

DEC 23 2008

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. CC-08-1105-MoPaH
7 10248 BEVERLY STREET, LLC,) Bk. No. LA 07-10700 EC
8 Debtor.)
9 _____)
10 CARLOS A. SISON,)
11 Appellant,)
12 v.) **MEMORANDUM**¹
13 RONALD MORRISON; JEFFREY I.)
14 GOLDEN, Chapter 11 Trustee;)
15 10248 BEVERLY STREET, LLC;)
16 DIANE HARTMAN; ROLANDO)
17 SARABIA; ALPHA OMEGA TAX &)
18 FINANCIAL SERVICES,)
19 Appellees.)
20 _____)

Argued and Submitted on November 21, 2008
at Los Angeles, California

Filed - December 23, 2008

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

Hon. Ellen Carroll, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and HOLLOWELL, 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.

1 The bankruptcy court disallowed the appellant's unsecured
2 claim. We AFFIRM.

3 **I. FACTS**

4 On June 15, 2005, appellant Carlos Sison ("Sison") and
5 appellee Ronald Morrison ("Morrison") formed 10248 Beverly
6 Street, LLC ("Debtor"), a limited liability company.² Debtor was
7 formed for the purpose of developing and selling real property
8 located at 10248 Beverly Street in Bellflower, California (the
9 "Property"). Debtor filed a single-asset real estate chapter 11
10 case on January 30, 2007, listing the Property as its primary
11 asset. Prior to conveying title to Debtor, Sison owned the
12 Property and a foreclosure sale was pending.³

13 Jeffrey I. Golden ("Trustee") was appointed chapter 11⁴
14 trustee of Debtor's estate. Trustee sold the Property for
15 \$830,000, and paid the secured debt, taxes, commission and costs

16
17 ² Debtor's response to Question 21 of its Statement of
18 Financial Affairs indicates that Morrison owned 50 percent of the
19 equity in Debtor and Sison owned the other 50 percent. However,
20 according to the Operating Agreement for Debtor (attached to the
21 response by Sison to Morrison's objection to his claim and
22 available at Docket Nos. 78 and 79 of the main case), the members
of Debtor are Sison and the "Secrest-Morrison Partnership."
Debtor's response to Question 23 of the Statement of Financial
Affairs reflects that David Secrest withdrew from "the
partnership" on December 31, 2006.

23 ³ Exhibit B to Debtor's Operating Agreement (at page 19)
24 indicates that the Property was also the subject of a pending
25 quiet title action and that Sison may have held title as "Karl
Rheiner Sison."

26 ⁴ Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
revised by The Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 of sale. The estate received net sale proceeds of \$306,803.16
2 for payment of administrative and unsecured claims.⁵

3 Debtor listed only one unsecured creditor on its Schedule F:
4 Morrison in the amount of \$286,500.⁶ The claim was not scheduled
5 as disputed, contingent or unliquidated; Morrison has not filed a
6 separate proof of claim. On or about March 12, 2008, Sison and
7 his spouse Diane Hartman ("Hartman") filed a document entitled
8 "Omnibus Objections to Claim of Ronald Morrison," but the docket
9 does not reflect whether this purported objection was ever
10 resolved.

11 On August 28, 2007, Sison filed, on the official form, an
12 unsecured proof of claim in the amount of \$70,000 for "services
13 performed" and "money loaned." He did not provide any supporting
14 explanation or documentation. On the same date, Hartman filed a
15 claim in the total amount of \$175,456 (although the face of the
16 claim reflects a priority claim in the amount of \$51,000 and an
17 unsecured nonpriority claim in the amount of \$175,456). Also on
18 that date, Rolando Sarabia ("Sarabia") filed a claim in the total
19 amount of \$240,000, with \$120,000 of that amount designated as
20 priority; he attached an agreement between Sarabia & Associates
21 and Sison as an exhibit to his claim.

22 On November 30, 2007, counsel for Morrison sent a letter to
23 Sison stating that the Debtor's records did not reflect a claim

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25 ⁵ According to the docket sheet, the bankruptcy court has
26 entered orders approving the administrative claims of Trustee in
27 the total amount of \$47,315.71 and of his accountants in the
28 total amount of \$16,194.40.

⁶ Debtor's Schedule F reflects that Morrison is owed
\$286,500 as "Share in Profit of LLC, Not Subject to Setoff."

1 owing to Sison and requesting that Sison provide him with
2 documentation in support of the claim. Sison never responded to
3 this request.

4 Sison filed an individual chapter 7 case in 2006. He did
5 not schedule any claim against Debtor as an asset of his estate.
6 On Schedule B, he responded "None" when asked to disclose
7 interest in partnerships or joint ventures, liquidated debts
8 owing to him, and any other contingent and unliquidated claim of
9 every nature.

10 On February 22, 2008, Morrison filed an "omnibus objection"
11 to the claims of Sison, Hartman and Sarabia. With respect to
12 Sison's claim, Morrison noted that the Debtor's records did not
13 reflect or support an unsecured claim by Sison beyond the amounts
14 he would receive as an equity holder,⁷ that Sison never provided
15 any documents in support of a claim notwithstanding requests by
16 Morrison's counsel and debtor's counsel, and that Sison did not
17 schedule a claim against Debtor as an asset in his own bankruptcy
18 case.

19 Anita R. Pieratt ("Pieratt"), who served as bankruptcy
20 counsel for Debtor and who represented Debtor in connection with
21 the formation of its business, filed a declaration in support of
22 Morrison's objection to Sison's claim. She stated that in
23 preparing the petition and schedules for Debtor, she consulted

24
25 ⁷ Although Sison did not include in his excerpts all of the
26 documents that he filed in response to Morrison's objection, they
27 are available at Docket Nos. 78 and 79. One document, the
28 Operating Agreement, provided that the first \$400,000 of net
profit would be distributed to the Secrest-Morrison Partnership
and any net profit between \$400,000 and \$800,000 would be
distributed to Sison. (Paragraph 4.2 at page 7).

1 "at length" with Morrison and Sison, who provided copies of
2 Debtor's financial records. According to Pieratt, these books
3 and records do not indicate that Debtor owes any monies to Sison
4 or that Sison performed any services benefitting Debtor. She
5 further declared that:

6 Sison never informed me that he loaned any money to the
7 Debtor or that he was one of its creditors. In fact, I
8 am aware that even after the [P]roperty was quieted in
9 the Debtor LLC, Sison lived on the [P]roperty without
10 paying rent to [Debtor] and rented out portions of it
11 and pocketed the rent money himself. Furthermore,
12 during the course of discovery in the [q]uiet title
13 action, I pleaded with Sison to provide me with any
14 checks, receipts, cashiers checks[,] etc., to prove
15 that he expended any money on the Beverly Street
16 Property. Even though I have three bankers boxes of
17 documents regarding the [P]roperty, he has never
18 provided me with a single cancelled check or anything
19 else to show that he ever paid any money towards the
20 [P]roperty.

21 Similarly, Morrison filed a declaration stating that the
22 Debtor's books and records did not reflect any monies or
23 remuneration owing to Sison and that Sison "never informed me
24 that he loaned any money to the Debtor or that he was one of its
25 creditors." Morrison's counsel, Steven M. Mayer ("Mayer"), also
26 filed a declaration regarding the lack of documentation or
27 explanation supporting Sison's claim.

28 In response to Morrison's omnibus objection, Sison and
Hartman filed their own objection to Morrison's claim (Docket No.
78) and a letter (Docket No. 79) stating that they had been
deprived of their "anticipated income" from the development of
the Property, that Sison had an ownership interest of 50 percent
in "the [P]roperty," and that Sison had lost many receipts
documenting his claims when he was "forced to move out from his
own [P]roperty." Sison and Hartman attached documents to this

1 letter, but Sison did not provide these documents in his
2 excerpts. We have obtained and reviewed the documents from the
3 bankruptcy court's docket.⁸

4 At a hearing on Morrison's omnibus objections, the
5 bankruptcy court indicated that it would sustain the objections:

6 I have read through everything that has been
7 filed, including all of the attachments and letters and
8 whatever else was submitted. I can't find a single
9 thing in any of the paperwork that would indicate that
10 the Debtor, this limited liability company, is
11 obligated to any of these parties.

12 A lot of the paperwork seems to indicate that Mr.
13 Sison is liable for these obligations personally, some
14 of which were accrued before the Debtor was even formed
15 as I understand it. There's no way a limited liability
16 company would be responsible for somebody else's
17 domestic support obligation. That's ridiculous.

18 Apparently, when Mr. Sison filed his own
19 bankruptcy, he didn't list anything was owed to him by
20 this corporate Debtor, and those papers were filed
21 under penalty of perjury. So I think I should be able
22 to rely on their truthfulness and accuracy.

