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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP Nos. ID-09-1000-MoDH
	ID-09-1001-MoDH
GREG V. THOMASON and DIANA THOMASON,	Bk. No. 03-42400
Debtors.	Adv. No. 04-06134
NICHOLAS A. THOMASON; SANDRA K. THOMASON; BYRON T. THOMASON; MARILYNN THOMASON,	
Appellants,	
v.	**M E M O R A N D U M**[1]
GREG V. THOMASON; DIANA THOMASON; R. SAM HOPKINS, Chapter 7 Trustee; UNITED STATES TRUSTEE; NEW BRITAIN INVESTORS, LLC; COLLEEN FORSBERG; WILLIAM FORSBERG,	
Appellees.	

Submitted Without Oral Argument on June 19, 2009
at Pasadena, California

Filed - June 26, 2009

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

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN and HOLLOWELL, 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.

In 2007, the panel affirmed a judgment of the bankruptcy court issued after a five-day trial in an adversary proceeding. In September 2008, certain plaintiffs in the adversary proceeding filed a "Demand for Retrial and Motion to Dismiss Bankruptcy" in both the adversary proceeding and in the debtors' main case. The bankruptcy court denied the requested relief. We AFFIRM.

I. FACTS

On November 7, 2003, Greg and Diana Thomason ("Debtors") filed a chapter 13[2] case, which was converted to chapter 7 on March 8, 2004. R. Sam Hopkins ("Trustee") was appointed as the chapter 7 trustee. On June 1, 2004, Appellants Nicholas A. Thomason, Sandra Thomason, Byron Thomason and Marilynn Thomason (collectively, "Appellants")[3] filed an adversary proceeding against Debtors, Trustee, William Forsberg ("Mr. Forsberg") and his wife Colleen Forsberg (together, the "Forsbergs"), and New Britain Investors, LLC ("New Britain") (collectively, "Appellees").

In the adversary proceeding (A.P. No. 04-6134), Appellants sought (among other things) a judgment quieting title in certain parcels of real property referred to as "Agren," "Farmstead" and "Teton Pastures." Following a five-day trial, the bankruptcy court issued a 79-page memorandum decision, holding that (among

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[2]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

[3]Thomason Farms, Inc. was also a plaintiff in the adversary proceeding, but is not a party to this appeal.

other things), Debtors' bankruptcy estate owned an undivided one-third interest in Agren and Teton Pastures.

The court also held that Mr. Forsberg held an undivided one-third interest in Farmstead, subject to any community property interest of his wife. The court further held that mortgages asserted by Appellants against Agren were not enforceable and that Trustee could sell Agren and Teton Pastures free and clear of the interests of co-owners (viz., the Appellants). Finally, in a finding relevant to this appeal, the court concluded -- in favor of Appellants -- that neither Debtor Greg Thomason nor his bankruptcy estate held an enforceable interest in property known as the "Sonja Thomason House."

Appellants appealed the judgment entered following the trial. On August 7, 2007, we issued a memorandum affirming the bankruptcy court's judgment. Appellants did not appeal our decision. Rather, on September 11, 2007, Appellants filed with the bankruptcy court a motion for reconsideration, for relief from judgment and for new trial. After much briefing by the parties, the bankruptcy court entered a thoughtful and well-reasoned 17-page memorandum decision explaining why Federal Rule of Civil Procedure 60(b) ("Rule 60(b)") (incorporated by Rule 9024) was inapplicable and why no fraud on the court occurred. On November 26, 2007, the bankruptcy court entered an order denying the motion for reconsideration. That order was not appealed.

Even though the judgment had been affirmed and is final, and even though the bankruptcy court had denied their first post-appeal motion for relief from the judgment, Appellants continued

to file pleadings requesting that the court vacate the judgment or grant a new trial. On September 26, 2008, Nicholas and Sandra Thomason, acting pro se, filed a "Demand for Retrial and Motion to Dismiss Bankruptcy" ("AP Demand") in the adversary proceeding.[4] On the same date, they filed the identical document in the main case ("Case Demand"). On November 28, Byron and Marilynn Thomason, acting pro se, joined the AP Demand and the Case Demand.

In the AP Demand and the Case Demand, Appellants again alleged fraud on the court, attaching the following documents as exhibits: (1) a memorandum filed by Debtors in support of a motion to dismiss a state court action against them (CV-08-554) and (2) a memorandum filed by Debtors' counsel on his own behalf in support of a motion to dismiss the same state court action (CV-08-554). Trustee, New Britain, the Forsbergs and Debtors opposed both the AP Demand and the Case Demand.

