Appealed 12/9/96

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

DONALD W. STEINKE and MARY V. STEINKE — Bankruptcy No. 93-51968XS
Debtors. — Chapter 7

MEMORANDUM DECISION AND ORDER RE:
OBJECTION TO TRUSTEE'S FINAL REPORT

William Arthur Gress objects to the trustee's Final Report because it seeks to disallow Gress' claim against the estate. Hearing on this matter was held on November 5, 1996 in Sioux City. James B. Cavanagh appeared for Gress; Donald H. Molstad, the trustee, appeared on his own behalf. This is a core proceeding under 28 U.S.C. 157(b)(2)(B).

Donald W. and Mary V. Steinke (debtors) filed their joint chapter 7 petition on December 7, 1993 (docket no. 1). Debtors scheduled Gress as the holder of a disputed unsecured claim in the amount of $220,000.00 (Schedule F, docket no. 1). Because it appeared there would be no assets to support a distribution, the clerk notified creditors, including Gress, not to file claims unless later instructed to do so (docket no. 6).

In March 1994, Gress initiated an adversary proceeding against Steinkes by filing a "Complaint to Determine Objection to Dischargeability of Debt." The complaint, in its entirety, stated:

William Arthur Gress ("Gress"), a creditor in the above bankruptcy proceeding, objects to the discharge of any indebtedness owed by the Debtors to Gress, or in the alternative, objects to the discharge of any indebtedness which this court may determine to be nondischargeable, for the following reasons:

1. The debt or some portion of the indebtedness is nondischargeable pursuant to 11 U.S.C. 523.

2. The Debtor, Donald W. Steinke, may have transferred, removed, or concealed property of the estate and has failed to satisfactorily explain the disappearance or loss of assets.

3. The Debtors obtained money and property from Gress by false pretenses and actual fraud.

4. A portion of the indebtedness owed by the Debtor, Donald W. Steinke, to Gress arises out of the willful and malicious injury to the property of Gress.

5. The Debtors have willfully and maliciously converted the assets of Gress and caused injury to Gress.

WHEREFORE, Gress requests this Court conduct a hearing and enter an order determining the dischargeability of the indebtedness owed by the Debtors, or any one of them, to Gress, and determining whether the indebtedness which relates to any property converted by the Debtors, or any one of them, or which relates to any property which has been transferred or removed from the estate or whose loss cannot be satisfactorily explained should be dischargeable.

(Complaint, Adversary No. 94-5021XS).

Also, the trustee objected to Steinkes' discharge. He joined with his objection a claim against Steinkes' son to recover an allegedly fraudulent conveyance of $10,000.00 (Adversary No. 95-5094XS). The trustee first became aware of the

conveyance from Gress' attorney who had learned of it in a post-petition examination of the debtors. Steinkes had failed to disclose the transfer in their Statement of Affairs or during the trustee's examination of them at the meeting of creditors. The transfer and debtors' failure to disclose it were the bases of the trustee's complaint.

The trustee's and Gress' adversary proceedings were consolidated for trial at Steinkes' request. By agreement of counsel, the objections to discharge were to be tried first along with the trustee's fraudulent conveyance action against Steinkes' son. Gress and debtors agreed that Gress' claim of nondischargeability would be tried later only if debtors were successful in defending the objections to discharge. Prior to trial, the trustee settled his claim against Steinkes' son for $2,500.00. Trial of the claims objecting to discharge took place in December 1995. On January 29, 1996, I entered an order denying Steinkes their discharges.

Because of the liquidation of various estate assets, a distribution to creditors became likely. On March 5, 1996, the clerk of court served on all creditors an order establishing June 3, 1996 as the deadline for filing claims (docket no. 62). Fed.R.Bankr.P. 3002(c)(5). The order was served on Gress' attorney. Fed.R.Bankr.P. 2002(g). Prior to the deadline, eight claims were filed. Gress did not file one.

The trustee believed there would be surplus funds after payment in full of administrative expenses and allowed claims. He notified the clerk who notified all creditors of a deadline--July 9, 1996-- for filing claims against the surplus. Fed.R.Bankr.P. 3002(c)(6). Creditors who had not previously filed claims could do so and share in the surplus. 11 U.S.C. 726(a)(3). In addition, the trustee sent a letter to Gress' attorney advising him that no claim had been filed by Gress and informing him of the new deadline (attachment to Gress' Objection to Final Report).

