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NOT FOR PUBLICATION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-15-1177-TaJuKi
6	RODOLFO VELASQUEZ,)	Bk. No.	3:14-bk-30344
7	Debtor.)		
8	_____)		
9	RODOLFO VELASQUEZ,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	BANK OF AMERICA N.A.,)		
13	Appellee.)		
	_____)		

Argued and Submitted on July 28, 2016
at San Francisco, California

Filed - August 9, 2016

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Appearances: Rodolfo Velasquez argued pro se; Andrea McDonald
Hicks of Bryan Cave, LLP argued for Appellee.

Before: TAYLOR, JURY, and KIRSCHER, 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 8024-1(c)(2).

1 **INTRODUCTION**

2 Chapter 13¹ debtor Rodolfo Velasquez appeals from an order
3 overruling his objection to Bank of America's proof of claim.
4 We AFFIRM.

5 **FACTS²**

6 The Debtor scheduled an interest in real property located
7 in San Francisco, California (the "Property"). Bank of America,
8 N.A. holds an obligation secured by a lien against the Property.

9 Bank of America filed a proof of its secured claim
10 evidencing \$35,732.30 in arrearages as of the petition date.
11 The arrearages consisted of \$34,379.24 in prepetition delinquent
12 payments and \$1,353.06 in prepetition administrative fees. The
13 \$34,379.24 of delinquent payments, in turn, consisted of 34
14 monthly payments: 19 payments of \$960.48; 14 payments of
15 \$1,074.63; and 1 payment of \$1,085.30.

16 In response, the Debtor filed a "Motion to Deny Bank of
17 America's Proof of Claim Filed in the Amount of \$35,732.30." He
18 broadly questioned the amount of the arrearage and even asserted
19 that the bank owed him money as a result of overpayment. More
20 specifically, he challenged the number of allegedly delinquent
21 payments and asserted that Bank of America had improperly
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23 ¹ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 All "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure.

26 ² We exercise our discretion to take judicial notice of
27 documents electronically filed in the underlying bankruptcy
28 case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 increased his monthly payment beyond \$960.48, the fixed payment
2 amount set forth in his promissory note. He less relevantly
3 pointed out that he made a large postpetition payment of \$26,000
4 and asserted that this cured any default.

5 Bank of America responded that its proof of claim, signed
6 and executed in accordance with the Federal Rules of Bankruptcy
7 Procedure, was prima facie evidence as to the legitimacy and
8 amount of the claim. It also acknowledged that the Debtor made
9 payments to the bank prepetition, explained that it applied
10 payments to cure the most remote payment default, and provided a
11 rudimentary spreadsheet regarding the Debtor's escrow statement
12 and calculation of payments.

13 At a continued hearing on the matter, both the bankruptcy
14 court and the Debtor professed confusion with the documents
15 submitted by Bank of America in support of its claim. The
16 attorney who appeared on behalf of the bank eventually explained
17 the mechanics of a suspense account and how it would have
18 applied to the Debtor's account. The bankruptcy court then
19 attempted to explain the concept to the pro se Debtor; the
20 Debtor's concerns were not eliminated.

21 The bankruptcy court then suggested that the parties
22 participate in a third-party mediation. Bank of America
23 tentatively agreed, and the bankruptcy court cautioned the
24 Debtor to set aside his anger and to cooperate with the bank.
25 The bankruptcy court asked the Debtor whether he could
26 reconstruct from his records every payment made to the bank
27 beginning from the inception of his loan; the Debtor responded
28 that he could. It, thus, instructed the Debtor to turn over his

1 documentation of payments to the bank's counsel within two
2 weeks; the Debtor agreed. The bankruptcy court continued the
3 matter.

4 Bank of America subsequently filed a supplemental
5 declaration by Henry Longres, an Assistant Vice-President at the
6 bank. Longres attached a spreadsheet, that he attested he
7 personally prepared, detailing the payments received from the
8 Debtor dating retrospectively from September 20, 2013 - the most
9 recent payment received prepetition - and how the payments were
10 applied to the several years of default. He explained that
11 payments received by the bank falling short of a full monthly
12 payment amount were placed in a suspense account. Once
13 sufficient funds were accumulated in the account, the bank made
14 a monthly payment.

