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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NOT FOR PUBLICATION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.	EC-07-1148-NaMoJu
)		
DAVID E. ROBINETTE and)	Bk. No.	02-93549
MARGIE L. ROBINETTE,)		
)	Adv. No.	05-09040
Debtors.)		
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DAVID E. ROBINETTE and)		
MARGIE L. ROBINETTE,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM ¹	
)		
LAURA J. FUREY SASNETT,)		
Executrix of the Estate of)		
O'Dell Sasnett,)		
)		
Appellee.)		

Argued and Submitted on October 26, 2007
at Sacramento, California

Filed - November 27, 2007

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

Before: NAUGLE,² MONTALI and JURY, 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. David N. Naugle, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 Following confirmation of the amended Chapter 11 Plan
2 ("Plan") of Mr. and Mrs. David Robinette ("Appellants"), Mr.
3 Robinette contacted secured creditor, Mr. Odell Sasnett, who was
4 represented by counsel, and urged him to file an amended claim
5 ("Amended Claim") in a reduced amount. Appellants' counsel
6 prepared the Amended Claim for Mr. Sasnett's execution and filed
7 it with the court without notice to Mr. Sasnett's counsel.
8 Appellants failed to file an objection to the original claim
9 ("Claim") as required by the Plan. Upon learning of the events
10 that had transpired, Mr. Sasnett's counsel filed a withdrawal of
11 the Amended Claim. Appellants filed an adversary proceeding
12 alleging claims for breach of contract and declaratory relief,
13 which the bankruptcy court treated as an objection to Claim.

14 We are called upon to decide whether the bankruptcy court
15 erred following trial of the objection to Claim when it
16 determined that (1) the Amended Claim was obtained by threats or
17 menace; (2) the Amended Claim was prepared and filed by the
18 Appellants' counsel without notice to Mr. Sasnett's counsel; (3)
19 the Claim, as set forth in Plan, was the legitimate claim and
20 should be honored under the Plan; and (4) the Appellants failed
21 to file an objection to the Claim pursuant to the provisions of
22 the Plan. We AFFIRM.

23

24

I. FACTS

25 On February 25, 1989, Mr. Sasnett entered into a partnership
26 agreement with Appellants, his sister and brother-in-law, to
27 purchase 850 acres of land located in Waterford, California (the
28 "Property"). Mr. Sasnett resided in Florida and gave power of

1 attorney to Mr. Robinette, who resided on the Property and
2 operated the farming partnership. Mr. Robinette advanced funds
3 on behalf of Mr. Sasnett over a four-year period for improvements
4 and operation of the partnership.

5 In 1996, the parties executed sale escrow instructions
6 for Appellants to purchase Mr. Sasnett's one-half interest in
7 the Property for \$750,000. Appellants promised to pay to Odell
8 O. Sasnett, Trustee of the Odell O. Sasnett Living Trust Dated
9 January 27, 1997: (1) \$725,000 with interest at the rate of 7.00%
10 per annum from November 1, 1999, and (2) principal and interest
11 payable in annual installments of \$77,773.05 beginning on
12 November 1, 2000 and continuing annually for a period of thirteen
13 years and executed an Installment Note, dated October 28, 1997,
14 which contained those terms.

15 Soon thereafter, Appellants were delinquent in their
16 payments to Mr. Sasnett and sought additional financing from
17 Farmers & Merchants Bank (the "Bank"). In exchange for \$50,000
18 of past due payments from Appellants, Mr. Sasnett agreed to
19 subordinate his deed of trust to the deed of trust of the Bank.
20 Appellants defaulted under the Bank note, and the Bank initiated
21 a foreclosure action. On September 23, 2002, Appellants filed a
22 petition under Chapter 11.

23 Carl Collins, counsel for Mr. Sasnett, filed the Claim in
24 the amount of \$858,042.66 on January 27, 2003; he also filed a
25 request for special notice.

