



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
December 28, 2022

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:) Case No.: 22-10963-mkn
NORMA OCHOA,) Chapter 13
Debtor.) Date: December 21, 2022
Time: 2:30 p.m.

**ORDER ON MOTION FOR RECONSIDERATION OF SEPTEMBER 16, 2022 ORDER
DENYING OBJECTION TO PROOF OF CLAIM 6-1 PURSUANT TO FEDERAL RULE
OF BANKRUPTCY 3008¹**

On December 21, 2022, the court heard the Motion for Reconsideration of September 16, 2022 Order Denying Objection to Proof of Claim 6-1 Pursuant to Federal Rule of Bankruptcy 3008 (“3008 Motion”) brought by the above-captioned Debtor. The appearances of all parties and counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND²

¹ In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “Bankruptcy Rule” are to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure. All references to “FRE” are to the Federal Rules of Evidence.

² Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015)(“The Court may consider the records in this case, the underlying bankruptcy case and public records.”).

On March 18, 2022, a voluntary Chapter 13 petition³ was filed by Norma Ochoa (“Debtor”). (ECF No. 1). Debtor’s address is shown as 2204 Stone Pine Court, Las Vegas, Nevada 89134 (“Residence”). Attached to the petition are the Debtor’s schedules of assets and liabilities (“Schedules”) and her statement of financial affairs. On her Schedule “A/B,” Debtor attests that her Residence is worth \$602,200. On her Schedule “D,” Debtor attests that the Residence is subject to a mortgage securing a loan from Fay Servicing. Debtor does not check any of the boxes designating the debt as contingent, unliquidated, or disputed, but the description of the property states as follows: “Debtor is asserting approx. \$100k arrears. \$437,829.71 is payoff quote as of 12/20/21. Debtor is objecting to \$142,389.00 amount due per Feb 2022 statement. ie discrepancy of over \$40k from 12/21 payoff to 2/22 mortgage statement.” It therefore appears that the Debtor disputes the amount owed on her residential mortgage. A Notice of Chapter 13 Bankruptcy Case (“Bankruptcy Notice”) was mailed to all creditors. (ECF No. 6). The Bankruptcy Notice also scheduled a meeting of creditors for April 26, 2022, and set a deadline of May 27, 2022, for creditors to file proofs of claim.

On April 14, 2022, creditor U.S. Bank National Association as Legal Title Trustee for Truman 2016 SC6 Title Trust (“USB”) filed proof of claim 6-1 (“POC 6-1”) in the amount of \$440,807.43, secured by a deed of trust (“DOT”) against the Residence. Attached to POC 6-1 is a copy of USB’s “Loan Payment History from First Date of Default” (“Loan History”),⁴ the underlying “Adjustable Rate Note” (“Promissory Note”), the DOT, and other documents. The face of POC 6-1 indicates the USB acquired the claim from Fay Servicing, LLC on May 1, 2020. POC 6-1 is signed under penalty of perjury by counsel representing USB in this bankruptcy proceeding.

On June 13, 2022, Debtor filed her Objection to Proof of Claim 6-1 U.S. Bank National

³ The petition reflects that the Debtor commenced a prior Chapter 13 proceeding on December 9, 2019, denominated Case No. 19-17780, that was dismissed on January 31, 2022 without entry of a bankruptcy discharge.

⁴ The Loan History reflects the payments, fees, charges, and balance due through March 16, 2022, i.e., before the instant Chapter 13 proceeding was commenced.

Association (“USB Claim Objection”)⁵ and noticed it to be heard on July 19, 2022. (ECF Nos. 36 and 37).

On July 1, 2022, USB filed its opposition to the USB Claim Objection. (ECF No. 42).

On July 14, 2022, Debtor re-noticed the USB Claim Objection to be heard on August 11, 2022. (ECF No. 43).

On July 19, 2022, Debtor filed a reply in support of her USB Claim Objection. (ECF No. 45).

