

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re: David G. DeLano and Mary Ann DeLano

Chapter 13
Case no: 04-20280

**Reply in Opposition
to Debtors' Objection to Claim
and Motion to Disallow it**

Dr. Richard Cordero, Creditor, states under penalty of perjury as follows:

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1. By their attorney, Christopher Werner, Esq., the Debtors object as follows to Dr. Cordero's claim:

Claimant sets forth no legal basis substantiating any obligation of Debtors. Claimant apparently asserts a claim relating to a pending Adversary Proceeding in Premier Van Lines (01-20692) relating to M & T Bank, for whom David DeLano acted only as employee and has no individual liability. Further, no liability exists as against M & T Bank. No basis for claim against Debtor Mary Ann DeLano, is set forth, whatsoever.

I. The DeLanos were so aware of Dr. Cordero's legal claim against them that they and their attorney themselves included it in the original bankruptcy petition

2. To begin with, it escapes Att. Werner's attention the inconsistency of affirming in the first sentence that Dr. Cordero provides "no legal basis" for "any obligation" of the Debtors to him, only to follow it up in the next sentence with the statement that the basis of the claim is "a pending Adversary Proceeding". That Adversary Proceeding, pending in the U.S. Bankruptcy Court in Rochester, docket no. 02-2230, is a lawsuit with opposing claims at law. Regardless of how those claims will be finally decided, the Adversary Proceeding does provide the legal basis for Dr. Cordero's claim!
3. Likewise, it escapes Att. Werner's recollection that it was he and the Debtors who in the very first document in the instant case, that is, the bankruptcy petition that they signed last January 26, 2004, listed Dr. Cordero's claim, describing it as "2002 Alleged liability re: stored merchandise as employee of M&T Bank –suit pending US BK Ct.". Therefore, it is disingenuous to insinuate that Dr. Cordero only "apparently asserts a claim" given that they were the first to recognize the DeLanos' potential liability to him and were the first to state so in the petition before Dr. Cordero could even suspect, let alone know, that they would file for bankruptcy.
4. In the same vein, it escapes Att. Werner's candor when he states that Dr. Cordero provided "no legal basis" and only "apparently asserts a claim" despite the fact that Dr. Cordero served him with a copy of his proof of claim with an attached copy of his November 21, 2002 pleading in the Adversary Proceeding containing his claim against Mr. DeLano. Consequently, Att. Werner knows full well not only the legal nature of Dr. Cordero's claim against Mr. DeLano, but also its precise substance.
5. Moreover, it escapes Att. Werner's capacity to spot legally significant facts that the Adversary Proceeding is *Pfuntner v. Gordon et al*, docket no. 02-2230, which is only derivatively related to the case that he cited in his above-quoted Objection, namely, "Premier Van Lines (01-20692)". It is to be hoped that Att. Werner's mistaken reference to only the Premier case is only a reflection on his lack of accuracy when raising an allegation against another party, rather than an intentional effort to mislead the Court and other parties by drawing their attention to a case where Mr. DeLano is not a named party.
6. In addition, it escapes Att. Werner's knowledge of first year law school Torts that a person is not insulated from "individual liability" just because he alleges that he "acted only as

employee” of his employer. Debtor David DeLano is a named third-party defendant in that Adversary Proceeding just as M&T Bank is a named defendant as well as a cross-defendant therein. They can be jointly and severally liable because or in spite of their employer-employee relationship.

II. The Debtors cannot contest a bankruptcy claim on grounds that they may not be liable in another case

7. As a matter of law and common sense, Mr. DeLano’s liability in another pending case, that is, the Adversary Proceeding *Pfuntner v. Gordon et al.*, is not a matter that can be denied in this case as the basis to object to a creditor’s claim against them. This is all the more so given that in his responsive pleading to Dr. Cordero’s third-party claim against him in that other case Mr. DeLano did not even deny his liability in that case on the grounds now asserted for the first time in this case that “David DeLano acted only as employee and has no individual liability”. It is not in the instant case where Att. Werner can announce the defense theory of Mr. DeLano’s to claims in another case. What kind of lawyering is this on the part of Att. Werner, who is not even Mr. DeLano’s attorney of record in the other case?!
8. Moreover, the Court in this case has no jurisdiction to decide the legal question whether Mr. DeLano is liable in another case. Not only has the trial in that other case not begun, but also no motion in that case has been raised, let alone heard, contesting Mr. DeLano’s liability, whether on the ground now asserted here or on any other ground. That other case is so much in its ‘infancy’ that discovery has not even started! But even if a motion had been raised, the issue whether Mr. DeLano is liable as an employee or in his personal capacity is one of fact that cannot be decided on the pleadings on the mere assertion that Mr. DeLano was M&T Bank’s employee at the time. Consequently, even if the Court in the instant case were to arrogate to itself power to pick out an issue of fact from another case and decide it in isolation, it has absolutely nothing to go by except a specific, 31-page complaint with exhibits and a general 2-page denial in that other case.
9. Mr. DeLano’s liability in another case is a matter to be decided by the court in that case through litigation in the context of all the parties, issues, and facts of the other case. As long as a decision in that case has not been reached and it has become final after exhaustion of all avenues of appeal, the claim against Mr. DeLano in that other case is viable. Hence, the claim in the other case provides a legally valid basis for a claim in the instant case.
10. Indeed, a claim can be asserted by a creditor regardless of whether it is reduced to judgment, whether the claim is liquidated, unliquidated, fixed, contingent, mature, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. *United States v. Connery*, 867 F.2d 929, 934 (reh'g denied)(6th Cir. 1989), appeal after remand 911 F.2d 734 (1990).
11. Hence, the Debtors’ objection to Dr. Cordero’s claim because they dispute his claim in another case falls due to its own lack of legal basis and the court’s lack of jurisdiction.

