11 USC § 502(b)(4)
Bankr Rule 3004
11 USC § 502(c)
Local Bankr Rule 3007-4
Attorney's lien

In re Fick, 394-35390-elp13

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Debtor objected to the claim of her former attorneys, who had attorney's liens on her property. Debtor filed the claim on behalf of the claimant pursuant to section 501(c) and Bankruptcy Rule 3004, because the claimant had not filed a timely claim. Claimant was not allowed to amend the debtor-filed claim, because it had not filed a timely proof of claim. Debtor was not barred from objecting to the claim under Local Bankruptcy Rule 3007-4, which governs what payments the trustee shall make on claims, not the timeliness of a debtor's objections.

In determining the reasonable value of the services performed by debtor's former attorneys, the court disallowed any services relating to a lien that had been declared invalid in state court arbitration. The court allowed the remainder of the fees that were reasonably incurred, up to the amount stated by debtor in her proof of claim. Because the allowable amount of the claim, which is secured by attorney's liens, exceeds that amount stated in debtor's proof of claim, the liens will not be extinguished by debtor's payment of the amount of the allowed claim unless she amends her proof of claim to cover the full amount of allowable fees.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:	)	Case No. 394-35390-elp13
	)	
NANCY M. FICK,	)	MEMORANDUM OPINION ON
	)	CLAIM NO. 7 OF BULLOCK
Debtor.	)	& REGIER, P.C.

Debtor has objected to Claim No. 7, which she filed on behalf of creditor Bullock & Regier, P.C. ("claimant"). After reviewing the evidence and hearing the testimony, I conclude that the claim should be allowed as a secured claim in the amount of $5,000.

I. FACTUAL BACKGROUND

Claimant law firm represented debtor in three matters: her legal separation from her husband, her dispute with the Oregon Department of Veteran's Affairs (DVA) regarding the interest rate to be charged on the loan for her residence, and her dispute with Mark and Mary Wilson ("the Wilsons") regarding a real estate transaction. Claimant filed four attorney liens against debtor's

property. Three were against her residence and related to services performed on the separation and DVA matters; the other was against the property involved in the dispute with the Wilsons and related to services performed on that dispute. The dispute with the Wilsons was resolved by arbitration. The arbitrator declared invalid the lien on the property involved in that dispute, and claimant has released that lien. The liens securing the claim at issue in this objection are the three that remain on debtor's residence.

The first lien was filed on February 18, 1994, for $3,930.90 for services relating to debtor's marital separation. The second lien was also filed on February 18, 1994, for $636.00 for services relating to the DVA matter. The third lien at issue in this proceeding was filed on July 28, 1994, for $1,958.94, also for services relating to the DVA matter.

II. LEGAL ANALYSIS

A. Can claimant amend the claim filed by debtor when claimant did not file a timely claim?

Claimant seeks to amend the claim debtor filed from $5,000 secured to $5,889.84 secured[1] and $1,843.61 unsecured. The

[1] The secured portion of the proposed amended claim, $5,889.84, includes only two liens: one for $3,930.90 and one for $1,958.94. Claimant has not separately claimed the $636 lien as a secured claim. It appears that the reason for claimant's failure to separately assert a secured claim for that lien is that it is subsumed in the lien for $1,958.94. After the $636 (continued...)

unsecured portion relates to services performed on the Wilson real estate matter. Debtor objects to the amendment. At the hearing on December 27, I indicated that I would allow claimant to amend as to the secured portion of the claim. On further consideration, however, I conclude that the law does not support such an amendment.

Claimant did not file a claim before the claims bar date. Pursuant to 11 U.S.C. § 501(c) and Bankruptcy Rule 3004, debtor then filed a proof of claim on claimant's behalf, for $5,000 as a secured claim. Although Bankruptcy Rule 3004 provides that "[a] proof of claim filed by a creditor pursuant to Rule 3002 or Rule 3003(c), shall supersede the proof filed by the debtor or trustee," both a leading bankruptcy treatise and case law recognize that the creditor's proof of claim will supersede the debtor-filed claim only if the creditor's claim is timely filed. 8 Collier on Bankruptcy ¶ 3004.03 (15th ed. 1995); IRS v. Kolstad (In re Kolstad), 928 F.2d 171 (5th Cir.), cert. denied 502 U.S. 958 (1991); In re Hamilton, 179 B.R. 749 (Bankr. S.D. Ga. 1995).

