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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	CC-04-1239-MaBK
)		
LYON & LYON, LLP,)	Bk. No.	LA 03-10365 VZ
)		
Debtor.)		
<hr/>			
)		
MICHAEL BOLAN,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
DAVID A. GILL,)		
Post-Confirmation Trustee;)		
LYON & LYON, LLP; UNITED)		
STATES TRUSTEE,)		
)		
Appellees.)		
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Argued and Submitted on
February 23, 2005, at Los Angeles, California

Filed - June 30, 2005

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

Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding.

Before: MARLAR, BRANDT and KLEIN, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrine of law of the case or the rules of res judicata, including claim preclusion and issue preclusion. See 9th Cir. BAP Rule 8013-1.

1 **INTRODUCTION**

2
3 In a contested claim objection proceeding, the bankruptcy
4 court disallowed a presumptively valid proof of claim for unpaid
5 compensation based on affidavit testimony presented by the
6 objecting trustee. Such testimony was inadmissible hearsay and,
7 thus, could not deprive the claim of its evidentiary presumption.

8 Even though there were disputed material facts, the
9 bankruptcy court did not conduct an evidentiary hearing as
10 mandated by Rules² 3007 and 9014(d). Instead, it improperly
11 shifted the burden of proof back to the claimant, found that his
12 compensation claim was not supported by sufficient accounting
13 evidence, and summarily ruled in the trustee's favor.

14 We hold that, in the absence of waiver, the bankruptcy court
15 was required to resolve all material factual issues in the same
16 manner as in an adversary proceeding. Here, the bankruptcy court
17 erred in ruling without holding an evidentiary hearing, and its
18 order sustaining the objection is therefore REVERSED AND REMANDED.

19
20 **FACTS**

21
22 Debtor law firm Lyon & Lyon, LLP ("Debtor") dissolved and
23 ceased operations in September, 2002. Appellant Michael Bolan
24 ("Bolan") was a former associate of Debtor. His employment
25

26 ² Unless otherwise indicated, all rule references are to the
27 Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules
28 1001-9036, which make applicable certain Federal Rules of Civil
Procedure ("Fed. R. Civ. P."), and all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 terminated on August 31, 2002, because of the firm's dissolution.

2 On December 5, 2002, Bolan filed, in Orange County Superior
3 Court, a first amended complaint ("Complaint") against Debtor,
4 seeking damages of \$72,055. The Complaint asserted counts for
5 violation of the California Labor Code for wages owed, breach of
6 express and implied contract, and unfair business practices.

7 The action was stayed when Debtor filed this voluntary
8 chapter 11 petition, and the action was not removed to bankruptcy
9 court. In its bankruptcy case, Debtor's liquidation plan was
10 confirmed and a post-confirmation trustee ("Trustee") was
11 appointed.

12 Bolan filed a proof of an unsecured priority claim against
13 the estate in the amount of \$72,055 for wages, salaries and
14 compensation. The proof of claim indicated that the priority
15 claim would be capped at \$4,650 pursuant to § 507(a)(3)³, and that
16 the balance would therefore be an unsecured claim.

17 In support of the proof of claim, Bolan attached selected
18 pages of the "Lyon & Lyon Attorney Manual" ("Manual"), dated
19 January 7, 1992.

20 Trustee filed an objection to Bolan's proof of claim,
21 attached a copy of the Complaint and disputed its allegations.
22 Trustee maintained that he could not "evaluate the accuracy of
23 [Bolan's] claim nor the merits of his damages calculations" unless
24 Bolan produced additional evidence, such as the following: (1) the
25 amounts Bolan was paid by Debtor between March 2001 through August
26 of 2002, (2) his collected monthly receipts, and (3) any system of

27
28 ³ In 2004, this amount was adjusted up to \$4,925. See 11
U.S.C.A. § 507(a)(3).

