

DEC 21 2010

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-09-1159-HKiSa
)		
AMR MOHSEN,)	Bk. No.	05-50662
)		
)	Adv. No.	06-05183
Debtor.)		
_____)		
AMR MOHSEN,)		
)		
Appellant,)		
)		
v.)		
)		
CAROL WU, Chapter 7 Trustee;)		
)		
Appellee.)		
_____)		

MEMORANDUM¹

Argued and Submitted on October 20, 2010
at San Francisco, California

Filed - December 21, 2010

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

Honorable Roger L. Efremsky, Bankruptcy Judge, Presiding

Appearances: Amr Mohsen argued, pro se, for the Appellant.
Dennis D. Davis of Goldberg, Stinnett, Davis &
Linchey, argued for Appellee.

Before: HOLLOWELL, KIRSCHER and SALTZMAN², Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

² Hon. Deborah J. Saltzman, Bankruptcy Judge for the
Central District of California, sitting by designation.

1 The chapter 7³ bankruptcy trustee filed a complaint against
2 two corporate entities, Advanced Information Management, Inc.
3 (AIM Inc.) and Advanced Investment Management, LLC (AIM LLC)
4 (AIM Inc. and AIM LLC are collectively referred to as the AIM
5 Entities⁴) alleging they were the debtor's alter ego and seeking
6 a determination that their assets be declared property of the
7 bankruptcy estate. The debtor filed a pro se answer to the
8 complaint on behalf of the AIM Entities. The bankruptcy court
9 determined that the debtor, neither an attorney nor a named
10 defendant in the action, did not have standing to defend against
11 the complaint. It therefore struck the answer and entered a
12 default judgment.

13 The debtor moved to set aside the default judgment but
14 because the debtor again appeared for the AIM Entities, the
15 bankruptcy court determined the debtor had no standing to seek
16 the requested relief. Furthermore, the bankruptcy court found
17 that even if the debtor had standing, there was no excusable
18 neglect that led to the entry of the default judgment or
19 extraordinary circumstances that existed to justify relief. We
20 AFFIRM.

24 ³ Unless otherwise specified, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
26 all "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure, Rules 1001-9037.

28 ⁴ AIM Inc. is an Egyptian corporation and AIM LLC is a
Delaware limited liability investment and holding company.

1 that the AIM Entities were the Debtor's alter ego.⁷

2 On November 1, 2006, the Debtor filed, pro se, a Response to
3 Complaint "as settlor of Star Trust, Chair of Board of Directors
4 and Shareholder of AIM, Inc., and shareholder of AIM, LLC." The
5 Debtor denied the allegations that the AIM Entities were his
6 alter ego but admitted that the property of the Star Trust became
7 property of the estate when the trust was revoked. Ehab Moshen,
8 the successor trustee of the Star Trust, also filed an answer
9 admitting the Star Trust property was property of the estate.

10 In January 2007, the Debtor's bankruptcy counsel filed a
11 motion requesting that the Trustee release from the estate the
12 funds of the AIM Entities to cover legal fees to defend against
13 the Complaint. The bankruptcy court denied the motion because no
14 evidence or authority was provided to support it.

15
16 ⁷ Under the alter ego doctrine, when the corporate form is
17 used to perpetuate a fraud, circumvent a statute, or accomplish
18 some other inequitable purpose, a court may disregard the
19 corporate entity and hold its individual shareholders liable for
20 the actions of the corporation. In California, courts have
consistently stated there are two general requirements for the
application of the alter ego doctrine:

21 1) there must be such a unity of interest and ownership
22 between the corporation and its equitable owner(s) that the
separate personalities of the corporation and its shareholders do
not truly exist;

23 2) there must be an inequitable result if the acts in
24 question are treated as those of the corporation alone, or stated
differently, the failure to disregard the corporate entity would
25 sanction a fraud or promote injustice. See Sonora Diamond Corp.
v. Superior Court, 83 Cal. App. 4th 523, 539 (2000).

