

**IT IS SO ORDERED.**

**Dated: 04:01 PM June 21 2007**



**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CASE NO. 01-50913
	)	
MICHAEL MARK NOWAK	)	CHAPTER 7
CHRISTINA SUSAN NOWAK,	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTOR(S)	)	
	)	<b>MEMORANDUM OPINION RE:</b>
	)	<b>ALLOWANCE OF "INFORMAL" PROOF</b>
	)	<b>OF CLAIM</b>

This matter is before the Court on the following pleadings: (1) the "Trustee's Final Report" [docket #63]; (2) an objection to the "Trustee's Final Report" filed by PCFS Financial [docket #64] (the "Objection"); (3) the trustee's response to the Objection [docket #67]; (4) a supplemental list of case authority filed by PCFS Financial [docket #71] and (5) a further response by the trustee [docket #72]. Appearing at the hearing on the matter were Lydia Spragin, the chapter 7 trustee and David Freeburg, counsel for PCFS Financial. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is determined to be a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A), (B) and (O), over which this Court has jurisdiction pursuant to 28 U.S.C. §1334.

## **I. BACKGROUND FACTS**

During the hearing, counsel represented that the pertinent facts in this case are not in dispute and neither party chose to present any evidence in support of their respective positions. Instead, each party relied upon their written pleadings and argument.

1. On March 20, 2001 Michael and Christina Nowak filed a voluntary chapter 7 bankruptcy petition. On their Schedule D - Creditors Holding Secured Claims they listed PCFS Financial as holding a security interest in property located at 4931 Shady Brook Run in Medina Ohio (the “Property”).

2. On April 20, 2001 the chapter 7 trustee filed a request of the Clerk of Courts to issue a notice to creditors to file proofs of claim [docket #4]. A notice was issued by the Clerk on April 23, 2001 setting the claims bar deadline at July 24, 2001 [docket #5]. PCFS Financial received a copy of such notice.

3. On October 4, 2001 the chapter 7 trustee filed a complaint against, *inter alia*, PCFS Financial which initiated Adversary Proceeding No. 01-5345 (the “Adversary Proceeding”). Through that complaint, the trustee alleged that PCFS Financial’s mortgage was invalid and could be avoided pursuant to § 544 of the Bankruptcy Code.

4. On August 21, 2002 the trustee filed a notice of intent to sell the Property (the “Sale Notice”) for a total purchase price of \$300,000.00 [docket #37]. The Sale Notice includes a reference to PCFS Financial’s mortgage lien and indicates that, due to a bona fide dispute over its validity, the lien would be transferred to the fund created by a sale. A copy of the Sale Notice was served upon, *inter alia*, counsel for PCFS Financial.

5. PCFS Financial filed an objection to the Sale Notice [docket #38] contending, *inter alia*, that (a) there was no bona fide dispute over its mortgage and (b) the Property was being sold at a price that would not fully satisfy its lien.

6. After a hearing on the Sale Notice and the objection, an Order was entered [docket #50] which overruled PCFS Financial's objection.

7. On January 30, 2003, PCFS Financial filed a motion seeking relief from the automatic stay and abandonment as to the Property [docket #48]. PCFS Financial contended that, as of the date of the filing of the motion, the total indebtedness due on its loan to debtors was \$570,999.50 [docket #48, Exhibit C]. The Trustee filed an objection to that motion on February 28, 2003 [docket #52]. On March 4, 2003, PCFS withdrew its motion [docket #53].

8. The trial in the Adversary Proceeding was held on March 21, 2003 and PCFS Financial, through counsel, fully prosecuted its position. On June 9, 2003 this Court entered a Memorandum Opinion and a Judgment in favor of the trustee thus avoiding PCFS Financial's mortgage on the Property [Adversary Proceeding - docket #42]. On July 13, 2003 PCFS Financial filed a notice of appeal in the Adversary Proceeding [Adversary Proceeding - docket #43].

9. On November 21, 2003, the trustee filed an amended notice of intent to sell the Property (the "Amended Sale Notice") again for a total purchase price of \$300,000.00 [docket #56]. The Amended Sale Notice also indicated that any sale of the Property would be free and clear of all liens and that any liens would transfer to the proceeds of sale. A copy of the Amended Sale Notice was served upon, *inter alia*, counsel for PCFS Financial. No objection to the Amended Sale Notice was filed.

10. On September 16, 2005, the Bankruptcy Appellate Panel for the Sixth Circuit (the “BAP”) entered its judgment affirming this Court’s ruling avoiding PCFS Financial’s mortgage. PCFS Financial did not appeal the BAP’s ruling and the Adversary Proceeding was closed on March 13, 2006.

11. PCFS Financial has never filed a proof of claim in this case nor did it file *anything* in this case before the July 24, 2001 claims bar deadline passed.

## **II. DISCUSSION**

Pursuant to her Final Report, the trustee proposes to pay the holders of allowed unsecured claims in full with interest. Because PCFS Financial has never filed a proof of claim in this case, the trustee does not consider it to be the holder of a claim and, thus, does not plan on making any distribution to PCFS Financial. Through the Objection, PCFS Financial contends that it should be deemed to have filed an “informal” proof of claim which should be allowed as an unsecured claim, thus enabling PCFS Financial to be paid in parity with all other holders of allowed unsecured claims. Whether a creditor should be deemed to have filed an “informal” proof of claim and, if so, whether such “informal” proof of claim should be allowed are equitable decisions that fall within the sound discretion of the bankruptcy court. *In re M.J. Waterman & Associates, Inc.*, 227 F.3d 604, 607 (6<sup>th</sup> Cir. 2000).

### **A. Whether PCFS Financial Should be Deemed to Have Filed an “Informal” Proof of Claim**

PCFS Financial contends that the motion for relief from stay that it filed on January 30, 2003 [docket #48] (the “Relief/Abandonment Motion”), coupled with the pleadings it filed in the Adversary Proceeding (collectively with the Relief/Abandonment Motion, the “Pleadings”) should

be deemed its “informal” proof of claim. For the Pleadings to be considered a proof of claim, PCFS Financial must show that they meet all of the following requirements: (1) that they are in writing; (2) that they contain a demand on the debtor’s estate; (3) that they express an intent to hold the debtor liable for the debt; and (4) that they were filed with the bankruptcy court. *In re M.J. Waterman & Associates, Inc.*, 227 F.3d 604, 609 (6<sup>th</sup> Cir. 2000). There is no dispute that the Pleadings meet the first and fourth requirements as they were all in writing and filed with this Court. As to the second and third requirements, the Court finds that PCFS Financial has not made the requisite showing.

On the date of the filing of this case PCFS Financial held a mortgage on the Property. Through the Relief/Abandonment Motion, PCFS Financial sought an order of this Court “conditioning, modifying or dissolving the automatic stay imposed by Section 362 of the Bankruptcy Code and for abandonment of property under Section 554 of the Bankruptcy Code.” While requesting that the Property be abandoned is in the nature of a “demand” against the estate, requesting that the stay be lifted is simply a procedural pre-requisite that PCFS Financial must meet before it may go to another forum to protect its property rights. However, neither the request for relief from the stay nor the request for abandonment from the estate expresses any intent to hold the debtors liable for a debt. Generally, a motion for relief from stay to foreclose on property rights in state court, standing alone, will not be construed as an informal proof of claim.

To effectively administer a bankruptcy estate, a trustee cannot be burdened by the uncertainty that would result from liberal allowance of informal proofs of claim through motions for relief from stay which [contain no explicit intention to hold the estate liable for any unsecured claim] . . . . The trustee must be able to close a case without the necessity of sifting through every motion for relief in search of a potential deficiency and then being required to investigate what happened at the foreclosure sale. Similarly, creating informal proofs of claim by imputing knowledge to the trustee would burden administration of the estate by requiring the trustee to investigate all rumors of claims before closing the estate.

*In re Anchor Resources Corp.*, 139 B.R. 954, 957 (D. Colo. 1992), *citing In re Glick*, 136 B.R. 654, 657-58 (Bankr. W.D.Va. 1991). *See also, e.g., In re Charter Co.*, 876 F.2d 861 (11<sup>th</sup> Cir. 1989) (motion for relief from stay to proceed with civil action against debtor’s subsidiary alleging tort injury as a result of exposure to contaminants contained sufficient demand against the estate and intent to hold estate liable to be considered an informal proof of claim).<sup>1</sup>

The Adversary Proceeding dealt with whether PCFS Financial’s mortgage on the Property was valid under Ohio law and the two central issues raised in that matter were (1) whether the applicable Ohio law was constitutional and (2) whether two witnesses were present at the mortgage closing. The pleadings that PCFS Financial filed in the Adversary Proceeding focused on those two issues. Nowhere in the Objection does PCFS Financial point to a particular pleading in the Adversary Proceeding that it claims would contain a demand on the debtors’ estate or an expressed intent to hold debtors liable for the debt. Instead, PCFS Financial simply refers to the totality of its pleadings:

In addition to the motion for relief from stay which contains the formal elements of a proof of claim, PCFS Financial has filed extensive documentation with the bankruptcy court, and defended the adversary proceeding, through appeal. PCFS Financial has filed the note, the amount due, provided the testimony of the debtors that they borrowed the money, [and] provided extensive evidence that in fact PCFS Financial has a claim against the bankruptcy estate.