15 He further explained that payments were made on account of
16 the most distant default. Thus, the bank applied payments
17 received from the Debtor in 2013 against defaulted payments in
18 2011 or earlier.

19 Finally, Longres explained that the Debtor's monthly
20 payment of principal and interest was always \$960.47 and that
21 the monthly payment increased in January 2013 to \$1,047.63 in
22 order to fund a property tax escrow account, required because
23 the Debtor failed to pay property taxes.

24 Counsel for Bank of America also filed declarations,
25 stating that they were not successful in scheduling a mediation
26 on account of counsel's unavailability one week and the Debtor's
27 general lack of cooperation. One of the attorneys attached
28 several emails between counsel and the Debtor evidencing his

1 alleged lack of cooperation.

2 The Debtor responded to the declarations and objected to
3 several of the statements therein; in particular, he generally
4 contested the calculations of his debt owed and the arrearages.
5 He also asserted that he was not uncooperative and laid blame
6 for the scheduling issue on counsel for Bank of America,
7 asserting erroneously that the bank's counsel could not meet
8 within two weeks as instructed by the bankruptcy court at the
9 prior hearing. He provided no evidence that he provided the
10 full accounting of his payments to Bank of America as required
11 by the bankruptcy court.

12 At the final hearing, the bankruptcy court expressed
13 disappointment that the Debtor had not provided documentation of
14 payments to Bank of America as he had promised to do and that
15 Debtor was uncooperative in scheduling and attending a mediation
16 with the bank. It found that Bank of America had complied with
17 its instructions, while the Debtor had not. The bankruptcy
18 court ultimately found that it was satisfied with Bank of
19 America's evidence and that it established that its claim for
20 arrearages was valid. Thus, it overruled the Debtor's
21 objections to the proof of claim.

22 Following entry of the bankruptcy court's order overruling
23 the Debtor's objection, the Debtor timely appealed.

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1 **JURISDICTION³**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 §§ 1334 and 157(b) (2) (A) and (B). We have jurisdiction under
4 28 U.S.C. § 158.

5 **ISSUE⁴**

6 Whether the bankruptcy court erred in overruling the
7 Debtor's objection to Bank of America's proof of claim.

8 **STANDARDS OF REVIEW**

9 In the context of claims objections, we review the
10 bankruptcy court's legal conclusions de novo and its factual
11 findings for clear error. See Pierce v. Carson (In re Rader),
12 488 B.R. 406, 409 (9th Cir. BAP 2013) ("An order overruling a
13 claim objection can raise legal issues (such as the proper
14 construction of statutes and rules) which we review de novo, as
15 well as factual issues (such as whether the facts establish
16 compliance with particular statutes or rules), which we review
17 for clear error." (citation omitted)). Whether an evidentiary
18 presumption has been rebutted is a question of fact reviewed for
19 clear error. Litton Loan Servicing, LP v. Garvida

20 _____
21 ³ In its brief, Bank of America briefly argues that the
22 appeal is moot given that the bankruptcy court dismissed the
23 chapter 13 case. We disagree. The order dismissing the case is
24 concurrently on appeal and a final determination has not been
25 made. More importantly, the bankruptcy court's ruling on the
26 Debtor's objection to claim could have a preclusive effect in
27 other litigation between the parties. See Siegel v. Fed. Home
28 Loan Mortg. Corp., 143 F.3d 525, 528-31 (9th Cir. 1998). We
conclude that the appeal is not moot.

⁴ The Debtor identifies ten issues on appeal. The
majority of these are duplicative, nonsensical, irrelevant, or
outside the scope of this appeal.

1 (In re Garvida), 347 B.R. 697, 703 (9th BAP Cir. 2006).

2 Factual findings are clearly erroneous if illogical,
3 implausible, or without support in inferences that may be drawn
4 from the facts in the record. See TrafficSchool.com, Inc. v.
5 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

6 We may affirm the decision of the bankruptcy court on any
7 basis supported by the record. See Hooks v. Kitsap Tenant
8 Support Servs., Inc., 816 F.3d 550, 554 (9th Cir. 2016).