26 Factors considered in applying the doctrine include whether
27 there was commingling of funds or assets, use of the entity as a
shell or conduit for the affairs of the other, inadequate
28 capitalization, disregard of corporate formalities, and lack of
segregation of corporate records. Id.

1 On February 27, 2007, the Trustee filed a motion to strike
2 the answer of the AIM Entities (which was the Response to
3 Complaint filed by the Debtor) and to enter a default against the
4 AIM Entities (the Motion for Default). Acting pro se, the Debtor
5 filed a response, "submitted by the defendants, [the AIM
6 Entities]," which was a motion to reconsider the denial of the
7 release of funds, along with a motion to dismiss the Complaint by
8 summary judgment, or, in the alternative, continue the hearing on
9 the Motion for Default so that the Debtor could find counsel for
10 the AIM Entities (the Motion to Dismiss).

11 The bankruptcy court held a hearing on the Motion for
12 Default and the Motion to Dismiss on May 3, 2007. The Debtor
13 appeared by telephone "on behalf of [the AIM Entities]" and was
14 able to present a partial argument to the bankruptcy court before
15 the connection was cut off.⁸ The bankruptcy court, finding that
16 the AIM Entities had not properly answered the Complaint, entered
17 an order on May 8, 2007, granting the Trustee's Motion for
18 Default. It also denied the Debtor's Motion to Dismiss. On June
19 13, 2007, a default judgment was subsequently entered in favor of
20 the Trustee and against the AIM Entities, declaring that the
21 assets of the AIM Entities were property of the Debtor's estate
22 (the Default Judgment). The Complaint was then dismissed by
23 stipulation with Ehab Mohsen as the trustee for Star Trust.

24 The Debtor appealed the order granting the Motion for
25 Default on May 21, 2007; however, the Bankruptcy Appellate Panel
26 dismissed the appeal as interlocutory on August 14, 2007.

27
28 ⁸ The Debtor was only allowed 15 minutes of telephone time
from the prison.

1 On May 8, 2008, the Debtor filed, on behalf of the AIM
2 Entities, a motion to set aside the Default Judgment (the Motion
3 to Vacate). Part of the relief requested was the release of the
4 AIM Entities' funds in order to pay for legal representation. At
5 the same time, the Debtor argued he had individual standing to
6 defend against the Complaint. The Debtor cited case law
7 regarding shareholder standing and asserted that because he was
8 "injured directly and independently of the injury to the AIM
9 entities" he had standing to request that the Default Judgment be
10 set aside. The Debtor contended that when the AIM Entities'
11 assets were seized by the Trustee as a result of the Default
12 Judgment, the AIM Entities were unable to pay certain tax
13 obligations. As a result, the Debtor, as a manager of AIM Inc.,
14 was allegedly liable to the Egyptian taxing authorities for those
15 obligations. Additionally, the Debtor argued that as a director,
16 he was liable to individual shareholders. Therefore, he argued
17 that he was injured directly and independently of the AIM
18 Entities, and as a person aggrieved, had standing to defend
19 against the Complaint.

20 The Trustee opposed the Motion to Vacate by arguing that the
21 Debtor, as a non-attorney and as a shareholder whose interests in
22 the AIM Entities belonged to the estate, had no standing to seek
23 relief on behalf of the AIM Entities. The Debtor then filed a
24 supplemental brief, which was a motion to impose sanctions
25 against the Trustee due to false representations that the Debtor
26 thought the Trustee had made in her declarations supporting the
27 opposition (the Sanctions Motion).

