Informal Proof of Claim
ORS 107.105
ORS 93.740
Notice of Lis Pendens
Judgment Lien
Equitable Estoppel

Holdner v. Holdner, Adversary No. 02-3072-elp
In re Holdner, Case No. 399-30517-elp13
Appellate No. CV 03-746-BR

10/30/2003 Dist. Ct. Judge Brown Unpub.
aff'g ELP

District Court Opinion and Order affirming bankruptcy court's decision on summary judgment. A copy of the bankruptcy court's letter ruling is attached to this summary.

Plaintiff filed an adversary proceeding seeking a judgment declaring that she had a secured claim against debtor arising from a dissolution of marriage judgment or, alternatively, that she had a timely filed unsecured claim by virtue of an informal proof of claim. The bankruptcy court, in a letter ruling which is attached, granted plaintiff's motion for summary judgment, holding that she had a timely, unsecured claim by virtue of an informal proof of claim.

The bankruptcy court rejected plaintiff's argument that she had a secured claim by virtue of a prepetition notice of lis pendens she filed pursuant to ORS 93.740. The court also rejected plaintiff's argument that she had a secured claim by virtue of a judgment lien for two reasons. First, the judgment lien was void under § 362(a)(5), because it was recorded in violation of the automatic stay. Second, even if the judgment lien was not void, it would not give rise to a prepetition secured claim. Under ORS 18.350(1), a judgment lien is effective "from the time of docketing" and the judgment lien in this case was docketed postpetition.

The bankruptcy court held that plaintiff's motion for relief from stay constituted an informal proof of claim. The bankruptcy court noted the liberal policy favoring informal proofs of claim in the Ninth Circuit and found that the motion for relief from stay satisfied the test for constituting an informal proof of claim because it stated the nature of the claim against the estate and evidenced an intent to hold the debtor liable for the claim. There is usually a requirement that the informal proof of claim state the amount of the claim, but the court held that an explicit claim amount is not required where, as here, the amount is not ascertainable because of pending litigation.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re WILLIAM F. HOLDNER

Debtor,

PATRICIA A. HOLDNER,

Appellee/Cross-Appellant/
Plaintiff/Creditor

v.

WILLIAM F. HOLDNER,

Appellant/Cross-Appellee/
Defendant/Debtor

CV 03-746-BR

BR Case No. 399-30517-elp13

Adv. Proc. No. 02-03072-elp

OPINION AND ORDER

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BROWN, Judge.

This matter comes before the Court on Debtor William F. Holdner's appeal and Creditor Patricia A. Holdner's cross-appeal of a final decision of the bankruptcy court in an adversary proceeding. Pursuant to 28 U.S.C. § 158(b)(1) and LR 2200-2, Debtor objected to referral of this matter to the Bankruptcy Appellate Panel and elected to have the appeal heard by this Court. The Court, therefore, has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a).

This Court reviews *de novo* a bankruptcy court's conclusions of law. *Grey v. Federated Group, Inc.*, 107 F.3d 730, 732 (9th Cir. 1997). The bankruptcy court's findings of fact cannot be set aside unless "clearly erroneous." Fed. R. Bankr. P. 8013.

Creditor Patricia Holdner filed an adversary proceeding in bankruptcy court seeking a judgment declaring 1) she has a valid secured claim against the Debtor arising from a judgment of dissolution of marriage or, alternatively, she has a timely-filed, unsecured claim, and 2) declaring that three parcels of real estate awarded to her in the dissolution are not property of

the Debtor's estate. The bankruptcy court consolidated the adversary proceeding with Patricia Holdner's Motion to Deem Motion for Relief from Stay a Timely Filed Informal Proof of Claim (hereafter Motion to Deem). William Holdner filed a Motion for Summary Judgment, and Patricia Holdner filed a Cross-Motion for Summary Judgment. The parties addressed both the adversary proceeding and the Motion to Deem in their summary judgment briefs.

In a letter opinion issued August 30, 2002, the Honorable Elizabeth L. Perris held Patricia Holdner has a timely, unsecured claim by virtue of an informal proof of claim filed before the claims bar date. In addition, Judge Perris ruled Patricia Holdner's second claim is premature and denied both parties' motions for summary judgment as to that claim. Accordingly, the bankruptcy court entered a judgment dismissing the adversary proceeding with leave to re-file the second claim after the conclusion of the dissolution litigation in state court.

This Court has carefully and thoroughly reviewed the record *de novo* and finds no error. The decision of the bankruptcy

court, therefore, is **AFFIRMED** in all respects.

