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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-16-1118-LNTa
)
 JOHN LOUIS AVITABILE,) Bk. No. 8:14-bk-14381-ES
)
 Debtor.)
)
)
 JOHN LOUIS AVITABILE,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
)
 KATHY ROCHELEAU;)
 BRUCE ROCHELEAU,)
)
 Appellees.)
)

Argued and Submitted on January 19, 2017
at Pasadena, California

Filed - February 13, 2017

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Appearances: Michael A. Wallin of Slater Hersey and Lieberman
LLP argued for appellant; Timothy Krantz argued
for appellees.

Before: LAFFERTY, TAYLOR, and NOVACK,** 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.

** Hon. Charles Novack, United States Bankruptcy Judge for
the Northern District of California, sitting by designation.

1 work that the Rocheleaus stated was not properly performed by
2 Avitabile.

3 On July 15, 2014, Avitabile filed a voluntary petition for
4 relief under chapter 7. On the front page of the petition,
5 Avitabile indicated that there were no assets in the estate and
6 therefore no funds would be available for distribution to
7 unsecured creditors. Consistent with that assertion, Avitabile
8 did not list any interest in real property on Schedule A.
9 Schedule F listed the debt owed to the Rocheleaus at \$600,000 and
10 did not indicate that the debt was disputed or otherwise invalid.
11 The creditor mailing matrix filed along with the petition listed
12 the Rocheleaus at their home address.

13 **B. Letter from Avitabile to the Chapter 7 Trustee**

14 On August 17, 2014, Timothy Krantz ("Krantz"), counsel to
15 the Rocheleaus, sent the chapter 7 trustee Thomas H. Casey (the
16 "Trustee") a one-page letter (the "August 17 Letter") suggesting
17 that Avitabile held an apparently undisclosed interest in a trust
18 that owned certain real property in Trabuco Canyon, California.
19 In the opening paragraph of the August 17 Letter, Krantz stated:

20 I represent an unsecured creditor, Bruce Rocheleau. My
21 client obtained a Judgment of \$513,976.35 against the
22 debtor on 2/10/14. My client wanted me to pass on to
23 you the following information about possible assets
that the debtor may have but is not disclosing. You
may want to ask him about [it] during the 341a meeting
of creditors.

24 **C. The Notice of Dividend and the Claims Bar Date**

25 On March 12, 2015, the Trustee filed a Notification of Asset
26 Case (the "Notification") in which he indicated that assets would
27 be administered in the case; on the same date the Clerk of the
28 Court sent out a Notice of Possible Dividend and Order Fixing

1 Time to File Claims (the "Notice") to all creditors listed in the
2 mailing matrix, thereby setting the deadline for filing proofs of
3 claim for June 15, 2015.

4 The Notice was sent to the Rocheleaus at the address listed
5 on the mailing matrix; however, the Rocheleaus deny its receipt.
6 In any event, it is undisputed that the Rocheleaus did not file a
7 formal proof of claim prior to the June 15, 2015 deadline.

8 **D. The Filing of the August 17 Letter with the Bankruptcy Court**

9 On March 12, 2015, the same day that the Trustee filed the
10 Notification and the Clerk of the Court sent out the Notice, the
11 Trustee also filed his Motion for Order Extending Time to File
12 11 U.S.C. § 727 Complaint (the "Extension Motion"). The
13 Extension Motion sought additional time for the Trustee to
14 determine whether filing a complaint for denial of discharge
15 pursuant to Section 727 was warranted. The Extension Motion
16 stated that the Trustee had recently discovered that Avitabile
17 held an unscheduled beneficial interest in a trust established by
18 Avitabile's mother prior to the filing of the petition. The
19 Extension Motion further stated that the Trustee was "only made
20 aware of this asset by a creditor who had obtained a judgment
21 against [Avitabile] in the amount of \$513,976.33 prior to the
22 Petition Date." Furthermore, a copy of the August 17 Letter was
23 attached to the Extension Motion as an exhibit.

24 **E. The Settlement**

25 On January 25, 2016, the Trustee and Avitabile entered into
26 a settlement agreement regarding the estate's potential interest
27 in the undisclosed family trust. Pursuant to the settlement
28 agreement, the estate would receive \$76,750 in exchange for the

1 release of the estate's interest in the trust. The settlement
2 agreement also set forth the proposed distribution of the \$76,750
3 to be received by the estate. Although the settlement agreement
4 acknowledged the existence of the Rocheleaus' judgment against
5 Avitabile, it did not include the debt owed to the Rocheleaus as
6 a claim that would be paid from the settlement, presumably
7 because they had not filed a proof of claim.

8 A copy of the settlement agreement was filed with the
9 bankruptcy court and served on all parties, including the
10 Rocheleaus. The Rocheleaus contended that they first became
11 aware that there would be a dividend in the case when they
12 received a copy of the motion to approve settlement; and they
13 were alarmed to read that they were not listed as unsecured
14 creditors who would receive a distribution from the estate.
15 Nevertheless, the Rocheleaus did not file an opposition to the
16 motion to approve the settlement agreement. On February 19,
17 2016, the bankruptcy court entered an order approving the
18 settlement agreement.

19 **F. The Rocheleaus' Proof of Claim and Accompanying Motion**

20 On February 8, 2016, the Rocheleaus filed a formal proof of
21 claim, which included as an attachment a copy of the state court
22 judgment. Shortly thereafter, on February 12, 2016, they also
23 filed the Motion for Order to Allow Late Filing of Proof of Claim
24 (the "Claim Motion").

