

NOT FOR PUBLICATION

APR 09 2010

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | | |
|-------------------------|---|-------------------------------|----------------|
| In re: |) | BAP No. | CC-09-1289-DHP |
| |) | | |
| CREPES 1, INC., |) | Bk. No. | LA 08-23774 SB |
| |) | | |
| Debtor. |) | | |
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| KURT SCHNEITER, |) | | |
| |) | | |
| Appellant, |) | | |
| |) | | |
| v. |) | MEMORANDUM¹ | |
| |) | | |
| DAVID L. RAY, Chapter 7 |) | | |
| Trustee, |) | | |
| |) | | |
| Appellee. |) | | |
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Argued and Submitted on March 19, 2010
at Pasadena, California

Filed - April 9, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: DUNN, HOLLOWELL and PERRIS,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the District of Oregon, sitting by designation.

1 Creditor, asserting "excusable neglect," filed a motion
2 seeking leave to file a late proof of claim. The bankruptcy
3 court determined that the creditor had not demonstrated
4 "excusable neglect" in failing to a file proof of claim within
5 the time set by the court, and denied the motion on that basis.
6 The creditor appealed. At oral argument the creditor withdrew
7 the appeal to the extent it related to the bankruptcy court's
8 determination with respect to "excusable neglect." Because this
9 was the only issue properly raised on appeal, we DISMISS the
10 appeal as moot.

11 I. FACTS

12 The debtor in this case is Crepes 1, Inc., a California
13 corporation that operated La Creperie Café. On February 23,
14 2005, Crepes 1 succeeded to a 10-year lease dated November 6,
15 2001, for premises located in Long Beach, California. Appellant,
16 Kurt Schneider, is the landlord under the lease.

17 In conjunction with the lease, Mr. Schneider advanced
18 \$825,000 to Crepes 1 through a series of commercial loans for
19 which Crepes 1 executed six promissory notes between December 9,
20 2005, and December 18, 2007. Mr. Schneider asserts that Crepes 1
21 granted him a security interest in all inventory, chattel paper,
22 accounts, equipment, general intangibles and fixtures when the
23 first note was executed. He further asserts that he filed a UCC-
24 1 Financing Statement covering this collateral with the Office of
25 the California Secretary of State on February 24, 2006.

26 Crepes 1 defaulted on its payment obligations under certain
27 of the notes beginning in August 2007, and made no payments on
28 notes dated November 2007 and December 2007. Beginning in

1 January 2008, Crepes 1 defaulted on its rent payments under the
2 lease. In April 2008, Mr. Schneider filed an unlawful detainer
3 action against Crepes 1.

4 Crepes 1 filed its voluntary chapter 7³ petition on August
5 28, 2008. Mr. Schneider was scheduled as a secured creditor with
6 a disputed claim in the amount of \$821,000.

7 On October 6, 2008, Mr. Schneider filed a motion for relief
8 from the automatic stay ("RFS Motion"),⁴ seeking leave to
9 continue the unlawful detainer action. The RFS Motion was filed
10 on the bankruptcy court's local form F 4001-1M.UD ("Unlawful
11 Detainer RFS Form"), which applies to motions specifically
12 seeking relief from the automatic stay for the purpose of
13 pursuing an unlawful detainer action against the debtor.

14 Appended to the Unlawful Detainer RFS Form was a separate
15 "Declaration of Kurt Schneider" ("Separate Declaration") which
16

17
18 ³ Unless otherwise indicated, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
20 All "Rule" or "FRBP" references are to the Federal Rules of
21 Bankruptcy Procedure, Rules 1001-9037.

22 ⁴ Mr. Schneider filed a request that we take judicial
23 notice of the RFS Motion and related pleadings. In light of the
24 authority set forth in O'Rourke v. Seaboard Sur. Co. (In re E.R.
25 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1989), we are
26 authorized to take judicial notice of the bankruptcy court
27 records. See Atwood v. Chase Manhattan Mortgage Co. (In re
28 Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003). Because
those pleadings will assist in our disposition of this appeal, we
grant Mr. Schneider's request. We observe that in doing so we
are taking judicial notice of the assertions made in those
pleadings, not of the truth of the assertions. See Credit
Alliance Corp. v. Idaho Asphalt Supply, Inc. (In re Blumer), 95
B.R. 143, 146-47 (9th Cir. BAP 1988).

1 stated that he also was seeking relief from the automatic stay to
2 complete a pending state court case in which he sought to collect
3 on the notes, each of which was identified as to date and amount.
4 Mr. Schneider asserted in the Separate Declaration a "claim for
5 possession" based upon his alleged security interest in all
6 inventory, chattel paper, accounts, equipment, general
7 intangibles and fixtures of Crepes 1.