If the creditor's claim is untimely, courts then consider

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[1](...continued)
lien was filed, claimant filed the lien for $1,958.94. According to the last page of Exhibit 2, the $636 lien covered the balance due on the DVA matter as of February 1, 1994, and the $1,958.94 lien covered the balance due as of July 1, 1994. It is apparent from Exhibit 2 that the lien for $1,958.94 covers a total balance that includes the same $636 that formed the basis for the $636 lien.

whether the creditor's claim will be allowed as an amendment of the debtor-filed claim. There is a split of authority on this issue. In Kolstad, the court held that the court had discretion whether to allow a creditor that had not filed a timely claim to amend a debtor-filed claim. It reasoned that the debtor's proof of claim should not irrevocably fix the amount of the allowed claim because that would potentially allow debtors to engage in abuse by understating the amount of the creditor's claim. In Hamilton, on the other hand, the court held that a creditor could not amend a debtor-filed proof of claim after the claims bar date had passed. It concluded that an amendment was not allowable because the creditor did not have a timely proof of claim to amend. The court recognized that allowing the amendment would, in essence, result in the creditor's claim superseding the claim filed by the debtor. It treated the proposed amendment as a new claim, and denied the new claim as untimely, because it did not meet any of the provisions of Bankruptcy Rule 3002 for late-filed claims.

Although generally amendments to claims are to be liberally allowed, In re Roberts Farms, Inc., 980 F.2d 1248 (9th Cir. 1992), I find the reasoning of Hamilton more persuasive than the reasoning of Kolstad, and conclude that the liberal amendment rule does not permit a creditor who has not filed a timely claim

to amend a debtor-filed claim.[2]

In this case, claimant did not file a timely claim. Debtor filed a claim for claimant pursuant to 11 U.S.C. § 501(c) and Bankruptcy Rule 3004. Debtor's filing of the claim benefits her because it allows her to pay the secured claim through the bankruptcy process.[3] Claimant's proposed amendment is, in

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[2] I do not perceive the potential for abuse discussed in Kolstad. Creditors with notice of the bankruptcy have the opportunity to protect their interests by timely filing a claim. A creditor's timely filed claim will supersede a debtor-filed claim. Bankruptcy Rule 3004. Further, debtors in Chapter 13 cases generally file claims when the creditor has not because debtors receive a benefit: most commonly, payment of a secured or nondischargeable claim over the life of the Chapter 13 plan. If the debtor understates the amount of the secured claim, the lien may not be satisfied through the plan payments, as I explain in note 3. If the debtor understates the amount of a nondischargeable claim, a balance will remain after payment under the plan. If the debtor overstates the claim, an interested party may object.

[3] A lien is extinguished by payment of the secured claim in full. If the debtor files a claim that understates the actual amount of the secured claim, there will be a balance remaining on the secured claim after the debtor pays the stated amount. When a balance remains on a secured claim after completion of a plan of reorganization, the majority view, with which I agree, is that the lien rides through bankruptcy and continues to encumber the collateral after the debtor's discharge. Dewsnup v. Timm, 502 U.S. 410, 418-19 (1992); In re Thomas, 883 F.2d 991 (11th Cir. 1989), cert. denied 497 U.S. 1007 (1990); 2 Lundin, Chapter 13 Bankruptcy §§ 6.13, 6.14 (2d ed. 1994). If a lien remains on the collateral after discharge, the creditor can foreclose on the lien. See 11 U.S.C. §§ 524(a)(2); 1327. Therefore, in cases such as this one, where the amount of the allowable secured claim is more than the amount stated in the debtor's proof of claim, payment of the amount specified in the debtor's proof of claim over the life of the plan will not extinguish the lien, and the lien will continue post-discharge for the balance. In this case, as I will explain later in this opinion, claimant has an allowable secured claim in the amount of $5,727.44 plus interest. The trustee will pay claimant only $5,000 plus interest because

(continued...)

reality, a new claim, which does not meet any of the requirements of Bankruptcy Rule 3002 for filing of late claims. Therefore, the claim at issue in this objection is $5,000, secured by debtor's residence.

