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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. CC-11-1436-PaDH
)	
THE YUCCA GROUP, LLC,)	Bankr. No. 10-12079-GM
)	
Debtor.)	
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FORWARD PROGRESS MANAGEMENT REAL)	
ESTATE, INC.,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
THE YUCCA GROUP, LLC,)	
)	
Appellee.)	
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Argued and Submitted on May 17, 2012
at Pasadena, California

Filed - June 8, 2012

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Appearances: Anthony J. Rothman argued for appellant Forward
Progress Management Real Estate, Inc.; Jerome
Bennett Friedman argued for appellee The Yucca
Group, LLC.

Before: PAPPAS, DUNN and HOLLOWELL, 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

1 Creditor Forward Progress Management Real Estate, Inc.
2 ("FPM") appeals the order of the bankruptcy court disallowing
3 FPM's proof of claim filed in The Yucca Group LLC's ("Yucca")
4 chapter 11² bankruptcy case. The bankruptcy court relied on two
5 separate grounds for its decision: that, under the peculiar facts
6 of this case, a complaint in an adversary proceeding by FPM
7 against Yucca did not constitute an informal proof of claim; and,
8 that FPM failed to show that its failure to timely file a proof of
9 claim was the result of its excusable neglect.

10 We REVERSE that portion of the bankruptcy court's order
11 concluding that FPM had not presented an adequate informal proof
12 of claim. We AFFIRM the bankruptcy court's determination that
13 FPM's failure to timely file a proof of claim was not occasioned
14 by excusable neglect.

15 **FACTS**

16 Yucca is a California limited liability company; its single
17 purpose is to hold unsold units of a condominium complex located
18 on Yucca Street in Los Angeles (the "Yucca Property"). Two of the
19 managers and members of Yucca, Gabriel Tauber ("Tauber") and
20 Avishay Weinberg ("Weinberg"), are also managers and members of
21 another real estate holding company, The Whitley Investment Group,
22 LLC ("Whitley"). Whitley owned a separate property ("Whitley
23 Property"), also in Los Angeles.

24 In November 2007, Tauber and Weinberg entered into a loan
25 agreement with FPM (the "Loan Agreement"). In it, FPM agreed to

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

1 extend credit to Whitley in the sum of \$400,000. To collateralize
2 the loan, Weinberg and Tauber granted FPM a security interest in
3 50 percent of their membership interests in Yucca. The Loan
4 Agreement also provided that FPM would receive a deed of trust on
5 the Whitley Property.

6 Whitley failed to repay the loan by its maturity date of
7 February 8, 2007. After FPM declared a default under the Loan
8 Agreement, at Whitley's request, FPM agreed to enter into a
9 Forebearance, Waiver and Modification Agreement (the "Forebearance
10 Agreement"), in which FPM agreed to forebear collection for set
11 times in exchange for payments of additional fees. After
12 continued defaults under the Forebearance Agreement, FPM caused
13 the trustee under the deed of trust to record a notice of default
14 as to the Whitley Property trust deed on June 13, 2008. The same
15 day, FPM commenced a civil action against Whitley, Weinberg and
16 Tauber in the California Superior Court.³

17 On a date not clear in the record, to avoid the foreclosure
18 sale, Whitley, Weinberg, Tauber and (for the first time) Yucca
19 entered into an amendment to the Forebearance Agreement
20 ("Amendment One"). Under Amendment One, Yucca, Whitley, Weinberg
21 and Tauber agreed that if the Whitley Property were sold at a loss
22 under the Loan Agreement, FPM could demand that the other parties
23 execute and record a deed of trust on two condominium units in the
24 Yucca Property.

25 Over the next two years, FPM alleges that there were
26 continuing defaults, a foreclosure sale of the Whitley Property, a

27 ³ While the parties generally agree to the facts set forth
28 thus far, from this point on, there is little agreement.

1 failure by Whitley, Yucca, Weinberg and Tauber to honor their
2 commitments to sign and record deeds of trust on the two Yucca
3 condominium units, and a failure to pay the remaining debts owed
4 under the parties' agreements.