On August 11, 2022, the hearing on the USB Claim Objection was continued to August 17, 2022, and thereafter taken under submission.

On September 16, 2022, an order was entered overruling the USB Claim Objection (“Objection Order”). (ECF No. 58).

On October 24, 2022, Debtor filed the instant 3008 Motion that was noticed to be heard on November 23, 2022.⁶ (ECF Nos. 62 and 63).

On November 8, 2022, USB filed an opposition to the 3008 Motion. (ECF No. 65).

On November 16, 2022, Debtor filed a reply (“3008 Reply”). (ECF No. 66).

On November 23, 2022, the court ordered counsel at the hearing to file supplemental briefs addressing two appellate decisions concerning the court’s reconsideration under FRBP 3008.

On December 15, 2022, USB filed a supplemental brief. (ECF No. 72).

On December 16, 2022, Debtor filed a supplemental brief (“3008 Supplement”). (ECF No. 73).

DISCUSSION

Debtor seeks relief from the Objection Order based on Bankruptcy Rule 3008. That rule

⁵ Debtor objected to the arrearages included in POC 6-1 as well as the attorney’s fees and costs charged. See USB Claim Objection at 2:21 to 3:4.

⁶ Five documents are attached to the 3008 Motion as Exhibits “1” through “5”. Exhibit 1 is a copy of the USB Claim Objection. Exhibit 2 is a copy of the Debtor’s reply filed in support of the USB Claim Objection. Exhibit 3 is a copy of the Objection Order. Exhibit 4 is a copy of the Loan History that was attached to POC 6-1. Exhibit 5 is a copy of the Promissory Note as well as the DOT. All of the exhibits consist of documents previously before the court.

1 states that a “party in interest may move for reconsideration of an order allowing or disallowing a
2 claim against the estate.” It also states that the court “after a hearing on notice shall enter an
3 appropriate order.” Bankruptcy Rule 3008 apparently implements Section 502(j) which provides
4 in pertinent part that “A claim that has been allowed or disallowed may be reconsidered for
5 cause” and that “A reconsidered claim may be allowed or disallowed according to the equities of
6 the case.” 11 U.S.C. § 502(j). Those provisions of Section 502(j) distinguish between a claim
7 that has been reconsidered, and a reconsidered claim that is allowed or disallowed. Neither
8 Bankruptcy Rule 3008 nor Section 502(j), however, offer guidance on the meaning of “cause” to
9 reconsider a prior claim objection order nor the “equities of the case” governing the allowance or
10 disallowance of a reconsidered claim.

11 In Nations First Capital, LLC v. Decembre (In re Nations First Capital, LLC), 2020 WL
12 3071983 (B.A.P. 9th Cir. June 5, 2020), the Bankruptcy Appellate Panel for the Ninth Circuit
13 (“BAP”) examined whether a bankruptcy court even has discretion to reconsider a prior order
14 sustaining a claim objection to which the claim never responded. The BAP recognized that
15 “Rule 3008 and Section 502(j) essentially provide for a two-step analysis. First the bankruptcy
16 court must determine if cause exists to reconsider the claim, and second, the court may enter an
17 appropriate order based on the equities of the case.” 2020 WL 3071983, at *5. In determining if
18 cause exists to even reconsider a prior order disallowing a claim based on a failure to respond to
19 a claim objection, the BAP relied on Bankruptcy Rule 9024, rather than Bankruptcy Rule 9023,
20 because the claimant did not timely appeal the order. Id. at *4. Bankruptcy Rule 9024 permits
21 relief under Civil Rule 60(b). The latter Civil Rule provides six separate grounds for relief,
22 including a claimant’s excusable neglect in failing to respond to a claim objection.⁷ The BAP
23 concluded that the bankruptcy court erred by addressing the second step without properly
24 analyzing the first.