23 There's just nothing here unless I missed
24 something, but I read everything, that would establish
25 that this corporate entity has any liability for any of
26 these obligations. I'm not saying the obligations
27 don't exist. They just don't appear to be obligations
28 of this Debtor.

And I understand before these objections were
filed there was a request made to all three claimants
to please give us your documentation, let us know why
you think this Debtor owes you something, and that -
those letters were not responded to. So I'm happy to
hear from any of the three of you if you have something

⁸ We may take judicial notice of the underlying bankruptcy records with respect to an appeal. O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233, n.9 (9th Cir. BAP 2003) ("We have obtained copies [of the relevant documents] from the clerk of the bankruptcy court, and take judicial notice of them."), citing Fegert, 887 F.2d at 957-58.

1 that establishes liability like a contract or a
2 guarantee or I don't know what else on the part of this
3 corporate entity. Otherwise, I'm inclined to sustain
4 these objections.

5 (Emphasis added).

6 In response to the court's comments, Sison stated that by
7 filing bankruptcy, Debtor stopped the development of the Property
8 and deprived him of profits. He did not argue that he had paid
9 reimbursable expenses or that he had provided compensable
10 services to Debtor. He did not indicate that he had further
11 evidence in support of his claim.

12 On April 4, 2008, the bankruptcy court entered the order
13 sustaining Morrison's objections and disallowing the claims of
14 Sison, Hartman and Sarabia. On April 14, 2008, Sison filed a
15 timely appeal of the "order sustaining objections to claim of C.
16 Sison." His notice of appeal did not mention the disallowance of
17 the claims of Hartman and Sarabia, and neither Hartman nor
18 Sarabia filed a notice of appeal.

19 On May 19, 2008, Sison filed a motion to reconsider the
20 disallowance of his claim, notwithstanding the pending appeal.⁹

21 ⁹ Paragraph 4 of the motion to reconsider indicates that
22 the correspondence and documents filed by Sison on or about March
23 10, 2008 (Docket Nos. 78 and 79) constituted an informal proof of
24 claim in the amount of \$386,000.00. Sison repeats this
25 allegation on page 6 of his opening brief. Nothing in the papers
26 filed by Sison states or implies that he has a claim in the
27 amount of \$386,000.00. To the contrary, the figure of \$386,000
28 is mentioned only once in those documents, when Hartman and Sison
state that they "strongly object" to the "claims (\$386,000.00) by
Mr. Ron Morrison." Other than the one-sentence bald allegation
in the now-withdrawn motion to reconsider and in the opening
brief, nothing in the record or on the bankruptcy court's docket
(continued...)

1 On July 8, 2008, he withdrew his motion to reconsider. On July
2 16, 2008, the bankruptcy court entered an order dismissing the
3 bankruptcy case, but reserving jurisdiction to resolve any issues
4 arising from this appeal and any resulting remand. In his brief,
5 Morrison stated that the allowed claims have been paid. See
6 Appellee's Opening Brief at page 4.

7 On July 22, 2008, arguing that Sison's opening brief was
8 deficient and frivolous, Morrison filed a motion for sanctions in
9 the form of (a) dismissal of the appeal and (2) monetary
10 sanctions in the amount of \$3,503.61. By order dated September
11 12, 2008, we denied the request for dismissal and deferred the
12 request for monetary sanctions. We are issuing a separate order
13 disposing of the sanctions motion.

14 **II. ISSUE**

15 Did the bankruptcy court err in disallowing the unsecured
16 claim of Sison?

17 **III. STANDARD OF REVIEW**

18 We review findings of fact for clear error and issues of law
19 de novo. Litton Loan Serv'g, LP v. Garvida (In re Garvida), 347
20 B.R. 697, 703 (9th Cir. BAP 2006). Whether due process has been
21 accorded is a question of law that we review de novo. Id.
22 Whether an evidentiary presumption has been rebutted is a
23 question of fact reviewed for clear error. Id. Whether a

24
25 ⁹(...continued)
26 reflects that Sison filed an informal proof of claim in that
27 amount on or about that date. Rather, he objected to a claim in
28 that amount by Morrison.

Notwithstanding the foregoing, Sison's counsel argued to us
that the court had disallowed his client's \$386,000 claim.

1 claimant has complied with Rule 3001 is a question of fact
2 reviewed for clear error. Heath v. Am. Express Travel Related
3 Serv. Co. (In re Heath), 331 B.R. 424, 428-29 (9th Cir. BAP
4 2005).

