

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of	:	Case No. 92-3031-CH
	:	Chapter 7
HELEN G. McCORD,	:	
	:	
Debtor.	:	

ORDER--OBJECTION TO AMENDED FINAL REPORT

On August 17, 1995, hearing was held on the objection to Trustee's Amended Final Report and Proposed Distribution which was filed by First Bank, FSB f/k/a Metropolitan Federal Bank ("Metropolitan"). Debtor, Helen G. McCord, was represented by her attorney, John M. Bouslog. Creditor, Metropolitan, was represented by its attorney, Mark D. Walz. Brenton Bank, N.A., Citizens First National Bank of Storm Lake, and Hartford Carlisle Savings Bank ("Unsecured Creditors") were represented by their attorney, Thomas H. Burke. The Chapter 7 Trustee, Donald F. Neiman, was also in attendance. At the conclusion of the hearing, the Court took this matter under advisement.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). The Court, upon review of the pleadings, evidence, briefs, and arguments of the parties now enters the findings and conclusions pursuant to Fed.R.Bankr.P. 7052.

ISSUES

At the time this matter was taken under submission, the Court stated the issues as follows:

1. Whether submission of a proof of claim in a no-asset case which was marked "received" by the Clerk and returned to the creditor as never filed, and which proof of claim was never re-submitted to the Clerk upon notice of recovery of assets, constitutes the filing of a proof of claim for the purpose of B.R. 3002(a) and 3002(c)(5).
2. Whether the filing of a Motion For Relief From Stay, in which the creditor recited the nature and amount of claim, and the filing of an objection by said creditor to the debtor's Motion to Avoid Judgment Liens, in which the creditor admitted the nature and amount of the claim, must be filed within the 90-day period after the mailing of the notice to creditors as provided in B.R. 3002(c)(5), or may the filing of said motion and objection be effective as an informal proof of claim even if filed before the notice to the creditors of assets.

FINDINGS OF FACT

1. Debtor, Helen G. McCord, filed for relief under Chapter 7 of the Bankruptcy Code on October 8, 1992.
2. Metropolitan was listed on the bankruptcy schedules as an unsecured creditor with the claim in the amount of \$400,508.73 plus interest and costs arising out of a foreclosure decree entered May 16, 1991, in the Iowa District Court for Warren County. The schedules also listed Metropolitan as holding a claim in the amount of \$1,338,775.85, together with interest and cost, arising out of a foreclosure decree entered January 6, 1992. These claims were partially secured claims.

3. Prior to the filing of the bankruptcy petition, Metropolitan had levied execution upon the judgment by garnishing two annuities which were issued by Guaranty Mutual Life Company of Omaha, Nebraska.

4. The notice of commencement of case under Chapter 7 filed October 9, 1992, stated that the case was a “no-asset” case and that creditors need not file a claim unless notified to do so.

5. Metropolitan filed an Objection to Claim of Exemptions on November 24, 1992. Metropolitan objected to debtor’s claim of homestead exemption and to the debtor’s claim of exemption in the two Guaranty Mutual Life Company of Omaha, Nebraska annuities.

6. On the same date, Metropolitan attempted to file a proof of claim on both its unsecured claim and the claims secured by the execution on the annuities. The proof of claim was served upon counsel for the debtor, and the chapter 7 trustee on November 23, 1992. A copy of the judgments entered by the Iowa District Court were attached as exhibits to the proof of claim. The proof of claim was marked “received” by the Clerk of Court and returned to counsel for Metropolitan because the case was a no-asset case at that time. That proof of claim was not filed.