25 The Claim Motion requested that the bankruptcy court allow
26 the Rocheleaus' formal proof of claim as timely based on two
27 alternative theories: first, that the June 15, 2015 deadline to
28 file a proof of claim should be extended as to the Rocheleaus

1 because their mistaken belief that no proof of claim had to be
2 filed was the result of "excusable neglect"; second, that
3 pursuant to applicable Ninth Circuit case law, the August 17
4 Letter qualified as a timely informal proof of claim to which the
5 late-filed claim could relate back and therefore the formal claim
6 should be deemed an amendment to the informal claim. Avitabile
7 opposed the Claim Motion² asserting that the August 17 Letter did
8 not meet the requirements for an informal proof of claim, mainly
9 because it was not brought to the attention of the bankruptcy
10 court.

11 **G. The Bankruptcy Court's Disposition**

12 On April 12, 2016, the bankruptcy court held a hearing on
13 the Claim Motion and granted the Claim Motion in part and
14 rejected it in part.

15 The bankruptcy court denied the Rocheleaus' excusable
16 neglect argument because it determined that the application of
17 Rule 9006 was limited by Rule 3002(c), which controls the
18 expansion of the deadline under which creditors must file a proof
19 of claim against the estate in chapter 7 cases. Specifically,
20 the bankruptcy court determined that Rule 3002(c) listed only six
21 exceptions to the requirement to timely file a proof of claim,
22 and excusable neglect was not one of them. This aspect of the
23 bankruptcy court's ruling is not contested in this appeal.

24 The bankruptcy court granted the Claim Motion insofar as it
25 asserted that the August 17 Letter satisfied the requirements set
26

27 ² As part of the settlement, the Trustee assigned standing
28 to oppose the Claim Motion to Avitabile.

1 forth for a finding that it was a timely informal proof of claim.
2 Avitabile timely appealed.

3 **JURISDICTION**

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

7 **ISSUE**

8 Did the bankruptcy court err in determining that the
9 August 17 Letter constituted a timely informal proof of claim?

10 **STANDARD OF REVIEW**

11 Whether a document satisfies the requirements for an
12 informal proof of claim is a question of law that we review de
13 novo. Dicker v. Dye (In re Edelman), 237 B.R. 146, 150 (9th Cir.
14 BAP 1999) (citing Pizza of Hawaii, Inc. v. Shakey's, Inc. (Matter
15 of Pizza of Hawaii, Inc.), 761 F.2d 1374 (9th Cir. 1985)).

16 **DISCUSSION**

17 The Ninth Circuit has long applied a rule of "liberality in
18 amendments" to creditors' proofs of claim, permitting a later
19 filed claim to relate back to a prior informal claim. Wright v.
20 Holm (In re Holm), 931 F.2d 620, 622 (9th Cir. 1991); County of
21 Napa v. Franciscan Vineyards, Inc. (In re Franciscan Vineyards,
22 Inc.), 597 F.2d 181, 182-83 (9th Cir. 1979) (citing
23 In re Patterson-MacDonald Shipbldg. Co., 293 F. 190, 191 (9th
24 Cir. 1923)). To constitute an informal proof of claim, a
25 document must: (1) be presented via a writing; (2) be presented
26 within the time frame for the filing of claims; (3) be asserted
27 by or on behalf of the creditor; (4) be brought to the attention
28 of the bankruptcy court; (5) indicate an intent to assert a claim

1 against the estate in a set or determinable amount.

2 In re Franciscan Vineyards, Inc., 597 F.2d at 182-83; Pacific
3 Resource Credit Union v. Fish (In re Fish), 456 B.R. 413, 417
4 (9th Cir. BAP 2011); In re Edelman, 237 B.R. at 155.

5 Avitabile does not dispute that the August 17 Letter was a
6 writing presented on behalf of the Rocheleaus within the time
7 frame for filing proofs of claim or that it indicated an intent
8 to assert a claim against the estate; the only element at issue
9 is whether the August 17 Letter was brought to the attention of
10 the bankruptcy court.³

11 The Ninth Circuit has expressly determined that it is not
12 necessary that an informal proof of claim be filed with the
13 bankruptcy court or otherwise appear on the bankruptcy court's
14 record in order to satisfy this requirement. In re Holm,
15 931 F.2d at 622 ("The document that purports to be an informal
16 proof of claim need not be filed in the court.");
17 In re Franciscan Vineyards, Inc., 597 F.2d at 183 (informal

18
19 ³ With respect to the second element, whether the August 17
20 Letter was presented within the time frame for filing proofs of
21 claim, the bankruptcy court found that this element was met
22 because under Rule 3002, (in the absence of other court order) a
23 proof of claim is timely if filed no later than 90 days after the
24 first date set for the § 341 meeting. However, when the
25 August 17 Letter was sent to Trustee, no claims bar date had been
26 set because the case appeared to be a no asset chapter 7. We are
27 not convinced that a document presented before a claims bar date
28 has been set could always satisfy the timing requirement. Such a
document would not be relevant where no assets are available to
pay creditors, and the creditor could not plausibly argue that it
intended to assert a claim against an estate with no assets. But
to the extent the bankruptcy court erred in this aspect of its
ruling, it was harmless error because the August 17 Letter was
filed with the court as an attachment to the Extension Motion on
the same day the claims bar date was set.

