

AUG 04 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NOT FOR PUBLICATION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

5	In re:)	BAP No. NC-13-1506-DJuKu
)	
6	CATHERINE JAN KOSTLAN,)	Bk. No. 11-30865-HLB
	DBA CKRT Properties,)	
7	DBA Parsimonius Design,)	
)	
8	Debtor.)	
)	
9	_____)	
	DAVID KAPNICK; LINDA KAPNICK,)	
10)	
	Appellants,)	
11)	A M E N D E D
	v.)	M E M O R A N D U M¹
12)	
	E. LYNN SCHOENMANN, Chapter 7)	
13	Trustee,)	
)	
14	Appellee.)	
)	
15	_____)	

Argued and Submitted on July 24, 2014
at San Francisco, California

Filed - August 4, 2014

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

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Gary M. Kaplan, Esq., of Farella Braun & Martel
LLP argued for appellants; Katherine D. Ray, Esq.,
of GOLDBERG, STINNETT, DAVIS & LINCHEY argued for
appellee.

Before: DUNN, JURY, and KURTZ, 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 The appellants, David and Linda Kapnick (together,
2 "Kapnicks"), guaranteed payment of a mortgage loan taken out by
3 the debtor, Catherine Jan Kostlan ("debtor"), to purchase real
4 property located in San Francisco, California ("Property").
5 Although the debtor defaulted on the mortgage loan, the lender,
6 Bank of America, N.A. ("Bank of America"), has not made a demand
7 on the Kapnicks under the guaranty.

8 After the debtor filed for bankruptcy relief, the Kapnicks
9 filed a proof of claim in an unknown amount based, in part, on
10 the guaranty.² The chapter 7 trustee objected to the claim for a
11 number of reasons, including § 502(e)(1)(B), which provides for
12 the disallowance of certain contingent claims. The bankruptcy
13 court sustained the chapter 7 trustee's objection.

14 The Kapnicks appeal the bankruptcy court's disallowance of
15 their claim.³ For the reasons set forth below, we VACATE and
16 REMAND for further proceedings.

17
18 **FACTS**

19 The facts appear to be undisputed. In March 2003, the
20 debtor purchased the Property, financing the purchase with an
21 \$850,000 loan from First Republic Bank. The bank secured
22

23 ² Unless otherwise indicated, all chapter and section
24 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
25 1532, and all "Rule" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

26 ³ The Kapnicks also appeal the bankruptcy court's decision
27 not to estimate their proof of claim under § 502(c)(1). Because
28 we vacate and remand the bankruptcy court's § 502(e)(1)(B)
determination, we do not reach the claim estimation issue.

1 repayment of the loan by a deed of trust on the Property. First
2 Republic Bank later assigned the deed of trust to Bank of
3 America.

4 In May 2003, the Kapnicks executed a continuing guaranty
5 with First Republic Bank ("Continuing Guaranty"). Under the
6 Continuing Guaranty, the Kapnicks promised to pay First Republic
7 Bank any debt owed by the debtor on the mortgage loan.

8 Specifically, the Continuing Guaranty stated:

9 To induce [Bank of America] . . . to grant credit and
10 or make financial accommodations to [the debtor] and in
11 consideration thereof of any loans, advances, or
12 financial accommodations heretofore or hereafter
13 granted by [Bank of America] to or for the account of
14 [the debtor], the undersigned [i.e., the Kapnicks]
15 (hereinafter called "Guarantors") jointly and severally
16 unconditionally guarantee and promise to pay [Bank of
17 America] or order, on demand, in lawful money of the
18 United States, any and all indebtedness (as hereinafter
19 defined) of [the debtor] to [Bank of America] under any
20 existing or future agreement or otherwise, and also
21 guarantee the due performance by [the debtor] of all
22 its obligations under all existing and future contracts
23 and agreements with [Bank of America].

24 The Kapnicks' obligations to First Republic Bank were independent
25 of the debtor's obligations to First Republic Bank.

26 Seven years later, the debtor executed a guaranty
27 reimbursement agreement ("Reimbursement Agreement") with the
28 Kapnicks. Under the Reimbursement Agreement, for recited
consideration of \$1,000, the debtor promised to reimburse the
Kapnicks for any and all amounts they expended pursuant to the
Continuing Guaranty, including any payments made on the mortgage
loan or any costs and expenses incurred in connection with it.
She further promised to "remain obligated under [the
Reimbursement Agreement] for as long as [the Kapnicks] remain[]
liable under the [Continuing Guaranty]." In conjunction with the

1 Reimbursement Agreement, the debtor gave the Kapnicks a junior
2 deed of trust on the Property.

3 The debtor filed her chapter 11 bankruptcy petition on
4 March 4, 2011; her case was converted to chapter 7 on June 7,
5 2011.⁴ E. Lynn Schoenmann initially was appointed as chapter 11
6 trustee, and later was reappointed as chapter 7 trustee
7 ("Trustee").

