NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. PR 10-036

Bankruptcy Case No. 09-09187-ESL

ROSA M. MELENDEZ TORRES
a/k/a ROSA MARIA MELENDEZ TORRES,
Debtor.

BANCO POPULAR DE PUERTO RICO,
Appellant,

v.

ROSA M. MELENDEZ TORRES,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
(Hon. Enrique S. Lamoutte, U.S. Bankruptcy Judge)

Before
Hillman, Kornreich, and Bailey,
United States Bankruptcy Appellate Panel Judges.

Wallace Vazquez Sanabria, Esq., on brief for Appellant.

Madeline Soto Pacheco, Esq., on brief for Appellee.

January 19, 2011

HILLMAN, U.S. Bankruptcy Appellate Panel Judge.

The appellant, Banco Popular de Puerto Rico ("BPPR"), appeals from the bankruptcy court's orders dated May 10, 2010 and May 24, 2010, sustaining the objection to BPPR's proof of claim of appellee-debtor Rosa M. Melendez Torres (the "Debtor") and denying BPPR's motion for reconsideration, respectively. For the reasons set forth below, the Panel **VACATES** both orders and **REMANDS** the matter to the bankruptcy court for further proceedings consistent with this decision.

BACKGROUND

The Debtor filed her chapter 13 petition on October 29, 2009. On November 3, 2009, the bankruptcy court issued the "Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines" which, *inter alia*, scheduled the meeting of creditors to be held pursuant to 11 U.S.C. § 341 (the "Meeting of Creditors") for December 15, 2009, and established March 15, 2010, as the deadline for all non-governmental unit creditors to file a proof of claim. After the Meeting of Creditors was held and upon the recommendation of the chapter 13 trustee, the bankruptcy court confirmed the Debtor's plan on January 22, 2010. Notably, the order confirming plan expressly provided that "[i]f the debtor's plan is confirmed prior to the last day to file claims . . . a modification of the confirmed plan pursuant to 11 U.S.C. [§] 1329 may be required after these dates have past [sic]."

On March 3, 2010, BPPR filed a proof of claim (the "Claim") in the amount of $77,366.61 secured by a mortgage on certain real estate.[1] The Claim reflected an outstanding arrearage of

[1] Prior to filing the Claim, BPPR erroneously filed a proof of claim for a mortgage owed by Eduardo J. Nater Vazquez and Maritza Rodriguez Ortiz on February 25, 2010. Therefore, while the Claim is technically an amended claim, further discussion of this point is irrelevant because the prior

$162.72. The statement of account attached to the Claim disclosed that the arrearage was made up of the following components:

AMOUNT IN ARREARS

PRE-PETITION AMOUNT:		
0 payments of $568.00 each one		0.00
Accumulated lated [sic] charges		22.72
Advances Under Loan Contract:		
Title Search	$45.00	
Other	$20.00	65.00
Legal Fees		75.00
A = TOTAL PRE-PETITION AMOUNT		162.72

Copies of the mortgage note and four pages of the mortgage were also attached. The mortgage pages bear an acknowledgment from the notary that the mortgage was presented for recordation, but does not include any language regarding collection costs or other expenses.

The Debtor filed an objection to the Claim (the "Objection") on March 29, 2010. In the Objection, the Debtor stated, in relevant part:

> 1. The claim includes an amount of $162.72, that purportedly corresponds to pre-petition fees and charges . . . .
>
> 2. The claim itself reflects, in its attachment, that there are no pre-petition arrears in mortgage payments. As a matter of fact, debtor is up to date on her mortgage payments to BPPR as it is shown in the attached certification provided by creditor (Attachment I).
>
> 3. The Chapter 13 plan was confirmed by order dated January 22, 2010 without any provision for payment of arrears to BPPR, since there were none as of filing (d. e. 12).
>
> 4. Should the claim, for these arrears not be disallowed debtor will be forced to modify her confirmed plan to provide for its payment. Accordingly, debtor will be forced to pay creditor an amount in excess of what is legally owed.
>
> 5. In a case where its secured status has not be questioned, and where debtor is current at the time of the bankruptcy filing in payments on the mortgage and remain current to this

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claim was simply filed in the wrong case and the Claim was nonetheless timely filed.

