

THIS OPINION NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 04-12595
)
THE CAPITAL CREATION CO., INC.,) Chapter 11
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

Creditor Allyne Gottlieb filed a proof of claim after the claims bar date. He now moves to have documents that he filed before the bar date be deemed to be an informal proof of claim, with the late-filed formal proof of claim then considered as an amendment to the timely filed informal proof of claim. The result he seeks is to share in the distribution to creditors in this chapter 11 case. (Docket 193). The debtor objects. (Docket 230). For the reasons stated, the motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B).

FACTS¹

The Capital Creation Co., Inc. filed its chapter 11 case on March 4, 2004 and scheduled Allyne Gottlieb as having a disputed secured claim. The court set July 30, 2004 as the last date for creditors to file claims. Although Mr. Gottlieb received this notice, he did not file a proof of

¹ The parties submitted this matter for decision on the briefs at a hearing held on April 21, 2005.

claim until August 24, 2004. He did, however, file these documents before the bar date:

- (1) The debtor applied to retain Benesch, Friedlander, Coplan & Aronoff, LLP as its chapter 11 counsel and Mr. Gottlieb filed an objection to that application on March 19, 2004. His objection asserted that he is a creditor of the debtor's estate "with a Claim in the approximate amount of \$2.3 million dollars" and objected to the appointment because the firm had previously served as his counsel in litigation against his son Joshua Gottlieb, the debtor's sole shareholder and director.
- (2) On May 3, 2004, Mr. Gottlieb filed motions under bankruptcy rule 2004 to examine J.L. Gottlieb Agency, Inc., Joshua Gottlieb (individually), and J.L. Gottlieb Co. These motions stated that "Allyne Gottlieb has a provable claim against the Debtor in the amount of \$2,201,134.39 plus interest[.]" He asked for the exams "to investigate various matters with respect to the financial affairs of the Debtor relative to the . . . claim of Allyne M. Gottlieb."
- (3) The court administratively granted the motions for rule 2004 examinations. Joshua Gottlieb, J.L. Gottlieb Agency, Inc., and J.L. Gottlieb, Co. then filed a motion for protective order and for reconsideration. Mr. Gottlieb responded to their motion on July 15, 2004. His response asserts that he "is a Creditor of the estate with a balance in the approximate amount of \$2,169,000.00[]" and argues that the examinations are needed to "obtain information based upon statements made at the First Meeting of Creditors and knowledge of the debtor's business that should be necessary for the consummation of the Plan and to ensure that Creditors receive all amounts that they may be due under a plan of reorganization."²

On August 24, 2004, Mr. Gottlieb filed a formal proof of claim³ asserting an unsecured claim in the amount of \$2,270,087.02. He later filed other proofs of claim asserting a secured claim in the same amount.⁴

² See motion Exhs. A, B, C, D, and E.

³ By formal, the court means a claim in compliance with bankruptcy rule 3001(a). See Official Form 10.

⁴ Proof of claim nos. 27 and 28. See also proof of claim no. 29. The debtor objected to the amended claims and the parties reported at the April 21, 2005 hearing that an agreed order will resolve that objection. See April 21, 2005 hearing results.

On November 24, 2004, the debtor and plan sponsor JG Acquisitions LLC filed a proposed disclosure statement and plan. The proposed plan classifies various creditors, including creating a class 3 for holders of late-filed claims. The plan states that Mr. Gottlieb is the only known holder of a class 3 claim, his claim is impaired, and he will not receive a distribution under the plan.⁵ Allyne Gottlieb objected to the disclosure statement on several grounds, one of which is that “[w]hile Debtor states that the secured claim of Allyne M. Gottlieb will not be paid, the secured claim has not been relegated to an unsecured status and has not been objected to by the Debtor.”⁶ The proponents filed several amended disclosure statements, each treating Mr. Gottlieb’s claim in the same fashion.⁷ Allyne Gottlieb filed a supplemental objection that again did not respond to the late-filed status of his claim. On February 25, 2005, the court approved the second amended disclosure statement and set the confirmation hearing for April 11, 2005.

On March 2, 2005, the debtor objected to Allyne Gottlieb’s claim (and others) for the purpose of conforming the claims to the treatment provided under the plan.⁸ On March 18, 2005, Allyne Gottlieb filed his motion to deem his three court filings to be an informal proof of claim. The motion does not state why he failed to file a timely claim or raise this issue earlier.⁹ The confirmation hearing had to be postponed for the issue to be resolved.¹⁰

⁵ Docket 170.