B. Is debtor barred from objecting to the claim by Local Bankruptcy Rule 3007-4, waiver or estoppel?

Claimant asserts that debtor cannot object to the claim, because her objection was not timely. It relies on Local Bankruptcy Rule 3007-4, which provides:

> "If the trustee mails a list of timely filed claims to the debtor, the trustee shall disburse funds on the basis of such list except for any claim the debtor objects to within thirty (30) days of the date such list was mailed to the debtor."

Claimant argues that, because debtor did not object within 30 days of the date the trustee sent his notice, debtor's objection is untimely.

Local Bankruptcy Rule 3007-4 does not bar debtor's objections. The rule is directed toward the trustee and governs what payments the trustee shall make on claims. It is not a time limit directed at debtors, nor does it affect the claims allowance process.

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[3](...continued)
debtor filed a claim for only $5,000. At the end of the Chapter 13 plan, claimant will still have a secured claim for the difference. If debtor wants to pay the secured claim in full through her Chapter 13 plan so that the lien will be extinguished on discharge, she may want to amend her proof of claim to cover the full amount of the allowable secured claim.

Claimant also argues that debtor has waived or is estopped to assert her right to object to its claim, because she included the claim on her Chapter 13 plan, which was confirmed. Debtor's plan provides that the trustee shall make disbursements "to secured creditors whose claims are filed, and duly proved and allowed." (Emphasis added.) The plan provided for payment of claimant's claim if it was filed and allowed. Because filing and allowance of the claim is a prerequisite to payment, the fact that debtor listed claimant's claim in her plan does not constitute waiver or estoppel.

C. Should the claim be allowed?

Turning to debtor's objections, debtor raises numerous objections to the claim. To the extent that she challenges the validity of the liens and claimant defends their validity, that is a matter that must be determined by an adversary proceeding and cannot be resolved in the context of the claims allowance process. Bankruptcy Rule 7001.

Debtor raised several technical defects on the form on which she filed her objections to the claim. The objections that the claim does not include a copy of the writing upon which it is based, that it does not include an itemized statement of the account and that it does not include a copy of the security agreement and evidence of perfection have been cured by claimant's submission of the retainer agreement debtor signed

with claimant, its billing statements and copies of the recorded liens. The other objections, that the proof of claim does not include a copy of the underlying judgment, that it fails to assert grounds for priority, that it does not include a copy of the assignment upon which it is based, and that it appears to include interest or charges accrued after the filing, do not apply to this claim.

Debtor also argues that the claim should be disallowed under 11 U.S.C. § 502(b)(4), because it exceeds the reasonable value of the attorney's services. Claimant responds that section 502(b)(4) does not apply to this claim, because it governs only the services of an attorney who represents a debtor in bankruptcy. Section 502(b)(4) provides that a claim shall be allowed except to the extent that, if the claim is for services of an attorney of the debtor, the "claim exceeds the reasonable value of such services." That section applies to any services provided by debtor's attorney prepetition. It "deals with unpaid claims for services by an * * * attorney regardless of whether or not such claim is based upon the rendition of services rendered in contemplation of the filing of a petition." 3 Collier on Bankruptcy ¶ 502.02[5] (15th ed. 1995).

Debtor argues that the claim should be disallowed to the extent it is for services provided in the domestic relations matter in which she obtained a legal separation from her husband.