5 **IV. JURISDICTION**

6 A bankruptcy court's allowance or disallowance of a proof of
7 claim is a final judgment. Poonja v. Alleghany Props. (In re Los
8 Gatos Lodge, Inc.), 278 F.3d 890, 894 (9th Cir. 2002). The
9 bankruptcy court had jurisdiction via 28 U.S.C. §§ 157(b) (2) (B)
10 and 1334. We have jurisdiction under 28 U.S.C. § 158.

11 **V. DISCUSSION**

12 A. Substantive Nature of Claim

13 A proof of claim constitutes "prima facie evidence of the
14 validity and amount of the claim" pursuant to Rule 3001(f) and is
15 deemed allowed under section 502(a) unless a party in interest
16 objects. See also Fed. R. Bankr. P. 3007. Once an objection is
17 filed, the court "after notice and a hearing, shall determine the
18 . . . claim[.]" See 11 U.S.C. § 502(b). Section 502(b) further
19 mandates that the court "shall allow" the claim, except to the
20 extent it falls within one of nine enumerated categories of
21 prohibited claims. Id.

22 Section 502(b) (1) sets forth one such prohibited claim: a
23 claim that "is unenforceable against the debtor and property of
24 the debtor, under any agreement or applicable law for a reason
25 other than because such claim is contingent or unliquidated." 11
26 U.S.C. § 502(b) (1). Here, Morrison contended that Sison did not
27 demonstrate the existence of an enforceable claim against Debtor
28 and the bankruptcy court agreed.

1 Sison filed a priority unsecured proof of claim in the
2 amount of \$70,000 and simply checked boxes indicating that the
3 claim was based on "services provided" and "money loaned." He
4 provided no further explanation or documentation. Counsel for
5 Morrison requested documentation and information from Sison
6 before filing an objection to his claim; he did not respond.¹⁰
7 Morrison therefore objected to the proof of claim on various
8 substantive grounds: (1) Sison did not list any such claims
9 against Debtor in the schedules filed in his personal bankruptcy
10 case, (2) the books and records of Debtor did not reflect the
11 existence of a debt owed to Sison, (3) the other equity interest
12 holder in Debtor (i.e., Morrison) and counsel for Debtor, both of
13 whom were familiar with Debtor's prepetition business, did not
14 know about any unsecured debt owing to Sison and could not
15 ascertain any possible basis for such a claim, (4) Sison assisted
16 in the preparation of Debtor's schedules and did not mention that
17 he held an unsecured claim that should be listed, and (5) despite
18 requests by Morrison's counsel, Sison did not provide information
19 to support his claim.

20 Morrison's objection therefore provided sufficient factual
21 and legal grounds to dispute the prima facie validity of Sison's
22 claim. "If the objector produces sufficient evidence to negate
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24 ¹⁰ As we have noted in other cases, "a creditor's lack of
25 adequate response to a debtor's formal or informal inquiries 'in
26 itself may raise an evidentiary basis to object to the
27 unsupported aspects of the claim, or even a basis for evidentiary
28 sanctions, thereby coming within [s]ection 502(b)'s grounds to
disallow the claim.'" Campbell v. Verizon Wireless S-CA (In re
Campbell), 336 B.R. 430, 436 (9th Cir. BAP 2005), quoting Heath,
331 B.R. at 437.

1 one or more of the sworn facts in the proof of claim, the burden
2 reverts to the claimant to prove the validity of the claim by a
3 preponderance of the evidence." Ashford v. Consol. Pioneer Mrtg.
4 (In re Consol. Pioneer Mrtg.), 178 B.R. 222, 226 (9th Cir. BAP
5 1995). The "proof of claim will lack prima facie validity, so
6 any objection that raises a legal or factual ground to disallow
7 the claim will likely prevail absent an adequate response by the
8 creditor." Campbell, 336 B.R. at 436.

9 In response to Morrison's objection, Sison and Hartman
10 submitted correspondence to the court with various documents
11 attached. The bankruptcy court reviewed this response and the
12 documentation, and could find no basis to support Sison's
13 allegation that Debtor owed him anything for services provided
14 and money loaned. We have reviewed the same documents and reach
15 the same conclusion: at most, the documents show that Sison
16 anticipated participating in the profits, if any, of Debtor. In
17 other words, any "claim" he had was limited to a return on his
18 equity interest, and under the Operating Agreement he provided,
19 he would not receive any distribution on his equity until Debtor
20 realized more than \$400,000 in profit.¹¹ The bankruptcy court
21 did not clearly err in finding that Sison's response was
22 inadequate to establish the existence of an enforceable unsecured
23 claim against Debtor. The preponderance of evidence, including

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25 ¹¹ In a letter dated May 30, 2005, Sison indicates that
26 Morrison and Secrest gave Sison "advance money" to be used for
27 his personal expenses, and that such advances would be deducted
28 from his share of the profit. This letter and the other
correspondence attached to Sison's response do not mention that
Sison had incurred reimbursable expenses on behalf of or provided
compensable services to Debtor.