On December 10, 2008, the bankruptcy court held a hearing on the AP Demand and the Case Demand and announced its findings and conclusions on the record. The court stated that it had read all of the allegations of fraudulent conduct, and concluded that none of the representations and conduct "would arise [sic] to the level of fraud required for me to revisit the adversary proceeding judgment nor to simply order the bankruptcy case dismissed." The court disagreed with Appellants' contentions that "false or fraudulent information was given the Court."

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[4]Only Nicholas signed the AP Demand, and only his name appears in the caption. The opening sentence of the AP Demand, however, states that both Nicholas and Sandra are seeking relief. At the hearing, Nicholas indicated that Sandra did join in both Demands.

On December 10, 2008, the court entered orders denying the AP Demand and the Case Demand. On December 19, 2008, Appellants filed a timely notice of appeal of the order denying the Case Demand, leading to BAP No. ID-09-1001. On Monday, December 22, 2008, Appellants filed a timely notice of appeal of the order denying the AP Demand,[5] leading to BAP No. ID-09-1000.

On May 5, 2009, we entered an order observing that Appellants did not provide excerpts of the record containing all of the items required by Rule 8009(b). In particular, Appellants had not provided the AP Demand and the Case Demand, the oppositions, the orders being appealed, the findings of fact and conclusions of law of the bankruptcy court, and the notices of appeal. We indicated that we would not dismiss the appeal for these deficiencies as long as Appellants provided a transcript of the court's oral findings and conclusions no later than May 26, 2009. We received the transcript on June 3, 2009. Despite the tardiness in delivery of the transcript, we will address the merits of the appeal.

II. ISSUE

Did the bankruptcy court abuse its discretion in denying the AP Demand and the Case Demand?

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[5]New Britain and Forsberg argue that this notice of appeal is untimely. They are incorrect. The notice is timely under Rules 8002(a) (requiring a notice of appeal to be filed within ten days of the entry of the order or judgment) and 9006(a) (providing that the computation period includes the last day, unless the last day falls on a Saturday or Sunday or court holiday, in which event the period runs until the end of the next day that the court is open). As the tenth day following entry of the order fell on a Saturday, the last day for filing the notice of appeal was Monday, December 22. U.S. v. Schimmels (In re Schimmels), 85 F.3d 416, 419-20 (9th Cir. 1996).

III. JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. § 157(b)(2)(A), (B), (C), (E), (K), (N) and (O) and § 1334. We have jurisdiction under 28 U.S.C. § 158.[6]

IV. STANDARDS OF REVIEW

We treat the AP Demand as a motion for relief from the judgment under Rule 60(b). We review orders denying such motions for abuse of discretion. Casey v. Albertson's Inc., 362 F.3d 1254, 1257 (9th Cir. 2004); Hammer v. Drago (In re Hammer), 112 B.R. 341, 345 (9th Cir. BAP 1990), aff'd, 940 F.2d 524 (9th Cir. 1991). "The Ninth Circuit has held that rulings on motions for relief from judgment will be reversed only upon a clear showing of abuse of discretion." Hammer, 112 B.R. at 345 (emphasis in original), citing Meadows v. Dominican Republic, 817 F.2d 517, 521 (9th Cir. 1987).

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[6]Under 28 U.S.C. § 158(a) and (c), we have appellate jurisdiction over final orders or, with leave of court, over interlocutory orders. The order denying the Case Demand was essentially an order denying a request to dismiss the bankruptcy case. Using the "pragmatic approach to finality," we have held that such an order is final, although generally orders denying dismissal of a bankruptcy case are interlocutory. Compare Canadian Commercial Bank v. Hotel Hollywood (In re Hotel Hollywood), 95 B.R. 130, 132 (9th Cir. BAP 1988) ("the orders appealed from, given the circumstances of this case, affect the rights of the parties with a degree of finality sufficient to warrant appellate review") with Dunkley v. Rega Props., Ltd. (In re Rega Props., Ltd.), 894 F.2d 1136, 1137-38 (9th Cir. 1990) (order denying motion to dismiss debtor's petition as filed in bad faith was not final order).

In this case, we will follow the Ninth Circuit's lead in Rega Properties, and hold that the order denying the Case Demand is interlocutory. Nevertheless, even though the order does not appear to be final, we can treat the notice of appeal as a motion for leave to appeal and grant leave to appeal pursuant to Rule 8003(c). See Fed. R. Bankr.P. 8003(c); Cutter v. Seror (In re Cutter), 398 B.R. 6, 16-17 (9th Cir. BAP 2008); Roderick v. Levy (In re Roderick Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995). We do so here.