5 On January 15, 2010, FPM commenced another civil action
6 against Tauber, Weinberg and, this time, Yucca, in state court.
7 The complaint sought an order awarding FPM an equity interest in
8 Yucca, and \$400,000 in damages for breach of contract by Yucca and
9 the other parties under the Loan Agreement and Forebearance
10 Agreements. Forward Progress Mgmt. Real Estate, Inc. v. The Yucca
11 Group, LLC, et al., case no. BC414337 (Superior Court, County of
12 Los Angeles). In addition, on February 22, 2010, FPM filed an
13 involuntary chapter 11 bankruptcy petition against Yucca. In that
14 petition, FPM asserted it held a secured and unsecured claim
15 against Yucca of \$691,016.26.⁴

16 Apparently in response, Yucca filed its own chapter 11
17 petition on February 24, 2010. On its Schedule F and Statement of
18 Financial Affairs, Yucca listed the contingent, unliquidated, and
19 disputed claim of FPM for the lawsuit, and it listed the amount of
20 the debt as \$300,000.

21 The parties to this appeal agree that FPM was extremely
22 active in many aspects of Yucca's bankruptcy case. Indeed, a
23 review of the docket in the bankruptcy case shows FPM filed
24 twenty-three different pleadings in connection with a variety of

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26 ⁴ It is not clear why this number is so much greater than the
27 \$400,000 claimed in the state court action. Based on the later
28 declaration of FPM's president, William Ruvelson ("Ruvelson"),
this higher number may have included the value of FPM's alleged
50 percent equity interest in Yucca.

1 proceedings in the bankruptcy court. Among those were pleadings
2 asserting that FPM was both an owner of an equity interest in
3 Yucca, and that it was a secured creditor. In addition, on
4 March 26, 2010, Yucca caused the state court action to be removed
5 to the bankruptcy court as an adversary proceeding, and thereby,
6 the pleadings filed thus far in that suit became matters of record
7 in the bankruptcy court.

8 Although FPM filed various motions in the bankruptcy case and
9 adversary proceeding, including a request that the bankruptcy
10 court appoint a chapter 11 trustee, according to a Joint Status
11 Report filed in the adversary proceeding on November 30, 2010, "A
12 settlement agreement has been reached with The Yucca Group, LLC
13 and [FPM]. . . . Pursuant to an agreement with The Yucca Group,
14 LLC, [FPM] will be filing a stipulation dismissing The Yucca
15 Group, LLC from the adversary proceeding with prejudice."

16 On December 8, 2010, Yucca filed a motion to set a bar date
17 for creditors to file proofs of claim in the bankruptcy case. The
18 bankruptcy court granted this motion and entered an order on
19 January 10, 2011, fixing the deadline for filing proofs of claim
20 as February 15, 2011. Yucca served copies of the bar date order
21 on all parties, including FPM and its counsel. However, it failed
22 to serve a "notice" of the bar date order on anyone.

23 On January 18, 2011, the bankruptcy court conducted a
24 continued status conference in the bankruptcy case and adversary
25 proceeding. No transcript of this conference was included in the
26 excerpts of record, nor does one appear in the bankruptcy court's
27 dockets. However, there are several indirect sources of
28 information about the events at that conference in the record.

1 The bankruptcy court had issued a tentative ruling prior to
2 the status conference, also on January 18. Apparently referencing
3 its tentative ruling from a similar conference held on
4 December 14, 2010, the court queried the parties: "Per the joint
5 status report [of November 30, 2010, FPM] will be dismissing the
6 Yucca Group from the complaint. The only other defendants in this
7 removed action were "Does." Does the plaintiff wish it remanded
8 or merely dismissed?" Tentative Ruling, January 18, 2011.

9 In addition, according to FPM's brief in this appeal, at the
10 status conference "the Court stated that FPM could not obtain
11 control of the Debtor by asserting the Equity Causes of Action in
12 the Adversary Proceeding." Op. Br. at 12.

13 Because we do not have a copy of the transcript, we are
14 unable to determine what other actions or discussions may have
15 occurred at the January 18, 2011 conference. However, on
16 January 28, 2011, the bankruptcy court entered an "Order
17 Dismissing Adversary Proceeding Against the Yucca Group, LLC,
18 Marcus Kimman, Gabriel Tauber and Avishay Weinberg." The order,
19 prepared by counsel for FPM, provides that the dismissal of the
20 FPM adversary proceeding against Yucca was "without prejudice,"
21 and "all defendants having been dismissed, the adversary
22 proceeding is closed."

23 Nine days after the claims bar date, on February 24, 2011,
24 FPM filed two proofs of claim, numbers 12 and 13. In Claim 12,
25 FPM asserted an unsecured claim for \$942,428.13. Claim 13 was
26 later dismissed by stipulation of the parties as duplicative.