1 compensation that was in place other than the one under which he
2 had been compensated. See Claim Objection (Jan. 29, 2004), at 6.
3 Trustee requested the court to set the matter for an evidentiary
4 hearing, pursuant to Rule 7001.⁴ Trustee also objected to any
5 priority treatment for Bolan's claim.

6 Trustee attached the declaration of Trish Lopez ("Lopez"),
7 who was Debtor's Controller from March 2002 through September 1,
8 2002. Lopez stated that her declaration was based upon "personal
9 knowledge," that her job "included financial statement review,
10 approving invoices, managing the budget and reforecasting the
11 budget and payroll" and "responding to accounts receivable
12 inquiries." Decl. of Lopez (Jan. 30, 2004), ¶¶ 1, 2. In
13 paragraph 6, Lopez stated:

14 6. Based upon my position as Controller of the Debtor and
15 based upon my review of the Debtor's books and records, I
16 have determined that Michael Bolan is a former employee of
17 the Debtor. His services were terminated as of August 31,
18 2002. The Debtor's books and records reflect that all
19 compensation earned by Michael Bolan was paid.

18 Id.

19 Bolan filed his opposition and attached his declaration, in
20 which he calculated the amounts owed to him, and additional
21 documentation, including: (1) the Complaint; (2) Debtor's

22 ⁴ Trustee stated:

23
24 The Trustee requests that the Court continue the hearing
25 on this objection and declare this matter to be a contested
26 matter pursuant to Bankruptcy Rule 7001. The Trustee further
27 requests that the court set a status conference 90 days out in
28 order to provide the parties to [sic] conduct discovery, with
the intention that the ultimate disposition of the matter, if
not otherwise resolved, will be determined by an evidentiary
hearing.

28 Claim Objection (Jan. 29, 2004), at 13.

1 "Commission System" guidelines, dated July 3, 2001; and (3)
2 various in-house e-mails concerning the commission system,
3 compensation for associates, and Bolan's vacation pay.
4 For the first time, Bolan presented the basis for his claimed
5 compensation. His work and compensation evidence is paraphrased
6 below:

7 • Bolan was first hired by Debtor in 1996 and
8 voluntarily separated in August of 2000. At that time
9 Bolan was given the Manual as his employment contract. He
10 was a salaried employee, but later became eligible for,
11 and was compensated pursuant to, a collection-based
12 commission system. Under that system, commissioned
13 associates received 35% of their collected receipts
14 monthly. Manual, § 3.2.

15
16 • Commissioned associates received vacation pay at the
17 rate of 1/26th of the prior year's commissions. Manual,
18 § 3.8.

19
20 • Commissioned associates who left the firm received
21 "run-off" commissions, consisting of 35% of the collected
22 receipts, for three months. Manual, § 3.2.

23
24 • When Bolan voluntarily left employment, in August,
25 2000, he was paid all the amounts owed to him, including
26 wages, vacation pay and run-off commissions.

27
28 • Bolan was rehired in March, 2001. At that time,

1 Debtor was compensating its commissioned associates under
2 a billed-based commission system.

3
4 • In July, 2001, Debtor changed its compensation system
5 from a billed-based system to a collection-based system.⁵
6 Because Bolan had not built up enough receivables to be
7 compensated under the new collection-based system, Bolan
8 was "forced" to accept compensation under a "salary
9 system." Id., ¶ 9.

10
11 • In December, 2001, Debtor paid Bolan \$40,000, which
12 it maintained was a bonus, but which Debtor alleged was
13 partial payment of compensation.

14
15 Bolan stated that he had received a total of \$178,944 in
16 wages, but calculated that he was still owed an additional \$72,055
17 for the time period March, 2001 through August, 2002.