IT IS SO ORDERED.

DATED this 30th day of October, 2003.

ANNA J. BROWN
United States District Judge

HoldnerCV03-746-Bnkr.10-30-03wpd.wpd

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

ELIZABETH L. PERRIS
BANKRUPTCY JUDGE

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Re: In re Holdner, Case No. 399-30517-elp13
Holdner v. Holdner, Adversary No. 02-3072-elp
Letter ruling on cross motions for summary judgment and Motion to Deem Motion for Relief from Stay as Timely Filed Informal Proof of Claim

Dear Counsel:

The purpose of this letter is to rule on the above referenced cross motions for summary judgment and motion. For the reasons discussed at the hearing on August 27, 2002 and stated below, I will grant the motion for summary judgment filed by Patricia Holdner ("plaintiff") on the first claim for relief asserted in the adversary complaint. The second claim for relief is not ripe for determination and will be dismissed without prejudice. I will also grant the Motion to Deem Motion for Relief from Stay as Timely Filed Informal Proof of Claim. I conclude that plaintiff has a timely unsecured claim, by virtue of an informal proof of claim filed before the claims bar date.

FACTS

Plaintiff filed a petition for dissolution of marriage against debtor in 1996. In 1997, she recorded several notices of lis pendens.

Debtor filed his chapter 13 petition in 1999, scheduling plaintiff as a creditor holding an unsecured claim. The deadline for filing proofs of claim in debtor's case was May 24, 1999.

30 docket & F

Plaintiff filed a motion for relief from stay on March 1, 1999. This court granted relief to permit "completion of the pending dissolution action . . . ." Exhibit 13b at 2.

In June of 1999, the court confirmed debtor's chapter 13 plan.

In October 1999, the state court entered a Judgment of Dissolution of Marriage ("the dissolution judgment"). The court awarded plaintiff three parcels of real property, $317,661 to equalize the property distribution ("the equalizing judgment") and support arrearages in the amount of $3,300. Plaintiff had the judgment recorded in the real property records of Columbia County shortly thereafter.

On February 28, 2000, plaintiff filed a proof of claim, asserting a secured claim in the amount of $416,376.55 for the equalizing judgment ($317,661), support arrearage ($3,300) and attorney fees ($94,415.55).

Exactly two years later, Plaintiff filed a Motion to Deem Motion for Relief from Stay as Timely Filed Informal Proof of Claim. A few days later, she filed a complaint against debtor, asserting two claims for relief. In the first claim for relief, she seeks a declaratory judgment that the $416,376.55 debt is secured by virtue of her prepetition filing of the notices of lis pendens.[1] Alternatively, if it is not secured, plaintiff asserts that she has a timely unsecured claim, because her motion for relief from stay constitutes an informal proof of claim. Finally, plaintiff asserts that even if she does not have a timely filed proof of claim, the terms of debtor's confirmed plan require that the debt be paid in full before he can receive his discharge. In her second claim for relief, plaintiff seeks a declaratory judgment that the three parcels of real property awarded to her in the dissolution judgment do not constitute property of debtor's bankruptcy estate.

Debtor filed a motion for summary judgment on both of plaintiff's claims for relief. Plaintiff filed a cross motion for summary judgment.

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[1] In the Motion to Deem Motion for Relief from Stay as Timely Filed Informal Proof of Claim, plaintiff refers to the equalizing judgment and the $416,376.55 debt interchangeably. The equalizing judgment comprises only $317,661 of the amount asserted in the secured proof of claim.

ISSUES

1. Whether plaintiff has a secured claim.

2. Whether plaintiff has a timely unsecured claim by virtue of an informal proof of claim.[2]

DISCUSSION

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056; Fed. R. Civ. P. 56(c). There is no dispute as to any genuine issue of material fact; the issues raised in the motions for summary judgment are all legal.

A. First Claim for Relief

1. Plaintiff does not have a secured claim.

Plaintiff asserts that she has a secured claim, primarily by virtue of prepetition notices of lis pendens filed pursuant to ORS 93.740.[3] I disagree.

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[2] I need not decide whether the terms of debtor's plan obligate him to pay plaintiff's untimely claim on a subordinated basis, given my decision that plaintiff has a timely filed claim by virtue of an informal proof of claim.

[3] Plaintiff raises two other arguments to support her assertion of a secured claim. First, she relies on the following emphasized portion of ORS 107.105(1)(f), which states, in part, as follows:

> (1) Whenever the court grants a decree of marital annulment, dissolution or separation, it may further decree as follows:
>
> . . .
>
> (f) For the division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances. A retirement plan or pension or an interest

(continued...)