> date, any fees are simply irrelevant as pertains to the administration of the estate, and certainly may not be designated or considered as pre-petition.
>
> 6. Any fee claimed for the filing of a claim in these circumstances ultimately amounts to a penalty levied against the estate merely for the debtor's exercise of her option to file for bankruptcy.
>
> 7. Moreover, the charge of $75.00 as legal fees is herein questioned on grounds that the preparation of a proof of claim is a purely ministerial act for which no legal's [sic] fees should be charged against a debtor. In re Allen[,] 215 B.R. 503 ([Bankr.] N.D. Tex. 1997); In re Maywood, 210 B.R. 91 (B[ankr.] N.D. Tex[.] 1997).
>
> 8. The net result of these actions is that, unless an order is entered to the effect that the amounts be expunged form [sic] debtor's record and creditor is barred from charging them, debtor herein will administratively and ultimately be charged for these amounts even though the arrears portion of the claim is disallowed.

The Objection was served on BPPR with a notice indicating that if no reply in opposition was filed within 30 days, the bankruptcy court could disallow the Claim without a hearing.

When BPPR did not file a response within 30 days of the Objection, the Debtor filed a request for an order disallowing the Claim on May 4, 2010. The next day, BPPR filed a response to the Objection stating in relevant part:

> 2. The reason for the objection is that Debtor was current as of the filing of the bankruptcy petition and accordingly Debtors [sic] are of the opinion that they should not pay anything.
>
> 3. Under the terms of the mortgage agreement . . . Debtors [sic] are to pay legal expenses as well as other cost [sic] related to the servicing of the mortgage.
>
> 4. 11 USCA [§] 506 allows for the charges and fees called for by the mortgage.
>
> 5. Finally Debtors [sic] do not object the amount [sic] and in our view the fees and charges are very reasonable as a matter of fact they are clerical.

BPPR also attached an additional two pages of the mortgage relating to collection costs and advances under the mortgage.

On May 10, 2010, the bankruptcy court, without a hearing, entered the following order:

> Debtor's objection to claim #17 filed by BANCO POPULAR DE PUERTO RICO (docket entry #17), is hereby granted. The response by Banco Popular de Puerto Rico (docket entry #19) does not show that the amounts claimed are actual, necessary, and reasonable expenses.

On May 20, 2010, BPPR moved for reconsideration of the May 10, 2010 order pursuant to Fed. R. Civ. P. 59(e). BPPR asserted that the Debtor never claimed the charges were not actual, necessary, or reasonable, but merely that she should not have to pay them because her mortgage payments were current. Although BPPR contended those arguments were waived by her failure to raise them, it nonetheless asserted that the contemporaneousness, necessity, and reasonableness of the charges were issues of fact which required a hearing and evidence to support the bankruptcy court's conclusion. Moreover, BPPR argued that the bankruptcy court deprived it of reasonable due process by disregarding the Debtor's contractual obligations without a hearing.

Four days later, the bankruptcy court, without a hearing, denied the motion for reconsideration without further explanation. On June 7, 2009, BPPR filed a timely notice of appeal of both the May 10, 2009 and May 24, 2009 orders.

JURISDICTION

A bankruptcy appellate panel may hear appeals from "final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)]." Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" An interlocutory order "'only decides some intervening matter pertaining to the

cause, and requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)). A bankruptcy appellate panel is duty-bound to determine its jurisdiction before proceeding to the merits even if not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). An order sustaining an objection to a claim is a final appealable order. See Orsini Santos v. Lugo Mender (In re Orsini Santos), 349 B.R. 762, 768 (B.A.P. 1st Cir. 2006) (citing Perry v. First Citizens Fed. Credit Union (In re Perry), 391 F.3d 282, 285 (1st Cir. 2004); Malden Mills Indus., Inc. v. Maroun (In re Malden Mills Indus., Inc.), 303 B.R. 688, 695 (B.A.P. 1st Cir. 2004)).

STANDARD OF REVIEW

On appeal, the bankruptcy court's findings of fact are reviewed pursuant to the clearly erroneous standard, and its conclusions of law *de novo*. See Lessard v. Wilton-Lyndeborough Coop. School Dist., 592 F.3d 267, 269 (1st Cir. 2010). A bankruptcy court's order disallowing a claim premised on a procedural default is an exercise of the court's general equitable powers and is reviewed for abuse of discretion, see Neal Mitchell Assoc. v. Braunstein (In re Lambeth Corp.), 227 B.R. 1, 6 (B.A.P. 1st Cir. 1998), but an order premised on the bankruptcy court's interpretation and application of the Bankruptcy Code is properly characterized as determining a legal question and is thus reviewed *de novo*. See id. at 6 n.9; see also American Express Bank, FSB, v. Askenaizer (In re Plourde), 418 B.R. 495 (B.A.P. 1st Cir. 2009). In the present case, the bankruptcy court's May 10, 2010 order sustaining the Objection indicates that BPPR's response, while untimely, was nonetheless considered. Therefore, the proper standard of review for that order is *de novo*.