18 The alleged deficits were in three categories: wages
19 (\$36,516), vacation pay (\$15,539) and run-offs (three months--
20 September, October and November, 2002--estimated to be \$6,800 per
21 month or a total of \$20,400). Essentially, his argument was that
22 Debtor failed to pay him the required amounts for his legal
23 services because it paid him under a salary system instead of the
24 billed-based commission system under which he had been rehired in

25
26 ⁵ Later, the bankruptcy court found that Debtor had the
27 discretion, under the Manual terms, to modify its compensation
28 scheme without prior written or oral notice. Bolan has not
challenged this finding on appeal and has therefore waived the
issue. See Laboa v. Calderon, 224 F.3d 972, 981 n.6 (9th Cir.
2000).

1 March, 2001, and failed to pay vacation and run-off commissions
2 according to the Manual, which he believed was still in effect.

3 Bolan also argued that Trustee had failed to meet his burden
4 of producing sufficient admissible evidence in support of his
5 objection, because California's labor laws required the employer
6 to maintain employment records and Lopez's declaration contained
7 only a conclusory statement that Bolan had been paid in full.

8 Trustee then filed a reply and the declaration of Mary
9 Feliton ("Feliton"), who was the acting administrator of Debtor
10 from the fall of 2001 through September 1, 2002. Feliton stated
11 that her declaration was based upon "personal knowledge," and that
12 her job included the "administration of all non-legal activities."
13 Decl. of Feliton (April 13, 2004), Trustee's Reply, p. 8-9. Among
14 the pertinent paragraphs of Feliton's declaration were the
15 following:

16 5. Based on my review of the Debtor's records, the Debtor
17 changed its compensation system on or about July 1, 2001
18 from a billed-based system to a collections based
19 system. This change affected the compensation of all
20 billed-based commissioned employees, including Michael
21 Bolan.

22 6. Based upon my review of the Debtor's books and records,
23 I have determined that Michael Bolan received a
24 discretionary bonus from the Debtor in December of 2001
25 in the amount of \$40,000.

26 Based upon my review of the Debtor's books and records,
27 I have determined that the debtor collected, based upon
28 Mr. Bolan's hours in 2002:

24	September	\$27,313.66
25	October	\$ 2,047.50
26	November	\$ 3,878.20

27 Id.

28 Bolan then objected to both the Lopez and Feliton

1 declarations (the portions cited above) as hearsay.⁶

2 At the April 20, 2004 hearing on the objection, the court
3 noted that Bolan had an opportunity to conduct discovery and
4 examine Debtor, but failed to do so. Nor did Bolan's attorney
5 request a continuance of the hearing in order to conduct
6 discovery.

7 The bankruptcy court then made its findings and conclusions
8 on the record. First it overruled Bolan's hearsay objections to
9 the Lopez and Feliton declarations, and determined that Trustee
10 met his burden of providing sufficient rebuttal evidence. It
11 found that the burden of proof shifted back to Bolan, but that he
12 had not produced the required records to support his claim that he
13 had not been fully compensated. The court stated:

14 [I]t was up to claimant to show me during what term or
15 what, what time during this employment the billing based
16 compensation was in effect, how many hours were billed,
17 and what was due, and the same thing with regards to
collections. . . . [T]he claimant has failed to establish
to me on purely an accounting basis, how much of that
compensation would fall under which system and why.

18 Tr. of Proceedings (April 20, 2004), p. 13-14.

19 Thus, the bankruptcy court found that Bolan had not produced
20 an accounting to establish that he was owed any additional
21 compensation for wages. Regarding vacation pay, the bankruptcy
22 court found that Bolan's claim was without merit because it was
23 based on a different work schedule than the one set for him by
24 Debtor. Regarding run-off commissions, the bankruptcy court
25 concluded that Bolan presented no evidentiary basis for such

26
27 ⁶ The bankruptcy court allowed Bolan to make an oral
28 objection to the Feliton declaration at the April 20, 2004
hearing, because he complained that he had not received Trustee's
reply until one day before the hearing.

1 payments under a salary system.

2 The bankruptcy court's order disallowing Bolan's proof of
3 claim was entered on April 27, 2004. Bolan timely appealed.

