

MAY 31 2006

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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NOT FOR PUBLICATION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 Nos.	SC-05-1170-SPaMa
)		SC-05-1180-SPaMa
7	KIRK FRIEDMAN,)		SC-05-1181-SPaMa
)		SC-05-1182-SPaMa
8	Debtor.)		
	_____)	Bk. No.	04-09158
9	KIRK FRIEDMAN,)		
)		
10	Appellant,)		
)		
11	v.)	MEMORANDUM¹	
)		
12	KENNETH BURNS; PAUL LISCOM;)		
)		
13	CALIFORNIA CORPORATIONS)		
)		
14	COMMISSION; JAMES L. KENNEDY,)		
	Chapter 7 Trustee,)		
)		
15	Appellees.)		
	_____)		

Argued and Submitted on
February 24, 2006 at San Diego, California

Filed - May 31, 2006

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

Honorable James W. Meyers, Bankruptcy Judge, presiding

Before: SMITH, PAPPAS and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 Kirk Friedman ("Debtor") appeals four related orders: 1) an
2 order denying Debtor's motion to dismiss an involuntary chapter 7
3 petition² entered January 28, 2005; 2) an order denying a motion
4 for its reconsideration entered April 28, 2005; 3) an order
5 granting petitioning creditors' motion for summary judgment
6 entered April 28, 2005; and 4) an order directing Debtor to file
7 schedules and statement of financial affairs entered April 27,
8 2005 (collectively, the "Orders"). The Notices of Appeal were
9 filed on April 29, 2005. As the Orders are interrelated and
10 revolve around a single issue -- whether the statutory
11 requirements for commencing an involuntary petition were
12 satisfied -- all four appeals are addressed in this memorandum.
13 We REVERSE and REMAND.

14 I. FACTS

15 On June 27, 2002, the California Corporations Commission
16 ("Commission") filed a complaint against Debtor and others³
17 (collectively, "Defendants") in Los Angeles Superior Court. The
18 complaint alleged that Defendants had fraudulently solicited
19 investments and sold unregistered securities to approximately 72
20 persons or entities in the total amount of \$2,932,465 for Green
21 Screen Partners, LLC and to approximately 138 persons or entities

22
23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
26 enacted and promulgated prior to the effective date (October 17,
2005) of The Bankruptcy Abuse Prevention and Consumer Protection
Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

27 ³ Debtor's co-defendants include Richard Houghton, Sean
28 Andrew O'Neal, and Jeffrey Shuken. Petitioning Creditors filed
involuntary chapter 7 petitions against each Defendant on October
21, 2004.

1 in the total amount of \$5,159,964 for Treasure Hunt Entertainment
2 II. The Commission sought a permanent injunction, civil
3 penalties, and restitution for the defrauded investors pursuant
4 to California Corporations Code ("Cal. Corp. Code") §§ 25110 and
5 25401.

6 On September 5, 2002, the Commission and Defendants
7 stipulated to the entry of a final judgment including a permanent
8 injunction and other ancillary relief (the "Consent Judgment").
9 Pursuant to the Consent Judgment, the Commission agreed not to
10 take any administrative or civil action against Defendants based
11 upon the complaint. In return, Defendants agreed to be jointly
12 and/or severally liable to the Commission for restitution in the
13 amount of \$8,092,429.55 and civil penalties in the amount of
14 \$10,500,000.

15 Debtor subsequently failed to make any of the payments
16 required under the Consent Judgment. On October 21, 2004, the
17 Commission, along with two of the affected investors, Kenneth
18 Burns ("Burns") and Paul Liscom ("Liscom") (collectively,
19 "Petitioning Creditors"), filed an involuntary petition against
20 Debtor pursuant to § 303(b). The involuntary petition alleged
21 that Debtor had at least 12 creditors and described Petitioning
22 Creditors' claims as arising from securities fraud and violations
23 of Cal. Corp. Code § 25000 et seq.

