account stated
assignment
judicial estoppel
open account

Troutman v. Official Committee of Unsecured Creditors
Ninth Circuit Ct. of Appeals No. Case No. 08-35296
Bankruptcy Adv. No. 03-6417-aer

6/15/09 9th Circuit Unpublished in Fed Rptr.(2009 WL 1974547)
(affirming Hogan-see op. E08-3, who aff'd Radcliffe-no underlying written opinion)

The Ch. 11 debtor formerly operated a regional chain of department stores. The unsecured creditor's committee brought suit against the debtor's principal's brother to collect several receivables. One receivable was on a "house account" whereby the Defendant could charge items sold by the debtor's stores and also charge purchases from third parties. The other receivable was based on an assignment. Earlier, the debtor's principal had borrowed $150,000 from a third party and subsequently loaned Defendant this amount to buy out Defendant's ex-wife's shares in the debtor. Then, in exchange for an assignment of the $150,000 receivable, the debtor paid off the principal's third party lender.

The bankruptcy court found for the committee on both the house account and the assigned debt. Defendant appealed to the District Court, which affirmed. Defendant then appealed to the Ninth Circuit, which also affirmed.

Regarding the house account, the court held the bankruptcy court did not err when it determined Defendant owed the amount shown on the debtor's books on a theory of "account stated" or alternatively on an "open account." Also, the bankruptcy court did not err in applying judicial estoppel to a portion of the house account debt, as Defendant years earlier had used the then amount shown in the account during his dissolution proceedings.

As to the assignment, the bankruptcy court did not err in allowing the claim to go forward based on the allegations in the committee's second amended complaint. The court also did not err in denying as untimely Defendant's motion to amend to add counterclaims and defenses to the assignment. Further, Defendant's assertion that the debtor was going to use the debt to purchase his stock in the debtor was futile because that arrangement was never pursued or consummated. For this reason alone, an amendment to Defendant's defenses to assert that theory

was properly rejected. Finally, the bankruptcy court did not err in finding the committee had proved Defendant's liability on the assigned debt. That the debtor obtained the debt from Defendant's brother did not affect the validity of its claim.

NOT FOR PUBLICATION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 COMPANY,	D.C. No. 6:07-CV-06106-HO
Debtor,	**MEMORANDUM***
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 11[1] proceedings of Troutman Investment Company, d/b/a Troutman's Emporium ("Emporium"). We affirm.

(1) The bankruptcy court did not err[2] 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

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

[1]11 U.S.C. §§ 1101–1174.

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

[3]See 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).

[4]See 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 discretion[5] when it determined that Troutman's use of the amount shown in the account during his dissolution proceeding in 1996 judicially estopped[6] 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

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

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

[6]See 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.

[7]For 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.