4
5 **ISSUES**

- 6
- 7 1) Whether Bolan and Trustee met their relative burdens of
8 production and/or proof under Rule 3001(f).
 - 9
 - 10 2) Whether the bankruptcy court erred in shifting the
11 burden of proof back to Bolan without first conducting
12 an evidentiary hearing.

13
14 **STANDARDS OF REVIEW**

15

16 The bankruptcy court's findings of fact are reviewed for
17 clear error, and its conclusions of law are reviewed de novo.
18 Neilson v. United States (In re Olshan), 356 F.3d 1078, 1083 (9th
19 Cir. 2004). The interpretation and application of the Bankruptcy
20 Rules is a pure issue of law, which we review de novo. Temecula
21 v. LPM Corp. (In re LPM Corp.), 269 B.R. 217, 220 (9th Cir. BAP
22 2001), aff'd, 300 F.3d 1134 (9th Cir. 2002).

23 Whether the bankruptcy court correctly allocated the burdens
24 of proof is a question of law, which we review de novo. W. Wire
25 Works, Inc. v. Lawler (In re Lawler), 141 B.R. 425, 428 (9th Cir.
26 BAP 1992).

27 Whether a proof of claim is executed and filed in accordance
28 with the Bankruptcy Rules, and whether an objecting party has

1 produced sufficient evidence to rebut an evidentiary presumption
2 are both factual questions that we review for clear error. Garner
3 v. Shier (In re Garner), 246 B.R. 617, 619 (9th Cir. BAP 2000).

4 We review the bankruptcy court's evidentiary rulings for an
5 abuse of discretion. Latman v. Burdette, 366 F.3d 774, 786 (9th
6 Cir. 2004); Cal. State Bd. of Equalization v. Renovizor's Inc. (In
7 re Renovizor's, Inc.), 282 F.3d 1233, 1237 n.1 (9th Cir. 2002).

8 To reverse on the basis of an erroneous evidentiary ruling, we
9 must conclude that the bankruptcy court abused its discretion and
10 that the error was prejudicial. Latman, 366 F.3d at 786. A
11 bankruptcy court necessarily abuses its discretion if it bases its
12 decision on an erroneous view of the law or on clearly erroneous
13 factual findings. Warrick v. Birdsell (In re Warrick), 278 B.R.
14 182, 184 (9th Cir. BAP 2002).

15 16 DISCUSSION

17 18 A. Burden of Proof and Evidentiary Issues

19 20 (1) Rule 3001

21
22 Each party disputes that the other carried its relative
23 burden of proof under the Bankruptcy Rules. The Bankruptcy Rules
24 and our case law have put in place a general procedure to allocate
25 the burdens of proof and persuasion in determining whether a claim
26 is allowable.

27 The starting place is Rule 3001(f), which provides that "[a]
28 proof of claim executed and filed in accordance with these rules

1 shall constitute prima facie evidence of the validity and amount
2 of the claim." Fed. R. Bankr. P. 3001(f). This rule creates an
3 evidentiary presumption of validity for a properly filed proof of
4 claim. Garner, 246 B.R. at 620.

5 The rules further provide that when a proof of claim is based
6 on a writing, the writing must be attached, or else an explanation
7 must be attached as to why or how such writing has been lost or
8 destroyed. Fed. R. Bankr. P. 3001(c).

9 Bolan's proof of claim demanded \$72,055 in unpaid wages,
10 vacation pay and collection run-offs. The only writing which he
11 attached was a selected portion of the Manual. However, the
12 Manual provisions did not purport to explain what payments Bolan
13 had already received, or how his claim was calculated according to
14 the system utilized by Debtor. Although the \$72,055 was the
15 amount of damages sought in his Complaint, one would not have
16 known how he calculated his economic harm, since Bolan attached
17 neither a copy of the Complaint nor a calculation to his proof of
18 claim. Moreover, Bolan's proof of claim contained absolutely no
19 explanation as to why he was entitled to an unsecured priority
20 claim. See 11 U.S.C. § 507(a)(3)(A) (providing for wages,
21 salaries or commission, including vacation, earned within 90 days
22 before the petition date, to the extent of \$4,925).