24 On November 15, 2004, Debtor moved to dismiss the
25 involuntary petition on the grounds that the statutory
26 requirements of § 303(b) had not been satisfied. Debtor argued
27 that 1) Burns and Liscom did not qualify as eligible petitioning
28 creditors because neither held a claim separate and distinct from

1 the Commission's claim under the Consent Judgment, 2) even if
2 they held claims independent of the Consent Judgment, such claims
3 were time barred, and therefore, the subject of a bona fide
4 dispute, and 3) Debtor's acknowledgment of liability to the
5 Commission under the Consent Judgment did not extend to Burns and
6 Liscom.

7 The Petitioning Creditors responded that as beneficiaries of
8 the restitution award referenced in the Consent Judgment, Burns
9 and Liscom held claims against Debtor that were not contingent as
10 to liability nor subject of a bona fide dispute. Relying on Cal.
11 Corp. Code § 25530,⁴ they maintained that subsection (b) of the

12
13 ⁴ Cal. Corp. Code § 25530 provides

14 (a) Whenever it appears to the commissioner
15 that any person has engaged or is about to
16 engage in any act or practice constituting a
17 violation of any provision of this division
18 or any rule or order hereunder, the
19 commissioner may in the commissioner's
20 discretion bring an action in the name of the
21 people of the State of California in the
22 superior court to enjoin the acts or
23 practices or to enforce compliance with this
24 law or any rule or order hereunder

25 (b) If the commissioner determines it is in
26 the public interest, the commissioner may
27 include in any action authorized by
28 subdivision (a) a claim for ancillary relief,
including but not limited to, a claim for
restitution or disgorgement or damages on
behalf of the persons injured by the act or
practice constituting the subject matter of
the action, and the court shall have
jurisdiction to award additional relief.

(c) In any case in which a defendant is
ordered by the court to pay restitution to a
victim, the court may in its order require

(continued...)

1 statute authorized the Commission to seek a restitution judgment
2 "on behalf of" the persons injured by Debtor's acts, including
3 Burns and Liscom, and subsection (c) provided such persons with
4 the individual right to enforce their share of the restitution
5 award as a separate civil judgment. Thus, the argument
6 concluded, Burns and Liscom effectively each held separate civil
7 judgments against Debtor pursuant to Cal. Corp. Code § 25530(c).
8 In addition, Petitioning Creditors argued that Debtor's voluntary
9 signature on the Consent Judgment constituted an acknowledgment
10 of his obligation to both the Commission and the investors, and
11 therefore, under California Code of Civil Procedure ("C.C.P.")
12 § 360, the statute of limitations did not apply.

13 A hearing on the motion to dismiss was held on December 16,
14 2004. The bankruptcy court rejected Debtor's interpretation of
15 Cal. Corp. Code § 25530(c) and determined that the statute
16 provided Burns and Liscom with individual claims for purposes of
17 § 303(b), holding

18 I think after listening to the argument of
19 counsel and reading the pleading, that . . .
20 it would be considered a technical view of
21 the bankruptcy requirements and rule that
22 there aren't sufficient creditors here under
23 this scenario. I think that would not
24 reflect the actuality of what is going on in
25 this process The Department of
26 Corporations has its own claim. The State of

27
28

24 ⁴(...continued)

25 the payment as a money judgment, which shall
26 be enforced by a victim as if the restitution
27 order were a separate civil judgment, and
28 enforceable in the same manner as is provided
for the enforcement of any other money
judgment

Cal. Corp. Code § 25530.

1 California has its own claim. But in
2 addition, the second cause of action, of
3 which the \$8 somewhat million dollars is
4 awarded for, they're acting in a
5 representative capacity of a number of
6 individuals, at least two of which,
7 apparently would, on this record, join in
8 this and therefore, I would think it would be
9 not be a very practical view to construe this
10 in a technical manner and I find that the
11 motion should be denied

12 Following the hearing, on January 10, 2005, Debtor filed an
13 answer to the involuntary petition asserting as affirmative
14 defenses the same arguments raised in the motion to dismiss.

