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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

<p>In re: MICHAEL A. TURCHIN, Debtor.</p>	<p>Case No. CV 16-06160-AB Bankr. Case No. 2:16-bk-13147-BR Adversary Case No. 2:16-ap-01281-BR</p>
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<p>STEVEN BERKOWITZ, Appellant, v. MICHAEL A. TURCHIN, Appellee.</p>

AMENDED OPINION

Appeal from the United States Bankruptcy Court
for the Central District of California.
Hon. Barry Russell, Bankruptcy Judge, Presiding.
Reversed.

1 In this bankruptcy appeal, Appellant-Creditor Steven Berkowitz (“Appellant”
2 or “Berkowitz”) contends the Bankruptcy Court erred in denying his Motion to
3 Allow Inadvertent Late Filing of Objection To Discharge and Complaint to
4 Determine Non-Dischargeability of Debt, entered on August 4, 2016. Dkt. No. 1.
5 Berkowitz’s non-dischargeability complaint was filed one day late due to a delay
6 caused by Federal Express. In the underlying proceeding, the Bankruptcy Court
7 held that the time limitations for filing a non-dischargeability complaint appeared to
8 be jurisdictional, but to the extent equitable powers could extend the deadline, they
9 are limited to situations where a court misleads a party.

10 On October 25, 2016, Berkowitz filed his opening brief. Dkt. No. 10. On
11 November 23, 2016, Appellee-Debtor Michael A. Turchin (“Appellee” or
12 “Turchin”) timely filed his opposition. Dkt. No. 11. On December 7, 2016,
13 Berkowitz timely filed his reply. Dkt. No. 14. This Court has jurisdiction to hear
14 the appeal under 28 U.S.C. section 158(a). After considering the papers filed in
15 connection with the appeal, the Court finds this matter appropriate for resolution
16 without oral argument. Fed. R. Bank. P. 8019(b)(3). For the reasons discussed
17 below, the Court **REVERSES** the Bankruptcy Court’s order.

18 I. BACKGROUND

19 On March 11, 2016, Turchin filed a voluntary petition for Chapter 7
20 bankruptcy in the Central District of California. (ER¹ 130-177.) That same date, the
21 Bankruptcy Court scheduled the meeting of creditors for April 11, 2016. (*Id.* at 183-
22 185.) Thus, the deadline for filing a complaint to determine the dischargeability of a
23 claim under 11 U.S.C. § 523(c) was June 10, 2016. *See* Fed. R. Bankr. P. 4007(c).

24 Prior to the bankruptcy proceedings, on November 5, 2015, Berkowitz
25 obtained a judgment from the District Court for Pitkin County, Colorado in his favor
26 and against Turchin in the amount of \$624,822.53 (“State Court Judgment”). (*Id.* at
27

28 ¹ All citations to “ER” refer to Appellant’s Appendix to his Opening Brief.

1 39-48.) Berkowitz sought to challenge the dischargeability of the State Court
2 Judgment based on 11 U.S.C § 523(a), which excepts from discharge debts obtained
3 by fraud. (*Id.* at 35-54.) On June 9, 2016, Berkowitz transmitted an Objection to
4 Discharge and Complaint to Determine Non-Dischargeability of Debt to Federal
5 Express in Colorado for guaranteed overnight delivery by June 10, 2016 to the
6 Bankruptcy Court in Los Angeles. (*Id.* at 64, ¶¶ 3-7.) Due to a handling error by
7 Federal Express, the non-dischargeability complaint was delivered to the Bankruptcy
8 Court on June 13, 2016, one business day late. (*Id.* at 107.)

9 On June 17, 2016, Berkowitz filed a Motion to Allow Inadvertent Late Filing
10 of Objection To Discharge and Complaint to Determine Non-Dischargeability of
11 Debt. (*Id.* at 56-67.) On July 12, 2016, Turchin filed an opposition. (*Id.* at 73-89.)
12 On July 18, 2016, Berkowitz filed a reply. (*Id.* at 92-107.) On July 26, 2016, a
13 hearing was held on Berkowitz’s motion, at which time the Bankruptcy Court denied
14 the motion. (*Id.* at 109-124.) The Bankruptcy Court held that to the extent Rule
15 4007(c) was not jurisdictional, it was bound by Ninth Circuit authority, *In re*
16 *Marino*, 37 F.3d 1354, 1358 (9th Cir. 1994), which limited extensions under Rule
17 4007(c) “to situations where a court explicitly misleads the party.” (*Id.* at 112, 117-
18 118.) On August 4, 2016, the Bankruptcy Court issued its order denying
19 Berkowitz’s motion to allow the late filing of the non-dischargeability complaint.
20 (*Id.* at 8-9.) On August 17, 2016, Berkowitz filed a notice of appeal. Dkt. No. 1.

