

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
R & D MACHINE TOOL, INC.,)	CASE NO. BK92-80612
)	
DEBTOR)	CH. 7
)	Fil. 266, 297, 309
)	

MEMORANDUM

Hearing was held on April 26, 1994, on Trustee's Objection to Claims, on Chickasaw County's Resistance, and on Dale Nelson's and Richard Walter's resistance to Chickasaw County's resistance. Appearing as Trustee was Richard D. Myers. Appearing on behalf of Chickasaw County was Richard P. TeKippe of New Hampton, Iowa. Appearing on behalf of Dale Nelson and Richard Walter was Charles Smith of Council Bluffs, Iowa. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(A) and (B).

Background

The debtor, R & D Machine Tool Inc., filed for relief under Chapter 11 of the Bankruptcy Code on April 3, 1992. The debtor did not list Chickasaw County (the County) on its schedules as a creditor, nor did the debtor list the County on the mailing matrix used in this case. However, the debtor owed the County approximately \$36,593 in personal property taxes on equipment.

On June 5, 1992, the debtor's case was converted to a Chapter 7 case. The Notice of Commencement of Case under Chapter 7 states, "Filing Claims: Deadline to File a Proof of Claim is 10/13/92." Filing no. 82. The County was not included on the mailing matrix and did not receive notice of the conversion or the proof of claims deadline. The County was first contacted regarding this bankruptcy case on February 16, 1993, after the claims bar date expired. Shortly after this initial contact, the County filed its proof of claim on February 24, 1993. Claim no. 76.

The trustee has objected to the claim of the County. The County has resisted because it was not included on the mailing matrix used in this case and because it did not have actual knowledge of the bankruptcy case until it was contacted in February of 1993. Two unsecured creditors, Dale Nelson and Richard Walter, have resisted the County's resistance to the trustee's objection to

claim on the ground that the County did in fact have knowledge of the bankruptcy case and that the proof of claim filed by the County was not valid.

The trustee currently has a proposal for an interim distribution of the assets of the estate pending before this Court. The distribution is the result of a settlement agreement between the trustee, Dale Nelson and Richard Walter. If the distribution is limited to those proofs of claims the trustee deems timely filed, the distribution will pay about 88% to general unsecured creditors, while Dale Nelson and Richard Walter will receive about 8% for their unsecured claims. Nelson and Walter allege that allowing the County's claim will dilute their interest in the settlement, which is contrary to their expectations upon entering into the settlement agreement.

Discussion and Decision

11 U.S.C. § 502 states that any proof of claim filed under Section 501 of Title 11 is deemed allowed unless a party in interest objects. Therefore, the proof of claim filed by the County is allowed until the trustee can show that the claim should be disallowed.

In Chapter 7 cases, a late filed proof of claim is subject to Section 726(a), which states:

(a) Except as provided in section 510 of this title, property of the estate shall be distributed -- (1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title; (2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is --

(A) timely filed under section 501(a) of this title; (B) timely filed under section 501(b) or 501(c) of this title; or (C) tardily filed under section 501(a) of this title, if -- (i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and (ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection;

11 U.S.C. § 726(a)(2) & (a)(3).

Fed. Bankr. R. 3002(c) states that a proof of claim for a Chapter 7 case must be filed within ninety days after the first date set for the meeting of creditors, which in this case, was October 13, 1992.

Under Section 726(a), administrative claims and priority claims are paid first. United States v. Vecchio (In re Vecchio), ___ F.2d ___, 1994 WL 113545 (2nd Cir. April 7, 1994) (holding that Section 726(a)(1)'s failure to distinguish between timely and untimely filed claims, while Section 726(a)(2) and (a)(3) distinguishes on the basis of whether the claims for general unsecured claims were timely filed, indicates that Congress intended for all priority claims to be allowed without regard to whether the proof of claim was filed after the bar date).

Next, allowed general unsecured claims that are timely filed are paid, including proof of claims that were filed late but are treated as timely filed because the creditor did not receive notice of the bar date and did not have knowledge of the bankruptcy case. In re Corporacion de Servicios Medico, 149 B.R. 746 (Bankr. D.P.R. 1993) (holding that an unsecured claim holder who had knowledge of a case being converted from Chapter 11 to Chapter 7 but who filed a proof of claim in the Chapter 7 case late had an allowed unsecured claim and was only entitled to third priority behind timely filed unsecured creditors pursuant to Sections 726(a)(2) and (a)(3). However, unsecured creditors without knowledge or notice of the conversion to Chapter 7 were entitled to the same priority status as timely filed unsecured claims under Section 726(a)(2)(C)); In re Osman, 164 B.R. 709 (Bankr. S.D. Ga. 1993) (holding that an unsecured creditor without actual notice or knowledge of bankruptcy case was entitled to same treatment as unsecured creditors who had timely filed claims, and discussing thoroughly the existing law and cases on the subject).

