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	)	EUPHONIX'S MOTION
EUPHONIX	)	FOR SUMMARY JUDGMENT
Defendants.	)	

The matter before the Court is the Motion for Summary Judgment filed by Defendant Euphonix on April 9, 1998 and Plaintiff-Debtor's response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendant Euphonix's Motion must be denied and that argument and evidence must be received on whether Euphonix can amend its claim.

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 Schedule F filed December 9, 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. Debtor approximated that unsecured claims totaled $166,264.34, which is

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slightly higher than the total unsecured claims of $147,705.60 stated on Debtor's amendment to schedule F (some scheduled claims were not valued).

On March 31, 1997, Debtor commenced an adversary proceeding against Jay Logan, a former business associate. The complaint and accompanying motion for a protective order sought to sequester certain recording equipment. A temporary restraining order was entered with Defendant Logan's consent pending a final resolution of the complaint. When the adversary proceeding did not timely progress, the Court established a deadline for progress in lieu of dismissal. Debtor responded on September 15, 1997 by moving to amend his complaint to add as defendants Colonial Leasing, Republic Leasing, and Euphonix. A permanent injunction was entered against Defendant Logan on October 22, 1997 with his consent. The additional parties were added by order entered October 24, 1997 and Debtor filed an amended complaint against the new defendants on November 24, 1997.

In the amended complaint, Debtor alleged the 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 Defendants to disclose the location and disposition of the equipment and Debtor wanted the Court to determine "the rights and responsibilities of all the parties with regard to said disputed property."

Defendant Republic Leasing Company filed a general denial on December 29, 1997. Colonial Pacific Leasing Corporation filed a general denial on February 6, 1998. 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 a 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 $81,796.75, unsecured.

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" proofs of claim.

II.

SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." F.R.Bankr.P. 7056 and F.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein). Although inferences may be drawn from the underlying facts, the matter must be viewed in the light most favorable to the party opposing the motion. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986), and cites therein). Further,

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial.

Amerinet, 972 F.2d at 1490 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

AMENDMENT OF A PROOF OF AN UNSECURED CLAIM. A proof of claim filed in compliance with 11 U.S.C. § 501 is deemed allowed. 11 U.S.C. § 502(a). If the proof is filed in compliance with the Federal Rules of Bankruptcy Procedure, it constitutes prima facie evidence of the validity and amount of the claim. F.R.Bankr.P. 3001(f).

An unsecured creditor must timely file a proof of claim in a Chapter 13 case for the claim to be allowed. 11 U.S.C. § 502(a) and F.R.Bankr.P. 3002(a). The deadline for filing a proof of an unsecured claim in a Chapter 13 case (non governmental creditor) is ninety days after the § 341 meeting of creditors was first set. F.R.Bankr.P. 3002(c). It may be extended only upon certain circumstances. F.Rs.Bankr.P. 3002(c) and 9006(b)(3). The federal rules do not contain a similar deadline for secured creditors to file a proof of claim in a Chapter 13 case. *See, e.g., GMAC v. Judkins (In re Judkins)*, 151 B.R. 553 (Bankr. D. Colo. 1993). Neither the Bankruptcy Code nor the federal bankruptcy rules specifically address the amendment of claims.[1] Some bankruptcy courts have looked to Fed.R.Civ.P. 15(a). *See, e.g., In re Best Refrigerated Express, Inc.*, 192 B.R. 503 (Bankr. D. Neb. 1996).

III.

Euphonix is correct that there is no dispute that the subject property is not property of the bankruptcy estate. However, F.R.Bankr.P. 3007 does permit an objection to a claim to be combined with an adversary proceeding, which Debtor has done. Since there is not sufficient evidence before the Court to determine Euphonix's claim, Euphonix's summary judgment motion must be denied. However, holding a trial to determine the amount of

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[1] Federal Rule of Bankruptcy Procedure 3008 allows a party in interest to move for reconsideration of *an order* allowing or disallowing a claim. The rule does not address amendments to previously uncontested claims.

Euphonix's claim may not produce any useful result. Debtor's seemingly simple request that the adversary continue so that Euphonix's claim can be valued is not so simple after all.

Before confirmation, Euphonix filed proof of a secured claim. Euphonix secured claim was not provided for in the plan nor disallowed. Therefore, that claim would not be discharged under 11 U.S.C. § 1328. Although Debtor's and Euphonix's counsel may have contemplated that Euphonix's claim would be determined after confirmation, other unsecured creditors had no notice of that intention through the plan. Further, the deadline for filing proof of an unsecured claim has passed unless Euphonix can meet one of the deadline exceptions in F.R.Bankr.P. 3002(c) or otherwise show that it may amend its claim from a secured claim to an unsecured claim after confirmation. Euphonix's ability to amend its claim, therefore, is the issue that must be addressed first. If Euphonix can now amend its claim, then we must determine a second legal issue of whether the confirmed plan can be modified to include Euphonix's unsecured claim. 11 U.S.C. § 1329(a). If the plan can be modified, only then do we need to receive evidence on the actual value of Euphonix's unsecured claim.

By August 17, 1998, Euphonix should advise the Court and Debtor's counsel of its position regarding the application of a filing deadline exception under Rule 3002(c) or another rule of law that permits post-confirmation amendment of its claim. If Euphonix contends that it can lawfully amend its claim, Debtor has until August 31, 1998 to respond. With their responses to this

Memorandum, each party can file a brief regarding the timeliness of Euphonix's amended proof of claim in this Chapter 13 case where a plan has been confirmed, where the creditor's initial proof of claim was for a secured claim and the amendment is for an unsecured claim, and where the confirmed plan did not specifically contemplate a post-confirmation valuation of Euphonix's claim.[2] Upon receipt of the responses and briefs, the Court will set a hearing on this issue, if needed.

An appropriate order shall be entered.

Dated this 21st day of July, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk
By: M. Kay Rewer
Deputy Clerk

UNITED STATES BANKRUPTCY COURT ★ SEAL

CERTIFICATE OF SERVICE
I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota
By: M. Kay Rewer
Date: 07-21-98

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered
JUL 21 1998
Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

[2] Counsel are cautioned that much of the existing case law arises from Chapter 11 or does not reflect amendments to 11 U.S.C. § 502(b) and F.R.Bankr.P. 3002 in 1994. *See*, e.g. *Holstein V. Brill*, 987 F.2d 1268 (7th Cir. 1993), and *I.R.S. v. Chavis (In re Chavis)*, 47 F.3d 818 (6th Cir. 1995).

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Total notices mailed: 9

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