UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NC-09-1159-HKiSa
AMR MOHSEN,	Bk. No. 05-50662
Debtor.	Adv. No. 06-05183
AMR MOHSEN,	**M E M O R A N D U M**[1]
Appellant,	
v.	
CAROL WU, Chapter 7 Trustee;	
Appellee.	

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 SALTZMAN[2], Bankruptcy Judges.

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[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.

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

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

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

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

I. FACTS[5]

Dr. Amr Mohsen (the Debtor)[6] filed a chapter 11 bankruptcy petition on February 8, 2005. In the course of the proceedings, funds of the AIM Entities were placed in the debtor-in-possession (DIP) account. The case was converted to chapter 7 on December 22, 2005, and Carol Wu was appointed as the trustee (the Trustee). Upon conversion, the funds in the DIP account remained in the estate pending a determination of their ownership.

On September 26, 2006, the Trustee filed a complaint (Complaint) against Ehab Mohsen, as the trustee of Star Trust, and the AIM Entities. Star Trust was a revocable trust formed by the Debtor in 1982. The Debtor served as trustee until 2004, and funded the trust with real estate in Egypt, stocks, certain partnership or equity interests, and investments. The Debtor revoked the trust in March 2005.

In the Complaint, the Trustee alleged that because the Debtor revoked the Star Trust, its assets became property of the estate. Additionally, the Trustee alleged that the assets of the AIM Entities belonged to the bankruptcy estate under the theory

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[5] The Appellant did not submit excerpts of record or transcripts as required by Rule 8009(b) and BAP Rule 8006-1. The Appellees provided only a limited number of documents as part of their excerpts of record. Therefore, the facts recited here are gleaned from taking judicial notice of the pleadings filed with the bankruptcy court through the electronic docketing system See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v. Chase Manhattan Mrtg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

[6] The Debtor has been incarcerated in federal prison since 2004.

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

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

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

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

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

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

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

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

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

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

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[8] The Debtor was only allowed 15 minutes of telephone time from the prison.

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

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

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

The Debtor filed a motion for reconsideration on January 30, 2009 (the Reconsideration Motion). In the Reconsideration Motion, the Debtor argued that the bankruptcy court made manifest errors of law and fact by finding he had no standing to defend against the Complaint. The Debtor contended (for the first time) that the Response to Complaint and Motion to Dismiss should have been construed by the bankruptcy court as motions by him to intervene as a defendant. The Debtor also argued that the Default Judgment unjustly deprived the AIM Entities of their assets in violation of their due process rights. A hearing was

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[9] The Debtor has not addressed the bankruptcy court's denial of the Sanctions Motion in his appellate briefs. 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).

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

II. JURISDICTION

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

III. ISSUES

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

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

IV. STANDARDS OF REVIEW

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

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

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

V. DISCUSSION

A. Standing.

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

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

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

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

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

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

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

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

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

> [a]n order granting intervention as of right is appropriate if (1) the applicant's motion is timely; (2) the applicant has asserted an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that without 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.

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

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

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

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

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

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

In California, a civil action ordinarily accrues when the wrongful act is done and the liability arises. Id. at 50. In 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.

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

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

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

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

B. Reconsideration.

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

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

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

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

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

CONCLUSION

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