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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	AZ-10-1104-JuBaPa
7	FIRST PROTECTION, INC.)	Bk. No.	08-08964-RTB
8	Debtor.)	Adv. No.	09-01266-RTB
9	<hr/>			
10	DAVID FURSMAN; LAURA FURSMAN;)		
11	GALE P. THOMPSON; REDUX)		
12	DEVELOPMENT, LLC)		
13	Appellants,)		
14	v.)	O P I N I O N	
15	DALE D. ULRICH, Chapter 7)		
16	Trustee,)		
17	Appellee.)		
18	<hr/>			

Argued and Submitted on October 22, 2010
at Phoenix, Arizona

Filed - November 22, 2010

Appeal from the United States Bankruptcy Court
for the District of Arizona

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding.

Appearances: Appellant David Fursman argued pro se
Stuart Bradley Rodgers of Lane & Nach, P.C.,
argued for appellee Dale D. Ulrich

Before: JURY, BAUER,¹ and PAPPAS, Bankruptcy Judges.

¹ Hon. Catherine E. Bauer, Bankruptcy Judge for the
Central District of California, sitting by designation.

1 JURY, Bankruptcy Judge:
2

3 Chapter 7² trustee, Dale D. Ulrich, commenced an adversary
4 proceeding against debtors David and Laura Fursman (the
5 "Fursmans" or "Debtors") and First Protection, Inc. ("FP"), and
6 non-debtors Gale P. Thompson ("Thompson") and Redux Development,
7 LLC ("Redux") (collectively, the "Defendants") seeking to avoid
8 the Fursmans' postpetition transfer of 50% of their interest in
9 Redux to Thompson under § 549. The parties filed cross motions
10 for summary judgment. Finding no genuine issue as to any
11 material fact, the bankruptcy court granted the trustee's motion
12 and entered judgment avoiding the transfer.

13 Defendants³ appeal, assigning multiple errors to the
14 bankruptcy court's decision. For the reasons explained below, we
15 AFFIRM.

16 **I. FACTS**

17 The Fursmans were the sole owners of FP, an Arizona
18 corporation, which was in the business of offering remote
19 monitored security systems. They also were the sole owners and
20 members of Redux, which was in the business of acquiring
21 residential properties to renovate and then sell or rent.

22 On July 18, 2008, the Fursmans filed their individual
23

24 ² Unless otherwise indicated, all chapter, section and
25 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
26 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

27 ³ Redux did not participate in this appeal because it was
28 unable to afford counsel.

1 chapter 11 petition. On the same day, the Fursmans authorized
2 and filed FP's chapter 11 petition. The Fursmans managed their
3 own affairs and those of FP as debtors-in-possession. On
4 September 16, 2008, the bankruptcy court approved the Fursmans'
5 motion to jointly administer the two estates under the caption of
6 FP.⁴

7 In the Fursmans' individual chapter 11, they listed their
8 100% membership interest in Redux valued at \$340,000 in Schedule
9 B. At the time of their filing, Redux's assets consisted of
10 unencumbered real property and a 2002 Cadillac Escalade. The
11 Fursmans also listed the operating agreement between Redux and
12 themselves as an executory contract in Schedule G.

13 On January 19, 2009, the Fursmans transferred 50% of their
14 membership interest in Redux to Thompson, who was Laura Fursman's
15 mother. In exchange, Thompson made a capital contribution of
16 \$1,000 and agreed to provide loans or a line of credit to Redux
17 as agreed upon by the members. Subsequently, Thompson made
18 approximately \$70,000 in loans to Redux so that the company could
19 complete its sole residential project.⁵ The Fursmans assert that
20 Thompson's loans were secured by the underlying real property
21 owned by Redux but the record has no evidence of a perfected
22

23
24 ⁴ Neither FP's estate nor its assets are implicated in
25 this appeal.

26 ⁵ The trustee later learned that the bulk of Thompson's
27 loans were used for the Fursmans' personal use, with less than
28 \$5,000 spent on improving the real property owned by Redux.
Debtors contend that they had an "agreement" with Redux to pay
their living expenses.

1 security interest.⁶

2 On June 15, 2009, the Fursmans' and FP's chapter 11 cases
3 converted to chapter 7 and Ulrich was appointed the chapter 7
4 trustee. The Fursmans amended their Schedule B to reflect their
5 interest in Redux valued at \$70,000.

