**NOT FOR PUBLICATION**

# UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

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**BAP NO. PR 10-004**

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**Bankruptcy Case No. 05-01282-MCF**

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**TOMÁS IRIZARRY CONCEPCIÓN,**
**Debtor.**

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**SUCN. FRANCISCO PEREA FERRER,**
**Appellant,**

**v.**

**TOMÁS IRIZARRY CONCEPCIÓN,**
**Appellee.**

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**Appeal from the United States Bankruptcy Court**
**for the District of Puerto Rico**
**(Hon. Brian K. Tester, U.S. Bankruptcy Judge)**

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**Before**
**Vaughn, Boroff, and Kornreich,**
**United States Bankruptcy Appellate Panel Judges.**

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**Lirio Torres Justiniano, Esq. and Anthony E. Keller, Esq., on brief for Appellant.**

**Ralph Vallone, Jr., Esq., on brief for Appellee.**

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**August 10, 2010**

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**Per curiam.**

This appeal by Succession Francisco Perea Ferrer ("Perea")[1] is from the order of the bankruptcy court disallowing Perea's untimely claim in the chapter 11 case of Tomás Irizarry Concepción (the "Debtor").[2] Because the bankruptcy court concluded erroneously that the bankruptcy rules preclude the application of equitable principles to late filed claims, we **VACATE** the order disallowing Perea's claim and **REMAND** the case for findings and conclusions consistent with the equitable standards set forth in Pioneer Inv. Serv. Co. v. Brunswick Assoc. L.P., 507 U.S. 380 (1993).

## BACKGROUND

The Debtor was the president and sole stockholder of Western Radiosonics, Inc. ("Western"). In 1986, Francisco Perea Ferrer sold his shares of Clínica Doctores Perea, Inc. (the "Clinic") to Western. The purchase price was financed by the seller and secured by the pledge of shares of the Clinic. The Debtor and his wife also provided personal guarantees.

The Debtor, Western, Perea, and the Clinic became embroiled in state court litigation. The Debtor and Western also sued PaviaHealth, the ultimate owner of the shares of the Clinic. Eventually, PaviaHealth consigned $416,730.00 to the state court in exchange for a release from Perea of liability relating to Perea's dispute with the Debtor and Western.

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[1] Succession Francisco Perea Ferrer is the estate of the decedent Francisco Perea Ferrer.

[2] When Perea initiated the appeal, it explained that it was also appealing that part of the order denying reconsideration of an earlier order directing the state court to transfer to the bankruptcy court consigned funds. Perea did not address this issue in its brief and stated at oral argument that it was not pursuing this question on appeal. Also, Perea has asked us to determine whether the bankruptcy court erred in not applying § 105 to the allowance of its claim. Because this argument was not raised below, it will not be considered on appeal. See Carreras v. Sajo, García & Partners, 596 F.3d 25, 32 n.5 (1st Cir. 2010).

The Debtor filed a chapter 11 petition on February 10, 2005, and the bankruptcy court fixed June 20, 2005, as the bar date for the filing of proofs of claim. Shortly after the commencement of the bankruptcy case, the Debtor and Western moved in state court for an order releasing the consigned funds to the Debtor. After their motion was denied by the state court, the debtor moved in the bankruptcy court for an order permitting the withdrawal of the consigned funds. This motion was granted. Later, in a separate order, the bankruptcy court directed the state court to transfer the consigned funds to the bankruptcy court.

The order confirming the Debtor's amended plan of reorganization was issued on February 4, 2009. On that date, about three and one-half years after the bar date, Perea filed its proof of claim in the amount of $445,500.00. Shortly thereafter, the bankruptcy court held a hearing and ordered the Debtor and Perea to file memoranda on whether Perea's claim should be allowed and, if so, the extent to which it should be allowed as a secured claim.

In its memorandum, the Debtor argued that Perea did not hold a secured claim and that its claim should be disallowed because of Perea's longstanding knowledge of the Debtor's bankruptcy case. In its two memoranda, Perea asserted that its claim was secured and that it filed its claim when it did because it had not received formal notice of the Debtor's bankruptcy case, despite the Debtor's knowledge of its claim. Perea also averred its belief that the stay of the state court litigation arose as a consequence of the bankruptcy case commenced by Western. Relying upon Pioneer Inv. Serv. Co. v. Brunswick Assoc., L.P., Perea insisted that its failure to file a timely claim was attributable to excusable neglect.

The bankruptcy court issued an order disallowing Perea's claim as untimely pursuant to Bankruptcy Rule 3003(c)(2), stating:[3]

> The congressional intent expressed in [Bankruptcy] Rule 3003(c)(2) was to require filing of valid proofs of claim within the established time limits and it precludes any exceptions based on general equitable principles. Maressa v. A.H. Robins, Co., 488 U.S. 826 (1988). . . . There is evidence in the record that Sucn. Perea received notification of the stay and was informed that a bankruptcy proceeding was underway. Sucn. Perea failed to comply with the requirements of [Bankruptcy] Rule 3003(c)(3).
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> This appeal followed.

## JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Id. at 646 (citations omitted). An order disallowing a claim is a final order. Vicenty v. Sandoval (In re Sandoval), 327 B.R. 493, 505 (B.A.P. 1st Cir. 2005).

## STANDARD OF REVIEW

A bankruptcy court's findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*. See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 269 (1st Cir. 2010). Because the essential facts in this case are not in dispute, our review of the order disallowing Perea's claim is *de novo*. See American Express Bank, FSB v. Askenaizer (In re Plourde), 418 B.R. 495, 499 (1st Cir. 2009).

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[3] All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

## DISCUSSION

Bankruptcy Rule 3003 governs the filing of proofs of claim in a chapter 11 case. Subparagraph (c)(3) provides, in pertinent part, that "[t]he court shall fix and for cause shown may extend the time within which proofs of claim or interest may be filed." Bankruptcy Rule 9006(b)(1), allows in part that:

> Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Applying these rules, the Supreme Court in Pioneer first addressed the scope of excusable neglect as set forth in Rule 9006:

> Hence, by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Rule 9006(b)(1), Congress plainly contemplated that the courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

507 U.S. at 389.

It further explained:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," *we conclude that the determination is at bottom an equitable one*, taking account of all relevant circumstances surrounding the party's omission. These include, as the Court of Appeals found, the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. See 943 F.2d, at 677.

Id. at 396 (emphasis provided).

Despite Perea's attempt to explain why its conduct should be excused under the framework of Pioneer, the bankruptcy court did not address the Pioneer standards in its order disallowing Perea's claim.

## CONCLUSION

We **VACATE** the order disallowing Perea's claim and **REMAND** the case to the bankruptcy court for findings and conclusions consonant with Pioneer.