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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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-07-1410-MkMoD
)		
JOHN EDWARD AMOROSO, JR.,)	Bk. No.	SA 02-16819-ES
)		
Debtor.)		
_____)		
)		
ZTE ELECTRONICS CORP., INC.,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JAMES J. JOSEPH, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on May 22, 2008
at Pasadena, California

Filed - July 11, 2008

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: MARKELL, MONTALI and DUNN, Bankruptcy Judges.

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

1 **SUMMARY**

2 The essence of this protracted dispute is not complicated:
3 The debtor, John Edward Amoroso, Jr. ("Amoroso"), owed money to a
4 company, Audio Wood Products, Inc. ("Audio"), which in turn owed
5 money to the appellant-creditor, ZTE Electronics Corp., Inc.
6 ("ZTE"). A California statute recognizes derivative, third-party
7 claims when the creditor has a judgment against a third party (A
8 owes B, B owes C, therefore A owes C)², so when Amoroso filed a
9 chapter 7³ bankruptcy case in 2002, ZTE filed a proof of claim
10 against his estate.

11 But ZTE's filing did not spell out either its factual basis
12 (Amoroso owes Audio and Audio owes ZTE) or its legal basis (CCP
13 § 708.210).⁴ As a result, ZTE's proof of claim was deficient. It
14 did not put the bankruptcy trustee or the creditors on notice
15 that it was derivative, and it did not explain the basis for the

16 ²Cal. Code of Civ. P. § 708.210 ("CCP § 708.210") provides,
17 "If a third person has possession or control of property in which
18 the judgment debtor has an interest or is indebted to the
19 judgment debtor, the judgment creditor may bring an action
20 against the third person to have the interest or debt applied to
the satisfaction of the money judgment."

21 ³Unless otherwise indicated, all chapter, section, and rule
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as
23 enacted and promulgated before the effective date (October 17,
24 2005) of the relevant provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.
L. 109-8, 119 Stat. 23 (2005), and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

25 ⁴The proof of claim contained a copy of an undated letter
26 sent by ZTE to "Michael Amoroso, Audio Wood Products," which
27 began, "Dear Michael" and continued, "The details your company
28 still owe us is [sic] as follows," and it listed five items
totaling \$187,518.50, minus \$20,000 (with a note "09.04.01"), and
it concluded, "Awp still owe [sic] ZTE Electronics Corp.
\$167,518.50 untill [sic] Sep. 04, 2001." But the proof of claim
did not make the link to the debt that Amoroso owed Audio.

1 derivative claim. Amoroso did not owe anything to ZTE directly,
2 and his Schedule F, which listed his debt to Audio, did not show
3 any debt to ZTE. So the trustee, James L. Joseph, had no way of
4 knowing what the basis was for ZTE's filing.

5 Making the problem more difficult for the trustee was the
6 fact that the amount that Amoroso owed Audio (\$200,000) was not
7 the same as the amount of ZTE's proof of claim against Amoroso
8 (\$167,518.50). There was no match, and there was no way for the
9 trustee to make a match. ZTE had the burden of making the
10 connection, and it failed to meet that burden.

11 The trustee eventually moved to disallow ZTE's claim, and
12 the bankruptcy court agreed. The court based its holding on the
13 fact that, before the claims bar date, ZTE took no action under
14 CCP § 708.210, so Amoroso's debt to Audio was discharged. In
15 addition, the court determined that ZTE's claim was precluded by
16 the findings in a prior adversary proceeding.

17 If ZTE's filing in the Amoroso bankruptcy had explained the
18 basis for its claim against the debtor, it would have been
19 sustainable. But because its proof of claim was deficient and ZTE
20 did not amend the proof of claim or repair the deficiency before
21 the claims bar date, we AFFIRM the bankruptcy court's holding.⁵

22 **FACTS**

23 On September 3, 2002, Amoroso filed a voluntary petition for
24 bankruptcy relief under chapter 7. On his Schedule F, he listed
25 an unsecured debt of \$200,000 to Audio. But Audio did not file a
26 claim in Amoroso's case, and no other party filed a claim on

27
28 ⁵In assessing the potential applicability of CCP § 708.210 to the facts of this case, we are not deciding any other cases involving third-party, derivative claims. Other cases that may arise will have to be evaluated on their own facts.

