

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF NEW YORK

In re

GERARD M. and ELSA M. WOLF

Case No. 89-10041 K

Debtors

ORDER AND MEMORANDUM

DISALLOWING CLAIM

On October 6, 1993 there came before the Court, Trustee William E. Lawson's Objection to the Proof of Claim of Joint Venture Assets Acquisition, as assignee of First City National Bank and Trust. (Claim #24). The claim was filed on November 15, 1990, several months after the May 31, 1990 bar date for the filing of claims.

Joint Venture Acquisition opposed the objection. The Affirmation of its attorney represents, inter alia, that "At no time was a notice received by First City, Joint Venture Asset Acquisition or your affirmant indicating a date by which proofs of claim must be filed."

Rarely, if ever, has the Court seen such a bold, unequivocal statement made under penalty of perjury by an attorney acting as such (rather than as a principal with full, personal

knowledge of the facts).<sup>1</sup> Nonetheless, such an attestation does not persuade the Court to set aside the clear records of the Court.

The creditor admits receiving notices from the Clerk both before and after the claims bar notice, but denies receipt of that particular notice. That notice, fixing May 31, 1990 as the bar date, is the subject of an affidavit of mailing executed by a Deputy Clerk on March 2, 1990. The Court finds that it was mailed to all known parties in interest.

It was not until Claim #24 was in fact filed that the Court was informed that First City's claim had been assigned to Joint Ventures Acquisition. Thus, the notice of the claims bar would have been mailed to First City. If Joint Venture Acquisition or its counsel did not receive the notice, it is more likely that First City did not forward it, than it is likely that First City did not receive it.<sup>2</sup>

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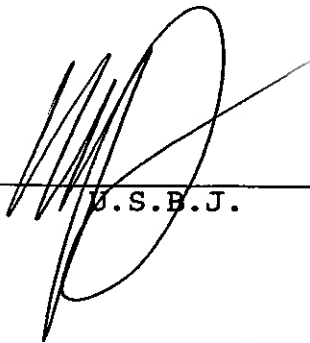
<sup>1</sup>Converting what a client tells counsel into counsel's own sworn statement could cost the attorney his or her license to practice.

<sup>2</sup>The Court notes that Joint Venture Acquisition bought this loan from First City as part of a purchase of "defaulted loans," and that that purchase occurred in May of 1989. If First City did not take steps to protect Joint Venture Acquisition, it may have some liability under the agreements governing the acquisition.

A notice duly mailed is presumed received. Counsel's affirmation here does not rebut the presumption. The objection is sustained. Claim #24 will be allowed only as a late filed claim.

SO ORDERED.

Dated: Buffalo, New York  
October 18, 1993



U.S.B.J.