

DOCKET NUMBER: 98-13023

ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Mark Joseph Tapia, Good Humor-Breyers Ice Cream

CHAPTER: 11

ATTORNEYS: L. C. Williams, G. Carwie

DATE: 10/26/00

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE

MARK JOSEPH TAPIA

Case No. 98-13023-MAM-11

Debtor.

ORDER OVERRULING DEBTOR'S OBJECTION TO CLAIM NO. 16

Lionel C. Williams, Mobile, Alabama, Attorney for Debtor

Gregory Carwie, Mobile, Alabama, Attorney for Good Humor-Breyers Ice Cream

This matter is before the Court on Debtor's objection to Claim Number 16 of Good Humor-Breyers Ice Cream ("Good Humor"). The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § § 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, Debtor's objections to Claim Number 16 of Good Humor is overruled and the claim is allowed in its entirety.

FACTS

Debtor owned 25% of Seward's Ice Cream Distributors, Inc. ("Seward's Ice Cream"). In 1996, Seward's Ice Cream was having difficulty paying accounts and Good Humor asked for additional guarantors for its account. On October 21, 1996, Debtor signed a conditional guaranty in which he guaranteed payment of "all loans, drafts, overdrafts, checks, notes, and all other debts, obligations, and liabilities of every kind and description, whether of the same or a different nature, arising out of credit previously granted, credit contemporaneously granted or credit granted in the future" by Good Humor to Seward's Ice Cream, to Seward's Ice Cream and another, or to another guaranteed or endorsed by Seward's Ice Cream, including interest and charges. The guaranty further states:

This is a continuing guarantee and shall remain in full force and effect until such time as all obligations of [Seward's Ice Cream] to [Good Humor] have been paid in full.

Revocation by any other Guarantor shall not affect any of the liabilities or obligations of the undersigned and this guarantee shall continue in full force and effect with respect to the undersigned.

The accounts receivable manager for Good Humor Testified that Good Humor would have stopped shipments to Seward's Ice Cream if they had not received additional guarantors for the account.

On December 20, 1996, Debtor sent a letter to Good Humor notifying Good Humor that Debtor was canceling his personal guarantee to Good Humor. Debtor's letter explained that Seward's Ice Cream had "finalized the sale of the majority [of] it's assets to Barber's Dairy of Birmingham, Alabama" and stated that Barber's would assume a portion of its distributorship. The letter further stated that the remaining assets of Seward's Ice Cream were being purchased personally by Steve Seward who would form a new company and who had agreed to assume the outstanding debt of Seward's Ice Cream owed to Good Humor. Good Humor asserts that it never received Debtor's letter perhaps because the letter was incorrectly addressed. The zip code was wrong. The sale of Seward's Ice Cream as described in Debtor's letter did occur. However, Good Humor alleges it never agreed to revoke the guaranty. Steve Seward's new company, Chilly's, made some payments to Good Humor on the Seward's Ice Cream account. It has not paid all of the debt. Chilly's had financial trouble and Steve Seward has not made a payment since June of 1999. The current outstanding balance owed to Good Humor is \$82,265.87.

On August 24, 1998, Debtor filed for relief pursuant to chapter 11 of the Bankruptcy Code. Debtor contends that he is no longer obligated on the debts of Seward's Ice Cream and

that Good Humor must look to Steve Seward or Barbers Dairy to collect any balance remaining. Good Humor maintains that it never released Debtor from the guaranty and that Debtor is obligated to pay the balance owed.

LAW

Bankruptcy Rule 3001(f) provides that 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." The party disputing the claim then has the burden of going forward with evidence of probative force equal to that of the allegations of the claim. *In re Britt*, 199 B.R. 1000, 1008 (Bankr.N.D.Ala. 1996). If the objecting party fails to offer sufficient evidence to overcome the evidentiary effect of the properly filed proof of claim, the objection will be denied and the claim will be allowed as filed. *Id.* Only if the objecting party presents evidence of equal probative weight, will the burden shift back to the claimant. *Id.* at 1009.

The issue is one of contract law and the contract law of Alabama is applicable. *Butner V. United States*, 440 U.S. 48 (1979). Debtor signed the instrument guaranteeing payment of the obligations of Seward's Ice Cream to Good Humor. The law is clear that "ordinarily when a competent adult, having the ability to read and understand an instrument, signs a contract he will be held to be on notice of all the provisions contained in that contract and will be bound thereby." *Green Tree Financial Corp. of Alabama v. Vintson*, 753 So.2d 497 (Ala. 1999) (citing *Power Equipment Co. v. First Alabama Bank*, 585 So.2d 1291, 1296 (Ala. 1991)). Debtor appears to be a competent adult who is capable of reading and understanding the contract and as such is on notice of all the provisions contained in the contract and is bound by them.

A continuing guaranty is not limited in time or amount and is operative until revoked. *Whitfield v. Birmingham Trust & Savings Co.*, 14 So.2d 137 (1943). The terms of the agreement between Debtor and Good Humor expressly state that the agreement shall remain in force until all obligations have been paid in full. Debtor contends that his letter of December 20, 1996 revoked the guaranty. However, Good Humor maintains that it never received the letter which was incorrectly addressed. Even if Good Humor received notice of Debtor's intent to revoke, Debtor received no response from Good Humor and cannot rely on his own unilateral decision to revoke. Unless Good Humor agreed otherwise, the most Good Humor would be required to relinquish is Debtor's guarantee of debts obtained after receipt of the letter. *Saint v. Wheeler & Wilson Mfg. Co.*, 10 So. 539 (Ala 1892). Since at that time, Seward's Ice Cream was insolvent and was no longer in operation, there were no later debts.

Debtor also contends that since Debtor is no longer involved in the business of Seward's Ice Cream and Seward's Ice Cream "has been dissolved or is bankrupt" that it would be inequitable to enforce the guaranty. However, courts have held that a guarantor's sale of his interest in the company is insufficient to terminate a guaranty. *Sharer v. Bend Milwork Syst., Inc.*, 600 So.2d 223 (Ala.1992); *Bledsoe v. Cargill, Inc.*, 452 so.2d 1334 (Ala.Civ.App.1984); *Whitfield v. Birmingham Trust & Savings Co.*, 14 So.2d 137 (1943). The fact that Seward's Ice Cream and Chilly's are unable to pay is not an excuse for Debtor's liability but, is in fact required before Good Humor can attempt to collect from Debtor. A conditional guaranty is one which is not immediately enforceable against the guarantor. *Shur-Gain Feed Div. v. Huntsville Prod. Credit Ass'n*, 372 So.2d 1317, 1320 (Ala.Civ.App. 1979). The guarantor agrees to pay the debt only if the claim is not, after exercise of reasonable effort on the part of the creditor,

collectable from the principal. *Id.* Here the principal company is no longer in existence and Good Humor has attempted to collect from Steve Seward but has been unsuccessful.

THEREFORE, IT IS ORDERED AND ADJUDGED:

- (1) Debtor's objection to claim number 16 of Good Humor-Breyers Ice Cream in the amount of \$82,265.87 is OVERRULED and the claim is allowed as an unsecured claim.

Dated: October , 2000

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE