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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	EC-13-1010-JuKiPa
)		
7	RONALD CALDERON and)	Bk. No.	EC-12-25992-MSM
	JANESSA LEE PRICE,)		
8)		
	Debtors.)		
9	<hr/>)		
10	FRANCIS DAVIN,)		
)		
	Appellant,)		
11)		
	v.)	M E M O R A N D U M *	
12)		
	JAN P. JOHNSON, Chapter 13)		
13	Trustee; RONALD CALDERON;)		
	JANESSA LEE PRICE,)		
14)		
	Appellees.)		
15	<hr/>)		

Argued and Submitted on October 18, 2013
at Sacramento, California

Filed - October 28, 2013

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

Honorable Michael S. McManus, Bankruptcy Judge, Presiding

Appearances: Timothy A. Charshaf, Esq. argued for appellant
Francis Davin; Ulric N. Duverney, Esq. argued for
appellees Ronald Calderon and Janessa Lee Price.

Before: JURY, KIRSCHER, and PAPPAS, Bankruptcy Judges.

* 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 Appellant-creditor Francis Davin appeals from the
2 bankruptcy court's order denying his motion for leave to file a
3 late proof of claim (POC) and a complaint for § 523
4 nondischargeability or, alternatively, to deny chapter 13¹
5 debtor, Janessa Lee Price, her discharge under § 727. We
6 AFFIRM.

7 **I. FACTS**

8 On April 30, 2007, Price and Davin entered into a written
9 agreement for Davin to purchase Interpretative Consulting
10 Services (ICS), a California corporation wholly owned by Price.
11 The parties agreed on a purchase price of \$1.5 million (reduced
12 to \$1 million if paid in full within one year of the April 30,
13 2007 contract date), including a \$150,000 non-refundable deposit
14 paid by Davin to Price. Thereafter, Davin assumed the
15 management and day-to-day operation of ICS. Later, a dispute
16 arose between the parties.

17 On May 17, 2010, Davin filed a complaint against Price in
18 the state court alleging causes of action for breach of
19 contract, fraud, negligent misrepresentation and breach of oral
20 contract.

21 On July 13, 2010, Price filed her answer and cross-
22 complaint against Davin, alleging causes of action for breach of
23 written contract, fraud, negligent misrepresentation, and breach
24 of oral contract.

25
26 _____
27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
"Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 **A. Debtors' First Bankruptcy**

2 On June 30, 2011, debtors filed a chapter 13 petition
3 (Bankr. Case No. 11-36278). Debtors listed Davin as a creditor
4 and sent a notice of stay of proceedings and notice of the
5 meeting of creditors and other deadlines to Davin at his home
6 address on Molina Street, Napa, California. Davin turned over
7 these documents to his attorney, Timothy Charshaf (Charshaf),
8 who was representing Davin in the state court action against
9 Price.

10 On July 8, 2011, Price's state court attorney, Norbert
11 Frost (Frost), served Charshaf by mail with a Notice of Stay of
12 Proceedings which was mailed to 4359 Town Center Blvd., Ste.
13 210, El Dorado Hills, CA 95762 (Town Center Blvd. Address).

14 On August 31, 2011, the bankruptcy court dismissed debtors'
15 case.

16 On September 7, 2011, Charshaf filed a Request for Special
17 Notice in the bankruptcy case.

18 On September 9, 2011, Charshaf notified the state court of
19 the dismissal of debtors' case.

20 **B. Debtors' Second Bankruptcy**

21 On March 27, 2012, debtors filed the instant case, also a
22 chapter 13. They again listed Davin as a creditor. Debtors and
23 their bankruptcy attorney, John Tosney (Tosney) signed the
24 Verification of Master Address List which listed Davin's address
25 as "c/o The Heritage Law Group, APC, 1101 Investment Blvd., Ste.
26 160, El Dorado Hills, CA 95762" (Investment Blvd. Address). The
27 Investment Blvd. Address was Charshaf's old address.

28 In a letter dated March 29, 2012, Tosney notified Frost

1 regarding debtors' bankruptcy filing and imposition of the stay.
2 The letter requested Frost to notify the state court of the
3 automatic stay. Attached to the letter was the face sheet of
4 debtors' petition.

5 On April 2, 2012, Frost served Charshaf with a Notice of
6 Stay of Proceedings, the March 29, 2012 letter, and the face
7 sheet of debtors' petition at the Town Center Blvd. Address.

8 On April 4, 2012, the bankruptcy court filed and mailed the
9 Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors &
10 Deadlines (Notice) to the addresses on the master address list.
11 The Notice set the first meeting of creditors for May 10, 2012,
12 the last day for filing nondischargeability complaints for
13 July 9, 2012, and the last day to file a POC for August 8, 2012.

14 Charshaf did not receive the Notice or debtors' chapter 13 plan
15 because debtors used the Investment Blvd. Address. Charshaf's
16 Notice was returned to the bankruptcy court as undeliverable and
17 the clerk notified Tosney that it was returned.

18 On July 9, 2012, the time for filing a nondischargeability
19 complaint in debtors' case expired.

20 On July 25, 2012, Charshaf filed a Request for Special
21 Notice with the bankruptcy court listing his address as 5176
22 Hillsdale Circle, Ste. 100, El Dorado Hills, CA 95762.

23 On August 8, 2012, the time for filing a POC in debtors'
24 case expired.

25 On October 31, 2012, Frost filed a status report in the
26 state court action stating that Davin had not filed a POC in
27 debtors' chapter 13 case and that debtors' plan had been
28 approved by the bankruptcy court on June 12, 2012. Frost

1 served Charshaf at the Town Center Blvd. Address.

2 On November 2, 2012, Charshaf filed a motion in the
3 bankruptcy court for leave to file a late POC on behalf of Davin
4 and a complaint for § 523 nondischargeability or, in the
5 alternative, to deny Price her discharge under § 727. Charshaf
6 filed a declaration in support, stating, among other things,
7 that he was the attorney for Davin and that Frost served him
8 with the Notice of Stay of Proceedings on April 2, 2012.

9 Price opposed the motion, contending that Davin had actual
10 and constructive notice of her bankruptcy case because Frost had
11 served Charshaf with a Notice of Stay of Proceedings. Price
12 filed a declaration in support stating that she was never aware
13 of Charshaf's new addresses and that the address she used was on
14 the original state court pleading. She also declared that The
15 Heritage Law Group's website still listed Charshaf as one of
16 their attorneys and listed a Sacramento area address as
17 2901 Douglas Blvd., Ste. 290, Roseville, CA 95661.

18 On December 17, 2012, the bankruptcy court denied Davin's
19 motion.² On December 20, 2012, the bankruptcy court entered the
20 order. On January 3, 2013, Davin filed a timely notice of
21 appeal.

22 II. JURISDICTION

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

26 ² There is no transcript of the hearing in the record.
27 Appellant's failure to include a transcript of this hearing,
28 while not fatal to their case since our review is de novo, is a
violation of Rule 8009(b) and 9th Cir. BAP R. 8006-1.

1 jurisdiction under 28 U.S.C. § 158.

2 **III. ISSUE**

3 Did the bankruptcy court err, as a matter of law, when it
4 concluded that Davin's complaint for § 523 nondischargeability
5 and POC were time barred?

6 **IV. STANDARD OF REVIEW**

7 Whether the bankruptcy court was correct in its
8 interpretation of § 523(a)(3)(B), its interpretation of
9 Rule 4007(c), and its disallowance of an untimely filed POC
10 under Rule 3002(c) is reviewed de novo. Towers v. United States
11 (In re Pac.-Atl. Trading Co.), 64 F.3d 1292, 1297 (9th Cir.
12 1995) (interpretation of statute); Herndon v. De La Cruz
13 (In re De La Cruz), 176 B.R. 19, 22 (9th Cir. BAP 1994)
14 (interpretation of Rule 4007(c)); IRS v. Osborne
15 (In re Osborne), 76 F.3d 306, 310 (9th Cir. 1996)(untimely POC).