27 Yucca objected to, and sought the disallowance of, Claim 12
28 on March 31, 2011, because it was late filed. FPM responded to

1 the objection on April 18, 2011, generally arguing that Yucca
2 failed to follow local rules on objections to claims and asserting
3 that Yucca had not provided a notice of the bar date to FPM.

4 The bankruptcy court conducted hearings on Yucca's objection
5 to FPM's claim on May 3, June 7, and July 26, 2011. At the May 3
6 hearing, addressing FPM's argument that it had not been properly
7 served with notice of the bar date according to the local rules,
8 the bankruptcy court ruled that any violations of local rules were
9 waived by the bankruptcy court. Further, the court noted that
10 Ruvelson, the president of FPM, was physically present in the
11 courtroom when the bankruptcy court set the bar date, and FPM
12 thereby had actual notice of the bar date. Finally, the court
13 observed that FPM's attorneys had been served with copies of the
14 bar date order. However, on its own initiative, the bankruptcy
15 court advised FPM that an adversary proceeding, under some
16 circumstances, could constitute an informal proof of claim. When
17 counsel for FPM indicated that he was not prepared to discuss
18 whether FPM satisfied the requirements for an informal proof of
19 claim, the bankruptcy court continued the hearing to June 7, 2011.

20 Before the hearing on June 7, 2011, the bankruptcy court
21 issued a tentative ruling. As to FPM's argument that the notice
22 of the bar date was inadequate, the court repeated its earlier
23 finding that FPM had actual notice of the bar date. Regarding
24 whether FPM qualified for an informal proof of claim, the court
25 stated:

26 It would seem that the state court complaint, removed to
27 this court by Debtor, is an explicit demand showing the
28 nature and amount of the claim and even shows FPM's
intent to hold Debtor liable and would constitute an
informal proof of claim, but for the fact that the

1 adversary proceeding was dismissed by FPM at the Status
2 Conference on January 18, 2011. It is not as if FPM
3 asked for leave to amend their Complaint; instead, they
4 dismissed their complaint, did not file a new complaint
5 nor a proof of claim. This gave the appearance that
6 they were withdrawing their claim against the Debtor.
7 If the filing of the complaint can show an intent to
8 hold Debtor liable, it would also seem that the
9 dismissal of said complaint, coupled with no other
10 action on the part of the creditor, shows a lack of
11 intent to hold Debtor liable for a debt. Or, at the
12 very least, is so ambiguous as to what the creditor
13 intends that it does not clearly show an intention to
14 hold the debtor liable and therefore does not meet the
15 elements to constitute an informal proof of claim.

9 Tentative Ruling, June 7, 2011 at 2.

10 Finally, addressing whether FPM's late filing of Claim 12
11 might be allowed as the result of excusable neglect, the
12 bankruptcy court discussed the factors outlined by the Supreme
13 Court in Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd.
14 P'ship, 507 U.S. 380 (1993), as amplified by the Ninth Circuit in
15 Pincay v. Andrews, 389 F.3d 853, 855-56 (9th Cir. 2004) (en banc).
16 After applying the Pioneer/Pincay factors, the court concluded
17 that excusable neglect did not apply.

18 After hearing from counsel at the hearing, the bankruptcy
19 court adopted its tentative ruling. But as to the excusable
20 neglect question, the court offered FPM a continuance to provide
21 additional evidence to show excusable neglect, because it was
22 especially interested in considering any declarations FPM might
23 submit from the FPM attorneys explaining why Ruvelson was not
24 advised of consequences flowing from failure to submit the claim
25 by the bar date.

26 FPM accepted the bankruptcy court's offer of a continuance.
27 But rather than comply with the instructions of the court to
28 submit detailed declarations, on June 21, 2011, FPM submitted

1 another declaration of Ruvelson stating only that "I was advised
2 and subsequently it was decided that for the purposes of
3 collecting money, that there was no need to continue the lawsuit,
4 but that a claim would suffice." Ruvelson does not give the name
5 of the attorney who gave him that advice.