We treat the Case Demand as a motion to dismiss the bankruptcy case for "cause." We review the denial of such a motion for abuse of discretion. We review the bankruptcy court's decision whether or not to dismiss a chapter 7 case for "cause" for abuse of discretion. Sherman v. SEC (In re Sherman), 491 F.3d 948, 969-70 (9th Cir. 2007); Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

We will find an abuse of discretion only if we have a definite and firm conviction that the bankruptcy court has committed a clear error of judgment in the conclusion it reached. Mendez, 367 B.R. at 113.

V. DISCUSSION

A. Matters Not Presented to the Bankruptcy Court

Generally, appellate courts do not consider arguments "that are not 'properly raise[d]' in the trial courts." O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989); Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996). See also In re Cybernetic Serv., Inc., 252 F.3d 1039, 1045 n.3 (9th Cir. 2001) (appellate court will not explore ramifications of argument because it was not raised below and, accordingly, was waived); Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir. 2001) (court will not consider issue raised for first time on appeal absent exceptional circumstances).

Appellants argue for the first time on appeal that the bankruptcy court "deliberately suppressed the whole of these previously submitted documents to assist the [Trustee] in obtaining an illegal claim to an asset" and that by this

"suppression," the bankruptcy court "created the platform to allow his former law partners [to obtain a judgment] based on deliberately suppressed and fabricated evidence." See pages 3-4 of Appellants' Opening Briefs. Even though neither the AP Demand nor the Case Demand refers to bias of the judge, and even though this is not an appeal of a motion for disqualification or recusal of the judge, the Appellants request that we reverse on these grounds. We will not do so, as these arguments have been raised for the first time on appeal. Even if these arguments had been raised prior to the appeal, Appellants have not demonstrated in their briefs the existence of any such bias or any grounds for disqualification.

Moreover, Appellants are requesting us to consider evidence not presented to the bankruptcy court in the context of the AP Demand and the Case Demand. Appellants' AP Demand and Case Demand referred to two documents not mentioned in their briefs here. Rather, they have appended to their opening brief four documents that were not mentioned in the AP Demand or in the Case Demand: (1) a letter dated September 18, 2003, from Northwest Farm Credit Service to BNG Partnership, (2) certain balance sheets of Thomason Farms, Inc. and BNG Partnership, (3) the last three pages of the bankruptcy court's 79-page memorandum decision which was the subject of BAP Nos. ID-06-1026 and ID-06-1365, and (4) an agricultural application for credit.

Because the four documents appended to the Appellants' briefs were not presented to the bankruptcy court in the context of the AP Demand and the Case Demand, we cannot consider them in this appeal. Oyama v. Sheehan (In re Sheehan), 253 F.3d 507, 512

n.5 (9th Cir. 2001) ("Evidence that was not before the lower court will not generally be considered on appeal"). As noted by the Ninth Circuit in Kirschner v. Uniden Corp of Am., 842 F.2d 1074, 1077-78 (9th Cir. 1988), "'We are here concerned only with the record before the trial judge *when his decision was made*.'" Kirschner, 842 F.2d at 1077, quoting United States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1979) (affidavits that "were not part of the evidence presented" to the trial court would not be considered on appeal) (emphasis in Kirschner). Therefore, in deciding whether the bankruptcy court abused its discretion in denying the AP Demand and the Case Demand, we must consider only the record before it when the decision was made. In any event, even if we were to consider the four documents appended to their opening brief, Appellants have not shown how they provide evidence of fraud on the court or bias by the bankruptcy court.

B. Appellants Have Not Shown "Fraud on the Court"

Although the Appellants' briefs do not disclose or fully develop the basis of their requested relief, it appears that they are relying on Rule 60(b)(6) and (d)(3), arguing that the judgment was obtained by fraud on the court.[7] The bankruptcy

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[7]Rule 60(b)(3) authorizes a court to relieve a party from a judgment where "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party" has occurred. Appellants, however, cannot seek relief under this subsection, as Rule 60(c)(1) requires a motion based on subsection (b)(3) to be made no more than a year after entry of the judgment. More than a year elapsed between the entry of the judgment and the filing of the AP Demand and the Case Demand.