28

1 A hearing on the Motion to Vacate and the Sanctions Motion
2 was held on January 22, 2009. At the close of hearing, the
3 bankruptcy court denied the Motion to Vacate. It determined that
4 the Debtor was precluded from appearing on behalf of the AIM
5 Entities because he was not a lawyer. The bankruptcy court found
6 that the Debtor was not seeking to intervene as a shareholder but
7 was seeking to act on behalf of corporate entities, which
8 required counsel. Additionally, the bankruptcy court found that
9 even if the Debtor had authority to act for the AIM Entities,
10 there was no demonstration that excusable neglect led to the
11 entry of the Default Judgment or that extraordinary circumstances
12 existed to justify relief. The bankruptcy court also denied the
13 Sanctions Motion finding there was no bad faith on the part of
14 the Trustee.⁹

15 The Debtor filed a motion for reconsideration on January 30,
16 2009 (the Reconsideration Motion). In the Reconsideration
17 Motion, the Debtor argued that the bankruptcy court made manifest
18 errors of law and fact by finding he had no standing to defend
19 against the Complaint. The Debtor contended (for the first time)
20 that the Response to Complaint and Motion to Dismiss should have
21 been construed by the bankruptcy court as motions by him to
22 intervene as a defendant. The Debtor also argued that the
23 Default Judgment unjustly deprived the AIM Entities of their
24 assets in violation of their due process rights. A hearing was
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26 ⁹ The Debtor has not addressed the bankruptcy court's
27 denial of the Sanctions Motion in his appellate briefs.
28 Therefore, the issue is deemed abandoned. See Branam v. Crowder
(In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205
F.3d 1350 (9th Cir. 1999).

1 held on the Reconsideration Motion on April 30, 2009, at which
2 time the bankruptcy court denied the Reconsideration Motion. The
3 Debtor timely appealed.

4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
6 § 157(b) (2) (J). We have jurisdiction under 28 U.S.C. § 158.

7 **III. ISSUES**

8 1. Did the bankruptcy court err in determining that the
9 Debtor did not have standing to seek relief from the Default
10 Judgment or otherwise abuse its discretion in denying the Motion
11 to Vacate?

12 2. Did the bankruptcy court abuse its discretion in denying
13 the Reconsideration Motion?

14 **IV. STANDARDS OF REVIEW**

15 We review the bankruptcy court's determination of standing
16 de novo. Virginia Sur. Co. v. Northrup Grumman Corp., 144 F.3d
17 1243, 1245 (9th Cir. 1998); Brown v. Sobczak (In re Sobczak),
18 369 B.R. 512, 516 (9th Cir. BAP 2007). A decision on a motion to
19 set aside entry of default is reviewed for an abuse of
20 discretion. In re Hammer, 940 F.2d 524, 525 (9th Cir. 1991). A
21 denial of a motion for reconsideration is also reviewed for an
22 abuse of discretion. Hansen v. Moore (In re Hansen), 368 B.R.
23 868, 874-75 (9th Cir. BAP 2007).

24 In determining whether the bankruptcy court abused its
25 discretion, we first "determine de novo whether the [bankruptcy]
26 court identified the correct legal rule to apply to the relief
27 requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th
28 Cir. 2009). If the bankruptcy court identified the correct legal

1 rule, we then determine whether its "application of the correct
2 legal standard [to the facts] was (1) illogical, (2) implausible,
3 or (3) without support in inferences that may be drawn from the
4 facts in the record." Id. (internal quotation marks omitted).

5 **V. DISCUSSION**

6 A. Standing.

7 The bankruptcy court denied the Motion to Vacate because it
8 determined that the Debtor did not have standing to act on behalf
9 of the AIM Entities since he was not an attorney licensed to
10 practice law. D-Beam Ltd. P'ship v. Roller Derby Skates, Inc.,
11 366 F.3d 972, 974 (9th Cir. 2004); see also Local Bankruptcy Rule
12 9010-1(a). It is well-settled that corporations must appear in
13 federal court through an attorney. Id.; Rowland v. Calif. Men's
14 Colony, 506 U.S. 194, 202 (1993).

15 The Debtor is not an attorney. The Debtor, who is not a
16 named defendant in the Complaint, filed the Response to Complaint
17 as a director and shareholder of the AIM Entities. He filed the
18 Motion to Dismiss on behalf of the AIM Entities and appeared "for
19 the AIM [E]ntities" at the hearing on the Motion for Default.
20 Hr'g Tr. (May 3, 2007) at 14:5-6. He subsequently filed the
21 Motion to Vacate in "pro per, and on behalf of [the AIM
22 Entities]" as manager and shareholder. As a result, the Debtor,
23 throughout the litigation, appeared for the AIM Entities even
24 though he was precluded from doing so as a non-attorney.