III. The Debtor's attorney cannot possibly have a good basis belief in that he has standing to assert that a third party, namely, M&T Bank, in another case is not liable to a creditor in this case

12. Att. Werner claimed at the hearing on July 19, 2004, that 'he has been in this business for 28 years', presumably meaning that he has been practicing law for that length of time. If so, he should know better than to pretend that the legally ridiculous allegation that "Further, no liability exists as against M&T Bank", a third-party in another case that has neither a claim nor standing in this case, provides grounds for the Debtors' objection to the claim of a creditor, Dr. Cordero, in the instant case.
13. Nor does Att. Werner have any standing to make such an allegation, for he is not M&T Bank's attorney in that other case. Therefore, he has no standing to represent M&T's legal position in that case, let alone in this case.
14. It should be noted that it is bad lawyering for Att. Werner to assert on behalf of the Debtors that M&T is not liable at all to Dr. Cordero in the other case, that is, the Adversary Proceeding Pfuntner v. Gordon et al, docket no. 02-2230. That only means that Mr. DeLano does not hold M&T liable for his acts as its employee. By contrast, Mr. DeLano's denial of liability to Dr. Cordero carries no weight until finally established in the Adversary Proceeding. What an unintended 'unthought of' consequence if M&T Bank were to argue successfully that Mr. DeLano is estopped from arguing respondeat superior in that Proceeding as a way to shift liability from him to his employer. Would Att. Werner be liable to Mr. DeLano for malpractice for hanging him up out there to bear alone the liability that he may be found to have to Dr. Cordero by a court with jurisdiction?
15. But even if Att. Werner were the attorney for M&T Bank, his biased opinion on his client's lack of liability is absolutely irrelevant to the issue whether Dr. Cordero has a valid claim against a different client of Att. Werner in different case. Att. Werner's opinion on any party or issue whatsoever is not evidence of anything. Since the facts in the other case have not even been the subject of discovery yet, let alone found by a court with jurisdiction, much less been given anything even remotely sounding like collateral estoppel effect, not to mention anything about res judicata for issues, Att. Werner cannot rely on any facts in that case to argue anything in this case. He is left with nothing but that: an opinion, his biased opinion expressed at the wrong time in the wrong context for the wrong purpose.
16. Indeed, Att. Werner's purpose of defending the DeLanos by disallowing Dr. Cordero's claim in this case is not advanced a bit by his allegation that "Further, no liability exists as against M&T Bank". Even if M&T were found not to be liable to Dr. Cordero in the other case, such finding would not preclude the finding that Debtor David DeLano was personally liable to Dr. Cordero. This is so because in law the fact that an employer is not vicariously liable to a third party by application of the doctrine of respondeat superior, is not incompatible with the fact that his employee may be personally liable by application, among others, of the doctrine of ultra vires due to the employee having acted on a folly of his own outside the scope of his employment. The only thing accomplished by that ridiculous allegation is the undermining of Att. Werner's credibility as a lawyer, for he failed to do his legal research homework before coming to court to advocate his client's interests.

IV. A creditor may assert a claim against only one of two debtors jointly filing a bankruptcy petition

17. Att. Werner also alleges in his objection to Dr. Cordero's claim that "No basis for claim against Debtor Mary Ann DeLano, is set forth, whatsoever". What an absolutely meaningless allegation! Who ever said that creditors lose their claims against a debtor if the latter and his spouse file a joint petition for bankruptcy? Whose head ever conceived of the idea that a bankruptcy system, let alone a national economy, could be predicated on the principle that debtors can escape their financial responsibility to those holding claims against them by the simple subterfuge of filing for bankruptcy jointly with their spouses?
18. Assuming that Att. Werner understands the concept of consistency, would he dare argue in court that Mr. DeLano is not liable to either AT&T Universal, Bank of America, Bank One, or Capital One, etc., because these creditors, whom the Debtors listed in Schedule F of their petition, hold claims against Mr. DeLano alone, but not against Mrs. DeLano?
19. Look! There, in the petition! It instructs the debtors to:

If a joint petition is filed, state whether husband, wife, both of them, or the marital community may be liable on each claim by placing an "H", "W", "J", or "C" in the column labeled "Husband, Wife, Joint, or Community".
20. The DeLanos and Att. Werner even marked their claims with either H, W, or J. As revealed by their own acts, they knew that the fact that a creditor holds a claim against one but not the other of the debtors was of absolutely no consequence. Yet, they went ahead and asserted the bogus objection to Dr. Cordero's claim by stating that he has "no basis for claim against Debtor Mary Ann DeLano". They knowingly raised a spurious objection. They acted in bad faith!
21. Att. Werner has cited not a single case or Bankruptcy Code section or Rule to object to Dr. Cordero's claim. He does not have even a legally cogent argument, only his opinion, one so perfunctorily cobbled together that it would have shocked his professors of Torts and Civil Procedure in his first year of law school to the point of denying him a passing grade. Thus, what could possibly have possessed Att. Werner to think that those utterly untenable allegations would pass muster with the chief judge of a federal bankruptcy court? Desperation.

V. The DeLanos' objection is a desperate attempt to remove belatedly Dr. Cordero, the only creditor that objected to the confirmation of their Chapter 13 plan and that is relentlessly insisting on their production of financial documents that can show the bad faith of their petition

22. For well over a year before filing their petition on January 26, the DeLanos have known the exact nature of Dr. Cordero's claim against Mr. DeLano, contained in his complaint of November 21, 2002, in another case. So much so that they and Att. Werner took the initiative to include it in their petition opening this case. They even marked it as unliquidated and

disputed. From that moment on they could have filed an objection to that claim because they already knew all the factual and legal elements supporting their dispute. Since then those elements have neither been strengthened nor added to. So what has changed? Only their level of desperation.

23. Their first manifestation of desperation took place at the meeting of creditors on March 8. As Mr. DeLano, a bank loan officer for 15 years must have expected, none of the 18 credit card issuers that they listed in Schedule F showed up. Far from taking advantage of consolidating and refinancing his and his wife's debt with a loan at a lower rate secured by property, Mr. DeLano took care to split their debt among so many unsecured nonpriority creditors so as not to give any of them a stake high enough to make it cost-effective to pursue their claims in bankruptcy court.
24. But something happened that was most unnerving: Dr. Cordero showed up in person, having traveled all the way from New York City to Rochester, and not only did he hand out written objections to confirmation, but also wanted to examine the DeLanos under oath! Swift to realize the danger was the Trustee's attorney, James Weidman, Esq., who was unlawfully presiding over the meeting, which the Trustee had the duty to conduct himself as provided under C.F.R. §58.6(a)(10). Att. Weidman asked Dr. Cordero whether he had any evidence that the DeLanos had committed fraud. Dr. Cordero indicated that he was not raising any accusation of fraud; rather, he was interested in establishing the good faith of the bankruptcy petition, an issue that is properly raised as to any petition. (cf. 11 U.S.C. §1325(a)(3))
25. The exchange alerted Att. Werner to danger. He contested on that very occasion that Dr. Cordero had a claim against the DeLanos and thus, his status as creditor. Dr. Cordero stated grounds supporting such status. Att. Werner relented. Dr. Cordero went ahead to ask questions of the DeLanos. However, in rapid succession, Att. Weidman asked Dr. Cordero more times to state his evidence of fraud. Dr. Cordero had even to insist that Mr. Weidman take notice that he was not alleging fraud. With that answer, Dr. Cordero failed to reveal how much he had already found out about the DeLanos, their petition, and their financial affairs. Att. Weidman panicked and put an end to the meeting after Dr. Cordero had asked only two questions of the DeLanos!
26. Later on in the courtroom before the Hon. John C. Ninfo, II, Trustee Reiber and Att. Weidman stated that the DeLanos' petition had been filed in good faith. Thus, Dr. Cordero impugned their capacity to conduct an impartial investigation of the DeLanos without any bias toward finding of good faith filing, the only one that can exonerate them of any charge of having approved, whether negligently or knowingly, a meritless petition filed in bad faith. Consequently, Dr. Cordero called for the replacement of the Trustee and the exclusion from the case of Att. Weidman.
27. All this gave notice to the DeLanos and Att. Werner that Dr. Cordero was serious about asserting his creditor status and claim. By then they had all the elements of law and fact concerning not only his claim, but also his determination to pursue it. If they had entertained a good faith belief that Dr. Cordero had no legal basis for asserting a claim against the DeLanos, they had to raise that objection timely on grounds of judicial economy and fairness. Nor did they do so after Dr. Cordero served Att. Werner with different papers in the course of the following months. Therefore, by their failure to raise that objection in a timely fashion, they created for Dr. Cordero a reliance interest in the reasonable assumption that they had given up any such objection and had accepted the legal validity of his claim. In reliance thereon, Dr.