7. On February 12, 1993, Metropolitan filed a Motion For Relief From Stay. Metropolitan requested relief from stay to allow it to foreclose its judgment lien on the homestead property of debtor. In the motion Metropolitan stated as follows:

Metropolitan is the holder of a secured claim against the property in the principal judgment amount of \$287,805.18 together with interest at the rate of 11% per annum, or \$86.74 per diem from May 16, 1991, to October 8, 1992, the date of filing, by virtue of the judgment rendered in favor of Metropolitan and against the debtor in the Iowa District Court for Warren

County in Equity No. 22031(a-122). Copies of the judgment and of a separate judgment rendered in favor of Metropolitan in Warren County Equity No. 22337, which evidences an additional \$1,733,305.30 of indebtedness of the debtor to Metropolitan are attached as exhibits A and B to the proof of claim of Metropolitan filed herein November 24, 1992. The Metropolitan proof of claim is incorporated herein by this reference.

The motion was served upon debtor's counsel, the chapter 7 trustee, and the U.S.

Trustee's office.

8. On February 22, 1993, Debtor filed a Motion to Avoid Judgment Lien on exempt property. On March 2, 1993, Metropolitan objected to the motion arguing that the property is non-exempt under Iowa law. This objection was served upon Thomas Burke, attorney for Brenton Bank, N.A., and Robert Benton, attorney for Hartford-Carlisle Savings Bank on March 2, 1993.

9. On March 11, 1993, a Notice of Need to File Proof of Claim Due to Recovery of Assets was filed by the Clerk of Court. The notice stated that:

The initial notice in this case instructed debtors that it was not necessary to file a proof of claim. Since that notice was sent, assets have been recovered by the trustee. Creditors who wish to share in any distribution of funds must file a proof of claim with the bankruptcy court at the address below on or before June 9, 1993. Creditors who do not file a proof of claim on or before this date will not share in any distribution from the debtor's estate.

10. Metropolitan did not resubmit its formal proof of claim for filing after receipt of this notice.

11. On April 5, 1993, the trustee filed a Motion to Authorize Compromise Settlement. The motion requested authorization of a settlement agreement between debtor, the chapter 7 trustee, Metropolitan and Hel Max, Inc. and provided for payment in satisfaction of the secured claim filed by Metropolitan on November 24, 1992, in the

amount of \$58,500.00. An order authorizing this settlement was entered on April 28, 1993.

12. On May 31, 1995, the trustee filed a Final Report and Proposed Distribution which proposed to pay only the unsecured claims of Citizens First National Bank, Brenton Bank, and Hartford-Carlisle Savings Bank.

13. Metropolitan filed an objection to the trustee's Final Report and Proposed Distribution on June 6, 1995. A copy of the proof of claim which Metropolitan attempted to file on November 24, 1992, was attached to the objection.

14. Citizens First National Bank, Brenton Bank, and Hartford-Carlisle Savings Bank filed an objection to Metropolitan's objection to the final report.

15. On June 26, 1995, the trustee filed an Amended Final Report which did not provide for payment of the Metropolitan unsecured claim. An objection to the Amended Final Report was filed by Metropolitan on June 29, 1995.

DISCUSSION

The Court shall first address the second issue taken under submission and raised by the parties. This issue concerns Metropolitan's contention that it should be allowed to participate in the distribution of funds in this case because the Objection to Exemptions, the Motion for Relief From Stay and the Objection to the Motion to Avoid Judgment Liens qualify as informal proofs of claim. Further, Metropolitan requests leave to amend such informal claims and that such claims be allowed as timely. The Unsecured Creditors argue that the period for filing proofs of claim began to run on March 11, 1993 and

expired on June 9, 1993. As the alleged informal proofs of claim were each filed prior to this period, the Unsecured Creditors argue that any informal proof of claim is untimely.

Fed. R. Bankr. P. 2002(e) provides in relevant part as follows:

NOTICE OF NO DIVIDEND. In a Chapter 7 case, if it appears from the schedules that there are no assets from which a dividend can be paid, the Notice of Meeting of Creditors may include a statement to that effect; that it is unnecessary to file claims; and that if sufficient funds become available for the payment of a dividend, further notice will be given for the filing of claims.

Fed. R. Bankr. P. 3002(c)(5) provides:

If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claims within 90 days after the mailing of the notice.

