

JUL 11 2011

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	NC-10-1476-JuHPa
6	DEMAS WAI YAN, aka Dennis Yan,)	Bk. No.	04-33526
7	Debtor.)		
8	<hr/>)		
9	THAI MING CHIU; CHEUK TIN YAN,)		
	Appellants,)		
10	v.)	M E M O R A N D U M *	
11	CHARLES LI; DEMAS WAI YAN;)		
12	JANINA M. HOSKINS, Chapter 7)		
13	Trustee,)		
	Appellees.)		
14	<hr/>)		

Submitted Without Argument
on June 16, 2011

Filed - July 11, 2011

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Appearances: Dennis Yan, Esq. on brief for Appellants Thai Ming Chiu and Cheuk Tin Yan; and Reidun Stromsheim, Esq., Stromsheim & Associates on brief for Appellee Janina M. Hoskins.

Before: JURY, HOLLOWELL and PAPPAS, Bankruptcy Judges.

Appellant Thai Ming Chiu ("Chiu") appeals the bankruptcy

* 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.

1 court's order denying his motion for reconsideration of the
2 order disallowing his late-filed claim for \$180,000. Appellant
3 Cheuk Tin Yan ("Yan")¹ appeals from the same order disallowing
4 his late-filed claim for \$194,000 (collectively we refer to Chiu
5 and Yan as the "Appellants"). We AFFIRM.

6 I. FACTS

7 Demas Yan filed his chapter 11² petition on December 19,
8 2004. In Schedule F, debtor listed an undisputed liquidated
9 debt of \$38,000 owed to Yan, who is debtor's father. Debtor did
10 not schedule any debt to Chiu, but did list a debt of \$324,779
11 owed to Simon and Benita Chiu. Debtor identified Simon and
12 Benita Chiu as his sister and brother-in-law in his Statement of
13 Financial Affairs. Notice of debtor's case was sent to all
14 scheduled creditors.

15 On September 15, 2006, debtor's case was converted to
16 chapter 7 and appellee, Janina M. Hoskins, was appointed the
17 trustee. On September 21, 2006, notice of the conversion and a
18 claims bar date of January 23, 2007, was served on all scheduled
19 creditors.

20 On February 27, 2009, the trustee filed and served on all
21 scheduled creditors a Notice of Filing of Final Report of
22 Trustee (the "Final Account"). The Final Account provided for
23 payment in full of all allowed general unsecured claims, which
24

25 ¹ Cheuk Tin Yan is also known as Chiuk Tin Yan.

26 ² Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 totaled \$564,023, but proposed no payments to Appellants, who
2 had not filed claims at that time. It also showed a surplus
3 estate in the amount of \$393,528.71, less a \$75,000 reserve
4 requested by the trustee, and less the amount of writs of
5 execution served on the trustee by postpetition judgment
6 creditors Sierra Point Lumber, Inc. ("Sierra Point") and Sing
7 Tao Newspapers San Francisco Ltd. ("Sing Tao") (collectively, the
8 "Judgment Creditors").³ No objections were filed and the
9 bankruptcy court approved the Final Account at a hearing on
10 March 18, 2009.

11 On March 23, 2009, creditor Charles Li ("Li") gave notice
12 to the trustee that he sought to reinstate his proof of claim,
13 which he had previously withdrawn. Li was the assignee of a
14 contractor's claim. With the possibility that Li's claim would
15 be allowed, the court issued a distribution order which
16 authorized the trustee to make all distributions specified in
17 the Final Account and further provided that if Li refiled his
18

19 ³ Both Judgment Creditors obtained orders from the
20 bankruptcy court permitting them to levy against the surplus
21 funds that would otherwise be returned to debtor. The bankruptcy
22 court docket shows that Sierra Point obtained a state court
23 judgment on April 28, 2006, against San Francisco Building
24 Professionals, Inc. ("SFBP") and Dong Xing Fu ("Fu"). Fu and
25 debtor were the sole shareholders of SFBP and Sierra Point later
26 discovered facts that led it to believe debtor was the alter ego
27 of SFBP. It thus asserted that the judgment should be amended to
28 include debtor as a judgment debtor and filed a proof of claim
(claim no. 12) based on an alter ego theory. The trustee
objected to the claim and the court disallowed it. However, for
reasons that are not apparent from searching the docket, the
amount of \$13,149.80 was authorized to be paid to Sierra Point.

The circumstances surrounding Sing Toa's postpetition levy
in the amount of \$97,789 are less clear.

