

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-16855

Chapter 13

PATRICIA WEIR

Debtor

MEMORANDUM AND ORDER

The Chapter 13 Trustee (“Trustee”) filed an objection to the claim of Beacon Federal Credit Union (“Beacon”). The record reveals that the objection and notice of the hearing were sent to Beacon at the address shown on its proof of claim. The notice of hearing was mailed more than thirty (30) days before the date of the hearing. Beacon failed to respond or appear at the hearing.

The Trustee objected to the claim on two grounds. First, the proof of claim failed to include a writing to show that Beacon has a security interest. *Fed. R. Bankr. P.* 3001(c). Second, the proof of claim failed to include evidence that Beacon’s security interest is perfected. *Fed. R. Bankr. P.* 3001(d).

The Debtor’s chapter 13 plan proposes to pay Beacon’s claim as a secured claim. The Trustee’s objection to the claim asserts, in effect, that Beacon does not have a security interest or the security interest can be avoided because it is not perfected.

Beacon’s proof of claim does not assert that it is based on a note, contract or other writing. This information is requested in paragraph 4 of the proof of claim form. The proof of claim also does not purport to be secured by any collateral, which is supposed to be identified in paragraph

9 of the proof of claim form. No security agreement or proof of perfection is attached. In other words, Beacon filed proof of an unsecured claim.

This fact pattern occurs frequently in chapter 13 cases, and it has left the Trustee and the debtors' attorneys in somewhat of a quandary as to the correct procedure and the correct remedy for obtaining a clear resolution of the parties' rights.

Failure to attach a writing or proof of perfection of a security interest may not be grounds for summary disallowance of a claim. The court should, perhaps, give the creditor time to amend the proof of claim to cure the defect. *Bank of Bellwood v. Stoecker (In re Stoecker)*, 143 B.R. 879 (N.D. Ill. 1992), *aff'd in part and rev'd in part*, 5 F.3d 1022 (7th Cir. 1993). Of course, an open-ended right to amend could cause problems with the administration of a chapter 13 case.

On the other hand, if a hearing is set and the creditor fails to prove the claim is secured, then disallowance may be the correct remedy. *Ashford v. Consolidated Pioneer Mortgage (In re Consolidated Pioneer Mortgage)*, 178 B.R. 222 (9th Cir. B.A.P. 1995) *aff'd* 91 F.3d 151 (9th Cir. 1996) (Table). It appears that disallowance in this situation will result in avoidance of the lien so that the creditor can not claim any security interest in the alleged collateral after the debtor has completed the chapter 13 plan. In this regard, the court would not be disallowing the claim solely because the creditor failed to file a proof of claim. 11 U.S.C. § 506(d)(2). The court would be disallowing the claim because the creditor, though given the opportunity, failed to prove the claim was secured.

The reported cases do not establish this result as a rule. Rules 7001 and 3007 also raise the question of whether this procedure is correct. Rule 7001 defines adversary proceedings to include a proceeding to determine the validity, priority or extent of a lien. *Fed. R. Bankr. P. 7001(2)*. Determining the validity of a lien must also include determining the legal existence of a lien. This also covers complaints to avoid a lien under one of the trustee's avoiding powers. Rule 3007 states that an objection to a claim is an adversary proceeding if it includes a demand for relief of the kind specified in Rule 7001. *Fed. R. Bankr. P. 3007*. Thus, the Trustee's objection to the claim can be viewed as an adversary proceeding because it seeks to determine the existence of a lien or to avoid it.

The court appreciates the Trustee's efforts to deal with this recurring problem. In the long run all the parties may be better served by requiring an adversary proceeding that expressly seeks to determine whether the creditor has a lien and whether it can be avoided. Then, if the creditor defaults, the Trustee can obtain a default judgment that will finally decide the matter. No one can be surprised later on.

At the hearing, the court sustained the Trustee's objection and directed him to submit an order. On reconsideration, however, the court is of the opinion that the Trustee should file an adversary proceeding. The rules seem to mean that an objection to a claim can be treated as an adversary proceeding. However, if this is not done from the beginning, the plaintiff may run afoul of certain time limits that apply in adversary proceedings. Even if § 546 may apply, its time limit

on complaints is nowhere near. For the sake of simplicity, the Trustee should start over by filing a complaint. Accordingly,

It is ORDERED that the Trustee's objection is OVERRULED without prejudice.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P. 7052*.

BY THE COURT

entered May 13, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE