

MAR 28 2014

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. MT-13-1393-JuKuPa
)
MARCELLA LEE BARKER,) Bk. No. 12-61445-RBK
)
Debtor.)

SPOKANE LAW ENFORCEMENT)
FEDERAL CREDIT UNION,)
Appellant,)

v.) M E M O R A N D U M*

MARCELLA LEE BARKER; ROBERT)
G. DRUMMOND, Chapter 13)
Trustee; OCWEN LOAN SERVICING,)
LLC; UNITED STATES TRUSTEE,)
Appellees.)

Argued and Submitted on March 20, 2014
at Pasadena, California

Filed - March 28, 2014

Appeal from the United States Bankruptcy Court
for the District of Montana

Honorable Ralph B. Kirscher, Bankruptcy Judge, Presiding

Appearances: Quentin M. Rhoades, Esq., of Sullivan, Tabaracci
& Rhoades, P.C. argued for appellant Spokane Law
Enforcement Federal Credit Union; Kraig C. Kazda,
Esq. argued for appellee Marcella Lee Barker;
Robert G. Drummond, Chapter 13 Trustee argued pro
se.

* 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 Before: JURY, KURTZ, and PAPPAS, Bankruptcy Judges.

2 Spokane Law Enforcement Federal Credit Union (SLECU)
3 appeals from the bankruptcy court's order (1) denying its Motion
4 for Allowance of Claims; (2) sustaining the objection to
5 late-filed claims filed by chapter 13¹ trustee, Robert G.
6 Drummond; and (3) disallowing SLECU's proofs of claim nos. 6, 7,
7 and 8 as late filed.² We AFFIRM.

8 I. FACTS

9 Marcella Lee Barker filed her chapter 13 petition on
10 September 6, 2012. Debtor listed SLECU as a secured creditor
11 owed \$6,646.00 in Schedule D and as an unsecured creditor owed
12 \$47,402.00 in Schedule F.³ The debts were listed as undisputed
13 and liquidated.

14 SLECU was properly served with notice that the deadline for
15 filing a proof of claim was January 8, 2013. The notice further
16 warned:

17 If you do not file a Proof of Claim by the "Deadline
18 to file a Proof of Claim" listed on the front side,

19 ¹ Unless otherwise indicated, all chapter and section
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
21 "Rule" references are to the Federal Rules of Bankruptcy
22 Procedure.

23 ² Appellees Drummond and Marcella Barker have filed briefs
24 in this appeal. Appellees Ocwen Loan Servicing, LLC and the
25 United States Trustee have not appeared.

26 ³ From what we can tell, the debts to SLECU arose from loans
27 made to debtor and her ex-husband, Darryl, for the purchase or
28 refinance of vehicles. At some point, Darryl sold two vehicles
without SLECU's consent. The Barkers then entered into two
modification agreements with SLECU for repayment of those loans
which are unsecured. SLECU evidently still holds a security
interest in the other vehicle, a 2004 Ford F-150 truck.

1 you might not be paid any money on your claim from
2 other assets in the bankruptcy case. To be paid, you
3 must file a Proof of Claim even if your claim is
4 listed in the schedules filed by the debtor.

5 SLECU did not file a proof of claim by the bar date.

6 On September 19, 2012, debtor filed her chapter 13 plan,
7 which she subsequently amended. Paragraph 2(c) titled
8 "Unimpaired Secured Claims" stated that SLECU's secured claim
9 against the 2004 Ford F-150 truck "will be left unimpaired by
10 the [p]lan, are not provided by the [p]lan and shall receive no
11 payments through the [t]rustee except with regard to those
12 arrearages specified below, if any[.]" No arrearages were
13 listed. The plan was a 100% repayment plan. SLECU had notice
14 of the plan and amended plan. On October 6, 2012, the
15 bankruptcy court confirmed debtor's plan.

16 In January 2013, Debtor filed a motion to modify her plan
17 along with an amended plan, both of which were served on SLECU.
18 Paragraph 2(c) titled "Unimpaired Secured Claims" deleted SLECU.
19 The bankruptcy court approved the modification by an order
20 entered on February 8, 2013. In March 2013, debtor filed a
21 second motion to modify her plan along with an amended plan,
22 both of which were served on SLECU. The bankruptcy court
23 approved the modification by an order entered on April 2, 2013.

24 On May 30, 2013, SLECU filed formal proofs of claim nos. 6,
25 7 and 8 in the amounts of \$5,490.78 (secured); \$28,293.84
26 (unsecured); and \$24,597.47 (unsecured), respectively. On
27 June 7, 2013, the trustee objected to the proofs of claim on the
28 grounds that they were untimely. SLECU requested a hearing and
29 argued that the late-filed claims should be allowed on the basis

1 that a disgruntled employee had failed to timely file the proofs
2 of claim.

3 On July 31, 2013, SLECU filed a Motion for Allowance of
4 Claims, asserting that debtor's Schedules D and F constituted an
5 informal proof of claim and/or judicial admission of its debt
6 because the schedules listed it. Therefore, according to SLECU,
7 its late-filed proofs of claim should relate back to the
8 informal, scheduled claims. In response, debtor argued that the
9 listing of a creditor in schedules does not constitute an
10 informal proof of claim. Debtor further asserted that
11 bankruptcy courts had no discretionary authority to enlarge the
12 time for filing a proof of claim.

13 At the August 2, 2013 hearing on the matter, the bankruptcy
14 court found SLECU had not made a written demand to hold debtor
15 liable for the debts and thus the requirements for an informal
16 proof of claim under Ninth Circuit law were not met. The court
17 denied SLECU's motion, sustained the trustee's objection to its
18 late-filed claims, and disallowed SLECU's claims.

19 The court entered an order consistent with its decision on
20 the same day, finding that: (1) it had no discretion to allow a
21 late filed proof of claim in a chapter 13 case based on the
22 holding in United States v. Osborne (In re Osborne), 76 F.3d
23 306, 310-11 (9th Cir. 1996); and (2) debtor's scheduling of
24 SLECU's debt did not satisfy the requirements for an informal
25 proof of claim set forth in Wright v. Holm (In re Holm),
26 931 F.2d 620, 622 (9th Cir. 1991). SLECU timely appealed from
27 this order.

1 **V. DISCUSSION**

2 **A. The Legal Principles Governing Bankruptcy Claims**

3 The Bankruptcy Code and Rules govern the requirements for
4 the filing and allowance of proofs of claim. In a chapter 13
5 case, the trustee may only make distributions "to creditors
6 whose claims have been allowed." See Rule 3021.

7 To be allowed, the claim must first be filed under § 501.
8 Section 501(a) provides that any creditor may file a proof of
9 claim. Section 501(c) provides that "[i]f a creditor does not
10 timely file a proof of such creditor's claim, the debtor or the
11 trustee may file a proof of such claim." "A proof of claim is a
12 written statement setting forth a creditor's claim."

13 Rule 3001(a).

14 If the claim meets the requirements of § 501, the
15 bankruptcy court must then determine whether the claim should be
16 allowed. Section 502(a) provides that a claim is deemed allowed
17 unless a party in interest objects. If such an objection is
18 made, the court shall allow such claim "except to the extent
19 that the proof of claim is not timely filed." See § 502(a)(9).

20 Rules 3002 and 3004 implement the provisions of §§ 501 and
21 502. If an unsecured creditor's claim is to be allowed in a
22 chapter 13 case, a proof of claim must be filed. See
23 Rule 3002(a). In chapter 13, a proof of claim is timely filed
24 if it is filed not later than 90 days after the first date set
25 for the meeting of creditors called under § 341(a). See
26 Rule 3002(c). If a creditor fails to file a claim within the
27 time periods prescribed, then the debtor (or trustee) may file a
28 claim on the creditor's behalf within 30 days of the expiration

1 of the creditor's bar date. See Rule 3004.⁴

2 Finally, Rule 9006, in conjunction with Rule 3002(c),
3 precludes the filing of an untimely proof of claim in chapter 7
4 and chapter 13 cases, except in very limited circumstances.⁵

5 **B. The Bankruptcy Court's Equitable Power To Enlarge The Time
6 for Filing A Proof of Claim Is Limited**

7 There is no dispute that SLECU failed to timely file its
8 proofs of claim by the January 8, 2013 bar date. Citing
9 Gardenhire v. IRS (In re Gardenhire), 209 F.3d 1145, 1148 (9th
10 Cir. 2000), SLECU acknowledges in its opening brief that the
11 claims bar date is a "rigid deadline" and that late-filed
12 general unsecured claims are disallowed. To be sure, the
13 bankruptcy court lacks any equitable power to enlarge the time
14 for filing a proof of claim unless one of the six situations in
15 Rule 3002(c) exists. None apply to this case. See
16 In re Gardenhire, 209 F.3d at 1148 ("Our precedents support the
17 conclusion that a bankruptcy court lacks equitable discretion to
18 enlarge the time to file proofs of claim; rather, it may only

19
20 ⁴ Rule 3004 states:

21 If a creditor does not timely file a proof of claim
22 under Rule 3002(c) or 3003(c), the debtor or trustee
23 may file a proof of the claim within 30 days after the
24 expiration of the time for filing claims prescribed by
25 Rule 3002(c) or 3003(c), whichever is applicable. The
26 clerk shall forthwith give notice of the filing to the
27 creditor, the debtor and the trustee.