8 The chapter 7 trustee opposed the RFS Motion on the basis
9 that he intended to assume and assign the lease, which would cure
10 Mr. Scheiter's landlord deficiency claim, and to sell other
11 related assets which might generate sufficient cash to make a
12 distribution to unsecured creditors in the case. In his reply,
13 Mr. Schneider asserted only his right to postpetition rent.
14 After hearing, the bankruptcy court denied the RFS Motion.

15 On December 17, 2008, the bankruptcy court entered an order
16 authorizing the chapter 7 trustee to sell certain assets of the
17 bankruptcy estate, specifically, two liquor licenses, the trade
18 name "La Creperie," and the lease ("Sale Assets"). Although
19 Mr. Schneider participated in the auction sale, he was not the
20 successful bidder. The ultimate sales price was \$820,000 ("Sale
21 Proceeds"). As part of the sale, the trustee assumed and
22 assigned the Lease, using the Sale Proceeds to cure the rent
23 defaults owed to Mr. Schneider.

24 On December 4, 2008, the bankruptcy court sent a "Notice of
25 Possible Dividend and Order Fixing Time to File Claims," setting
26 March 9, 2009, as the deadline ("Claims Bar Date") by which
27 creditors were to file proofs of claim as required by Rule
28 3002(c)(5). No proof of claim was filed by or on behalf of

1 Mr. Schneider by the Claims Bar Date.

2 On March 31, 2009, Fainsbert Mase & Snyder, LLP ("FMS")
3 substituted as counsel for Mr. Schneider in the bankruptcy case.
4 FMS received former counsel's case files on May 1, 2009.
5 Sometime after receipt of the files, FMS reviewed them and
6 discovered no proof of claim had been filed on Mr. Schneider's
7 behalf in the case.

8 On July 2, 2009, Mr. Schneider filed a motion ("Motion") to
9 extend the Claims Bar Date to allow him to file a proof of claim,
10 relying solely on a request that the bankruptcy court find that
11 missing the Claims Bar Date was the result of "excusable
12 neglect." The chapter 7 trustee filed a limited opposition.
13 Specifically, the chapter 7 trustee did not oppose
14 Mr. Schneider's request to file a proof of claim, unless he
15 intended to file a claim asserting a security interest in the
16 Sale Proceeds. At the hearing on the Motion, the bankruptcy
17 court determined that Mr. Schneider had not satisfied his burden
18 of proving that the neglect in failing to file a proof of claim
19 by the Claims Bar Date was excusable. The bankruptcy court
20 further found prejudice to the chapter 7 trustee in the delay in
21 asserting the claim.

22 Asserting error in the bankruptcy court's findings with
23 respect to "excusable neglect" and prejudice, Mr. Schneider
24 appealed from the order entered denying leave to file his proof
25 of claim. At oral argument, Mr. Schneider informed the panel
26 that he did not intend to pursue on appeal his assertion that the
27 bankruptcy court erred in determining that Mr. Schneider did not
28 prove "excusable neglect" for his failure to meet the Claims Bar

1 Date. Instead, he intended to rely solely on his assertion,
2 raised for the first time in his opening brief, i.e., that the
3 RFS Motion constitutes a timely-filed informal proof of claim.

4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334 and 157(b) (2) (A) and (B). Federal courts may decide only
7 actual cases or live controversies. Clear Channel Outdoor, Inc.
8 v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th Cir BAP 2008).
9 While it is well established that we lack jurisdiction to hear
10 moot cases, United States v. Pattullo (In re Pattullo), 271 F.3d
11 898, 900 (9th Cir. 2001), we have jurisdiction to determine our
12 jurisdiction. Hupp v. Educ. Credit Mgmt. Corp. (In re Hupp), 383
13 B.R. 476, 478 (9th Cir. BAP 2008).

