

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE

In re)	
)	
JOHNNY E. KEEFAUVER)	Case No. 91-34138
JUDY KEEFAUVER)	Chapter 12
)	
Debtors)	

MEMORANDUM OPINION

This matter is before the court on the motion of an unsecured creditor, Mize Farm and Garden Supply, Inc. ("Mize"), seeking allowance of its claim, formal proof of which was not filed until after the "bar date" established by Fed. R. Bankr. P. 3002(c). Mize alleges that its formal proof of claim was merely an amendment of a timely filed "informal" claim in the form of an agreed order avoiding the prepetition lien held by Mize as a preferential transfer. In the alternative, Mize asserts that even if its claim is found to be untimely, such status alone is not a valid basis for disallowance. For the reasons set forth below, the court concludes that the claim of Mize should not be allowed.

I.

The facts in this case have been stipulated by the parties. The debtors filed this Chapter 12 family farmer's case on August 12, 1991, with Frank D. Gibson being initially appointed as the Chapter 12 trustee. The schedules filed by the debtors on August 23, 1991, list Mize as an unsecured creditor with a claim in the amount of \$12,735.60. The claim was not listed as disputed.

(54)

The claim held by Mize was based on a promissory note executed by the debtor, Johnny Keefauver, on April 26, 1990, in the principal amount of \$17,459.23. The note represented three unpaid invoices and an insufficient funds check issued by the debtors to Mize. The note was secured by a lien on all of the debtors' livestock, which lien was perfected by Mize on July 1, 1991.

The debtors' § 341 meeting of creditors was held on September 9, 1991. The proceeding memorandum for the meeting indicates that several attorneys and creditors attended the meeting including Attorney Paul Sherwood who appeared on behalf of Mize.¹ Shortly after the meeting was held, the debtors' attorney, Margaret B. Fugate, contacted Mr. Sherwood by letter dated September 18, 1991. Ms. Fugate asserted in the letter that the perfection of the lien by Mize on July 1, 1991, within the 90 days preceding the filing of the debtors' bankruptcy case, was an avoidable transfer. Ms. Fugate asked Mr. Sherwood to advise her if Mize would consent to the avoidance of the lien or if it would be necessary for her to file an adversary proceeding to avoid the lien. Apparently Mize did agree to Ms. Fugate's request because, thereafter, by letter dated October 18, 1991, Ms. Fugate forwarded to Mr. Sherwood an agreed order avoiding Mize's lien. The agreed order was executed by Mr. Sherwood and Ms. Fugate on behalf of their respective clients and tendered to the court whereby it was signed and entered on October 31, 1991.

¹The record does not reflect the extent of Mr. Sherwood's participation in the meeting.

Pursuant to Fed. R. Bankr. P. 3002(c),² December 9, 1991 was set by the clerk of the court as the bar date or deadline for filing proofs of claim in this case. No formal proof of claim was filed by Mize by this date³; instead, Mize did not file a proof of claim until February 23, 1993, when it filed an unsecured claim in the amount of \$18,124.75.

The debtors' plan was confirmed by the court on March 6, 1992. The confirmed plan does not mention Mize by name but does provide, *inter alia*, that unsecured creditors will receive a pro rata share of the funds paid to the trustee after payment of administrative expenses and secured claims, which dividend was estimated at greater than 66%.

C. Kenneth Still was appointed successor Chapter 12 trustee in this case on June 1, 1993. Sometime after his appointment, Mr. Still commenced distribution of plan payments to unsecured creditors who had timely filed claims. No payments were distributed to Mize, although no objection had been filed to Mize's claim. On September 29, 1994, Mize filed a "Motion to Determine Status of Claim" wherein it requests that its claim be allowed and paid by the Chapter 12 trustee as other timely filed unsecured claims. In the motion, Mize asserts that the formal proof of claim filed by it

²Fed. R. Bankr. P. 3002(c) provides that "[i]n a ... chapter 12 family farmer's debt adjustment [case], ... a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code" The first date set for the meeting of creditors in this case was September 9, 1991.

³The stipulations do not indicate why Mize failed to file a formal proof of claim by December 9, 1991.

on February 23, 1993, should be considered timely filed because it was merely an amendment of a timely filed informal claim, *i.e.*, the agreed order entered October 31, 1991, avoiding the prepetition lien of Mize. Alternatively, it is Mize's contention that even if its formal proof of claim was not an amendment of a previously filed informal claim, that untimeliness is not a proper ground for disallowance of a claim and that, therefore, it is entitled to payment on its proof of claim. On November 14, 1994, the Chapter 12 trustee filed an objection to the allowance of Mize's claim alleging that it was untimely and disputing Mize's contention that the formal proof of claim was an amendment of any informal claim.