26 ⁵ Rule 9006(b)(3) provides:

27 The court may enlarge the time for taking action under
28 Rules . . . 3002(c), . . . only to the extent and under
the conditions stated in those rules. . . .

1 enlarge the filing time pursuant to the exceptions set forth in
2 the Bankruptcy Code and Rules.”) (citing In re Osborne, 76 F.3d
3 306 (9th Cir. 1996), In re Tomlan, 907 F.2d 114 (9th Cir. 1990)
4 and Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.),
5 920 F.2d 1428, 1432-33 (9th Cir. 1990)). SLECU’s attempt to
6 distinguish Gardenhire and Osborne on their facts is
7 unpersuasive because the rule of law stated in those cases
8 applies with equal force to this case.

9 To the extent SLECU argues that excusable neglect is a
10 basis for enlarging the time for filing a proof of claim, that
11 argument has no merit.⁶ The excusable neglect standard set
12 forth in Rule 9006(b)(3) does not apply to permit the court to
13 extend the time for filing a proof of claim under Rule 3002(c).
14 In re Coastal Alaska Lines, Inc., 920 F.2d at 1432-33.
15 Therefore, under Rule 3002(c), a proof of claim must be
16 disallowed if it is untimely. Because SLECU had actual notice
17 of debtor’s bankruptcy case in time to file a proof of claim by
18 the claims bar date, the bankruptcy court properly found that
19 its proofs of claims were time-barred.

20 **C. The Informal Proof of Claim Doctrine Does Not Apply**

21 To avoid disallowance, SLECU argues that its late-filed
22 _____

23 ⁶ SLECU simply mentions excusable neglect as a reason why
24 courts accept late filings caused by inadvertence, mistake, or
25 carelessness, as well as by intervening circumstances beyond a
26 party’s control and cites Pioneer Inv. Servs. Co. v. Brunswick
27 Assocs. Ltd. P’ship, 507 U.S. 380 (1993). SLECU did not argue
28 excusable neglect in the bankruptcy court and the bankruptcy
court did not mention it. However, we may consider for the first
time on appeal issues of law when the relevant facts are
undisputed and/or the factual record has been fully developed.
See Vasquez v. Holder, 602 F.3d 1003, 1010 n.6 (9th Cir. 2010).

1 proofs of claim should be deemed timely under the informal proof
2 of claim doctrine because debtor listed it as a creditor with an
3 undisputed and liquidated claim in her Schedules D and F. The
4 informal proof of claim doctrine is rooted in the policy
5 favoring liberal amendments to creditors' proofs of claim so
6 that the late-filed formal claim relates back to previously
7 filed informal claim. In re Holm, 931 F.2d at 622.

8 The Ninth Circuit has articulated various tests for
9 determining whether a document constitutes an informal proof of
10 claim. Early on, in Perry v. Certificate Holders of Thrift
11 Sav., 320 F.2d 584 (9th Cir. 1963), the court held that "there
12 must have been presented, within the time limit, by or on behalf
13 of the creditor, some written instrument which brings to the
14 attention of the court the nature and amount of the claim." Id.
15 at 590. This Panel has interpreted the Perry test to include
16 five requirements: (1) presentment of a writing; (2) within the
17 time for the filing of claims; (3) by or on behalf of the
18 creditor; (4) bringing to the attention of the court; (5) the
19 nature and amount of a claim asserted against the estate.
20 In re Fish, 456 B.R. at 417 (citing Dicker v. Dye
21 (In re Edelman), 237 B.R. 146, 155 (9th Cir. BAP 1999)).

22 In Cnty. of Napa v. Franciscan Vineyards, Inc.
23 (In re Franciscan Vineyards, Inc.), 597 F.2d 181, 182 (9th Cir.
24 1979), the Ninth Circuit recited the Perry test, but also
25 refined it, noting: "'Whether formal or informal, a claim must
26 show . . . that a demand is made against the estate, and must
27 show the creditor's intention to hold the estate liable.'"
28 Several years later in Sambo's Rests., Inc. v. Wheeler

1 (In re Sambo's Rests., Inc.), 754 F.2d 811 (9th Cir. 1985), the
2 Ninth Circuit did not mention the Perry test at all, but relied
3 on its previous statement in Franciscan Vineyards to hold: "For
4 a document to constitute an informal proof of claim, it must
5 state an explicit demand showing the nature and amount of the
6 claim against the estate, and evidence an intent to hold the
7 debtor liable." Id. at 815.

