

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. MB 97-057

IN RE: ROBERT N. DICROCE

THE TENTH RMA PARTNERS, L.P.,

Appellant,

v.

ROBERT N. DICROCE,

Appellee.

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Eastern Division)
(Hon. Carol J. Kenner, U.S. Bankruptcy Judge)**

Before

Goodman, Lamoutte and Haines, Bankruptcy Judges

**Michael B. Feinman, Jeffrey J. Cymrot, and the Law Offices of Michael B. Feinman
for The Tenth RMA Partners, L.P.**

Norman Novinsky, Seth D. Miller, and Novinsky & Associates for Robert N. DiCroce

February 25, 1998

PER CURIUM - Before the panel is the bankruptcy court's order denying a motion to file a late claim in DiCroce's chapter 11 reorganization proceeding. The motion was filed by Pi Financial group, LLC (hereinafter "Pi"), as the servicing agent for Tenth RMA Partners Limited Partnership (hereinafter "RMA"), the true holder of the claim. The bankruptcy court denied the motion to file a late claim. The court had previously granted the debtor's oral motion for setting a bar date for all claims made at an earlier hearing.

Background

DiCroce filed his petition for reorganization under chapter 11 of the Bankruptcy Code on June 20, 1995. The schedules accompanying the petition included Pi as the holder of a liquidated, noncontingent, undisputed, unsecured, nonpriority claim in the amount of \$287, 486.49.

On May 28, 1996, the bankruptcy court held a hearing as to the adequacy of DiCroce's disclosure statement, which was also a continued hearing on the motion by the United States Trustee to convert the case to one under chapter 7. The hearing was noticed to all parties in interest, including Pi. The claim of the Environmental Protection Agency (EPA), and its potential effect upon the debtor's reorganization, was discussed at the hearing and the court suggested directing the EPA to file a claim by a certain date. (Transcript of 5/28/97 hrg., p. 7) Accordingly, DiCroce's counsel made an oral motion for the court to establish a bar date for the filing of proofs of claim. (Transcript of 5/28/96 hrg., p. 7). DiCroce's attorney indicated that "I would like to get all creditors because I still have some unsolved issues with some of the mortgages as to what really is outstanding." Id. The court clarified that the bar date applied to all creditors, not just the EPA, then granted the motion and established August 1, 1996 at 4:00 p.m. as the bar date for filing claims. Id. at pp. 7 - 8. The court further clarified that as to the EPA, the bar date applied to all claims, whether pre- or post-

petition, and directed the debtor to specifically give notice to the EPA. *Id.* at p. 8. Neither Pi, RMA, nor any other party in interest received notice prior to the May 28 hearing that debtor or the court would address the issue of establishing a claims bar date.

DiCroce's attorney prepared the Bar Date Order and Notice to All Creditors, which was served on May 30, 1996, and provides:

ORDERED that each holder of valid claim in the above-captioned case, whether or not such claim is listed on the Debtor's schedules, including all secured, unsecured, priority, and administrative claims (i.e., claims arising after the filing of the bankruptcy petition and claims of administration) shall file a written Proof of Claim with the Clerk ... on or before 4:00 p.m. on August 1, 1996

All claims not filed within the time prescribed shall not be allowed and shall forever barred ..." [sic]

Pi admits receiving a copy of DiCroce's notice regarding the bar date and, further, that it did not file a claim within the time period set forth in the notice.

RMA filed a motion for leave to file a late claim on February 27, 1997. It subsequently filed a brief in support of its motion, arguing that its claim enjoyed status as a filed claim pursuant to 11 U.S.C. § 1111(a). The court scheduled a hearing on RMA's motion to be held on July 8, 1997. At that hearing, DiCroce's counsel indicated that the bar date was set because of problems with the environmental claim, as well as the need for something definitive from all creditors to proceed with the case. (Transcript of 7/8/97 hrg. at p. 3). The court denied RMA's motion, finding (1) that there was no excusable neglect permitting the late filing of a claim; (2) that the letter sent on August 25, 1995 by Mr. Cleon Turner, on behalf of RMA, to debtor's attorney does not constitute an informal proof of claim; and (3) that "this court's order specifically setting a bar date for filing unsecured claims supersedes the statutory provision in Section 1111(a) ... particularly where, as here, the debtor

asserts that there would be prejudice on account of allowance permitting RMA to file a claim at this late date since it would impair the debtor's ability to negotiate with J.E. Roberts, it secured creditor.” (See transcript of 7/8/97 hrg at pp. 29 - 31.)

At no point did DiCroce object to RMA's claim as he had scheduled it. As of the July 8, 1997 hearing he had not yet confirmed a plan of reorganization.

Discussion

Jurisdiction

DiCroce asserts that this appeal is untimely in that what RMA should have appealed is the bankruptcy court's unwritten bench order establishing the bar date for filing claims, rather than the court's denial of RMA's motion for leave to file a late claim. However, given that the establishment of the bar date was effected only through notice promulgated by DiCroce's counsel, rather than by entry of a court order and notice of the same, the panel finds that RMA was correct in appealing the bankruptcy court's denial of its motion for leave to file a late claim. DiCroce's notice of the bar date cannot be considered a “final judgment, order or decree” which conclusively determined a discrete dispute. Fed. R. Bankr. P. 8001(a); In re American Colonial Broadcasting Corp., 758 F.2d 794 (1st Cir. 1985).

