IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
HAROLD EUGENE O'CONNOR,	§	CASE NO. 99-36662-SAF-7
	§	
DEBTOR(S).	§	

MEMORANDUM OPINION AND ORDER

On August 16, 2001, H.C. Ruparelia filed a proof of claim covering a land claim for $938,511 and an "Elliott" debt claim for $52,000. On October 22, 2002, Harold E. O'Connor, the debtor, filed an objection to the proof of claim. On December 12, 2002, the court held a hearing on the portion of the objection to claim pertaining to the Elliott debt. The court did not complete the hearing on December 12, 2002.

By scheduling order entered February 27, 2003, the court, *sua sponte*, adopted the adversary proceeding rules to the Elliott debt claim allowance hearing. The court set trial docket call for April 14, 2003, at 1:30, and provided that evidence from the December 12, 2002, hearing would be considered part of the trial record. The parties were required to submit a joint pre-trial order, exchange witness lists and exhibits, and file proposed

findings of fact and conclusions of law. Ruparelia complied with the scheduling order. O'Connor did not comply.

By order entered April 10, 2003, the court continued the trial docket call to June 9, 2003, at 1:30 p.m. At the trial docket call on June 9, 2003, the court set the trial for the Elliott debt claim allowance on June 24, 2003, at 9:30 a.m., confirming that setting by order entered June 12, 2003. Even after the trial docket call, O'Connor did not serve and file an exhibit or witness list. O'Connor neither filed proposed findings of fact and conclusions of law, nor did he file a proposed pre-trial order.

After Ruparelia rested his case at the June 24, 2003, trial, O'Connor sought to testify. Ruparelia objected, citing failure to comply with the scheduling order. The court sustained the objection. O'Connor took exception and on June 25, 2003, submitted a letter to the court requesting that the trial be re-opened and that he be allowed to testify. O'Connor cites the local rule of this court stating that in a contested matter, the court presumes the debtor will testify. L.B.R. 9014.1(c)(2). The scheduling order entered February 27, 2003, supercedes that rule and specifically directs the parties to exchange witness lists. The court stated in the order that it would consider the imposition of appropriate sanctions in the event of non-compliance. O'Connor did not articulate the basis for his

objection to the Elliott debt claim in his objection to claim. In his opening statement on December 12, 2002, O'Connor attacked the Elliott note. The scheduling order was intended to focus on the gravamen of the dispute. Yet, O'Connor failed to submit a proposed pre-trial order or proposed findings of fact and conclusions of law, which would have articulated his position. By also failing to serve a witness list, Ruparelia could not adequately prepare for the trial. Sustaining the evidentiary objection constitutes an appropriate sanction for noncompliance with the scheduling order.

O'Connor further contends that he stated at the December 12, 2002, hearing that he would testify. He argues that, as a result, Ruparelia should not be surprised and the court should overlook the noncompliance with the scheduling order. The court will enforce its order. Ruparelia could reasonably infer that O'Connor made a strategic decision not to testify when O'Connor chose not to submit a witness list.

The court turns to the merits of the claim.

Sections 501 and 502 of the Bankruptcy Code and Bankruptcy Rule 3001 provide that "a party correctly filing a proof of claim is deemed to have established a *prima facie* case against the debtor's assets." In re Fid. Holding Co., Ltd., 837 F.2d 696, 698 (5th Cir. 1988). The claimant will prevail unless a party who objects to the proof of claim produces evidence to

rebut the claim. Id. Upon production of this rebuttal evidence, the burden shifts to the claimant to prove its claim by a preponderance of the evidence. Id. Accordingly, Ruparelia's proof of claim as a secured claim is *prima facie* valid, unless O'Connor produces evidence to rebut the presumption.

On August 1, 2001, O'Connor executed a promissory note promising to pay Dean L. Elliott $40,000, with 10 percent interest, due on February 1, 2001. On April 11, 2001, O'Connor and Elliott agreed to extend the note, with the principal at $48,000, payable July 15, 2001. On August 13, 2001, Elliott assigned the note to Ruparelia.

O'Connor contends that the note was executed post-petition in violation of the automatic stay, and that it contains no exhibits evidencing the pledging of collateral to secure the note. Relying on Ruparelia's exhibits evidencing the transaction, O'Connor also observes that he did not execute a security agreement and Elliott did not file a UCC financing statement. O'Connor has rebutted the *prima facie* validity of the proof of claim, requiring Ruparelia to establish the claim by a preponderance of the evidence.

O'Connor filed a petition for relief under Chapter 11 of the Bankruptcy Code on September 17, 1999. Prior to that time, Elliott had loaned some money to O'Connor. On March 29, 2000, the court confirmed O'Connor's Chapter 11 plan. The plan

proposed to pay general unsecured creditors in full over three years through the sale of real estate. After confirmation, on August 1, 2000, O'Connor executed the $40,000 promissory note to Elliott and on April 11, 2001, O'Connor executed the $48,000 extension note.