On July 1, 1996, Gress' attorney filed a claim on Gress' behalf in the unsecured amount of $125,554.21. The proof also asserted a priority claim in the amount of $922.60 (sic). The priority claim was explained in an attachment to Gress' proof:

[T]he creditor initiated dischargeability proceedings and undertook discovery and took depositions with regard to certain items and estate assets which were not accounted for. These resulted in a denial of discharge, dismissal of proceedings, and a recovery to the estate. Although creditor incurred substantial legal expenses, these are not requested. However, creditor did incur the following and requests reimbursement for the same pursuant to 11 U.S.C. 507 and 11 U.S.C. 503.

1. Attorney fees for 4 hours @ $125.00 per hour for document review and taking the deposition of Donald and Mary Steinke.	$500.00
2. Deposition of Donald and Mary Steinke paid to Cassel, Inc. on 1/23/95	322.60
Total Priority Claim	$822.60

(Gress Proof of Claim, page 2 (claim no. 10)). Only Gress filed a proof of claim after the initial deadline. Trustee Molstad and Gress' attorney, James B. Cavanagh, had been corresponding regarding the possible allowance of Gress' priority claim. Cavanagh provided the trustee with a copy of Gress' Proof of Claim (July 28, 1996 letter, attachment to Gress' Objection to Final Report). Molstad responded that he would be willing to allow the $322.60 deposition cost as an administrative expense (July 5, 1996 letter, attachment to Gress' Objection to Final Report). All of this correspondence took place after the June claims deadline.

Gress filed a proof of claim in the chapter 7 case of Mardon, Inc. (Bankruptcy No. 93-51067XS). The equity interests in Mardon, Inc. had been owned by Steinkes. The claims were related. Gress' timely claim was filed in 1993, and he received a distribution.

The trustee filed his Final Report in the Steinke case on September 5, 1996 (docket no. 65). It included a report of his proposed distribution (Exhibit B). As it turned out, administrative claims and timely filed claims would exhaust the estate assets. Therefore, untimely claims would not share in the distribution. The trustee proposed to make no distribution to Gress on account of his untimely claim (docket no. 65, Exhibit B, page 2). Notice of the Final Report and the proposed distribution was served on all creditors. Gress objected.

Although the trustee appears also to seek disallowance of the claim, and Gress objects to that treatment, it is not an objection to the claim or its "disallowance" that is at issue in this case. Prior to the enactment of the Bankruptcy Reform Act of 1994, the Code did not provide for claims to be disallowed because they were not timely filed. Section 502(b) of the Code was amended, effective October 22, 1994, to do so. That change in the Code was not applicable to cases, as this one, filed before the effective date. For affected cases, tardiness is a ground for disallowance, unless there are sufficient estate assets to permit distribution to such claims. In chapter 7 cases, it does not appear that the outcomes are changed, just the language of treatment.

Creditors may file proofs of claim. 11 U.S.C. 501(a). In a chapter 7 case, a creditor with an unsecured claim must file to participate in a distribution of estate assets, because only filed claims are allowed and only allowed claims participate in the distribution of estate property. Fed.R.Bankr.P. 3002(a), 11 U.S.C. 726(a). In a case filed prior to October 22, 1994, if a creditor filed a claim, timely or tardily, in a chapter 7 case, it was "deemed allowed" pursuant to 11 U.S.C. 502(a). For such cases, tardiness was not grounds for disallowance. The timeliness of the filing of the claim affects the claimant's distribution rights. 11 U.S.C. 726(a). Under that Code section, priority claims are paid first in full. The second tier of distribution is to creditors holding allowed unsecured claims including timely filed claims and certain tardily filed claims. 11 U.S.C. 726(a)(2)(A-C). The third tier of distribution is to allowed unsecured claims for which the proofs were tardily filed, but who are not entitled to second tier treatment under 726(a)(2)(C).

Thus, although Gress' claim is deemed allowed, if it were tardily filed despite Gress' notice of the case, Gress will receive a distribution in the case under 726(a)(3) only if there are sufficient assets to pay all timely claims in full. There are not.

Gress thus asks that his Proof of Claim filed July 1, 1996 be considered as an amendment to a timely but informally filed proof of claim. If this may be done, Gress' claim would be timely and he would receive a distribution pro rata with other unsecured creditors. If his claim is found to be timely, he would take 77.5% of the $9,132.09 which is available for distribution to general unsecured creditors. If his priority claim is also allowed, he would receive $822.60 and 77.5% of the remaining $8,309.49. The issue is significant to Gress and the holders of allowed unsecured claims.