6 On October 1, 2009, the trustee commenced an adversary
7 proceeding against the Defendants seeking to avoid the Fursmans'
8 postpetition transfer of 50% of their interest in Redux to
9 Thompson under § 549 and requested an order requiring turnover of
10 Redux's books and records under § 542.⁷ On the same day, the
11 trustee moved for a temporary restraining order, seeking to
12 enjoin the Fursmans from selling or otherwise dissipating assets
13 owned by Redux, which the bankruptcy court granted by order
14 entered on October 2, 2009. The court subsequently granted the
15 trustee's request for a preliminary injunction by order entered
16 on October 15, 2009.

17 Thereafter, the parties filed cross motions for summary
18 judgment on the merits of the complaint. After hearing oral
19 argument, the court took the matter under advisement. On March
20 5, 2010, the bankruptcy court ruled for the trustee and entered
21 judgment on March 15, 2010.

22 The bankruptcy court found that the Fursmans' interest in
23

24 ⁶ At oral argument, trustee's counsel acknowledged that
25 obligations of Redux, whether to Thompson or to other creditors,
26 would need to be addressed by the trustee either in the course of
dissolving the LLC or as claims against the estate.

27 ⁷ The § 542 claim for relief is not at issue in this
28 appeal.

1 Redux became property of their bankruptcy estate and therefore
2 they had no personal interest in Redux at the time they
3 authorized the transfer to Thompson. The court also found that
4 the transfer was avoidable under § 549 because it was an
5 unauthorized postpetition transfer. The court lifted the
6 injunction, finding that it was inapplicable to the trustee and
7 the estate as 100% owner of Redux. Finally, the court awarded
8 the trustee \$250 in costs, payable by Defendants, jointly and
9 severally.

10 On March 17, 2010, the Fursmans filed a Motion for
11 Reconsideration, arguing that the bankruptcy court's factual
12 finding that the transfer occurred after they filed their chapter
13 7 bankruptcy petition was clearly erroneous. They maintained
14 that the transfer occurred six months prior to the conversion of
15 their case and that at the time of the transfer they were acting
16 as debtors-in-possession. The court denied the Fursmans' motion
17 by order entered on March 31, 2010, finding that the trustee's
18 avoiding power under § 549 was not affected by the conversion of
19 their case.

20 On March 29, 2010, the Defendants filed a timely Notice of
21 Appeal ("NOA"), which was not signed by Thompson. They
22 subsequently moved for a stay pending appeal which the bankruptcy
23 court denied.

24 **II. JURISDICTION**

25 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
26 over this core proceeding under § 157(b)(2)(A) and (E). We have
27 jurisdiction under 28 U.S.C. § 158(a).

1 the transferee, is the "person aggrieved." See Debbie Reynolds
2 Hotel & Casino, Inc. v. Calstar Corp. (In re Debbie Reynolds
3 Hotel & Casino, Inc.), 255 F.3d 1061, 1066 (9th Cir. 2001) ("Only
4 a party who is 'directly and adversely affected pecuniarily' by
5 an order of the bankruptcy court may appeal."). We have
6 previously held that debtors, as transferors of property, do not
7 have standing to appeal an order avoiding the transfer. See
8 Trujillo v. Grimmett (In re Trujillo), 215 B.R. 200, 203 n.3 (9th
9 Cir. BAP 1997). However, we do not apply this rule in a vacuum.
10 In Trujillo, the debtors argued on appeal that the property was
11 never transferred at all because they retained beneficial title
12 to the property. Id. The Panel held that the debtors had
13 standing to appeal this limited issue. Id.

14 Similarly, the Fursmans raise numerous issues relating to
15 their defenses as transferors. They argue: (1) that they
16 (personally) did not sell or otherwise transfer their membership
17 interest in Redux to Thompson; (2) that the transfer was
18 authorized because they were operating as debtors-in-possession
19 when the transfer occurred; (3) that the trustee had no right to
20 control Redux or participate in management because he was simply
21 an assignee of the Fursmans' rights under Arizona law and the
22 operating agreement; and (4) that the operating agreement was an
23 executory contract which the trustee did not timely assume under
24 § 365(d)(1) and which was not assumable under § 365(c)(1)(A) or
25 (e)(2)(A)(i). We conclude that resolution of these issues
26 directly affects the Fursmans and thus they have standing to
27 address these issues on appeal.