15 Believing that the bankruptcy court had misinterpreted Cal.
16 Corp. Code § 25530(c), Debtor filed a motion for reconsideration
17 on February 7, 2005. Debtor argued that § 25530(c) was not self-
18 executing and that only individuals or entities actually named in
19 the restitution award could enforce it as a civil judgment.
20 Stated otherwise, as the Commission was the only named obligee,
21 the Consent Judgment created a single enforceable claim, not
22 several individual enforceable claims. Thus, according to
23 Debtor, for purposes of § 303(b), the Petitioning Creditors
24 represented one claim, not three.

25 On February 9, 2005, Petitioning Creditors filed a motion
26 for summary judgment. They reasoned that because the bankruptcy
27 court had already ruled in their favor on the defenses Debtor
28 alleged in the answer, and since no additional legal defenses or
genuine issues of material fact were raised, they were entitled
to the entry of an order for relief as a matter of law.

Debtor countered that Petitioning Creditors had failed to
meet their burden of proof as to each element of their claim and
to attach affidavits supporting the allegations as required by

1 Fed. R. Civ. P. 56. In addition, Petitioning Creditors had not
2 introduced evidence demonstrating Debtor's failure to pay debts
3 as they became due as required under § 303(h).

4 Relying on the totality of the circumstances test discussed
5 in In re Vortex Fishing Sys., Inc., 277 F.3d 1057 (9th Cir.
6 2002), Petitioning Creditors maintained that the unpaid Consent
7 Judgment, which represents an overwhelming proportionate share of
8 Debtor's overall debt, alone, was enough to satisfy § 303(h).

9 On April 15, 2005, the bankruptcy court heard both motions
10 and concluded the hearing by denying the reconsideration motion
11 and granting the summary judgment motion. The bankruptcy court
12 reasoned

13 I think given the judgment we're dealing
14 with, I do think that that [sic] provides the
15 basis for the individual claims that
16 justifies the petition. And I think that on
17 this record that the Debtors have admitted
not paying the debts as they become due, and
therefore I do think this motion for summary
judgment should be granted

18 Debtor appeals.

19 **II. ISSUE**

20 Whether the bankruptcy court erred in determining that for
21 purposes of § 303(b) Petitioning Creditors each held separate and
22 distinct claims under the Consent Judgment.

23 **III. JURISDICTION**

24 Federal subject matter jurisdiction is founded under 28
25 U.S.C. §§ 1334(b) and 157(b)(1). We have appellate jurisdiction
26 over final orders pursuant to 28 U.S.C. § 158(c).

1 **IV. STANDARD OF REVIEW**

2 We review the bankruptcy court's legal conclusions de novo,
3 findings of fact for clear error, and mixed questions of law and
4 fact de novo. In re Roberts, 331 B.R. 876, 880 (9th Cir. BAP
5 2005). Moreover, a bankruptcy court's interpretation of state
6 law and orders granting or denying summary judgment are also
7 reviewed de novo. Id.; In re Paine, 283 B.R. 33, 36 (9th Cir.
8 BAP 2002).

9 **V. DISCUSSION⁵**

10 Debtor contends that the claims of Burns and Liscom are not
11 separate and distinct from the claim held by the Commission under
12 the terms of the Consent Judgment, and therefore, the bankruptcy
13 court erred when it denied the dismissal motion and entered the
14 order for relief. We agree.

15 A. The Requirements of § 303(b)

16 Only creditors with certain claims are eligible to commence
17 an involuntary petition under § 303(b). Section 303(b) provides,
18 in relevant part:

19 (b) An involuntary case against a person is
20 commenced by the filing with the bankruptcy
21 court of a petition under chapter 7 or 11 of
this title-

22 (1) by three or more entities, each of
23 which is either a holder of a claim
24 against such person that is not
contingent as to liability or the

25 ⁵ Shortly before the time set for oral argument before this
26 panel, Appellees' counsel faxed a one-sentence letter to the
27 Clerk advising that he would not be presenting oral argument.
28 Due to this unanticipated absence, we had to rely solely on
Appellees' arguments provided in the brief and were unable to
engage Appellees regarding various issues concerning the
interplay between Cal. Corp. Code § 25530 and § 303(b).