Rule 60(b)(6) permits relief from a judgment for "any other reason that justifies relief," although such a motion must still be made within a "reasonable time." Rule 60(d)(3) states that the rule does not limit a court's power to "set aside a judgment

(continued...)

court did not abuse its discretion in denying their AP Demand and the Case Demand, as Appellants did not clearly explain how Appellees obtained the judgment through misrepresentation or other misconduct that would constitute fraud on the court. See Casey, 362 F.3d at 1260 (moving party must prove by "clear and convincing evidence" that judgment was procured by fraud or misconduct). In addition, the record does not support Appellants' claim that the bankruptcy court's conduct in the case evidenced bias or fraud. See Corey v. Loui (In re Corey), 892 F.2d 829, 838-39 (9th Cir. 1989).[8]

Although the term "fraud on the court" remains a "nebulous concept," Broyhill Furniture Indus., Inc. v. Craftmaster Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993), that phrase "should be read narrowly, in the interest of preserving the finality of judgments." Toscano v. Commissioner, 441 F.2d 930, 934 (9th Cir. 1971). Simply put, not all fraud is fraud on the

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[7](...continued)
for fraud on the court."

[8]The Ninth Circuit's comments in Corey are applicable here:

> Appellants make a broadside attack on the impartiality of [the trial judge]. We are unimpressed. A judge's comments aimed at facilitating orderly proceedings are not, in and of themselves, evidence of bias. See Hansen v. Commissioner, 820 F.2d 1464, 1467 (9th Cir. 1987). Moreover, judicial bias must arise from extrajudicial sources. United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). In this case, the record shows clearly that, to the extent the learned district judge was inclined to rule against appellants, this was the product of his knowledge of the facts of the case gained during judicial proceedings, not of any extrajudicial information.

Corey, 892 F.2d at 838-39.

court. To constitute fraud on the court, the alleged misconduct must "harm [] the integrity of the judicial process." Alexander v. Robertson, 882 F.2d 421, 424 (9th Cir. 1989). Appellants argue that Appellees did not disclose certain evidence or that they suppressed certain evidence. Generally, non-disclosure by itself does not constitute fraud on the court. See England v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960) (failure to produce evidence, without more, does not constitute fraud on the court). Similarly, perjury by a party or witness, by itself, is not normally fraud on the court. Levander v. Prober (In re Levander), 180 F.3d 1114 (9th Cir. 1999).

Here, Appellants have not demonstrated any perjury or non-disclosure. In fact, the evidence of fraud presented to the bankruptcy court -- Debtors' representations in a state court case that they did not have an interest in the Sonja Thomason House -- is consistent with testimony of Debtor Greg Thomason during the trial in the adversary proceeding.[9] In addition, the allegedly suppressed Exhibit 4 to Appellants' opening briefs (the agricultural application for credit) -- not mentioned in the AP Demand or the Case Demand -- was introduced by Appellants as Exhibit 50 at the trial and was the subject of an examination of Appellant Byron Thomason. Finally, and most importantly, the bankruptcy court held in its judgment that the Sonja Thomason House did not belong to the estate or to Debtors. Even if Greg Thomason's statements about the Sonja Thomason House had been

[9]Appellants did not discuss, cite to or rely on this "evidence" of purported fraud in their briefs. As such, this argument 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).

inconsistent, the judgment on this particular property was in favor of Appellants. Appellants' contention that the judgment was procured by fraud on the court is therefore confusing.

The Ninth Circuit has held that "fraud on the court" must be shown by clear and convincing evidence. England, 281 F.2d at 309-10. Appellants have not presented clear and convincing evidence of any such fraud. The bankruptcy court therefore did not abuse its discretion in denying the AP Demand and Case Demand.

C. Appellants Did Not Show "Cause" to Dismiss the Main Case

Under section 707(a), a "court may dismiss a case under this chapter only after notice and hearing and only for cause, including" three enumerated causes. 11 U.S.C. § 707(a); Sherman, 491 F.3d at 970. Appellants have not argued that any of the three enumerated causes exist here (unreasonable and prejudicial delay, nonpayment of fees, or failure to file documents required by section 521). Appellants have not articulated any other "cause" for dismissal, other than the "fraud on the court" and bias claims that we already have addressed. Accordingly, the bankruptcy court did not err in denying Appellants' request to dismiss the bankruptcy case.

D. Request for Sanctions

Debtors, the Forsbergs and New Britain have requested in their briefs that we impose sanctions against Appellants under Rule 8020 for filing and prosecuting a frivolous appeal. Trustee indicates that he will be filing a separate motion for sanctions. Trustee's approach is the correct one: Rule 8020 requires that a request for sanctions be made in a separately filed motion. A

request for sanctions in a party's appellate brief is not sufficient and we therefore deny without prejudice the requests for sanctions by Debtors, the Forsbergs and New Britain. Nghiem v. Ghazvini (In re Nghiem), 264 B.R. 557, 560 n.4 (9th Cir. BAP 2001); Highland Fed. Bank v. Maynard (In re Maynard), 264 B.R. 209, 213 n.5 (9th Cir. BAP 2001). We will consider the sanctions requests upon the filing of appropriate motions.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.