1 Audio's behalf. Amoroso was granted a discharge on December 16,
2 2002.

3 On December 23, 2002, before the claims bar date of January
4 29, 2003, ZTE filed its unsecured claim in Amoroso's bankruptcy
5 for nonpayment for goods sold to Audio in the amount of
6 \$167,518.50 (Claim 14). Claim 14 does not refer to CCP
7 § 708.210.

8 ZTE could have included in its proof of claim the legal or
9 factual basis for it. We assume, without deciding, that if it had
10 done so, its claim would likely have been valid, and it probably
11 would have shared in Amoroso's bankruptcy estate. Instead, ZTE
12 embarked on a legal strategy that consumed significant time,
13 energy, and resources, and ultimately proved fruitless.

14 Before filing Claim 14, ZTE initiated an adversary
15 proceeding to determine the dischargeability of Amoroso's debt to
16 ZTE under § 523 ("523 Action"). In its complaint, ZTE alleged
17 that Amoroso was an alter ego of Audio. On April 14, 2004, the
18 bankruptcy court held that ZTE had not presented sufficient
19 evidence to justify piercing the corporate veil to hold Amoroso
20 liable for Audio's debt to ZTE. It further held that "[t]here is
21 no debt owed by [Amoroso] to [ZTE]." Neither the complaint nor
22 the court's findings of fact and conclusions of law addressed the
23 applicability of CCP § 708.210.

24 ZTE appealed, and this panel affirmed on December 13, 2004.
25 ZTE again appealed, and on March 1, 2007, the Ninth Circuit
26 affirmed the BAP. The Ninth Circuit held that ZTE had failed to
27 establish Amoroso's personal liability on a theory of alter ego.
28 ZTE Elecs. Corp, Inc. v. Amoroso, 223 Fed. Appx. 708 (9th Cir.

1 2007). The Ninth Circuit also affirmed that ZTE failed to
2 demonstrate nondischargeability under 11 U.S.C. § 523(a). Id. at
3 709.

4 On August 20, 2007, the trustee filed its "Motion for Order
5 Disallowing . . . Claim Number 14 of ZTE [etc.]" on grounds of
6 collateral estoppel based on the holdings in the 523 Action. On
7 September 17, 2007, ZTE opposed the trustee's motion, arguing for
8 the first time that CCP § 708.210 gave it a direct claim against
9 Amoroso. ZTE's opposition to the trustee's motion to disallow its
10 claim contained its first explicit mention of CCP § 708.210.

11 On September 20, 2007, ZTE filed an amended proof of claim
12 in the amount of \$188,133 (Claim 22).⁶ In his reply to ZTE's
13 opposition, the trustee sought to disallow Claims 14 and 22 on
14 the ground that Audio had not filed a claim on which ZTE's claims
15 under CCP § 708.210 could be based.

16 At the hearing on October 4, 2007, ZTE clarified that its
17 claim was now based on "Debtor's own admission that he [owes]
18 Audio Wood money irrespective of his other relationship with
19 Audio Wood." The bankruptcy court sustained the trustee's
20 objection to both claims. The court held that "whatever claim
21 [ZTE] may have had is barred at this point," because the bar date
22 had passed. On October 26, 2007, the bankruptcy court issued its
23 order disallowing Claims 14 and 22. This appeal ensued.

24 **JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
26 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C. § 158.

27
28 ⁶No explanation is found in the record for the difference
between the amount of the state judgment, \$203,457.57, and the
amount of the amended claim.

1 **ISSUE**

2 Did the bankruptcy court err in sustaining the trustee's
3 objection to ZTE's claims against Amoroso based on CCP
4 § 708.210?⁷

5 **STANDARDS OF REVIEW**

6 We review conclusions of law and issues of statutory
7 interpretation de novo. Irwin Mortgage Co. v. Tippett (In re
8 Tippett), 338 B.R. 82, 85 (BAP 9th Cir. 2006). The decision to
9 permit the amendment of a filed proof of claim is reversible only
10 for an abuse of discretion. Wall Street Plaza, LLC v. JSJF Corp.
11 (In re JSJF Corp.), 344 B.R. 94, 99 (BAP 9th Cir. 2006).