On November 2, 1994, the court conducted a pretrial conference in this contested matter, during which the parties were advised that the court had taken under advisement the issue of whether a claim may be disallowed solely because of its untimeliness in an unrelated chapter 13 case.⁴ The parties advised the court that they were aware of the pending matter and stated that they were agreeable to the court's ruling in that case being applicable to the present case. The parties further stated that the facts were not in dispute and that the legal issues could be submitted to the court on written stipulations and briefs.

Briefs and stipulations have now been filed by the parties. In addition, on December 23, 1994, this court held in the Chapter 13 case of *In re Jennifer Annette Jones*, Case no. 93-34532, that

⁴See *In re Jennifer Annette Jones*, Case No. 93-34532, pending in the United States Bankruptcy Court for the Eastern District of Tennessee.

claims had to be filed within the time set by Fed. R. Bankr. P. 3002(c) in order to be allowed⁵ in a Chapter 13 case and that a late filed claim may be disallowed solely because of its untimeliness. Application of this ruling to the present case mandates the sustainment of the Chapter 12 trustee's objection and disallowance of the claim filed by Mize on February 23, 1993, unless the court finds that the claim was merely an amendment of any timely informal claim filed by Mize.

II.

Fed. R. Bankr. P. 3002(a) provides that "[a]n unsecured creditor ... must file a proof of claim or interest in accordance with this rule for the claim or interest to be allowed" Subsection (c) of Rule 3002 states that "[i]n a chapter 7 liquidation, a chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code" Fed. R. Bankr. P. 3001(a) states that "[a] proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form." The appropriate Official Form is Form 10 of the Official Bankruptcy Forms (formerly Official form 19). See 8 COLLIER ON

⁵The ruling presupposed an objection to the allowance of the claim having been filed. Otherwise, a claim which has been filed and has not been objected to is deemed allowed. See 11 U.S.C. § 502(a).

BANKRUPTCY ¶ 3001.3[2] (15th ed. 1993). Form 10 is denominated as a "proof of claim" and calls for the inclusion of the name and address of the creditor, the basis for the claim, the date the debt was incurred, the date of any judgment on the debt, classification of the claim, i.e., whether the claim is unsecured nonpriority, unsecured priority or secured, the amount of the claim and attachment of copies of any documents supporting the claim, such as promissory notes, invoices, evidence of security interests, etc.

The agreed order which Mize contends constitutes a claim states in its entirety the following:

AGREED ORDER

The debtors and Mize Farm & Garden Supply, Inc. announce to the Court that they have reached an agreement as to the validity of the security interest of Mize Farm & Garden in all livestock owned by the debtor [sic]. It appears to the Court that Mize Farm & Garden extended credit to the debtors over a period of time on open account. When the account became delinquent, Mize Farm & Garden requested that the debtors secure the account. A UCC-1 was filed in the Washington County Register of Deeds on July 1, 1991. Perfection was within ninety days of the entry of the Order for Relief. It further appears that the Debtors and Mize Farm & Garden have agreed that the transfer constitutes a preferential transfer within the meaning of 11 U.S.C. § 547. It is therefore, ORDERED, that

The security interest of Mize Farm & Garden in the livestock owned by the debtors is avoided pursuant to 11 U.S.C. § 547.

/s/ _____
RICHARD STAIR, JR.
U. S. Bankruptcy Judge

APPROVED:

/s/
PAUL SHERWOOD
Attorney for Mize Farm & Garden
116 Unaka Avenue
Johnson City, Tn. 37601

/s/
MARGARET B. FUGATE
Attorney for Debtors
114 E. Market Street
Johnson City, TN. 37601
(165) 928-6561

It is clear on its face that the agreed order does not meet the technical requirements of a formal proof of claim and therefore does not "conform substantially" to the official form. The document is entitled "agreed order" rather than "proof of claim"; neither the amount of the claim nor the date the claim was incurred is set forth therein, and no supportive documentation is attached.