In contrast, a bankruptcy court's order denying a motion to reconsider is reviewed for manifest abuse of discretion. See Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991). An abuse of discretion occurs where a bankruptcy court "ignored a material factor deserving of significant weight, relied upon an improper factor or [made] a serious mistake in weighing proper factors." Howard v. Lexington Invs., Inc., 284 F.3d 320, 323 (1st Cir. 2002) (quoting Indep. Oil & Chem. Workers of Quincy, Inc. v. Procter & Gamble Mfg. Co., 864 F.2d 927, 929 (1st Cir. 1988). "When . . . the court below has not disclosed the findings and conclusions upon which relief was denied, [the Panel] will sustain 'on any independently sufficient ground made manifest by the record,'" United States v. Sterling Consulting Corp. (In re Indian Motocycle Co.), 289 B.R. 269, 277 (B.A.P. 1st Cir. 2003) (quoting Hodgens v. General Dynamics Corp., 144 F.3d 151, 173 (1st Cir. 1998)), but remand is necessary where the lack of a record on appeal precludes review under this standard. See Salem Five Cents Savs. Bank v. Tardugno (In re Tardugno), 241 B.R. 777, 780 (B.A.P. 1st Cir. 1999).

DISCUSSION

Section 502(a) of the Bankruptcy Code provides that "[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). Even if a party in interest objects, however, 11 U.S.C. § 502(b) provides that the bankruptcy court "shall allow" the claim unless one of nine enumerated exceptions apply.[2] Courts disagree as to whether 11 U.S.C. § 502(b) sets forth the exclusive

[2] Section 502(b) provides in relevant part:

> Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--

bases upon which a claim may be disallowed. See In re Plourde, 418 B.R. at 504 n.12 (collecting cases); B-Real, LLC v. Melillo (In re Melillo), 392 B.R. 1 (B.A.P. 1st Cir. 2008).

Although the Bankruptcy Code does not prescribe what documentation must accompany a proof of claim, Fed. R. Bankr. P. 3001 requires that a proof of claim be a written statement that conforms substantially to "the appropriate Official Form," and if the claim is secured by real

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> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;
> (2) such claim is for unmatured interest;
> (3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;
> (4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;
> (5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--
>
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--
>
> (i) the date of the filing of the petition; and
> (ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus
>
> (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;
>
> (7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds--
>
> (A) the compensation provided by such contract, without acceleration, for one year following the earlier of--
>
> (i) the date of the filing of the petition; or
> (ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus
>
> (B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;
>
> (8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or
> (9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure . . . .
>
> 11 U.S.C. § 502(b).

property and based upon a writing, the claim must be accompanied by either the original or a duplicate of the writing, as well, as proof that the security interest has been perfected. Fed. R. Bankr. P. 3001(a), (c)-(d). In In re Plourde, the Panel further explained:

> Official Form 10[, the appropriate Official Form,] instructs the claimant to "attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of liens." Official Form 10. The creditor is required to explain any failure to attach documents based on a lack of availability. In addition, if the required documents are too voluminous, the creditor may attach a summary. Official Form 10 further requires the claimant to specify whether the claim includes "any interest or other charges in addition to the principal amount of the claim," and if so, to attach an "itemized statement of all interest or additional charges."

In re Plourde, 418 B.R. at 503-504. The sufficiency of a summary attached to a proof of claim must be analyzed on a case-by-case basis, taking into account the detail provided, the content of the schedules, and the identity of the objector. Id. at 509 n.22.

"A proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim," Fed. R. Bankr. P. 3001(f), requiring an objecting party to produce "substantial evidence" to rebut this presumption of validity. See Juniper Dev. Group v. Kahn (In re Hemingway Transp., Inc.), 993 F.2d 915, 925 (1st Cir. 1993). "If the objection is substantial, the claimant 'is required to come forward with evidence to support its claims . . . and bears the burden of proving its claims by a preponderance of the evidence.'" In re Plourde, 418 B.R. at 504 (quoting In re Organogenesis, Inc., 316 B.R. 574, 583 (Bankr. D. Mass. 2004)); see also Tracey v. United States (In re Tracey), 394 B.R. 635, 639 (B.A.P. 1st Cir. 2008). Objections to proofs of claim, like proofs of claim themselves, must be in writing, see Fed. R. Bankr. P. 3007, and pursuant to the Puerto Rico Local Bankruptcy Rules,

must state "the legal and factual grounds for the objection with particularity." P.R. LBR 3007-1(a).