8 In this case, the only "writing" SLECU relies upon for
9 application of the informal proof of claim doctrine is debtor's
10 Schedules D and F. However, the mere scheduling of a debt by a
11 debtor does not pass any test in the Ninth Circuit for an
12 informal proof of claim. Under the Sambo's Rests. test, the
13 scheduling of a debt does not constitute an "explicit demand" by
14 SLECU. Stating a demand does not mean the debtor giving mere
15 notice (such as on the schedules), but also requires a showing
16 that the creditor intends to hold the estate liable.

17 In re Sambo's Rests., Inc., 754 F.2d at 815; see also United
18 States v. Int'l Horizons, Inc. (In re Int'l Horizons), Inc.,
19 751 F.2d 1213, 1217 (11th Cir. 1985). Accordingly, debtor's
20 scheduling of the debt cannot reasonably be construed as
21 evidence of SLECU's intent to pursue its claims.

22 The scheduling of a debt also does not meet all the
23 requirements under the Perry test. In the order disallowing
24 SLECU's claims, the bankruptcy court found that debtor's
25 schedules "are not statements of the creditor." SLECU contends
26 that the informal proof of claim need not be filed by the
27 creditor. This statement is only partially correct. Under the
28 Perry test, the writing must be presented "by or on behalf of

1 the creditor." Obviously it was the debtor, not SLECU, who
2 filed the schedules. Further, although a debtor may file a
3 proof of claim on behalf of a creditor under § 501 and
4 Rule 3004, that filing must occur after the bar date. See
5 Rule 3004. Here, debtor filed her schedules well before the bar
6 date and thus it is unreasonable to conclude that the schedules
7 constituted an informal proof of claim filed on SLECU's behalf
8 pursuant to Rule 3004. Therefore, because the schedules were
9 not presented "by or on behalf of" SLECU, this element of the
10 Perry test is not met.⁷

11 More to the point, the relationship between the Bankruptcy
12 Code and the Federal Rules of Bankruptcy Procedure, which
13 together lay the foundation for the disallowance of late-filed
14 claims in chapter 13 cases, also demonstrates that the
15 scheduling of a debt standing alone does not equate to the
16 filing of a proof of claim pursuant to § 501.

17 Otherwise, there would in effect be no claims deadline
18 (all subsequently filed proofs of claim relating back
19 to the informal, scheduled claims), and the Bankruptcy
20 Rule requiring the filing of proofs of claim in
21 Chapter [13] cases (Rule 3002) would have no meaning.

22 In re Crawford, 135 B.R. 128, 132 (D. Kan. 1991).

23 SLECU cites several cases in its opening brief for the
24 proposition that the listing of claims in a debtor's schedules
25 amounts to an informal proof of claim. But these cases actually

26 ⁷ The schedules could reasonably be construed as meeting the
27 other four elements of the Perry test: The schedules constitute
28 a writing filed prior to the bar date, and the listing of the
debt as undisputed and liquidated is arguably enough to show the
nature and the amount of the claim asserted against the estate
and bring it to the attention of the court.

1 require more. Although the scheduling of a debt is not itself
2 an informal proof of claim, one may be found when the schedules
3 combine with other documents or evidence of the creditor's
4 intent to pursue the claim.

5 For example, in Scottsville Nat'l Bank v. Gilmer, 37 F.2d
6 227, 229 (4th Cir. 1930), the Fourth Circuit reversed the
7 district court's decision disallowing a late-filed claim by the
8 bank:

9 In the case presented here the debt due appellant bank
10 was listed in the schedule filed by the bankrupt, and
11 appears in the record. The letter of the trustee to
12 the bank and the bank's answer thereto, which must be
13 read together, show clearly that both the trustee and
14 bank treated the bank's claim as valid as against the
15 bankrupt estate; the trustee conferred with the
16 officers and the attorney for the bank frequently with
17 regard to matters connected with the estate; the
18 president of the bank knew that the bank's debt was
19 included in the schedule filed by the bankrupt; and it
20 is admitted by the trustee that through the effort of
21 the bank the value of bankrupt's estate was increased
22 at least 50 per cent. All these things lead to the
23 conclusion that there was sufficient in the record to
24 justify the permission to the bank to file an amended
25 claim at the time it presented same for filing, and
26 that the action of the referee in allowing said filing
27 was right.