ORS 93.740 provides, in relevant part, as follows:

> (1) In all suits in which the title to or any interest in or lien upon real property is involved, affected or brought in question, any party thereto at the commencement of the suit, or at any time during the pendency thereof, may have recorded by the county clerk or other recorder of deeds of every county in which any part of the premises lies a notice of the pendency of the action containing the names of the parties, the object of the suit, and the description of the real property in the county involved, affected, or

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[3](...continued)
therein shall be considered as property. The court shall consider the contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets. There is a rebuttable presumption that both spouses have contributed equally to the acquisition of property during the marriage, whether such property is jointly or separately held. Subsequent to the filing of a petition for annulment or dissolution of marriage or separation, the rights of the parties in the marital assets shall be considered a species of coownership, and a transfer of marital assets under a decree of annulment or dissolution of marriage or of separation entered on or after October 4, 1977, shall be considered a partitioning of jointly owned property. . . .

ORS 107.105(1)(f) goes on to address, at great length, other considerations relevant to the division of property. Plaintiff makes too much of the emphasized language. The language upon which plaintiff relies must be read in context of the entire subsection. It does not provide that one spouse has a lien against the property ultimately awarded to the other spouse.

Plaintiff's second argument is that her "lien is created judicially as recognized by Farrey v. Sanderfoot, 500 U.S. 291 (1991)." Plaintiff's Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment, 10:7-8. This argument is without merit. The lien in Farrey was explicitly created in the decree, which provided that the ex-wife "'shall have a lien against the real estate property of [the ex-husband] for the total amount of money due her pursuant to" the divorce decree and that "'the lien shall remain attached to the real estate property . . . until the total amount of the money is paid in full.'" Farrey, 500 U.S. at 293 (quoting divorce decree). The dissolution judgment in this case contains no such language.

> brought in question, signed by the party or the attorney of the party. From the time of recording the notice, and from that time only, the pendency of the suit is notice, to purchasers and encumbrancers, of the rights and equities in the premises of the party filing the notice. The notice shall be recorded in the same book and in the same manner in which mortgages are recorded, and may be discharged in like manner as mortgages are discharged, either by such party or the attorney signing the notice.
>
> (2) [With certain exceptions not relevant here,] a conveyance or encumbrance that is not recorded in the manner provided by law before the filing of a notice of pendency that affects all or part of the same real property is void as to the person recording the notice of pendency for all rights and equities in the real property that are adjudicated in the suit. . . .

A notice of lis pendens is "[a] notice, recorded in the chain of title to real property . . . to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome." BLACK'S LAW DICTIONARY 942-3 (7th ed. 1999). The purpose of a lis pendens filing

> is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered; otherwise, by successive alienations pending the litigation, its judgment or decree could be rendered abortive, and thus make it impossible for the court to execute its judgment or decree.

Houston v. Timmerman, 17 Or. 499, 499 (1889).

A bankruptcy court, addressing this issue under Iowa law, stated as follows:

> Courts in interpreting the effect of lis pendens statutes of other states have held that lis pendens does not create a lien or serve as an encumbrance on real property. Kensington Development Corp. v. Israel, 142 Wis.2d 894, 419 N.W.2d 241, 245 (1988); In re Kodo Properties, Inc., 63 B.R. 588, 589 (Bankr. E.D.N.Y. 1986); In re Miller, 39 B.R. 145, 147 (Bankr. W.D. Mo. 1984); and McKenzie County v. Kasady, 55 N.D. 475, 214 N.W. 461, 465 (N.D. 1927).
> Other courts may differ. See Union Planters National Bank v. Bell (In re Bell), 55 B.R. 246, 249 (Bankr. N.D. Tenn.

> 1985). But there the statute provided that the lis pendens was a lien.[4]

In re Rodemeyer, 99 B.R. 938, 941 (Bankr. N.D. Iowa 1989). See also Brooks v. R&M Consultants, Inc., 613 P.2d 268, 270 (Alaska 1980)(filing notice of lis pendens does not give rise to a lien); Evans v. Fulton Nat'l Mortgage Corp., 309 S.E.2d 884, 885 (Ga. Ct. App. 1983)(notice of lis pendens does not create a special lien on property which can be used to satisfy a money judgment).

