

APR 17 2008

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-07-1467-KBmd
)
 6 ALAN DOLCH; JERUND DOLCH,) Bk. No. LA 05-40150-EC
)
 7 Debtors.)
)
 8 AMERICAN EXPRESS TRAVEL RELATED)
 SERVICES COMPANY, INC.; MBNA)
 9 AMERICA (DELAWARE), N.A.,)
)
 10 Appellants,)
)
 11 v.) **MEMORANDUM***
)
 12 JOHN MENCHACA, Chapter 7)
 Trustee; ALAN DOLCH; JERUND)
 13 DOLCH; UNITED STATES TRUSTEE,)
)
 14 Appellees.)
)

Argued and Submitted on March 19, 2008
at Pasadena, California

Filed - April 17, 2008

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

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding

Before: KLEIN, BRANDT,** and MACDONALD,*** Bankruptcy Judges.

*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.

**Hon. Philip H. Brandt, U.S. Bankruptcy Judge for the
Western District of Washington, sitting by designation.

***Hon. Donald MacDonald, Chief U.S. Bankruptcy Judge for the
District of Alaska, sitting by designation.

1 Two creditors appeal an order sustaining the chapter 7
2 trustee's objections to claims totaling \$387,959.01 premised on
3 the individual debtors' liability for credit card debts on
4 corporate accounts. The debtors were officers, directors, and 40
5 percent shareholders of the corporation.

6 Without stating its findings of fact and conclusions of law
7 either on the record or in writing, the bankruptcy court
8 concluded that the appellants did not provide sufficient
9 documentation to prove personal liability of the debtors or of
10 the estate for the corporate expense.

11 Nor did the bankruptcy court conduct the evidentiary hearing
12 with witnesses available for direct and cross-examination on the
13 disputed material factual issues, as required by Federal Rule of
14 Bankruptcy Procedure 9014(d).

15 The result is that we are left with a record that does not
16 permit appropriate appellate review of an important question.
17 Hence, we VACATE and REMAND to the bankruptcy court for, at a
18 minimum, explicit findings of fact and conclusions of law and the
19 evidentiary basis for such rulings. The bankruptcy court may
20 elect to conduct further proceedings in light of Rule 9014(d).

21
22 FACTS

23 Appellees Alan and Jerund Dolch are joint debtors in a
24 chapter 7 case filed on October 14, 2005, in which appellee John
25 J. Menchaca is the chapter 7 trustee.

26 According to the debtors' Schedule B and Statement of
27 Financial Affairs, they were officers, directors and 40 percent
28 shareholders of MC2 Custom Alloys, Inc., a California

1 corporation.¹ The corporation is insolvent.

2 In dispute are three general unsecured proofs of claim.
3 American Express' Claim Nos. 6 (\$169,909.27) and 7 (\$197,386.87)
4 and MBNA's Claim No. 16 (\$20,662.87). All of these proofs of
5 claim were timely filed by the same law firm.

6 The trustee objected to Claim Nos. 6, 7, and 16, on July 3,
7 2007, as part of an omnibus objection to eight claims.² The
8 objections to Claim Nos. 6, 7, and 16 were on grounds that the
9 claims lacked sufficient documentation which would give rise to
10 liability on the part of the debtors or the estate for the debts.

11 Hearing on the trustee's objections to the American Express
12 claims and the MBNA claim occurred on August 29, 2007, in which
13 the court continued the hearing until October 31, 2007, to
14 provide additional time for the appellants to present the court
15 with further evidence to prove that the debtors were liable for
16 the corporate expenses.³

17 At the continued hearing, the court sustained the trustee's
18 objections to the American Express claims and the MBNA claim,
19 apparently because of the insufficiency of evidence provided by
20 appellants. The court, however, neither actually conducted an
21 evidentiary hearing in compliance with Rules 9014(d) and (e), nor

22
23 ¹Other principals of the corporation are apparently being
pursued as putative guarantors of the corporation's debt.

24 ²Such an omnibus objection to claim is now generally not
25 permitted by Federal Rule of Bankruptcy Procedure 3007, as
26 amended effective December 1, 2007.

27 ³Four of the other five claims (Claim Nos. 2, 3, 15, and 17)
28 in the omnibus objection were resolved by order entered on
September 7, 2007. The trustee withdrew the objection to Claim
No. 14 on September 4, 2007.

1 made findings of fact and conclusions of law in compliance with
2 Civil Rule 52. Fed. R. Civ. P. 52(a), incorporated by Fed. R.
3 Bankr. P. 7052 & 9014.

4 The order disallowing Claim Nos. 6, 7, and 16 in their
5 entirety was entered on November 9, 2007.

6 This timely appeal ensued.

8 JURISDICTION

9 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334
10 over this core proceeding under 28 U.S.C. § 157(b)(2)(B). We
11 have jurisdiction under 28 U.S.C. § 158(a)(1).

13 ISSUE

14 Whether the bankruptcy court erred in sustaining the
15 trustee's objection to the appellants' filed proofs of claim
16 without conducting an evidentiary hearing to resolve contested
17 material facts and without stating findings of fact or
18 conclusions of law.

20 STANDARD OF REVIEW

21 We review findings of fact for clear error and issues of law
22 de novo. Hoopai v. Countrywide Home Loans, Inc. (In re Hoopai),
23 369 B.R. 506, 509 (9th Cir. BAP 2007).

25 DISCUSSION

26 This appeal presents potentially important questions
27 regarding evidence in support of proofs of claim in the context
28 of transactions that are conducted electronically. It presents

1 variations on the theme that we addressed in our so-called
2 Vinhnee decision where the issue related to introducing account
3 statements in evidence. Am. Express Travel Related Servs. Co. v.
4 Vinhnee (In re Vinhnee), 336 B.R. 437 (9th Cir. BAP 2005). Here,
5 the issue relates to the manner of proving the existence and
6 terms of underlying contracts, the outcome of which involves
7 fundamental assumptions underlying electronic commerce.

8 We are presented with a record, however, that does not
9 permit meaningful review of such an important question. The
10 basic problem is that the bankruptcy court did not employ the
11 requisite procedure for hearing the dispute, considering
12 testimonial and documentary evidence admitted pursuant to the
13 Federal Rules of Evidence, and making findings of fact and
14 conclusions of law. While we have done our best to attempt to
15 resolve the appeal on the merits, we would have to make so many
16 assumptions about facts and procedures that we could not do so in
17 good conscience on such an important question.

18
19 I

20 An objection to a claim is a "contested matter" governed by
21 Federal Rule of Bankruptcy Procedure 9014. Litton Loan Serv'g,
22 LP v. Garvida (In re Garvida), 347 B.R. 697, 704 (9th Cir. BAP
23 2006); see Advisory Committee Note to Fed. R. Bankr. P. 3007.

24 Under Rule 9014(d), "[t]estimony of witnesses with respect
25 to disputed material factual issues shall be taken in the same
26 manner as testimony in an adversary proceeding." Fed. R. Bankr.
27 P. 9014(d).

1 Rule 9014(d) was adopted in 2002 to stop a practice by which
2 some courts required that Rule 9014 contested matters be resolved
3 based on affidavits, as is permitted with respect to motions by
4 virtue of Federal Rule of Civil Procedure 43(e). The Advisory
5 Committee Note is explicit on the point:

6 Subdivision (d) is added to clarify that if the motion
7 cannot be decided without resolving a disputed material
8 issue of fact, an evidentiary hearing must be held at which
9 testimony of witnesses is taken in the same manner as
10 testimony is taken in an adversary proceeding or at a trial
11 in a district court civil case. Rule 43(a), rather than
12 Rule 43(e), F.R. Civ. P. would govern the evidentiary
13 hearing on the factual dispute. Under Rule 9017, the
14 Federal Rules of Evidence also apply in a contested matter.
15 Nothing in the rule prohibits a court from resolving any
16 matter that is submitted on affidavits by agreement of the
17 parties.