23 Trustee contends that Bolan failed to file a presumptively
24 valid proof of claim. The bankruptcy court seemingly agreed when
25 it stated:

26 It is important to note that for the proof of claim to
27 attain the status of deemed allowance, it has to be
28 properly filed. To be properly filed, it has to be
supported by any and all admissible documents. In a
case such as this, where the employee did receive some

1 compensation, but claims he's entitled to more; the
2 burden on the respondent is to show some kind of
3 documentation or some other form of testamentary
4 evidence, which shows the -- an accounting essentially,
5 of time spent, which compensation system applied and
6 which did not.

7 Tr. of Proceedings (April 20, 2004), P. 12-13.

8 The rules do not require, however, that a claimant file
9 evidence along with the proof of claim in order to attain prima
10 facie effect. Garner, 246 B.R. at 621.

11 Rule 3001 is the definitive authority concerning the contents
12 of a proof of claim. See 8 Collier on Bankruptcy ¶ 3001.03 (Henry
13 J. Sommer and Alan N. Resnick, eds., 15th ed. rev. 2004). When a
14 claim is based on a writing, this rule provides that such writing
15 should be filed with the proof of claim. Fed. R. Bankr. P.
16 3001(c). Bolan attached Manual excerpts in sufficient compliance
17 with this rule.

18 Nevertheless, Trustee challenges the legal sufficiency of
19 Bolan's compensation claim because he did not attach payroll
20 accounting records in support of his allegations.

21 Rule 3001 does not require that the claim allege facts
22 sufficient to support a legal liability. Nonetheless, this
23 common-sense requirement has been grafted onto the rule by case
24 law. See Lundell v. Anchor Constr. Specialists, Inc. (In re
25 Lundell), 223 F.3d 1035, 1039 (9th Cir. 2000) (objector must
26 produce evidence to refute at least one of the allegations
27 essential to the claim's legal sufficiency) (citing In re
28 Allegheny Int'l, 954 F.2d 167, 173-74 (3d Cir. 1992)); Ashford v.
Consol. Pioneer Mortgage (In re Consol. Pioneer Mortgage), 178
B.R. 222, 226 (9th Cir. BAP 1995), aff'd, 91 F.3d 151 (9th Cir.

1 1996) ("In other words, a claim that alleges facts sufficient to
2 support a legal liability to the claimant satisfies the claimant's
3 initial obligation to go forward.") (quoting Allegheny Int'l, 954
4 F.2d at 173). Furthermore, the court noted that Bolan had the
5 opportunity to conduct discovery to obtain such records but did
6 not do so.

7 For Bolan's compensation claim, payroll accounting records
8 would constitute additional evidence, but were not the requisite
9 writing to show Debtor's legal liability. Rather, Bolan's
10 allegations that he was owed additional compensation under the
11 Manual were legally sufficient when supported by his
12 interpretation of his attached Manual excerpts. Therefore, we
13 reject Trustee's suggestion that payroll records are a per se
14 required writing for any compensation claim, under Rule 3001(c),
15 and hold that Bolan's proof of claim was presumptively valid.

16 Appropriately, the bankruptcy court did not readily reject
17 Bolan's proof of claim, but instead placed the burden on Trustee
18 to come forward with some counter-evidence.