The Eighth Circuit quoted the following standard in reviewing the amendment 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, disclose facts showing an assertion of a claim against the estate and intention by the claimant to share in its assets, there would be a basis for the proposed amendment

In re Donovan Wire & Iron Co., 822 F.2d 38, 39 (8th Cir. 1987) (per curium) (quoting Tarvel v. Crex Carpet Co., 90 F.2d 683, 685-86 (8th Cir. 1937).

In Haugen, the Eighth Circuit found that an amendable informal claim exists if the claim:

- 1) is made within the bar period;
- 2) explicitly states the nature and amount of the claim; and
- 3) evidences an intent to pursue the claim and hold the debtor liable.

Haugen, 876 F.2d at 682.

In that case, the Eighth Circuit held that a letter sent to the U.S. Trustee on May 27, 1986 constituted a timely and amendable proof of claim. Id. The letter was sent five days before the case converted to a Chapter 11 and the clerk of court sent a notice requiring proofs of claim to be filed before September 22, 1986. The Court found that the letter was within the bar period, stated the nature and amount of the claim, and evidenced an intent to pursue the claim. Furthermore, the Eighth Circuit found that the creditor's "active participation throughout the earlier bankruptcy proceedings demonstrated Butler's intent that the letter assert a claim." Id. (citations omitted).

This Court has previously adopted the Haugen reasoning in In re Phillips, 166 B.R. 129, 132 (Bankr. S.D. Iowa 1994). In Phillips, a creditor who filed a complaint objecting to dischargeability on April 1, 1991, was found to have filed an informal proof of claim as the complaint was filed before the deadline of July 3, 1991. In the Phillips case, the notice of need to file proof of claim due to recovery of assets was not filed until April 4, 1991, approximately three days after the complaint was filed.

The Court finds that the Motion for Relief From Stay and Objection to Motion to Avoid Liens filed by Metropolitan constitute informal proofs of claim. The pleadings were filed prior to the bar period deadline. The Motion for Relief From Stay explicitly states

that the nature of the claim is a state court judgment and specifies the amount of the unsecured claim as \$1,733,305.30. Furthermore, both pleadings evidence an intent to pursue the claim and hold the debtor liable.

The Court notes that the informal proofs of claim were filed before the Notice of Need to File Proof of Claim Due to Recovery of Assets was filed. The Unsecured Creditors argue that the informal proofs of claim were filed too early and seek to characterize the situation as one where the period for filing claims had not yet begun to run. However, the Court finds that the early filing of such claims does not mean the claims are untimely. This Court can find no precedent, nor has the Unsecured Creditors provided any such cases, where such circumstances have been found to invalidate an informal claim. Instead, as discussed above, both the Eighth Circuit and this Court have found the reverse to be true.

In this case, the informal proofs of claim were clearly filed before the deadline for filing proofs of claim. Such pleadings properly put the Court and the creditors on notice of the claim held by Metropolitan and Metropolitan's intent to pursue such claim. Therefore, the Court finds that such pleadings shall constitute informal proofs of claim.

Liberality is permitted in the amendment of informal claims. Therefore, the Court finds that Metropolitan's motion to amend informal proof of claim is hereby granted and Gordon may proceed to file an amended proof of claim. Moreover, such amended proof of claim shall relate back to the informal proof of claim and be considered timely filed. Therefore, Metropolitan shall be included in the distribution of assets as it may be entitled pursuant to ' 726(a)(2)(A).

The first issue stated by the Court when this matter was taken under advisement need not be reached in this case. Therefore, the Court declines to decide at this time whether the unfiled and returned claim was indeed a formal proof of claim.

ORDER

IT IS THEREFORE ORDERED that Metropolitan's Objection to the Amended Final Report is sustained as Metropolitan has an informal proof of claim subject to amendment.

IT IS FURTHER ORDERED that Metropolitan's Motion to Amend Informal Proof of Claim is granted and Metropolitan is granted permission to file a formal amended proof of claim.

IT IS FURTHER ORDERED that upon filing, the amended proof of claim shall relate back to the informal proof of claim and be deemed timely filed.

Dated this _____ day of March, 1996.

RUSSELL J. HILL, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT