

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
BILLY GENE ANTHONY and) CASE NO. 07-33275 HCD
KIMBERLY ELAINE ANTHONY,) CHAPTER 13
)
DEBTORS.)

Appearances:

Jon R. Rogers, Esq., Staff Attorney, counsel for Debra L. Miller, Trustee, Post Office Box 11550, South Bend, Indiana 46634-0956; and

Fredric Lawrence, Esq., counsel for Creditor, Nelson & Frankenberger, 3105 East 98th Street, Suite 1700, Indianapolis, Indiana 46280.

MEMORANDUM OF DECISION

At South Bend, Indiana, on October 24, 2013.

Before the court are the Trustee's Objection to Claim Number 18-1, filed by Standing Chapter 13 Trustee Debra L. Miller, Trustee ("Trustee") of the chapter 13 bankruptcy case of Billy Gene Anthony and Kimberly Elaine Anthony ("debtors"), and the Response to Trustee's Objection, filed by The Bank of New York, as Successor-in-Interest to JPMorgan Chase Bank, N.A., as Trustee, Successor-in-Interest to Bank One, N.A., as Trustee of the Amortizing Residential Collateral Trust, 2002-BC1 ("Creditor").¹ After the briefing period had passed, the court took the matter under advisement. For the reasons that follow, the court sustains the Trustee's Objection to Claim No. 18-1.²

¹ The creditor originally filing the proof of claim was the servicer Ocwen Loan Servicing, LLC.

² The court has jurisdiction to decide the matter before it pursuant to 28 U.S.C. § 1334 and § 157 and the Northern District of Indiana Local Rule 200.1. The court has determined that this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

BACKGROUND

The underlying facts are uncontested. The debtors Billy Gene and Kimberly Elaine Anthony filed their chapter 13 petition on December 18, 2007. The claims bar date was set for April 22, 2008. On May 23, 2008, one month after the deadline for filing claims, the Creditor filed a proof of claim, Claim No. 16-1, secured by a lien on the Anthonys' residential property.³ The Trustee objected on two grounds: its lateness and its failure to provide proof of perfection. She and the debtors commenced an adversary proceeding to avoid the Creditor's lien claimed in Claim No. 16-1. The facts being undisputed, the court granted partial summary judgment in favor of the plaintiffs and against the Creditor on Counts I and II of the four-count Complaint. *See* R. 47, Mem. Dec. (Adv. Proc. No. 09-3140). It granted the Trustee the right to avoid the Creditor's lien on the debtors' real property under 11 U.S.C. § 544(a)(3), and it demoted the Creditor's claim to an unsecured status. *See id.* at 6, 11. Counts III and IV, concerning the validity and allowance of the claim, were set for evidentiary hearing. The court stated the undisputed material facts and the legal parameters for that hearing:

[T]he defendants admit that only the first page of the Note was attached to the Proof of Claim and that other relevant documents were lost. In addition, the defendants do not dispute that the Proof of Claim was filed a month after the bar date, and the court finds that it was untimely filed under § 502(b)(9) and [*Matter of*] *Greenig* [152 F.3d 631 (7th Cir. 1998)]. As a matter of law, the court has no power to enlarge the 90-day deadline for filing pursuant to Federal Rule 9006(b)(3) for excusable neglect. Its only authority to extend the time fixed by [Bankruptcy] Rule 3002(c) is found in the exceptions to that rule.

Id. at 11.

On September 26, 2012, at the hearing, the Trustee withdrew Counts III and IV, and the court entered final judgment on Counts I and II of the Trustee's Amended Complaint. *See* R. 56, Judgment (Adv. Proc. No. 09-3140). The court also heard the Trustee's Objection to Claim No. 16-1. The Creditor admitted

³ The debtors' chapter 13 Plan, confirmed on July 6, 2010, listed the Creditor as one holding a "secured debt[] which will extend beyond the length of the Plan," but only "if allowed by the court." The Plan also proposed to cure defaults to the Creditor if its claim was allowed by the court. It listed the Creditor as one holding an unrecorded, unperfected lien and stated that, "[p]ursuant to 11 U.S.C. § 544, the unrecorded mortgage, unrecorded Note and whatever lien is being held by creditor shall be ordered void upon confirmation of the plan." R. 77, Third Amended Chapter 13 Plan.

that the mortgage lien, never properly recorded, was unperfected. It also agreed with the Trustee that the claims bar date could not be enlarged in this chapter 13 case. Accordingly, the court sustained the Trustee's Objection and disallowed Claim No. 16-1 as untimely. *See* R. 119 (Order of Sept. 26, 2012) (Main Case No. 07-33275).

On October 25, 2012, the Creditor filed an unsecured claim, Claim No. 18-1. The Trustee objected and asked the court to disallow it as belatedly filed. The Creditor responded that the claim was allowable under Rule 3002(c)(3) of the Federal Rules of Bankruptcy Procedure. That rule provides:

(c) In a . . . chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under § 341(a) of the Code, except as follows:

. . .

(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 if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

Fed. R. Bankr. P. 3002(c)(3). The Creditor contended that it had filed its unsecured Claim No. 18-1 timely, within 30 days of the Court's September 26, 2012, ruling, and that its claim became allowable as a result of the court's Judgment avoiding its mortgage lien. *See* R. 129 at 1, 3; R. 135 at 1. It relied on *In re Ong*, 469 B.R. 599 (Bankr. W.D. Pa. 2012), which held that a proof of claim was allowed as timely filed under Rule 3002(c)(3) if, after a lien was avoided, the creditor filed a proof of claim for an unsecured claim within 30 days after the court's order avoiding the lien became final. *See* R. 129 at 3 (citing *Ong*, 469 B.R. at 601).

In her Brief, the Trustee urged the court not to rely on *In re Ong*, since it was a chapter 7 case which treated the creditor's proof of claim as timely filed for purposes of § 726(a). She argued that chapter 13 cases did not have a corresponding provision to § 726(a)(1)-(3) and that chapters 7 and 13 served different goals: "[I]f late-filed claims are not barred in Chapter 13 actions, it would not be possible to determine with finality whether a Chapter 13 plan satisfies [the requirement to pay creditors what they would receive under

a Chapter 7] . . .” R. 136 at 9 (quoting *In re Husmann*, 276 B.R. 596, 598 (Bankr. N.D. Ill. 2002)). There were only limited circumstances for extending a bar date in a chapter 13 case, she asserted, and this case did not fit the narrow exception created by Rule 3002(c)(3). *See id.* at 11-12.

DISCUSSION

The issue before the court is whether the Creditor’s unsecured Claim No. 18-1 should be allowed. The claim allowance process, set forth in the Bankruptcy Code and the Rules that implement it, was followed when the Creditor filed its Proof of Claim No. 16-1. That claim was disallowed. The creditor asks the court now to allow its Claim No. 18-1.

A creditor holding a claim against a debtor’s estate may file a proof of claim, and that claim is deemed allowed unless a party in interest raises an objection to it. *See* 11 U.S.C. §§ 501(a), 502(a). If a party objects to a filed claim, however, the court holds a hearing on the objection and determines whether the claim is allowed or disallowed and in what amount. *See* § 502(b). Federal Rule of Bankruptcy Procedure 3002(a) requires an unsecured creditor to file a proof of claim in order for its claim to be allowed.

When the “proof of such claim is not timely filed,” the claim must be disallowed. § 502(b)(9). “Timely filing” is defined in Bankruptcy Rule 3002(c): A creditor’s filing of a proof of claim is timely if it is filed within 90 days of the first date set for the § 341 meeting of creditors. There are six exceptions to that rule, and unless one of them applies, “the 90-day time limit is an absolute bar” in chapter 7, 12, and 13 bankruptcy cases. *Matter of Greenig*, 152 F.3d 631, 634 (7th Cir. 1998); *see also In re Washington*, 483 B.R. 871, 872 (Bankr. E.D. Wis. 2012) (“Bankruptcy Code § 502(b)(9), together with Bankruptcy Rule 3002(c) and Rule 9006(b)(3), generally prohibit the filing of late claims in chapter 13 cases, except under specific circumstances.”). As this court explained in its earlier Memorandum of Decision,

Courts consistently conclude that, once the Bankruptcy Reform Act of 1994 added § 502(b)(9), they no longer had any authority to permit a claim in a chapter 13 case to be filed late or to deem the claim timely – unless a Rule 3002(c) exception applied. *See In re Daniels*, 466 B.R. [214, 217 (Bankr. S.D.N.Y. 2011]; *see also* 4 Keith M. Lundin, Chapter 13 Bankruptcy, 3d Ed. 2007 (2000 & Supp. 2004) § 290.1 at 290-1 (“[U]pon objection, § 502(b)(9) disallows

untimely filed secured, unsecured or priority claims.”); 9 *Collier on Bankruptcy*, ¶ 3002.03[1] at 3002-10 (15th ed. 2009) (“Courts have uniformly held that no extension of the time fixed by Rule 3002(c) may be granted after the time has passed (except as specifically allowed by the provisions of Rule 3002(c)(1) - (6)). The court has no equitable power to extend the time fixed by Rule 3002(c).”).

R. 47 at 10 (Adv. Proc. No. 09-3140).

The Creditor herein asserted that Rule 3002(c)’s third enumerated exception applied to it. According to the Creditor, it held an unsecured claim, submitted to the claims register as Claim No. 18-1. It insisted that, under Rule 3002(c)(3), once this court’s Judgment avoided the lien but deemed the Creditor’s interest unsecured, it could file its claim within 30 days and have an allowed unsecured claim. The Creditor did just that: It filed its claim within 30 days of the Court’s September 26, 2012, Judgment avoiding its mortgage lien. It urged the court to find that its timely Claim No. 18-1 thus became allowable as a result of the court’s Judgment.

The Creditor relied on *In re Ong*, 469 B.R. 599 (Bankr. W.D. Pa. 2012). In that case, the chapter 7 debtors’ trustee successfully avoided the mortgagee’s unrecorded mortgage lien under § 544(a)(3). The mortgagee then filed an unsecured claim under Bankruptcy Rule 3002(c)(3). The Pennsylvania bankruptcy court found the unsecured claim timely filed and allowed it. *See id.* at 601. The Creditor herein asks this court to follow the Pennsylvania court’s reasoning and to allow its unsecured claim.

This court finds that the Creditor’s reliance on *In re Ong* was misplaced, due to two important distinctions between that case and this one. First, in *Ong*, the creditor did not file a proof of claim as a secured claimant. It chose not to participate in the bankruptcy, relying on the fact that secured liens may pass through bankruptcy unaffected. *See id.* Therefore the *Ong* creditor filed its first (and only) proof of claim as an unsecured claim, and it filed the claim within the 30-day time limit of Rule 3002(c)(3). Its timely filing thus complied with the Advisory Committee’s elucidation of Rule 3002(c)(3):

Although the claim of a secured creditor may have arisen before the petition, a judgment avoiding the security interest may not have been entered until after the time for filing has expired. Under Rule 3002(c)(3) the creditor *who did not file a secured claim* may nevertheless file an unsecured claim within the time prescribed.

Fed. R. Bankr. P. 3002(c)(3), Advisory Committee Note (1983) (emphasis added). In contrast, however, the Creditor in this case *did* file a secured claim, one that was untimely and disallowed.

