UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Not For Publication

In re	:	Chapter 11
ENRON CREDITORS' RECOVERY CORP., *et. al.*,	:	Case No. 01-16034
Reorganized Debtors.	:	

OPINION GRANTING BANK OF COMMERCE'S MOTION TO RECONSIDER AND VACATING THAT PORTION OF A JULY 22, 2004 ORDER DISALLOWING AND EXPUNGING CLAIM NO. 7691

APPEARANCES

WEIL, GOTSHAL & MANGES LLP
Attorneys for the Reorganized Debtors
767 Fifth Avenue
New York, NY 10153

Martin J. Bienenstock, Esq.
Brian S. Rosen, Esq.
Melanie Gray, Esq.

POWELL GOLDSTEIN LLP
Attorneys for Bank of Commerce
2200 Ross Avenue, Suite 3200
Dallas, TX 75201

Keith Miles Aurzada, Esq.
John A. Moore, Esq.

ARTHUR J. GONZALEZ
United States Bankruptcy Judge

The issue before the Court is whether the Court should vacate that portion of a July 22, 2004 order disallowing and expunging Claim 7691 because Bank of Commerce ("BOC") did not

receive notice of the Debtors' objection to the claim. Upon consideration of the pleadings and arguments of the parties, the Court grants BOC's motion to reconsider and finds that portion of a July 22, 2004 order disallowing and expunging Claim 7691 should be vacated.

I. Jurisdiction

The Court has subject matter jurisdiction over this matter under sections 1334(b) and 157(a) of title 28 of the United States Code and under the July 10, 1984 "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York. This is a core proceeding within the meaning of section 157(b)(2) of title 28 of the United States Code.

II. Background

A. *General Procedural History*

Commencing December 2, 2001 (the "Petition Date"), Enron and certain of Enron's direct and indirect subsidiaries (collectively, the "Debtors" or "Debtor," referencing a single entity) each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code"). The Debtors' chapter 11 cases were procedurally consolidated for administrative purposes. During the chapter 11 cases, the Debtors operated their businesses and managed their properties as debtors in possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. On July 15, 2004, the Court entered an order confirming the Debtors' Supplemental Modified Fifth Amended Joint Plan of Affiliated Debtors (the "Plan") in these cases. The Plan became effective on November 17, 2004, and the Debtors emerged from chapter 11 as reorganized debtors (the "Reorganized Debtors"). Effective March 1, 2007, Enron changed its name to Enron Creditors Recovery Corp. Thereafter, on April 4, 2007, an order was entered authorizing the change of the caption of the Reorganized Debtors' cases.

The Debtors filed "Motion of the Debtors for an Order Pursuant to Bankruptcy Rules 2002(a)(7), 2002(l), and 3003(c)(3) Establishing Deadlines for Filing Proofs of Claim and Approving the Form and Manner of Providing Notice Thereof" on July 31, 2002 (the "Bar Date Notice Request"). The Bar Date Notice Request provided the following provision: "To avoid confusion and facilitate the Claims reconciliation process, the Debtors request that all creditors … be required to file separate Proofs of Claim with respect to each alleged claim and against each Debtor." By order dated August 1, 2002 (the "Bar Date Order"), the Court set October 15, 2002, as the bar date (the "Bar Date") by which proofs of claim must be filed against certain Debtors and approved the Bar Date Notice Request "in all respects."

B. *Claim 7691*

Prior to the Petition Date, Forrest Construction, Inc. ("Forrest") was a borrower of BOC. BOC operates in Wyoming. After Forrest defaulted on its payment obligations, BOC, as part of its collection efforts, filed a UCC-1 statement with the Wyoming Secretary of State on February 22, 1999. In the UCC-1 statement, BOC listed as collateral for Forrest's debt an assignment of all of Forrest's accounts receivable.

