

AUG 10 2007

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NOT FOR PUBLICATION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

6	In re:)	BAP No.	NV-07-1024-SRB
7	MARIANNE NOBLE,)	Bk. No.	06-10935
8	Debtor.)	Ref. No.	07-04
9	_____)		
10	MARIANNE NOBLE,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	ONG COMMODITIES PRIVATE, LTD,)		
14	Appellee.)		
	_____)		

Argued and Submitted on July 26, 2007
at Las Vegas, Nevada

Filed - August 10, 2007

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding.

Before: SMITH, RUSSELL² and BRANDT, 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. Barry Russell, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 Creditor filed a proof of claim in debtor's bankruptcy case
2 based on money loaned, guarantees, and a judgment it held against
3 debtor's husband. Debtor objected to the claim on the ground
4 that she was not liable for her husband's separate property debt.
5 The bankruptcy court overruled the objection, finding that the
6 claim was a community debt. A timely appeal followed. We
7 AFFIRM.

8 I. FACTS

9 Marianne Noble ("Debtor") and her spouse, Larry Noble
10 ("Larry") (collectively, the "Nobles"), were married in May 2002.
11 On October 11, 2003, Larry executed two guarantees in connection
12 with a business venture, one for \$35,000 and another for \$75,000,
13 on behalf of Mike Andretti and in favor of Ong Commodities
14 Private, Ltd. ("Creditor"). Ultimately, the business venture
15 went bad, causing Creditor to seek payment from Larry.

16 Larry failed to uphold his obligations under the guarantees.
17 On August 16, 2004, Creditor obtained a default judgment against
18 Larry in the High Court of the Republic of Singapore in the
19 amount of \$98,236.669 (U.S. dollars), inclusive of interest and
20 costs, which was subsequently domesticated in the District Court
21 of Clark County, Nevada (the "Judgment").

22 Following the domestication of the Judgment, the Nobles made
23 three \$10,000 payments to Creditor from their joint checking
24 account on January 20, 2005, January 24, 2005, and February 28,
25 2005. After the February 28 payment no further payments were
26 made. Creditor commenced efforts to recover on the Judgment,
27 obtaining a writ of attachment and writ of garnishment on June
28 15, 2005, which froze Larry's assets.

1 In response to Creditor's collection activity, Larry filed
2 for chapter 7³ relief on June 20, 2005. The case was later
3 converted to chapter 13.

4 On February 24, 2006, the court approved Larry's chapter 13
5 plan. The plan provided for total payments of \$168,699, and
6 indicated that this amount was agreed to by his creditors as
7 "consideration [for] resolution of Larry's disposable income and
8 potential preferential transfers." Under the plan, Creditor
9 would be paid 49% of its claim.⁴

10 During the pendency of Larry's case, Creditor took 2004
11 examinations of the Nobles. From these exams, Creditor learned
12 that, just prior to filing for bankruptcy, Larry transferred
13 large amounts of money into Debtor's bank account and removed his
14 name from the couple's joint bank account. Based on this
15 information, Creditor filed a state court complaint against
16 Debtor on March 16, 2006, which prayed for damages related to
17 alleged fraudulent transfers made by Larry, a preliminary
18 injunction, and declaratory relief (the "Complaint"). It also
19 filed a motion for preliminary injunction against Debtor on April
20 19, 2006, that requested Debtor's bank accounts be frozen.

22 ³ Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
25 enacted and promulgated by The Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005,
119 Stat. 23.

26 ⁴ On August 12, 2005, Creditor filed a proof of claim in
27 Larry's bankruptcy case in the amount of \$98,236.69. The
28 unsecured, nonpriority claim was based on money loaned and the
Judgment.

1 Before the motion could be heard, Debtor filed for chapter
2 13 relief on May 5, 2006. In her schedules, she listed Creditor
3 as an unsecured creditor and designated its claim as contingent,
4 unliquidated, and disputed. The amount of Creditor's claim was
5 listed as unknown.