Cordero has invested his time, effort, and money pursuing his claim.

28. Therefore, more than four months later and only after Dr. Cordero's relentless request for financial documents threatens to prove that their petition was filed in bad faith, it is untimely for Att. Werner and the DeLanos to raise their objections to his claim...for the third time.

VI. The DeLanos already objected to Dr. Cordero's creditor status and claim in their Statement to the court on April 16, to which Dr. Cordero timely replied on April 25, and the DeLanos did not pursue the issue, whereby they are now barred by laches from raising it again two months later

29. On April 16, the DeLanos raised the already untimely objection that Dr. Cordero "is not a proper creditor in this matter". To this Dr. Cordero timely replied less than 10 days later thus:

a) This is what the Bankruptcy Code has to say as to who is a proper "creditor":

B.C. §101. Definitions

(10) "creditor" means (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;...

[(15) "entity" includes person...]

In turn, it defines "claim" thus:

(5) "claim" means (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

b) The Code's definition of who is a creditor is more than broad enough to include Dr. Cordero and his pre-petition claim against Mr. DeLano.

30. Not only did Att. Werner fail to provide any legal argument for their April 16 contention that Dr. Cordero was not a proper creditor, but they did not even counter with an objection, let alone a legal argument, to Dr. Cordero's legal basis for asserting his creditor status, not within the following 10 days, not within the next 30 days, not in the next two months. Far from it, to their repetition of their objection devoid of any legal argument they add an abundance of legally ridiculous, spurious, and thoughtless allegations. Hence, now they are barred from raising the objection not only by untimeliness and laches, but also by bad faith.
31. Furthermore, at the hearing on July 19, 2004, Att. Werner brought up the subject of raising a motion to challenge Dr. Cordero's status as a creditor of the DeLanos. Judge Ninfo himself pointed out to Att. Werner that Mr. DeLano's liability in the Adversary Proceeding could not be decided in this case. Dr. Cordero too mentioned many of the issues discussed here. Yet, Att. Werner went ahead and raised the motion without taking into account any of those issues and without presenting any legal argument that one would expect of a lawyer, particularly one 'in this business for 28 years'. He could not have reasonably have thought that he was acting

responsibly when he disregarded the legal difficulties of his position pointed out by the court itself as well as by the opposing party for the record at a hearing.

32. Does Att. Werner expect the court and Dr. Cordero to rehash the same issues at the August 25 hearing of his motion? By his conduct, he shows that he wants simply to have another go at it while sparing himself the effort, time, and money required to do legal research, think through the legal issues, and write down an argument worthy of a lawyer. But in the process, he has irresponsibly caused Dr. Cordero, who holds himself to the standards of a professional, to invest a lot of effort, time, and money to research and write this response. Att. Werner will also cause the court to revisit the same issue, compounded by the ridiculous and spurious statements that Att. Werner has added in his motion. For such irresponsible conduct and the waste that he has already caused and will still cause shortly, Att. Werner will be asked to compensate Dr. Cordero and to bear sanctions imposed by the court.

VII. The Debtors cannot overcome the legal presumption of validity that Rule 3001(f) attaches to Dr. Cordero's proof of claim by merely repeating an abbreviated version of their April 16 objection, which was merely an allegation devoid of any legal support

33. Rule 3001(a) provides thus:

(a) Proof of Claim

A proof of claim is a written statement setting forth a creditor's claim. A proof of claim shall conform substantially to the appropriate Official Form.

34. Dr. Cordero's proof of claim of May 15 not only conforms substantially to the appropriate form, but it was also contained in the official one provided to him with the notice of the meeting of creditors. Moreover, it was so formally correct, that it was filed by the clerk of court and entered in the register of claims.

35. FRBkrP Rule 3001(f) provides as follows:

(f) Evidentiary effect

A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim.

36. Dr. Cordero's claim is now legally entitled to the presumption of validity. As a result, it is legally stronger than when the DeLanos and Att. Werner took the initiative to include it in the January 26 petition. It follows that by summarizing their April 16 objection, as to which they made no effort to support with law or precedent, and weakening it with the addition of legally ridiculous and spurious allegations made in bad faith, they cannot possibly overcome a claim now strengthened with prima facie evidence of validity as a result of the filing of Dr. Cordero's proof of claim.

VIII. Relief Requested

37. Therefore, Dr. Cordero respectfully request that the Court:

- a) hold a hearing on the motion;
- b) reject the motion to disallow his claim against the DeLanos;
- c) award Dr. Cordero costs and any other proper and just relief.

August 17, 2004

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