26 ⁷ Civil Rule 60(b) permits a court to grant relief from a prior order or a prior judgment on
27 proof of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered
28 evidence; (3) fraud, misrepresentation, or misconduct by the opposing party; (4) the judgment is
void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason that
justifies relief.

Addressing cause for relief from the order under Civil Rule 60(b), the BAP agreed with the bankruptcy court that the claimant failed to demonstrate excusable neglect under Civil Rule 60(b)(1) for failing to respond to the subject claim objection. Id. at *5. The BAP also concluded that the bankruptcy court abused its discretion by finding extraordinary circumstances under Civil Rule 60(b)(6) to excuse the claimant's failure to respond. Id. at *6. Because cause did not exist under Civil Rule 60(b), the BAP concluded that the bankruptcy court abused its discretion by reconsidering its prior claim disallowance. Id. at *8. Because the first step was not met, the BAP did not address whether the improperly reconsidered claim should be allowed or disallowed "based on the equities of the case." On further appeal, the Ninth Circuit affirmed the BAP's reasoning on whether cause had been established to reconsider the prior order. See Decembre v. Nations First Capital, 851 Fed.Appx.21 (9th Cir. 2021).

In the instant case, Debtor filed the 3008 Motion on October 24, 2022. The Objection Order was entered on September 16, 2022, and the 14-day appeal period under Bankruptcy Rule 8002(a)(1), if applicable, would have elapsed on September 30, 2022. Because the 3008 Motion was filed beyond the appeal period, it appears that Bankruptcy Rule 9024 is applicable, requiring Debtor to demonstrate as a threshold matter that she is entitled to reconsideration of the Objection Order under Civil Rule 60(b). In other words, she must meet the first step described in Nations First Capital.⁸

Just like the USB Claim Objection, see Objection Order at 3:12-18, the 3008 Motion is not accompanied by sufficient evidence to overcome the prima facie validity of POC 6-1. Debtor now focuses on the attorney's fees included in POC 6-1, see 3008 Motion at 2:26 to 3:21,

⁸ In the 3008 Motion, Debtor does not identify any ground under Civil Rule 60(b) that would provide a basis for relief, other than suggesting that USB has the burden of proof on the reasonableness of its legal fees under Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227 (B.A.P. 9th Cir. 2003). See 3008 Motion at 3:1-7. In her 3008 Reply, Debtor also does not identify any grounds for relief under Civil Rule 60(b) and simply cites the Atwood decision. See 3008 Reply at 1:16-22. In her 3008 Supplement, Debtor finally suggests that a "mistake" under Civil Rule 60(b)(1) exists because the Objection Order did not determine the reasonableness of USB's claim for legal fees under Atwood. See 3008 Supplement at 1:26 to 2:2. However, for the reasons discussed in note 11, infra, Atwood simply does not apply. Debtor does not seek relief under any of the other grounds set forth in Civil Rule 60(b).

1 but has offered no evidence contesting the reasonableness of the fees sought. Debtor
 2 acknowledges that the DOT underlying POC 6-1 authorizes recovery of attorney's fees but offers
 3 only argument rather than evidence, id. at 3:8-19, to overcome the validity of the fees charged.
 4 There is no evidence that the Debtor sought to discover any billing statements that would be in
 5 support of the legal expenses appearing in the Loan History. Debtor has offered no evidence
 6 disputing the hours expended by USB's counsel in connection with the obligation underlying
 7 POC 6-1,⁹ nor has she submitted evidence contesting the hourly rates charged. There is no
 8 indication that the Debtor ever sought evidence prior to filing the USB Claim Objection to
 9 dispute the reasonableness of the time expended or hourly rates charged by counsel, nor is there
 10 any indication that the Debtor sought to take an examination of USB's representative under
 11 Bankruptcy Rule 2004. Debtor also has offered no evidence from other competent counsel
 12 establishing the hours reasonably expended for similar services or the hourly rates that would be
 13 charged by other competent counsel. In other words, Debtor asserts that the attorney's fees
 14 included in POC 6-1 are excessive but offered no evidence to support that suggestion with the
 15 USB Claim Objection¹⁰ and offers no evidence now in support of the 3008 Motion.¹¹