6 On May 11, 2006, Creditor filed a proof of claim in Debtor's
7 bankruptcy case in the amount of \$218,016.48 for money loaned and
8 "[o]ther guarantee; judgment" (the "Claim"). The proof of claim
9 states that the debt was incurred on October 6, 2003, and October
10 11, 2003, and that Creditor had obtained a state court judgment
11 on August 16, 2004 (i.e., the Judgment obtained against Larry).
12 As support for the Claim, Creditor attached a breakdown of the
13 amounts loaned to Mike Andretti, including the accumulated
14 interest, and copies of the documents related to the Judgment.

15 Debtor quickly filed an objection to the Claim, arguing that
16 she could not be held liable because the debt represented a
17 business debt incurred exclusively by Larry. She also maintained
18 that Creditor was judicially estopped from asserting that she
19 owed the Claim based on the following statement made in the
20 Complaint, "On or about August 16, 2004, judgment was entered
21 against Larry Wendell Noble in the Republic of Singapore in the
22 amount of \$155,395.40 Singapore Dollars, plus interest and costs
23 incurred, in favor of [Creditor] for money due under a personal
24 guarantee which [Larry] failed and/or refused to repay."

25 Objection to Claim 3, Sept. 29, 2006.

26 Creditor responded that even though the obligation was
27 incurred by Larry and the Judgment named only him, the debt arose
28 during the marriage and was entered into for the community's

1 benefit. Thus, under Nevada law the Claim was a valid community
2 debt for which Debtor was liable.

3 The bankruptcy court held an evidentiary hearing on the
4 matter on October 12, 2006, at which time testimony was taken
5 from Larry and Debtor. Following the hearing, the court provided
6 both parties the opportunity to file supplemental briefs and
7 informed them that an oral ruling would be made on December 14,
8 2006.

9 At the December 14 hearing, the court ruled that Creditor
10 held a valid claim.⁵ Though acknowledging that Debtor had not
11 signed the guarantees, the court noted that the debt had been
12 incurred during the marriage and was, therefore, presumed to be a
13 community obligation under Nevada law. The court recognized that
14 the presumption could be rebutted by "show[ing] that there was no
15 intention or expectation when the transaction began that a
16 material economic benefit would accrue." Hr'g Tr. 4:8-10, Dec.
17 14, 2006. The court found, however, that Debtor had failed to
18 provide evidence sufficient to rebut the presumption. Because
19 Nevada law allows the managing spouse of a community business to
20 encumber assets of the community in the ordinary course of
21 business without the consent of the nonparticipating spouse, the
22 court ruled that Creditor held a legitimate claim against Debtor.

23 The order memorializing the court's oral ruling was entered
24 on January 9, 2007. A timely notice of appeal was filed by
25 Debtor on January 18, 2007.

26 ⁵ The court made clear that it was not making any
27 determination as to the amount of the Claim, and that the only
28 issue it was deciding was whether Creditor held a claim against
Debtor.

1 a party in interest objects under § 502(a). 11 U.S.C. § 502(a).

2 "Upon objection, the proof of claim provides some evidence
3 as to its validity and amount and is strong enough to carry over
4 a mere formal objection without more." Lundell v. Anchor Constr.
5 Specialists, Inc. (In re Lundell), 223 F.3d 1035, 1039 (9th Cir.
6 2000). To defeat a claim, the objector must come forward with
7 evidence that tends to rebut the claim by probative force equal
8 to that of the creditor's proof of claim. Id.; see also Ashford
9 v. Consol. Pioneer Mortgage (In re Consol. Pioneer Mortgage), 178
10 B.R. 222, 226 (9th Cir. BAP 1995), aff'd, 91 F.3d 151 (9th Cir.
11 1996). "'If the objector produces sufficient evidence to negate
12 one or more of the sworn facts in the proof of claim, the burden
13 reverts to the claimant to prove the validity of the claim by a
14 preponderance of the evidence.'" Consol. Pioneer Mortgage, 178
15 B.R. at 226 (quoting In re Allegheny Int'l, Inc., 954 F.2d 167,
16 173-74 (3d Cir. 1992)). Ultimately, the burden of persuasion
17 rests with the claimant. Lundell, 223 F.3d at 1039.