---

<sup>1</sup> PCFS Financial further contends that the Relief/Abandonment Motion should be considered an informal proof of claim because it contains all the information within a proof of claim including the name and address of the creditor, the basis of the claim, the date the debt was incurred, the classification of the claim, the amount of the claim and documents in support of the claim. Objection at pg. 4. Although the Relief/Abandonment Motion does, in fact, contain all of this information, it does so because of this Court’s requirement that a motion for relief comply with a standardized form. *See* General Order 99-1. Accordingly, the inclusion of such information did not put the trustee on any type of notice that PCFS Financial was seeking anything other than relief to pursue its property rights in some other forum.

Objection at pg. 4. This generalized reference does not satisfy PCFS Financial’s obligation to demonstrate that the Pleadings contained a demand on the debtors’ estate and expressed an intent to hold debtors liable should PCFS Financial lose the Adversary Proceeding. No party in interest, especially the trustee, should have to sift through the Pleadings and make an assumption about what PCFS Financial might do to recover on its loss if the mortgage were deemed invalid. Whether PCFS Financial intended to seek recovery from the estate as an unsecured claimant is not clear from the Pleadings.

Of note in this case is that in October or November 2002 (during the pendency of the Adversary Proceeding), PCFS Financial and the trustee negotiated a proposed “Order Allowing Administrative Expense and Allowing Recovery from Allowed Secured Claim” regarding unpaid heating bills for the Property that was entered by the Court on November 6, 2006 [docket #45]. Through that order PCFS Financial contemplates that its lien may be deemed invalid and asserts a limited intention to recover from the estate:

PCFS Financial Services consents to the allowance and payment of such expense and to its reimbursement to the estate of such expense in the event it is determined to have a valid and subsisting first lien upon said property and that such reimbursement shall be a condition of any stay relief or abandonment of said property from the estate . . . .

Trustee may not be able to restore heat to the premises without the payment of certain bills incurred for the preceding year and if such restoration of heat to the property requires the payment of funds not presently in possession of the Trustee, that PCFS Financial Services will advance such funds to the estate provided it is granted an administrative claim against the estate of the Debtors for the amounts advanced to be reimbursed by the proceeds of any sale of the property . . . *in the event that PCFS does not have a valid and subsisting first lien against said property, but not otherwise.*  
...

Although neither counsel for PCFS Financial nor the trustee relied upon this agreed order to support their respective arguments regarding allowance of an “informal” proof of claim [*see* Order Requiring Further Briefing (docket #73) and PCFS Financial’s Response (docket #75)], the limited relief sought by PCFS Financial in the event that its mortgage was avoided further suggests that the Pleadings do not include a demand upon the estate or an intention to hold debtors’ liable for all potential unsecured debt.

**B. Whether an “Informal” Proof of Claim Should be Allowed**

Assuming, *arguendo*, that PCFS Financial is deemed to have filed an “informal” proof of claim, PCFS Financial must then demonstrate that the allowance of such proof of claim would not work an inequity upon all the other claimants in the case. In ruling on an action in equity, the Court must balance the interests of *all* parties involved. *In re M.J. Waterman & Associates, Inc.*, 227 F.3d 604, 610 (6<sup>th</sup> Cir. 2000).

If PCFS Financial were deemed to be the holder of an allowed unsecured claim, the amount that the trustee would then pay to holders of allowed unsecured claims would drop from 100% plus interest to approximately 29%. As already noted, PCFS Financial filed nothing in this case before the passage of the original claims bar deadline. However, unlike the majority of other creditors in this case who were forced to file a proof of claim shortly after the case was filed, PCFS Financial was given another chance to file a proof of claim pursuant to FED. R. BANKR. P. 3002(c)(3):

- (3) An unsecured claim which arises in favor of any 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. . . .



The parties stipulated that the judgment in the Adversary Proceeding became final on March 13, 2006, which was almost five years after debtors’ filed their petition. Although PCFS Financial has acknowledged that Rule 3002(c)(3) applied due to the avoidance of its mortgage on the Property, it offered no explanation as to why it did not take advantage of the extended proof of claim filing deadline afforded by such rule. Because PCFS Financial knew from very early on in this case that the trustee intended to challenge its mortgage on the Property, the unexplained failure to take advantage of the extended proof of claim filing deadline coupled with a very large reduction in return to unsecured creditors who did file proofs of claim would work too large an inequity for an “informal” proof of claim by PCFS Financial to be allowed.

### **III. CONCLUSION**

Based upon the foregoing the Court finds that the Pleadings do not constitute an “informal” proof of claim but further finds that, if the Pleadings were to be considered an “informal” proof of claim, it would be inequitable to all other parties for such claim a claim to be allowed. Accordingly, the Objection is hereby overruled. This Order is not intended for publication.

# # #

cc [via electronic mail]:      LYDIA SPRAGIN, Chapter 7 Trustee  
   DAVID FREEBURG, Counsel for Provident Bank  
   MICHAEL DEMCZYK, Counsel for Debtors