

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF

CENTRAL TRANSFER AND  
DISTRIBUTION COMPANY,

DEBTOR

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CASE NO. BK82-1704

MEMORANDUM OPINION

This matter came before the Court on objection to claim filed by Tri-County Bank & Trust objecting to the claim of Timmons Building Services, Inc.. Hearing was held on June 13, 1986. At the hearing Timmons Building Services, Inc., (Timmons), challenged the standing of the Bank to object to the claim since the trustee had objected to the claim twice and on both occasions the Court had overruled such an objection. The Court then requested both parties to brief the issue. The Bank filed an original brief on June 20, 1986. Timmons responded on July 3, 1986, and the Bank filed its final brief on July 16, 1986.

Appearing on behalf of the Bank were Jerrold L. Strasheim and Mary L. Swick of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, Omaha, Nebraska. Appearing on behalf of Timmons was Michael G. Helms of Schmid, Ford, Mooney & Frederick, P.C., Omaha, Nebraska.

The issues are as follows:

1. Does the Bank have standing to object to the claim of Timmons?
2. Are the previous orders of the Court overruling objections of the trustee to such claim res judicata?
3. If the Bank has standing and the previous orders are not binding upon the Court, should the Court reconsider the allowance of the Timmons claim on the basis of the documents attached to the various briefs and the arguments of counsel?

Decision

A creditor does have standing to object to the claim of another creditor if the trustee has not adequately brought the matter to the attention of the Court. Previous orders overruling the objection by the trustee are not binding upon the Court

because, in the first instance, the trustee failed to appear at the hearing and was, therefore, defaulted. At the second hearing, the trustee requested that its objection be overruled on the basis that its first objection had been overruled. In addition, the trustee admitted that it had not investigated the underlying contractual obligation of the debtor to Timmons before negotiating with Timmons a relief from the automatic stay. Finally, the Court shall set a one-half day evidentiary hearing on the allowability of the claim of Timmons as a result of a review of the contractual documentation and mechanic lien form attached to the briefs.

#### Finding of Facts

1. Central Transfer and Distribution Company (Central Transfer) filed a Chapter 11 bankruptcy petition on September 29, 1982.

2. The Bank is a creditor of the debtor and has filed an allowable claim of approximately \$195,000 which is secured to the extent of approximately \$6,000 and unsecured to the extent of approximately \$189,000. The Bank has an additional claim (contingent claim) of approximately \$214,000 which is all unsecured and may or may not be allowed.

3. Timmons has filed a proof of claim and an amended proof of claim based upon a mechanic's lien that was filed against certain real property allegedly owned by the debtor but concerning which Timmons contracted with a firm allegedly related to the debtor, Central Storage and Van Co.

4. Clay M. Rogers was appointed and is acting trustee of the bankruptcy estate. The trustee filed an original objection to the claim of Timmons on or about April 12, 1983. The claim did not challenge the validity of the contractual obligation running between the debtor and Timmons. A Journal Entry was entered on December 15, 1983, (Filing No. 98), overruling the objection because the trustee failed to appear and, therefore, was defaulted.

5. The Bank was given no notice of the first Timmons objections or the hearing thereon.

6. On June 5, 1984, the trustee and Timmons stipulated that the amount due Timmons on the claim as of May 31, 1984, was \$66,203.02 including \$3,978 in attorney's fees and interest. The parties further stipulated that the Timmons claim should be allowed in the amount of \$66,203.02 as against the estate of the debtor. Finally, the parties stipulated that Timmons should have relief from the automatic stay in order to pursue a foreclosure action pending in State Court.

7. The Court did not enter an order vacating the automatic stay and did not enter an order allowing the Timmons claim.

8. The State Court foreclosure proceedings are still pending and have not proceeded to judgment.

9. On October 1, 1985, the trustee's third revised plan of reorganization was confirmed as amended. The confirmed plan is a liquidating plan and authorizes the trustee to sell all assets of the estate free and clear of all liens and encumbrances on such assets and calls for distribution of the proceeds in the same manner as in a Chapter 7 case.

10. Notwithstanding the fact that the trustee had stipulated to relief from the automatic stay and the fact that Timmons is pursuing a State Court foreclosure action, the trustee has continued to attempt to sell the real estate involved.

11. The confirmed plan at Article X provides that the Court retains jurisdiction of the case to the maximum extent permitted by law. The retention of jurisdiction includes the right of the Court to "reconsider, reduce, disallow or expunge claims previously allowed and to recover distributions made thereon...."

12. In February of 1986 the Bank, by counsel, reviewed the Timmons mechanic lien and underlying documentation. In addition, the Bank discovered the stipulation with regard to the allowance of the claim and the granting of relief from the stay. The trustee informed the Bank that the trustee had no knowledge of any defects in the mechanic's lien or the underlying documentation and that the trustee had never reviewed the contract between Timmons and Central Transfer and Distribution Company, if any.