19
20 **(2) § 502(a) and Rule 3007**

21
22 Under § 502(a), a proof of claim is deemed allowed, unless a
23 party in interest objects. 11 U.S.C. § 502(a); see also Fed. R.
24 Bankr. P. 3007. The filing of an objection to a proof of claim
25 "creates a dispute which is a contested matter" within the meaning
26 of Bankruptcy Rule 9014 and must be resolved after notice and
27 opportunity for hearing. See Adv. Comm. Notes to Fed. R. Bankr.
28 P. 9014; Jorgenson v. State Line Hotel, Inc. (In re State Line

1 Hotel, Inc.), 323 B.R. 703, 710 (9th Cir. BAP 2005).

2 Trustee objected to the proof of claim and had to produce
3 sufficient evidence to "show facts tending to defeat the claim by
4 probative force equal to that of [its] allegations." Lundell, 223
5 F.3d at 1039 (alteration added) (quoting Wright v. Holm (In re
6 Holm), 931 F.2d 620, 623 (9th Cir. 1991)).

7 Local Bankruptcy Rule 3007-1(1) provides that objections to
8 claims must be supported by admissible evidence filed with the
9 objection. See Local Bankr. R. 3007-1(1), C.D. Cal. With his
10 response and reply, Trustee filed the declarations of Lopez, which
11 concluded--without specifics--that Debtor had been paid all of the
12 compensation to which he was entitled, and Feliton, which recited
13 a similar conclusion.

14
15 **(3) Hearsay Objection**
16

17 Bolan contends that the bankruptcy court erred in admitting
18 both declarations because the challenged portions were hearsay.
19 Federal Rule of Evidence ("Fed. R. Evid.") 801 (made applicable in
20 contested matters by Rule 9017) defines hearsay as "a statement,
21 other than one made by the declarant while testifying at the trial
22 or hearing, offered in evidence to prove the truth of the matter
23 asserted." Moreover, Bolan contends that the declarations did not
24 meet the business records exception to hearsay⁷ because the

25 _____
26 ⁷ An exception for hearsay exists where the custodian or
27 witness testifies that such record was (1) made in the regular
28 practice of that business; (2) and kept in the regular course of
that business; (3) by a person with knowledge; and (4) at or near
(continued...)

1 declarations failed to attach the actual documentary evidence
2 being attested to, i.e., Bolan's payroll records.

3 Lopez's declaration was made "upon personal knowledge"; she
4 stated that her job "included financial statement review,
5 approving invoices, managing the budget and reforecasting the
6 budget and payroll" and "responding to accounts receivable
7 inquiries." Decl. of Lopez (January 30, 2004), ¶ 1, 2. She
8 stated that she had reviewed "Debtor's books and records" and
9 concluded that "Debtor's books and records reflect that all
10 compensation earned by Michael Bolan was paid." Id., ¶ 6.

11 It is axiomatic that testimony concerning business records
12 must refer to records being proffered into evidence. Here, the
13 "books and records" attested to were not presented for admission
14

15 ⁷(...continued)
16 the time of the recorded event. Spear v. Global Forest Prods. (In
17 re Heddings Lumber & Bldg. Supply, Inc.), 228 B.R. 727, 730 (9th
18 Cir. BAP 1998).

18 _____ Federal Rule of Evidence 803(6) provides:

19 **Records of Regularly Conducted Activity.** A memorandum,
20 report, record, or data compilation, in any form, of acts,
21 events, conditions, opinions, or diagnoses, made at or
22 near the time by, or from information transmitted by, a
23 person with knowledge, if kept in the course of a
24 regularly conducted business activity, and if it was the
25 regular practice of that business activity to make the
26 memorandum, report, record, or data compilation, all as
27 shown by the testimony of the custodian or other qualified
28 witness, or by certification that complies with Rule
902(11), Rule 902(12), or a statute permitting
certification, unless the source of information or the
method or circumstances of preparation indicate lack of
trustworthiness. The term "business" as used in this
paragraph includes business, institution, association,
profession, occupation, and calling of every kind, whether
or not conducted for profit.