On October 7, 2002, Forrest filed Claim 7691 against Enron Wind Development Corp. ("EWD") for construction goods and services allegedly provided to Zond Constructors, Inc. ("Zond") from April through May of 1999. Enron purchased Zond in 1997, and Zond's name was changed to Enron Wind Constructors Corp. ("EWC").[1] Forrest attached invoices to Claim 7691, which showed the work allegedly performed by Forrest and the amount allegedly charged

[1] BOC concedes that Forrest mistakenly filed Claim 7691 against EWD instead of EWC. At the hearing on July 26, 2007, BOC argued that the circumstances would warrant relief from the Court to treat Claim 7691 as a claim against EWC. However, BOC stated that it had not yet requested such relief from the Court because it was trying to gather additional information.

to Zond. In its proof of claim, Forrest sought an unsecured claim in the amount of $1,376,891.76.[2]

On August 5, 2003, the Internal Revenue Service ("IRS") provided Debtors' counsel with a Notice of Levy instituted against Forrest. The Notice of Levy sought satisfaction of $946,053.36 allegedly owed by Forrest.[3] On August 14, 2003, Forrest assigned its rights to Claim 7691 to BOC. On August 21, 2003, Bankruptcy Services, LLC ("BSI"), the Debtors' claims agent, modified Claim 7691 to reflect a transfer of such claim from Forrest to the IRS ("Forrest-IRS Transfer"). On August 22, 2003, BSI sent notice of the Forrest-IRS Transfer to Forrest. In September of 2003, BOC delivered Notice to Transfer Claim Pursuant to Rule 3001(e) ("Forrest-BOC Transfer") to the clerk's office. The clerk's time-stamp on the Forrest-BOC Transfer evidences a receipt date of September 8, 2003. No objections were posed against the Forrest-BOC Transfer. On November 18, 2003, the Forrest-BOC Transfer was entered into the Court's electronic docket.

On May 11, 2004, Debtors filed their Thirty-Third Omnibus Objection to Proofs of Claim (No Amount Due Per Debtors' Books and Records and Insufficient Proof) ("33rd Objection"). In their 33rd Objection, the Debtors sought to disallow and expunge Claim 7691 in its entirety because the Debtors' books and records did not evidence an amount due and owing to Forrest. The Debtors listed the claimant of Claim 7691 as "IRS – ATTN: MICHAEL L. BRALEY" and further listed such claim as being transferred from Forrest. BOC contends, and Debtors do not dispute, that neither Forrest nor BOC received notice of the 33rd Objection. The IRS presented

[2] The Court notes that this amount differs from the amount reflected in the stipulation of facts submitted by the parties. However, since the amount listed in Claim 7691 is $1,376,891.76, not $1,276,891, the Court assumes, without deciding, that the amount mentioned in the stipulation of facts was an error. Further, the Court notes that the correct amount of Claim 7691 is not relevant to the determination of the instant matter.

[3] The IRS eventually increased the amount of its lien to $1,294.455.39 after two subsequent amendments to the Notice of Levy.

no response to Debtors' 33rd Objection, and the Court granted the 33rd Objection on July 22, 2004, ("33rd Order") disallowing, among other claims, Claim 7691.

According to BOC, it first discovered the disallowance and expungement of Claim 7691 on or about January 2, 2007. BOC further contends that it only became aware of the 33rd Objection and 33rd Order on or about March 5, 2007. Upon discovering this information, BOC asserts that it contacted Debtors' counsel and explained that BOC failed to receive notice of the 33rd Objection or the 33rd Order. As such, BOC claims it attempted to reach an agreement with Debtors' counsel setting aside the 33rd Order. However, Debtors' counsel informed BOC that since the IRS had filed the Notice of Levy against Claim 7691, Debtors were not required to provide notice to BOC. Thereafter, BOC filed its motion to reconsider on May 1, 2007. Debtors filed their objection on July 19, 2007. BOC submitted their response to the Debtors' objection on July 25, 2007. A hearing was held on July 26, 2007. At the hearing, the parties were directed to submit a stipulation reflecting the chronology of relevant events upon which there is no dispute. On August 22, 2007, the parties submitted the stipulation of facts in connection with the Motion to Reconsider.

III. Discussion

A. *Parties' Contentions*

1. *BOC's Contentions*

BOC contends that since it perfected its security interest prior to the entry of the Notice of Levy, it has priority over the IRS with regard to Claim 7691. Moreover, since a proper assignment and/or transfer of Claim 7691 occurred between Forrest and BOC, and since no one objected to the Forrest-BOC Transfer filed with the Court, BOC is the proper owner of Claim 7691. As the proper owner of Claim 7691, it was entitled to notice of the 33rd Objection. Since

Debtors failed to provide such notice, BOC contends that its ignorance of the 33rd Objection and 33rd Order until March of 2007 was through no fault of its own. As such, BOC asserts that sufficient cause exists to reconsider and vacate that portion of the 33rd Order disallowing and expunging Claim 7691.