1 subject of a bona fide dispute, or an
2 indenture trustee representing such a
3 holder, if such claims aggregate at
4 least \$12,300 more than the value of any
5 lien on property of the debtor securing
6 such claims held by the holders of such
7 claims

8 (2) if there are fewer than 12 such
9 holders, excluding any employee or
10 insider of such person and any
11 transferee of a transfer that is
12 voidable under section 544, 545, 547,
13 548, 549, or 724(a) of this title, by
14 one or more of such holders that hold in
15 the aggregate at least \$12,300 of such
16 claims

17 11 U.S.C. § 303(b).

18 In determining whether the requirements of § 303(b) have
19 been met, a court must closely examine the entities who have
20 commenced the involuntary case. 4 Collier on Bankruptcy
21 ¶ 303.03[2] (15th ed. rev. 2005). For a debtor who has 12 or
22 more eligible creditors, at least three of the petitioning
23 creditors must hold separate and distinct claims. See 11 U.S.C.
24 § 303(b) (1).

25 B. The Bankruptcy Court Erred In Finding That Burns and Liscom
26 Held Separate and Distinct Claims Under the Consent Judgment

27 Debtor argues that as the Consent Judgment only named the
28 Commission as the entity to whom Debtor owed payment of the
restitution award, Cal. Corp. Code § 25530(c) does not apply to
Burns and Liscom. Consequently, Burns and Liscom are ineligible
petitioning creditors because they cannot assert that they each
have distinct and separate claims based upon the Consent
Judgment.

1 1. Burns and Liscom are entitled to a share of the
2 restitution awarded in the Consent Judgment based on
3 §§ 25530(a) and (b)

4 Cal. Corp. Code § 25530(a) provides the Commission with the
5 authority to "bring an action in the name of the people of the
6 State of California . . . to enjoin the act or practices or to
7 enforce compliance" of any law or rule provided for in the Cal.
8 Corp. Code. In addition, subsection (b) allows the Commission to
9 "include in any action authorized by subdivision (a) a claim for
10 restitution on behalf of the persons injured by the act or
11 practice constituting the subject matter of the action." Cal.
12 Corp. Code § 25530(b).

13 In examining the Consent Judgment in relation to the
14 complaint and Cal. Corp. Code § 25530, the Commission was clearly
15 acting on behalf of the defrauded investors, and not itself, when
16 it pursued the \$8 million claim for restitution. When examined
17 concurrently, the complaint and the Consent Judgment clearly
18 reflect that the Commission's intent was to obtain full
19 restitution for those injured by Debtor's actions. Accordingly,
20 as apparent victims of Debtor's securities fraud, Burns and
21 Liscom are entitled to claim a share in the restitution award.⁶
22 Whether such entitlement constitutes an eligible claim for
23 § 303(b) purposes, however, requires an analysis of the language
24

25
26 ⁶ A restitution award to the Commission on behalf of
27 defrauded investors is paid to the Department of Corporations as
28 the agent for the individual investors. The Commission then
distributes the award to the investors on a pro-rata basis
determined by the proofs of claim filed by each of them prior to
disbursement.

1 and scope of both Cal. Corp. Code § 25530(c) and the Consent
2 Judgment.

3 2. Cal. Corp. Code § 25530(c) and the terms of the Consent
4 Judgment are not sufficient to establish separate and
5 distinct individual claims for purposes of §303(b)

6 Cal. Corp. Code § 25530(c) provides,

7 In any case in which a defendant is ordered
8 by the court to pay restitution to a victim,
9 the court may in its order require the
10 payment as a money judgment, which shall be
11 enforceable by the victim as if the
12 restitution order were a separate civil
13 judgment, and enforceable in the same manner
14 as is provided for the enforcement of any
15 other money judgment. Any order issued under
16 this subdivision shall contain provisions
17 that are designed to achieve a fair and
18 orderly satisfaction of the judgment.