25 After entry of the Default Judgment, the Debtor argued for
26 the first time in his Motion to Vacate that he had standing
27 because he was "injured directly and independently of the AIM
28 Entities" and therefore met the requirements for standing under

1 the holding of Virginia Sur. Co. v. Northrup Grumman Corp., 144
2 F.3d at 1245. However, Virginia Sur. Co. discusses the standing
3 requirements necessary to bring a shareholder derivative suit
4 against a corporation, and, as explained below, the Debtor no
5 longer held any equity interest in the AIM Entities.

6 Here, the Debtor did not have standing to defend against the
7 Complaint as an individual shareholder because the Debtor's
8 shareholder interests were held by the estate on the date the
9 Complaint was filed. The bankruptcy estate includes "all legal
10 or equitable interests of the debtor in property as of the
11 commencement of the case." 11 U.S.C. § 541(a)(1). Once a
12 bankruptcy petition is filed, property rights belonging to a
13 debtor under state law become assets of the estate. Butner v.
14 United States, 440 U.S. 48, 54-55 (1979). On his bankruptcy
15 schedules, the Debtor listed the assets of AIM Inc. and his
16 shares in AIM LLC. As a result, the Debtor's interests and
17 rights as a shareholder of AIM LLC became property of his
18 bankruptcy estate. Accordingly, the Debtor did not have standing
19 as a shareholder to set aside the Default Judgment. Thus, the
20 bankruptcy court did not err in denying the Motion to Vacate on
21 this basis.

22 In his Reconsideration Motion and on appeal, the Debtor
23 argues that the bankruptcy court should have construed his
24 various pleadings as motions to intervene as a separate
25 defendant. Specifically, he argues the bankruptcy court should
26 have construed the Response to Complaint and Motion to Dismiss as
27 motions to intervene as an aggrieved party who had obligations to
28 taxing authorities and AIM shareholders.

1 While the pleadings of pro se litigants are to be liberally
2 construed, a court is not required to search the record and make
3 their arguments for them. Aguasin v. Mukasey, 297 Fed. Appx. 706
4 (9th Cir. 2008). Additionally, arguments must be briefed in
5 order to be preserved. Id. The Debtor did not address the issue
6 of intervention until his appellate brief (although it was
7 mentioned in passing in the Reconsideration Motion). Therefore,
8 the argument was waived and the bankruptcy court did not err in
9 not addressing it. In re Cybernetic Serv., Inc. 252 F.3d 1039,
10 104 n.3 (9th Cir. 2001).

11 Generally, we will not consider issues raised for the first
12 time on appeal. Franchise Tax Bd. v. Roberts (In re Roberts),
13 175 B.R. 339, 345 (9th Cir. BAP 1994). However, we may consider
14 the issue if it is purely one of law and the opposing party is
15 not prejudiced by the failure to raise the issue in the trial
16 court. Dumont v. Ford Motor Credit Co. (In re Dumont), 581 F.3d
17 1104, 1116 (9th Cir. 2009). Under Federal Rule of Civil
18 Procedure (FRCP) 24, a party has a right to intervene if certain
19 conditions are met; and, is permitted to intervene in other
20 instances. Permissive intervention is within the discretion of
21 the bankruptcy court. Thus, we cannot consider the Debtor's
22 argument to the extent it is based on permissive intervention
23 because permissive intervention is not purely a question of law
24 and there is no record upon which to determine whether the
25 bankruptcy court abused its discretion. However, we may address
26 the Debtor's argument that he had a right to intervene and defend
27 as a matter of right under FRCP 24(a)(2).