ORS 93.740 does not provide that a notice of lis pendens creates a lien. In fact, the statute specifically provides that only "rights and equities in the real property that are adjudicated in the suit" enjoy priority over unrecorded conveyances and encumbrances. Plaintiff was not granted any rights in the properties awarded to debtor in the dissolution judgment. The dissolution judgment states that debtor "is awarded all of the parties' interest in" the real property granted to him.

Plaintiff also argues that she has a secured claim by virtue of a judgment lien. There are two problems with this argument. First, the judgment lien is void, because it was recorded in violation of the automatic stay. Under § 362(a)(5), the filing of a bankruptcy petition operates as a stay of "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title[.]" Acts taken in violation of the automatic stay are void. Rein v. Providian Fin. Corp., 270 F.3d 895, 904 (9th Cir. 2001). Second, even if the judgment lien is not void, a judgment lien is

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[4] The statutory provision applicable in In re Bell, 55 B.R. 246 (Bankr. N.D. Tenn. 1985) states as follows:

> The creditor has a lien lis pendens upon the property of the defendant situated in the county of suit, if properly described in the bill of complaint, on the filing of the bill, so far as concerns the pursued defendant; and the creditor may have a lien lis pendens upon all property, so described, as against bona fide purchasers and encumbrancers, for value, upon registration of an abstract of the claimed lien as provided by this Code.

Tenn. Code. Ann. § 26-4-104.

effective "from the time of docketing[.]" ORS 18.350(1). Here, the judgment lien was docketed postpetition and thus did not give rise to a prepetition secured claim.

Plaintiff relies on In re Lane, 980 F.2d 601 (9th Cir. 1992), for the proposition that the judgment lien relates back to the date she filed her notices of lis pendens, giving rise to a prepetition secured claim. Lane is distinguishable. In Lane, the court applied California law to determine whether the recording of a lis pendens constituted a transfer under § 547(e)(1)(a). 980 F.2d at 602. In considering this question, the court acknowledged that the filing of a lis pendens does not create a lien under California law. It concluded, however, that it was the attainment of a superior interest, achieved by the filing of a lis pendens, "not the creation of a lien or the rendering of a judgment, that creates a transfer under" § 547.[5] 980 F.2d at 606.

This is not a § 547 avoidance action. Instead, the question is whether plaintiff had a prepetition secured claim against debtor. Plaintiff's lis pendens filings merely protected her superior rights in the property ultimately awarded to her in the dissolution judgment; they did not create a lien against the property awarded to debtor.[6]

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[5] A "transfer" is broadly defined under the Bankruptcy Code to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption[.]" § 101(54).

[6] Section 1328(c) states that, with certain exceptions not relevant here, a chapter 13 discharge "discharges the debtor from all unsecured debts provided for by the plan or disallowed under section 502 . . . ." Plaintiff argues, for the first time in her Reply to Defendant's Response to Plaintiff's Cross-Motion for Summary Judgment, that, even if her claim is not secured, it would not be discharged, because it was not "provided for" by debtor's plan. This argument is without merit. A scheduled creditor's claim is "provided for" within the meaning of § 1328(c) if "the claim was in a class that would have received distributions had an allowable proof of claim been filed." 4 Keith M. Lundin, CHAPTER 13 BANKRUPTCY 3D ED. § 349.1 (Rev. 2000)(citing cases).

2. Plaintiff has a timely, unsecured claim by virtue of an amendable, informal proof of claim.

There is no dispute that plaintiff did not timely file a formal proof of claim in debtor's case. However, plaintiff argues that she has a timely unsecured claim, because her motion for relief from stay is an informal proof of claim.

"The doctrine of the 'informal proof of claim' is well established in the Ninth Circuit[.]" In re Edelman, 237 B.R. 146, 154 (9th Cir. BAP 1999). There is a long-established liberal policy favoring the allowance of informal proofs of claim in the Ninth Circuit. In re Sambo's Restaurants, Inc., 754 F.2d 811, 816 (9th Cir. 1985). This liberal policy reflects the Circuit's "preference for resolution on the merits, as against strict adherence to formalities." In re Anderson-Walker Indus., Inc., 798 F.2d 1285, 1287 (9th Cir. 1986). "'For a document to constitute an informal proof of claim, it must state an explicit demand showing the nature and amount of the claim against the estate, and evidence an intent to hold the debtor liable.'" In re Holm, 931 F.2d 620, 622 (9th Cir. 1991)(quoting Anderson-Walker, 798 F.2d at 1287). I conclude that plaintiff's motion for relief from stay satisfies these requirements.