1 claim and it was allowed, its status would be that of a late
2 claim, subordinated to all timely filed claims. Finally, the
3 order prevented the trustee from distributing any surplus funds
4 to debtor or paying on any levy against the funds.

5 On April 27, 2009, Li refiled his claim in the sum of
6 \$221,000.

7 On October 23, 2009, three alleged creditors, including
8 Chiu, filed untimely claims totaling \$558,665: (1) debtor's
9 mother, Tina Yan, filed claim no. 23 in the sum of \$338,665;
10 (2) Kaman Liu filed claim no. 24-1 in the sum of \$40,000; and
11 (3) Chiu filed claim no. 25 in the sum of \$180,000. Debtor had
12 not listed any of these debts in his Schedule F.

13 On December 1, 2009, the trustee filed and served her
14 objections to the tardy claims.⁴ The trustee objected to Chiu's
15 claim because it was late-filed and the proof of claim showed it
16 was for personal loans to debtor but did not attach
17 documentation showing that the funds actually went to him.

18 On December 14, 2009, debtor, purportedly on behalf of
19 Chiu, hand delivered to the trustee copies of checks totaling
20 \$180,000 that showed the funds going from Chiu to debtor.⁵
21 Debtor also submitted a supporting declaration stating that he
22 borrowed the funds from Chiu and had not repaid him. At that
23 time, the trustee did not tell debtor whether the documents were
24 sufficient to prove Chiu's claim. The trustee later advised

25 _____
26 ⁴ Because only Chiu's claim is involved in this appeal,
27 we do not discuss the trustee's objections to the other claims.

28 ⁵ Apparently these documents were not filed with the
court.

1 debtor that Chiu would have until January 29, 2010, to respond
2 to her objection to his claim. Chiu did not file a response or
3 appear at the February 26, 2010 hearing.

4 Instead, debtor appeared at the hearing and represented to
5 the court that Chiu was his relative and he owed him the money.
6 He further represented that Chiu and his other relatives might
7 be willing to amend their claims so that the trustee did not
8 have to liquidate property to satisfy their claims. In other
9 words, they were allegedly willing to simply use up the surplus
10 in the estate, whatever it was.

11 The bankruptcy court's statements on the record demonstrate
12 that it was concerned with the circumstances surrounding the
13 tardy claims filed by debtor's relatives. The court observed
14 that the trustee was about to make a distribution to
15 postpetition lien creditors and that Li came in with a claim and
16 then "all of a sudden relatives came out of the woodwork at the
17 last minute." Hr'g Tr. (February 26, 2010) at 11:4-5.
18 Ultimately, the court sustained the trustee's objections to
19 Chiu's claim and entered an order disallowing it on March 2,
20 2010.

21 On March 8, 2010, Chiu filed a motion for reconsideration,
22 arguing that he had given documents to debtor, who then
23 forwarded them to the trustee, and that the trustee did not
24 request any further documentation. Thus, implicitly Chiu
25 asserted that he met his burden of proof on the presumptive
26 validity of his claim. The trustee responded to Chiu's motion,
27 arguing that he had not demonstrated any grounds for
28 reconsideration; i.e., that there was any manifest error of fact

1 or law or newly-discovered evidence.

2 On March 8, 2010, Yan filed his claim in the sum of
3 \$194,000. Attached to the proof of claim were a loan ledger and
4 copies of cancelled checks that totaled \$258,290.

5 On April 6, 2010, the trustee objected to Yan's claim on
6 the grounds that (1) it was late filed despite Yan's knowledge
7 of the bankruptcy case; (2) Yan never objected to the trustee's
8 final accounting; (3) the claim was \$156,000 more than the
9 \$38,000 listed on debtor's schedules; and (4) the basis of the
10 claim appeared to be the same as that for Yan's wife, Tina Yan,
11 whose claim was previously disallowed.

12 In response, Yan argued that his claim could not be denied
13 simply because it was late filed. He further asserted that he
14 submitted cancelled checks. Debtor also submitted his sworn
15 declaration which stated that he had borrowed the money from his
16 father. Debtor further explained that he did not list the full
17 amount owed to his father on his schedules because he did not
18 want to create the appearance of questionable large claims from
19 relatives and also did not care whether his relatives' claims
20 were discharged.

21 In reply, the trustee again asserted that Yan's debt
22 overlapped with the claim of his wife and, if it did not
23 overlap, then debtor's parents together asserted they were owed
24 nearly \$600,000 prepetition. The trustee argued that Yan
25 presented no evidence regarding the purpose of the loans nor
26 were there any documents that showed whether debtor paid any of
27 the funds back. Finally, the trustee pointed out that debtor
28 had a duty to make full and accurate disclosures under § 521,

1 which he failed to do by not listing the various loans from his
2 relatives in his schedules.

