

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:) CASE NO. 03-04179-W
DALE PRESTON COLLINS,)
Debtor.)
_____)

FILED
at ____ O'clock & ____ min. ____ M
MAR 24 2004
BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (26)

ORDER

THIS MATTER comes before the Court upon the Motion for Leave to Amend Informal Proof of Claim (the "Motion") filed by International Fidelity Insurance Company ("IFIC" or "Creditor"). In the Motion, IFIC requests to amend its informal proof of claim based on its activities during the bankruptcy case of Dale Preston Collins ("Debtor") prior to the deadline for filing formal proofs of claim. The chapter 7 trustee filed an objection to the Motion. No other party in the case filed an objection. After considering the pleadings, the evidence presented, and counsels' arguments at the hearing, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7052.¹

FINDINGS OF FACT

1. On October 3, 2001, IFIC extended Performance and Labor and Material Payment Bonds to Sea Coast Builders, LLC ("Sea Coast") in connection with Sea Coast's construction of a Country Inn & Suites Hotel in Beaufort County, South Carolina. As part of the agreement between IFIC and Sea Coast, Sea Coast's principals executed personal guaranties

¹ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

that permitted IFIC to seek indemnification from the principals in the event that IFIC had to pay under the bonds. On October 3, 2001, Debtor, as President of Sea Coast, executed such a guaranty.

2. Sea Coast did not complete the hotel project, and IFIC was forced to bear the costs of completing construction. Relying on the guaranties, IFIC sued the principals on February 28, 2003 in a lawsuit captioned International Fidelity Insurance Company v. Dale Preston Collins, Annie Lou Collins, and Harold D. Cecil, Case Number 9:03-665-23 in the United States District Court for the District of South Carolina, Beaufort Division. In the Complaint, IFIC sues Debtor, Harold Cecil, and Annie Lou Collins for breach of contract and specific performance regarding the defendants' obligations under the personal guaranties, and IFIC estimates its damages to be at least \$450,000. This litigation is pending.

3. Since the above-referenced lawsuit was filed, IFIC has paid additional expenses in completing the project, and the total amount paid is at least \$688,033.75.

4. On April 4, 2003, Debtor filed a Voluntary Petition seeking chapter 7 relief. Debtor's bankruptcy filing stayed the IFIC litigation against Debtor.

5. In Schedule F, Debtor lists IFIC with an unsecured claim of \$450,000. In his Statement of Financial Affairs, Debtor lists his pending action with IFIC as a suit or proceeding in which he was a party within the one year immediately preceding the filing of this bankruptcy case.

6. On May 9, 2003, the first meeting of creditors was held. IFIC attended the first meeting of creditors. The chapter 7 trustee declared this case an asset case, and, on May 12,

2003, the Court served a Notice to File Proof of Claim or Interest. The noticed bar date was August 11, 2003.

7. On June 23, 2003, IFIC contacted the chapter 7 trustee's office. IFIC explained the nature of its claim and inquired with the trustee as to the case's status and what actions the trustee might take in the case.

8. On July 8, 2003, IFIC contacted Debtor's counsel as well as the chapter 7 trustee to discuss extending the deadline to object to Debtor's discharge and or the discharge of the debt owed to IFIC. The parties reached an agreement to extend the deadline, and IFIC filed a Consent Order reflecting this agreement with the Court.

9. On July 23, 2003, the Court entered the Consent Order.

10. When the bar date passed on August 11, 2003, IFIC had not filed a formal proof of claim.

CONCLUSIONS OF LAW

In the Fourth Circuit and in this District, courts have recognized informal proofs of claim as a means of relieving creditors that failed to file a formal proof of claim of the type specified in Federal Rule of Bankruptcy Procedure 3001(a) within the time specified in Rule 3002(c) by allowing these informal proofs of claim to be amended after the claims bar date.² See In re Elleco, 295 B.R. 797, 800 (Bankr. D.S.C. 2002); In re Delacruz, C/A No. 01-02118-W, slip op. at 2, 2002 WL 362755, at *2 (Bankr. D.S.C. Jan. 25, 2002). "Under the informal proof of claim doctrine, if a creditor's actions before the expiration of the deadline to file a claim constitutes an informal proof of claim, the creditor is allowed to amend the informal proof of claim with a formal proof of claim complying with Rule 3001(a)." Elleco, 295 B.R. at

800. As a general rule, the Fourth Circuit has a liberal policy in favor of finding an informal proof of claim if there is anything in the bankruptcy case's record that establishes a claim, in which case the informal proof of claim may be amended when substantial justice will be done by allowing the amendment. See id. (citing Fyne v. Atlas Supply Co., 245 F.2d 107, 108 (4th Cir. 1957); In re Fant, 21 F.2d 182, 183 (W.D.S.C. 1927)).