Notwithstanding these deficiencies, many courts have found that a document which does not substantially conform to the official form may, if certain minimal criteria are met, constitute an informal proof of claim. See *In Dietz*, 136 B.R. 459, 462-63 (Bankr. E.D. Mich. 1992), and the cases cited therein. This informal proof of claim may be amended after the filing deadline has passed to bring the document into compliance with Rule 3001(a). *Id.* at 463. The parties agree that the generally accepted standard used by the courts to determine what constitutes an informal proof of claim is the four part test recognized by Judge Cook in *In re*

Vaughn Chevrolet, Inc., 160 B.R. 316 (Bankr. E.D. Tenn. 1993), wherein the court listed the following prerequisites:

- (1) The proof of claim must be in writing.
- (2) The writing must contain a demand by the creditor on the debtor's estate.
- (3) The writing must express an intent to hold the debtor liable for the debt.
- (4) The proof of claim must be filed with the bankruptcy court.

Id. at 319, citing *In re McCoy Management Services, Inc.*, 44 B.R. 215, 217 (Bankr. W.D. Ky. 1984).⁶

The Chapter 12 trustee asserts that the agreed order relied upon by Mize does not constitute an informal claim because the second and third elements of the test, that the writing contain a demand by the creditor on the debtor's estate and express an intent to hold the debtor liable for the debt, are allegedly missing from the agreed order. Mize argues to the contrary that the necessary demand and intent may be manifested in a variety of ways, and that the intent to hold the debtor liable may be implicit not explicit, citing *Gaudio v. Stamford Color Photo (In re Stamford Color Photo, Inc.)*, 105 B.R. 204 (Bankr. D. Conn. 1989). Mize alleges that

⁶Other courts have reduced the test to one sentence: "A written document filed with the bankruptcy court which contains a demand on the estate or otherwise expresses an intent to hold the debtor liable for an alleged debt will serve as an informal proof of claim." *In re Dietz*, 136 B.R. at 464. "Whether formal or informal, a claim must show (as the word itself implies) that a demand is made against the estate, and must show the creditor's intention to hold the estate liable." *Matter of Evanston Motor Co., Inc.*, 26 B.R. 998, 1001 (N.D. Ill. 1983), *aff'd*, 735 F.2d 1029 (7th Cir. 1984), quoting *In re Thompson*, 227 F. 981, 983 (3rd Cir. 1915).

implicit in the agreed order avoiding the lien is a demand on the estate and that "there would obviously be no reason to avoid Mize's lien if no claim was being asserted."

This court disagrees. Implicit in the agreed order is the existence of a prepetition claim - nothing more. "[M]ere evidence of the existence of a claim in the hands of the trustee or the bankruptcy court is insufficient, there must also be some evidence of the creditor's intent to assert its claim against the estate." *Matter of Evanston Motor Co., Inc.*, 26 B.R. at 1000; see also 8 COLLIER ON BANKRUPTCY ¶ 3001.03 (15th ed. 1993) ("[A] mere public assertion of liability is not enough.") The agreed order notes the existence of the prepetition claim held by Mize against the debtors, the securing and perfection of that claim with a lien within the preferential period, and the agreement to avoid the lien as a preference. The order is silent as to whether Mize will continue to assert the claim against the debtors and seek to hold the estate liable for the debt. In fact, nothing in the agreed order even implicitly indicates that Mize is making a demand against the debtors or intends to hold the estate liable for the claim. The trustee's observation that one could conclude from reading the order that the claim of Mize has been satisfied in some manner is just as likely as Mize's suggested reading of the order that the assertion of a claim is inherent in the order. In the absence of some indication in the agreed order that Mize is making a demand on the estate or seeking to hold the debtors liable, the agreed order can not constitute a claim.

Mize argues in its brief that its participation in this case evidences the requisite intent and demand as though the collective effect of all of Mize's activities in this case compensates for any deficiencies in the agreed order and satisfies the elements of an informal claim when considered together. As recited earlier, Mize's participation in this case includes the listing of Mize as an unsecured creditor by the debtors in their schedules, the attendance of the attorney for Mize at the creditors meeting, and the correspondence between the attorney for the debtors and the attorney for Mize which resulted in the agreed order being entered.

A similar argument was raised by the creditor in *Vaughn Chevrolet*, wherein the creditor asserted that its participation in the case, which consisted of a post-petition demand letter to the debtor's attorney, the filing of a Notice of Appearance by the creditor's attorney and the creditor's participation in a Rule 2004 examination, amounted to an informal proof of claim. See *In re Vaughn Chevrolet, Inc.*, 160 B.R. at 318. The court in *Vaughn Chevrolet* ruled against the creditor, however, concluding that regardless of the collective effect of these activities, the required elements of a proof of claim, *i.e.*, the filing of a document with the court which evidenced a demand on the debtor and the intent to hold the debtor or the estate liable, were not present. *Id.* at 322. The demand letter had not been filed with the court,⁷ the Notice of Appearance contained nothing that could be

⁷The court noted that the letter, of course, made the debtor aware of the creditor's claim but observed that neither the debtor's nor the trustee's knowledge of a claim is (con.)

construed as a demand on the estate and there was no evidence of a demand in anything the creditor said or did at the 2004 examination. *Id.* at 321-22.