The second crucial distinction is the one pointed out by the Trustee. *Ong* was a chapter 7 case, and under § 726(a)(2)(C), tardily filed claims may be allowed – if the late filer “did not have notice or actual knowledge of the case in time to file for timely filing.” 11 U.S.C. § 726(a)(2)(C)(i); see *Fogel v. Zell*, 221 F.3d 955, 962 (7th Cir. 2000). Courts in our circuit and elsewhere have been quick to differentiate chapter 13 cases from chapter 7 cases in this area, however, and to point out that the specific exception for late-filing creditors found in chapter 7 cases is not found in chapter 13 cases. See, e.g., *In re Stoecker*, 179 B.R. 532, 538 (N.D. Ill. 1994) (“Unlike Chapter 13 cases where payments are distributed under a plan, § 726 provides for the order of distribution of property of the estate in Chapter 7 cases.”); *In re Washington*, 483 B.R. 871, 875 (Bankr. E.D. Wis. 2012) (“Of course, [§ 726(a)(2)(C)] does not apply in Chapter 13 cases.”); see also *In re Nealey*, 2011 WL 1485541, at *4 (Bankr. E.D. Va. Apr. 19, 2011) (finding that neither the excusable neglect standard nor an extension of the bar date applies in chapter 13). It is clear that Congress intended the claims filing deadline in a chapter 13 case to be absolute “to establish a time line in order to get a plan confirmed, get creditors paid, and get a case closed.” *In re Horlacher*, 389 B.R. 257, 263 (Bankr. N.D. Fla. 2008); see also *In re Shanks*, 2011 WL 721632 at *4 (Bankr. S.D. Ind. Feb. 22, 2011) (finding that, “if late-filed claims are not barred in chapter 13 actions, it would not be possible to determine with finality” chapter 13 plan requirements) (quoting *In re Husmann*, 276 B.R. 596, 598 (Bankr. N.D. Ill. 2002)); *In re Thul-Theis*, 431 B.R. 828, 829 (Bankr. W.D. Wis. 2010) (“As a general matter, late-filed claims are completely barred in a chapter 13 case.”); *In re Barnes*, 2004 WL 3135459, at *1 (Bankr. D. Dist. Col. 2004) (“Congress’ failure to adopt a similar rule for chapter 13 is strong statutory evidence that tardily filed claims in chapter 13 are not to share in distributions under a confirmed chapter 13 plan even when the creditor was not given notice of the bankruptcy case until after the bar date.”). In light of these differences between chapters 7 and 13, the court finds that the Creditor cannot rely on *In re Ong*’s reasoning to support its argument herein.

Rule 3002(a) mandates that an unsecured creditor file a proof of claim, and in a chapter 13 case the claim must be filed in order to be allowed and paid through the chapter 13 plan. *See In re Shiver*, 484 B.R. 468, 471 (Bankr. N.D. Fla. 2012). “Thus, failure to *timely* file an unsecured proof of claim is fatal to a creditor receiving anything on account of such claim in a chapter 13 case.” *In re Jackson*, 482 B.R. 659, 663 (Bankr. S.D. Fla. 2012) (emphasis added) (*quoted in Shiver*). However, the Creditor responded that it indeed had filed an unsecured proof of claim timely, within the enlarged claim filing period of Rule 3002(c)(3). For that reason, the Creditor urged, its unsecured claim should be allowed.

The allowance of a claim under the Bankruptcy Code’s § 502 is a threshold question. Courts reviewing chapter 13 cases warn claimants of the dire consequences of the untimely filing of a claim, causing its disallowance under § 502(b)(9), because disallowed § 502 claims are discharged under § 1328(a).⁴ *See In re Gardenhire*, 209 F.3d 1145, 1147 (9th Cir. 2000) (disallowance is fatal in chapter 13 cases because untimely claims are included in the § 1328(a) discharge); *In re Monk*, 2011 WL 212831 at*4 (Bankr. D. Or. Jan. 21, 2011) (same); *see also In re Sykes*, 451 B.R. 852, 857 (Bankr. S.D. Ill. 2011) (stating that Rule 3002(c)’s 90-day deadline has been “strictly construed as a sort of statute of limitations”); *In re Wright*, 300 B.R. 453, 458 (Bankr. N.D. Ill. 2003) (explaining that, even before § 502(b)(9) was added to the Code in 1994, courts construed § 501 and § 502 and Rule 3002 “to mean that a timely filed proof of claim was a precondition to allowance”).