6 Before the continued hearing on July 26, 2011, the bankruptcy
7 court issued yet another tentative ruling:

8 Claimant has filed the supplemental declaration of
9 William Ruvelson. Although somewhat confusing, the
10 basic story told is that he was not looking to be paid,
11 but to take over the company. When it became obvious
12 that this would not happen, he thought about being paid.
13 Although he had actual notice of the bar date, he
14 assumed that his lawyers were doing whatever was
15 necessary to protect him. But obviously they did not.
16 There are no declarations from the lawyers. Debtor
17 interprets this to mean that there was a decision not to
18 timely file a proof of claim or at least not to file one
19 so long as the plan to take over the company was
20 feasible. However, from the court's prospective, it
21 could just as easily be that the lawyers do not want to
22 expose themselves to a malpractice claim and hope that
23 the court will excuse the late filing of the claim.
24 These cases are always difficult. Statuettes of
25 limitations have to have some meaning. In this case,
26 but for the dismissal of the complaint prior to the bar
27 date, the court would find that the complaint was an
28 informal proof of claim. But the dismissal did take
place and the result is as described below.

21 SUSTAIN THE OBJECTION TO CLAIM #12 IN THAT
22 THE CLAIM WAS NOT TIMELY FILED.

21 FPM did not appear at the continued hearing.⁵ At the
22 hearing, the bankruptcy court ruled, "per the tentative ruling as
23 placed on the docket, that the objection [to claim 12] is
24 sustained."

25 The bankruptcy court entered its order sustaining Yucca's

26 ⁵ We have carefully examined the record and briefs and cannot
27 find any explanation by FPM or its counsel why it failed to comply
28 with the bankruptcy court's request for evidence from FPM's
counsel.

1 objection to FPM's claim 12 on August 1, 2011. FPM filed this
2 timely appeal on August 12, 2011.

3 JURISDICTION

4 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
5 and 157(b)(2)(B). The Panel has jurisdiction under 28 U.S.C.
6 § 158.

7 ISSUES

8 Whether the bankruptcy court erred in finding that FPM did
9 not have a valid informal proof of claim.

10 Whether the bankruptcy court abused its discretion in finding
11 that FPM's late filing of its claim was not the result of
12 excusable neglect.

13 STANDARDS OF REVIEW

14 Whether a valid informal proof of claim exists in a
15 bankruptcy case is a question of law reviewed de novo. Pac.
16 Resource Credit Union v. Fish (In re Fish), 456 B.R. 413, 417 (9th
17 Cir. BAP 2011). De novo review requires the Panel to
18 independently review an issue, without giving deference to the
19 bankruptcy court's conclusions. See Cal. Franchise Tax Bd. v.
20 Wilshire Courtyard (In re Wilshire Courtyard), 459 B.R. 416, 423
21 (9th Cir. BAP 2011) (citing First Ave. W. Bldg., LLC v. James
22 (In re Onecast Media, Inc.), 439 F.3d 558, 561 (9th Cir. 2006)).

23 We review the bankruptcy court's decision declining to find
24 excusable neglect for the late filing of a claim for abuse of
25 discretion. Pincay v. Andrews, 389 F.3d at 858. In applying an
26 abuse of discretion test, we first "determine de novo whether the
27 [bankruptcy] court identified the correct legal rule to apply to
28 the relief requested." United States v. Hinkson, 585 F.3d 1247,

1 1262 (9th Cir. 2009) (en banc). If the bankruptcy court
2 identified the correct legal rule, we then determine whether its
3 "application of the correct legal standard [to the facts] was
4 (1) illogical, (2) implausible, or (3) without support in
5 inferences that may be drawn from the facts in the record." Id.
6 (internal quotation marks omitted). If the bankruptcy court did
7 not identify the correct legal rule, or its application of the
8 correct legal standard to the facts was illogical, implausible, or
9 without support in inferences that may be drawn from the facts in
10 the record, then the bankruptcy court has abused its discretion.
11 Id.

12 DISCUSSION

13 I.

14 The bankruptcy court erred in ruling that FPM 15 did not have an informal proof of claim.

16 In this case, it is undisputed that FPM filed no formal proof
17 of claim prior to the expiration of the deadline set by the
18 bankruptcy court. However, FPM argues that the bankruptcy court
19 should have decided that it had timely submitted an informal proof
20 of claim. Reviewing the record de novo, we agree with FPM.

21 The informal proof of claim doctrine has been long recognized
22 in the Ninth Circuit. In re Fish, 456 B.R. at 417. It is an
23 extension of the "so-called rule of liberality in amendments to
24 creditors' proofs of claim so that the formal claim relates back
25 to previously filed informal claim." In re Holm, 931 F.2d 620,
26 622 (9th Cir. 1991) (quoting In re Anderson-Walker Indus., Inc.,
27 798 F.2d 1285, 1287 (9th Cir. 1986). Simply stated, "for a
28 document to constitute an informal proof of claim, it must state

1 an explicit demand showing the nature and amount of the claim
2 against the estate, and evidence an intent to hold the debtor
3 liable." 931 F.2d at 622 (quoting In re Sambo's Restaurants,
4 Inc., 754 F.2d 811, 815 (9th Cir. 1985)).