14 **III. ISSUE**

15 Whether Mr. Schneider's assertion that he timely filed an
16 informal proof of claim is properly before the panel.

17 **IV. DISCUSSION**

18 As noted previously, the only relief Mr. Schneider sought
19 through the Motion was that the bankruptcy court find "excusable
20 neglect" in his failure to meet the Claims Bar Date. Rule 8006
21 requires that an appellant, within ten days after filing the
22 notice of appeal, serve on the appellee a statement of issues to
23 be presented. In his Statement of Issues on Appeal,
24 Mr. Schneider listed a single issue: "Did [the bankruptcy court]
25 err in determining that Appellant failed to establish 'excusable
26 neglect' when he failed to [file] his proof of claim before the
27 bar date?" He expressly waived this issue at oral argument.
28 Typically, this would end our review of the appeal. See

1 Pattullo, 271 F.3d at 900 ("If a case becomes moot while pending
2 on appeal it must be dismissed.").

3 However, Mr. Schneider announced at oral argument his intent
4 to pursue his assertion that the RFS Motion constitutes an
5 informal proof of claim that could be amended by filing a formal
6 proof of claim after the Claims Bar Date, a matter raised for the
7 first time in his opening brief in this appeal.

8 We typically do not consider arguments on appeal that were
9 not "properly raised" in the bankruptcy court. O'Rourke v.
10 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957
11 (9th Cir. 1989); Woods v. Pine Mountain, Ltd. (In re Pine
12 Mountain, Ltd.), 80 B.R. 171, 173 (9th Cir. BAP 1987) (generally,
13 an issue not raised before the bankruptcy court is waived). It
14 is true that we have discretion to consider an argument raised
15 for the first time on appeal "if the issue presented is purely
16 one of law and either does not depend on the factual record
17 developed below, or the pertinent record has been fully
18 developed." In re Pike, 243 B.R. 66, 69 (9th Cir. BAP 1999);
19 Pizza of Hawaii Inc. v. Shakey's, Inc. (In re Pizza of Hawaii,
20 Inc.), 761 F.2d 1374, 1379 (9th Cir. 1985). However, these
21 conditions are not satisfied to allow the exercise of such
22 discretion in this appeal.

23 "For a document to constitute an informal proof of claim, it
24 must state an explicit demand showing the nature and amount of
25 the claim against the estate, and evidence an intent to hold the
26 debtor liable." In re Holm, 931 F.2d 620, 622 (9th Cir. 1991).
27 These are factual issues, which Mr. Schneider never raised for
28 determination by the bankruptcy court in the first instance.

1 The Declaration of Kurt Schneider ("RFS Declaration"), upon
2 which Mr. Schneider appears to rely as the evidentiary record for
3 purposes of establishing that he holds an informal proof of
4 claim, contains several evidentiary defects which impact the
5 determination that the RFS Motion provided sufficient notice of
6 Mr. Schneider's alleged secured claim to constitute an informal
7 proof of claim. In particular, Mr. Schneider says he has a
8 security interest in "all inventory, chattel paper, accounts,
9 equipment, general intangibles and fixtures," and that the
10 security interest was perfected by the filing of a UCC-1
11 financing statement on February 24, 2006, in the office of the
12 California Secretary of State. Yet the RFS Declaration did not
13 include any evidence of the attachment of a security interest
14 through a security agreement. Further, although the UCC-1
15 financing statement attached to the RFS Declaration includes a
16 collateral description, it does not reflect a filing date to
17 evidence perfection. Finally, the security interest
18 Mr. Schneider claims has no apparent connection to the assets the
19 trustee sold, i.e., the liquor licenses, the trade name, and the
20 estate's interest in the lease.⁵

21 _____
22 ⁵ Prior to the auction, counsel for the chapter 7 trustee
23 clarified what was being sold:

24 I wanted to make clear before we start the auction of a
25 couple of things. First of all, we're not selling a
26 business today. We're selling specific assets. We are
27 selling two liquor licenses for beer and wine. We are
28 selling the name of the restaurant, and we are assuming
and assigning a lease.

(continued...)

1 These deficiencies relate directly to whether Mr. Schneiter
2 stated an "explicit demand showing the nature and amount of the
3 claim against the estate." Because our determination of the
4 informal proof of claim issue on appeal depends on a factual
5 record that was not developed before the bankruptcy court, we
6 cannot decide that issue in this appeal.

7 **VI. CONCLUSION**

8 Mr. Schneiter did not present to the bankruptcy court the
9 issue that the RFS Motion constituted an informal proof of claim;
10 accordingly this issue is not properly before us. Because
11 Mr. Schneiter has withdrawn the only issue properly raised on
12 appeal, we DISMISS the appeal as moot.

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22 ⁵(...continued)

23 So to the extent that there's other assets in the
24 facility, most of them are [under]-secured and over
25 encumbered [T]he Trustee at this moment is
26 planning to abandon those assets, which will have
27 whatever affect [sic] it's going to have. But I wanted
to be very clear today on what we're selling and what
we're not selling.

28 Tr. of Dec. 2, 2008 Hearing, at 3:2-16.