1 The Ninth Circuit has adopted a four-part test to determine
2 whether a party may intervene as a matter of right under FRCP
3 24(a) (2) :

4 [a]n order granting intervention as of right is
5 appropriate if (1) the applicant's motion is timely;
6 (2) the applicant has asserted an interest relating to
7 the property or transaction which is the subject of the
8 action; (3) the applicant is so situated that without
9 intervention the disposition may, as a practical
matter, impair or impede its ability to protect that
interest; and (4) the applicant's interest is not
adequately represented by the existing parties.

10 United States ex rel McGough v. Covington Tech., 967 F.2d 1391,
11 1394 (9th Cir. 1992); Educ. Credit Mgmt. Corp. v. Bernal (In re
12 Bernal), 223 B.R. 542, 547 (9th Cir. BAP 1998).

13 The problem with the Debtor's argument that he should have
14 been allowed to intervene is that he failed to demonstrate that
15 he had an individual interest in defending against the Complaint.
16 His alleged interest in the litigation is in protecting himself
17 from personal liability to shareholders if the AIM Entities'
18 corporate veil was pierced, as well as from his personal
19 liability on tax obligations owed by AIM Inc. to the Egyptian
20 authorities. He argues that because these obligations are non-
21 dischargeable, his injury is distinct from the AIM Entities or
22 its shareholders. However, there is no evidence to support his
23 arguments other than the Debtor's assertions of purported
24 liability.

25 A bankruptcy discharge in a chapter 7 relieves a debtor from
26 prepetition claims. Accordingly, any liabilities the Debtor may
27 have had to the AIM Entities' shareholders as a result of the
28

1 Default Judgment were subject to his bankruptcy discharge.¹⁰
2 Furthermore, debts that fall within an exception to discharge
3 under § 523(a)(2) and (a)(4) are not self-executing; non-
4 dischargeable claims must first be proven. Urbatek Sys., Inc. v.
5 Lochrie (In re Lochrie), 78 B.R. 257, 259-60 (9th Cir. BAP 1987).
6 There is no evidence that any shareholder claims were made
7 against the estate or that nondischargeability actions had been
8 filed against the Debtor.

9 Additionally, the Debtor's contention that he needed to
10 intervene in order to protect against liability for tax
11 obligations is unpersuasive. First, there is no evidence in the
12 record that a tax obligation owed by AIM Inc. to the Egyptian
13 taxing authorities even existed, much less that it was a
14 nondischargeable debt of the Debtor. Furthermore, according to a
15 letter submitted to the bankruptcy court by a member of AIM
16 Inc.'s board of directors, the tax obligation did not result from
17 the Default Judgment but from a withholding of payments by
18 another entity back in 2005. The Debtor's intervention to defend

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20 ¹⁰ A claim is defined as a "right to payment, whether or
21 not such right is reduced to judgment, liquidated, unliquidated,
22 fixed, contingent, matured, unmatured, disputed, undisputed,
23 legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5).
24 The broad definition of claim allows that no matter how remote or
25 contingent, all prepetition legal obligations of the debtor will
26 be dealt with in the bankruptcy case and all scheduled
27 liabilities will be subject to discharge. See Hassanally v.
28 Republic Bank (In re Hasanally), 208 B.R. 46, 49 (9th Cir. BAP
1997).

26 In California, a civil action ordinarily accrues when the
27 wrongful act is done and the liability arises. Id. at 50. In
28 this situation, any shareholder liability would have arisen at
the time there was a breach of any fiduciary duty by not keeping
the corporate form.

1 against the Complaint would not have provided him with the
2 ability to protect against any personal liability for corporate
3 taxes. If Egyptian law imposes personal liability on a corporate
4 director for unpaid taxes, the Debtor, as a director of AIM Inc.,
5 would owe the taxes whether or not the corporate veil was
6 pierced.

7 Thus, to the extent the Debtor was not representing the AIM
8 Entities or his shareholder interest, but sought relief from the
9 Default Judgment as an intervening "person aggrieved," he still
10 did not have standing to set aside the Default Judgment because
11 he simply did not demonstrate that he was individually damaged by
12 the entry of the Default Judgment or the Trustee's success in
13 piercing the corporate veil.