26 The Order Confirming Plan was entered on September 19, 2003.
27 The Plan provided for sale of the Property in two stages: (1) a
28 lot split of three 40-acre parcels and one 65-acre parcel with

1 estimated sale proceeds of \$1.7 million, less costs of sale and
2 development; and (2) an additional 200 acres split into 40-acre
3 parcels with estimated sale proceeds of \$1.75 million, less costs
4 of sale and development. Pursuant to the Plan, the revenues from
5 the sales were expected to satisfy the claims of the Bank, Mr.
6 Sasnett and the United States Department of Agriculture ("USDA").
7 The amended disclosure statement ("Disclosure Statement")
8 described the debt to Mr. Sasnett as follows:

9 Following the full payment of the secured
10 debt of Farmers & Merchant Bank, the proceeds
11 from the sale of subsequent parcels will be
12 applied to the promissory note and deed of
13 trust of Odell Sasnett until satisfied in
14 full in conformance with the terms of his
15 security agreement.

16 The Disclosure Statement lists the Claim in the amount of
17 \$858,042.66 and provides that it is disputed because it does not
18 consider payments made on the promissory note and appears to
19 include interest upon interest. Under the Distribution of
20 Chapter 11 Proceeds, as set forth in the Disclosure Statement,
21 the Claim is listed in the amount of \$894,792.65. The Disclosure
22 Statement fails to disclose that Appellants contend they had
23 setoffs of \$224,500 against the amount of the Claim.

24 The Plan provides the following provision for objections to
25 claims:

26 A party in interest may file an objection to
27 any claim within sixty (60) days after the
28 effective date of the Plan. Objections not filed
 within such time shall be deemed waived.

 The effective date is defined as ten days after the
confirmation date, which was September 19, 2003. Notwithstanding
that the Plan set forth a deadline for filing objections to

1 claims and further provides that an objection to claim not filed
2 by the deadline shall be deemed waived, Appellants failed to file
3 an objection to the Claim either within the 60-day deadline as
4 set forth in the Plan, or any time thereafter.

5 Approximately two weeks after entry of the order confirming
6 Plan, Mr. Robinette sent letters to Mr. Sasnett, dated October
7 15, 2003 and November 23, 2003, urging him to consult with his
8 attorney and accountant and to reduce the amount of the Claim.
9 In December of 2003, Robert Sasnett, Sr. ("Robert"), Mr.
10 Sasnett's son, wrote a letter to Mr. Robinette in response, which
11 included erroneous calculations by Mr. Sasnett's accountant
12 regarding the amount due on the note. In January of 2004, Mr.
13 Robinette sent a letter to his counsel Malcolm Gross advising him
14 of the receipt of the same and sought his advice. Mr. Robinette
15 sent a letter to Mr. Sasnett, dated April 27, 2004, which, among
16 other things, indicated that the disputed amount of claim must be
17 resolved to finalize the claim and "...if it goes to the court
18 contested your money could be tied up in escrow which I'm sure
19 neither of us want."

20 Although Mr. Sasnett was represented by Mr. Collins during
21 this time, Mr. Sasnett failed to inform Mr. Collins of the
22 correspondence with Mr. Robinette. Mr. Gross, Appellants'
23 counsel, prepared the Amended Claim in the amount of \$550,000,
24 which was executed by Mr. Sasnett, and he filed the same with the
25 court without notice to Mr. Collins.

26 Following the April 27, 2004 letter and subsequent to the
27 filing of the Amended Claim, Mr. Robinette, Mr. Sasnett and
28 Robert participated in a telephone conversation in which Mr.

1 Robinette told Mr. Sasnett and Robert that they should do as he
2 had insisted or Mr. Sasnett would receive nothing.

3 In December of 2004, Appellants decided to sell the
4 remaining 346-acre parcel without further parceling, although the
5 Plan provided otherwise. Appellants filed a motion to sell the
6 346-acre parcel indicating that they anticipated the sale
7 proceeds would satisfy their obligations under the Plan to pay
8 the Amended Claim, the claim of USDA and the unsecured claims.
9 No objections to the sale were raised by Mr. Sasnett or Mr.
10 Collins.