28 Fed. R. Evid. 803(6).

1 into evidence. As a result, Lopez's testimony as to the content
2 of the books and records was merely based on her personal
3 knowledge and conclusions as to the contents of such
4 unauthenticated records, and, therefore, did not fall under the
5 business records exception. Her statements were inadmissible
6 hearsay.

7 In a contested proceeding, declaration evidence based on
8 personal knowledge is not considered to be hearsay; however, the
9 evidentiary restrictions on hearsay within hearsay still apply.
10 Garner, 246 B.R. at 625. Federal Rule of Evidence 805 states that
11 "[h]earsay included within hearsay is not excluded under the
12 hearsay rule if each part of the combined statements conforms with
13 an exception to the hearsay rule provided in these rules." Fed.
14 R. Evid. 805.

15 An illustration is the business record coming within
16 the hearsay exception provided in Rule 803(6), which
17 includes within it information supplied by an informant
18 not himself under a duty to provide such information. If
19 the informant's statement itself qualifies as a hearsay
20 exception, for example, an excited utterance, Rule 803(2),
21 the record containing it is admissible provided among
22 others that the person recording the excited utterance was
23 under a business duty to do so. Of course, if either the
24 original statement or the statement within which the
25 second level statement appears is admissible as not
26 hearsay as defined in Rule 801(d), provided that the
27 remaining statement is so exempted or qualifies as a
28 hearsay exception, the two statements are admissible.

23 Hon. Barry Russell, Bankr. Evid. Manual, § 805.1, p. 1154 (2004).

24 Here, even though Lopez's statement based on personal
25 knowledge was an exception to the hearsay rule for purposes of the
26 contested matter, the underlying records to which she attested
27 were unavailable and therefore, still hearsay. Feliton's
28 declaration was no different.

1 These hearsay statements were then relied upon by the court
2 in shifting the burden of proof back to Bolan and in ruling as it
3 did against him. Thus, the evidentiary admission prejudiced
4 Bolan. Latman, 366 F.3d at 787 (improper shifting of burden of
5 proof was prejudicial).

6 We hold therefore that the bankruptcy court abused its
7 discretion to the extent it relied on the offending portions of
8 the Lopez and Feliton declarations in disallowing Bolan's claim,
9 and erred in shifting the burden of proof back to Bolan.

10
11 **B. Requirement for Evidentiary Hearing**

12
13 Admitting unreliable declaration evidence to rebut the
14 evidentiary presumption of the validity of Bolan's claim was just
15 one problem with the outcome of this contested matter.

16 According to the rules, only if the objector produces
17 sufficient evidence to negate the claim's validity does the burden
18 of persuasion shift back to the claimant, who then has the
19 ultimate burden to demonstrate that the claim deserves to share in
20 the distribution of Debtor's assets. See Spencer v. Pugh (In re
21 Pugh), 157 B.R. 898, 901 (9th Cir. BAP 1993).

22 Trustee's declaration evidence was inadmissible. The
23 remainder of Trustee's objection was a denial of the factual
24 allegations of Bolan's Complaint, which Trustee authenticated and
25 attached to his objection. Trustee's pleading was in the nature
26 of an answer, rather than in the form of an affidavit. Indeed,
27 Trustee requested that the contested matter be set for hearing as
28 an adversary proceeding and that time be allowed for discovery.

1 Undisputedly, there were material factual issues concerning
2 the allegations of Bolan's Complaint. Trustee therefore requested
3 Rule 7001 relief, in accordance with Rule 3007, which provides, in
4 pertinent part:

5 If an objection to a claim is joined with a demand for
6 relief of the kind specified in Rule 7001, it becomes an
adversary proceeding.

7 Fed. R. Bankr. P. 3007.

8 Trustee's arguments created issues concerning the validity
9 and extent of Bolan's interest in Debtor's property (Rule 7001(2)
10 or for declaratory relief (Rule 7001(9)).

11 Even if an adversary proceeding were not required here, Rule
12 9014 grants some of the same adjudicative protections for
13 contested matters. Specifically, Rule 9014(a) provides that a
14 motion in a contested matter shall be served in the same manner as
15 a summons and complaint in Rule 7004.