18 A. Claim Based Upon The Guarantees And Judgment

19 1. Community property versus separate property liability

20 Community property cannot be used to satisfy a debt unless
21 it is shown to be a community claim. Case v. Maready (In re
22 Maready), 122 B.R. 378, 381 (9th Cir. BAP 1991). For a claim to
23 be considered a "community claim," it must have "[arisen] before
24 the commencement of the case concerning the debtor for which
25 property of the kind specified in section 541(a)(2)^[6] of this

26 _____
27 ⁶ Section 541(a)(2) provides that the filing of a bankruptcy
28 petition creates an estate, which, among other types of property,
includes

(continued...)

1 title is liable, whether or not there is any such property at the
2 time of the commencement of the case." 11 U.S.C. § 101(7). In
3 other words, it must be "a debt owed by the debtor or the
4 debtor's spouse, which under state law could have been satisfied
5 from community property that would have passed to the debtor's
6 bankruptcy estate, whether or not such property existed at the
7 commencement of the case." Fed. Deposit Ins. Corp. v. Soderling
8 (In re Soderling), 998 F.2d 730, 733 (9th Cir. 1993). In order
9 to determine whether a creditor holds a community claim, we look
10 to state marital property law. Maready, 122 B.R. at 381 n.2.

11 The Nobles lived in Nevada during and immediately after the
12 filing of their respective bankruptcy cases. In Nevada,
13 community property is defined as "[a]ll property, other than that
14 stated in [Nevada Revised Statute ("NRS")] 123.130⁷, acquired
15 after marriage by either husband or wife, or both," limited by
16 exceptions which are not relevant to the instant matter. NRS
17 § 123.220 (2007). Though all property acquired during marriage
18 is presumed to be community property, the presumption can be
19 rebutted by clear and convincing evidence. Norwest Fin. v.

20 _____
21 ⁶(...continued)

22 [a]ll interests of the debtor and the debtor's spouse
23 in community property as of the commencement of the
24 case that is-

25 (A) under the sole, equal, or joint management and
26 control of the debtor; or

27 (B) liable for an allowable claim against the
28 debtor, or for both an allowable claim against the
debtor and an allowable claim against the debtor's
spouse, to the extent that such interest is so
liable.

⁷ NRS § 123.130 discusses what comprises the separate
property of a wife and husband.

1 Lawver, 849 P.2d 324, 326 (Nev. 1993); Fick v. Fick, 851 P.2d
2 445, 448 (Nev. 1993). With respect to a loan, the presumption of
3 community obligation is rebutted by a showing that the lender
4 intended to extend the loan on the faith of the existing property
5 belonging to the acquiring spouse. Norwest Fin., 849 P.2d at
6 326; Schulman v. Schulman, 558 P.2d 525, 531 (Nev. 1976).

7 Under Nevada law, "either spouse, acting alone, may manage
8 and control community property . . . with the same power of
9 disposition as the acting spouse has over his separate property."
10 NRS § 123.230 (2007).

11 Debtor believes the court erred in finding that the
12 guarantees and Judgment represented a community claim. To rebut
13 the community property presumption, Debtor relies on the
14 testimony of Larry and herself to establish Creditor's intent.
15 Specifically, she relies on the following facts: 1) Larry was the
16 sole party to the guarantees, 2) the Judgment was entered
17 exclusively against Larry and domesticated only as to him, 3)
18 Debtor was never asked to be a guarantor, and 4) Creditor
19 allegedly did not know that Debtor was married to Larry when the
20 guarantees were entered into. Based on this evidence, Debtor
21 maintains that the Claim represents Larry's separate property
22 debt for which she is not liable.