28 Moreover, it is unnecessary to adhere to strict standards

1 regarding standing on appeal here because the trustee named the
2 Fursmans as party defendants in the adversary proceeding. The
3 adverse judgment against them not only avoids the transfer to
4 Thompson, but also makes the Fursmans liable for the costs
5 awarded to the trustee. Therefore, the Fursmans do not stand
6 solely in the shoes of a debtor in this appeal, but will suffer
7 pecuniary harm as defendants if the judgment is affirmed. Under
8 these circumstances, the Fursmans should not be denied an
9 opportunity to appeal from an adverse judgment when they fully
10 participated in defending the case below. See Comjean v.
11 Cruickshank, 191 B.R. 504, 507 (D. Mass. 1995) (noting that
12 imposing the pecuniary loss requirement on a debtor who was named
13 as a party defendant in an adversary proceeding "would
14 paradoxically imply that a party against whom a judgment is
15 entered is not aggrieved by that judgment.").

16 However, the Fursmans may only appeal to protect their own
17 interests and not those of a coparty. Taxel v. Elec. Sports
18 Research (In re Cinematronics, Inc.), 916 F.2d 1444, 1448 (9th
19 Cir. 1990). In this regard, the trustee urges us to dismiss
20 Thompson from this appeal because she did not properly join the
21 NOA or the appellate briefs by signing her name – a requirement
22 under Rule 9011(a). The trustee cites no authority that supports
23 application of Rule 9011(a) to our appeals and the authority we
24 found suggests otherwise.⁸ See Franchise Tax Bd. v. Roberts (In

26 ⁸ Rule 8001(a) governs the filing of a NOA from a
27 judgment of a bankruptcy court. There is no requirement in Rule
28 8001 that all the parties sign the NOA. Rule 8001(a) is "modeled
(continued...)

1 re Roberts), 175 B.R. 339, 345 n.4 (9th Cir. BAP 1994) (noting
2 that Fed. R. App. P. 38 rather than Rule 9011 applied for
3 purposes of awarding sanctions for a frivolous appeal).
4 Regardless, whether the rule is applicable or not, the signing of
5 papers, deriving from Rule 9011(a), is a non-jurisdictional
6 requirement. Becker v. Montgomery, 532 U.S. 757, 760 (2001).
7 Accordingly, the fact that Thompson signed neither the NOA nor
8 the appellate briefs does not deprive us of jurisdiction over her
9 appeal. See id.

10 Further, Rule 9011(a) provides a remedy for an unsigned
11 paper: "An unsigned paper shall be stricken unless omission of
12 the signature is corrected promptly after being called to the
13 attention of the attorney or party." Here, prompted by the
14 trustee's challenge to Thompson's joinder in this appeal,
15 Thompson filed a declaration on May 29, 2010, stating that it was
16 her "intention and understanding that [she] was actively
17 participating in the proceedings by listing her name in each
18 pleading," as well as her "endorse[ment] of all previous
19 pleadings and documents presented on behalf of [herself] and
20 David and Laura Fursman, including the opening brief filed in the
21 Bankruptcy Appellate Case captioned above." Thompson filed her
22 declaration just fifteen days after the defect was brought to her
23

24 _____
25 ⁸(...continued)
26 after" Fed. R. App. P. 3, which governs the manner of taking an
27 appeal from a district court ruling. Wien Air Alaska, Inc. v.
28 Bachner, 865 F.2d 1106, 1111 n.4 (9th Cir. 1989) (stating that
Rule 8001(a) "derives from the appellate rule"). Fed. R. App. P.
3 also does not contain a requirement that all parties sign the
NOA.

1 attention. Thus, even were the papers in this appeal subject to
2 Rule 9011(a), the lack of a signature defect has been cured.
3 Becker, 532 U.S. at 760 (“[I]f the [NOA] is timely filed and
4 adequate in other respects, jurisdiction will vest in the court
5 of appeals, where the case may proceed so long as the appellant
6 promptly supplies the signature once the omission is called to
7 his attention.”).

8 It is undisputed that the NOA was timely filed and adequate
9 in all other respects. Further, it was clear from the face of
10 the NOA that Thompson intended to appeal the bankruptcy court’s
11 decision avoiding the transfer; the trustee does not contend
12 otherwise. Accordingly, we decline to dismiss Thompson from this
13 appeal on the technical grounds argued by the trustee.