3 On July 23, 2010, the court held a hearing on Chiu's motion
4 for reconsideration and the trustee's objection to Yan's claim.
5 At the conclusion of the hearing, the court took the matter
6 under submission.

7 The court disallowed Yan's claim and denied Chiu's motion
8 for reconsideration by order entered November 19, 2010. In its
9 accompanying Memorandum Decision, the court observed that it had
10 discretion to grant an extension of time to permit the late
11 filing of a claim in a chapter 7 surplus case citing Vehaus v.
12 Wilson (In re Wilson), 96 B.R. 257, 262-63 (9th Cir. BAP 1988).
13 Based on the evidence and record before it, the court declined
14 to grant an extension of time to permit Appellants to file late
15 claims for several reasons.

16 First, Appellants had adequate notice of the claims bar
17 date,⁶ yet Chiu failed to file a claim until two years and nine
18 months after the bar date, and Yan failed to file a claim until
19 three years and one month after the bar date. Second,
20 Appellants had notice of the Final Account, which showed that
21 the trustee would not be making any distributions to either of
22 them. Yet, neither Chiu nor Yan objected to the Final Account.
23 Rather, Chiu waited until eight months and Yan waited more than
24 a year after notice of the Final Account to file their claims.

25
26 ⁶ Chiu lived at the same address as Simon and Benita Chiu
27 who were listed on debtors' schedules. Appellants concede on
28 appeal that they had notice of the claims bar date and the Final
Account.

1 Third, the court found that Yan was an insider and Chiu lived
2 with and shared a joint bank account with someone who debtor
3 identified as an insider. Fourth, the claims were filed only
4 after the postpetition Judgment Creditors obtained writs of
5 execution attaching the estate's surplus. Fifth, the late-
6 filed claims equated to the amount of the surplus, and the net
7 effect of allowing the late-filed claims would be to transfer
8 the surplus to dilatory insiders and to keep those funds from
9 postpetition judgment creditors.

10 The bankruptcy court also made further findings of fact
11 regarding whether Chiu had met his burden of proving the
12 validity and enforceability of his claim. The court found that
13 Chiu's claim was supported by an unauthenticated check ledger, a
14 canceled check written on the joint account of Thai Ming Chiu
15 and Benita Mui Yan-Chiu in the sum of \$15,000, and a declaration
16 by debtor that he borrowed \$180,000 from Chiu and did not repay
17 the loan. The court observed that the documentary support did
18 not establish on its face that a loan was made by Chiu to
19 debtor. In that regard, the court noted numerous
20 inconsistencies in the documents provided, which we need not
21 repeat here.

22 Chiu and Yan timely appealed.

23 **II. JURISDICTION**

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

1 findings are "(1) 'illogical,' (2) 'implausible,' or (3) without
2 'support in inferences that may be drawn from the facts in the
3 record.'" Id. If the bankruptcy court did not identify the
4 correct legal rule, or its application of the correct legal
5 standard to the facts was illogical, implausible, or without
6 support in the record, then the bankruptcy court abused its
7 discretion. Id.

8 We may affirm the bankruptcy court's decision on any ground
9 fairly supported by the record. Wirum v. Warren (In re Warren),
10 568 F.3d 1113, 1116 (9th Cir. 2009).

11 **V. DISCUSSION**

12 The Bankruptcy Code and Rules set forth the requirements
13 for proofs of claim. Section 501(a) provides that a creditor
14 "may file a proof of claim." A proof of claim constitutes
15 "prima facie evidence of the validity and amount of the claim"
16 under Rule 3001(f) and is deemed allowed under § 502(a) unless a
17 party in interest objects. Here, the trustee objected to
18 Appellants' claims. Her objections triggered § 502(b) which
19 provides that after notice and a hearing, a bankruptcy court
20 must analyze and apply the grounds for disallowance enumerated
21 in paragraphs (1) through (9).

22 Section 502(b)(9) states that late-filed claims are
23 disallowed except when they are covered by § 726(a)(3). Thus,
24 the plain language of § 502(b)(9) sets forth the rule that when
25 there is a surplus estate in a chapter 7 case such as here,
26 late-filed claims cannot be disallowed on the grounds that they
27 were tardily filed. However, § 502(b)(9) does not eviscerate
28 the remaining grounds for disallowance under subsections (1)

1 through (8). In addition, § 726(a)(3) does not provide for the
2 payment of all late-filed claims, but merely sets the priority
3 for late-filed claims that are otherwise allowed under § 502(b).

