

APR 06 2005

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OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No. NC-04-1497-PSBr
)	
STRAIGHTLINE INVESTMENTS, INC.,)	Bk. No. 97-13375 AJ
)	
Debtor.)	Adv. No. 99-01249 AJ
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CHARLES D. AALFS,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
CHARLES E. SIMS, Trustee,)	
)	
Appellee.)	
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Argued and Submitted on
March 24, 2005 at San Francisco, California

Filed - April 6, 2005

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding

Before: PERRIS, SMITH and BARR,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. James N. Barr, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 This is an appeal after remand. The issues raised by the
2 appellant are the same as those decided by this Panel in the earlier
3 appeal. We AFFIRM under the law of the case doctrine.

4 FACTS³

5 In 1999, the chapter 7⁴ trustee in this bankruptcy case filed a
6 Complaint to Avoid Post-Petition Transfers ("the complaint") against
7 Charles D. Aalfs ("Aalfs") pursuant to § 549.⁵ In the first claim
8 for relief, the trustee sought to avoid transfers of certain
9 accounts receivable. In the second claim for relief, the trustee
10 sought to avoid transfers of inventory and cash.⁶ After a trial,
11 the bankruptcy court found that the transfers of the accounts
12 receivable were avoidable, and entered judgment for the trustee on
13

14
15 ³ Rather than repeat much of the background information and
16 analysis in the prior memorandum decision, we focus here on the
17 issue of whether the decision of the prior Panel is law of the case.

18 ⁴ Unless otherwise indicated, all chapter and section
19 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

20 ⁵ Section 549(a) states that, with certain exceptions and
21 limitations not implicated here,

22 the trustee may avoid a transfer of property of the estate-

23 (1) that occurs after the commencement of the case; and

24 (2) (A) that is authorized only under section 303(f) or
25 542(c) of this title; or

26 (B) that is not authorized under this title or by the
court.

⁶ The complaint also set forth a third claim for relief,
which simply combined the first two. As a result, we only refer to
the first two claims for relief.

1 the first claim. The judgment did not dispose of the second claim
2 for relief.

3 Aalfs appealed, arguing that the bankruptcy court erred in
4 entering judgment for the trustee on the first claim. The trustee
5 cross-appealed on the second claim for relief. We concluded that
6 the judgment was not final, because it did not dispose of the second
7 claim for relief, and granted leave to appeal the interlocutory
8 order pursuant to 28 U.S.C. § 158. We issued an unpublished
9 memorandum decision affirming the bankruptcy court on the first
10 claim for relief, and remanding for the bankruptcy court to make
11 findings and enter judgment on the second claim. See In re
12 Straightline Invs., Inc., BAP Nos. NC-02-1218-RyKMa; NC-02-1241-
13 RyKMa (December 24, 2002).

14 Aalfs appealed to the Ninth Circuit, which dismissed the appeal
15 for lack of jurisdiction, because it was an appeal from an
16 interlocutory order. See In re Straightline Invs., Inc., 97
17 Fed.Appx. 79 (9th Cir. 2004). The Ninth Circuit remanded, with
18 instructions that we remand to the bankruptcy court for it to
19 dispose of the second claim for relief.

20 On remand, the bankruptcy court held a non-evidentiary hearing
21 and issued a Memorandum on Remand which states, in pertinent part,
22 as follows:

23 The court did not intend to issue an interlocutory
24 decision in this case. It neglected to mention the transfer of
25 cash and inventory only because it was concentrating fully on
26 the transfer of accounts; almost all of the testimony and
argument related to the accounts. The court has reviewed the
entire trial transcript and issues these supplemental findings
and conclusions in order to correct its oversight.

1 Law of the case rules are founded upon "the sound public policy
2 that litigation must come to an end. An appellate court cannot
3 efficiently perform its duty to provide expeditious justice to
4 all if a question once considered and decided by it were to be
litigated anew in the same case upon any and every subsequent
appeal." Kimball, 590 F.2d at 771 (quotations omitted). This
doctrine also serves to maintain consistency.

5 Jeffries, 114 F.3d at 1489. The law of the case doctrine applies to
6 interlocutory decisions of the same or higher tribunals. United
7 States v. Real Prop. Located at Incline Vill., 976 F.Supp. 1327,
8 1354 (D. Nev. 1997) (citing Ridgeway v. Mont. High School Ass'n, 858
9 F.2d 579, 587-88 (9th Cir. 1988)).

10 Law of the case is a nonjurisdictional, discretionary doctrine.
11 However, a court does not enjoy unfettered discretion in deciding
12 whether to apply the doctrine. The earlier decision should be
13 followed, unless:

14 1. substantially different evidence was produced at a
15 subsequent trial;

16 2. there has been an intervening change in controlling
17 authority; or

18 3. the decision was clearly erroneous and its enforcement
19 would work a manifest injustice.

20 Jeffries, 114 F.3d at 1489; In re Sonoma V, 34 B.R. 758, 760-61 (9th
21 Cir. BAP 1983). The burden is on Aalfs to establish that one of
22 these three exceptions applies. Sonoma, 34 B.R. at 761.

23 Aalfs raises a number of arguments in this appeal in support of
24 his position that the bankruptcy court erred in entering the
25 Judgment After Remand. Aalfs argues that he purchased the
26 receivables outright, and that the bankruptcy court erred in finding

1 that the transactions were disguised, impermissible loans rather
2 than sales. In addition, Aalfs contends that a transfer must
3 diminish the estate to be avoidable under § 549. Aalfs also argues
4 that the bankruptcy court erred in rejecting his "ordinary course"
5 defense. Finally, Aalfs argues that the recoupment and earmarking
6 doctrines apply. We discussed at length and rejected each of these
7 arguments in our December 24, 2002 memorandum decision.

8 Aalfs has not shown that any one of the three exceptions to the
9 law of the case doctrine set forth above applies. First, no
10 substantially different evidence was produced in the bankruptcy
11 court on remand. The bankruptcy court did not even conduct an
12 evidentiary hearing on remand. Second, there has not been an
13 intervening change in controlling authority with regard to any of
14 the issues we decided in the earlier appeal. The only case cited by
15 Aalfs in his appellate briefs that was decided after entry of our
16 memorandum decision is The Cadle Co. v. Mangan, 316 B.R. 11 (D.
17 Conn. 2004). This case discusses the earmarking doctrine, but it
18 does not constitute an intervening change in controlling authority.
19 Finally, our decision in the earlier appeal is not clearly
20 erroneous. In addition, Aalfs has not shown that enforcement of the
21 earlier decision would work a manifest injustice. "The existence of
22 exceptional circumstances is required before finding a manifest
23 injustice." Jeffries, 114 F.3d at 1492. No exceptional
24 circumstances are present in this case.

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CONCLUSION

For the reasons set forth above, we AFFIRM under the law of the case doctrine.