

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
2002 JAN 24 AM 11:52
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

John K. Delacruz (d/b/a
Coast Marine d/b/a
Panaholding) and
Elizabeth E. Lewis

Debtors.

C/A No. 01-02118-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Alfred N. Kolberg's ("Creditor") Motion to Allow Late Filed Claim is granted on the grounds that Creditor's adversary proceeding as well as his activities during Debtors' bankruptcy case served as an informal proof of claim; accordingly, Creditor's informal proof of claim may be amended. Creditor should make his amendment within twenty days by filing a formal proof of claim that prominently references that it is allowed as an amendment to the informal proof of claim recognized by this Judgment and Order.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
January 23, 2002.

ENTERED
JAN 25 2002
J.G.S.

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ORDER

Chapter 7

THIS MATTER comes before the Court upon the Motion by Alfred N. Kolberg ("Creditor") to file a late claim in the Chapter 7 case of John K. Delacruz and Elizabeth E. Lewis ("Debtors"). Creditor alleges that he was not listed in the Debtors' initial filing with the Court and that he did not receive notice to file a claim. Creditor avers that he has participated extensively in Debtors' bankruptcy case, evidenced in part by his timely filing of an adversary proceeding to deny the discharge of debt owed to Creditor,¹ and, therefore, the Court should permit him to file a late proof of claim.

Pursuant to Federal Rule 3002(c) of Bankruptcy Procedure, creditors in a Chapter 7 case must file their claims within ninety days after the 11 U.S.C. §341² first meeting of creditors. In this case, the first meeting of creditors was held on April 11, 2001; therefore, the deadline to file a proof of claim was July 10, 2001. Creditor failed to do so, and, as stated above, he now asks the Court to extend the time to permit his late filing.

This Court, however, generally cannot extend the period for filing a proof of claim in a

¹ Kolberg v. Delacruz, Adv. No. 01-80111.

² Further references to the Bankruptcy Code shall be by section number only.

ENTERED
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Chapter 7 case. Although Rule 9006(b)(1) grants courts discretion to enlarge periods of time found in the Federal Rules of Bankruptcy Procedure or to permit acts to be done after their time for performance has expired under the Rules, this discretion is limited in some instances. See In re Waters, C/A No. 99-05666-W, slip op. 2 (Bankr. D. S.C. Feb. 3, 2000). This case happens to be one of those instances where the Court's discretion is restricted. Rule 9006(b)(3) allows courts to enlarge the time for taking action under Rule 3002(c) "only to the extent and under the conditions stated in those rules." After reviewing the grounds asserted for permitting a late claim, the Court concludes that they do not fit within one of the conditions delineated in Rule 3002(c).

In this District, however, courts have permitted informal proofs of claim asserted before the bar date to be amended after the bar date. These informal proofs of claim serve essentially the same purpose as a timely and formally filed proof of claim. See In re Smith, 100 B.R. 289, 293 (Bankr. D. S.C. 1988), aff'd, 100 B.R. 293 (D. S.C. 1989) (finding that two letters by a creditor, one to the trustee and the other to the clerk of court, indicating that the creditor was pursuing its claim against the debtor constituted an informal proof of claim that was capable of later amendment). To qualify as an informal proof of claim that would permit a creditor to file an amended claim after the deadline has passed, there must be sufficient notice of the claim given during the course of the bankruptcy proceeding. See Davis v. Columbia Constr. Co. (In re Davis), 936 F.2d 771, 775 (4th Cir. 1991); Fyne v. Atlas Supply Co., 245 F.2d 107, 108 (4th Cir. 1957). Indeed, mere knowledge by the trustee of the claim is insufficient (see Fyne, 245 F.2d at 108) as is the listing of the claim in the debtors' schedules (see In re Faust, 180 B.R. 432, 435 (Bankr. D. S.C. 1994)). Instead, the creditor must affirmatively act to alert other parties to the

presence of its claim. See Faust, 180 B.R. at 435. Examples of instances where courts found sufficient affirmative action are where the creditor not only presented correspondence to the trustee in the case and the clerk's office announcing its claim but also where the creditor was listed in the debtor's schedules as having two unsecured claims and counsel for the creditor attended the first meeting of creditors. See Smith, 100 B.R. at 293. Likewise, a court found this affirmative action where the creditor's counsel provided extensive documentation to and engaged in regular pre-deadline communication regarding the creditor's claims with the Chapter 7 Trustee and the Trustee listed the creditor's counsel in the schedules. See In re Cambridge Mortgage Corp., C/A No. 87-03933, slip op. 5-6 (Bankr. D. S.C. Nov. 2, 1990).

Other courts addressing this issue have considered a number of factors to determine whether an action should be allowed as an informal proof of claim. Although these factors may be seen as reference points used in meeting the affirmative action standard previously used in this District, this Court will also examine them in its analysis. The Fifth Circuit recently described the elements for a sufficient informal proof of claim as the following: (1) the claim must be in writing; (2) the writing must contain a demand by the creditor on the debtor's estate; (3) the writing must evidence an intent to hold the debtor liable for such debt; (4) the writing must be filed with the bankruptcy court; and (5) based upon the facts of the case, allowance of the claim must be equitable under the circumstances. See Nikoloutsos v. Nikoloutsos (In the Matter of Nikoloutsos), 199 F.3d 233, 236 (5th Cir. 2000); see also Barlow v. M.J. Waterman & Assoc., Inc. (In re M.J. Waterman & Assoc., Inc.), 227 F.3d 604, 609-10 (6th Cir. 2000); Clark v. Valley Fed. Sav. & Loan Ass'n (In re Reliance Equities, Inc.), 966 F.2d 1338, 1345 (10th Cir. 1992).

Guided by the cited precedent from this District and the factors used by Circuit Courts,

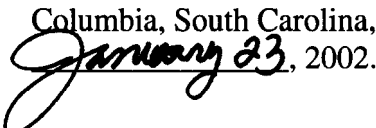
this Court rules that Creditor affirmatively acted to alert Debtors, the Chapter 7 Trustee, and other parties of his claim even though he did not file a formal proof of claim within the proper time period.³ Creditor did so principally by filing and serving his adversary complaint within the time period allowed for filing a proof of claim. By filing his complaint with the Court, Creditor effectively gave notice to all interested parties in the Debtors' bankruptcy case that he had a claim. Indeed, in his complaint, Creditor announced that he was a creditor who was owed a debt. Moreover, because the adversary was a denial of discharge action, Creditor sought to hold Debtors liable on the debt. In addition, from the Court's review of the case file, it appears that Creditor actively participated in Debtors' bankruptcy case, evidenced in part by his appearance through counsel at the first meeting of creditors. Accordingly, it is, therefore,

ORDERED that Creditor's adversary proceeding as well as his activities during Debtors' bankruptcy case served as an informal proof of claim; and

ORDERED that Creditor's informal proof of claim may be amended. To assist the Clerk's Office and the Trustee, Creditor should make his amendment within twenty days by filing a formal proof of claim that prominently references that it is allowed as an amendment to the informal proof of claim recognized by this Order.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
 January 23, 2002.

³ The Fourth Circuit has noted that an informal proof of claim does not have to be in writing. See Davis, 936 F.2d at 775.

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

w/ judgment

JAN 25 2002

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

JUDY G. SMITH

Deputy Clerk

CC
USTR
Davis

Kolberg

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