

IN THE UNITED STATES DISTRICT COURT FOR THE

RECEIVED  
DISTRICT COURT OF NEBRASKA

IN THE MATTER OF

DLJ FARMS, INC.,

DEBTOR. UNITED STATES BANKRUPTCY CLERK  
FOR THE DISTRICT OF NEBRASKA  
OMAHA

OCT 30 1987

CV. 86-0-857

BK. 84-15411

ORDER

ATL

William L. Olson, Clerk

By

This matter is before the Court on the FDIC's appeal of the Bankruptcy Court's order of September 30, 1986, sustaining the Trustee's objection to its claim (Filing No. 1).

The facts are as follows: DLJ Farms, Inc. (hereinafter debtor) filed Chapter 11 bankruptcy on August 13, 1984. In their financial statement, debtor listed Farmers State Bank, Rising City, Nebraska, as a creditor with a contingent secured claim based upon a corporate guaranty of indebtedness for individuals. On August 20, 1984, the Bank filed a motion for relief of the automatic stay and a motion to prohibit use, sale and lease of collateral. The motion for relief of the stay was dismissed without prejudice and was never refiled. The motion to prohibit use, sale and use of collateral was sustained on September 7, 1984.

On November 30, 1984, two unsecured creditors of the Estate, Bruno Cooperative and Northside 66, filed an adversary proceeding against Farmers State Bank, DLJ Farms, Inc., and others seeking to set aside any security interest held by the Bank and to determine that the guaranty signed by DLJ was void and unenforceable for lack of consideration. The Bank filed nothing in response to the action. On January 7, 1985, a default

judgment was entered against the Bank. Although the FDIC contends in its brief that the Bank never received notice of the entry of the default, the record shows that the Bankruptcy Court specifically ordered that the Clerk's office send notice of the judgment to Farmers State Bank. The judgment was never appealed.

On February 13, 1985, the proceeding was converted to a Chapter 7 bankruptcy. On August 2, 1985, Farmers State Bank was declared insolvent and the FDIC succeeded to its claims. On December 16, 1985, the FDIC filed a motion in Bankruptcy Court to set aside the default judgment. The motion was overruled on April 15, 1986, and the decision was never appealed.

On March 28, 1986, the FDIC filed an "amended proof of claim." The trustee in bankruptcy then objected to the claim for the reason that, by virtue of the earlier default judgment, the FDIC, as successor to the Bank, was not a creditor of the Estate. On September 30, 1986, the Bankruptcy Court sustained the trustee's objection. By journal entry, the Court held:

This Court previously entered a default judgment against Bank on the validity of a guaranty which is the basis for this claim. Default judgment was not set aside. Purported informal proof of claim by Bank in Chapter 11 was insufficient to alert Chapter 7 trustee of claim. Therefore, informal proof of claim was invalid and cannot be amended by FDIC. Claim of FDIC cannot be allowed as unsecured because the underlying obligation, the guaranty, has been determined to be unenforceable.

This Court may review the Bankruptcy Court's legal conclusions de novo, but the Bankruptcy Court's findings of fact may not be set aside unless clearly erroneous. Bankr.R. 8013; *Wegner v. Grunewaldt*, 821 F.2d 1317, 1320 (8th Cir. 1987); *In re Martin*, 761 F.2d 472, 474 (8th Cir. 1985).

The threshold issue for resolution by this Court is whether the Bankruptcy Court erred in finding that the motions filed by the Bank in August, 1985, were legally insufficient to constitute informal proofs of claim. Filing a proof of claim is a prerequisite to the allowance of a creditor's claim. Bankr.R. 3002(a); *Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir. 1984). All claims listed by a debtor in its schedule of claims are deemed to be filed unless the debtor lists a claim as "disputed, contingent or unliquidated." 11 U.S.C. § 1111(a); *In re South Atlantic Financial Corp.*, 767 F.2d 814, 817 (11th Cir. 1985), cert. denied, sub nom. *Biscayne 21 Condominium, Inc. v. South Atlantic Financial Corp.*, 106 S.Ct. 1197 (1986). As noted, the claim of Farmers State Bank was listed on debtor's lists and schedules as a contingent claim. It is undisputed that the Bank filed no formal proof of claim.

"An informal claim may be asserted, if it can be at all, only when it is apparent that the creditor intends to seek recovery from the estate and when the informal proof of claim is 'filed' prior to the bar date." *In re International Horizons, Inc.*, 751 F.2d 1213, 1217 (11th Cir. 1985). Mere notice of a claim alone is not to be called an informal proof of claim and does not excuse the absence of the proper timely proof required

by law. *Id.* "The general rule is that a claim arises where the creditor evidences an intent to assert its claim against the debtor. Mere knowledge of the existence of the claim by the debtor, trustee or bankruptcy court is insufficient." *Id.* quoting *Wilkins v. Simon Bros., Inc.*, 731 F.2d 462, 465 (7th Cir. 1984). Thus, in order to constitute an informal proof of claim, a document must satisfy a three-prong test: the document must state an explicit demand showing (1) the nature of its claim; (2) the amount of the claim against the estate; and (3) must evidence an intent to hold the debtor liable. *In re South Atlantic Financial Corp.*, 767 F.2d at 819; *In re Sambo's Restaurants*, 754 F.2d 811, 815 (9th Cir. 1985); and *In re Franciscan Vineyards, Inc.*, 597 F.2d 181, 183 (9th Cir. 1979) (per curiam), cert. denied, sub nom. *Grover v. County of Napa*, 445 U.S. 915 (1980).

With that test in mind, the Court finds the motions filed by Farmers State Bank are not sufficient to constitute informal proofs of claim. Although the documents show the existence and amount of the claim, they do not evidence an intent on the part of the claimant to hold the debtor liable for the claim. Of particular significance is the fact that the Bank's motion for relief from automatic stay was dismissed without prejudice and was not refiled. Also, it is significant that there was virtually no participation by the Bank in the bankruptcy proceedings from August, 1984, until December, 1985. Moreover, the entry of default judgment and the Bank's apparent acquiescence in that decision would ordinarily signify that the Bank either did not believe it had a legal claim or that it had

abandoned its claim. "The informal proof of claim as a minimum must furnish the information that a formal claim would give. This includes the fact that claimant has what it believes to be legal claim for money owing." In re International Horizons, 751 F.2d at 1218. Under the circumstances, the Bank's actions were not sufficient to fully inform the Bankruptcy Court or trustee of its claim. See, e.g., In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1380 (9th Cir. 1985) (noting creditor's active participation in bankruptcy proceedings); In re International Horizons, 751 F.2d at 1218 ("[A]n ambiguous message would to the ordinary mind become a little less ambiguous as a greater length of time passed in silence."). The FDIC has not shown sufficient facts from which to conclude that the Bankruptcy Court erred in finding that no informal proof of claim was filed.

The FDIC also contends that it should have status as an unsecured creditor even in light of the default judgment since the FDIC had a lien on the property separate from the guaranty which was avoided by the Court's entry of default judgment against the Bank. This Court need not address that issue since resolution of the issue of the filing of a proof of claim renders the question moot. The Bank is precluded from asserting any claim against the estate by virtue of its failure to file a proof of claim. Accordingly,

IT IS HEREBY ORDERED that the decision of the Bankruptcy Court is affirmed.

DATED this 28<sup>th</sup> day of October, 1987.

BY THE COURT:



LYLE E. STROM  
UNITED STATES DISTRICT JUDGE