16 **V. DISCUSSION**

17 The record shows that it is undisputed that Charshaf
18 represented Davin with respect to the same debt in the state
19 court and debtors' bankruptcy proceedings. It is also
20 undisputed that the bankruptcy court sent the Notice of the bar
21 dates to Charshaf at an outdated address and thus he never
22 received it. Finally, it is undisputed that Charshaf received
23 the Notice of Stay of Proceedings from Frost approximately six
24 days after debtors' bankruptcy filing. This notice, which
25 attached the face sheet of debtors' petition, gave the name of
26 the bankruptcy case, the bankruptcy court, and the bankruptcy
27 case number.

1 **A. Notice: Complaints for § 523 Nondischargeability**

2 Debtors listed Davin as a creditor on their schedules.
3 Rule 4007(c) requires a creditor to file a complaint for
4 nondischargeability under § 523(a)(2), (4), and (6) no later
5 than 60 days after the first date set for the meeting of
6 creditors under § 341(a). A listed creditor who has adequate
7 notice of the meeting of creditors but fails to make a timely
8 complaint, has certain claims automatically discharged pursuant
9 to § 523(c)(1). However, the fact a creditor is listed has no
10 effect on the discharge of its claim in the absence of effective
11 due process notice.

12 Although there is no per se rule, generally when a debtor
13 lists an incorrect address so as to cause the creditor not to
14 receive notice, the creditor's debt has not been duly scheduled.
15 See Lubeck v. Littlefield's Rest. Corp. (In re Fauchier),
16 71 B.R. 212, 215 (9th Cir. BAP 1987). An unlisted creditor's
17 claim ordinarily is not discharged and that creditor may file a
18 complaint for nondischargeability under § 523(a)(2), (4) and (6)
19 at any time pursuant to § 523(a)(3)(B) unless the "creditor has
20 notice or actual knowledge of the case" in time to comply with
21 the 60-day deadline set forth in Rule 4007(c).

22 Section 523(a)(3) provides that "[a] discharge under
23 section . . . 1328(b) of this title does not discharge an
24 individual debtor from any debt--"

25 (3) neither listed nor scheduled under section
26 521(a)(1) of this title, with the name, if known to
the debtor, of the creditor to whom such debt is owed,
in time to permit--

27 . . .

1 (B) if such debt is of a kind specified in paragraph
2 (2), (4), or (6) of this subsection, timely filing of
3 a proof of claim and timely request for a
4 determination of dischargeability of such debt under
one of such paragraphs, unless such creditor had
notice or actual knowledge of the case in time for
such timely filing and request. . . .

5 By its plain terms, § 523(a)(3)(B) specifically qualifies any
6 right to assume receipt of formal notice. See Lompa v. Price
7 (In re Price), 871 F.2d 97, 99 (9th Cir. 1989) (reasoning that
8 "[t]he statutory language [of § 523(a)(3)(B)] clearly
9 contemplates that mere knowledge of a pending bankruptcy
10 proceeding is sufficient to bar the claim of a creditor who took
11 no action, whether or not that creditor received official notice
12 from the court of various pertinent dates.") (internal citations
13 omitted).

14 Regardless of whether we consider Davin as a listed or
15 unlisted creditor, at bottom the inquiry is one of effective due
16 process notice. Due process requires that the creditor receive
17 the type of notice that was reasonably calculated under all the
18 circumstances to apprise it of the pendency of the action and
19 afford it an opportunity to present its claims. Mullane v.
20 Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950); Fireman's
21 Fund Mort'g Corp. v. Hobdy (In re Hobdy), 130 B.R. 318, 320 (9th
22 Cir. BAP 1991). In circumstances similar to those here, the
23 Ninth Circuit has held that actual timely notice to the
24 creditor's attorney of the pendency of the bankruptcy meets the
25 due process requirement. In re Price, 871 F.2d at 99. Further,
26 it is well established that a creditor who learns of a
27 bankruptcy filing has a duty to inquire into the relevant
28 deadlines. Id. Simply put, in cases of actual notice, it is up

1 to the creditor to see that the complaint for § 523
2 nondischargeability is timely filed.