14 **B. The Merits**

15 Section 549 authorizes the trustee to avoid a transfer of
16 estate property that occurs after the commencement of the case.
17 The trustee’s prima facie case requires proof of (1) a transfer
18 (2) of estate property; (3) that occurred after the commencement
19 of the case; and (4) that was not authorized by statute or the
20 court.⁹ § 549. Once the trustee establishes a prima facie case,
21 to the extent that a transfer is avoided under § 549, the trustee
22 may recover, for the benefit of the estate, the property
23 transferred, or the value of such property, from the initial
24

25
26 ⁹ Section 549 provides in relevant part: “(a) Except as
27 provided in subsection (b) or (c) of this section, the trustee
28 may avoid a transfer of property of the estate – (1) that occurs
after the commencement of the case; . . . (2) (A) . . . ; or (B)
that is not authorized under this title or by the court.”

1 transferee or any subsequent transferee. § 550(a)(1) and (2).¹⁰

2 Rule 6001 provides: "Any entity asserting the validity of a
3 transfer under § 549 of the Code shall have the burden of proof."

4 Therefore, the ultimate burden here is on appellants.

5 **1. Transfer**

6 Debtors assert that they did not make a "transfer" to
7 Thompson because Redux itself expanded the members to include
8 Thompson. A transfer is broadly defined as:

9 [E]ach mode, direct or indirect, absolute or
10 conditional, voluntary or involuntary, of disposing of
11 or parting with - (i) property; or (ii) an interest in
property.

12 § 101(54)(D); see also, Aalfs v. Wirum (In re Straightline Invs.,
13 Inc.), 525 F.3d 870, 877 (9th Cir. 2008). The plain language of
14 the statute makes clear that the transfer need not be made
15 directly by the debtor. § 101(54)(D) (stating that a transfer
16 may be direct or indirect); see also, Carmel v. River Bank Am.
17 (In re FBN Food Servs., Inc.), 175 B.R. 671, 683 (Bankr. N.D.
18 Ill. 1994), aff'd, 185 B.R. 265 (N.D. Ill. 1995). There is no
19 question that a "transfer" of Debtors' property occurred by the
20 transaction between the Fursmans and Thompson even though the
21 transfer may have been effected by Redux, an entity which was
22 100% owned and controlled by Debtors.

23
24 ¹⁰ Section 550 provides in relevant part: "(a) Except as
25 otherwise provided in this section, to the extent that a transfer
26 is avoided under section . . . 549 . . . of this title, the
27 trustee may recover, for the benefit of the estate, the property
28 transferred, or, if the court so orders, the value of such
property, from - (1) the initial transferee of such transfer . .
. ; or (2) any immediate or mediate transferee of such initial
transferee."

1 **2. Estate Property**

2 Moreover, it is clear under § 541(a) that if Debtors
3 possessed any "legal or equitable interest" in Redux as of their
4 filing date, then that interest was property of their estate, and
5 any act by Debtors to exercise control over or to negate such
6 interest might be voidable under § 549(a).

7 Debtors' main contention in this appeal centers on the
8 bankruptcy court's legal conclusion regarding the extent of their
9 interests in Redux that became property of their estate.

10 "Although the question whether an interest claimed by the debtor
11 is 'property of the estate' is a federal question to be decided
12 by federal law, bankruptcy courts must look to state law to
13 determine whether and to what extent the debtor has any legal or
14 equitable interests in property as of the commencement of the
15 case." McCarthy, Johnson & Miller v. N. Bay Plumbing, Inc. (In
16 re Pettit), 217 F.3d 1072, 1078 (9th Cir. 2000) (citing Butner v.
17 United States, 440 U.S. 48, 54-55 (1979)).

18 Because Redux is an Arizona limited liability company, we
19 examine the relevant statutes in the Arizona LLC Act. Ariz. Rev.
20 Stat. § 29-601(13) defines a "Member's interest" as "a member's
21 share of the profits and losses of a limited liability company
22 and the right to receive distributions of limited liability
23 company assets." Ariz. Rev. Stat. § 29-732(A) provides that an
24 interest in a limited liability company is personal property.
25 Debtors do not dispute that their membership interest and,
26 therefore, their right to profits and distributions from Redux
27 became property of their estate.