8 Bank of America filed a proof of claim in May 2011 ("Bank of
9 America Claim"), asserting a \$957,471.99 secured claim based on
10 the mortgage loan and deed of trust.

11 The Kapnicks filed a proof of claim in September 2011
12 ("Kapnick Claim"), asserting a secured claim in an unknown amount
13 based on the Reimbursement Agreement and the junior deed of
14 trust.⁵ They contended that the Kapnick Claim included "all
15

16 ⁴ As of July 30, 2014, no discharge order has been entered.
17

18 ⁵ The Kapnicks also asserted a \$3,570.25 unsecured priority
19 claim for administrative expenses under §§ 503(b)(1) and
20 507(a)(2), based on amounts the Kapnicks spent for property
21 insurance from May 5, 2011 to November 17, 2011, and for storage
22 fees for the debtor's personal property. The Trustee objected to
23 this portion of the Kapnick Claim as well, contending that this
24 amount was not entitled to administrative expense priority
25 because it did not provide a benefit to the bankruptcy estate.

26 The bankruptcy court indicated at the hearing that it was
27 inclined to sustain the Trustee's objection to the unsecured
28 priority portion of the Kapnick Claim without prejudice, subject
to the Kapnicks filing and serving an application for payment of
administrative expenses. The bankruptcy court did not
specifically refer to the unsecured priority portion of the
Kapnick Claim in the Kapnick Claim Order; rather, it merely
stated that it was sustaining the Trustee's objection for the
reasons stated on the record at the hearing and in its tentative
continue...

1 amounts owed now or in the future by the Debtor for any
2 reimbursement, indemnification, or other obligation of the Debtor
3 pursuant to the [Reimbursement Agreement] and applicable law,
4 including, without limitations, any amounts paid or to be paid by
5 [the Kapnicks] to [Bank of America] with respect to the [mortgage
6 loan]."

7 Meanwhile, in August 2011, the Trustee moved to abandon the
8 estate's interest in the Property and any of the debtor's
9 personal property located there under § 554 ("Motion to
10 Abandon"). She sought abandonment on the grounds that the
11 Property lacked equity,⁶ and any sale thereof might create
12 adverse tax consequences for the bankruptcy estate. When no
13 objections were made to the Motion to Abandon, the bankruptcy
14 court entered an order on September 27, 2011 ("Abandonment
15 Order"), authorizing the Trustee to abandon the Property and the
16 debtor's personal property located there.

17 In March 2013, the Trustee filed an objection to the Bank of
18 America Claim, requesting that the entire Bank of America Claim
19 be disallowed. She noted that Bank of America had not initiated
20

21 ⁵...continue
ruling.

22 In their opening brief, the Kapnicks do not mention the
23 bankruptcy court's disallowance of that portion of their claim
24 seeking reimbursement of administrative priority expenses.
25 Because they do not raise this issue on appeal in their opening
26 brief, they have waived it. Dilley v. Gunn, 64 F.3d 1365, 1367
(9th Cir. 1995) ("Issues not raised in the opening brief usually
are deemed waived.").

27 ⁶ The Trustee believed the Property lacked equity based on
28 its scheduled value of \$850,000, and Bank of America's secured
claim of \$957,371.99.

1 any foreclosure proceedings to enforce its secured claim.⁷ The
2 Trustee challenged the Bank of America Claim on the ground that
3 it was unenforceable against the bankruptcy estate because the
4 Property was no longer part of the bankruptcy estate, having been
5 abandoned under § 554, among other grounds.

6 Bank of America never responded to the Trustee's objection
7 to its proof of claim. Consequently, the bankruptcy court
8 entered an order ("Bank of America Claim Order") sustaining the
9 Trustee's objection.

10 The Trustee also filed an objection to the Kapnick Claim
11 seeking disallowance of the entire Kapnick Claim on various
12 grounds.⁸ Among them, she sought disallowance of the Kapnick
13

14
15 ⁷ Bank of America did not move for relief from stay as to
the Property at any time during the debtor's bankruptcy case.