11 In October and December of 2004, Mr. Sasnett received two
12 partial payments on his Amended Claim from escrow. Mr. Sasnett
13 submitted a beneficiary demand for \$464,042.05 in connection with
14 the sale of the 346-acre parcel. In February of 2005, following
15 the sale, Mr. Collins reviewed the escrow demand and discovered
16 that there was a \$550,000 claim basis for the demand. After
17 conferring with Mr. Sasnett and learning of the events which had
18 transpired, Mr. Collins immediately filed a withdrawal of the
19 Amended Claim. The final escrow closed and approximately
20 \$313,000 was deposited in Mr. Collins's trust account until the
21 dispute over the funds could be resolved. Mr. Sasnett passed away
22 on April 15, 2005. _____

23 Appellants were in default under the Plan and filed an
24 adversary proceeding ("Complaint") against Laura J. Furey
25 Sasnett, Executrix of the Estate of Odell Sasnett,³ and the
26 _____

27 ³ The amended answer denies that Laura J. Furey Sasnett is
28 the executrix of the Estate of Odell Sasnett and admits that she
(continued...)

1 Estate of Odell Sasnett ("Appellee") alleging claims for breach
2 of contract and declaratory relief.

3 The matter was tried in the bankruptcy court on January
4 11 and 12, 2007 and concluded on March 8, 2007. Although the
5 Complaint purports to allege claims for breach of contract and
6 declaratory relief, the bankruptcy court concluded that the
7 matter would be treated as an objection to claim. The bankruptcy
8 court inquired of Appellants' counsel, Mr. Gross, as to whether
9 he was in agreement with the court's conclusion; he responded in
10 the affirmative. Counsel for the Appellee, James Ganzer,
11 indicated that the Plan was binding on all parties and, if this
12 was an objection to claim, it was time-barred pursuant to the
13 provisions of the Plan.⁴

14 The bankruptcy court did not allow closing arguments and
15 stated its findings on the record. Appellee's counsel prepared a
16 judgment which stated, in part, that the court recited its
17 findings of fact and conclusions of law on the record; the Claim
18 was ordered valid; the funds on deposit with Mr. Collins should
19 be paid to the Appellee; and the court reserved jurisdiction
20

21 ³(...continued)
22 is the trustee of the "Sasnett Revocable Living Trust dated
23 January 27, 1997, as amended April 5, 2005." E.R. 3, p. 12:21-24.

24 ⁴ Normally, when a filed document is amended, the amended
25 document replaces the original. Similarly, when the amended
26 document is later withdrawn, there is no revival of the original
27 document. Rule 3006 provides, in part, that a creditor may not
28 withdraw a claim, except on order of the court, when the creditor
has accepted or rejected the plan. "Unless the court orders
otherwise, an authorized withdrawal of a claim shall constitute
withdrawal of any related acceptance or rejection of a plan." No
party has raised this point, so we will not pursue it further.

1 over the Appellee's attorney's fees pursuant to the security
2 instrument.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction under 28 U.S.C.
5 § 1334 and § 157(b) (1) and (b) (2). We have jurisdiction pursuant
6 to 28 U.S.C. § 158 (a).

7 **III. ISSUES**

8 1. Whether the bankruptcy court erred when it determined that
9 the Amended Claim was obtained by threats and prepared and
10 filed without notice to Mr. Sasnett's counsel, and the
11 Claim, as set forth in the Plan, was the legitimate claim
12 and should be honored under the Plan.

13 2. Whether the bankruptcy court erred when it determined that
14 further grounds for the withdrawal of the Amended Claim was
15 that the Plan provided a provision for objecting to claims,
16 and Appellants failed to file an objection in accordance
17 with the Plan.

18 **IV. STANDARDS OF REVIEW**

19 We review the bankruptcy court's findings of fact for clear
20 error and conclusions of law de novo. Heritage Hotel Ltd. P'ship
21 I v. Valley Bank of Nev. (In re Heritage Hotel Ltd. P'ship. I),
22 160 B.R. 374, 376 (9th Cir. BAP 1993), aff'd mem., 59 F.3d 175
23 (9th Cir. 1995). "Findings of fact, whether based on oral or
24 documentary evidence, shall not be set aside unless clearly
25 erroneous, and due regard shall be given to the opportunity of
26 the bankruptcy court to judge the credibility of the witnesses."
27
28

1 Rule 8013.⁵ "The preclusive effect of a prior judgment is a
2 mixed question of law and fact in which the legal questions
3 predominate" and which we review de novo. Kelley v. South Bay
4 Bank, (In re Kelley), 199 B.R. 698, 701 (9th Cir. BAP 1996).