28 Debtors contend, however, that their non-economic rights,

1 such as their right to manage and control Redux, did not become
2 property of their estate. In support of this proposition, they
3 argue that the trustee's rights are only as an assignee under
4 Ariz. Rev. Stat. § 29-732(A)¹¹ or not unlike that of a judgment
5 creditor with a charging order under Ariz. Rev. Stat. § 29-
6 655(A).¹² As such, they contend the trustee had no right to
7 participate in the management of Redux or to control it, but may
8 recover only the profits and accrued distributions, of which
9 there are none.

10 Debtors' arguments are similar to those raised in In re
11 Albright, 291 B.R. 538 (Bankr. D. Colo. 2003), one of the few

12
13 ¹¹ Ariz. Rev. Stat. § 29-732(A) provides in relevant part:

14 The assignment of an interest in a limited liability
15 company does not dissolve the limited liability company
16 or entitle the assignee to participate in the
17 management of the business and affairs of the limited
18 liability company or to become or to exercise the
19 rights of a member, unless the assignee is admitted as
20 a member as provided in [Ariz. Rev. Stat.] § 29-731.
21 An assignee that has not become a member is only
22 entitled to receive, to the extent assigned, the share
23 of distributions, including distributions representing
24 the return of contributions, and the allocation of
25 profits and losses, to which the assignor would
26 otherwise be entitled with respect to the assigned
27 interest. (emphasis added)

28 ¹² Ariz. Rev. Stat. § 29-655(A) provides in relevant part:

29 A. On application to a court of competent jurisdiction
30 by any judgment creditor of a member, the court may
31 charge the member's interest in the limited liability
32 company with payment of the unsatisfied amount of the
33 judgment plus interest. To the extent so charged, the
34 judgment creditor has only the rights of an assignee of
35 the member's interest. (emphasis added)

1 cases which discuss a bankruptcy trustee's rights in a single-
2 member LLC in conjunction with the governing statutory LLC law.
3 In Albright, the chapter 7 trustee moved for authority to
4 liquidate property owned by the individual debtor's LLC. The
5 trustee maintained that because the debtor was the sole member
6 and manager of the LLC at the time she filed bankruptcy, he
7 controlled the LLC and could cause the LLC to sell the real
8 property and distribute the sales proceeds to her bankruptcy
9 estate. Id. at 539. The debtor asserted that, at best, the
10 trustee was entitled to a charging order and could not assume
11 management of the LLC or cause the LLC to sell the real property.
12 Id. After examining the relevant statutes in the Colorado LLC
13 Act, the court held that the debtor's bankruptcy filing
14 effectively assigned her entire membership interest in the LLC to
15 the bankruptcy estate, and the trustee obtained all her rights,
16 including the right to control the management of the LLC. Id. at
17 540.¹³

18 In addressing the debtor's argument regarding the statutory
19 charging order limitation, the Albright court observed that the
20 purpose of the charging order was not served in single-member
21 LLCs because it was to protect other members of an LLC from being
22 forced to involuntarily share governance responsibilities with
23

24 ¹³ The Albright court observed that in a multi-member LLC
25 the result would be different. "Where a single member files
26 bankruptcy while the other members of a multi-member LLC do not,
27 . . . the bankruptcy estate is only entitled to receive the share
28 of profits or other compensation by way of income and the return
of the contributions to which that member would otherwise be
entitled." 291 B.R. at 540 n.7. Our decision in this appeal,
however, does not involve a multi-member LLC.

1 someone they did not choose, or from being forced to accept a
2 creditor of another member as a co-manager. Id. at 541. "A
3 charging order protects the autonomy of the original members, and
4 their ability to manage their own enterprise." Id.; see also,
5 Olmstead v. Fed. Trade Comm'n, 44 So. 3d 76, 81 (Fla. 2010)
6 (noting that the charging order provision under Florida's LLC Act
7 "simply acknowledges that a judgment creditor cannot defeat the
8 rights of nondebtor members of an LLC to withhold consent to the
9 transfer of management rights.")

