

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

COUNTER COPY - DO NOT REMOVE -

In re)	Bankruptcy Case No. 80C-00261
)	
WORLD OF TOYS & HOBBIES, INC.,)	
)	
Debtor.)	Civil Proceeding No. 81PC-0680
)	
M. W. KASCH COMPANY,)	
)	
Plaintiff.)	
)	
vs.)	
)	
HARRIET E. STYLER, Trustee of the Estate of World of Toys & Hobbies, Inc.,)	
)	
Defendant.)	

O R D E R

On August 4, 1982, plaintiff filed this action seeking a determination of the validity, priority and extent of its security interest in the accounts and contract rights of the debtor. The defendant-trustee has moved for summary judgment based upon the following arguments:

1. that plaintiff's failure to file a proof of claim within six months following the first meeting of creditors precludes its seeking relief in this action pursuant to 11 U.S.C. § 523(c) and Bankruptcy Rule 302(e); and
2. that plaintiff's participation in a state court bulk-sales action precludes its taking any action in the Bankruptcy Court.

11 U.S.C. § 501(a) states that a creditor may file a proof of claim. The comments by the House Judiciary Committee make it clear that this section is permissive.

This subsection is permissive only, and does not require filing of a proof of claim by any creditor. It permits filing where some purpose would be served, such as where a claim that appears on a list filed under proposed 11 U.S.C. 924 or 1111 was incorrectly stated or listed as disputed, contingent, or unliquidated, where a creditor with a lien is undersecured and asserts

a claim for the balance of the debt owed him (his unsecured claim, as determined under proposed 11 U.S.C. 506(a)), or in a liquidation case where there will be a distribution of assets to the holders of allowed claims. In other instances, such as in no-asset liquidation cases, in situations where a secured creditor does not assert any claim against the estate and a determination of his claim is not requested under proposed 11 U.S.C. 506(d), or in situations where the claim asserted would be subordinated and the creditor would not recover from the estate in any event, filing of a proof of claim may simply not be necessary.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 351 (1977).

Where a creditor seeks to share in the distribution of the estate in a liquidation case, filing of a proof of claim is required. However, where a creditor asserts a lien on assets of the debtor, as in this case, filing of a proof of a claim would serve no purpose. Here, the creditor does not assert a claim against the estate, but seeks instead to enforce its security agreement. Accordingly, Bankruptcy Rule 302(e) is not applicable and is not a bar to plaintiff's civil proceeding.

Similarly, § 523(c) is not applicable to the instant case in as much as plaintiff is seeking to have the Court determine the validity, priority and extent of its lien, not the dischargeability of debtor's obligation.

Defendant's memorandum in support of her motion for summary judgment relies upon plaintiff's failure to respond to a request for admission to establish that plaintiff was awarded \$53,634.73 in a state court action. Even if such fact is deemed admitted, pursuant to Bankruptcy Rule 736, there is no evidence to support a finding that the judgment was satisfied. To the extent that plaintiff's claim remains unpaid, it is entitled to enforce any valid lien, subject to statutory limitations.

The Court makes no ruling at this time on the question of the validity, priority or extent of the lien claimed

by plaintiff. It appears that the parties are in dispute as to which entities are liable on the security agreement. Such a dispute presents an issue of fact which must be resolved at trial.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is denied.

DATED this 15 day of October, 1982.

BY THE COURT:


GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing order to the following this 18 day of October, 1982.

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