16
 17 ⁹ On its face, the Loan History reflects that most of the legal expenses were incurred
 18 during the Debtor's prior Chapter 13 proceeding. Having initiated a Chapter 13 proceeding in
 19 2019 that ultimately failed in 2022, it is not clear what steps would have been unrelated to
 20 protecting USB's interest in its collateral.

21 ¹⁰ As a practical matter, most claim objections are sustained by default. A properly filed
 22 proof of claim, however, constitutes prima facie evidence of validity and amount under
 23 Bankruptcy Rule 3001(f). See Sloan v. Sandton Credit Solutions Master Fund IV (In re Sloan),
 24 2022 WL 17716448, at * 3 (B.A.P. 9th Cir. Dec. 15, 2022). Section 502(j) permits
 25 reconsideration of orders both sustaining and overruling claim objections, but it does not simply
 26 authorize "do overs" for every objection. When a creditor fails to file a proof of claim or an
 27 objection is sustained by default, the creditor's most common basis to seek reconsideration is to
 28 demonstrate "excusable neglect." See, e.g., Pioneer Inv. Services Co. v. Brunswick Assocs. Ltd.
Partnership, 507 U.S. 380 (1993)(excusable neglect of counsel in missing claim filing deadline).

¹¹ As previously noted, Debtor maintains that USB has the burden of proof on the
 reasonableness of its attorney's fees and costs based on the BAP decision in Atwood. The BAP
 expressly recognized that the secured creditor could obtain attorney's fees by filing a proof of
 claim rather than proving the reasonableness of its fees by filing a separate motion. 293 B.R. at
 232. The Atwood decision, however, involved an oversecured creditor seeking allowance of
 reasonable attorney's fees under Section 506(b). The secured creditor had the burden under

Under these circumstances, Debtor has failed to meet her burden of demonstrating that cause exists under Civil Rule 60(b) to reconsider the Claim Objection Order. Because POC 6-1 is not a reconsidered claim, it is unnecessary to consider the second step of allowing or disallowing POC 6-1 based on the equities of the case.¹²

IT IS THEREFORE ORDER that the Motion for Reconsideration of September 16, 2022 Order Denying Objection to Proof of Claim 6-1 Pursuant to Federal Rule of Bankruptcy 3008 brought by Norma Ochoa, Docket No. 62, be, and the same hereby is, **DENIED**.

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Section 506(b) or Section 1322(b) to establish the reasonableness of its fees as an essential element of its statutory claim. Id. at 233. Because an essential element of its claim under Section 506(b) was that its attorney's fees were reasonable, the oversecured creditor could not rely on the presumption of validity afforded by Bankruptcy Rule 3001(f). Id., citing Garner v. Shier (In re Garner), 246 B.R. 617, 620-21 (B.A.P. 9th Cir. 2000). Moreover, Atwood did not address the requirements under Bankruptcy Rule 3008 and Section 502(j) for reconsideration of a claim objection order. Instead, the bankruptcy court overruled an objection to the reasonableness of the attorney's fees included in a Chapter 13 secured creditor's proof of claim. The BAP reversed that determination as clearly erroneous. 293 B.R. at 233-34. The two-step process articulated in Nations First Capital was neither followed nor discussed. Thus, both procedurally and substantively, the decision in Atwood does not apply to the Debtor's proceeding.

¹² If the court did reach the second step, the same result likely would occur based on the Debtor's failure to provide an evidentiary basis to determine the amount of attorney's fees and costs incurred by USB during the Debtor's prior Chapter 13 proceeding and the failure to provide evidence of the reasonableness of the legal fees under a lodestar method or other standard.