UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 96-40590
	)	
WILLIAM M. GREEN	)	Chapter 13
Soc. Sec. No. 557-92-0969	)	
Debtor.	)	
WILLIAM M. GREEN	)	Adv. No. 97-4016
Plaintiff,	)	
-vs-	)	
	)	
JAY LOGAN, COLONIAL LEASING,	)	MEMORANDUM OF DECISION RE:
REPUBLIC LEASING, and	)	POST-CONFIRMATION AMENDMENT
EUPHONIX	)	OF EUPHONIX'S PROOF OF CLAIM
Defendants.	)	

The issues before the Court are the effect of Euphonix's amended proof of claim filed post-confirmation and whether Debtor's confirmed plan should be modified to provide for it. These are core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision shall constitute the Court's interim findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes Euphonix's amended proof of claim is untimely and that Debtor's confirmed plan cannot be modified to provide payments on the amended proof of claim. However, the validity of Euphonix's amended proof of claim may still be determined by this Court.

I.

William M. Green (Debtor) filed a Chapter 13 petition on August 8, 1996. Euphonix, Inc., (Euphonix) filed a proof of secured claim of $69,626.87 on September 3, 1996. By an amendment to his schedule of general, unsecured claims filed December 9,

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1996, Debtor stated Euphonix's claim was undisputed but that the amount was unknown. Debtor's plan was confirmed February 19, 1997. The confirmed plan did not include Euphonix as a secured creditor. It proposed to pay all unsecured claims in full over the five-year plan term from disposable income but the plan did not commit all disposable income to the payment of unsecured claims. Debtor approximated that the unsecured claims totaled $166,264.34, which is slightly higher than the total unsecured claims of $147,705.60 stated on Debtor's amendment to schedule of unsecured, general claim (some scheduled claims were not valued).

On March 31, 1997, Debtor commenced an adversary proceeding against Jay Logan, a former business associate, seeking a protective order regarding certain recording equipment. Debtor and Logan eventually reached an agreement. After some delay in the proceeding, Debtor amended his complaint on November 24, 1997 to add as defendants Colonial Leasing, Republic Leasing, and Euphonix.

In the amended complaint, Debtor alleged these defendants were in wrongful possession of property of the bankruptcy estate that consisted of recording equipment owned and leased by Debtor. Debtor complained Euphonix had possession of most of the equipment and had failed to give him an accounting for it. Debtor sought an order requiring these defendants to disclose the location and disposition of the equipment and Debtor wanted the Court to determine "the rights and responsibilities of all parties with regard to said disputed property." Debtor and Colonial Leasing later stipulated to Colonial Leasing's dismissal.

In an amended answer filed February 10, 1998, Euphonix stated it had leased certain equipment to Dakota Teleproductions, Inc., not Debtor, and that before Debtor had filed bankruptcy it had repossessed the equipment from Dakota Teleproductions, Inc., who had defaulted. Euphonix acknowledged that Debtor was a guarantor on the lease and that it had filed its proof of claim based on that guaranty.

On April 9, 1998, Euphonix moved for summary judgment on the grounds that the recording equipment was not property of the bankruptcy estate and that Debtor had no remaining interest in the lease because of the pre-petition default and repossession. On April 27, 1998, Euphonix filed an amended proof of claim for an unsecured claim of $81,796.75.

Debtor responded to Euphonix's summary judgment motion on May 20, 1998. He stated that Euphonix had answered many of the questions raised in his complaint because he now better knew what had happened to some of the leased equipment. He did not dispute that he had no ownership interest in the equipment and that the equipment was not property of the bankruptcy estate. However, Debtor wanted the adversary proceeding to continue so that the Court could determine how much he owed Euphonix now that Euphonix had repossessed and sold some equipment and now that Euphonix had filed "conflicting" [Debtor's word] proofs of claim.

The Court denied Euphonix's motion for summary judgment because, in essence, all issues originally raised in Plaintiff's amended complaint had been resolved. The remaining issue,

generated by Euphonix's response to Debtor's summary judgment motion and by Euphonix's April 27, 1998 proof of claim, was the effect of Euphonix's April 27, 1998 proof of claim. The Court requested briefs. In their respective briefs, both Debtor and Euphonix agreed Euphonix should be allowed to amend its claim. Euphonix argued that its original proof of claim for a secured claim was inadvertent and it argued equity should permit it to get its amended claim included in a modified plan. Euphonix argued there is a liberal allowance for amended proofs of claim in this Circuit. Debtor acquiesced to the amendment in hopes of speeding toward a trial to determine the validity of that amended proof of claim. Debtor said the issue of whether Debtor's confirmed plan should be modified should not be decided until the amount of the claim is fixed.