23 There is no evidence in the record suggesting that Creditor
24 relied solely on Larry's financial records nor is there testimony
25 from Creditor to indicate that it intended to hold only Larry
26 liable.

27 In addition, the Nobles' own actions support a finding that
28 the guarantees and Judgment represented a community debt. After

1 the Judgment was domesticated, three payments were made to
2 Creditor - all of which were drawn from the Nobles' joint bank
3 account. The fact that community funds were used to pay the
4 Judgment clearly undermines Debtor's argument that she believed
5 the Judgment was only against Larry and that only his separate
6 property funds should be held liable for it.

7 Debtor also testified that when the guarantees were
8 executed, Larry was the primary provider for the family and that
9 the majority of the family income came from his business
10 activities.⁸ Although Debtor tries to classify the guarantees as
11 personal and not business, Larry's testimony strongly suggests
12 that the guarantees were made in connection with a business
13 venture.⁹ The fact that Larry unilaterally managed and

14 _____
15 ⁸ Debtor worked for Larry's business Tri Star Vending for
16 approximately a year sometime during the past ten years. From
17 this employment she received about \$900 every two weeks. She
18 also had a telemarketing business sometime during this period,
19 but it is unclear how much income, if any, she obtained from it.

20 ⁹ During the evidentiary hearing Debtor's attorney,
21 Christopher Burke, questioned Larry about his relationship with
22 Creditor and the guarantees. The following conversation took
23 place:

24 Q: . . . Are you familiar with a gentleman name
25 Katai Ong [a.k.a. Creditor]?

26 A: Yes.

27 Q: Okay. When did you first meet him?

28 A: 1986, 1987

. . .

Q: And what were your dealings with Mr. Ong over the
last 20 years?

A: He was an owner in a business that I owned. We
both had ownership in a -- in a company Operator
Services West. And since then, we had multiple
business transactions.

(continued...)

1 controlled the community business does not transmute the
2 obligation from a community debt to his separate debt.

3 The facts and testimony Debtor relies on to rebut the
4 community property presumption does not equate to clear and
5 convincing evidence that the guarantees and Judgment were Larry's
6 separate obligations.

7 2. Effect of spouse's confirmed chapter 13 plan

8 Debtor further argues that Larry's confirmed plan resolves
9 any outstanding community debt which was in existence at the time
10 he filed for bankruptcy. Because the Claim was incurred prior to
11 Larry filing his petition, Debtor maintains that even if it were
12 a community claim, § 524(a)(3) prohibits Creditor from seeking
13 satisfaction of it from her. Debtor's reliance on § 524(a)(3) is
14 misplaced.

15 Section 524(a)(3) provides that a debtor's discharge
16 operates as an injunction by preventing a creditor holding a

17 _____
18 ⁹(...continued)

19 Q: Okay. Are you familiar with a situation that
20 occurred in 2003 where you personally guaranteed a
21 loan for an individual?

22 A: Yes.

23 Q: Okay. Why don't you tell me a little about that.

24 A: I heard about a business opportunity from a friend
25 of mine, Bradford Writ, and he and I guaranteed a
26 loan with Katai Ong.

27 Q: . . . Now, what happened with that claim after
28 the guarantee? Did this business deal work out
fine, and everybody went home?

A: No. No. It did not work out, and I -- I relied
on Katai who did the due diligence on the business
deal. He gave it a thumbs-up. It didn't work
out.

Hr'g Tr. 10-11 & 12, Oct. 12, 2006.

1 community claim from trying to recover after-acquired community
2 property from either the filing or non-filing spouse. 11 U.S.C.
3 § 524(a)(3); Collier Family Law & Bankruptcy Code P 4.08 (2007).
4 Under chapter 13 of the Code, a debtor does not receive a
5 discharge until all plan payments are completed. 11 U.S.C.
6 § 1328(a).