10 We agree with the outcome in Albright, but reach the same
11 conclusion by way of another path.

12 **a. Section 541(c)**

13 We conclude that all of Debtors' contractual rights and
14 interest in Redux became property of their estate under
15 § 541(a)(1) by operation of law when they filed their petition.
16 Section 541(c)(1)(A) overrides both contract and state law
17 restrictions on the transfers or assignment of Debtors' interest
18 in Redux in order to sweep all their interests into their estate.
19 § 541(c)(1)(A).¹⁴ Accordingly, the restrictions Debtors point to
20 under the operating agreement or the Arizona LLC Act did not
21 prevent the vesting of their contractual rights in their
22 bankruptcy estate. See Movitz v. Fiesta Invs., LLC (In re

23
24 ¹⁴ Section 541(c)(1)(A) provides in relevant part:

25 [A]n interest of the debtor in property becomes
26 property of the estate under subsection (a)(1) . . .
27 notwithstanding any provision in an agreement, transfer
28 instrument, or applicable nonbankruptcy law – (A) that
restricts or conditions transfer of such interest by
the debtor

1 Ehmann), 319 B.R. 200, 206 (Bankr. D. Ariz. 2005) (noting
2 limitations in operating agreement of multi-member LLC and
3 provisions under Arizona's LLC Act fell within scope of
4 § 541(c)(1)). As a result, the trustee was not a mere assignee,
5 but stepped into Debtors' shoes, succeeding to all of their
6 rights, including the right to control Redux. Id. For this same
7 reason, we are not persuaded by Debtors' argument that relegates
8 the trustee to the role of a judgment creditor and the remedy of
9 a charging order under Ariz. Rev. Stat. § 29-655(A).

10 **b. Section 365**

11 Generally, the bankruptcy estate automatically succeeds to a
12 debtor's assets. However, because an executory contract is both
13 a potential asset and a potential liability of the debtor it is
14 treated differently.

15 The trustee's power to reject those executory
16 contracts which he finds burdensome to the bankrupt's
17 estate is an extension of his power to renounce title
18 to and abandon burdensome property which is already a
19 part of the estate. Because executory contracts . . .
20 involve future liabilities as well as rights, however,
21 an affirmative act of assumption by the trustee is
22 required to bring the property into the estate in order
23 to ensure that the estate is not charged with the
24 liabilities except upon due deliberation. Thus,
25 executory contracts . . . - unlike all other assets -
26 do not vest in the trustee as of the date of the filing
27 of the bankruptcy petition. They vest only upon the
28 trustee's timely and affirmative act of assumption.

23 Cheadle v. Appleatchee Riders Ass'n (In re Lovitt), 757 F.2d
24 1035, 1041 (9th Cir. 1985) (citations omitted). Thus, if the
25 operating agreement is an executory contract as Debtors contend,
26 § 365 governs the trustee's rights rather than § 541(c)(1). In
27 that event, the restrictive provisions under the Arizona LLC Act
28 or the operating agreement that affect the transfer of Debtors'

1 rights and interests in Redux may be enforced through operation
2 of § 365 in some instances.¹⁵

3 Whether a contract is executory within the meaning of the
4 Bankruptcy Code is a question of federal law. Benevides v.

5
6 ¹⁵ Section 365 provides in relevant part:

7 (c) The trustee may not assume or assign any executory
8 contract or unexpired lease of the debtor, whether or
9 not such contract or lease prohibits or restricts
assignment of rights or delegation of duties, if--

10 (1) (A) applicable law excuses a party, other than the
11 debtor, to such contract or lease from accepting
12 performance from or rendering performance to an entity
13 other than the debtor or the debtor in possession,
whether or not such contract or lease prohibits or
restricts assignment of rights or delegation of duties;

14

15
16 (d) (1) In a case under chapter 7 of this title, if the
trustee does not assume or reject an executory contract
17 . . . within 60 days after the order for relief . . .
18 then such contract . . . is deemed rejected.

19

20 (e) (2) Paragraph (1) of this subsection does not apply
21 to an executory contract or unexpired lease of the
debtor, whether or not such contract or lease prohibits
22 or restricts assignment of rights or delegation of
duties, if --

23
24 (A) (i) applicable law excuses a party, other than the
debtor, to such contract or lease from accepting
25 performance from or rendering performance to the
trustee or to an assignee of such contract or lease,
26 whether or not such contract or lease prohibits or
restricts assignment of rights or delegation of duties;
27 and (ii) such party does not consent to such assumption
28 or assignment

1 Alexander (In re Alexander), 670 F.2d 885, 888 (9th Cir. 1982).
2 A contract is executory only when the "obligations of both
3 parties are so far unperformed that the failure of either party
4 to complete performance would constitute a material breach and
5 thus excuse the performance of the other." Ehmann, 319 B.R. at
6 204 (quoting Unsecured Creditors' Comm. v. Southmark Corp. (In re
7 Robert L. Helms Constr. & Dev. Co.), 139 F.3d 702, 705 (9th Cir.
8 1998). Obviously, the definition of an executory contract
9 presumes that there are other parties to the contract besides
10 Debtors.