14 In any event, even if the Debtor were allowed to
15 individually intervene, he could not answer for the AIM Entities.
16 Because the AIM Entities did not answer the Complaint, the
17 bankruptcy court was required to enter a default. Fed. R. Civ.
18 P. 55(a) ("When a party against whom a judgment for affirmative
19 relief is sought has failed to plead or otherwise defend, . . .
20 the clerk must enter the party's default.").

21 We may affirm the bankruptcy court on any basis supported by
22 the record. Woosley v. Edwards (In re Woosley), 117 B.R. 524,
23 530 (9th Cir. BAP 1990). Because we conclude that the bankruptcy
24 court did not err in denying the Motion to Vacate due to the
25 Debtor's lack of standing to seek relief, we do not reach the
26 issue of whether it was an abuse of the bankruptcy court's
27 discretion to find there was no excusable neglect or manifest
28 error that required the Default Judgment to be vacated.

1 B. Reconsideration.

2 A motion for reconsideration filed within 14 days of the
3 underlying order is treated as a motion to alter or amend a
4 judgment under Fed. R. Civ. P. 59(e) such that it tolls the time
5 within which to file a notice of appeal of the underlying order
6 until the order on reconsideration is entered. Am. Ironworks &
7 Erectors, Inc. v. N. Am. Constr. Corp., 248 F.3d 892, 898-99 (9th
8 Cir. 2001). Amendment or alteration of a judgment is appropriate
9 under Fed. R. Civ. P. 59(e) only if the court (1) is presented
10 with newly discovered evidence that was not available at the time
11 of the original hearing, (2) committed clear error or made an
12 initial decision that was manifestly unjust, or (3) there is an
13 intervening change in controlling law. Zimmerman v. City of
14 Oakland, 255 F.3d at 740.

15 A motion for reconsideration is not permitted to rehash the
16 same arguments made the first time or to simply express an
17 opinion that the bankruptcy court was wrong; or, to assert new
18 legal theories that could have been raised before. In re Greco,
19 113 B.R. 658, 664 (D. Haw. 1990), aff'd and remanded, Greco v.
20 Troy Corp., 952 F.2d 406 (9th Cir. 1991). In reviewing the
21 Reconsideration Motion, we note that the Debtor largely presents
22 the same arguments made in his Motion to Vacate or asserts new
23 legal arguments (such as his argument that his pleadings should
24 have been construed as a motions to intervene) that he could have
25 presented earlier.

26 The Debtor did not provide any excerpts of record or
27 transcripts and the appellants provided only limited documents.
28 We may review the bankruptcy court's electronic docket if the

1 parties' excerpts of record do not include relevant documents
2 (see Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293
3 B.R. 227, 233 n. 9 (9th Cir. BAP 2003)); however, we cannot
4 review here whether the bankruptcy court abused its discretion in
5 denying the Reconsideration Motion because the transcript for the
6 hearing on the Reconsideration Motion is not contained on the
7 bankruptcy court docket.

8 Absent a record demonstrating that the bankruptcy court
9 abused its discretion in denying the Debtor's Reconsideration
10 Motion, we must affirm. Kritt v. Kritt, 190 BR 387; Syncom
11 Capital Corp. v. Wade, 924 F.2d 167 (where appellant failed to
12 provide a trial transcript, his contentions were "unreviewable"
13 and "justif[ied] summary affirmance."); McCarthy v. Prince (In re
14 McCarthy), 230 B.R. 414, 417 (9th Cir. BAP 1999) (if findings of
15 fact and conclusions of law were made orally on the record, a
16 transcript of those findings is mandatory).

17 **CONCLUSION**

18 We agree with the bankruptcy court's determination that the
19 Debtor did not have standing to defend against the Complaint or
20 set aside the Default Judgment. There is no basis to demonstrate
21 that the bankruptcy court abused its discretion in denying
22 reconsideration of that ruling. Accordingly, we AFFIRM.

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