In this case, the Creditor’s first proof of claim was disallowed under § 502(b)(9) and Rule 3002(c) as untimely filed. At the time, the Creditor recognized the critical result of having filed its proof of claim one month late, and admitted to the court that the deadline for its filing could not be enlarged. It neither moved to alter or amend nor appealed the court’s order of disallowance. Consequently, the Creditor’s untimely claim was disallowed; it no longer held an “allowed claim” and the claim was subject to discharge. *See In re Roubert*, 336 B.R. 22, 27 (Bankr. D.P.R. 2005) (stating that a chapter 13 creditor with

⁴ Section 1328(a) provides that a debtor obtains a “discharge of all debts provided for by the plan or disallowed under section 502 of this title.” 11 U.S.C. § 1328(a).

an untimely proof of claim disallowed under § 502 “does not have a right to receive a distribution under a confirmed plan until it holds a claim allowed pursuant to section 502(a)”; *In re MacKenzie*, 314 B.R. 277, 280 (Bankr. D.N.H. 2004) (finding that untimely, disallowed proof of claim of residential mortgagee resulted in loss of mortgagee’s right to receive distribution under debtor’s plan).

Nevertheless, in the view of the Creditor, the first (secured) claim and the second (unsecured) one are different claims, and the unsecured claim, timely filed under Rule 3002(c)(3), should be allowed. The court finds, however, that the two proofs of claim are based upon the same mortgage and note, and are different only because the court found that the unrecorded, unperfected mortgage lien was avoidable. This Creditor essentially asked the court to allow a second-filed, unsecured claim that originally was disallowed as an untimely secured claim.

The Creditor cited no cases in which a disallowed secured claim was re-filed and allowed as an unsecured claim under Rule 3002(c)(3), and the court found none. Instructive to this court, however, was the Kansas bankruptcy court’s analysis of similar facts in *In re Ramsey*, 356 B.R. 217 (Bankr. D. Kan. 2006). In that case, as in this one, the mortgage lien holder filed a proof of claim a month after the claims bar date. Upon objection, the court found that the claim was untimely and the lien unperfected; it disallowed the claim. The trustee then filed an adversary proceeding to avoid and recover the unrecorded lien. After the parties came to an agreement and the trustee asked the court for approval of their settlement, however, the debtor objected to the settlement. The court, noting that the creditor did not hold an allowed claim, denied the settlement on the ground that it did not meet the best interest of creditors test. The *Ramsey* case took a different path from the one in this case because the issue therein was the parties’ settlement. In a footnote, however, the Kansas court considered another outcome based on the creditor’s holding an unsecured claim after its lien was avoided:

[The creditor] suggests it will have an unsecured claim . . . upon avoidance of its lien, presumably relying on 11 U.S.C. § 502(h)⁵ and Bankruptcy Rule 3002(c)(3) (dealing with filing and allowance of unsecured claims resulting from avoidance actions). However, the Court questions whether 11 U.S.C. § 502(h) or Rule 3002(c)(3) resurrects a *disallowed* claim. *In re Toronto*, 165 B.R. 746, 752 n.4 (Bankr. D. Conn. 1994) (quoting Advisory Committee Note (1983), “Although the claim of a secured creditor may have arisen before the petition, a judgment avoiding the security interest may not have been entered until after the time for filing claims has expired. Under Rule 3002(c)(3) the creditor *who did not file a secured claim* may nevertheless file an unsecured claim within the time prescribed.” (Emphasis added)). *Res judicata* may be applicable, but this issue is not briefed and is not before the Court.

Id. at 228 n.50. It is this hypothetical situation that is now before this court. The Creditor herein, relying on Rule 3002(c)(3), has asserted that its second-filed, unsecured claim is timely and allowed. This court determines, however, that Rule 3002(c)(3) does not resurrect a disallowed claim. It finds that, because the Creditor’s originally filed secured claim had been disallowed, it was subject to discharge in the chapter 13 case. The subsequent filing of the same (albeit unsecured) claim could not resuscitate the earlier disallowed claim.

