

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK**

**IN RE:**

**Joseph C. George,**

**CASE NO. 93-21658**

**AMENDED DECISION**

**Debtor(s).**

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**BACKGROUND**

The Trustee has objected to Claim of Marine Midland Bank ("Marine") in the amount of \$46,779.18, filed on December 20, 1995, as being late filed, since the last date to file claims in this case, which was filed as a Chapter 7 case on July 20, 1993, was November 26, 1993 pursuant to the August 6, 1993 Notice of the Court.

Marine has opposed the Trustee's objection to its claim asserting alternatively that:

1. Since Marine was never properly served with the August 6, 1993 Notice advising creditors and parties in interest of the last day to file claims, it has not received fundamental due process and therefore the Court should either reject the application of the November 26, 1993 bar date to Marine or enlarge the time under Rule 9006 for Marine to file a claim to a time on or after December 20, 1995.
2. Its September 15, 1993 Stipulation with the then Trustee (Mr. Cooper), the debtor and the debtor's attorney, which was approved by a September 16, 1993 Order of the Court, should be found by the Court to be an informal proof of claim which was then amended by Marine's December 20, 1995 Claim.

I have reviewed the Stipulation, the submissions of the interested parties, the relevant case law and the facts and circumstances of this case, and I do not believe that it would be a proper exercise of my discretion to find that Marine's September 18, 1993 Stipulation for relief from stay and the abandonment of the Trustee's interest in certain collateral was an informal proof of claim. The parties have extensively briefed and argued the issue. I find as follows:

1. The Stipulation does not in my opinion assert a present intent to hold the Debtor or

the Chapter 7 estate liable for the full amount of the claim beyond the realization of any proceeds from the liquidation of the collateral. This is required by *In re W.T. Grant Co.*, 53 B.R. 417, 421 (Bankr. S.D.N.Y. 1985) and later cases. (To constitute an informal proof of claim, there must be some informal writing or some pleading in the bankruptcy case which is a timely assertion by the creditor of his claim against the debtor's estate, and the timely written assertion or pleading must apprise the court of the existence, nature and amount of the claim as well as evidence an intent on the part of the claimant to hold the debtor liable for that claim.)

2. The Stipulation specifically provides for notification to the Trustee of any surplus realized from the liquidation of the collateral, but it does not in any way reserve a right to participate in the case for any deficiency (either by the filing of an accounting, a proof of claim or otherwise).
3. The Stipulation was drawn by the attorneys for Marine.
4. Until December 20, 1995, Marine did not further participate in the case in any way after its deficiency had been fixed which would have evidenced an intent to recover its deficiency.
5. The facts of this case do not otherwise justify an exercise of the Court's discretion to find that the Stipulation was an informal proof of claim or that it should be amended at this late date. Among other facts and circumstances, it should be noted that the successor Trustee and other parties in interest have been negotiating a settlement of two adversary proceedings based on the amount of the filed claims. Although because of the nature of the adversary proceedings (requests for denial of discharge) I am not suggesting that there is ultimate prejudice to the parties because Marine has an interest in any possible settlement, nevertheless there has been substantial time and expense based on false assumptions because of Marine's failure to file a timely formal proof of claim.
6. Marine is a sophisticated creditor as to bankruptcy proceedings and its attorneys representing it in this case, Harter, Secrest & Emery, are most sophisticated and knowledgeable as to bankruptcy matters.
7. This case is very similar to *In re Anchor Resources Corporation*, 139 B.R. 954 (D. Colo. 1992). Although not a case from this Circuit, the analysis therein applies well to the facts of this case.

As to Marine's assertion that it did not have actual notice of the fact that this was an asset case from its inception and that there was a bar date of November 26, 1993 to file claims, in my

opinion the pleadings and submissions are presently insufficient for me to make the necessary finding that the bar date should or should not be enlarged on equitable grounds.

It is clear from the state of the proceeding to date that:

- A. The Court was in error in that it did not properly serve Marine with the August 6, 1993 Notice which included notice of the November 26, 1993 bar date.
- B. Marine and its attorneys have asserted that neither Marine or Harter, Secrest & Emery ever received a copy of the August 6, 1993 Notice.

What I have not heard from Marine or Harter, Secrest & Emery is that neither of them were otherwise aware of the bar date from:

- A. Discussions with the Denton, Keyser law firm, which incorrectly received the August 6, 1993 notice.
- B. Discussions with the Trustee or the Court in connection with the September 15, 1993 Stipulation or the case.
- C. A review of the Court's file.
- D. A review of the case information on PACER which is utilized very frequently now and was in August and September, 1993 by Harter, Secrest & Emery.

Marine's submissions are careful to state that they never received the written notice, but they do not definitely state that neither Marine or Harter, Secrest & Emery otherwise had actual notice of the bar date. We need to determine that question of fact.

This matter will be adjourned to allow additional submissions or for additional discovery by the Trustee on this question.

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/s/  
**Hon. John C. Ninfo, II**  
**U.S. Bankruptcy Judge**

Dated: February 21, 1996