19 Cal. Corp. Code § 22530(c) (emphasis added).

20 In determining whether subsection (c) is applicable to Burns
21 and Liscom, we must examine the express language of the statute.
22 See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S.
23 837, 842-44 (1984); U.S. v. Buckland, 289 F.3d 558, 564 (9th Cir.
24 2002). “[A]s long as the statutory scheme is coherent and
25 consistent, there generally is no need for a court to inquire
26 beyond the plain language of the statute.” U.S. v. Ron Pair
27 Enters., 489 U.S. 235, 240-41 (1989).

28 Subsection (c) applies “[i]n any case in which a defendant
is ordered by the court to pay restitution to a victim.” This
language suggests that for subsection (c) to be applicable
payment of the restitution must be ordered to a victim.
Logically and practically, it follows that a restitution order
can only be enforceable as a money judgment if the victim is

1 actually identified in the order. Otherwise a restitution
2 judgment enforceable by unnamed persons could undermine the
3 intended goal of achieving a "fair and orderly satisfaction of
4 the judgment." See Cal. Corp. Code § 25530(c).

5 Moreover, the underlying public policy purpose of § 25530
6 supports a narrow reading of subsection (c). The "intent behind
7 § 25530 was to create a governmental cause of action to protect
8 the public interest by enjoining defendants from similar illegal
9 conduct in the future." People v. Martinson, 233 Cal. Rptr. 617,
10 620 (Cal. Ct. App. 1986). Subsection (c) was included by the
11 legislature as a way for the Commission to obtain restitution on
12 behalf of defrauded investors, thereby relieving victims of the
13 burden of pursuing the violators on their own. Restitution,
14 however, is not the only avenue for recovery available to wronged
15 investors. Id. Defrauded investors are also provided private
16 rights of action for reimbursement pursuant to Cal. Corp. Code
17 § 25503. This being the case, there is no reason to interpret
18 subsection (c) more broadly than what is expressed in the plain
19 language of the statute.

20 In applying § 25530, Petitioning Creditors argue that
21 because subsection (c) does not expressly require victims to be
22 specifically named in a court order, the Commission's right to
23 payment under the Consent Judgment can be interpreted as a right
24 to payment also held by Burns and Liscom as the direct intended
25 beneficiaries of the Consent Judgment. However, this application
26 of subsection (c) does not comply with its plain meaning. If the
27 Petitioning Creditors' application is correct, then the Consent
28 Judgment could be enforced by anyone claiming to have been harmed

1 by Debtor, whether or not such harm actually occurred, to the
2 detriment of legitimate victims. Clearly, this is not what the
3 California legislature intended.

4 Nor does Petitioning Creditors' interpretation make
5 practical sense from an enforcement standpoint. Though the
6 Consent Judgment expressly requires Debtor to pay restitution to
7 the Commission in the form of a money judgment, it is absent of
8 any language indicating to whom the restitution award is payable
9 to other than the Commission. The language in the Consent
10 Judgment would provide a future court with no indication that
11 Burns and Liscom were victims. As a result, we believe the
12 bankruptcy court erred in finding that Burns and Liscom were
13 entitled to enforce payment of their pro-rata share of the
14 restitution award against Debtor under Cal. Corp. Code
15 § 55230(c). Because § 55230(c) is inapplicable to Burns' and
16 Liscom's claims, Petitioning Creditors have failed to show that
17 the claims are separate and independent from the Commission's
18 under the Consent Judgment. Thus, Burns and Liscom do not
19 qualify as petitioning creditors under § 303(b).

20 C. There Is No Evidence that Petitioning Creditors Filed the
21 Involuntary Petition In Bad Faith

22 Debtor asserts that Petitioning Creditors filed the
23 involuntary petition in bad faith and for an improper purpose --
24 routine debt collection. Debtor contends that the petition was
25 filed because Petitioning Creditors were unable to collect the
26 Consent Judgment and they believed that Defendants were
27 improperly transferring assets. However, there is no evidence in
28 the record to support these allegations except a statement by the