5 Over the years, numerous types of documents and pleadings
6 have been deemed adequate by the Ninth Circuit to constitute an
7 informal proof of claim. See In re Holm, 931 F.2d at 622-23 (a
8 disclosure statement); In re Pizza of Hawaii, 761 F.2d 1374,
9 1381-82 (9th Cir. 1985) (a complaint for relief from the automatic
10 stay with attachments); In re Sambo's Restaurants, Inc., 754 F.2d
11 at 815-16 (a complaint removed from state court); County of Napa
12 v. Franciscan Vineyards (In re Franciscan Vineyards), 597 F.2d
13 181, 182-83 (9th Cir. 1979) (a letter to a bankruptcy trustee,
14 even though it had not been filed with the bankruptcy court); Sun
15 Basin Lumber Co. v. United States, 432 F.2d 48 (9th Cir. 1970) (an
16 objection to trustee's petition to sell property). The oft-cited
17 elements required under Ninth Circuit case law to establish a
18 valid informal proof of claim are:

- 19 (1) presentment of a writing;
20 (2) within the time for the filing of claims;
21 (3) by or on behalf of the creditor;
22 (4) bringing to the attention of the court;
23 (5) the nature and amount of a claim asserted against the
24 estate.

25 In re Edelman, 237 B.R. at 150.

26 In this appeal, the bankruptcy court found that FPM initially
27 had met the case law requirements for establishing an informal
28 proof of claim: "It would seem that the state court complaint,
removed to this court by Debtor, is an explicit demand showing the
nature and amount of the claim and even shows FPM's intent to hold

1 Debtor liable and would constitute an informal proof of claim[.]”
2 Tentative Ruling, June 7, 2011, at 2. We concur with the
3 bankruptcy court’s conclusion because, as the record and evidence
4 show, the adversary proceeding pleadings, including FPM’s
5 complaint against Yucca and the others, were: (1) presented to the
6 court; (2) within the time for filing of claims; (3) by the
7 creditor FPM; (4) bringing to the attention of the court; (5) the
8 nature and amount of claim asserted against the estate.⁶

9 Despite the contents of the adversary proceeding file,
10 however, the bankruptcy court found that, because the adversary
11 proceeding had been dismissed, FPM’s pleadings could not
12 constitute an informal proof of claim. As it noted in its last
13 tentative ruling: “In this case, but for the dismissal of the
14 complaint prior to the bar date, the court would find that the
15 complaint was an informal proof of claim. But the dismissal did
16 take place and the result is [denial of the claim.]”. It is with
17 this conclusion that we part company with the bankruptcy court.

18 First, while FPM admittedly decided to forego its claim to an
19 equity interest in Yucca, there is nothing definitive in the
20 record to show that, by dismissal of the adversary proceeding, FPM
21 intended to abandon its claims against Yucca for breach of the
22 loan contracts as alleged in its complaint. According to the
23 bankruptcy court, FPM had stated in its status report of
24 November 30, 2010, that it had reached an agreement with Yucca,
25 and would thereafter submit a stipulation dismissing Yucca from

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27 ⁶ Moreover, while it did not, the bankruptcy court could have
28 also found these elements were satisfied by the many other
pleadings and submissions made by FPM in the bankruptcy case
urging its position, or opposing positions taken by Yucca.

1 the adversary proceeding with prejudice. However, as near as we
2 can tell, no stipulation for the dismissal of Yucca with prejudice
3 was ever submitted to the bankruptcy court before the court
4 entered the order dismissing the adversary proceeding. While FPM
5 submitted notices of dismissal to the bankruptcy court on
6 January 10 and 18, those notices sought dismissal only of the
7 claims asserted against defendants United Commercial Bank, East
8 West Bank and Josef Mamaliger. Moreover, the actual order
9 submitted by FPM and executed by the bankruptcy court dismissing
10 the adversary proceeding against Yucca expressly provided that the
11 dismissal was without prejudice. The state of the record is
12 therefore, at best, equivocal, in this regard.