11 U.S.C. § 1111(a)

Section 1111(a) of the Bankruptcy Code provides that “[a] proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.” This section regulates the claim process in chapter 11 cases and provides an exception to the general rule that all creditors must file proofs of claim in order to

participate in any bankruptcy distribution. 7 Lawrence P. King, et al., Collier on Bankruptcy ¶ 1111.01 (15th ed. rev. 1997). Section 1111(a) relieves a holder of a claim from having to file a proof of claim in a chapter 11 case provided that (1) the list of creditors referred to in § 521(1) has been filed, and (2) the claim is scheduled, but not as disputed, contingent or unliquidated. Id. at 1111-4. Thus, § 1111(a) gives certain creditors in a chapter 11 proceeding the status of a claimant who has filed a proof of claim and relieves such creditors of the requirement of filing a proof of claim. Midwest Commerce Banking Co. v. Elkhart City Centre, 4 F.3d 521, 523 (7th Cir. 1993); First Fidelity Bank, N.A. v. Hooker Investments, Inc., 937 F.2d 833 (2nd Cir. 1991); ITT Commercial Finance Corp., Inc. v. Dilkes, 933 F.2d 939, 941-42 (11th Cir. 1991).

Pi's claim was included in DiCroce's schedules and was not listed as disputed, contingent or unliquidated; therefore, a proof of claim is "deemed filed" for Pi's claim in DiCroce's bankruptcy case pursuant to § 1111(a).

Power to Set a Bar Date

While a deadline is set forth for the filing of claims in chapter 7, 12 and 13 cases under Fed. R. Bankr. P. 3002(c), neither the Bankruptcy Code nor the rules set forth a deadline for the filing of claims in a case filed under chapter 11 of the Code. DiCroce is correct in asserting that a bankruptcy court may issue bar orders in chapter 11 cases. Pursuant to Fed. R. Bankr. P. 3003(c)(3), the court may fix and, for cause shown, extend the time within which proofs of claim may be filed in chapter 11 cases. 7 Collier ¶ 111.02[5][c] at 1111-10. The bankruptcy court may, upon the motion of a party or *sua sponte*, establish a bar date for filing claims. However, given that creditors whose claims are not scheduled as disputed, contingent or unliquidated are not obliged to file proofs of claim at all, the setting of a bar date does not, in and of itself, alter their rights: their claims are, by

operation of law, “deemed filed.”

11 U.S.C. § 105(a)

The bankruptcy court enjoys broad equitable powers under section 105 of the Bankruptcy Code. Section 105(a) provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

“The basic purpose of section 105 is to assure the bankruptcy court’s power to take whatever action is appropriate or necessary in aid of the exercise of their jurisdiction.” 2 Lawrence P. King, et al., Collier on Bankruptcy ¶ 105.01 (15th ed. rev. 1997). The use of the term “provisions” rather than “purposes” to describe the bankruptcy court’s power suggests that an exercise of such power be tied to another section of the Bankruptcy Code, and not merely to a general concept or objective. Id. at 105-5.

The equitable power of the bankruptcy court is limited and must only be exercised within the confines of the Bankruptcy Code. Northwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); Noonan v. Secretary of Health and Human Services (In re Ludlow Hospital Society, Inc.), 124 F.3d 22, 27 (1st Cir. 1997); Official, Unsecured Creditors’ Committee v. Stern (In re SPM Manufacturing Corporation), 984 F.2d 1305, 1311 (1st Cir. 1993); In re Plaza de Diego Shopping Ctr., Inc., 911 F.2d 820, 830-31 (1st Cir. 1990). “Section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code. 2 Collier at 105-7. Furthermore, it does not “authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under

applicable law, or constitute a roving commission to do equity.” United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986). “A proper application of § 105(a) will effectuate the Bankruptcy Code without fashioning or altering substantive rights of debtors or creditors” Cuevas-Segarra v. Maria Luisa Contreras, ___ F.3d ___, No. 97-1234 (1st Cir. 1998).

The bankruptcy court has no equitable power under § 105 to deprive creditors of rights or remedies available to them under the Code. Official, Unsecured Creditors’ Committee v. Stern (In re SPM Manufacturing Corporation), 984 F.2d at 1311. The bankruptcy court may not use § 105(a) if another Code provision impedes the requested exercise of equitable power. Noonan, 124 F.3d at 28.

The bankruptcy court’s approval of the debtor’s oral request to fix a period for filing of any and all claims may have appeared to be a practical and expeditious solution to aid this debtor in its reorganization process. However, the exercise of the court’s equity powers may not contravene a specific provision of the Bankruptcy Code. Therefore, although the court could establish a bar date by which creditors who needed to file proofs of claim were required to do so, it could not extend such an order to cover claims already “deemed filed” under § 1111(a).¹

¹The precise point raised by RMA’s appeal is whether the bankruptcy court erred in denying its motion for leave to file a late proof of claim. Our conclusion is that the court could not override § 1111(a) by granting the debtor’s unnoticed, oral motion asking that a bar date be set for filing proofs for all claims, including those scheduled but not designated as disputed, contingent or unliquidated. Technically, the bar date order simply could not operate to require RMA to file a proof of claim in circumstances where the Code required no such filing. In any event, we resolve the issue as presented by the parties and reverse the order refusing to permit RMA to file its claim “late”. Stating the issue differently, we conclude that, as to RMA, the bar date simply was without effect.

Conclusion

The bankruptcy court erred in using its equitable powers pursuant to § 105(a) to effect an order which, in setting a claims bar date applicable to all creditors, limited the rights of RMA to have its claim deemed filed pursuant to section 1111(a). Accordingly, the decision of the bankruptcy court to deny RMA's motion for leave to file a proof of claim is hereby reversed, and the case remanded for further proceedings consistent with this decision.