16
17 ⁸ The Trustee argued that the Reimbursement Agreement was
unenforceable under California law because: 1) it was void as an
18 illegal contract, as it required the debtor to waive her anti-
19 deficiency protections; 2) it was unconscionable in unreasonably
favoring the Kapnicks by requiring the debtor to waive any
20 defenses she might have; and 3) the debtor's waiver of her
defenses was not knowing and intelligent.

21 The bankruptcy court did not base its ruling on any of the
Trustee's state law arguments. In fact, at the September 12,
22 2013 hearing on the Trustee's objection to the Kapnick Claim, the
bankruptcy court explained that it was "not sustaining the
23 objection on any grounds other than the fact that [it] believe[d]
24 that the claim [was] contingent." Tr. of Sept. 12, 2013 hr'g,
3:18-20. The bankruptcy court stated that it was "not finding
25 that the contract [was] illegal . . . or that the contract [was]
unconscionable." Tr. of Sept. 12, 2013 hr'g, 3:17-18.

26 On appeal, neither the Trustee nor the Kapnicks address the
27 state law grounds asserted by the Trustee in her objection to the
Kapnick Claim. We therefore decline to address them further in
28 this disposition.

1 Claim under § 502(e)(1)(B).

2 The Trustee argued that § 502(e)(1)(B) provided for
3 mandatory disallowance of contingent guaranty claims when the
4 following three circumstances were present: 1) the claim was
5 contingent; 2) the claim was for reimbursement or contribution;
6 and 3) the claimant was co-liable with the debtor with respect to
7 the claim. She alleged that all three circumstances were present
8 in that: 1) the Kapnicks' claim was contingent because they had
9 not yet paid any amounts to Bank of America under the Continuing
10 Guaranty and might not have to pay if Bank of America's debt was
11 satisfied through enforcement against the Property; 2) the
12 Kapnicks' claim was based on a guaranty, which, by its nature,
13 was a claim for contribution or reimbursement; and 3) the
14 Kapnicks and the debtor were co-liable to Bank of America on the
15 mortgage loan in that the debtor had direct liability on the
16 mortgage loan as the primary obligor and the Kapnicks had
17 secondary liability on the mortgage loan as guarantors under the
18 Continuing Guaranty.

19 The Kapnicks countered the Trustee's objection, arguing that
20 the Trustee failed to provide any evidence to support it. They
21 also contended that § 502(e)(1)(B) did not apply because there
22 was no possibility of duplicate liability now that the Bank of
23 America Claim had been disallowed. Further, if the Kapnicks
24 satisfied their obligations under the Continuing Guaranty, which
25 they anticipated doing, disallowance of the Kapnick Claim would
26 be pointless. If the bankruptcy court were inclined to sustain
27 the Trustee's objection, the Kapnicks asked that the bankruptcy
28 court estimate their claim under § 502(c)(1).

1 In her reply, the Trustee stressed that the Kapnicks'
2 reimbursement claim remained contingent and unliquidated. The
3 Kapnicks did not present any evidence showing that their
4 reimbursement claim would ever mature or be liquidated. In fact,
5 the Kapnicks did not specify a dollar amount for the secured
6 portion of their claim. Their claim was entirely contingent on
7 the Kapnicks' payment to Bank of America for any deficiency
8 resulting from the debtor's default on the mortgage loan and Bank
9 of America's foreclosure sale, which had not occurred and had not
10 even been noticed.

11 She noted that the Kapnicks bore the burden of proof to
12 establish the validity and amount of their claim, but they failed
13 to do so. The Trustee emphasized that the claim of co-debtors,
14 such as guarantors like the Kapnicks, is allowed only to the
15 extent that the co-debtors actually paid the third party's claim.
16 However, the Kapnicks had not provided any evidence that they had
17 paid Bank of America under the Continuing Guaranty or that Bank
18 of America was seeking to enforce the Continuing Guaranty.

19 The Trustee advised the bankruptcy court that she did not
20 object to temporary disallowance of the Kapnick Claim, subject to
21 reconsideration under § 502(j).

22 The bankruptcy court scheduled a hearing on the Trustee's
23 objection to the Kapnick Claim for September 12, 2013. The day
24 before the hearing, the bankruptcy court issued a tentative
25 ruling indicating that it was inclined to sustain the Trustee's
26 objection to the Kapnick Claim under § 502(e)(1)(B), subject to
27 reconsideration under § 502(j), if and when the Kapnick Claim
28 became noncontingent.