12 **DISCUSSION**

13 For the past several years, ZTE fought Amoroso over whether
14 Amoroso was Audio's alter ego. Only after losing that extended
15 litigation did ZTE seek to characterize its proof of claim as
16 raising claims under CCP § 708.210. As set forth above, the
17 existence of this derivative claim, as well as its amount, were
18 all unknown to the trustee until after the litigation had ended,
19 and after the claims bar date had passed. A different story
20 might have been written had ZTE indicated either the existence or
21 the amount of its derivative claim in its original proof of
22 claim. But it did not. And changing or amending claims after a
23

24 ⁷ZTE also claims that the trustee lodged the objection to
25 claim in retaliation for ZTE's opposing the trustee's application
26 to employ debtor's counsel and for arguing that the trustee and
27 debtor's counsel colluded with one another. There are no facts
28 or law to support these claims. Further, ZTE is raising these
issues for the first time on appeal. See Concrete Equip. Co.,
Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520
(BAP 9th Cir. 1996). For these reasons, we do not consider the
retaliation and collusion claims.

1 claims bar date raises significant issues of equity and
2 prejudice.

3 A claims bar date is not a mere technicality. A trustee and
4 an estate's prepetition creditors are entitled to know what the
5 claims are against a bankruptcy estate so the trustee can provide
6 for the orderly distribution of the debtor's assets. In re
7 Workman, 373 B.R. 460, 467 (D.S.C. 2007) (stating that "[u]ndue
8 prejudice . . . may be demonstrated through evidence that
9 allowance of [an] amended claim would interfere with the orderly
10 distribution to other creditors."). See Brown v. Chestnut (In re
11 Chestnut), 422 F.3d 298, 300 (5th Cir. 2005) (describing the
12 purpose of orderly distribution in relation to the automatic
13 stay).

14 As a result, "[t]he crucial inquiry" in whether to allow the
15 type of modification and amendment attempted by ZTE 'is whether
16 the opposing party would be unduly prejudiced by the amendment.'" In re JSJF Corp., 344 B.R. at 102 (quoting Roberts Farm, Inc. v.
18 Bultman (In re Roberts Farms Inc.), 980 F.2d 1248, 1251 (9th Cir.
19 1992)). "[I]n determining prejudicial effect [we] look to such
20 elements as bad faith or unreasonable delay in filing the
21 amendment, impact on other claimants, reliance by the debtor or
22 other creditors, and change of the debtor's position." Venhaus v.
23 Wilson (In re Wilson), 96 B.R. 257, 262, (BAP 9th Cir. 1988).
24 See also 9 COLLIER ON BANKRUPTCY ¶ 3001.04[1] (Alan N. Resnick &
25 Henry J. Sommer eds., 15th ed. rev. 2008).

26 In the focus on prejudice, this view is consonant with
27 approaches taken in other circuits.

28 The Court must scrutinize both the substance
of the proposed amendment and the original

1 proof of claim to ensure that the amendment
2 meets three criteria. First, the proposed
3 amendment must not be a veiled attempt to
4 assert a distinctly new right to payment as
5 to which the debtor estate was not fairly
6 alerted by the original claim. Second, the
7 amendment must not result in unfair prejudice
8 to other holders of unsecured claims against
9 the estate. Third, the need to amend must
10 not be the product of bad faith or dilatory
11 tactics on the part of the claimant.

12 In re Crane Rental Co., Inc., 341 B.R. 118, 120-21 (Bankr.
13 D. Mass. 2006) (quoting Woburn Associates v. Kahn, 954 F.2d 1, 10
14 (1st Cir. 1992), cert. denied, 510 U.S. 914 (1993); Gens v.
15 Resolution Trust Corp., 112 F.3d 569, 575 (1st Cir. 1997)).

16 This approach is also consistent with those courts that have
17 not permitted post-bar date changes if they attempt to change the
18 nature of the claim as originally filed. See, e.g., In re
19 Spiegel, Inc., 337 B.R. 816 (Bankr. S.D.N.Y. 2006) (a late proof
20 of claim seeking lease rejection damages does not relate back to
21 a timely filed proof of claim that asserted a claim for
22 prepetition rent); In re Limited Gaming of America, Inc., 213
23 B.R. 369 (Bankr. N.D. Okla. 1997) (IRS not allowed to amend claim
24 13 months after passage of bar date, as amendment would prejudice
25 debtor and creditors); In re Refrigerated Exp., Inc., 204 B.R. 44
26 (Bankr. D. Neb. 1996) (IRS not allowed to amend valid claim five
27 years after the bar date passed).