After receiving time to foster a settlement, Chapter 13 Trustee Dale A. Wein fild a brief on November 13, 1998. He argued Euphonix's amended proof of claim was not timely under F.R.Bankr.P. 3002(c) and that the change of the claim from secured to unsecured was not just a typographical or other minor error that could easily be recognized and accommodated in the confirmed plan. Trustee Wein emphasized that all other unsecured creditors will be prejudiced if Euphonix is permitted to amend its claim after confirmation because a 100% payout of unsecured cliams will no longer be possible based on Debtor's current monthly plan payment.

II.
AMENDMENT OF A PROOF OF CLAIM

Applicable law. A proof of claim may generally be amended through one of two courses. Federal Rule of Bankruptcy Procedure 3002(c) provides the most direct route through one of several conditions for extending the time to file a proof of claim therein. A court may even extend those extended deadlines but it may not enlarge the conditions for an extension under Rule 3002(c). F.R.Bankr.P. 9006(2)(3); *In re Greenig*, 152 F.3d 631, 634-36 (7th Cir. 1998). However, under F.R.Bankr.P. 9006(b)(1) excusable neglect is expressly eliminated as an equitable justification for allowing an untimely proof of claim.

A proof of claim may also be amended under F.R.Civ.P. 15(c), which is applicable to the claims process through F.R.Bankr.P. 7015, which provides that F.R.Civ.P. 15 applies in adversary proceedings, and F.R.Bankr.P. 9014, which applies Rule 7015 to contested matters, including the determination of claims. Under Rule 15(c), a claim may be amended and may relate back to the original claim if the amended claim arose out of the same conduct, transaction, or occurrence set forth in the original claim.[1] *In re Unroe*, 937 F.2d 346, 349 (7th Cir. 1991).

> "Great liberality in permitting amendments of claims in bankruptcy proceedings is proper. . . . If the record

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[1] If events between the date of its original proof of claim was filed and April 27, 1998 changed Euphonix's claim, Euphonix may have attempted to supplement its claim under F.R.Civ.P. 15(d) and F.R.Bankr.P. 7015. No motion for that relief was filed, however.

> made within the statutory period, *formal or informal*, disclosed facts showing an assertion of a claim against the estate and an intention by the claimant to share in its assets, there would be a basis for the proposed amendment. . . ."

In re Donovan Wire & Iron Co., 822 F.2d 38, 39 (8th Cir. 1987)(quoting *Tarbell v. Crex Carpet Co.*, 90 F.2d 683, 685-86 (8th Cir. 1937) (emphasis in quoting case).

Discussion. Euphonix's April 27, 1998 proof of claim cannot be deemed a timely amendment to its original proof of claim. Euphonix has not shown that its April 27, 1998 proof of claim fails under one of the exceptions provided in F.R.Bankr.P. 3002(c). Federal Rule of Civil Procedure 15(c) also does not open a window for an amendment. Changing the proof from secured to unsecured and increasing the amount claimed by $12,169.88 cannot be deemed a mere technical correction of an inadvertent error. Most important, nothing in the record before confirmation put anyone on notice that Euphonix's original proof of claim was in error and that Euphonix intended to participate in the plan as an unsecured creditor. Whatever Debtor may have known, if anything, about the nature of Euphonix's claim, the Court, Trustee, and other creditors had only Euphonix's original proof of a secured claim to which they could refer. Euphonix did not object to Debtor's plan, which did not provide any treatment of its claim. It was over a year after confirmation of a plan, over four months after Euphonix was brought into the adversary proceeding and over two months after Euphonix filed its amended answer before Euphonix's amended proof of claim

finally surfaced. *See Holstein v. Brill*, 987 F.2d 1268, 1271 (7th Cir. 1993)(passing milestones in a case may make an amendment less appropriate). Finally, the guaranty status of Euphonix's original claim did not put anyone on notice that Euphonix's claim really was unsecured rather than secured. *See also In re Best Refrigerated Express, Inc.*, 204 B.R. 44 (Bankr. Neb. 1996); *In re Wrenn Insurance Agency of Missouri, Inc.*, 178 B.R. 792, 798-99 (Bankr. W.D. Mo. 1995).