21 **II. LEGAL STANDARD**

22 District courts have jurisdiction to hear appeals from, *inter alia*, “final
23 judgments, order, and decrees” of the bankruptcy courts. 28 U.S.C. § 158(a)(1); *see*
24 *also* Fed. R. Bankr. P. 8005. “When reviewing a decision of a bankruptcy court, a
25 district court functions as an appellate court and applies the standards of review
26 generally applied in federal courts of appeal.” *In re Guadarrama*, 284 B.R. 463, 468
27 (C.D.Cal. 2002). “The bankruptcy court's findings of fact are reviewed for clear
28 error, while its conclusions of law are reviewed de novo.” *In re Strand*, 375 F.3d

1 854, 857 (9th Cir. 2004). The scope of the exercise of equitable power is reviewed
2 de novo, and the exercise of equitable power is reviewed for an abuse of discretion.
3 *In re Sasson*, 424 F.3d 864, 867 (9th Cir. 2005). “A bankruptcy court necessarily
4 abuses its discretion if it bases its ruling ‘on an erroneous view of the law or on a
5 clearly erroneous assessment of the evidence.’” *In re Staffer*, 262 B.R. 80, 82
6 (B.A.P. 9th Cir. 2001) (citation omitted).

7 **III. DISCUSSION**

8 The issue on appeal is whether the Bankruptcy Court erred in refusing to
9 permit the non-dischargeability complaint to proceed in spite of its untimely filing
10 when the delay occurred due to a failure of Federal Express.

11 Under Fed. R. Civ. P. 4007(c), “a complaint to determine the dischargeability
12 of a debt under § 523(c) shall be filed no later than 60 days after the first date set for
13 the meeting of creditors under § 341(a).” Fed. R. Bankr. P. 4007(c). The court may
14 enlarge the deadline under Rule 4007(c) if a request is made before the 60-day
15 expiration period. *Id.*; *see also* Fed. R. Bankr. P. 9006(b)(3). Although the Ninth
16 Circuit has construed the requirements of Rule 4007(c) strictly, Rule 4007(c) is not
17 jurisdictional. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (“[T]he filing deadlines
18 prescribed in Bankruptcy Rules . . . are claim-processing rules that do not delineate
19 what cases bankruptcy courts are competent to adjudicate.”); *see also In re Santos*,
20 112 B.R. 1001, 1006 (B.A.P. 9th Cir. 1990) (“[W]e determine that the deadlines for
21 filing dischargeability complaints and objections to discharge set forth in Rules
22 4007(c) and 4004(a) are not jurisdictional time limits.”).

23 The Ninth Circuit has allowed “an exception to Rule 4007(c)'s time limit for
24 ‘unique’ or ‘extraordinary’ circumstances.” *In re Kennerley*, 995 F.2d 145, 147 (9th
25 Cir. 1993); *Anwar v. Johnson*, 720 F.3d 1183, 1188 (9th Cir. 2013) (“[A]bsent
26 unique and exceptional circumstances . . . we do not inquire into the reason a party
27 failed to file on time in assessing whether she is entitled to an equitable exception
28 from FRBP 4007(c)'s filing deadline”); *Willms v. Sanderson*, 723 F.3d 1094, 1103

1 (9th Cir. 2013) (“On occasion, we have suggested that unique or extraordinary
2 circumstances might allow an untimely § 523(a)(2) complaint to stand.”) (internal
3 quotations and citations omitted); *In re Anwiler*, 958 F.2d 925, 929 (9th Cir. 1992)
4 (“It would be very harsh indeed to deny equitable relief in cases where the delay in
5 filing is not due to the fault of either party.”).

6 However, the Court believes that the Ninth Circuit has not limited the
7 application of the unique or extraordinary circumstances doctrine to situations where
8 the court misleads a party. (ER 112, 117-118.) In *Anwar*, a case decided after *In re*
9 *Marino*, the Ninth Circuit left open the possibility of relief due to “external forces
10 that prevented any filings -- such as emergency situations, the loss of the court's own
11 electronic filing capacity, or the court's affirmative misleading of a party.” *Anwar*,
12 720 F.3d at 1188 n.6; *see also In re Schwartz*, 592 F. App'x 605, 605-606 (9th Cir.
13 2015) (finding “unique and exceptional circumstances” doctrine might warrant relief
14 from Rule 4007(c) time limits if “an emergency situation prevented the filing, or that
15 a court explicitly misled [a party]”).

16 The Court therefore finds the Bankruptcy Court’s refusal to reconsider
17 Berkowitz’s non-dischargeability complaint, based on its assumption that it lacked
18 authority to do so, was an abuse of discretion. It is undisputed that Berkowitz
19 deposited the non-dischargeability complaint with Federal Express the day before it
20 was due for guaranteed next day delivery. (ER 64, ¶¶ 3-7.) As the Bankruptcy
21 Court noted in the underlying proceedings, the delayed delivery of the non-
22 dischargeability complaint “was clearly not [Berkowitz’s] fault; it was somebody
23 else’s.” (*Id.* at 112-113.) Berkowitz had done all that reasonable diligence requires.
24 In the absence of the “handling error” of Federal Express, the non-dischargeability
25 complaint would have been filed on time. (*Id.* at 107.) Under these circumstances,
26 the Court finds the untimely filing is attributable not to Berkowitz, but rather an
27 “external force” that falls into the realm of “unique and extraordinary”
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1 circumstances. Accordingly, the Court concludes that relief is appropriate and
2 reverses the decision of the Bankruptcy Court.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Bankruptcy Court's order is **REVERSED** and
5 the case is **REMANDED** with instructions to reinstate Berkowitz's non-
6 dischargeability complaint.

7
8 **IT IS SO ORDERED.**

9
10 DATED: March 8, 2017



11 _____
12 HONORABLE ANDRÉ BIROTTE JR.
13 UNITED STATES DISTRICT JUDGE

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