

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 15 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

In re:)	No. 08-35296
)	
TROUTMAN INVESTMENT)	D.C. No. 6:07-CV-06106-HO
COMPANY,)	
)	MEMORANDUM*
Debtor,)	
_____)	
)	
RON TROUTMAN,)	
)	
Appellant,)	
)	
v.)	
)	
OFFICIAL COMMITTEE OF)	
UNSECURED CREDITORS OF)	
TROUTMAN INVESTMENT)	
COMPANY,)	
)	
Appellee.)	
_____)	

Appeal from the United States District Court
for the District of Oregon
Michael R. Hogan, District Judge, Presiding

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

Submitted June 1, 2009**
Portland, Oregon

Before: O'SCANNLAIN, FERNANDEZ, and FISHER, Circuit Judges.

Ron Troutman appeals the district court order affirming the bankruptcy court's judgment in an adversary proceeding brought by the Official Committee of Unsecured Creditors of Troutman Investment Co. ("Committee") in the Chapter 11¹ proceedings of Troutman Investment Company, d/b/a Troutman's Emporium ("Emporium"). We affirm.

(1) The bankruptcy court did not err² when it determined that Troutman owed the amount shown on the books of Emporium as his house account on the date of bankruptcy. That determination was properly made on an account stated theory,³ or on an open book account theory.⁴ Moreover, to the extent that

**The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

¹11 U.S.C. §§ 1101–1174.

²See Cossu v. Jefferson Pilot Sec. Corp. (In re Cossu), 410 F.3d 591, 595 (9th Cir. 2005).

³See Hulse Ocwen Fed. Bank, FSB, 195 F. Supp. 2d 1188, 1200–01 (D. Or. 2002); Sunshine Dairy v. Jolly Joan, 234 Or. 84, 85–88, 380 P.2d 637, 638–39 (1963); Tri-County Ins., Inc. v. Marsh, 45 Or. App. 219, 223–24, 608 P.2d 190, 192 (1980).

⁴See Farmer's Feed & Supply Co. v. Indus. Leasing Corp., 286 Or. 311, 316, 594 P.2d 397, 400 (1979); Nw. Country Place, Inc. v. NCS Healthcare of Or., Inc.,
(continued...)

Troutman asserts that the amount shown in the account was not accurate at some earlier time, the bankruptcy court did not abuse its discretion⁵ when it determined that Troutman's use of the amount shown in the account during his dissolution proceeding in 1996 judicially estopped⁶ him from claiming that the account was in error as of that time. Moreover, he does not point out any error that might have developed since then.

(2) Nor did the bankruptcy court err when it determined that Troutman owed \$150,000 on account of an amount that Emporium ultimately advanced on his behalf. That Emporium obtained that debt from Troutman's brother, to whom Troutman originally owed the money, did not affect the validity of Emporium's claim. See Misic v. Building Serv. Employees Health & Welfare Trust, 789 F.2d 1374, 1378 n.4 (9th Cir. 1986); Tumac Lumber Co., Inc. v. United States, 625 F. Supp. 1030, 1032 (D. Or. 1985); Commonwealth Elec. Co. v. Fireman's Fund Ins. Co., 93 Or. App. 435, 438, 762 P.2d 1041, 1042 (1988). Troutman's assertion that Emporium was going to use the debt to purchase some of his stock in Emporium is

⁴(...continued)
201 Or. App. 448, 460, 119 P.3d 272, 279 (2005).

⁵Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001).

⁶See Hamilton, 270 F.3d at 782–83; Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 600–01, 603 (9th Cir. 1996).

futile because that arrangement was never pursued or consummated by either alleged party thereto.⁷

AFFIRMED.

⁷For that reason alone, an amendment to Troutman's defenses to assert that theory was properly rejected. See Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004); see also Allen v. City of Beverly Hills, 911 F.2d 367, 374 (9th Cir. 1990). Moreover, the request to amend was not timely. See Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608–609 (9th Cir. 1992); Texaco, Inc. v. Ponsoldt, 939 F.2d 794, 798–99 (9th Cir. 1991). We note, also, that the theory of recovery was sufficiently encompassed within the Committee's second amended complaint to place Troutman on notice.