3 Charshaf admits he had actual notice of debtors' bankruptcy
4 within six days of its filing. Moreover, Charshaf could have
5 identified Price as the debtor based on the notice he received
6 which included the face sheet of debtors' petition with their
7 names and the case number. At minimum, Charshaf should have
8 reviewed the bankruptcy court file, which is a public record.
9 Had he done so, he would have had ample time to file the
10 complaint for § 523 nondischargeability. See Mfgs. Hanover v.
11 Dewalt (In re Dewalt), 961 F.2d 848 (9th Cir. 1992) (thirty-day
12 notice provision of Rule 4007(c) provides a guide to the minimum
13 time within which it is reasonable to expect a creditor to act).
14 Indeed, Charshaf does not explain why he failed to investigate
15 after receiving actual notice of debtors' second bankruptcy
16 filing in light of debtors' prior filing. In short, actual
17 notice of debtors' filing is imputed to Davin for purposes of
18 due process.

19 Davin also asserts his constitutional right to formal
20 notice of the bar date on the basis of the bankruptcy court's
21 decision in In re Rogowski, 115 B.R. 409 (Bankr. D. Conn. 1990).
22 Rogowski is not binding on this Panel. Under Price, Davin did
23 not act reasonably in waiting for formal notice of the bar dates
24 after his attorney received actual notice of debtors' bankruptcy
25 case.

26 In sum, the due process requirements for notice have been
27 met in this case. Charshaf had actual notice of Price's
28 bankruptcy, he could have identified Price as the debtor since

1 he had obtained the face sheet of debtors' petition, and he had
2 plenty of time to file a § 523 nondischargeability complaint or
3 move for an extension of time. Accordingly, the bankruptcy
4 court properly found Davin's complaint for § 523
5 nondischargeability was time-barred.

6 **B. Notice: POC Bar Date in Chapter 13 Cases**

7 The last date to file a timely POC in this case was
8 August 8, 2012. Davin failed to file a POC by that date. Under
9 Rule 3002(c), a POC must be disallowed if it is untimely.
10 Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.),
11 920 F.2d 1428, 1432-33 (9th Cir. 1990). Again, Davin relies on
12 his lack of formal notice of the claims bar date as grounds for
13 filing a late POC.

14 In this context, the rules regarding due process are
15 essentially the same as those for complaints for § 523
16 nondischargeability. A creditor who has knowledge of the
17 debtor's bankruptcy case in time to file a timely POC is not
18 entitled to participate in the distribution of assets. Id. at
19 1430-31. Once Charshaf received actual notice of debtors'
20 bankruptcy case, he was on inquiry notice with respect to the
21 claims bar date. Indeed, Charshaf filed a Request for Special
22 Notice in the case on July 25, 2012. As noted by the bankruptcy
23 court, had Charshaf checked the docket when he filed his
24 request, he would have discovered that there was still time to
25 file a POC by the August 8, 2012 claims bar date.

26 The bankruptcy court lacks any equitable power to enlarge
27 the time for filing a POC unless one of the six situations in
28 Rule 3002(c) exists. Id. at 1432-33. None apply to this case.

1 Further, the excusable neglect standard set forth in
2 Rule 9006(b)(3) does not apply to permit the court to extend the
3 time for filing a POC under Rule 3002(c). Id. Because Charshaf
4 had actual notice of debtors' bankruptcy case in time to file a
5 POC by the claims bar date, the bankruptcy court properly found
6 that Davin's POC was time-barred.

7 **VI. CONCLUSION**

8 For all these reasons, we AFFIRM.

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