

In the United States Bankruptcy Court

for the Northern District of Iowa

PAUL M. KAPUSTYNSKI and
JACQUELINE S. KAPUSTYNSKI

Debtor(s).

Bankruptcy No. 97-40327M

Chapter 7

OBJECTION TO TRUSTEE'S FINAL REPORT

The matter before the court is an objection to the trustee's final report and proposed distribution of estate assets. The objection was filed by Bernard and Sandra Wagner and by Eugene and Magdalene Wagner. Hearing was held February 24, 1998 in Mason City. J. Mathew Anderson represented the Wagners; Larry S. Eide, the trustee, represented himself. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

In his Final Report and Proposed Distribution, the trustee treats the Wagners as creditors with allowed, but tardily filed claims. As such, they would receive distributions from estate assets in third priority under 11 U.S.C. § 726(a)(3). As there are insufficient assets in the estate to reach creditors in the third tier of distribution, Wagners would receive nothing. They object to this treatment.

Wagners agree that their claim was tardily filed, but they contend they should receive a pro rata distribution with timely filed claims under § 726(a)(2).

Estate property is distributed first for claims and expenses having priority under § 507. 11 U.S.C. § 726(a)(1). After priority claimants are paid in full, the next level of distribution is for each allowed unsecured claim timely filed under specified subsections of § 501 and for each allowed unsecured claim which was tardily filed if the creditor who holds the tardily filed claim "did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim" and if such creditor files its claim in time to permit payment. 11 U.S.C. § 726(a)(2)(c). If there are insufficient estate assets to pay the second level creditors in full, they share pro rata. If claimants on the second level of distribution are paid in full, a distribution may be made on account of "any allowed unsecured claim, proof of which is tardily filed...." 11 U.S.C.

§ 726(a)(3).

The assets in Kapustynskis' case permit payment in full of first tier claims and expenses and pro rata payments of second tier claims. There are insufficient assets to pay anything on allowed tardily filed claims under § 726(a)(3).

Wagners' claims were tardily filed. Although the trustee seemingly does not object to their allowance, they will receive no distribution unless they can prove that they "did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim...." 11 U.S.C. § 726(a)(2)(c).

Findings

Paul M. and Jacqueline Kapustynski filed their joint petition under Chapter 7 on February 7, 1997 (docket no. 1). In the schedule of creditors filed with their petition, they did not list any of the Wagners as creditors. On February 13, 1997, the clerk served notice on all scheduled creditors of the filing of the petition and of the meeting of creditors (docket no. 5). The notice advised creditors that there appeared to be no assets in the estate for distribution and that they were not to file proofs of claim. *Id.* During the course of the administration of the estate, it was determined that there might be a distribution. The clerk served notice on creditors of a deadline for filing claims (docket no. 9). The notice was served

March 31, 1997. The deadline for filing claims was June 30, 1997. Id. Wagners still were not on the creditor mailing matrix or schedules. They were not served with the notice.

On May 5, 1997, debtors amended their schedules and added "Mr. and Mrs. Bernard Wagner" as creditors holding an unsecured claim (docket no. 15). The amendment stated that the claim was "disputed" and "unknown" in amount. Id. Debtors' attorney served the amendment on Bernard and Sandra Wagner by mail on May 2.

Bernard and Sandra Wagner received the notice on or about May 4. Eugene and Magdalene Wagner were never added to the schedules or to the mailing matrix. Bernard and Sandra would have been served any notices served after their being added to the schedule of unsecured creditors. However, the clerk would not have served on them notices which were served on creditors prior to the date of the amendment. They were thus not served by the clerk with the notice of the claims deadline.

Eugene and Magdalene learned of Kapustynskis' bankruptcy in mid-May from Bernard and Sandra. About May 8 or 9, Sandra contacted an attorney in Osage about the bankruptcy notice. He referred them to J. Mathew Anderson. About this time, Bernard and Sandra told Eugene and Magdalene about the bankruptcy notice. On behalf of all the Wagners, Sandra met with Anderson between May 12 and 15.