1 Sison's own bankruptcy schedules in his personal bankruptcy case,
2 weighed in favor of disallowance of the claim.¹²

3 B. Procedural Questions

4 In his opening brief, Sison argues that the bankruptcy court
5 erred in sustaining Morrison's objection, as Rule 3007(c) limits
6 omnibus objections: "Unless otherwise ordered by the court or
7 permitted by subdivision (d), objections to more than one claim
8 shall not be joined in a single objection." Fed. R. Bankr. P.
9 3007(c).¹³ Subsection (d) provides that an omnibus objection may
10 be lodged against claims "filed by the same entity" or solely on
11 eight enumerated grounds. Fed. R. Bankr. P. 3007(d).

12 While Morrison's objection was not based solely on any of
13 the enumerated grounds of subsection (d), he did allege that the
14

15 ¹² In the unlikely event Sison actually had or has a
16 meritorious claim that accrued prior to March 21, 2006 (the date
17 he filed his personal bankruptcy petition), it belongs to his
18 chapter 7 estate as an undisclosed asset. Diamond Z Trailer,
19 Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 418-19 (9th
20 Cir. BAP 2007). If the bankruptcy court had disallowed Sison's
21 claim solely on the basis that he lacked standing to prosecute it
22 (because the claim belonged to his bankruptcy estate), we would
23 have to reverse under Federal Rule of Civil Procedure 17 (made
24 applicable by Rules 9014 and 7017). That rule prohibits
25 dismissal of an action because the real party in interest is not
26 prosecuting it until the real party in interest (i.e., the
27 bankruptcy trustee) has a reasonable opportunity to join the
28 action. We treat the bankruptcy court's order (and our
affirmance of that order) to apply to Sison only, and not to the
trustee of his chapter 7 estate.

25 ¹³ See also California Central District Local Bankruptcy
26 Rule 3007-1(a)(4) and (5), providing that a "separate objection
27 must be filed to each proof of claim" unless the objection
28 pertains to multiple claims filed by the same creditor, the
objections asserts the same type of objection to multiple claims,
or the court orders otherwise.

1 same person prepared the three claims and that the three claims
2 were filed as a part of a "conspiracy orchestrated by [Sison] to
3 defraud the Debtor, the estate, the other legitimate creditors,
4 and this Court." Morrison further noted that "there are several
5 curious similarities between the three claims that strongly
6 suggests the claimant worked in concert in the preparation and
7 filing of the Subject Claims." Given these allegations, the
8 omnibus objection arguably was directed at claims "filed by the
9 same entity" and thus fell within the exception of Rule
10 3007(d).¹⁴

11 Even if the omnibus objection violated Rule 3007(c) and (d),
12 Sison waived this procedural objection by not raising it before
13 the bankruptcy court. We will not consider issues raised for the
14 first time on appeal. O'Rourke v. Seaboard Sur. Co. (In re
15 Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989); Concrete Equip.
16 Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513,
17 520 (9th Cir. BAP 1996). See also In re Cybernetic Serv., Inc.,
18 252 F.3d 1039, 1045 n.3 (9th Cir. 2001) (appellate court will not
19 explore ramifications of argument because it was not raised below
20 and, accordingly, was waived); Scovis v. Henrichsen (In re
21 Scovis), 249 F.3d 975, 984 (9th Cir. 2001) (court will not
22 consider issue raised for first time on appeal absent exceptional
23 circumstances).

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26 ¹⁴ In his opening brief, Morrison contended that no Rule
27 3007(c) or (d) exists. Morrison is incorrect. Those subsections
28 of Rule 3007 became effective on December 1, 2007, and thus
governed Morrison's 2008 objection.

1 **VI. CONCLUSION**

2 For the foregoing reasons, we AFFIRM the bankruptcy court's
3 disallowance of Sison's proof of claim. We will address
4 Morrison's sanctions motion in a separate order.

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