2. *Debtors' Contentions*

Debtors contend that "re-instatement of [Claim 7691] is not warranted . . . because: (i) the . . . Debtors' books and records reflect that no amounts are due to Forrest for [Claim 7691] and (ii) the existing and uncontested IRS levy against Forrest prevents BOC from receiving any distributions on [Claim 7691]." With regard to their first contention, the Debtors argue that any goods or services allegedly provided by Forrest were provided for the benefit of EWC and not EWD. EWD is the company against whom BOC filed Claim 7691. Nonetheless, the Debtors assert that neither company's books or records reflect any amount due and owing Forrest. With regard to their second contention, the Debtors argue that the Notice of Levy predates the Forrest-BOC Transfer. Debtors therefore contend that the IRS is entitled to payment in full prior to any remittance to BOC. Since both the IRS's and BOC's claims are unsecured, and since the distribution to unsecureds in either EWD's or EWC's cases would be insufficient to pay the IRS claim in full, thereby preventing any distribution with regard to BOC's claim, Debtors contend that denial of BOC's motion to reconsider the 33rd Order "does not deprive BOC of a substantial right or remedy warranting the re-instatement of the Claim." The Debtors further argue that prejudice exists since BOC's motion for reconsideration was filed approximately two years after entry of the 33rd Order and approximately two months after BOC discovered that Claim 7691 had been disallowed and expunged.

B. *Validity of BOC's Claim*

Federal Rule of Bankruptcy Procedure 3001(c) provides that "[w]hen a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim." Rule 3001(f) provides that "a proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." An objecting party must provide "substantial evidence" to rebut the prima facie presumption of validity of a proof of claim. *In re Hemingway Transp., Inc.*, 993 F.2d 915, 925 (1st Cir. 1993).

In this case, Forrest attached documents to Claim 7691 evidencing goods and services allegedly provided to Zond and evidencing charges allegedly invoiced to Zond. Since Forrest complied with Rule 3001, Claim 7691 enjoys a prima facie presumption of validity under Rule 3001(f). This prima facie presumption extended to the transferee of Claim 7691. Debtors attempt to rebut this prima facie validity by stating that neither EWD's nor EWC's books or records reveal a debt due and owing to Forrest. The Court finds this does not constitute "substantial evidence" sufficient to rebut the prima facie validity of Claim 7691. This finding assumes, without deciding, that BOC could establish that Claim 7691 should be treated as a timely filed claim against EWC. The Court finds that a separate proceeding is necessary to address the availability of any such relief against EWC.

C. *BOC's Motion for Reconsideration*

BOC seeks relief from the 33rd Order pursuant to its motion for reconsideration under 11 U.S.C. § 502(j). Courts may reconsider a claim that was previously disallowed based upon the equities of the case. 11 U.S.C. § 502(j).[4] In evaluating a motion for reconsideration, courts are

[4] Section 502(j) provides

to utilize the standard for relief outlined in Federal Rule of Civil Procedure 60(b) ("Rule 60(b)"),[5] *DeGeorge Capital Corp. v. Novak (In re DeGeorge Fin. Corp.)*, 2002 U.S. Dist. LEXIS 17621, at *46, 2002 WL 31096716, at *13 (D. Conn. July 15, 2002) (citing *In re Johansmeyer*, 231 B.R. 467, 470 (E.D.N.Y. 1999)), which applies to bankruptcy proceedings via Federal Rule of Bankruptcy Procedure 9024. A motion for reconsideration of an order disallowing a creditor's claim may be granted if the creditor demonstrates its failure to respond was the result of "excusable neglect."[6] *See In re Colonial Realty Co.*, 202 B.R. 185, 187 (Bankr. D. Conn. 1996). A motion for reconsideration under "excusable neglect" must be brought within one year from the entry of judgment under Rule 60(b). However, Rule 9024(1) provides that the one year limitation does not apply with regard to "a motion . . . for the reconsideration of an order

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> A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

[5] Rule 60(b) provides

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect. . . .

[6] BOC argued for reconsideration under Rule 60(b)(6), which provides

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment.