4 The primary question in this appeal involves the allowance
5 of Appellants' claims, not their priority under § 726(a)(3). In
6 that regard, the bankruptcy court improperly relied on In re
7 Wilson, 96 B.R. 257 which, in turn, relied on Rule 3002(c)(6).
8 Rule 3002(c)(6) previously implemented § 726(a)(3) and was
9 construed in Wilson to give the bankruptcy court discretion
10 whether to extend the time to permit creditors to file late
11 claims. Prior to 1996, Rule 3002(c)(6) provided:

12 In a Chapter 7 liquidation case, if a surplus remains
13 after all claims allowed have been paid in full, the
14 court may grant an extension of time for the filing of
claims against the surplus not filed [in a timely
manner].

15 Rule 3002 was amended in 1996 to make clear that late proofs of
16 claim are governed by § 502(b)(9) and not the Rule. See
17 Advisory Committee Note to Rule 3002 (1996). Among other
18 things, subsection (c)(6) was deleted from the Rule at that
19 time. Consequently, decisions like Wilson which apply Rule
20 3002(c)(6) in its former version no longer reflect the
21 applicable law.

22 Although Appellants' claims were tardily filed, the outcome
23 of this appeal does not turn on that fact alone because the
24 trustee objected to Appellants' claims on other grounds. "[T]he
25 proper exercise of the bankruptcy court's equitable powers under
26 § 502 is through investigation into the existence, validity and
27 enforceability of claims leading to their allowance or
28 disallowance" Murgillo v. Cal. State Bd. of Equal.

1 (In re Murgillo), 176 B.R. 524, 533 (9th Cir. BAP 1995). For
2 the reasons explained below, we conclude that the record
3 supports the bankruptcy court's disallowance of Appellants'
4 claims on a burden of proof analysis. Therefore, the court's
5 reliance on Wilson and Rule 3002(c)(6) was harmless error. See
6 Rule 9005 ("Harmless Error") (incorporating into bankruptcy
7 rules Civil Rule 61, which provides: "At every stage of the
8 proceeding, the court must disregard all errors and defects that
9 do not affect any party's substantial rights.").

10 **A. Chiu's Claim**

11 Chiu concedes that the trustee's initial objection to his
12 claim was justified because his proof of claim did not include
13 the supporting documents. Thus, Chiu had the ultimate burden to
14 prove the validity of his claim by a preponderance of the
15 evidence. Spencer v. Pugh (In re Pugh), 157 B.R. 898, 901 (9th
16 Cir. BAP 1993). Moreover, Chiu's burden was heightened because
17 he was debtor's relative and an insider under the Code. See
18 Pepper, 308 U.S. at 306. As such, Chiu's claim was subject to
19 rigorous scrutiny. Fabricators, Inc. v. Technical Fabricators,
20 Inc. (In re Fabricators, Inc.) 926 F.2d 1458, 1465 (5th Cir.
21 1991).

22 Although Chiu subsequently provided the trustee with
23 cancelled checks purporting to show funds transferred from Chiu
24 to debtor, the bankruptcy court found, and we agree, that those
25 checks did not on their face establish a loan by Chiu to debtor
26 due to inconsistencies or incomplete information on the face of
27 the checks. Moreover, the check ledger submitted in support of
28 his claim was unauthenticated. Finally, the record shows that

1 Chiu failed to provide a written response to the trustee's
2 objection and thus did not provide any further detail regarding
3 the loans he allegedly made to debtor. Chiu also did not
4 appear at the hearing. On this record, we conclude that Chiu
5 failed to carry his burden of proving the amount and validity of
6 his claim. Thus, the bankruptcy court did not err by
7 disallowing Chiu's claim.

8 We are not persuaded by Chiu's argument on reconsideration
9 that he proved up his claim because the trustee did not ask for
10 anything more. Had the trustee truly been satisfied, the
11 trustee would have withdrawn her objection to his claim.
12 Moreover, reconsideration of the disallowance of a claim is
13 based "on the equities of the case." See § 502(j). The
14 equities of this case would not have supported the reversal of
15 the disallowance of Chiu's claim nor does Chiu even argue that
16 point on appeal. Accordingly, the bankruptcy court did not
17 abuse its discretion by denying Chiu's motion for
18 reconsideration of the order disallowing his claim.