13 Second, the bankruptcy court decided that, if the removal of
14 the state court complaint to the bankruptcy court by FPM showed an
15 intent to hold Yucca liable, then dismissal of that complaint must
16 necessarily show Yucca's lack of intent to do so. However, this
17 conclusion is at odds with the case law that holds that withdrawal
18 of a filing constituting an informal proof of claim does not
19 negate the intent to hold a debtor liable for a debt. For
20 example, in In re Silas, 2006 Bankr. LEXIS 1162 at *6-7 (Bankr.
21 D.S.C. 2006), the creditor, DaimlerChrysler, had objected to
22 confirmation of Silas' chapter 13 plan, but later withdrew that
23 objection. When its withdrawal of the objection was offered to
24 defeat its right to assert an informal proof of claim, the
25 bankruptcy court rejected the argument:

26 In DaimlerChrysler's Objection to Debtors' proposed
27 plan, it asserted that the total debt owed on the
28 vehicle was \$ 12,840.84. The Court believes that the
Objection meets the requirements for an informal proof
of claim. . . . The voluntary withdrawal of the

1 Objection, in the instance of this case, does not negate
2 DaimlerChrysler's intent to collect the claim but
3 primarily demonstrates that DaimlerChrysler did not
 intend to pursue its objection to the valuation of the
 secured portion of its claim.

4 Id. at *6.

5 Similarly, in Washington v. Nissan Motor Acceptance Corp.
6 (In re Washington), 158 B.R. 722 (Bankr. S.D. Ohio 1993), an
7 objection to a chapter 13 plan that was later withdrawn was,
8 nonetheless, treated as an informal proof of claim because, as the
9 bankruptcy court explained: "It is incontrovertible that debtor
10 was fully aware of the exact amount of Nissan's claim and Nissan's
11 intent to hold debtor liable on the claim pursuant to the order
12 containing Nissan's withdrawal of its confirmation objection and
13 the accompanying upward adjustment of its allowed secured claim."
14 158 B.R. at 724. Although Silas and Washington are both chapter
15 13 cases, they stand for the logical proposition that once a
16 filing adequate to constitute a proof of claim is made, the later
17 withdrawal of that filing does not necessarily demonstrate a
18 creditor's lack of intent to hold a debtor liable on the claim.
19 As the decisions show, depending upon the facts and though a
20 pleading constituting a valid informal proof of claim is
21 withdrawn, the claimant may still intend to enforce the debtor's
22 liability through some other means.

23 A third reason for departing from the bankruptcy court's
24 reasoning is that it is out of step with the treatment of formal

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1 proofs of claim in the Rules. Under Rule 3006,⁷ a formal proof
2 of claim may only be withdrawn in two ways. Under some
3 circumstances, a creditor can, as of right, file a notice of
4 withdrawal of the claim. However, if after the creditor filed the
5 claim, an objection or complaint is filed against the creditor,
6 the creditor has accepted or rejected a plan, or the creditor
7 otherwise has participated significantly in the case, the creditor
8 may not withdraw the claim except on order of the court and notice
9 and a hearing. A leading treatise has described the nature of the
10 affirmative action that should be required under this Rule to
11 demonstrate the creditor's intent to no longer hold the debtor
12 liable for the debt evidenced by a proof of claim:

13 No form is specified for this notice, but, at a minimum,
14 it should identify the creditor and the claim being
15 withdrawn and should affirmatively state that the claim
16 has not been objected to, that no adversary proceeding
17 has been filed against the creditor and that the
18 creditor has not voted on a plan or otherwise
19 participated significantly in the case.

18 ⁷ **Withdrawal of Claim; Effect on Acceptance or Rejection of**
19 **Plan**

20 A creditor may withdraw a claim as of right by filing a
21 notice of withdrawal, except as provided in this rule.
22 If after a creditor has filed a proof of claim an
23 objection is filed thereto or a complaint is filed
24 against that creditor in an adversary proceeding, or the
25 creditor has accepted or rejected the plan or otherwise
26 has participated significantly in the case, the creditor
27 may not withdraw the claim except on order of the court
28 after a hearing on notice to the trustee or debtor in
possession, and any creditors' committee elected
pursuant to § 705(a) or appointed pursuant to § 1102 of
the Code. The order of the court shall contain such
terms and conditions as the court deems proper. Unless
the court orders otherwise, an authorized withdrawal of
a claim shall constitute withdrawal of any related
acceptance or rejection of a plan.

28 Rule 3006 (emphasis added).

1 9 COLLIER ON BANKRUPTCY ¶ 3006.01 (Alan N. Resnick & Henry J. Sommer,
2 eds., 16th ed., 2010); but see In re Overly-Hautz Co., 57 B.R.
3 932, 935 (Bankr. N.D. Ohio 1986), aff'd, 81 B.R. 434 (N.D. Ohio
4 1987) (simple letter to the court is sufficient for withdrawal).