7 Here, Larry confirmed his chapter 13 plan on February 24,
8 2006. The term of the plan is five years and provides to pay
9 Creditor 49% of its claim held against Larry's estate.¹⁰ At oral
10 argument, Debtor's counsel represented that Larry is two years
11 into the plan term and a discharge has not yet been issued. In
12 the absence of a discharge, § 524(a)(3) presently is not a bar to
13 Creditor filing a proof of claim against Debtor's estate. While
14 it is true that the plan provides for Creditor's claim and stays
15 Creditor from trying to collect the debt from Debtor during its
16 pendency, see 11 U.S.C. § 1301(a), there is no guarantee that
17 Larry will complete his plan. Due to the risk of dismissal or
18 conversion of Larry's bankruptcy case, Creditor had every right
19 to file a proof of claim against Debtor's estate in order to
20 safeguard its interest. Until Larry consummates his plan and
21 receives a discharge, Debtor remains contingently liable on the
22 Claim.

23 3. Judicial Estoppel

24 We are unpersuaded by Debtor's further argument that
25 Creditor is judicially estopped from claiming she is liable for
26

27 ¹⁰ The claim filed in Larry's bankruptcy case is based on
28 the same guarantees and Judgment that the Claim asserted against
Debtor's estate is.

1 the Claim based on statements made in the Complaint and
2 preliminary injunction motion.¹¹ In determining the
3 applicability of judicial estoppel, several factors inform a
4 court's decision such as: 1) whether "a party's later position
5 [is] 'clearly inconsistent' with its earlier position," 2)
6 "whether the party achieved success in the prior proceeding," and
7 3) "whether, if not estopped, the party seeking to assert an
8 inconsistent position would derive an unfair advantage or impose
9 an unfair detriment on the other party." Abercrombie & Fitch
10 Trading Co. v. Moose Creek, Inc., 486 F.3d 629, 633 (9th Cir.
11 2007) (internal citations omitted).

12 Here, Creditor has always maintained that it is entitled to
13 payment from Debtor on the basis that the debt represents a
14 community claim. As discussed above, the fact that the
15 guarantees and Judgment were only related to Larry does not alter
16 the Claim's status as a community claim for which Debtor can be
17 liable. While it is true that Creditor did not seek to recover
18 the Claim through the Complaint, this did not bar it from
19 asserting an alternative theory of recovery (i.e., the fraudulent
20 transfer cause of action) nor did it cause Creditor to assert a
21 position inconsistent with the basis of the Claim. Moreover, no
22 ruling by any state court or bankruptcy court has been made in
23 regard to the Complaint. Nothing in the record suggests that

24
25 ¹¹ The specific statements are, "On August 16, 2004 judgment
26 was entered in favor of Ong Commodities Private Limited, . . .
27 and against Larry Wendell Noble," Preliminary Injunction Mtn. 2,
28 Apr. 19, 2006, and "On or about September 22, 2004, Plaintiff
filed an action in Clark County District Court . . . against
Larry Wendell Noble . . . to enforce the foreign money judgment."
Complaint 2, Mar. 16, 2006.

1 Creditor achieved any success from the statements made in the
2 Complaint or that it obtained an unfair advantage over Debtor.
3 We therefore conclude that the equitable doctrine of judicial
4 estoppel has no application in this case.

5 B. Claim Based Upon The State Court Complaint

6 Notwithstanding the court's comments respecting the state
7 fraudulent conveyance cause of action, the proof of claim does
8 not identify the Complaint as a basis for the Claim, but instead
9 references only the guarantees and the Judgment and includes only
10 documentation relating to the same. We therefore need not
11 address whether the Complaint would also provide Creditor with an
12 independent claim against Debtor, and note that the judge
13 overseeing Larry's bankruptcy case, ruled that the filing of the
14 Complaint against Debtor was a violation of the stay.

15 **VI. CONCLUSION**

16 Based on the foregoing, we AFFIRM the order of the
17 bankruptcy court.
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