O'Connor could not implement the plan. On June 18, 2001, the court converted the case to a case under Chapter 7 of the Bankruptcy Code. Elliott advanced some funds to O'Connor pre-petition. He advanced additional funds post-petition. But the original promissory note and the extension note were executed post-petition. Both notes were executed prior to the entry of the order converting the case to a case under Chapter 7 of the Bankruptcy Code. Unless the claim is for an administrative expense under 11 U.S.C. § 503(b), a claim against the debtor that arises after the order for relief but before conversion is treated for all purposes as if the claim had arisen immediately before the date of the filing of the petition. 11 U.S.C. § 348(d). As the notes were executed after the entry of the order confirming the Chapter 11 plan, the notes do not evidence administrative expenses under § 503(b). Similarly, the notes do not evidence loans to a debtor in possession under 11 U.S.C. § 364, having been executed post-confirmation. As a result, the claim based on the extension note is a deemed a pre-petition claim.

O'Connor argues that execution of the notes post-petition violated the automatic stay of 11 U.S.C. § 362. In the Fifth Circuit, a violation of the automatic stay is voidable, not void. Picco v. Global Marine Drilling Co., 900 F.2d 846, 850 (5th Cir. 1990). A portion of the note obligated O'Connor to repay pre-petition loans. The remainder of the note obligated O'Connor to repay post-petition loans. The automatic stay applies to efforts to collect pre-petition, but not post-petition obligations. 11 U.S.C. § 362(a)(6). Thus, the execution of the note in part amounts to an act to collect, assess or recover a pre-petition claim, and, in part, a post-petition claim. However, the notes were not executed until after the entry of the confirmation order. In most Chapter 11 cases, the automatic stay does not apply post-confirmation, as the plan usually provides for discharges and collection injunctions. 11 U.S.C. §§ 362(c)(2)(C); 1141. Indeed, O'Connor's plan, at article XI, provided for the discharge of pre-confirmation debts. The automatic stay typically would not apply to post confirmation obligations. The promissory note and the extension note were executed post-confirmation. O'Connor could not consummate his plan, and the court converted the case. As described above, conversion results in the obligations being deemed pre-petition claims. Under these circumstances, the court finds that the notes should not be voided.

On its face, the promissory note executed August 1, 2000, has several defects. The note refers to an Exhibit A, which does not exist. The note contains a hand written statement that reads: "subject to certain adjustments on the itemized list of charges." That phrase is lined out and initialed "4/11/01," a date which is two months after the due date. Following the lined-out phrase, the note reads "*See attached Exhibit "B" acknowledgment of corrected accounting signed and dated 11/20/00." The asterisk connotes a footnote, but the body of the note contains no asterisk. And, again, that notation post dates the note.

Elliott testified that the parties altered the note by the addendums and notations. Elliott testified that O'Connor raised questions regarding amounts loaned by Elliott and wanted adjustments. The parties added the footnote reference to Exhibit "B" to address those concerns. Elliott further testified that he loaned O'Connor more money in April 2001, which resulted in the execution of the extension note. He explained that the parties then lined through the hand written provision in the original note, to make it consistent with the extension note.

Handwritten entries on a printed document may take precedence over those in typeface based on the proposition that a handwritten entry expresses the latest intention of the parties to the contract. However, courts apply that principal when

neither party to the contract contests the validity of the handwritten entries. In re Windsor Plumbing Supply Co., Inc., 170 B.R. 503, 523 (Bankr. E.D.N.Y. 1994). O'Connor contests the line out of the "subject to" provision, which ironically is itself a handwritten addition. But the court does not need to investigate those alterations. See In re Young, 995 F.2d 547, 549 (5th Cir. 1993). Regardless of what occurred or why the original note was altered, O'Connor executed a written note on April 11, 2001, evidencing an obligation to pay a debt of $48,000. That note supercedes the August 1, 2000, note and governs. The extension note establishes the debt.

Elliott testified that O'Connor made no payment on that note. He further testified that he assigned the note to Ruparelia. There is no evidence of a payment on that note. The purchase price paid by Ruparelia for the note does not constitute evidence of the amount due on the note. Ruparelia has therefore established by a preponderance of the evidence a claim of $48,000.

Ruparelia asserts that the Elliott debt was secured by O'Connor's art work. The note executed August 1, 2000, refers to collateral described in an Exhibit A. There is no Exhibit A to the note. Ruparelia produced no evidence of a security agreement or a Uniform Commercial Code financing statement. Accordingly, Ruparelia has not established by a preponderance of the evidence

that the claim is secured. Because of that failure of proof, the claim will be allowed as an unsecured claim. As an unsecured claim, Ruparelia is not entitled to attorneys fees. 11 U.S.C. § 506(b).

Based on the foregoing,

IT IS ORDERED that H.C. Ruparelia is allowed a general unsecured claim of $48,000 based on the Elliott debt.

Dated this 10th day of July, 2003.

Steven A. Felsenthal
United States Bankruptcy Judge