5 Although the phrase "participated significantly in the case"
6 is not defined in the Rules, courts have interpreted it to refer
7 to "a creditor that enters a bankruptcy case and asks the court to
8 act on its behalf in some substantive way." In re Owens, 455 B.R.
9 640, 646 (Bankr. W.D. Mich. 2011); Cruisehone Inc. v. Cruise
10 Ships Catering and Servs, N.V. (In re Cruise Ships Catering and
11 Servs, N.V.), 278 B.R. 325, 331 (Bankr. E.D.N.Y. 2002). In this
12 case, the parties agree that FPM otherwise participated actively
13 in the bankruptcy case making numerous substantive demands on the
14 court, in addition to commencing the adversary proceeding against
15 Yucca. FPM Op. Br. at 4 ("FPM has been a very active creditor in
16 asserting its rights against the Debtor."); Yucca Reply Br. at 7
17 ("FPM has been a litigator throughout the Chapter 11 case of the
18 Debtor."). Indeed, FPM actively and extensively sought to enforce
19 its rights as a creditor during the bankruptcy case: (1) FPM filed
20 an involuntary bankruptcy petition against Yucca, asserting it
21 held a claim against Yucca of over \$690,000; (2) when Yucca filed
22 its chapter 11 petition in the San Fernando Valley division of the
23 Central District, FPM unsuccessfully sought change of venue to Los
24 Angeles, see bankr. dkt. no. 18; (3) as a creditor, FPM filed an
25 opposition to, and sought a hearing on, Yucca's request to pay
26 insider compensation, filed six supplemental pleadings and
27 responses, and participated in the bankruptcy court hearing
28 concerning that matter, see bankr. dkt. nos. 33, 36, 45, 54, 56,

1 58, 59, and 101; (4) filed a motion for appointment of a
2 chapter 11 trustee, filed two supplemental pleadings, and
3 participated in the hearing, see bankr. dkt. nos. 76, 85, and 86;
4 and (5) opposed Yucca's second motion for extension of time to
5 file a plan, bankr. dkt. no. 164.⁸

6 Given the extent of its activities in Yucca's bankruptcy
7 case, had FPM filed a timely formal proof of claim, it would not
8 have been allowed to simply "withdraw" that claim absent notice of
9 a request to Yucca and other major parties in the bankruptcy case,
10 a hearing, and permission of the bankruptcy court. In light of
11 this heightened procedural requirement to withdraw a claim, that
12 an otherwise adequate informal proof of claim could somehow be
13 extinguished without any further formalities by dismissal of an
14 adversary proceeding without prejudice would seem contrary to the
15 approach and philosophy evidenced by the Rules.

16 In summary, in this Circuit, the courts apply a rule of
17 liberality to allow late-filed formal proofs of claim, under
18 proper circumstances, to relate back to the filing of so-called
19 informal proofs of claim. We agree with the bankruptcy court's
20 finding that FPM's removal of the state court complaint to the
21 bankruptcy court satisfied the traditional requirements for an
22 informal proof of claim. However, we respectfully disagree with
23 the bankruptcy court's conclusion that the later dismissal of the
24 adversary proceeding without prejudice constituted a withdrawal of
25 FPM's claim. We therefore REVERSE the decision of the bankruptcy
26

27 ⁸ We do not include in this list the numerous pleadings filed
28 by FPM in the bankruptcy case based only on its status as a
putative equity member of Yucca.

1 court that FPM's informal proof of claim, which was later amended
2 by FPM's formal proof of claim, should be disallowed.

3 II.

4 The bankruptcy court did not abuse its discretion
5 when it found that FPM's delay in filing a formal proof
6 of claim was not the result of excusable neglect.

7 The conclusion that FPM timely filed a valid informal proof
8 of claim which was not later withdrawn is sufficient to dispose of
9 this appeal. However, we feel it appropriate to comment on the
10 alternative argument offered by FPM.

