

FILED

APR 16 2009

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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

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In re:)	BAP Nos. AZ-08-1290-PaDJu
)	08-1300-PaDJu
BRET JAMES HAMEL,)	(cross-appeals)
)	
Debtor.)	Bk. No. 03-05432
)	
_____)	Adv. No. 07-00517
JAMES HAMEL and DIANE HAMEL,)	
)	
Appellants/Cross-)	
Appellees,)	
)	
v.)	MEMORANDUM¹
)	
LINDA LALLISS, fka LINDA HAMEL,)	
)	
Appellee/Cross-)	
Appellant.)	
_____)	

Argued by Video Conference
and Submitted on March 18, 2009

Filed - April 16, 2009

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

Hon. Randolph Haines, United States Bankruptcy Judge, Presiding

Before: PAPPAS, DUNN and JURY, 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.

1 Because we are unable to ascertain and review the bankruptcy
2 court's reasons for granting summary judgment based on its
3 apparent interpretation of its own orders, we summarily affirm the
4 court's entry of summary judgments holding that appellants have no
5 right to recover certain real and personal property from appellee.
6 In the cross-appeal, we reverse the bankruptcy court's imposition
7 of sanctions against appellants and dismiss appellee's request
8 that additional sanctions be awarded.

9
10 **FACTS**

11 Bret James Hamel ("Bret" or "Debtor") filed a chapter 7²
12 bankruptcy petition on April 2, 2003. At the time Debtor was
13 married to Linda Lalliss ("Lalliss"), who did not join the
14 bankruptcy petition. The couple was involved in divorce
15 proceedings in Maricopa County, Arizona, Superior Court. The
16 other interested parties in this appeal are Debtor's parents,
17 James ("James") and Diane Hamel (collectively "Parents"), and the
18 chapter 7 trustee in Debtor's bankruptcy case, Charles L. Riley
19 ("Trustee").

20 Debtor's schedules listed an ownership interest in a house
21 (the "Residence") valued at \$196,000, subject to a mortgage
22 balance of \$96,000. Debtor claimed the Residence exempt as his
23 homestead in the amount of \$100,000. The schedules also listed
24 his interests in various family corporations and partnerships,
25 valued by Debtor at approximately \$25,000 as of 2001, and
26

27 ² Unless otherwise indicated, all chapter, section and
28 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330,
as enacted and promulgated prior to the effective date (October
17, 2005) of the relevant provisions of the Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8,
April 20, 2005, 119 Stat. 23, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

1 household goods, owned jointly with Lalliss, worth \$8,070, for
2 which he claimed an exemption of \$8,000. Among the household
3 goods, Debtor listed a "piano."

4 The initial disputes in the bankruptcy case involved
5 Debtor's exemption claims. Trustee objected to the total amount
6 of exemptions Debtor had claimed for the household goods. The
7 bankruptcy court sustained Trustee's objection to the household
8 goods exemptions in an order entered on July 15, 2003, limiting
9 Debtor's overall household goods exemption to \$4,000 and the
10 exemption for the piano to \$250.

11 On May 30, 2003, Trustee moved to assume certain executory
12 contracts as to which Debtor was a party, consisting principally
13 of the family partnership interests. Trustee's motion was granted
14 by the bankruptcy court as to the partnership interests on July 3,
15 2003. Trustee then filed a Notice of Sale proposing to sell two
16 of the partnership interests to Alan Travis. However, James
17 provided certain information to Travis about the partnership
18 interests causing him to withdraw his bid. The bankruptcy court
19 approved the rescission of this sale on September 16, 2003.

20 Trustee next apparently commenced negotiations with Ascending
21 Star, LLC, to sell it "the remaining non-exempt, noncash
22 assets of the bankruptcy estate." The agreement between Trustee
23 and Ascending Star provided that: "the estate will sell a 65%
24 interest in the remaining assets to Ascending Star, LLC ("ASL") in
25 exchange for a payment of \$5,000.00. ASL will then take the steps
26 necessary to liquidate and/or recover funds in connection with the
27 assets and the estate will receive 35% of any recovery after the
28 payment of related attorneys' fees and expenses."

1 Parents objected to this sale, arguing that they held liens
2 on all the family-related businesses and that Debtor's interests
3 in those businesses were valueless. Because Parents wished to
4 avoid litigation, they instead offered \$10,000 to Trustee for the
5 purchase of these assets.