This Court has recently addressed informal proofs of claim in three cases, In re Delacruz, In re Elleco, and In re Trimble. These decisions have consistently applied the same principles of law; however, comparing the case at bar with these precedents reveals that, when confronted with a motion seeking leave to amend an informal proof of claim, the Court must apply these principles on a case-by-case basis and consider the facts and circumstances of each case. Indeed, in Delacruz, the Court granted leave to amend the informal proof of claim because, prior to the bar date, the creditor attended the first meeting of creditors and filed an adversary proceeding seeking to deny the discharge of the debt owed to the creditor. See C/A No. 01-02118-W, slip op. at 4; 2002 WL 362755, at *2 (Bankr. D.S.C. Jan. 25, 2002). In Elleco, the Court found that there was no informal proof of claim where, prior to the bar date, the creditor participated in the case by attending the first meeting of creditors, attending the 2004 examination of the debtor's president, discussing the resolution of non-bankruptcy litigation with debtor's counsel, fulfilling its role as a surety in paying claims on behalf of the debtor, and filing a notice of appearance in the bankruptcy case. See 295 B.R. at 802-03. Most recently, the Court held that there was an informal proof of claim where the creditor's participation was attending the first meeting of creditors, corresponding with debtor's counsel regarding its claims, submitting a consent order extending the deadline to file a complaint to

object to the debtor's discharge or the discharge of specific debts, and filing an objection to the debtor's motion to sell real property. See In re Trimble, C/A No. 02-02557-W, slip op. at 3 (Bankr. D.S.C. Oct. 29, 2002). In the objection, the creditor listed the claims it held against the debtor. See id.

The case before the Court bears similarities with all of the cited cases but does not tidily fit within the facts of Delacruz, Elleco, or Trimble. The Court, however, concludes that this case's record establishes IFIC's informal proof of claim. IFIC has been the most active creditor in this case evidenced by its attendance at the first meeting of creditors, conversations with debtor's counsel and the chapter 7 trustee, and the submission of the Consent Order extending the deadline to object to discharge or dischargeability. The Court emphasizes the importance of the Consent Order, which implies a claim against Debtor. Its effect was to alert Debtor, the Court, and parties in interest of IFIC's potential intent to hold Debtor liable for the amount owed under the guaranty. At a minimum, the consent order expresses IFIC's presence in the case as a creditor, and it conveys that IFIC was exploring or investigating its options whether to file a complaint objecting to Debtor's discharge or the discharge of the debt owed to IFIC.

In addition, a review of other documents filed in the case supplements IFIC's actions and fleshes out the informal proof of claim. Debtor's Schedules and Statement of Financial Affairs reveal that IFIC is the largest creditor in the case and that IFIC was suing Debtor prepetition. Combining the information from Debtor's bankruptcy documents with IFIC's actions in the case amply constitutes an informal proof of claim to put parties in interest on notice that IFIC holds a sizable claim against Debtor. Cf. In re Smith, 100 B.R. 289, 293 (Bankr. D.S.C. 1988), aff'd by Commodore Sav. Ass'n v. Allen (In re Smith), 100 B.R. 293

(Bankr. D.S.C. 1989) (finding an informal proof of claim where the creditor corresponded with debtor's counsel and the clerk of court and identified itself as a creditor and the debtor listed the creditor in its schedules as having a claim in a specific amount).

CONCLUSION

For the foregoing reasons, the Court

ORDERS that IFIC's Motion is granted and that IFIC may amend its informal proof of claim by filing a formal proof of claim that shall be considered timely. IFIC should file its formal proof of claim within twenty days of entry of this Order.

AND IT IS SO ORDERED.

Columbia, South Carolina
March 24, 2004


UNITED STATES BANKRUPTCY JUDGE

ENTERED

MAR 25 2004

L. G. R.