⁶ Docket 176.

⁷ Docket 172, 178, 182.

⁸ Docket 189.

⁹ At the April 21, 2005 hearing, the firm representing Mr. Gottlieb stated that the failure to file was the result of counsel’s oversight. The court appreciates the candor shown by counsel.

¹⁰ Docket 228.

ISSUE

Do the documents filed by Mr. Gottlieb before the claims bar date qualify as a valid informal proof of claim and, if so, does equity favor allowing him to amend that claim to bring it into compliance with the bankruptcy rules?

DISCUSSION

The claims bar date is a critical part of the chapter 11 process. “Absent the setting of a [claims] bar date, a Chapter 11 case could not be administered to a conclusion . . . Bar dates protect not only the debtor’s interests, but creditors’ interests as well. It establishes a date by which the plan proponent can determine which liabilities will be asserted against the estate.” *In re Nutri*Bevco, Inc.*, 117 B.R. 771, 781 (Bankr. S.D.N.Y. 1990) (internal citation omitted).

The bankruptcy rules prescribe the requirements for filing proofs of claims in chapter 11 cases. Under the rules, the court establishes the bar date for filing claims. *See* FED. R. BANKR. P. 3003(c)(3). Any creditor may file a claim within that time. *See* FED. R. BANKR. P. 3003(c)(1). A creditor whose claim is not scheduled, or whose claim is scheduled as disputed, contingent or unliquidated, is required to file a claim within the time set. *See* FED. R. BANKR. P. 3003(c)(2). The time for filing a proof of claim may be extended as permitted by the bankruptcy rules. *See* FED. R. BANKR. P. 3003(c)(3) and 9006(b). The failure to timely file a proof of claim is grounds to disallow it. *See* 11 U.S.C. § 502(b)(9).

“Creditors who have failed to adhere to the strict formalities of the Bankruptcy Code but who have taken some measures to protect their interests in the bankruptcy estate may be able to preserve those interests by showing that they have complied with the spirit of the rules.” *Barlow v. M.J. Waterman & Assocs., Inc. (In re Waterman & Assocs., Inc.)*, 227 F.3d 604, 608-09 (6th Cir. 2000). They are able to do so if the pre-bar date actions which they have taken constitute an

informal proof of claim. *Id.* at 609. The concept of an informal proof of claim is based on the equitable doctrine of substantial compliance. *Id.* at 608.

As the *Waterman* court said in describing the informal proof of claim doctrine:

Creditors ignore the formalistic requirements of the Code do so at their own peril . . . as they run the risk of being denied use of the informal proof of claims doctrine if their pre-bar date actions do not meet the standards imposed in their jurisdiction. These standards are designed to protect the interests of the debtor as well as the other creditors who saw fit to follow the Code's rules and whose interests may be directly affected by the delinquent creditor's failure to file in a timely fashion. It is a delicate balance. On the one hand we do not wish to enact too heavy-handed a measure to punish a creditor who may not have strictly adhered to the formalities of the filing requirements, but whose actions were sufficient to put the court and the debtor on notice of his or her intention to seek to hold the debtor liable. On the other hand, we must protect the rights and interests of the parties at interest whose diligence entitles them to a timely distribution of the estate.

Id. at 609.

A creditor must show four things to come within the informal proof of claim doctrine:

- (1) The proof of claim must be in writing;
- (2) The writing must include a demand by the creditor on the debtor's estate;
- (3) The writing must express an intent to hold the debtor liable for the debt; and
- (4) The proof of claim must be filed with the bankruptcy court.

In re Waterman & Assocs., 227 F.3d at 609 (citing *In re Vaughn Chevrolet, Inc.*, 160 B.R. 316, 319 (Bankr. E.D. Tenn 1993)).

Mr. Gottlieb's filings satisfy these first four requirements for an informal proof of claim. They are in writing and were filed with this court. Although they state varying claim amounts, the filings reflect Mr. Gottlieb's intention to protect his financial interests in this case. Finally,

they state an intent to hold the debtor liable and include a demand against the debtor's estate.