She argues that the work Mr. Bullock performed on that matter after the trial in early September 1993 was unnecessary and was a result of Mr. Bullock's failure to have legal issues resolved at the trial. According to debtor, the matters could have been resolved in September, when it would not have cost her any extra fees, but instead they were resolved after the trial, requiring an extensive expenditure of attorney time. The evidence was that many of the services for which debtor was charged in connection with the domestic relations matter were the result of debtor's attempt to insert into the court's final separation order matters that were not within the court's preliminary ruling. The evidence does not support her assertion that Mr. Bullock himself manufactured the need for the services.

Debtor next argues that I should disallow the charges for services relating to the real estate matter involving the Wilsons. As I explained at the beginning of this opinion, the lien relating to those services has been declared invalid and claimant has released the lien. Claimant has not been permitted to amend its claim to seek payment for any of those services as an unsecured claim. None of the services involved in the secured claim relate to the Wilson v. Fick matter, except as I describe below. To the extent any of the charges covered by the liens at issue in this order do relate to that matter, they will be disallowed.

Finally, debtor argues that I should disallow the charges for services relating to the DVA matter, because she never signed a retainer agreement relating to that matter, and because she never asked claimant to represent her on that matter. Debtor signed a retainer agreement for representation relating to her domestic relations matter with her husband. The DVA matter arose out of the separation matter; it was not necessary to have a separate, signed agreement for representation. Further, the evidence showed that, although debtor chose to handle part of the DVA matter herself and would sometimes ask Mr. Bullock not to represent her, she also would, from time to time, ask Mr. Bullock to represent her. Most notably, she asked him to represent her at the informal hearing before the Department of Veteran's Affairs, which he did. There is no convincing evidence that any of the work Mr. Bullock performed relating to the DVA matter was unauthorized.

Debtor did not ever question any of the monthly billing statements that she received from claimant at or near the time of the billings. She did not complain about the bills until after this bankruptcy was filed. In fact, debtor expressed her appreciation for the work that Mr. Bullock did contemporaneous with the time when it was performed and acknowledged to him that she owed him for his services. Debtor now charges that Mr. Bullock violated various ethical requirements and performed

services that harmed rather than helped her interests. I find no convincing evidence to support those charges.

My review of the billing statements reveals two entries that should not be included in this claim because they relate to the Wilson v. Fick matter. On November 18, 1993, debtor was charged $55.00 for "[o]ffice conference with client regarding legal description on deed of conveyance. Went through survey maps." On November 22, 1993, she was charged $77.00, in part for a telephone conference with Mary Wilson's attorney. Those charges are not properly allowable as part of the secured claim.

I also note that some services relating to the DVA matter were charged as part of the separation matter, and those charges were included in the $3,930.90 lien filed on February 18, 1994. Because claimant is entitled to payment for services relating to both matters, it is not relevant to this proceeding that the charges were commingled. As to the lien filed on July 28, 1994 for $1,958.94, the billing records and testimony indicate that that lien is for services performed on the DVA matter between January 1, 1994 and February 7, 1994, when Mr. Bullock resigned from representing debtor, plus $30.40 for expenses incurred in March, 1994. Mr. Bullock has not explained why debtor should be charged for expenses incurred after his withdrawal as counsel, and that charge should be disallowed.

III. CONCLUSION

The total amount of the secured claim claimant is asserting is $5,889.84. Of that amount, $162.40 should be disallowed ($132.00 for services improperly charged and $30.40 for expenses incurred after Mr. Bullock resigned), leaving an allowable secured claim of $5,727.44. There is convincing evidence that the services that form the basis for that amount were reasonable and necessary. I have already held, however, that debtor's proof of claim is for only $5,000 and that claim has not been amended. Therefore, the claim will be allowed in the amount of $5,000 as a secured claim. The court will issue a separate order in accordance with this opinion.

This Memorandum Opinion shall constitute Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052 and they shall not be separately stated.

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ELIZABETH L. PERRIS
Bankruptcy Judge

cc: Nancy M. Fick
Todd A. Peterson
Robert W. Myers