1 At the hearing, the bankruptcy court explained the basis for
2 its tentative ruling: it reasoned that § 502(e)(1)(B) required
3 denial of the Kapnick Claim because the Kapnick Claim was
4 contingent. The bankruptcy court stressed that it was "not
5 finding that the contract [was] illegal . . . [and] that the
6 contract [was] unconscionable." Tr. of Sept. 12, 2013 hr'g,
7 3:17-18. It was "not sustaining the [Trustee's] objection on any
8 grounds other than the fact that [it] believe[d] that the claim
9 [was] contingent. And [it] didn't see in the record . . . before
10 [it] any dispute as to the contingent nature of [the Kapnick
11 Claim]." Tr. of Sept. 12, 2013 hr'g, 3:18-22.

12 Counsel for the Kapnicks "agree[d] that there's not evidence
13 in the record on this issue one way or the other at this point."
14 Tr. of Sept. 12, 2013 hr'g, 3:23-25. He insisted that the
15 bankruptcy court needed to hold a further hearing to receive
16 evidence on the issue as to whether the Kapnick Claim was
17 contingent. Counsel for the Kapnicks noted that the only
18 evidence the bankruptcy court had was the Kapnick Claim itself.

19 He conceded that at the time the Kapnick Claim was filed, it
20 was "a bit of a contingent" Tr. of Sept. 12, 2013 hr'g,
21 4:4. But, he pointed out that, in the Motion to Abandon, the
22 Trustee represented that there was no equity in the Property. If
23 that were true, he argued, then the Kapnicks apparently would be
24 liable under the Continuing Guaranty because the value of the
25 Property was insufficient to satisfy the debt owed by the debtor
26 to Bank of America. Counsel for the Kapnicks noted that, while
27 some of these circumstances "[were] hypothetical," the amount of
28 the Kapnick Claim likely would be substantial, given that the

1 Property "[was] underwater and [it would] likely be sold for even
2 less than the market value at a foreclosure sale." Tr. of
3 Sept. 12, 2013 hr'g, 5:3-7.

4 Upon questioning by the bankruptcy court, counsel for the
5 Kapnicks admitted that no foreclosure proceedings had been
6 commenced, to his knowledge, and that Bank of America had made no
7 demand on the Continuing Guaranty. He reported that it was
8 "mostly true" that the Kapnicks had not paid anything toward the
9 Continuing Guaranty, noting that they nonetheless had maintained
10 insurance on the Property as required under the Continuing
11 Guaranty. Tr. of Sept. 12, 2013 hr'g, 5:14-18. Counsel for the
12 Kapnicks also informed the bankruptcy court that the debtor had
13 not made any payments on the mortgage loan since the petition
14 date.

15 Quoting § 502(e)(1)(B), the bankruptcy court then asked him
16 whether the Kapnick Claim was not a "claim for reimbursement of
17 an entity that [had] secured the claim of a creditor," as set
18 forth in the statute. Tr. of Sept. 12, 2013 hr'g, 5:23-25,
19 6:1-2. Counsel for the Kapnicks agreed with this
20 characterization.

21 The bankruptcy court noted that counsel for the Kapnicks
22 conceded in his papers that the Kapnick Claim was contingent. It
23 also pointed out that the Kapnicks had "plenty of time to move
24 for reconsideration of an order disallowing [their] claims [sic]
25 should it become noncontingent, which exactly [is] what
26 [§] 502(j) provides for." Tr. of Sept. 12, 2013 hr'g, 7:18-21.
27 It further advised counsel for the Kapnicks that if called upon
28 to do so, it would estimate the Kapnick Claim at zero because it

1 was contingent.

2 Counsel for the Kapnicks disagreed, contending that the
3 bankruptcy court needed to take into account "the likelihood of a
4 contingency occurring coupled with the anticipated damages if it
5 did occur." Tr. of Sept. 12, 2013 hr'g, 8:3-5. He insisted that
6 if evidence were presented on the issue, the amount of the
7 Kapnick Claim would not be zero.

8 In the end, the bankruptcy court took the matter under
9 submission. A few weeks later, on September 30, 2013, the
10 bankruptcy court entered an order ("Kapnick Claim Order"),
11 sustaining the Trustee's objection to the Kapnick Claim for the
12 reasons stated on the record at the hearing and in its tentative
13 ruling. Appellants' ER, Tab 13 at 188. Notably, since the
14 bankruptcy court entered the Kapnick Claim Order, as of July 11,
15 2014, the Kapnicks have not moved for reconsideration of
16 disallowance of the Kapnick Claim under § 502(j).

17 The Kapnicks timely appealed.

18

19

JURISDICTION

20 The bankruptcy court had jurisdiction under 28 U.S.C.
21 §§ 1334 and 157(b)(2)(B). We have jurisdiction under 28 U.S.C.
22 § 158.