5 **V. DISCUSSION**

6 Appellants present the following issues for the first time
7 on appeal: (1) the Amended Claim constitutes a judicial
8 admission; (2) judicial and/or equitable estoppel bar Mr.
9 Sasnett's recovery due to his failure to act for extended periods
10 of time; and (3) the equitable power of the court should be
11 invoked to enforce the Amended Claim. The record demonstrates
12 that these issues were not raised before the bankruptcy court.
13 We will not review an issue raised for the first time on appeal,
14 but "may exercise our discretion to hear a new issue when it is
15 'purely one of law' and will not prejudice the opposing party."
16 Palm v. Klapperman (In re Cady), 266 B.R. 172, 183 n. 12
17 (9th Cir. BAP 2001), *aff'd*, 315 F. 3d 1121 (9th Cir. 2003)
18 citing Columbia Steel Casting Co., Inc. v. Portland General
19 Electric, Co., 111 F.3d 1427, 1443 (9th Cir. 1997). Because the
20 issues raised by Appellants for the first time on appeal involve
21 mixed questions of law and fact, we exercise our discretion and
22 decline to consider them.

23
24 ⁵ Unless otherwise indicated, all "Code," chapter, and
25 section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
26 1330 prior to its amendment by the Bankruptcy Abuse Prevention
27 and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23,
28 as the case from which this adversary proceeding and this appeal
arises was filed before its effective date (generally 17 October
2005). All Rule references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9036.

1 **1. The bankruptcy court did not err when it determined that**
2 **the Amended Claim was obtained by threats and prepared and**
3 **filed without notice to Mr. Sasnett's counsel, and the**
4 **Claim, as set forth in the Plan, was the legitimate claim**
5 **and should be honored under the Plan**

6 Appellants contend that the evidence presented at trial
7 demonstrates that Mr. Robinette and Mr. Sasnett negotiated for
8 seven months prior to the filing of the Amended Claim, Mr.
9 Sasnett was advised to consult with his attorney and accountant,
10 and Mr. Sasnett chose not to spend money on attorneys and
11 requested that Mr. Robinette's counsel prepare the Amended Claim
12 and file it with the court.

13 At trial, Appellants introduced the letters to Mr. Sasnett
14 from Mr. Robinette to demonstrate that Mr. Sasnett was urged to
15 contact his attorney and accountant and Mr. Sasnett was not
16 threatened or coerced into executing the Amended Claim. Mr.
17 Gross elected not to question Mr. Robinette regarding the threats
18 to which Robert testified at trial. Appellants argue that the
19 letters contradict the testimony of Robert and should be accorded
20 more credibility than Robert's testimony. They also contend that
21 Robert requested a loan from Mr. Robinette several months after
22 the Amended Claim was withdrawn, which is inconsistent with
23 his testimony regarding duress, menace and threats of litigation.

24 In addition to the testimony of the witnesses, the
25 bankruptcy court also admitted into evidence certain portions of
26 the Alternate Direct Testimony and the exhibits introduced by the
27 parties. Following the testimony of Mr. Collins, the bankruptcy
28 court inquired as to whether the parties were resting their case.
Mr. Gross responded in the affirmative. Mr. Ganzer queried
whether the bankruptcy court wished the parties to brief the

1 legal issues. The bankruptcy court declined and proceeded to
2 announce its findings on the record. Mr. Gross raised no
3 objection. The bankruptcy court made the following findings of
4 fact regarding threats made to Mr. Sasnett by Mr. Robinette:

5 I don't know what you have to say about those
6 threats, Mr. Robinette. Nobody ever asked you
7 and that's part of the frustration I had
8 here because nobody asked you and there
9 was testimony the other day by David [sic]
10 Sasnett that says you made threats. Well,
11 that -- those statements have not been
12 challenged in any way, so I'm going to accept
13 those as truthful. As a matter of fact, I
14 saw him on the stand and I think he was telling
15 the truth.