Here, the main thrust of the Objection was the Debtor's contention that the fees and charges constituting the pre-petition arrearage portion of the Claim were unrecoverable because the Debtor was current in her mortgage payments on the petition date and remained so post-petition. Though not clearly, the Debtor also appears to have challenged the assertion that these charges were, in fact, pre-petition arrearages in as much as she refers to them being inappropriately "designated or considered as pre-petition." On the other hand, she undercuts this interpretation by asserting, without explanation, that "the arrears portion of the claim is disallowed," possibly reasoning that her confirmed plan did not provide for any arrearage.[3]

Ultimately, the Objection is too ambiguous and lacks the factual and legal particularity required by the local rule. See P.R. LBR 3007-1(a). The Debtor's primary argument, that because there were no pre-petition or post-petition arrears in her mortgage payments, any fees are irrelevant, is without legal support. Notably, the Debtor did not state that she did not incur late fees, but only that her *payments* were current as of the petition date. Additionally, despite the initial absence of the mortgage pages relating to BPPR's entitlement to costs, which it subsequently attached to the response, she did not contest the amount or validity of either the "Title Search" or "Other" charges in the Objection. In fact, the only specific objection proffered was to legal fees incurred preparing the Claim, though it is not apparent on its face that such costs were actually included in the legal fees requested. To the contrary, the statement of

[3] This argument, however, fails to consider that the claims bar date had not yet passed by the time the plan had been confirmed.

account indicated that all these charges were incurred pre-petition. None of these arguments fall under any of the nine exceptions set forth in 11 U.S.C. § 502(b). At best, one could only construe the Objection as challenging the sufficiency of the summary of account or, more generally (and generously), the documentation supporting the Claim.[4]

Given the Objection's vagueness, it was error for the bankruptcy court to have sustained it. The Claim substantially conformed to Official Form 10 and was accompanied by the writing upon which the secured claim was based, namely, the mortgage note, a portion of the mortgage evidencing the perfection of the security interest, and an itemized statement of account. Assuming, *arguendo*, that the omission of the mortgage pages demonstrating BPPR's entitlement to collection costs and other advances deprived the Claim of prima facie validity, see Fed. R. Bankr. P. 3001(f), their attachment to the response, which was expressly considered by the bankruptcy court, should have remedied any procedural defect. See, e.g., In re Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993) ("A creditor should therefore be allowed to amend his incomplete proof of claim . . . to comply with the requirements of Rule 3001, provided that other creditors are not harmed by the belated completion of the filing"); Heath v. American Express Travel Related Servs. Co., Inc. (In re Heath), 331 B.R. 424 (B.A.P. 9th Cir. 2005) (claim should not be disallowed simply for failure to fully comply with Fed. R. Bankr. P. 3001(c)); Dove-Nation v. eCast Settlement Corp. (In re Dove-Nation), 318 B.R. 147, 152 (B.A.P. 8th Cir. 2004) ("[E]ven

[4] On appeal, however, the Debtor characterizes the Objection as follows: "it is objected [sic] that Melendez' estate be liable to BPPR for fees and charges that under the circumstances of the instant case are not required to have been incurred in the first place, and even worse, where no evidence of these having been incurred has been provided by BPPR." Essentially, the Debtor appears to argue that if she was otherwise current in her payments, BPPR should not have filed a proof of claim or incurred any fees. Alternatively, she may be arguing that default is a precondition to collect these fees under the mortgage. In any event, this emphasizes the Objection's lack of clarity even at this late stage.

if the claims had not substantially complied with Rule 3001, the claims are still allowed claims under Section 502 of the Bankruptcy Code unless the Debtor establishes an exception under Section 502(b)."); cf. Caplan v. B-Line, LLC (In re Kirkland), 572 F.3d 838 (10th Cir. 2009) (claim disallowed for failure to provide *any* supporting documentation after an evidentiary hearing); In re Melillo, 392 B.R. at 4-5 (claim disallowed where creditor failed to prove ownership of claim by providing proof of assignment). Instead, the bankruptcy court found that the "response . . . does not show that the amounts claimed are actual, necessary, and reasonable expenses," raising issues which were not articulated in the Objection, issues of which BPPR had no notice and to which BPPR was afforded no opportunity to respond. This too was error.[5]

CONCLUSION

The Panel **VACATES** the bankruptcy court's orders sustaining the Objection and denying reconsideration and **REMANDS** the matter to the bankruptcy court for further proceedings.

[5] Alternatively, the Panel would be compelled to vacate the order denying reconsideration and remand the matter back to the bankruptcy court to make appropriate findings of fact and conclusions of law as a review for abuse of discretion is impossible where the bankruptcy court's reasoning is not articulated. See In re Tardugno, 241 B.R. at 779.