieved GSCH of its responsibility to ensure that Ms. Cherry received notice of the claims bar date. *See* Memorandum in Support of GSCH's Motion to Dismiss at ¶ 3 (Exhibit 3). The 72-page mailing matrix – listing more than 500 creditors – does not include Ms. Cherry, despite the Superior Court medical malpractice action having been litigated for more than a year when GSCH filed for bankruptcy protection.

12. This Court approved GSCH's reorganization on April 2, 2004, without ever deciding Ms. Cherry's lift stay motion. Some seven months later, at a status conference in the Superior Court medical malpractice action, GSCH filed a motion to dismiss, arguing that because Ms. Cherry did not file a formal proof of claim in this Court, her medical malpractice action must be dismissed. *See* Exhibit 3 (GSCH's Motion to Dismiss).

13. In opposition to GSCH's motion in the Superior Court medical malpractice action, Ms. Cherry argued that her lift stay motion in this Court was sufficient proof of her claim, and that she is entitled to maintain her medical malpractice action because GSCH has liability insurance coverage exceeding the amount of Ms. Cherry's claim. *See* Exhibit 4 (Opposition to GSCH's Motion to Dismiss).

14. On January 17, 2005, Judge Weisburg denied GSCH's motion to dismiss the Superior Court medical malpractice action, but "suggested" that Ms. Cherry seek this Court's *post hoc* approval of her claim, rather than "risk ... initiating a jurisdictional tug or war." *See* Exhibit 5 (Order denying GSCH's motion to dismiss the Superior Court medical malpractice action). Trial in the Superior Court action is currently scheduled for July 11, 2005. *See* Exhibit 6 (Scheduling notice).

15. To the extent that authorization is required from this Court for the determination

and liquidation of Ms. Cherry's medical malpractice claim against GSCH, the circumstances set forth in the foregoing paragraphs justify allowing Ms. Cherry to file her proof of claim at this juncture, *nunc pro tunc*, thereby alleviating Judge Weisburg's concern regarding a "jurisdictional tug of war," and allowing the Superior Court medical malpractice action to proceed without further delay.[2]

16. GSCH argued in the Superior Court action that, by filing its Notice of Bankruptcy Stay, the onus was shifted to Ms. Cherry to learn of the applicable bar date and file her proof of claim in accordance therewith. However, the debtor's knowledge of a creditor controls whether the debtor has a duty to list that creditor as a "known" creditor. *In re Maya*

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[2] In moving for dismissal of the Superior Court action, GSCH unsuccessfully attempted to distinguish *West v. White*, 73 B.R. 983 (Bkrtcy.D.D.C. 1987), from the circumstances of these proceedings. *See* Exhibit 3 (Memorandum) at ¶¶ 12-13. GSCH's discussion of the *West* decision, however, failed to mention the critical factor that required denial of GSCH's motion to dismiss: GSCH has liability insurance coverage in the amount of $1 million per incident for the relevant timeframe, an amount sufficient to cover Ms. Cherry's $950,000 medical malpractice claim.

Indeed, nearly every court that has considered the relevant issue in *West* agrees that "the statutory language and purpose of the § 524(a) injunction, aimed at protecting the debtor, [does] not preclude a suit tailored solely to determining the debtor's liability as a precondition to recovery against the debtor's liability insurance." *Green v. Welsh*, 956 F.2d 30, 34 (2nd Cir. 1992), *citing* 11 U.S.C.§ 524(a) and (e). *See also In re Hendrix*, 986 F.2d 195, 197 (7th Cir. 1993) ("as to whether such an injunction extends to a suit only nominally against the debtor because the only relief sought is against his insurer, the cases are pretty nearly unanimous that it does not"); *In re Shondell*, 950 F.2d 1301, 1307 (7th Cir. 1991) (citing *Collier on Bankruptcy*, ¶ 524.02, for the proposition that § 524 was intended for the benefit of the debtor "but was not meant to affect the liability of third parties, or to prevent such liability through whatever means required"). Nor does the failure to file a proof of claim in this Court necessarily prevent Ms. Cherry from pursuing the Superior Court medical malpractice action. *See, e.g., In re Shondell*, 950 F.2d at 1307 (failure to file a proof of claim does not preclude action against debtor to obtain recovery from debtor's insurer).