The facts here are distinguishable from those in *F.D.I.C. v. Be-Mac Transport Co. (In re Be-Mac Transport, Inc.)*, 83 F.3d 1020 (8th Cir. 1996). In *Be-Mac*, the bankruptcy court denied the creditor's motion to amend its proof of claim from unsecured to secured shortly before confirmation of a Chapter 11 plan; the creditor was precluded from participating in the confirmation process as a secured creditor. The Court of Appeals overturned the bankruptcy court because the amended proof of claim should have been allowed to insure the creditor's participation in the confirmation process and to allow the creditor to protect its lien. *Id.* at 1026-27. Here, Euphonix's April 27, 1998 proof of claim was *filed* after confirmation. Further, whether the April 27, 1998 proof of claim is allowed under § 502(a) and F.R.Bankr.P. 3001(f) will not affect any lien held by Euphonix nor affect the discharge of Euphonix's claim, as discussed below.

III.

MODIFICATION OF A CONFIRMED CHAPTER 13 PLAN

Applicable law. Confirmation of a Chapter 13 plan binds the debtor and each creditor, whether or not the creditor accepts the treatment provided. 11 U.S.C. 1327(a). A confirmed Chapter 13 plan, however, can be modified to change certain provisions. 11 U.S.C. § 1329(a). The modification may change the amount of a payment of a claim provided in the plan, change the time for such a payment, or alter the distribution to a creditor whose claim is provided for in the plan but who has been paid from another source. 11 U.S.C. § 1329(a)(1-3). A modification of a confirmed plan must meet the same requirements for approval as did the plan when it was first confirmed. 11 U.S.C. §§ 1329(b), 1322(a), 1322(b), 1323(c), and 1325(a).

Discussion. As provided in § 1329(a), the types of modifications that can be made to a confirmed Chapter 13 plan are limited. Even assuming Euphonix's April 27, 1998 proof of claim is a timely amended proof of claim, § 1329(a) does not provide any basis for modifying Debtor's confirmed plan to treat that amended proof of claim. Section 1329(a) refers to modifications only to claims already "provided for by the plan." Euphonix's claim is not presently treated in Debtor's confirmed plan. Therefore, there is no existing plan treatment to modify by increasing or reducing the amount of payments as allowed by § 1329(a)(1), by extending or reducing the time for payments as allowed by § 1329(a)(2), or by

accounting for payments received outside the plan.

Sections 1328(a) and 1329(a) leave all parties in the same position they were at confirmation. Euphonix's claim (under either proof) is not "provided for by the plan" and will not be discharged. 11 U.S.C. § 1328(a). Unsecured creditors will still be paid in full. Debtor can use disposable income not committed to plan payments to pay Euphonix's claim outside the plan.

IV.
DETERMINING EUPHONIX'S CLAIM

Finally, the Court concludes that it may still determine the validity of Euphonix's April 27, 1998 proof of claim as requested by Debtor. Determination of a claim against the estate is a core matter; there is no time limitation imposed by the jurisdictional provisions of 28 U.S.C. § 157(b)(2) since the bankruptcy estate still exists. 11 U.S.C. § 1306(a). Debtor has waived the timeliness issue, so 11 U.S.C. § 502(b)(9)(1994) does not preclude the Court from determining the amount of the April 27, 1998 claim. Just because Euphonix's April 27, 1998 proof of claim was not timely and cannot be provided for in Debtor's plan does not deem it a disallowed claim. *See, e.g., United States v. Waindel (In re Waindel)*, 65 F.3d 1307 (5th Cir. 1995). Finally, a determination of Euphonix's April 27, 1998 claim will benefit Debtor and Euphonix without affecting other creditors since Debtor's confirmed plan will not be modified to provide for the amended claim.

No order will be entered at this juncture. Counsel for Debtor

and Euphonix shall confer and promptly advise Nita Sarvis, the Court's scheduling deputy, when they will be for ready for trial on the validity of Euphonix's April 27, 1998 proof of claim and how much trial time is needed.

Dated this 4th day of December, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT ★ SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
DEC 04 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

DEC 04 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By_____

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Total notices mailed: 7

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