At the time of her meeting with Anderson, the Wagners were investigating the unauthorized cutting of trees from their land near Osage. They were first aware of the cutting on April 2, 1997. By the time Bernard and Sandra received the bankruptcy notice, Wagners were not satisfied that they knew all the facts surrounding the cutting. They had contacted the county sheriff's office on April 2, and Deputy Torney began investigating. Sandra Wagner learned the same day that Kapustynskis had arranged for some logging to be done. She knew also that the trees had been removed through Kapustynskis' property.

Bernard and Sandra Wagner met with Kapustynskis, adjacent landowners, in late April. They also met with others, including the man who had cut the trees. By the time Bernard and Sandra had received the bankruptcy notice in early May, Wagners had learned that the Kapustynskis had been paid for their trees.

Nonetheless, by the time Sandra met with Anderson, Wagners felt they had not fully put together the chain of events surrounding the cutting. By "the beginning of June" however, the four Wagners had authorized Anderson to take action in the bankruptcy case by filing a complaint to except their claims from Kapustynskis' discharge.

Their complaint was filed June 23, 1997. All four Wagners were plaintiffs. It was filed under §§ 523(a)(6) and (a)(4). They contended that Kapustynskis "through their agents, willfully and maliciously cut timber located on the Plaintiffs (sic) property and received the proceeds from the sale of the timber." (Adversary proceeding no. 97-9125M, docket no. 1.)

Eide filed his final report on August 25, 1997 (docket no. 23). His report did not deal with any claims of Wagners because none had been filed. Wagners objected to the final report (docket no. 25). In it, they stated that the "Proofs of Claims should be allowed as a late filed claim because they did not receive notice." They asked to be included in the dividend distribution.

The objection was filed September 16, 1997. Attached to it was a Proof of Claim dated September 15, 1997 and signed by Wagners' attorney. The claim on behalf of all four Wagners was for the unsecured amount of \$6,000.00. On January 12, 1998, each of the Wagners filed an amended Proof of Claim (claim nos. 8-11). Each was for \$1,556.00 for "Loss of timber." The separate claims were filed on the basis that each Wagner had an interest in the real estate where the timber was cut.

On January 28, 1998, Eide filed a First Amended Trustee's Final Report (docket no. 33). He treated each claim as a late filed, unsecured, non-priority claim. The report was somewhat confusing as to whether the trustee was objecting to the amount of each claim. By marking each Wagner claim with an asterisk, he appeared to object to the amounts claimed. Nonetheless, the report treated each claim as "allowed as a late filed unsecured claim" (docket no. 33, page 8).

The parties did not litigate the issue of the amount of each claim. Their dispute centers on whether Wagners' claims

should be paid on the same distribution level as timely filed claims. If not, the amount of each claim is irrelevant as there will be no distribution to an inferior level of claims.

Bernard and Sandra Wagner had actual notice of the bankruptcy case by May 4, 1997. Eugene and Magdalene Wagner had actual notice of the bankruptcy case by May 9, 1997. Notwithstanding that they never received official notice of the June 30, 1997 deadline for filing claims, they had actual notice of the case in time to file timely claims. They filed their complaint to determine dischargeability prior to the claims deadline. They had time to act, but they argue they did not have notice of the claims deadline. It is not lack of notice of the claims deadline that entitles creditors to distribution under § 726(a)(2)(C), it is lack of notice of the case. Wagners had notice of the case. They could have contacted the clerk to determine any deadlines to which they were subject.

Conclusion

Bernard and Sandra Wagner and Eugene and Magdalene Wagner are not entitled to distribution under 11 U.S.C. § 726(a)(2)(C) with unsecured claims which were timely filed. Their objection to the trustee's report should be overruled.

ORDER

IT IS ORDERED that the Wagners' objections to the trustee's First Amended Final Report and Proposed Distribution are overruled. The trustee's Final Report is approved.

SO ORDERED THIS DAY OF MARCH 1998.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U.S. mail to Scott Buchanan, J. Mathew Anderson, Larry Eide and U.S. Trustee.