Although Judge Weisburg expressed concern that the Superior Court may not have jurisdiction to grant an exception to the claims bar date or the § 524 injunction, a number of courts have suggested otherwise. *See, e.g., In re Petition of Board of Directors of Hopewell Intern. Ins., Ltd.*, 281 B.R. 200, 209 (Bkrtcy.S.D.N.Y. 2002) (citing various cases including *Green v. Welsh, supra*, for the proposition that "a creditor with a personal injury claim against the former debtor [does] not even have to seek modification of the permanent injunction to proceed against the debtor's insurance"); *In re Pettibone Corp.*, 156 B.R. 220, 232 (Bkrtcy.N.D.Ill. 1993) (citing *Hendrix, supra*, for the proposition that "the injury claimant was not obliged to ask the bankruptcy judge for any relief" from discharge injunction in order to proceed against the debtor's insurance); *Arreygue v. Lutz*, 69 P.3d 881, 884 (Wash.App.Div.3 2003) (permission of bankruptcy court unnecessary since § 524 injunction does not prohibit lawsuit against discharged debtor to recover from debtor's insurance); *Forsyth v. Jones*, 67 Cal.Rptr.2d 357, 360-61 (Cal.App.4.Dist. 1997) (no need for plaintiff to seek relief in bankruptcy court from § 524 injunction since "there is no need to seek relief from an injunction which does not extend to the action in which you wish to engage").

Const. Co., 78 F.3d 1395, 1398 (9th Cir. 1996). Known creditors (such as Plaintiff) must be given at least 20 days notice by mail of the proof of claims bar date. *See, e.g., In re Eagle Mfg., Inc.*, 62 F.3d 730, 735 (5th Cir. 1995), *citing* Bankruptcy Rule 2002(a)(8). *See also Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3rd Cir. 1995) ("*Known* creditors must be provided with actual written notice of a debtor's bankruptcy filing *and bar claims date*. For *unknown* claimants, notification by publication will generally suffice") (emphasis supplied; citations omitted). Moreover, a claims bar date notice is presumed to have been received by a creditor only "when the debtor offers proof that it was timely and properly mailed...." *In re Grand Union Co.*, 204 B.R. 864, 870 (Bkrtcy.D.Del.1997). GSCH has not offered such proof, presumably because its omission of Ms. Cherry from the mailing matrix of known creditors resulted in a failure to notify Ms. Cherry of the claims bar date.

17. The fact that a creditor has actual knowledge of a Chapter 11 bankruptcy proceeding does not obviate the need for notice. *Maya Const., supra*, 78 F.3d at 1399. Indeed, "[t]he burden is on the debtor to cause formal notice to be given; the creditor who is not given notice, even if he has actual knowledge of the reorganization proceedings, does not have a duty to investigate and inject himself into the proceedings." *Id.* Because inadequate notice of the claims bar date is a defect which precludes discharge of a claim in bankruptcy, *Chemetron Corp., supra,* 72 F.3d at 346, a claimant who is not properly notified of the bar date is not bound by the legal effects of the confirmation of a reorganization plan, and should be allowed to file a late proof of claim. *Eagle Mfg., supra*, 62 F.3d at 735.

18. In any event, Ms. Cherry's lift stay motion – filed in this Court before the claims bar date, and specifying the nature of her claim against GSCH, her intent to hold GSCH liable and the value of her claim – constituted an "informal proof of claim" sufficient to put GSCH

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and this Court on notice of her claim. *See In re U.S. Office Products Co. Securities Litigation*, 313 B.R. 73, 85 (Bkrtcy.D.D.C. 2004), *citing, inter alia*, *In re Waterman*, 227 F.3d 604, 605-12 (6th Cir. 2000). Indeed, rulings from various federal courts are uniform in their holdings that lift stay motions containing comparable information are to be treated as sufficient proof of claims. *See, e.g., In re Charter Co.,* 876 F.2d 861, 864 (11th Cir.1989); *In re Pizza of Hawaii, Inc.,* 761 F.2d 1374, 1381 (9th Cir.1985); *In re Veilleux,* 140 B.R. 28, 30 (Bkrtcy.D.Conn. 1992); *In re Gateway Investments Corp.,* 114 B.R. 784 (Bankr.S.D.Fla.1990); *In re Chicoine,* 97 B.R. 30 (Bkrtcy.D.Mont.1988); *In re Wm. B. Wilson Mfg. Co.,* 59 B.R. 535, 540 (Bkrtcy.W.D.Tex.1986).