11 Debtors ignore the fact that they are the sole members and
12 100% owners of Redux and thus there are essentially no "other
13 parties" to the operating agreement. Therefore, application of
14 an executory contract analysis in this context does not make
15 sense. Debtors could decide to have Redux withhold profits and
16 distributions and otherwise control the underlying assets,
17 thereby hamstringing the chapter 7 trustee into a perpetual
18 stalemate at the expense of their creditors. Executory contract
19 law does not work to produce such an absurd result.

20 Moreover, Debtors seek to use the asserted executory nature
21 of the operating agreement to ensnare the trustee rather than for
22 the purpose for which it was intended – namely, to have a
23 reference for determining whether the assumption of a contract
24 would impose administrative liability on the estate. Ehmann,
25 319 B.R. at 205 n.4 (citing In re Bergt, 241 B.R. 17, 21-36
26 (Bankr. D. Alaska 1999). However, Debtors' efforts fall short
27 because they mistakenly argue that the operating agreement, as an
28 executory contract, "rides through" their bankruptcy. The ride

1 through doctrine does not apply in a chapter 7 case. Diamond Z
2 Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 422-
3 23 (9th Cir. BAP 2007).

4 Section 365(d)(1) plainly states that if the chapter 7
5 trustee does not assume or reject an executory contract within
6 60-days, "then such contract . . . is deemed rejected."
7 § 365(d)(1). The result of the "deemed rejected" language is
8 that Debtors are relieved of burdensome future obligations under
9 the operating agreement while they are trying to recover
10 financially. Rejection also constitutes a breach of a contract
11 which permits the other party to file a creditor's claim. But,
12 Debtors clearly do not want to be relieved of their "burdensome"
13 future obligations and, as previously noted, there are no other
14 parties to file a creditor's claim. As the foregoing discussion
15 amply demonstrates, analyzing the operating agreement as an
16 executory contract does not serve any of the purposes of § 365.

17 Even if we could accept the executory nature of the
18 operating agreement, application of § 365(c)(1) and (e)(2)(A)
19 would be meaningless in this context. These sections were
20 designed "to protect non-debtor third parties whose rights may be
21 prejudiced by having a contract performed by an entity other than
22 the one with which they originally contracted" C.O.P
23 Coal Dev. Co. v. C.W. Mining Co. (In re C.W. Mining Co.), 422
24 B.R. 746, 761 (10th Cir. BAP 2010). There are no non-debtor
25 third parties to protect here. See In re Modanlo, 412 B.R. 715,
26 727 (Bankr. D. Md. 2006) ("By definition, there can be no
27 remaining members of a single member LLC . . . whose personal
28 relationships (among members) could be compromised by being

1 forced to accept substitute performance from a stranger
2 (bankruptcy trustee).”). Finally, the plain language of § 365
3 (c) (1) and (e) (2) (A) makes clear that the provisions are not for
4 the debtor’s protection.

5 Accordingly, for all these reasons, we decide that § 365 has
6 no application in this case. Id. at 727 n.16 (citing 9 Susan
7 Kalinka, Limited Liability Companies and Partnerships: a Guide to
8 Business and Tax Planning, Louisiana Civil Law Treatise § 1.44
9 (2006) (concerning multi-member LLC’s but pointing out that there
10 “is no reason to prohibit a trustee in bankruptcy from assuming
11 all of the rights and obligations of a debtor who is the only
12 member of a single-member LLC. In that case, there are no
13 non-debtor members whose interests could be harmed by the
14 operation of the LLC by a trustee or debtor in possession.”)).

15 In sum, the bankruptcy court correctly found, as a matter of
16 law, that Debtors’ membership interests and contractual rights
17 under the operating agreement became property of their estate.

18 **3. After the Commencement of the Case**

19 We have no difficulty deciding that Debtors’ transfer to
20 Thompson occurred after the commencement of their chapter 11
21 case. The conversion of Debtors’ chapter 11 case to one under
22 chapter 7 constitutes an order for relief under chapter 7, but
23 does not “effect a change in the date of the filing of the
24 petition, the commencement of the case, or the order for relief.”
25 § 348(a). Thus, as the bankruptcy court properly concluded in
26 denying Debtors’ Motion for Reconsideration, the conversion of
27 their case had no effect on the trustee’s avoidance rights.
28 Rather, the trustee was vested with avoidance rights under § 549

1 from the commencement of Debtors' case.