This court similarly finds that no single document has been filed in this case that meets the judicial standards for recognition as an informal proof of claim on Mize's behalf. Nor does Mize's participation in this case collectively meet these standards because none of Mize's activities supplies the demand and intent elements. The mere listing of Mize as a creditor in the debtors' schedules is not a sufficient claim to permit later amendment. *See Matter of Evanston Motor Co., Inc.*, 26 B.R. at 1000. With respect to the attendance by Mize's attorney at the creditors meeting, the record suffers from the same defect as in *Vaughn Chevrolet* - it does not indicate if the attorney said or did anything at the meeting that would constitute a demand or the assertion of a claim. This court is unwilling to conclude that mere attendance at a creditors meeting by a creditor or its representative constitutes an implicit demand on the estate or evidences an implicit intent to hold the estate liable. The correspondence between the attorney for the debtors and the attorney for Mize regarding the agreed order similarly fails to provide the necessary elements of demand and intent.

Finally, in support of its assertion that the claim should be allowed, Mize notes that another creditor in this case, Associates

(con.) sufficient to create an informal proof of claim. *See In re Vaughn Chevrolet, Inc.*, 160 B.R. at 321 n. 5 and cases cited therein.

Financial, pursuant to an agreed order between the previous Chapter 12 trustee, the attorney for the debtors and the creditor, was permitted to take advantage of the informal proof of claim doctrine and have its untimely claim allowed by relying on certain documents that it timely filed in this case. Mize alleges that the documents filed by Associates Financial are not materially different from the agreed order relied upon by Mize and that it would be inequitable to treat similarly situated creditors differently.

The documents upon which Associates Financial relied, however, are materially different from the Mize agreed order because the documents filed by Associates Financial clearly indicated an intent on its part to make demand on the estate and hold the estate liable. These documents consisted of a motion for adequate protection and relief from the automatic stay filed by Associates Financial wherein it not only recited that it had a claim against the debtors, but also requested the court to require the debtors to pay it a monthly sum of money to adequately protect it until such time as the plan of reorganization was approved, attaching to the motion the security documents in support of its claim. A request for adequate protection payments or for automatic stay relief has been recognized by many courts to constitute an explicit demand upon the estate. See *In re Charter Co.*, 876 F.2d 861 (11th Cir. 1989); *In re Pizza of Hawaii, Inc.*, 761 F.2d 1374 (9th Cir. 1985); *In re Gateway Investments Corp.*, 114 B.R. 784 (Bankr. S.D. Fla. 1990); *In re Holywell Corp.*, 68 B.R. 203 (Bankr. S.D. Fla. 1986); *In re Key*, 64 B.R. 786 (Bankr. M.D. Tenn. 1986).

Associates Financial also filed an objection to confirmation of the debtors' proposed plan. Objections to confirmations have routinely been found by their very nature to include an implicit intent to hold the estate liable. See *In re Harper*, 138 B.R. 229 (Bankr. N.D. Ind. 1991); *In re Joiner*, 93 B.R. 130 (Bankr. N.D. Ohio 1988); *In re Ungar*, 70 B.R. 519 (Bankr. E.D. Pa. 1987); *In re Casterline*, 51 B.R. 219 (D. Colo. 1985); *In re Sullivan*, 36 B.R. 771 (Bankr. E.D.N.Y. 1984). Contra *In re Stewart*, 46 B.R. 73 (Bankr. D. Or. 1985). Accordingly, Mize and Associates Financial are not similarly situated and the court finds no equitable reason to allow the claim of Mize.⁸

An order will be entered in accordance with this memorandum sustaining the objection of the Chapter 12 trustee and disallowing the claim filed by Mize.

ENTER: January 19, 1995

BY THE COURT



MARCIA PHILLIPS PARSONS
United States Bankruptcy Judge

⁸This court has previously questioned whether its equity powers include the ability to allow a late filed claim in the absence of an agreement. See *In re Jennifer Annette Jones*, Case No. 93-34532 (memorandum opinion of Dec. 23, 1994).