11 At one time, the Ninth Circuit followed a "strict standard"
12 for application by trial courts faced with a claim of excusable
13 neglect for failure to file timely pleadings. See, e.g., Pratt v.
14 McCarthy, 850 F.2d 590, 593 (9th Cir. 1988) (strict standard
15 required both a showing of extraordinary circumstances that
16 prevented timely filing and injustice resulting from denying an
17 extension of time). However, that standard changed markedly with
18 the Supreme Court's decision in Pioneer Invest. Servs. Co. In
19 subsequent opinions, the Ninth Circuit has applied the Pioneer
20 factors in a broad range of circumstances to emphasize that in
21 reviewing requests for extensions of time, trial courts should
22 take into consideration all relevant factors, and not concentrate
23 on any single circumstance in isolation. Pincay v. Andrews,
24 389 F. 3d at 853. In particular, Pioneer articulated a four-part
25 balancing test for determining whether there had been excusable
26 neglect within the meaning of Rule 9006(b), the Bankruptcy Rule
27 patterned on Civil Rule 6(b), relating to enlargement of a time
28 period to accommodate a party's failure to act due to "excusable
neglect." Pincay expanded on the concepts developed in Pioneer,

1 applying the same tests in various contexts in which the phrase
2 "excusable neglect" appears in the Civil Rules.

3 In the current appeal, the bankruptcy court correctly
4 identified the Pioneer/Pincay four-tier analysis of excusable
5 neglect:

6 Because Congress has provided no other guideposts for
7 determining what sorts of neglect will be considered
8 "excusable," we conclude that the determination is at
9 bottom an equitable one, taking account of all relevant
10 circumstances surrounding the party's omission. These
11 include, as the Court of Appeals found, the danger of
prejudice to the debtor, the length of the delay and its
potential impact on judicial proceedings, the reason for
the delay, including whether it was within the
reasonable control of the movant, and whether the movant
acted in good faith.

12 Pioneer Invest. Servs. Co., 507 U.S. at 395; cf. Pincay, 389 F.3d
13 at 855. In its tentative rulings and comments during the
14 hearings, the court addressed these factors.

15 Regarding the potential danger of prejudice to the debtor,
16 the bankruptcy court found that allowing FPM's late-filed formal
17 proof of claim could result in inclusion of an additional
18 \$942,428.13, which may have a deleterious effect on the proposed
19 liquidation payout. As to the length of the delay and its
20 potential impact on judicial proceedings, the bankruptcy court did
21 not consider the nine-day delay in filing the FPM claim to be a
22 significant factor.

23 The bankruptcy court linked the third and fourth Pioneer
24 factors – the reason for the delay and whether the movant acted in
25 good faith. The court was unable to properly analyze these
26 factors because FPM did not provide adequate information and
27 evidence why a proof of claim was not timely filed. The court was
28 especially concerned with the apparent failure of counsel to

1 advise FPM's president, Ruvelson, about the necessity for filing a
2 timely proof of claim:

3 Certainly his attorney Mr. Rothman was aware of the
4 proof of claim requirement, yet Mr. Rothman's
5 declaration is devoid of any explanation as to why a
6 proof of claim was not timely filed. As no real
evidence or argument has been presented as to why
counsel failed to timely file a proof of claim,
excusable neglect has not been shown.

7 The court was also particularly interested in evidence from an
8 earlier attorney for FPM, Brian Harvey. The court continued the
9 hearing on Yucca's objection to FPM's claim twice to provide FPM
10 an opportunity to supply evidence from the attorneys supporting
11 the alleged excusable neglect. Finally, despite assuring the
12 bankruptcy court that he would welcome the opportunity for a third
13 continuance and would provide the requested evidence, neither
14 Mr. Rothman nor any attorney for FPM attended the last hearing on
15 July 29, 2011.

16 "The burden of presenting facts demonstrating excusable
17 neglect is on the movant." Key Bar Investments, Inc. v. Cahn
18 (In re Cahn), 188 B.R. 627, 631 (9th Cir. BAP 1995); In re Pac.
19 Gas & Elec. Co., 311 B.R. 84, 89 (Bankr. N.D. Cal. 2004). We
20 agree with the bankruptcy court that no real evidence was
21 presented by FPM as to why its counsel failed to timely file a
22 proof of claim, and thus, under Pioneer/Pincay, FPM failed to meet
23 its burden and the bankruptcy court did not abuse its discretion
24 in not finding excusable neglect for the late filing of the formal
25 proof of claim.

26 **CONCLUSION**

27 We REVERSE the decision of the bankruptcy court that, under
28 these facts, FPM did not hold a valid, timely informal proof of

1 claim which was amended by FPM's formal proof of claim.

2 We AFFIRM the bankruptcy court's finding that FPM's delay in
3 filing a formal proof of claim did not result from excusable
4 neglect.

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