"However, Rule 60(b)(6) only applies if the reasons offered for relief from judgment are not covered under the more specific provisions of Rule 60(b)(1)-(5)." *Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) (citing *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 863 & n.11, 108 S.Ct. 2194, 100 L.Ed. 2d 855 (1988)). Since the Court finds that "excusable neglect" under Rule 60(b)(1) is applicable, it cannot and will not analyze BOC's motion for reconsideration under Rule 60(b)(6).

allowing or disallowing a claim against the estate entered without a contest. . . ." Therefore, although BOC filed its motion for reconsideration more than one year from entry of the 33rd Order, the 33rd Order was entered without contest since BOC was not provided notice of the 33rd Objection.

The Second Circuit looks to three factors when deciding motions for reconsideration under Rule 60(b). *In re Enron, Inc.*, 325 B.R. 114, 118 (Bankr. S.D.N.Y. 2005)(citing *American Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57, 59 (2d Cir. 1996)). These factors include (1) whether the failure to respond was willful, (2) whether the movant had a legally supportable defense, and (3) the amount of prejudice that the non-movant would incur if the court granted the motion. *Id*.

There is, however, a strong preference that courts resolve disputes on their merits. *Brien v. Kullman Indus., Inc.*, 71 F.3d 1073, 1077 (2d Cir. 1995). Indeed, courts resolve any doubts in favor of the movant in order to increase the likelihood that disputes will be resolved on their merits. *Pecarsky v. Galaxiworld.Com Ltd.*, 249 F.3d 167, 172 (2d Cir. 2001) (citing *Jackson v. Beech*, 205 U.S. App. D.C. 84, 636 F.2d 831, 836 (D.C. Cir. 1980)).

1. *Willful Factor*

The first factor in the Second Circuit test is whether the default on the part of the movant was willful. *American Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d at 59. The Second Circuit has interpreted this factor to require something more than just negligence or carelessness on the part of the movant. *Id*. at 59-61. Defaults that are caused by negligence may be excusable, while defaults that occur as a result of deliberate conduct are not excusable. *Gucci Am., Inc. v. Gold Center Jewelry*, 158 F.3d 631, 635 (2d Cir. 1998). Conduct on the part of the movant that is in bad faith falls under the willfulness standard and weighs heavily against the

movant. *American Alliance*, 92 F.3d at 60. In addition, the degree of negligence still remains a relevant factor when assessing whether the movant acted in good faith. *Id*. at 60-61.

BOC never received notice of the 33rd Objection. As such, it had no knowledge that Debtors contested the validity of Claim 7691. Furthermore, although BOC failed to serve notice of the Forrest-BOC Transfer to the Debtors in accordance with the Case Management Order, dated February 20, 2002, as amended by that certain Second Amended Case Management Order, dated December 17, 2002 (the "CMO"), BOC did comply with Rule 3001(e) regarding the transfer of the claim. Further, the Court notes that it is likely that BOC was unaware of the service requirements under the CMO because BOC was not a creditor of any of the Debtors at the time notice of the CMO was served. Such does not relieve BOC of its obligation to make an inquiry as to whether other procedural rules or orders impact its obligations regarding the transfer of a claim. However, the circumstances do not support a finding that BOC's failure was willful. Furthermore, when BOC discovered that Claim 7691 had been disallowed and expunged, it sought to contact Debtors' counsel in order to reach an agreement. When an agreement could not be reached, BOC filed the present motion for reconsideration. The Court finds that BOC's actions were not deliberate. At worst, BOC's conduct may have been the product of some carelessness, but any such carelessness does not rise to the level of willfulness.

2. *Legally Supportable Defense*

The Second Circuit test also requires that the movant have a legally supportable defense or position within the underlying litigation. *American Alliance*, 92 F.3d at 61. In *American Alliance*, the Second Circuit found that in order to satisfy the meritorious defense element, the movant's defense "need not be ultimately persuasive at this stage." *Id*. at 61. "A defense is meritorious if it is good at law so as to give the factfinder some determination to make." *Id*.

(citing *Anilina Fabrique de Colorants v. Aakash Chems. and Dyestuffs, Inc.*, 856 F.2d 873, 879 (7th Cir. 1998)).

In the current case, the Debtors argue that neither EWC's or EWD's books and records reflect an amount due and owing under Claim 7691. Further, the Debtors argue that the IRS was the proper holder of Claim 7691 at the time of its disallowance. However, Forrest provides documentation to support the prima facie validity of Claim 7691 under Bankruptcy Rule 3001(f), and the prima facie validity of such claim remained upon the execution of the Forrest-BOC Transfer.

