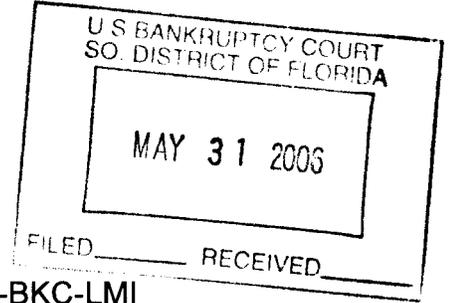


ORDERED in the Southern District of Florida on May 31, 2006



Laurel Myerson Isicoff
Laurel Myerson Isicoff, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA



IN RE:

CASE NO. 05-43464-BKC-LMI

ROBERT H. STONE,

Chapter 7

Debtor.

NOVA INFORMATION SYSTEMS, INC.,

ADV. CASE NO. 06-01117-BKC-LMI

Plaintiff,

vs.

ROBERT H. STONE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (CP #19)

THIS CAUSE came before the Court on Wednesday, May 10, 2006 at 9:30 a.m on Defendant's Motion to Dismiss (CP #19) filed by Defendant Robert H. Stone. The Court having reviewed the pleadings, considered argument of counsel and the *pro se* Defendant, and otherwise having considered all matters the Court deems relevant, the Court grants the Motion To Dismiss for the reasons set forth below.

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Background

The Debtor, Robert H. Stone petitioned for Chapter 7 bankruptcy relief on October 12, 2005. The deadline to file a complaint objecting to discharge or to determine the dischargeability of certain debts was January 30, 2006 (the "Complaint Deadline").

On January 31, 2006, Nova Information Systems, Inc., (the "Plaintiff") filed this adversary proceeding seeking to except from discharge a debt in the amount of two-hundred sixteen thousand eight hundred eight and 33/100 dollars (\$216,808.33), based on alleged fraud under 11 U.S.C. 523(a)(2)(A).

On March 31, 2006, the Debtor filed his Motion To Dismiss (CP #19) asserting two separate grounds of dismissal, one of which is based on the Plaintiff's failure to file this adversary proceeding before the complaint deadline. In response, Plaintiff's Counsel filed his Affidavit in Opposition To Motion To Dismiss (CP #23) asserting that the complaint was filed late due to Plaintiff's counsel's inability to file electronically utilizing the Southern District of Florida Bankruptcy Court's CM/ECF system and accordingly the case should not be dismissed.

Discussion

Pursuant to Bankruptcy Rule 4007(c), a complaint to determine the dischargeability of a debt "shall be filed not later than 60 days following the first date set for the meeting of the creditors." The court may extend the filing deadline for cause upon the motion of a party in interest. FED. R. BANKR. P. 4007(c). However, the motion for extension of time must be filed before the filing deadline has expired. Where no motion to extend the filing

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deadline has been filed, a bankruptcy court is without power to extend the deadline. *Byrd v. Alton (In re Alton)*, 837 F.2d 457 (11th Cir. 1988); *Nicholson v. Isaacman (In re Isaacman)*, 26 F.3d 629, 632 (6th Cir. 1994).

The Plaintiff argues that the Court should nevertheless accept the untimely filed complaint and allow the action to proceed. By affidavit, Plaintiff's counsel asserts that the tardiness of the complaint is attributable to his inability to utilize the Southern District of Florida Bankruptcy Court's CM/ECF system. Indeed, Plaintiff's counsel asserts that he was "forced to file the pleading by mail." At the hearing on this matter, Plaintiff's counsel relied on this Court's Administrative Order 05-2 ("AO 05-2") for the argument that late filings as a result of a counsel's inability to utilize CM/ECF are excused.

Plaintiff's counsel's reliance on AO 05-2 is misplaced. AO 05-2 Part IV: Electronic Filing Date and Technical Difficulties, subsection (B) provides in pertinent part:

If required to meet a filing deadline, a registered user is permitted to conventionally file a paper only when the CM/ECF system is inaccessible or the registered user's computer system is inoperable. A registered user whose filing is made untimely as a result of a technical failure may seek, or the court on its own motion may grant, appropriate relief.

In order to avail himself of the protections of subsection B, Plaintiff's counsel must have been a "registered user" at the time of filing. AO 05-2 defines a "registered user" as an interested party who has been approved to electronically file papers in this court. By affidavit, Plaintiff's counsel acknowledges that he was not approved to electronically file in the Southern District of Florida until March 30, 2006, two months after conventionally filing this action. The affidavit further acknowledges that prior to filing this action, Plaintiff's

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counsel was advised that he would not be able to receive the necessary training for filing electronically until at least February 2006. The inability to file the adversary complaint in this case prior to the deadline was not attributable to technical difficulties experienced by a registered user, but rather, because Plaintiff's counsel was not yet a registered user.¹ Accordingly, the untimely filed complaint may not be excused pursuant to AO 05-2.

The Court does not find it necessary or appropriate to exercise its equitable powers pursuant to 11 U.S.C. § 105 to allow the action to proceed. By affidavit, Plaintiff's counsel asserts the "understanding that Plaintiff would not be prejudiced by the inability of counsel to file electronically based on technical problems with the CM/ECF system" based on conversations with the bankruptcy court clerks. As discussed above, the inability to electronically file did not result from technical difficulties. This is not a situation where Plaintiff's counsel reasonably relied on a court order extending the filing deadline or an erroneous statement to that effect issued by the clerk of the bankruptcy court. See *Marshall v. Demos (In re Demos)*, 57 F.3d 1037, 1040 (11th Cir. 1995)(holding adversary complaint was timely filed where creditor reasonably relied on court order granting extension pursuant to §105); *In re Isaacman*, 26 F.3d at 636 (finding abuse of discretion where court refused to utilize equitable powers to allow an action to proceed where a creditor-plaintiff reasonably relied on an erroneously set bar date and communications with a clerk of the bankruptcy court). The cause of the late filing in this instance was a

¹CM/ECF was not available for use in the Southern District of Florida, by parties other than panel trustees, staff of the Office of the U.S. Trustee, and selected high-volume filers until April 2006.

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combination of the plaintiff waiting until the Complaint Deadline to contact and retain counsel, and then selecting counsel in Tampa rather than counsel in Miami, who could have timely filed the pleading. Under such circumstances, it would be inappropriate for the Court to exercise its equitable powers to relieve the Plaintiff and its counsel of the consequences of the decisions they made.

For these reasons, the Court finds that adversary complaint was untimely filed and must be dismissed.²

ORDERED AND ADJUDGED that the Defendant's Motion To Dismiss (CP #19) is GRANTED.

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Copies furnished to
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Nova Information Systems, Inc., Plaintiff
C/O Peter Max Fallon, Esq., Lead Attorney for Plaintiff
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²The Debtor raised other grounds for dismissal but the untimeliness of the filing makes it unnecessary for the Court to address the other grounds.