Discussion

The Bankruptcy Code does not prescribe the deadlines for the filing of creditors' claims. In chapter 7 cases, the deadline is fixed pursuant to the provisions of Fed.R.Bankr.P. 3002(c). The deadline established in a case may be enlarged by the court only under limited circumstances. Fed.R.Bankr.P. 3002(c); Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 389, 113 S.Ct. 1489, 1495 n.4 (1993). Our Circuit Court long ago recognized the importance of adhering to the claims filing deadline, but it recognized also the importance of the goal of equality of distribution among creditors. It expressed the following as the "policy behind permitting untimely amendments to a proof of claim:"

The limitation of time within which proofs of claim should be made must necessarily be observed. Such disposition of bankruptcy cases that creditors may expeditiously realize what they may is important and necessary; but the substance of things, and not the forms merely, should be observed. Bankruptcy proceedings are equitable in their nature, and should be as far as possible conducted on broad lines to accomplish the ultimate purpose of distributing the assets of a bankrupt pro rata among his creditors.

In re Faulkner, 161 F. 900, 903 (8th Cir. 1908), as quoted in Matter of Donovan Wire & Iron Co., 822 F.2d 38, 39 (8th Cir. 1987). The Circuit Court directs my attention to the following standard in reviewing amendments of informal claims:

Great liberality in permitting amendments of claims in bankruptcy proceedings is proper, but the statute requiring that a proof of claim in writing be filed is clear, positive and unambiguous and it must not be nullified in the name of equity. If the record made within the statutory period, *formal or informal*, disclosed facts showing an assertion of a claim against the estate and an intention by the claimant to share in its assets, there would be a basis for the proposed amendment.

Id. (quoting Tarbell v. Crex Carpet Co., 90 F.2d 683, 685-86 (8th Cir. 1937)) also quoted in First American Bank &

Trust of Minot v. Butler Machinery Co. (In re Haugen Construction Services, Inc.), 876 F.2d 681, 682 (8th Cir. 1989).

The purpose of allowing post-deadline amendments to timely informal claims seems to be to protect those creditors who have made a timely but technically faulty assertion of a claim against the estate. Perhaps the creditor sent the claim to the trustee, rather than file it with the clerk, or it sent a letter, rather than a claims form. Perhaps the creditor omitted a supportive attachment. Authorities indicating the trend in allowing liberality in amendment "permit amendments to correct defects of form, or to supply greater particularity in the allegations of fact from which the claim arises, or to make a formal proof of claim based upon facts which, within the statutory period, had already been brought to the notice of the trustee by some informal writing or some pleading in the bankruptcy proceedings." Tarbell v. Crex Carpet Co., 90 F.2d at 685, quoting In re G. L. Miller & Co., 45 F.2d 115, 116 (2d Cir. 1930).

The recognition of informal claims is not without limits. The informal claim must be in writing. It must explicitly state the nature and amount of a claim asserted against the estate. It must show an intent to share in the estate's assets. In re Pape, No. C-85-1055, slip op. at 2 (N.D. Iowa July 11, 1986).

Gress contends that his actions or other events in this case should constitute an informal claim against the estate. He refers to the debtors' scheduling of his claim, his examination of the debtors, his making available to the trustee information about the possible fraudulent conveyance, his complaint objecting to debtors' discharge and to the dischargeability of his particular debt, and that he had filed a timely claim in a related bankruptcy case. Moreover, he points to his participation in the case as consistent with his assertion of a claim long before the expiration of the claims deadline.

Having considered Gress' contentions in light of the applicable Circuit Court decisions and in light of the district court's decision in In re Pape, I conclude that Gress did not file a timely informal claim in this case. Because his claim as a general unsecured creditor was tardily filed, his objection to the trustee's report will be overruled.

It has been determined in this district that the listing of the creditor on a debtor's schedules is not the equivalent of an informal proof of claim. In re Pape at 3, citing In re Greene, 33 B.R. 1007, 1009 (D. R.I. 1983). As to the examination of the debtors and the discovery of a possible fraudulent conveyance, Gress' efforts therein were no doubt valuable to the estate. But they were not a writing asserting a claim against the estate in an explicit amount. Moreover, it cannot be said that Gress' efforts could only have been addressed to obtaining a distribution from the estate. They led to successful objections to discharge by him and the trustee, and Gress is now permitted to pursue collection from debtors outside of bankruptcy. Gress' claim filed in the bankruptcy case of Mardon, Inc., a company owned by debtors, shows an intent to recover a claim in that case, not the Steinkes'.

Gress' strongest argument for an informal claim was his filing of the complaint against Steinkes under 523 and 727 of the Bankruptcy Code. Under 523, he sought a determination that Steinkes' debt to him be excepted from discharge upon grounds of fraud, false pretenses, and willful and malicious injury to Gress' property interests. Although Gress stated he was a creditor, nowhere in the complaint does he explicitly state the amount of his claim. More importantly, nowhere in the complaint, under either 523 or 727, does he manifest any intent to assert a claim against the estate.

