

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

HENRY M. & SYLVIA C. STEPIEN

Case No. 92-11951 K

Debtors

This matter came before the Court on the Debtors' motion objecting to the claim of Midlantic Bank, N.A. ("Midlantic"). The motion was made nearly five years into this case, which began in Chapter 13, converted to Chapter 11 and then reconverted to Chapter 13. The bar date for claims was October 5, 1992, initially, and then June 14, 1993, after reconversion (at the Debtors' request) to Chapter 13. Midlantic's claim was filed a year and a half after the second bar date (filed on December 27, 1995) in the amount of \$104,652.05 as a claim secured by a judgment lien on the real property of the Debtors, and the real property of Mr. Stepien's corporation, H.M.S. Direct Mail Service, Inc. Midlantic's judgment was taken in 1991, in connection with a business debt of the corporation, personally guaranteed by the Stepiens. An amended proof of claim was filed by Midlantic's successor in interest (actually by the local attorney for said creditor) in a reduced amount of \$29,652.37 plus interest. That amended proof of claim was filed on February 11, 1997, in response to the Debtors' January 21, 1997 objection which pointed out that the original proof of claim had neglected to credit the Debtor with a \$75,000 payment that had been made upon the judgment. Obviously, the claim was grossly and inexcusably late-filed and could have been disallowed under Rule 3007 had it not been for the

fact that the Debtors did not raise this objection until almost one year after they received the Trustee's February, 1996 "Motion to Allow Additional Claims" and this Court's Order giving the Debtor ten days within which to raise objection.¹ The Debtors, however, do not just want Midlantic's claim disallowed in the bankruptcy case; they want to extinguish Midlantic's lien on their home, for all purposes.²

The Debtors would have the Court believe that the validity of Midlantic's remaining \$29,652.37 claim (which, with interest on the \$236,159.32 judgment at the judgment rate, is substantially in excess of that amount) centers on whether the balance of their obligation to Midlantic was compromised and released by agreement between Mr. Stepien and Midlantic's representative, Anura Unger, when Mr. Stepien sold, for Midlantic's benefit, \$75,000 worth of equipment and had the purchaser remit the \$75,000 proceeds to Midlantic.

Mr. Stepien testified that Ms. Unger agreed in June, 1992, on Midlantic's behalf, that if he were able to net \$75,000 for Midlantic from the sale of the equipment, Midlantic would forgive the last \$29,657.37 in principal, and all the interest, on the \$236,159.32 judgment. (There had been another \$131,506.95 paid from the sale of business property that also was

¹The very purpose of that Motion and Order is to make certain that the Debtor and counsel know what claims have or have not been filed, so that the Debtor may address all claims issues early in the case, rather than at the end of the case. Were this writer asked to overrule the objection on this basis alone, I would do so without hesitation. *See In re White*, Case No. 89-12820, Dec. of June 27, 1994.

²To that extent, the proper procedure would have been an Adversary Proceeding under 11 U.S.C. § 506(b) and Rule 7001(2). In light of the disposition today, however, such a proceeding would likely be unavailing.

subject to the judgment lien.) Ms. Unger, on the other hand, testified that the June, 1992 telephonic agreement was that if Midlantic received \$75,000 from the sale of the equipment, then Midlantic would agree to release the balance of the judgment only if half of the remaining principal balance (*i.e.*, half of the \$29,657.37) were paid by the Debtor within 90 days. It is undisputed that the \$75,000 was paid directly to Midlantic by the purchaser of the equipment in July of 1992 (although there was no evidence as to who remitted the check), and that Mr. Stepien made no further payments to Midlantic other than through the Chapter 13 Trustee before filing the present objection to the claim.

There is no documentary support for the Debtors' version of the facts. Some bank records and records of "charge-offs" produced by Midlantic on the Debtors' demand are of questionable value, if any. Nothing produced clearly bespeaks a release. Testimony was offered by Mr. Stepien's sister, who was general manager of the business. Her testimony was offered to corroborate the fact that it was Mr. Stepien's understanding as of June of 1992, that he would be free of the Midlantic judgment debt if he could close the sale of the equipment for \$75,000. Midlantic offered one document in support of Ms. Unger's version of the facts, purporting to be her file notes of July 17, 1992. These notes indicate an agreement to accept the \$75,000 and half of the remaining principal balance. (Claimant's Exhibit 6.)