The nature of the claim is apparent from the motion for relief from stay. Plaintiff sought relief to prosecute "her claim for property distribution, alimony, and attorney fees" in the pending dissolution action. Exhibit 13. While the motion does not explicitly state a claim for any equalizing judgment that might be awarded, the equalizing judgment is merely the means employed by the state court to achieve an equitable division of the parties' property. The claim for property distribution is expressly stated in the motion for relief from stay. I acknowledge that the motion for relief from stay does not set out the amount of plaintiff's claim. An explicit claim amount is not required where, as here, the amount is not ascertainable because of pending litigation. In re The Charter Co., 876 F.2d 861, 864 n.5 (11th Cir. 1989)(citing In re Pizza of Hawaii, Inc., 761 F.2d 1374 (9th Cir. 1985)).

The motion for relief evidenced plaintiff's intent to secure her share of the marital property, including holding debtor liable to the extent the state court awarded her a money judgment against him. To hold otherwise would require me to ignore the realities of this case. Whether the motion for relief from stay constitutes an informal proof of claim must be considered in light of plaintiff's "active and continuing role in" debtor's

bankruptcy. Anderson-Walker, 798 F.2d at 1288. The facts and circumstances involved with the dissolution of the parties' marriage has played a central role in debtor's chapter 13 case. This case involves substantial marital assets. Plaintiff did not seek relief from stay simply to obtain a dissolution of her marriage. She also sought to secure her share of the marital assets.

Citing In re Phillips, 175 B.R. 901 (Bankr. E.D. Tex. 1994) and In re Grubb, 169 B.R. 341 (Bankr. W.D. Pa. 1994), debtor argues that plaintiff should be equitably estopped from asserting an unsecured claim. I disagree. The courts in Phillips and Grubb found that allowing the creditors to assert untimely claims would be prejudicial. In contrast, amendments to informal proofs of claim should be freely allowed in the absence of prejudice. Sambo's Restaurants, 754 F.2d at 816-17. Debtor's other unsecured creditors are not prejudiced, because plaintiff is asking for prospective relief only. She is not asking for the redistribution of plan payments made by the trustee to date. In addition, requiring debtor to pay plaintiff's claim consistent with the terms of his chapter 13 plan is not inequitable or prejudicial with regard to debtor.

Finally, I reject debtor's argument that plaintiff should be estopped from asserting an unsecured claim, because she waited too long to amend her informal proof of claim. While "an informal proof of claim must be amended within a reasonable amount of time[,]" 9 Lawrence P. King, COLLIER ON BANKRUPTCY ¶ 3001.05[4] (15th ed. Rev. 2000), plaintiff filed her secured claim, and thus amended her informal proof of claim, promptly after the dissolution judgment was entered. The fact that she was mistaken as to the secured nature of her claim does not mean that it should be disallowed. Instead, for the reasons stated above, I conclude that it should be allowed as a timely filed unsecured claim.

B. Second Claim for Relief

In her second claim for relief, plaintiff requests a declaration that the three parcels of real property awarded to her are not property of debtor's estate. I will deny both parties' requests for summary judgment on this claim for relief.

A decision on this issue would be premature, given that the dissolution judgment is on appeal and enforcement of that judgment has been stayed by the Oregon Court of Appeals. However, as I have previously said,

> when the appeals are completed and the dissolution judgment becomes final, I intend to abide by the decision of the state court and, if requested, to grant relief from stay so [plaintiff] can obtain whatever property the state court has determined is hers.

Exhibit 16:1.

The second claim for relief will be dismissed without prejudice to re-filing once the dissolution litigation in the state courts comes to an end.

CONCLUSION

I will grant plaintiff's motion for summary judgment on the first claim for relief in the adversary complaint, on the basis that plaintiff has a timely, unsecured claim by virtue of an informal proof of claim. I will deny the parties' motions for summary judgment on the second claim for relief and will dismiss that claim without prejudice. Ms. Salyer shall submit an order in the adversary proceeding within ten (10) days of the date of this letter. Ms. Salyer shall also submit an order in the main case, granting the Motion to Deem Motion for Relief from Stay as Timely Filed Informal Proof of Claim. The order shall provide that (1) the timely informal proof of claim was amended by plaintiff's proof of claim asserting a secured claim; (2) debtor's objection to the claimed security interest is sustained; and, (3) the order is without prejudice to any further objection to the claim on a basis other than those already litigated (secured status and timeliness).

Very truly yours,

ELIZABETH L. PERRIS
Bankruptcy Judge

ELP:rjm
cc: United States Trustee
Mark A. Johnson