19 **B. Yan's Claim**

20 Besides the timing aspect of Yan's claim and his insider
21 status, the trustee's objection pointed out numerous other
22 inconsistencies which demonstrated that Yan's claim lacked prima
23 facie validity.

24 The amount of Yan's claim changed numerous times over the
25 course of this case. Initially, debtor, under penalty of
26 perjury, scheduled Yan's debt in the amount of \$38,000.
27 However, Yan, also under penalty of perjury, filed his proof of
28 claim for \$194,000. The record does not reflect that debtor

1 ever amended his Schedule F before the trustee made the
2 distributions set forth in the Final Account, nor did Yan ever
3 amend his proof of claim. Thus, it is impossible to tell which
4 sworn version of the facts is the true version.

5 Yan's claim was irregular in other respects. Yan attached
6 documents to his proof of claim showing \$258,290 in checks to
7 debtor, but stated that he wanted only \$194,000. Debtor offers
8 the explanation that Yan reduced his claim so that the trustee
9 would not have to liquidate properties in a distressed market.
10 However, this explanation makes no sense. Legitimate creditors
11 of a bankruptcy estate assert their rights to payment from
12 property of the estate; they are not concerned with further
13 liquidation of properties. If anything, the conflicting numbers
14 in debtor's schedules, in Yan's proof of claim, and in the
15 supporting documentation suggest that the amount of the claim
16 was arrived at arbitrarily to coincide with the amount of the
17 surplus estate.

18 Finally, the record shows that Yan's proof of claim
19 overlapped to some extent to that of his wife, Tina Yan, whose
20 claim was disallowed. There is no explanation in the record for
21 such an overlap.

22 In sum, we conclude that the record shows that Yan failed
23 to prove the actual amount of his claim and its validity.
24 Accordingly, we affirm the bankruptcy court's decision to
25 disallow Yan's claim.

26 **C. Bankruptcy Aspects**

27 Besides a lack of proof, overriding bankruptcy principles
28 would also support the bankruptcy court's decision to disallow

1 Appellants' claims under the circumstances of this case. In re
2 Murgillo, 176 B.R. at 533. The record supports the bankruptcy
3 court's explicit concern regarding the timing of Appellants'
4 claims; i.e., that they served no valid bankruptcy purpose, but,
5 instead, were strategically filed so that debtor could avoid
6 paying his postpetition Judgment Creditors who had attached the
7 surplus of his estate.

8 Further, debtor has presented a myriad of changing stories
9 in this case. Full disclosure in the bankruptcy schedules is
10 essential to satisfy a significant purpose: that adequate
11 information be available to the trustee without the need for
12 investigation into whether the information is true. Debtor did
13 not list Chiu's claim in his schedules, which were signed under
14 penalty of perjury. Yet, debtor later declared under penalty of
15 perjury that he owed the money when Chiu filed his tardy claim.
16 Moreover, debtor listed his father's claim as \$38,000, but he
17 later admitted that he did not list the full amount of the debt
18 because he did not want to create the appearance of questionable
19 large claims from relatives. Debtor's failure to fully and
20 adequately disclose not only has serious consequences, but his
21 change in position demonstrates an intent to play fast and loose
22 with the court, thereby prejudicing the trustee's administration
23 of his estate. Had debtor listed the claims of his relatives as
24 required, the trustee would have, before the Final Account,
25 liquidated other assets to assure distribution to all creditors.
26 Instead, she was prepared to abandon the assets to debtor.

27 This later point directly relates to debtor's role in this
28 appeal. His representation of Chiu and Yan as their attorney is

1 truly troubling to this Panel. Where a debtor is a creditor's
2 attorney, the conflict of interest involved is obvious. How can
3 the debtor, as lawyer, advise his clients fully and effectively
4 when the lawyer himself is on the other side of the bargaining
5 table? Allowing Appellants' claims in full would compel the
6 trustee to liquidate more of the to-be-abandoned estate, an
7 obvious negative result to debtor.⁷

8 **VI. CONCLUSION**

9 For the reasons stated above, we AFFIRM.

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

25 ⁷ We also observe that debtor, acting as Appellants'
26 attorney, potentially jeopardized their claims by filing a brief
27 in this appeal that is not in proper format. Fed. R. App. P.
28 Rule 32(4) requires that the text of the brief be double-spaced.
We may dismiss an appeal for violation of the rule. See 8001(a).
That we did not do so does not lessen the import of debtor's
actions which he took in the role of an attorney.