

SO ORDERED.

SIGNED this 16th day of January, 2019.



Lena Mansori James

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re

Richard Anthony Mitchell and
Marisa Suzanne Mitchell,

Debtors.

Case No. 18-80336

ORDER ON OBJECTION TO CLAIM

This case came before the court for a hearing on January 3, 2019 on the Debtors' Objection to Claim 11 of Nathan Nicely ("Objection"). At the hearing, Koury Hicks appeared on behalf of Richard Anthony Mitchell and Marisa Suzanne Mitchell ("Debtors"), Benjamin Lovell appeared on behalf of the Chapter 13 Trustee, and Nathan Nicely ("Creditor") appeared pro se. Having considered the Objection in light of the record and the arguments of the parties, the court finds and concludes as follows:

1. The Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on May 8, 2018. On their Schedule E/F, the Debtors listed the Creditor with a claim in the amount of \$2,797.00 though the Creditor's last name was misspelled and his address was incorrect. The Debtors' list of creditors also identified the Creditor with an incorrect address. The clerk's office sent notice

of the Chapter 13 filing to the Debtors' list of creditors indicating that July 17, 2018 was the deadline for filing proofs of claim.

2. The Debtors proposed a 60-month Chapter 13 plan with the Trustee to disburse funds to pay priority claims in full, cure and maintain the Debtors' first and second mortgages, and pay a claim secured by a 2013 Ford Edge. The proposed plan estimated that no dividend would be paid to general unsecured creditors.¹
3. The Creditor filed a timely objection to the Debtors' proposed plan on July 13, 2018. In his objection to confirmation he asserted that he had obtained an award against Richard Anthony Mitchell, Debtor 1, dated May 26, 2017 from a small claims court case (17 CVM 2231) and under an agreed repayment plan, the Creditor was to receive monthly payments of \$200.00 until paid in full. The Creditor further indicated that the \$200.00 check for the April 2018 payment was returned for insufficient funds, and that the total amount remaining due was \$3,222.00. The Creditor also alleged that though the debt was unsecured, due to unique circumstances including an alleged failure to post clear notice of the dissolution of a corporate business entity and a subsequent breach of a consignment agreement, the Creditor's claim should be entitled to priority status. Lastly, the Creditor asked that his address be corrected.

¹ The Debtors' statement of current monthly income filed with their petition showed that their income was above median, but that their monthly disposable income under 11 U.S.C. § 1325(b)(2) was negative. As is the case for all Chapter 13 debtors in this district, paragraph 8.1h of the Debtors' plan requires that the Debtors promptly report to the Trustee and amend schedules to reflect any significant increases in income and any substantial acquisitions of property.

4. On July 24, 2018 at the hearing on confirmation of the Debtors' plan, counsel for the Debtors asked that the plan be confirmed despite the Creditor's objection to confirmation, pointing out that the Creditor had not filed a proof of claim. The Creditor asserted that he had not received proper notice of the claim deadline and was not aware of the requirement of an official proof of claim form. The court informed the Creditor that a proof of claim form was required to participate in distributions made under a Chapter 13 plan, and the Trustee offered to provide the Creditor with the necessary form. The court overruled the Creditor's objection, as nothing in the plan precluded his claim, once filed, from being treated in accordance with the Bankruptcy Code.
5. The Creditor then filed Claim 11 on July 25, 2018, asserting a priority claim of \$3,210.00 based on "goods sold on consignment and converted in small claims." Claim No. 11 at 2. The Creditor asked for priority status pursuant to § 507(a)(3) of the Bankruptcy Code. The Creditor attached various documentation to the proof of claim form including a list of consignment items, an email documenting receipt of certain items, a contract of consignment property, and an account statement showing the original amount of the small claims award, payments received, and the current balance due.
6. The Debtors now object to Claim 11 on the grounds that it was filed after the deadline for filing claims and therefore should be disallowed in its entirety. If the claim is allowed, the Debtors contend that it is not entitled to priority treatment.
7. The Creditor filed a timely response to the Objection in which he generally describes the series of events leading up to his late-filed claim and asks that Claim 11 be allowed for the reasons set forth in his original objection to

confirmation dated July 12, 2018. At the hearing, the Creditor asserted that he filed his original objection prior to the proof of claim deadline, but was not aware that he was required to use and file a proof of claim form, and therefore neglected to do so. He stated that immediately following the hearing on plan confirmation, he obtained a proof of claim form from the Trustee's office and filed it the next day.

8. The Fourth Circuit recognizes informal proofs of claim where a creditor has taken some action that gives sufficient notice that the creditor has a claim against the estate. *Davis v. Columbia Constr. Co., Inc. (In re Davis)*, 936 F.2d 771, 776 (4th Cir. 1991). In this district, informal proofs of claim have been allowed where a writing containing a demand by a creditor upon the estate and expressing an intent to hold the debtor liable for the debt has been filed with the bankruptcy court and where the facts of the case are such that allowance of the claim is equitable. *In re Graves*, No. 00-10622C-13G, 2001 WL 1699649 (Bankr. M.D.N.C. Feb. 15, 2001) (Stocks, J.); *In re Scott*, No. 00-10993C-7G, 2001 WL 1855035 (Bankr. M.D.N.C. Sept. 24, 2001) (Stocks, J.). An informal proof of claim that is filed before the expiration of the deadline to file a claim may be amended with a proof of claim on the official claim form when substantial justice will be done by allowing the amendment. *In re Elleco, Inc.*, 295 B.R. 797, 800 (Bankr. D.S.C. 2002).
9. Based on the record, the court finds it appropriate to treat the Creditor's objection to confirmation, which was filed prior to the proof of claim deadline, as an informal proof of claim. The Creditor's objection to confirmation clearly set forth his demand upon the estate for payment, the basis for his demand, and the amount. Both the Debtors and the Trustee had sufficient notice of this claim prior to the expiration of the deadline for filing

claims and prior to confirmation of the plan. The court further considers that the Debtors listed an incorrect address for the Creditor on their schedules, and the Creditor timely responded to both the notice of proposed plan and the objection to claim, and promptly filed an official claim form after the confirmation hearing, just eight days after the deadline. Under these circumstances, recognizing the Creditor's objection to confirmation as an informal proof of claim is equitable, and substantial justice will be done by allowing Claim 11 as an amendment.

10. At the hearing, both the Debtors and the Trustee asserted that even if Claim 11 is not disallowed as untimely, the Creditor has not established that the claim is entitled priority status under the Bankruptcy Code. On his proof of claim form, the Creditor asserts priority under 11 U.S.C. § 507(a)(3) as an unsecured claim allowed under § 502(f). Section 502(f) applies to certain claims in involuntary cases and is not applicable in this case as the Debtors filed a voluntary petition for relief. The Creditor also asks for priority status for the reasons set forth in his objection to confirmation. The court has reviewed the objection to confirmation and, even taking the allegations as true, finds no basis under the Bankruptcy Code to afford Claim 11 with priority status.

Based on the foregoing, it is therefore ordered that the Debtors' objection to Claim 11 as untimely filed is overruled, the Debtors' objection to Claim 11 as a priority claim is sustained, and Claim 11 is allowed a general unsecured claim in the amount of \$3,210.00.

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PARTIES TO BE SERVED

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18-80336 C-13

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