Finally, allowed general unsecured claims that are untimely filed, where the creditor received notice of the bar date or had knowledge of the bankruptcy case, are paid last. In re R & D Machine Tool, Inc., BK92-80612 (Bankr. D. Neb. May 11, 1994) (holding that an unsecured creditor who had notice of the claims bar date and had knowledge of the bankruptcy case had an allowed claim, but would be paid after allowed unsecured claims that were timely filed).

Several courts have treated Bankruptcy Rule 3002 as a statute of limitation and have absolutely barred claims that are filed after the claims bar date set in Chapter 7 cases. Osman, 164 B.R. at 712 n. 7 (listing Chapter 7 cases that have construed Rule 3002 as a bar to tardily filed claims, including a Fourth Circuit case). However, at least in a Chapter 7 case, these decisions appear to be in conflict with the Bankruptcy Code. Section 502 treats any proof of claim filed as allowed and explicitly states the grounds upon which a court may disallow a claim. The timeliness of the filing of the proof of claim is not listed as a means to disallow a claim. See 11 U.S.C. § 502(a) & (b). Section 502 together with Section 726(a) are consistent with their treatment of allowed unsecured claims and were drafted with the assumption that late filed claims would not be disallowed. Vecchio v. United States (In re Vecchio), ___ F.2d ___, 1994 WL 113545 (2nd Cir. 1994) (holding that under Sections 502(a), (b) and 726(a) claims may be allowed and tardily filed, despite Bankruptcy Rules); United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1089 (6th Cir. 1990) (holding that a tardily filed proof of claim by creditor with notice was allowable and was afforded the appropriate treatment under Section 726(a)); Osman, 164 B.R. at 714.

One bankruptcy court believes the conflict between the Code and the Rules arose when the drafters of the Bankruptcy Code hastily copied Rule 302 from the previous bankruptcy rules, which dealt with a bankruptcy statute that did explicitly disallow late filed proofs of claims, and created Rule 3002 without noticing that the underlying statute had changed and no longer disallowed tardy proofs of claims. In re Hausladen, 146 B.R. 557, 559 (Bankr. D. Minn. 1992) (holding that an unsecured creditor's proof of claim was allowed even though tardily filed in a Chapter 13 case). In the instance where there is a conflict between the Code and the Rules, the Code prevails. Rules Enabling Act, 28 U.S.C. § 2075; Osman, 164 B.R. at 714 (citing In re Stoecker, 151 B.R. 989, 1004; In re Roberts, 68 B.R. 1004, 1006 (Bankr. E.D. Mich. 1987); United New Mexico Bank v. Wilferth (In re Wilferth), 57 B.R. 693, 694 (Bankr. D.N.M. 1986)).

Conclusive evidence that Rule 3002 does not absolutely bar late filed claims, at least in Chapter 7 cases, is located in the Rule itself. Rule 3002(c)(6) explicitly states that in a Chapter 7 case a court may grant an extension of time to file a proof of claim against any surplus remaining after all allowed claims are paid in full. Fed. Bankr. R. 3002(c)(6). It appears that this subsection contemplates that tardily filed proof of claims filed before distribution are allowed and paid in accordance with Sections 502(a), (b) and 726(a), while those who do not file prior to distribution are entitled to the remaining surplus.

In this case, the County filed its proof of claim nearly four months after the claims bar date. The County did not have notice

of the claims bar date because the debtor failed to list the County on the mailing matrix.

Nelson and Walter allege that the County "should have known" about the bankruptcy case because other creditors in the proximate area of Chickasaw County received notice of the case. However, there is no evidence that the County Treasurer had actual knowledge of the case. Chickasaw County is in the northeast portion of Iowa, and if the appropriate county official had a hint of the bankruptcy, it would be reasonable for the county official to believe that any bankruptcy case would have been filed in the United States District Court for the Northern District of Iowa. There is no evidence that there were adequate means available to the county official to permit the official to know that this case had been filed in the District of Nebraska. This Court will not, without evidence, presume that the appropriate county official had knowledge of the bankruptcy case.