19. The purpose behind the "informal proof of claim" doctrine is "to alleviate problems with form over substance; that is, equitably preventing the potentially devastating effect of the failure of a creditor ... when, in fact, pleadings filed by the party asserting the claim ... puts all parties on sufficient notice that a claim is asserted by a particular creditor." *U.S. Office Products, supra*, 313 B.R. at 85.

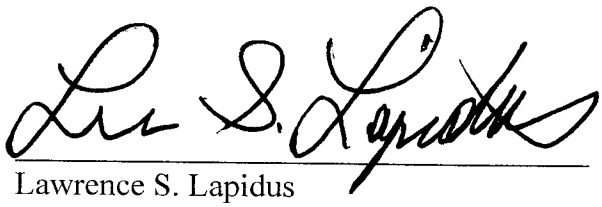
20. Here, as in *U.S. Office Products*, form should not reign over substance given that Ms. Cherry's lift stay motion put GSCH and this Court on notice of her claim against GSCH. Moreover, given GSCH's failure to list Ms. Cherry on the mailing matrix of known creditors, equity requires that she be allowed to proceed with her medical malpractice action in Superior Court.

WHEREFORE, the Movant Florence May Cherry prays that this Court enter an Order:

Determining that the claim asserted by the Movant Florence May Cherry constitutes a Retained Liability of the Reorganized Debtor, which may be determined and liquidated in the Superior Court of the District of Columbia, and;

Granting such other and further relief as may be just and proper.

Respectfully submitted,



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Attorneys for Movant Florence May Cherry

PLEASE TAKE NOTICE THAT WITHIN ELEVEN (11) DAYS AFTER SERVICE OF THIS MOTION you must file and serve a written objection to the motion, together with the proposed order required by Local Bankruptcy Rule 9072-1. The objection and proposed order must be filed with the Clerk of the Bankruptcy Court, U.S. Courthouse, 3rd and Constitution Ave., N.W., Washington, D.C. 20001, and served (by delivery or mailing of a copy) upon the undersigned. The objection must contain a complete specification of the factual and legal grounds upon which it is based. You may append affidavits and documents in support of your objection.

IF YOU FAIL TO FILE A TIMELY OBJECTION, THE MOTION MAY BE GRANTED BY THE COURT WITHOUT A HEARING. The Court may grant the motion without a hearing if the objection filed states inadequate grounds for denial.

Certificate of Service

I HERBY CERTIFY that on this 23rd day of February, 2005, a copy of the foregoing Motion To Allow Late Filing of Proof of Claim and Proposed Order was mailed via first class mail, postage prepaid, to:

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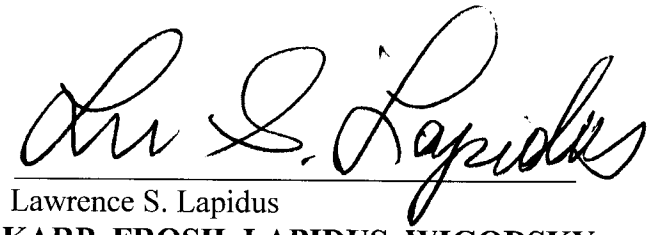

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UNITED STATES BANKRUPTCY COURT
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IN RE:	:	
GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION I, *et al.*,	:	**Case No.: 02-2250** **Jointly Administered** **(Chapter 11)**
Debtors.	:	
FLORENCE MAY CHERRY,	:	
Movant,	:	
v.	:	
GREATER SOUTHEAST COMMUNITY HOSPITAL CORPORATION I, *et al.*,	:	
Respondent	:	

ORDER

Upon consideration of the *Motion to Allow Late Filing of Claim*, it is this _____ day of _____, 2005 by the United States Bankruptcy Court of the District of Columbia:

ORDERED, that the *Motion* be, and hereby is, **GRANTED**; and it is

FURTHER ORDERED, that Movant's Proof of Claim is filed in this Court.

_____
Judge S. Martin Teel, Jr.
Bankruptcy Judge