16 Also, where there are disputed facts, Rule 9014(d) provides:
17 "Testimony of witnesses with respect to disputed material factual
18 issues shall be taken in the same manner as testimony in an
19 adversary proceeding." Fed. R. Bankr. P. 9014(d). Subsection (d)
20 was added to the Bankruptcy Rules in 2002

21 to clarify that if the motion cannot be decided without
22 resolving a disputed material issue of fact, an
evidentiary hearing must be held at which testimony of
23 witnesses is taken in the same manner as testimony is
taken in an adversary proceeding or at a trial in a
24 district court civil case. Rule 43(a), rather than Rule
43(e), F.R.Civ.P. would govern the evidentiary hearing on
25 the factual dispute. Under Rule 9017, the Federal Rules
of Evidence also apply in a contested matter. Nothing in
26 the rule prohibits a court from resolving any matter that
is submitted on affidavits by agreement of the parties.

27 Advisory Committee Note, Fed. R. Bankr. P. 9014 (2002).

28 Rule 9014(d) means that the evidentiary hearing must be an

1 adversary proceeding in which opposing parties are present, may be
2 represented by counsel, and are allowed to call, examine, cross-
3 examine, and subpoena witnesses, whose testimony is submitted
4 under oath or affirmation and officially transcribed or recorded.
5 See Fed. R. Civ. P. 43(a) (requiring that “[i]n all trials the
6 testimony of witnesses shall be taken orally in open court, unless
7 otherwise provided by these rules . . .”).⁸

8 Rule 9014(d) requires an adversarial hearing in which it was
9 undisputed that Bolan neither stipulated to resolution by motion
10 and affidavit testimony, nor waived his right to an evidentiary
11 hearing. Despite the myriad factual issues raised in the
12 Complaint concerning the payroll systems and records, the
13 bankruptcy court did not treat the contested matter as an
14 adversary proceeding in order to produce the material evidence in
15 accordance with Rule 9014(d). Instead, it relied on declarations
16 and told Bolan that he should have taken depositions or otherwise
17 conducted discovery. This was a clear violation of Rule 9014(d).

18 Therefore, we hold that the bankruptcy court erred in
19 summarily disallowing Bolan’s presumptively valid proof of claim.

24 ⁸ This rule does not preclude a direct-examination-by-
25 declaration or “alternate direct testimony” procedure used in some
26 districts under Rule 43(a), which requires the witness to be on
27 the stand subjected to cross-examination. See Adair v. Sunwest
28 Bank (In re Adair), 965 F.2d 777, 780 (9th Cir. 1992) (“The
primary purposes of Rule 43(a) are to ensure that the accuracy of
witness statements may be tested by cross-examination and to allow
the trier of fact to observe the appearance and demeanor of the
witnesses.”).

1 CONCLUSION

2
3 Bolan's proof of claim met the minimum requirements to
4 establish a prima facie presumption of validity. A compensation
5 claim is not per se legally insufficient if it does not contain
6 accounting record evidence.

7 Trustee's evidence did not rebut the presumption because the
8 declarations of Lopez and Feliton were inadmissible hearsay, and
9 no books or records were proffered.

10 Additionally, Trustee's objection was coupled with a request
11 for relief as to the allegations of the Complaint, and such
12 request initiated an adversary proceeding under Rule 7001. Also,
13 Rule 9014(d) required that the court conduct a hearing in order to
14 elicit evidence on the disputed material factual issues. Without
15 such evidence, Trustee's objection was insufficient to overcome
16 the presumptive validity of Bolan's proof of claim, and the
17 bankruptcy court erred in disallowing it without first conducting
18 an evidentiary hearing on the claim objection. Therefore, we
19 REVERSE AND REMAND for proceedings consistent with this memorandum
20 decision.