9 **DISCUSSION**

10 "A proof of claim executed and filed in accordance with
11 [the Federal Rules of Bankruptcy Procedure] shall constitute
12 prima facie evidence of the validity and amount of the claim."
13 Fed. R. Bankr. P. 3001(f). This evidentiary presumption is a
14 rebuttable one. In re Garvida, 347 B.R. at 706. "The mechanics
15 of what it takes to rebut the Rule 3001(f) presumption are
16 driven by the nature of the presumption as 'prima facie'
17 evidence of the claim's validity and amount." Id. at 706-07.
18 Thus, a properly executed proof of claim constitutes prima facie
19 evidence, and "[o]ne rebuts evidence with counter-evidence."
20 Id.

21 Here, the record shows that Bank of America executed and
22 filed the proof of claim in accordance with the Federal Rules of
23 Bankruptcy Procedure. Thus, its proof of claim provided prima
24 facie evidence as to the validity and amount of its claim. The
25 burden then shifted to the Debtor to supply sufficient counter-
26 evidence. The bankruptcy court implicitly found that he did not
27 do so. On this record, its finding was not clearly erroneous.

28 The Debtor's only relevant counter-evidence were copies of

1 checks made payable to Bank of America over the course of a two-
2 year period preceding the chapter 13 filing and a short time
3 thereafter. The Debtor argues that these checks prove that he
4 made payments to Bank of America that would negate its claim of
5 arrears.

6 First, there is no dispute that the Debtor was in default
7 as of the petition date. His postpetition payment of \$26,000
8 evidences his awareness that he owed the bank money beyond his
9 required postpetition monthly payments. Moreover, although Bank
10 of America filed its proof of claim several months after the
11 case was commenced, the document correctly calculated the
12 arrearages as of the petition date. Thus, while the Debtor's
13 large postpetition payment decreased the arrearages that he owed
14 to Bank of America, the proof of claim remained valid and
15 accurate because it evidenced the amount owed when the Debtor
16 commenced his chapter 13 case.

17 Second, Bank of America supplied additional evidence
18 supporting its proof of claim and accounting for the limited
19 payment evidence supplied by the Debtor. The supplemental
20 declaration of Henry Longres authenticated detailed spreadsheets
21 showing the receipt and application of payments preceding and
22 immediately following the Debtor's bankruptcy filing. The
23 spreadsheets accounted for the payment evidence supplied by the
24 Debtor and established that the Debtor was in arrears for the
25 June, 2011 payment as of the petition date. Longres also
26 explained how Bank of America used a suspense account to hold
27 partial payments until there were sufficient funds to clear a
28 past due payment. He finally explained that the monthly payment

1 increased because the Debtor failed to pay real property taxes.

2 Ultimately, the bankruptcy court found that Bank of
3 America's evidence adequately supported its proof of claim and
4 fully addressed the limited counter-evidence supplied by Debtor.
5 On this record, we cannot say that its findings were clearly
6 erroneous.

7 On appeal, the Debtor argues that an evidentiary hearing or
8 a trial is warranted, "where more time is available to
9 scrutinize the evidences [sic] and to make sure that the money
10 is owed." But the record shows that, in effect, the bankruptcy
11 court granted a summary adjudication in favor of Bank of
12 America. The bankruptcy court may sua sponte grant a summary
13 adjudication in the absence of a genuine dispute of material
14 fact and where the movant is entitled to judgment as a matter of
15 law. See Fed. R. Civ. P. 56(a) & (f)(3) (incorporated into
16 bankruptcy proceedings by Rules 7056 and 9014); Arce v. Douglas,
17 793 F.3d 968, 976 (9th Cir. 2015) (federal court may grant
18 summary judgment sua sponte where the party against which
19 summary judgment is granted has a "full and fair opportunity to
20 ventilate the issues.") (citation omitted).

21 Here, the Debtor advanced no evidence that, even if assumed
22 as true, would have justified a trial. His generalized
23 allegations of fraud against Bank of America were insufficient,
24 and he had a full and fair opportunity to ventilate the issue of
25 whether he owed the arrearages as claimed by Bank of America.
26 Again, his payment evidence was not disputed by Bank of America;
27 instead, it accounted for these payments and established that
28 its petition date arrearage calculation was accurate

1 notwithstanding their receipt. As the bankruptcy court
2 concluded, there remained no genuine issue of material dispute
3 that justified a trial.

4 **CONCLUSION**

5 Based on the foregoing, we AFFIRM.
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