Regarding the priority of BOC and the IRS with respect to Claim 7691, "the relative priority of a federal tax lien is governed by federal law." *United States v. McCombs*, 30 F.3d 310, 321 (2d Cir. 1994). "In general, priority as a lienor is determined by the . . . rule of first in time is the first in right." *Id*. (quoting *Don King Prods. v. Thomas*, 945 F.2d 529, 533 (2d Cir. 1991)) (internal quotations omitted).

Per the Debtors' contentions, the Notice of Levy was not provided until August 5, 2003. However, BOC appears to have obtained and perfected a security interest in Forrest's accounts receivable on February 22, 1999, which is the date the UCC-1 statement was filed with the Wyoming Secretary of State. Therefore, per the rule of "first in time is the first in right," BOC would seem to have a priority over the IRS with regard to Claim 7691 since it appears to have perfected its security interest more than four years prior to the imposition of the IRS's lien. Since Debtors failed to provide notice to BOC regarding the 33rd Objection, Claim 7691 remains a valid claim. Further, as stated in footnote 1, the Court does not reach issues regarding the appropriateness of granting any relief regarding the treatment of Claim 7691 as a timely claim against EWC. Upon reviewing the elements of the "meritorious defense" presented by BOC and

based on the arguments made regarding Claim 7691 against EWC, the Court finds that BOC's arguments satisfy the "meritorious defense" standard for purposes of the consideration herein and thus, a prima facie case exists to warrant the Court's consideration of Claim 7691 against EWC.

3. *Prejudice to the Non-Movant*

The amount of prejudice to the non-movant is the final factor the Second Circuit examines in deciding a motion for reconsideration. *American Alliance*, 92 F.3d at 59. Generally, mere delay is not sufficient to demonstrate a sufficient level of prejudice. *Davis v. Musler*, 713 F.2d 907, 916 (2d Cir. 1983). In the instant case, there exists a minimal amount of prejudice to the Debtors.

The Debtors initially claimed that since the IRS, and not BOC, was the proper holder of Claim 7691, and since the IRS did not object to the 33rd Objection, it would be severely prejudiced if BOC's motion for reconsideration was granted. However, the prejudice would occur if the Debtors had made a distribution to the IRS, but since no distribution was made and to the extent Claim 7691 was brought before the Court in the correct estate, the IRS would receive notice of any adjudication of such claim before any distribution would be made. The Debtors also contend that since Claim 7691 was mistakenly filed against EWD, instead of EWC, BOC will not be entitled to any distribution. However, BOC may seek to have Claim 7691 treated as a claim against EWC.[7] Any potential prejudice experienced by the Debtors in having to expend time and effort arguing against such a result is minimized by the fact that BOC never received notice of the 33rd Objection, and thereby, was not given the opportunity to attempt to protect any right it had to a distribution.

[7] The Court is not deciding whether any such relief should be granted.

Finally, the Debtors argue that prejudice exists since BOC's motion for reconsideration was filed approximately two years after entry of the 33rd Order and approximately two months after BOC discovered Claim 7691 was disallowed and expunged. The Debtors have not articulated any specific prejudice other than the passage of time. Although BOC did file the present motion more than two years after entry of the 33rd Order, BOC was not given notice of the 33rd Objection or 33rd Order and therefore, the delay in filing its present motion was not deliberate but, instead, as a result of not being given notice. Moreover, BOC explains that when it found out that Claim 7691 had been disallowed and expunged, it sought to contact Debtors' counsel and reach an agreement. BOC's initial efforts to diligently resolve the dispute without court intervention should not be counted against it. Therefore, the Court finds that minimal, if any, prejudice will inure to the Debtors upon the granting of BOC's motion for reconsideration.

IV. Conclusion

The Court finds that the three Second Circuit factors weigh in favor of BOC. Namely, the Court finds that BOC's actions were not willful, BOC had a legally supportable defense within the underlying litigation, and minimal, if any, prejudice will inure to the Debtors upon the granting of the motion. Therefore, the relief sought should be granted and that portion of the July 22, 2004 order disallowing and expunging Claim 7691 should be vacated.

BOC is to settle an order consistent with this opinion. In such order BOC will be directed to seek relief regarding the treatment of Claim 7691 against EWC within thirty (30) days of the entry of that order.

Dated: New York, New York
August 28 2007

s/Arthur J. Gonzalez
UNITED STATES BANKRUPTCY JUDGE