2 **4. Authorized By Statute**

3 Debtors contend, without much discussion or analysis, that
4 as debtors-in-possession they were entitled to make transfers
5 like the one to Thompson as part of the ordinary course of
6 conducting their business. With certain limitations, § 1107
7 gives a debtor-in-possession all the rights, functions and duties
8 possessed by a trustee. Section 1108 allows the trustee to
9 operate the debtor's business. When the debtor's business is
10 being operated under §§ 1107 and 1108, § 363(c)(1) gives the
11 debtor-in-possession authority to enter into transactions,
12 including the sale or lease of property of the estate, in the
13 ordinary course of business, without notice or a hearing, and to
14 use property of the estate in the ordinary course of business
15 without notice or a hearing.

16 The vertical dimension, or creditor's expectation, test and
17 the horizontal dimension test are applied to determine whether a
18 transaction is within the ordinary course of business for
19 purposes of § 363(c). Straightline Invs., 525 F.3d at 879.
20 Debtors must satisfy both tests to prove the ordinary course of
21 business defense. Id.

22 Yet, Debtors neither discuss these tests nor argue that they
23 are met in this appeal.¹⁶ Debtors simply assert that adding a
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25 ¹⁶ To determine whether the transaction meets the vertical
26 dimension test, courts often compare the debtor's pre-petition
27 business activities with that of debtor's post-petition business
28 activities. Straightline Invs., 525 F.3d at 879. If the
debtor's post-petition transaction is ordinary relative to the
(continued...)

1 member such as Thompson to contribute funding to complete the
2 real estate project of Redux was in the normal course of business
3 and "not extraordinary," but this is argument and not proof. The
4 record shows that Debtors submitted no evidence that they ever
5 admitted a member aside from the one instance of admitting
6 Thompson. Moreover, Debtors had a 100% interest in Redux from
7 its inception in mid-2007 until they made the transfer to
8 Thompson in early 2009 – just six months after they filed for
9 bankruptcy. There is no proof that Debtors' transfer to Thompson
10 was precipitated by anything other than their bankruptcy filing.
11 Finally, common sense dictates that this transaction was not the
12 type which similar businesses would make in the ordinary course.
13 Compare Credit Alliance Corp. v. Idaho Asphalt Supply, Inc. (In
14 re Blumer), 95 B.R. 143, 148 (9th Cir. BAP 1988). Based on the
15 record provided, we conclude that neither test for the ordinary
16 course of business defense was met as a matter of law.
17 Accordingly, there is no genuine issue of any material fact with
18 respect to this defense.

19 **5. Good Faith Purchaser Defense Under § 549(c)**

20 Finally, § 549(c) provides an exception to avoidance when a
21 transfer of an interest in real property to a good faith
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23 ¹⁶(...continued)
24 pre-petition relationship between the debtor and the creditor, a
25 court will find that the post-petition transfer did not expose
26 creditors to unknown risks, thereby satisfying the test. Id. at
27 880. The horizontal dimension test requires a finding that the
28 transfer was of a type which similar businesses would make in the
ordinary course of business. Id. at 881. The purpose of this
test is to "assure that neither the debtor nor the creditor [did]
anything abnormal to gain an advantage over other creditors." Id.

1 purchaser is made. Debtors' 100% membership interest constitutes
2 personal property. Since Congress chose to protect only good
3 faith transferees of real property under § 549(c) and failed to
4 mention good faith transferees of personal property, it must have
5 intended that postpetition transfers of personal property be
6 avoidable regardless of the knowledge or good faith of the
7 transferee. Hayhoe v. Cole (In re Cole), 226 B.R. 647, 653-54
8 (9th Cir. BAP 1998) (citing Hohn v. United States, 524 U.S. 236,
9 250 (1998)) ("Where Congress has failed to include language in
10 statutes, it is presumed to be intentional when it has used such
11 language elsewhere in the Code."). Accordingly, the exception to
12 avoidance for good faith transferees is inapplicable under these
13 circumstances. Kupetz v. United States (In re Williams), 104
14 B.R. 296, 299 (Bankr. C.D. Cal. 1989).

15 VI. CONCLUSION

16 For the reasons stated above, we AFFIRM.
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