The Debtor has attacked Ms. Unger's credibility on a number of fronts:

- Ms. Unger signed the original proof of claim which she now admits mistakenly failed to credit the Debtors with the \$75,000 payment.³

- Ms. Unger undertook no collection efforts from these Debtors during the three and one-half year period between the time Midlantic received the \$75,000 and the time she filed the erroneous claim in December of 1995. (Her employer's attorneys did, however, pursue Midlantic's rights in the related corporate bankruptcy.) Why did Midlantic not pursue its claims in the Debtors' case until several years after the claims bar? The Debtors suggest that Mr. Stepien's commission-free efforts toward a buyer for the equipment support the inference that an agreement had been reached and a successful effort on his part would cause Midlantic to provide a release.

- Ms. Unger claims that Midlantic did not pursue its lien claim against the equipment itself only because it wished to assist Mr. Stepien in selling his business as a going concern. The Debtors wish the Court to conclude that that is a falsehood, and that the real reason that Midlantic did not pursue its lien on the equipment was because without Mr. Stepien's efforts to find a buyer the equipment was unmarketable.

³It is inscribed on Official Form # 10 that the "Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571."

Ironically, it is Mr. Stepien's testimony here that cannot be credited, and perhaps that of his sister as well. Not only does their testimony fail of its own merit,⁴ but it is belied by the record in the bankruptcy case file. Although the contents of the file were not presented at hearing, they have been judicially noticed at the Court's own instance, as is always the case in matters like this that are directed to the case file and the events reflected therein such as bar dates, lists of creditors, and orders allowing claims..

At hearing Mr. Stepien testified under oath that he was "flabbergasted" to learn in 1996, that Midlantic had filed a claim, because he felt "relieved of debt" to Midlantic when he made the "agreement" with Ms. Unger in June of 1992, and closed the sale of the equipment in July. This testimony cannot be reconciled with the fact that on January 3, 1993, he swore under oath in a "Petition for Conversion," notarized by his current counsel, and filed here on January 19, 1993, that "In our original papers a debt was listed to Midlantic Commercial Leasing. We believe this debt is now reduced to some \$15,000." (Document #44) Furthermore, after the case was reconverted to Chapter 13 on the basis of that Motion, the Debtor appeared at a § 341 meeting (on April 5, 1993) at which he caused the Chapter 13 Trustee to include Midlantic in his and his wife's Plan for a "Judgment. (13,000)" to be paid in full along with other claims on the promise that "within 3 years debtor will retire, sell home and business and pay off plan." All of

⁴Mr. Stepien has been a businessman for many years, but not only did he fail to get the purported agreement in writing, he failed to confirm it by letter, or by memorandum upon tender of the \$75,000 check, or by seeking a "zero balance" statement, or by seeking a recordable discharge of the judgment lien.

this was repeated in the Order of Confirmation dated April 7, 1993, which was served on the Debtors. (Document #58.)

Moreover, in June of 1993, Debtors' counsel sought additional fees (Document #62) and noted a 7/31/92 "phone with C. Anger of Midlantic" and, on 3/23/93 - "Two phone conversations re status Midlantic claim -- phone call to the Chapter 13 Trustee." The latter phone conversations occurred just before the April, 1993 § 341 meeting and confirmation hearing. Thus, counsel had focused his attention on the Midlantic matter just before his clients included Midlantic in their Chapter 13 plan as a judgment creditor.

How can the Court reconcile Mr. Stepien's testimony that he felt free of debt to Midlantic in July of 1992, with the 1993 oaths? The Court finds that Henry Stepien's testimony before this Court on May 20, 1997, under oath, is not credible. Either that, or his 1993 oaths were not credible. Consequently, the supporting testimony of his sister, Blanch Cena, is also suspect. The Debtor's sworn statements in 1993 seem to support Ms. Unger's testimony to the effect that at one point she was willing to settle for half of \$29,657.

The Debtors' objection is overruled. The amended claim is allowed. Further, Henry Stepien shall appear before the Court on **July 15, 1997 at 2:00 p.m.** to show cause why he should not be referred to the U.S. Attorney under 18 U.S.C. § 3057, in light of what appears to be either false testimony at hearing or false oaths in the filed documents. (The Court is also troubled by the fact that counsel for the Debtors attention was personally focused upon this claim in 1993, four years before he affixed his signature to the claims objection that asserts that the

debt was released in 1992, and the fact that counsel apparently did not examine his clients' previously filed attestations in this case, before commencing the present objection.)

SO ORDERED.

Dated: Buffalo, New York
June 30, 1997

U.S.B.J.