19 Id. (emphasis added). Thus, besides being listed in the
20 debtor's schedules, there was far more in the record to support
21 allowance of the late-filed claim.

22 In In re Clapp, 57 B.R. 921 (Bankr. D. Minn. 1986),
23 although creditor was listed in the debtor's schedules, the
24 debtor sought to disallow the creditor's claim in its entirety
25 because the creditor did not file a formal proof of claim by the
26 bar date. In allowing the creditor's claim, the bankruptcy
27 court found that it "clearly and frequently asserted its
28 intention to pursue its claim," by writing letters to the

1 debtor's attorney and having its officer appointed to the
2 Unsecured Creditors Committee prior to the bar date.

3 In In re Hart Ski Mfg. Co., Inc., 5 B.R. 326, 327 (Bankr.
4 D. Minn. 1980), the bankruptcy court stated that the bar date
5 "does not apply to claims clearly and sufficiently asserted
6 within the filing period set." Id. at 328. "[I]f there is
7 upon the record in the bankruptcy proceedings' within the time
8 limitations, 'anything sufficient to show the existence, nature
9 and amount of a claim, it may be amended even after the
10 expiration of the period.'" Id. There, the creditor was listed
11 in the debtor's schedules, but the court also found that the
12 creditor had continually asserted its claims in various
13 pleadings filed in the case.

14 Finally, in Dresser Indust., Inc. v. Rite Autotronics Corp.
15 (In re Rite Autotronics Corp.), 27 B.R. 599 (9th Cir. BAP 1982)
16 the court recognized an amendable claim, in the absence of the
17 timely filing of a formal "Proof of Claim," where the debtor
18 listed a creditor in its petition and the creditor later
19 participated on a creditor's committee despite the fact there
20 was no writing. The Panel later limited the holding in Rite
21 Autotronics to its facts because there was no writing and the
22 case was filed under chapter 11. See Lees-Carney & Co. v.
23 Morrow (In re Kenitra, Inc.), 64 B.R. 841, 842 (9th Cir. BAP
24 1986). Indeed, in chapter 11, § 1111(a) provides that a proof
25 of claim is deemed filed under § 501 when it appears in the
26 schedules, except when it is scheduled as disputed, contingent,
27 or unliquidated. There is no parallel statute in the context of
28 chapter 13. Thus, well-settled statutory construction

1 principles point away from construing the mere listing of an
2 undisputed debt in a chapter 13 debtor's schedules as an
3 informal proof of claim. See Griffith v. United States
4 (In re Griffith), 206 F.3d 1389, 1394 (11th Cir. 2000) ("where
5 Congress knows how to say something but chooses not to, its
6 silence is controlling").

7 In the end, none of these cases help SLECU's position. The
8 schedules here do not combine with other documents or evidence
9 of SLECU's intent to pursue the claims. In sum, we hold that
10 the scheduling of a debt does not by itself constitute an
11 informal proof of claim. Therefore, the bankruptcy court
12 properly disallowed SLECU's proofs of claims as time-barred.

13 **C. The Judicial Admissions Doctrine Does Not Apply**

14 SLECU also relies on the judicial admissions doctrine to
15 support allowance of its claims. Its argument goes like this:
16 Creditor failed to timely file a proof of claim; debtor listed
17 the debts in her schedules; under the doctrine of judicial
18 admissions, debtor is bound by this listing; ergo, the listing
19 functions as if the creditor had timely filed the proofs of
20 claim under Rule 3002(c) or 3003(c).⁸ To recognize this
21 argument would allow through the back door what SLECU cannot
22 accomplish through the front door – the mere scheduling of a
23 debt to constitute an informal proof of claim. This would
24 circumvent not only the requirements for an informal proof of
25 claim under Ninth Circuit case law, but would also render

27 ⁸ SLECU's citation to Rule 3003(c) is puzzling. That rule
28 applies only in chapter 9 and 11 cases.

1 Rule 3002(c) essentially meaningless.

2 **VI. CONCLUSION**

3 For the reasons stated, SLECU's late-filed proofs of claim
4 have nothing to relate back to. Accordingly, we AFFIRM the
5 bankruptcy court's order disallowing SLECU's proofs of claim.⁹

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27 ⁹ Although proof of claim no. 6 is disallowed, the
28 underlying lien (to the extent one exists) is not extinguished by
the mere fact of disallowance.