Mr. Gottlieb's pre-deadline filings, therefore, constitute a valid informal claim.

A valid informal proof of claim is not enough, though, to end the discussion. If the four requirements are met, "the court may examine a fifth factor – whether it would be equitable to allow the amendment of the informal proof."¹¹ *Id.* If the court permits the late-filed formal proof of claim to amend the timely informal proof of claim, it eliminates the taint of the untimely filing and allows the creditor to participate in the case. The interests of the moving creditor, the debtor, and other creditors must all be considered in determining whether this is an equitable result. *Id.* at 610.

Mr. Gottlieb argues that equity favors the amendment because the debtor was aware of his claim, scheduled it, and filed a preference action against him which references the debt. He also contends that he will be prejudiced if his claim is disallowed because he will receive nothing. The flip side of his argument, which the debtor makes, is that creditors who filed timely claims will be harmed if the amendment is allowed because Mr. Gottlieb will share in the distribution despite not having complied with the rules. The debtor contends further that when Mr. Gottlieb failed to file a timely proof of claim, it believed Mr. Gottlieb had decided not to pursue this family dispute any further. The debtor then thought that Mr. Gottlieb changed his mind and filed a proof of claim, but too late to be effective. The debtor also emphasizes Mr. Gottlieb's lack of diligence in putting forward his position, as shown by his failure to file his motion until the eve of confirmation. That timing caused the confirmation hearing to be postponed at the last minute and will result in administrative expense to the estate in either

¹¹ Although the *Waterman* court uses the word "may", it is clear from the discussion that a court *should* go on to consider the fifth factor.

preparing for a new hearing or having to draft a new plan and disclosure statement that accounts for Mr. Gottlieb's untimely claim.

Equity does not favor allowing the amendment under the facts of this case because Mr. Gottlieb unduly delayed in seeking the relief he requests. He either knew or should have known when he filed his proof of claim that it was untimely and could have asked for a determination on the issue at that point. That would have allowed the debtor and the plan proponent to address the issue and have it resolved before preparing a disclosure statement and plan, matters that generally involve considerable expense to a bankruptcy estate. If Mr. Gottlieb did not act when he filed the proof of claim in August 2004, he certainly should have acted in November 2004 when the debtor and the plan sponsor filed documents that expressly identified the late filing as the basis for disallowing Mr. Gottlieb's claim. Mr. Gottlieb first objected to the disclosure statement on January 17, 2005 on other grounds, and he did not raise the issue of allowing his untimely claim until well after the disclosure statement had been approved and the confirmation hearing had been scheduled.

Delay is often aggravating, but it is not always prejudicial. In this case, however, Mr. Gottlieb's delay *is* prejudicial to the estate and other creditors. The approved disclosure statement provides that class 2 general unsecured claims total approximately \$3.5 million and are to be paid a pro rata share of \$150,000.00. Mr. Gottlieb's claim for \$2,207,087.02 is substantial and allowing the amendment would drastically reduce plan payments to class 2 unsecured creditors. As a result, if Mr. Gottlieb is permitted to make his claim, the plan proponents will have to go back to square one to craft a plan that takes his claim into consideration and is also likely to be accepted by other creditors. This will cause delay and expense, both of which prejudice the other creditors by extending the time for them to receive their dividend and also

reducing the amount available for distribution because there will be additional administrative expense attributable to the negotiation and drafting of a new plan and disclosure statement.

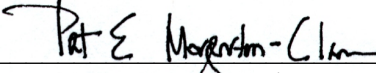
These problems would have been avoided if Mr. Gottlieb had timely raised the late-filed issue.

Because he did not, the equities do not favor treating his proof of claim as an amendment to his informal proof of claim.

CONCLUSION

For the reasons stated, the motion of Allyne Gottlieb to deem his pleadings as an informal proof of claim and to allow such claim as timely is denied. A separate order will be entered reflecting this decision.

Date: 17 May 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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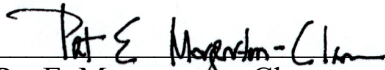


In re:) Case No. 04-12595
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THE CAPITAL CREATION CO., INC.,) Chapter 11
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Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, the motion of Allyne Gottlieb to deem pleadings which he filed as an informal proof of claim and to allow his claim as being timely filed is denied. (Docket 193).

IT IS SO ORDERED.

Date: 17 May 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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