23

24

ISSUE

25 Did the bankruptcy court err in disallowing the Kapnick
26 Claim?

27 ///

28 ///

1 **STANDARDS OF REVIEW**

2 We review a bankruptcy court’s decision to disallow a claim
3 for an abuse of discretion. See U.S. v. Berger (In re Tanaka
4 Bros. Farms, Inc.), 36 F.3d 996, 998 (10th Cir. 1994) (“The
5 decision of the bankruptcy judge to disallow the amended proof of
6 claim is reviewable under an abuse of discretion standard.”
7 (citation omitted)); Bitters v. Networks Elec. Corp.
8 (In re Networks Elec. Corp.), 195 B.R. 92, 96 (9th Cir. BAP
9 1996). We apply a two-part test to determine objectively whether
10 the bankruptcy court abused its discretion. United States v.
11 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc). First,
12 we “determine de novo whether the bankruptcy court identified the
13 correct legal rule to apply to the relief requested.” Id.
14 Second, we examine the bankruptcy court’s factual findings under
15 the clearly erroneous standard. Id. at 1252 & n.20. A
16 bankruptcy court abuses its discretion if it applied the wrong
17 legal standard or its factual findings were illogical,
18 implausible or without support in the record. Trafficschool.com,
19 Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

20
21 **DISCUSSION**

22 Section 502(e) (1) (B) provides, in relevant part:

23 [T]he court shall disallow any claim for reimbursement
24 or contribution of an entity that is liable with the
25 debtor on or has secured the claim of a creditor to the
26 extent that . . . such claim for reimbursement or
contribution is contingent as of the time of allowance
or disallowance of such claim for reimbursement or
contribution

27 Under section 502(e) (1) (B), “[a] claim will be disallowed
28 only if (1) the claim is for reimbursement or contribution;

1 (2) the party asserting the claim is liable with the debtor on
2 the claim of a creditor; and (3) the claim is contingent at the
3 time of allowance or disallowance." Dant & Russell, Inc. v.
4 Burlington N.R.R. Co. (In re Dant & Russell, Inc.), 951 F.2d 246,
5 248 (9th Cir. 1991). The party seeking disallowance of the claim
6 must show all three elements. Norpak v. Eagle-Picher Indus.,
7 Inc. (In re Eagle-Picher Indus., Inc.), 131 F.3d 1185, 1187-88
8 (citing Dant & Russell, Inc., 951 F.2d at 248 (9th Cir. 1991)).

9 The Kapnicks do not challenge the first requirement; the
10 Kapnick Claim clearly is for reimbursement. Moreover, counsel
11 for the Kapnicks agreed with the bankruptcy court at the hearing
12 that the Kapnick Claim was a claim for reimbursement. They also
13 do not challenge the third requirement. And even if the Kapnicks
14 did contest the bankruptcy court's determination on the
15 contingent nature of the claim, we cannot conclude that the
16 bankruptcy court clearly erred in its determination. The claim
17 still remains contingent as Bank of America still has not made a
18 demand for payment on the Kapnicks.

19 Instead, the Kapnicks seek to set aside the bankruptcy
20 court's ruling by focusing on the second requirement,
21 co-liability. They contend that, under Dant & Russell, Inc., a
22 determination on the second requirement is central to disallowing
23 a claim under § 502(e)(1)(B). Specifically, the Kapnicks argue
24 that their claim is not subject to disallowance under
25 § 502(e)(1)(B) because co-liability no longer exists given the
26 earlier disallowance of the Bank of America Claim.

27 The Kapnicks' argument that disallowance of the Bank of
28 America Claim eliminated their co-liability with the debtor is

1 not supported by any authority and makes no sense. Disallowance
 2 of the claim by default precludes Bank of America from
 3 participating in any distribution from the debtor’s bankruptcy
 4 estate, but it does not establish anything regarding liability or
 5 co-liability on the mortgage loan debt. While the debtor
 6 ultimately may receive a discharge in her bankruptcy case, the
 7 Kapnicks are not in bankruptcy, and their obligation under the
 8 Continuing Guaranty (if any) will not be discharged.

9 However, the problem here is that the bankruptcy court did
 10 not make any finding as to co-liability. Nothing in the record,
 11 including the Kapnick Claim Order, indicates that the bankruptcy
 12 court made such a finding. Accordingly, we must vacate and
 13 remand for the bankruptcy court to make a co-liability
 14 determination as a required element under § 502(e)(1)(B).
 15

16 **CONCLUSION**

17 For the foregoing reasons, we VACATE and REMAND for further
 18 proceedings consistent with this disposition.
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28