28 As noted above, the proof of claim that ZTE filed on
December 23, 2002 (Claim 14) was deficient because it failed to
make the link between the money that Amoroso owed Audio and the
money that Audio owed ZTE. ZTE attempted to cure this deficiency
by filing Claim 22 on September 17, 2007, which amended Claim 14.
Claim 22 included a copy of a judgment against Audio for

1 \$203,457.57 (including interest, attorneys' fees and costs) that
2 ZTE had won on October 31, 2003.

3 But by 2007, the bar date in the Amoroso bankruptcy had long
4 passed. The case had been administered for four years. Without
5 even considering whether ZTE's failure to file a proof of claim
6 specifying its alleged rights under CCP § 718.210 before the
7 claims bar date extinguished its bankruptcy rights against
8 Amoroso, it is apparent that much had happened that would make
9 the late recognition of ZTE's claim unfair and inequitable. The
10 debtor had fought a long alter ego lawsuit without notice that
11 ZTE also claimed rights under CCP § 718.210. The trustee and
12 other creditors no doubt developed expectations regarding the
13 administration of Amoroso's estate without the unreasonable delay
14 and alterations ZTE's last-minute change would have entailed.
15 Against this background, we cannot say that the trial court
16 abused its discretion when it overruled ZTE's Claim 22,
17 essentially barring ZTE from amending its earlier proof of claim.

18 In 2007, long after losing the alter ego action, ZTE
19 attempted to add CCP § 708.210 to its proof of claim. As noted,
20 it could have done that when it had first filed in 2002, but
21 attempting to do it at this point was a new argument, a new
22 claim, and a new filing beyond the bar date.⁸

23 CONCLUSION

24 The bankruptcy court held that ZTE failed to comply with the
25 requirements of CCP § 708.210 by failing to bring an action
26 showing Audio's indebtedness to ZTE and Amoroso's indebtedness to

27
28 ⁸Because of the result we reach, we do not need to decide
the questions of collateral estoppel and claim preclusion.

1 Audio. We believe that ZTE's burden was not even that great. All
2 ZTE needed to have done was to timely file a proof of claim that
3 showed the trustee why Amoroso owed it money. It didn't, and
4 under the circumstances, the bankruptcy court's decision not to
5 permit ZTE to press its CCP 708.210 claim cannot be an abuse of
6 discretion.⁹

7 AFFIRMED.
8

9
10 ⁹On March 7, 2008, two weeks before oral arguments were
11 heard in this appeal, the appellee/trustee, James J. Joseph,
12 filed a motion with this panel seeking sanctions against the
13 appellant, ZTE, and its counsel of record under Fed. R. Bankr. P.
14 8020 and 28 U.S.C. § 1927. He asserted that they had filed "a
15 frivolous appeal that is without any legal or factual basis, that
16 has unnecessarily increased the administrative expenses incurred
17 by the Debtor's bankruptcy estate, and that could have been filed
18 for no other reason than for an improper purpose."

19 Rule 8020 permits the BAP to award damages and costs against
20 an appellant who files a frivolous appeal. An appeal is
21 frivolous when the result is obvious or when the appellant's
22 arguments are wholly without merit. First Fed. Bank of Cal. v.
23 Weinstein (In re Weinstein), 227 B.R. 284, 297 (9th Cir. BAP
24 1998); Determan v. Sandoval (In re Sandoval), 186 B.R. 490, 496,
25 n.7 (9th Cir. BAP 1995).

26 In the opinion of this panel, though ZTE has lost the case,
27 its appeal was not frivolous, its argument was not without merit,
28 and the outcome was not obvious. As we have noted in this
memorandum, if ZTE had made the derivative basis of its claim
explicit in its initial proof of claim, the outcome of this case
could have been different. Therefore, the appellee's motion for
sanctions under Rule 8020 is denied.

Appellant's citation to 28 U.S.C. § 1927 is unavailing. In
the Ninth Circuit, "28 U.S.C. § 1927 does not suffice because the
Ninth Circuit does not regard a bankruptcy court as a 'court of
the United States.'" Miller v. Cardinale (In re DeVille), 361
F.3d 539, 546 (9th Cir. 2004) (citing Perroton v. Gray (In re
Perroton), 958 F.2d 889, 896 (9th Cir. 1992)). Because only a
court of the United States has the power to sanction under
§ 1927, and under DeVille and Perroton this panel is not a court
of the United States, we will not act on appellant's request.

A separate order denying sanctions is being entered
concurrently with this memorandum.