

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

ROBERT R. VILLANI
SANDRA R. VILLANI

Case No. 87-10391 K

Debtors

DECISION AND ORDER

A creditor, J.M. Heineke Assoc. of 3859 North Buffalo Road, Orchard Park, New York, opposes the Trustee's Rule 3007 Motion to Disallow Heineke's \$81,796.74 claim (Claim #21) as "late-filed" under Bankruptcy Rule 3002.

First, J.M. Heineke asserts that the Court's "Notice of Need to File Proof of Claim Due to Recovery of Assets" (which was dated April 9, 1990 and which set July 9, 1990 as the claims bar date) was not received by Heineke until September 11, 1990. Heineke appends some sort of so-called "Transaction Report" to substantiate this assertion. The "Transaction Report" and its significance is unexplained. I find it inadequate to rebut the presumptions created by the Court's records, showing notice sent to all creditors (including Heineke at its correct address) on April 9, 1990. J.M. Heineke was duly listed on the debtor's schedules and mailing matrix. The Clerk's affidavit of mailing notes that 100 notices were sent; and the mailing matrix contains precisely 100 entries, including Heineke's. This results in a presumption that notice was duly received in a timely fashion and that presumption has not been overcome. Accordingly, I find that notice

was duly mailed to Heineke on April 9, 1990.

Second, at oral argument Heineke asserted that the Proof of Claim it filed in the case of Cataract Lumber and Home Center, Inc. should be found to have properly asserted at least an "informal claim"¹ in the case of Robert and Sandra Villani, given the facts that Heineke clearly had a judgment against both Cataract and the Villanis. The Villanis were principals of Cataract, which was recited as a "d/b/a" of Mr. Villani in the Court's records of their bankruptcy petition. (It is important to note that the two cases had different Trustees.)

"[K]nowledge that [the claimant] might assert a claim is not ... knowledge that a claim was, indeed, being asserted." *In re W.T. Grant Co.*, 53 B.R. 417, 422 (Bankr. S.D.N.Y. 1985). Thus, even if the same Trustee served in both cases, knowledge that Heineke could assert a claim against the estate of Villani is not notice that such a claim was, in fact, being asserted.

Furthermore, if the gravamen of Heineke's argument is that the Clerk's cross-referencing of the two cases² put the

¹An "informal claim" is something less than a Proof of Claim, which was timely filed and which may be amended at any time to meet the requisite formalities. 8 Collier on Bankruptcy ¶ 3001.03(b) 15th Ed. 1992).

²In fact, the Clerk over-emphasized the relationship of the two cases by reflecting "Cataract Lumber and Home Center, Inc." as a "d/b/a" for Robert R. Villani and Sandra R. Villani. Cataract Lumber and Home Center, Inc. was not a name by which the Villani's "did business," nor had the Villanis shown it as a "d/b/a" in their

Villani Trustee (Mr. Horwitz) on notice of the fact that claims allowed against Cataract should be deemed asserted against Mr. Villani as well, the argument must similarly fail.

"The general rule is that a claim arises where the creditor evidences an intent to assert its claim against the debtor. Mere knowledge of the existence of the claim by the debtor, trustee, or bankruptcy court is insufficient." *Wilkins v. Simon Brothers, Inc.*, 731 F.2d 462 (7th Cir. 1984).

Mr. Horwitz had knowledge of the fact that Mr. Villani was a principal of Cataract and was liable on certain of Cataract's debts³ in general, and the Heineke debt in particular.

However, the Villani case was not filed until after Heineke filed its claim against Cataract. Thus it is impossible for that claim to be construed as satisfying the one element that appears to be the sine qua non of an "informal proof of claim."⁴ -- the evidencing of an intent to assert the creditor's claim against the debtor's estate. Regardless of the language used in the Proof

petition. Cataract apparently was a duly-formed corporation of which Robert Villani was a principal.

³The Villani's Schedules and Statements clearly state that there was personal liability on certain debts of Cataract, including the Heineke debt.

⁴See the authorities discussed at 8 Collier on Bankruptcy, ¶ 3001.03[3] (15th Ed. 1992), particularly footnotes 36 and 53 and text at footnotes 50 and 51.

of Claim, Heineke's Proof of Claim filed on November 10, 1986 could not possibly assert a claim against the bankrupt estate of the Villani's, who did not file a bankruptcy petition until more than five months later, on March 20, 1987.

The Court will leave to an appropriate case the question of whether the result would be different had the Villani case already been filed and had (1) the same Trustee been appointed to both cases, or (2) the Villani Trustee had actual knowledge of the claim filed by Heineke in the Cataract case, or (3) Heineke been actually misled, by the Clerk's cross-referencing, into believing that its claim filed in the Cataract case constituted a filing in the Villani case.

Claim #21 is disallowed, other than as a late-filed claim.

Dated: Buffalo, New York
November 20, 1992



U.S.B.J.