Gress argues that a complaint against debtors under these sections is not inconsistent with an assertion of a claim against the estate. That may be so, but that is not the test. An informal claim must indicate an intention to assert a claim against the estate (In re Pape at 2) not just be "not inconsis-tent" with such a claim. There may be good reasons why a creditor might file a discharge or dischargeability complaint against a debtor in a chapter 7 case and yet intentionally not file a proof of claim. The creditor may be aware that the assets in the estate would provide an insignificant distribution either to all creditors or to it. Or, perhaps the creditor itself received an avoidable conveyance and wants to preserve its right to a jury trial in any action to recover it. Nonetheless, the creditor's conscious desire not to file a proof of claim would in no way prejudice it from pursuing claims against the debtor under 523 or 727.

Also, the remedy available to the creditor, if successful in pursuing its claims under 523 or 727, is the nondischarge of its debt--the ability to pursue the debtor notwithstanding the filing of the case. It is in no way a claim against the estate or its assets. The district court decided in In re Pape that an objection to discharge and the subsequent participation in the resulting adversary proceeding did not satisfy the requirements of an informal proof of claim. The creditor in its

complaint in Pape said nothing about the nature of its claim, and the only information as to the amount of the claim was the listing in the debtor's schedules. In re Pape at 3. I conclude that Gress' filing and pursuit of his objections to debtors' discharge and complaint to determine dischargeability of debt did not constitute an informal proof of claim.

I realize this conclusion is at odds with Matter of Phillips, 166 B.R. 129 (Bankr. S.D. Iowa 1994). In that case, at least, the creditor "explicitly stated the nature of the claim . . . and the prayer for $207,500." Id. at 132. Also, in Phillips, the court found that the complaint evidenced an intent by the creditor to hold the debtor liable. Id. However, I respectfully disagree that the latter fulfills the requirement that an informal claim must show "an assertion of a claim against the estate and an intention by the claimant to share in its assets. . . ." Donovan Wire, 822 F.2d at 39. For that reason, I decline to follow Phillips on whether a complaint against the debtor under 523 constitutes an informal claim against the estate.

Gress cites as persuasive Matter of McCord, No. 92-3031-CH, (Bankr. S.D. Iowa March 26, 1996). That case held that various filings by a creditor constitute the filing of an informal claim. The facts of that case are significantly different from this one, and, therefore, I do not find the case helpful.

Finally, as to Gress' overall participation in the case, I decline to adopt a totality of the circumstances test in which a creditor's entire participation in a case would be evaluated as an "informal claim." That is not presently the test in this circuit.

Gress' Administrative Claim

Gress seeks allowance of a priority administrative claim which would reimburse him for the legal fees and the cost of an examination of the debtors during the bankruptcy. During this examination, Gress' counsel learned of the pre-petition transfer of $10,000 from Steinkes to their son. Gress' attorney turned the examination transcript over to the trustee, who upon further investigation filed his complaint to recover the transfer. He settled the matter by the son's payment to the estate of $2,500. The transfer also formed part of the trustee's and Gress' objections to discharge. Gress asks that the $500 in legal fees paid to his attorney for the examination and the cost of the transcript be awarded as an expense of administration. Prior to filing his final report, the trustee said he would be willing to agree to reimbursement for the transcript, but he did not finalize his agreement as he was told by the U.S. Trustee's office that any such agreement would draw the U.S. Trustee's objection.

Section 503(b) requires notice of Gress' request for payment of an administrative expense. As the request is for compensation and reimbursement of expenses, notice must be to all creditors. Fed.R.Bankr.P. 2002(a)(7). Gress has failed to provide such notice. Although Gress' objection to the trustee's final report will be overruled, Gress will be given a short period of time to file and serve an application for payment. The trustee shall withhold distribution for such period. If no application is filed, the trustee may distribute in accordance with his final report. If an application is filed, the trustee shall withhold distribution pending ruling on the application.

ORDER

IT IS ORDERED that the objection of William Arthur Gress to the trustee's Final Report is overruled. Gress shall have 14 days to file and serve an application for payment of an administrative expense. If such application is filed and served, the trustee shall withhold distribution pending ruling on the application. Otherwise, the trustee may distribute in accordance with his report. Judgment shall enter accordingly.

SO ORDERED THIS 27th DAY OF NOVEMBER 1996.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U.S. mail to: James Cavanagh, Don Molstad and U.S. Trustee.