The second allegation by Nelson and Walter is that the Chickasaw County Attorney had knowledge of the bankruptcy case because as a private practitioner he represented Nelson and Walter pre-bankruptcy and in the early portions of the bankruptcy case. Relatively rural counties in Iowa often have part-time County Attorney's who are also private attorneys. However, the County Attorney was not the party who knew that the County had a claim against the estate. The County Treasurer was the party who prepared the proof of claim and was the party the trustee initially contacted in February of 1993. Therefore, the County itself did not have knowledge about the bankruptcy case, even though the County Attorney may have had knowledge of the case from his capacity as a private attorney for other parties in the case. If an attorney has knowledge of a bankruptcy case, but that knowledge did not result from the attorney's representation of the creditor in question, it may not be implied that the creditor had knowledge of the bankruptcy case. There is no presumption that if one county officer knows a fact all other county officers are charged with such knowledge.

Since the County did not have knowledge of the bankruptcy case, its claim is allowed and is, at the very least, a general unsecured claim pursuant to Section 726(a)(2). To the extent that a portion of the County's proof of claim is a priority claim under 11 U.S.C. § 507(a)(7)(B), that portion of the claim will be treated as allowed and payable pursuant to Section 726(a)(1).

Nelson's and Walter's final allegation is that the proof of claim should be disallowed anyway because the County did not use the official proof of claim form prescribed in Bankruptcy Rule 9009, and the letter used by the County does not "conform substantially" to the appropriate official form as required by Bankruptcy Rule 3001(a). Fed. Bankr. R. 9009, 3001(a). This allegation is without merit because in the Eighth Circuit a letter

to the bankruptcy case trustee, which informs the trustee of the claim is sufficient to constitute an informal proof of claim. In re Haugen Construction Servs., Inc., 876 F.2d 681 (8th Cir. 1989). The County Treasurer sent the trustee a letter shortly after receiving notice of the bankruptcy case, the letter sufficiently informs the trustee of the proof of claim, and the trustee forwarded this letter to the Court to be filed as a proof of claim. It is clear from these circumstances that the County's proof of claim is sufficient under the law of the Eighth Circuit.

In conclusion, the County's claim is allowed, and to the extent the County's claim represents taxes on personal property, the County has an unsecured claim for both pre- and post-petition claims. If the County did not perfect any liens in pre-petition personal property tax claims, the pre-petition personal property claims are general unsecured claims pursuant to Section 726(a)(2). The County's post-petition personal property claims are either general unsecured claims pursuant to Section 726(a)(2) or administrative claims pursuant to Section 726(a)(1). Equitable Life Assurance Society v. Ballentine Bros., Inc. (In re Ballentine Bros., Inc.), 86 B.R. 198 (Bankr. D. Neb. 1988). To the extent the County has a claim for pre-petition real estate taxes, which are secured by a lien under Iowa law, the County may not participate in the interim distribution because the lien may be satisfied by the sale of the asset. However, to the extent that the County has a claim for post-petition real estate taxes, the County has an administrative expense claim pursuant to Section 726(a)(1) or at worst has a general unsecured claim pursuant to Section 726(a)(2).

If the parties continue to disagree over what portion of the County's claim is a secured claim or an administrative claim or a general unsecured claim, the trustee may request hearing, and the parties will be required to brief relevant Iowa tax law.

Separate journal entry to be entered.

DATED: May 23, 1994.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.

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R & D MACHINE TOOL, INC.,)	CASE NO. BK92-80612
)	A
<u>DEBTOR(S)</u>)	
)	CH. 7
)	Filing No. 266, 297, 309
)	
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: May 23, 1994
<u>Defendant(s)</u>)	HEARING DATE: April 26, 1994

Before a United States Bankruptcy Judge for the District of Nebraska regarding Trustee's Objection to Claims.

APPEARANCES

Richard D. Myers, Trustee
Robert Tekippe, Attorney for Chickasaw County
Charles Smith, Attorney for Dale Nelson and Richard Walter

IT IS ORDERED:

Late filed proof of claim allowed with distribution rights pursuant to 11 U.S.C. § 726(a)(1) and (a)(2). See memorandum this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

CC: Movant, Objector/Resistor (if any), Debtor(s) Atty. and all parties appearing at hearing
[] Chapter 13 Trustee [] Chapter 12 Trustee [] U.S.Trustee

Movant is responsible for giving notice of this journal entry to all other parties if required by rule or statute.