18 Fed. R. Bankr. P. 9014(d), Advisory Committee Note.

19 There plainly were disputed material issues of fact. Nor
20 does it appear that the parties agreed that the matter could be
21 submitted on affidavits. The transcripts, rather, support the
22 proposition that the parties were required by the court to
23 present affidavits. Moreover, there is no indication in the
24 record that the court complied with the requirement under Rule
25 9014(e) that there be procedures "that enable the parties to
26 ascertain at a reasonable time before any scheduled hearing
27 whether the hearing will be an evidentiary hearing at which
28 witnesses may testify." Fed. R. Bankr. P. 9014(e).

Even if we inferred that the parties' conduct at the
hearings indicated that they de facto consented to the
proceedings as if stipulating to admission of the affidavits
without cross-examination, we are reluctant to overlook the
procedural error, especially in light of the absence of

1 evidentiary rulings and findings of fact and conclusions of law.

3 II

4 Rule 9014 incorporates the provisions of Federal Rule of
5 Civil Procedure 52, which require that findings and conclusions
6 be stated on the record after the close of the evidence or to
7 appear in an opinion or memorandum of decision filed by the
8 court. Specifically, in an action tried on the facts without a
9 jury, "the court must find the facts specially and state its
10 conclusions of law separately." Fed. R. Civ. P. 52(a)(1),
11 incorporated by Fed. R. Bankr. P. 7052.

12 These findings must be sufficient to indicate the factual
13 basis for the court's ultimate conclusion. Unt v. Aerospace
14 Corp., 765 F.2d 1440, 1444 (9th Cir. 1985).

15 The Supreme Court has explained that without "statements of
16 the preliminary and basic facts" on which the trial court relied,
17 "their findings are useless for appellate purposes." Dalehite
18 v. United States, 346 U.S. 15, 24 n.8 (1953); Mattel, Inc. v.
19 Walking Mountain Prods., 353 F.3d 792, 815 (9th Cir. 2003).

20 The findings must be explicit enough to give the appellate
21 court a clear understanding of the basis of the trial court's
22 decision, and to enable it to determine the ground on which the
23 trial court reached its decision. Mattel, Inc., 353 F.3d at 815;
24 Unt, 765 F.2d at 1444.

25 Effective review should not depend upon the intuition of the
26 appellate judges or their ability to divine the critical facts or
27 the trial court's reasons for its judgment. Williams v. Levi (In
28 re Williams), 323 B.R. 691, 700 (9th Cir. BAP 2005).

1 It is difficult to review the bankruptcy court's ruling in
2 this instance because there are no detailed findings of fact or
3 conclusions of law, either on the record or in a separate opinion
4 or memorandum decision.

5 With respect to American Express Claim Nos. 6 and 7, the
6 court's complete findings and conclusion regarding Claim Nos. 6
7 and 7 are as follows:

8 THE COURT: I'm going to sustain these two
9 objections as well. I just think there hasn't been
10 adequate documentation to show that these individuals
11 who may have been officers of the corporate entity are
12 personally liable on these corporate credit card
13 accounts, and I also find the -- the newer arguments
14 relating to Section 1624 of the Civil Code [Statute of
15 Frauds] to be not persuasive.

16 Hr'g Tr. at 3:12-18 (Oct. 31, 2007).

17 As to MBNA Claim No. 16, the bankruptcy court made no
18 findings of fact and summarily concluded, "I'm going to sustain
19 the objection to this claim," after listening to appellant's
20 argument regarding legibility of the account application. Hr'g
21 Tr. at 2:10-11 (Oct. 31, 2007).

22 These findings are inadequate to support a conclusion that
23 the trustee's objections to \$387,959.01 in claims should be
24 sustained. Findings of fact and conclusions of law are essential
25 to appellate review of the order sustaining these objections. We
26 cannot divine the critical facts or the trial court's reasons for
27 its judgment. Williams, 323 B.R. at 700.

28 Moreover, as indicated, this case is too complex and too
important to be decided without the benefit of focused findings
of fact and conclusions of law by the trial judge.