16 Transcript of Proceedings, E.R. 32, p. 411:20-25, p. 412:1-4.

17 "A factual finding is clearly erroneous if the appellate
18 court, after reviewing the record, has a firm and definite
19 conviction that a mistake has been committed." Welther v. Donell
20 (In re Oakmore Ranch Mgmt.), 337 B.R. 222, 224 (9th Cir. BAP
21 2006) citing Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.
22 Ct. 1504, 84 L.Ed. 2d 518 (1985). When findings are based on
23 credibility, and "when a trial judge's finding is based on his
24 decision to credit the testimony of one of two or more witnesses,
25 each of whom has told a coherent and facially plausible story
26 that is not contradicted by extrinsic evidence, that finding, if
27 not internally inconsistent, can virtually never be clear error."
28 Anderson v. Bessemer City, 470 U.S. 564, 575, 105 S. Ct. 1504, 84
L.Ed. 2d 518 (1985). A trial court's findings are accorded
"great deference" when they are based on "determinations
regarding credibility of the witnesses." Id. at 575. As
indicated in its findings, the bankruptcy court observed Robert

1 and believed that he was telling the truth.⁶ This intensely
2 factual determination was not clearly erroneous.

3 Additionally, Appellants contend that the bankruptcy court
4 committed clear error when (1) it determined that Appellants and
5 their counsel were responsible for informing Mr. Sasnett's
6 counsel of the Amended Claim; and (2) it failed to address the
7 legal significance of a sworn statement, the declaration of
8 Mr. Sasnett, filed as the Addendum to the Amended Claim.

9 The evidence presented demonstrated that Mr. Sasnett's
10 counsel, Mr. Collins, executed and filed the Claim; he filed a
11 request for special notice; his attorney-client relationship with
12 Mr. Sasnett had not been terminated; he attended all scheduled
13 hearings, including the hearing on the motion to sell; and he had
14 been in contact with Appellants' counsel, Mr. Gross, his former
15 law partner, during the entire period.

16 Notwithstanding the foregoing, Mr. Gross prepared the
17 Amended Claim and Addendum to Claim for Mr. Sasnett's signature,
18 and he subsequently filed the Amended Claim and billed the estate
19 for his services. Appellants argue that the "fact that Mr.
20 Sasnett was not represented by counsel as to the amendment is
21 not of significance." In re Young, 995 F. 2d 547, 549 n. 7 (5th
22 Cir. 1993). Appellants failed to raise this argument at trial,
23 and the panel will not consider it on appeal. We "will not
24 consider arguments that are not properly raised in the trial
25 courts." In re E.R. Fegert, Inc., 887 F. 2d 955, 957 (9th Cir.
26 1989) (citations omitted).

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28 ⁶ We have no doubt that it also discounted as of little or
no value the testimony about Robert's request for a loan from his
uncle.

1 **2. The bankruptcy court did not err when it determined that**
2 **further grounds for withdrawal of the Amended Claim was that**
3 **the Plan provided a provision for objecting to claims, and**
4 **Appellants failed to file an objection in accordance with**
5 **the Plan**

6 With respect to the bankruptcy court's findings that the
7 Claim should be honored under the Plan, that the Plan contained a
8 provision for filing objections to claims, and that Appellants
9 filed no objections, we interpret these findings as a legal
10 determination that claim preclusion applies. We conclude that
11 this determination is correct as a conclusion of law.

12 When the bankruptcy court determined that the breach of
13 contract claim would be tried as an objection to claim, Mr.
14 Ganzer raised the defense of claim preclusion on the record and
15 in the appellate brief. The Plan contains a provision for filing
16 objections to claims, which states:

17 A party in interest may file an objection to
18 any claim within sixty (60) days after the
19 effective date of the Plan. Objections not filed
20 within such time shall be deemed waived.

21 The provisions of a confirmed plan bind a debtor and any
22 creditor. Section 1141(a). "Once a bankruptcy plan is confirmed,
23 it is binding on all parties and all questions that could have
24 been raised pursuant to the plan are entitled to res judicata
25 effect." Trulis v. Barton, 107 F.3d 685, 690 (9th Cir. 1995).
26 The question of whether Mr. Sasnett was owed \$550,000 and not
27 \$858,042.66, as provided for in the Plan, due to alleged setoffs
28 and other obligations could have been raised prior to
confirmation or following confirmation by complying with the
provisions of the Plan.

1 The Plan provides that objections not filed within the
2 requisite time "shall be deemed waived." Accordingly, the
3 bankruptcy court correctly concluded that further grounds for
4 allowing the withdrawal of the Amended Claim existed because
5 the Plan set forth a provision for objecting to claims and
6 Appellants failed to file an objection.

7 **VI. Conclusion**

8 For the foregoing reasons, We AFFIRM.

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