The court further finds that, pursuant to Rule 3002(c)(3), the unsecured claim did not “arise” in favor of the Creditor or “become allowable” as a result of the court’s Judgment. That Judgment determined that the Creditor’s unperfected lien was avoidable. In other words, it found another defect (in addition to its belated filing) in the Creditor’s claim. The Seventh Circuit carefully distinguished between belatedly filed claims, which are time-barred, and invalidly secured liens in *In re Tarnow*, 749 F.2d 464 (7th Cir. 1984). The appellate court concluded in *Tarnow* that the rejection of a claim on the ground that it was late did “not call into question the validity of the lien.” *Id.* at 465. In this case, the Creditor’s claim was rejected on the ground that it was late and, in addition, was rejected because the lien was invalid. If the claim had

⁵ Section 502(h) provides, in pertinent part:

A claim arising from the recovery of property . . . shall be determined, and shall be allowed . . . or disallowed . . . the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. § 502(h).

been allowed as a threshold matter, the invalid, avoidable lien could have been allowed as an unsecured claim. However, the court's Judgment could not resurrect the disallowed untimely claim.

The court concludes that the Trustee's objection to the Creditor's Claim No. 18-1 is well taken. Because this Creditor is not a "creditor who did not file a secured claim," as the Advisory Committee Note recognized as necessary, it does not qualify as a creditor permitted to "file an unsecured claim within the time prescribed" by Rule 3002(c)(3). Moreover, since Claim No. 16-1 was disallowed under § 502(b)(9) and consequently is subject to discharge under § 1328(a), the Creditor's filing of the unsecured version of the same claim, namely Claim No. 18-1, even within the 30-day window granted by Rule 3002(c)(3), does not resurrect the disallowed original claim.

In addition, it is well settled that, without the timely filing of proofs of claim, chapter 13 plans could not be administered in an orderly, effective, and efficient manner. The debtors' bankruptcy case is near its end, and the Trustee has advised the court that she has sufficient funds to pay in full all unsecured creditors who timely filed claims. She suggested that, "[if the Creditor] were allowed to join that group of unsecured creditors at this date, the pro rata distribution paid to creditors who filed their claims as required by law would plummet." R. 136 at 11. Courts considering whether a movant's late claim should be allowed at the end of a chapter 13 case weigh whether the distribution to the timely unsecured creditors was near completion and whether the allowance would force the debtor to stay longer in bankruptcy. *See In re Durham*, 329 B.R. 899, 903 (Bankr. M.D. Ga. 2005) (rejecting late claim). They also balance the equities of the case by considering whether an untimely claimant who had much more time to meet the filing requirements should receive the bulk of the distribution. *See In re Nowak*, 385 B.R. 799 at *7 (6th Cir. B.A.P. 2008) (rejecting late claim). Because the Creditor's Claims No. 16-1 and 18-1 are disallowed under the Bankruptcy Code and Rules, the reasonable and equitable result will be accomplished in this case. The court concludes that the Trustee's Objection to the Creditor's Claim No. 18-1 must be sustained.

CONCLUSION

For the reasons set forth above in this Memorandum of Decision, the court sustains the Trustee's Objection to Claim No. 18-1 filed by Standing Chapter 13 Trustee Debra L. Miller, Trustee of the chapter 13 bankruptcy case of Billy Gene Anthony and Kimberly Elaine Anthony. The court disallows the Claim No. 18-1 of The Bank of New York, as Successor-in-Interest to JPMorgan Chase Bank, N.A., as Trustee, Successor-in-Interest to Bank One, N.A., as Trustee of the Amortizing Residential Collateral Trust, 2002-BC1.

SO ORDERED.

/s/ HARRY C. DEES, JR.

HARRY C. DEES, JR., JUDGE
UNITED STATES BANKRUPTCY COURT