13. Thereafter, both the trustee and the Bank filed objection to Timmons claim based on the allegedly defective mechanic's lien filing. The matters were consolidated for status hearing on June 13, 1986, and at that time the trustee stated that either by reason of the stipulation which he had executed several years before or by reason of the prior order overruling his first objection to the Timmons claim, the Court should overrule the second objection. The Court did overrule the second objection, even though the Bank opposed such overruling.

At the status hearing Timmons alleged that the Bank has no standing to object to or move for reconsideration of the Timmons claim and also argued that the overruling of the trustee's second objection is res judicata to the objection and the motion of the Bank.

#### Conclusions of Law

The Bankruptcy Code provides for objections to claim by parties in interest at §502. Case law has established that a creditor is a party in interest. However, there has developed a rule which is generally applied in the Eighth Circuit. A creditor has no standing to object unless a trustee refuses to do so. 3

Collier on Bankruptcy, Paragraph 502.01(2) at 502-13 to 14; Amick v. Mortgage Security Corporation of America, 30 F.2d 359 (8th Cir. 1929).

As a result of this rule, Timmons alleges that the Bank has no standing to object because the trustee has already objected and been overruled twice. This Court does not agree. The trustee may have filed two written objections but did not attempt to prosecute the objections and, admittedly without investigating the claim, stipulated to the validity of the claim and stipulated to relief from the automatic stay, the basis of the validity of the claim. Therefore, without ruling upon the validity of the claim, this Court believes very strongly that the trustee did not make a legitimate effort to investigate or prosecute the objection to the claim, all to the detriment of the general creditors. The Bank, being a general creditor, has the right to object in the place of the trustee.

With regard to Timmons claim that previous rulings on the objections by the trustee have a res judicata effect on the Bank, the Court finds the law to be otherwise. Section 502(j) of the Bankruptcy Code provides that previously allowed claims may be reconsidered "for cause" and the confirmed plan itself provides that allowed claims may be reconsidered. Therefore, the order overruling the objections by the trustee cannot be and is not a final order adjudicating on the merits the issues with regard to the validity of the claim. No other party had notice of the objection, the hearing or the stipulation entered into by Timmons and the trustee. This Court finds that unless all parties in interest have notice, such orders and stipulations are not binding upon those parties without notice.

The State Court mechanic's lien foreclosure action has not gone to judgment and there has been no sale of the property allegedly subject to the mechanic's lien. The confirmed plan provides that all of the property of the estate, which would include the real estate subject to the State Court foreclosure action, is to be sold by the trustee free and clear of liens. To permit the foreclosure action to go forward in State Court to judgment and then sale may deprive the bankruptcy estate of an asset which could be liquidated for the benefit of all of the creditors, prior to any determination having been made in the Bankruptcy Court of the validity and allowability of Timmons claim. Although it may be argued that the validity of the mechanic lien can be determined in a more timely fashion in State Court than in the bankruptcy forum, the Court is concerned that the State Court proceeding does not have all of the interested parties before it. The fact that the trustee has previously agreed to relief from the automatic stay so that Timmons could proceed with the foreclosure action leads the Court to believe the trustee would not have much incentive to dispute the validity of

the lien in State Court. In addition, neither the Bank nor other creditors in the bankruptcy estate are parties to or may be parties to the State Court proceeding.

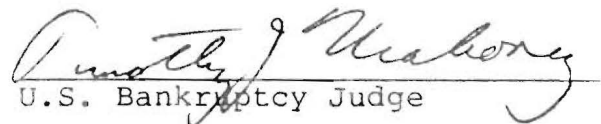
Even if the Court is incorrect in its assumption that the trustee has little incentive to defend the foreclosure case, the determination of the validity of the lien and, therefore, the allowability of the claim of Timmons is a core proceeding under 28 U.S.C. §157(b)(2)(B) and (K). Such determination of the validity of allowability of the claim should be and shall be brought before the Bankruptcy Court.

Therefore, the motion of the Bank to reconsider the allowability of the claim of Timmons is granted. A hearing on the objection to such claim and its allowability shall be scheduled as a primary case as soon as possible. Such a decision requires a reimposition of the automatic stay, assuming such a "reimposition" is authorized anywhere in the Bankruptcy Code or the cases. If it is not, then the Bank shall be granted 15 days from the date of this opinion to file an adversary proceeding requesting the determination of the validity of the lien of Timmons or the allowability of such claim and include in such adversary complaint a request for a temporary restraining order against Timmons with regard to further proceedings in the State Court action. This Court will not enjoin the State Court in this action. However, unless the parties agree to restrain themselves from further proceeding in the State Court foreclosure action, this Court will entertain a request for a temporary restraining order against Timmons in such action.

Separate Journal Entry to follow.

DATED: October 17, 1986.

BY THE COURT:

  
U.S. Bankruptcy Judge

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