6 The bankruptcy court conducted a hearing concerning the
7 proposed sale to ALS on December 17, 2003. Debtor, Trustee, ALS
8 and Parents were represented by counsel at the hearing. Parents
9 indicated to the court that they were seeking to purchase 100
10 percent of Debtor's interests in the family businesses and were
11 prepared to increase their \$10,000 offer, if necessary. ALS also
12 offered to increase its bid. The court granted a continuance to
13 allow the parties to continue negotiations. Hr'g Tr. 31: 23-24
14 (December 17, 2003).

15 At the February 17, 2004 continued hearing, Debtor, Trustee,
16 ALS, and Parents again appeared. Trustee recommended that the
17 bankruptcy court accept the increased bid of Parents for \$60,000
18 for purchase of the assets of the estate, together with an
19 additional \$10,000 to be paid by Parents as consideration for
20 Trustee's agreement to dismiss an adversary proceeding he had
21 filed against Debtor and Parents concerning the family business
22 interests. Hr'g Tr. 3:3-8 (February 17, 2004).

23 During this hearing, the discussion of what assets were to be
24 sold, with one exception, dealt solely with the business interests
25 of Debtor. The only reference during the hearing to the Residence
26 or household goods was a comment by the attorney representing both
27 Debtor and Parents:

28

1 The Debtor, in this case, Your Honor, has absolutely no
2 assets whatsoever as a result of the divorce action.
3 Any assets the Trustee has not been interested in, and
4 frankly, Your Honor, the[y] are considerable, remain in
the custody of Linda Hamel. For example, there is
substantial equity in the former community home; she has
that. There's a very expensive piano; she has that.

5 Hr'g Tr. 20:20-24 (February 17, 2004) (emphasis added).

6 After listening to the parties' presentations, the bankruptcy
7 court approved the sale to Parents, summarizing:

8 This is the Trustee's motion for authority to sell
9 estate assets. Basically, the standard for the Court's
10 approval of such a motion is the business judgment rule,
11 whether the Trustee properly exercised his business
12 judgment and whether the result[] of the exercise of
13 that judgment is within a range of reasonableness. I
14 understand the nature of the asset; it's much more akin
15 to settling litigation than simply selling an asset.
16 That's inherent in the nature of any asset that's in a
17 partnership, because all you really get when you acquire
18 a partner's interest is a charging lien, which is
19 effectively an invitation to litigation. . . . I find
20 that Trustee has properly exercised his business
21 judgment and that the sale as recommended by the Trustee
22 is a reasonable result for the sale of these assets,
23 based on all the facts and circumstances known to the
24 Trustee and this Court. On that basis, I'll approve the
25 sale to [Parents] on the terms set forth on the record.

18 Hr'g Tr. 26:16-27:13 (February 17, 2004) (emphasis added).

19 The bankruptcy court entered an order approving the sale to
20 Parents on February 17, 2004. The order does not individually
21 list any particular assets included in the sale, but rather refers
22 to a sale by Trustee of "all of the remaining non-cash, non-exempt
23 assets of the estate to James and Linda Hamel for a payment of
24 \$60,000 [which were to be] conveyed 'as is, where is' and are
25 subject to any and all liens, claims and adverse interests."

26 On June 4, 2004, Lalliss filed a motion for an order deeming
27 any exempt assets remaining in the bankruptcy estate abandoned so
28 that the state divorce court could distribute them between Lalliss

1 and Debtor. Parents objected to this motion on two grounds,
 2 contending that: (1) Lalliss' motion did not specify the assets to
 3 be abandoned; and (2) Lalliss' motion implied that the assets were
 4 to be abandoned to her, rather than jointly with Debtor.

5 The hearing on Lalliss' motion to abandon was held on October
 6 26, 2004. A transcript of this hearing is not in the excerpts of
 7 record, nor could we locate one in the bankruptcy court's docket.
 8 According to the order entered by the bankruptcy court October 26,
 9 2004, Debtor, Parents and Lalliss were present at the hearing.
 10 The bankruptcy court granted the abandonment motion. Its order
 11 included, inter alia, the following terms:

12 - "Any property sold to [Parents] shall be excepted from this
 13 order."

14 - "The property listed by the Debtor in his schedules shall
 15 be the only property subject to this order: to wit:

16 "Household goods 17 and furnishings, 18 including audio, 19 video, and 20 computer 21 equipment"	ARS § 33- 125	\$8,000	\$8,070
22 "Residence"	ARS § 33- 23 1101	\$100,000	\$196,000

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 25 - "The above listed property shall be abandoned to the Debtor
 26 and to [Lalliss] to the extent that any of the property is
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1 community property under the laws of the State of Arizona.”³

2 The order granting the Lalliss motion to abandon property was not
3 appealed.

4 On December 8, 2004, Lalliss filed her own chapter 7
5 petition. Her schedule A listed the current market value of the
6 Residence as \$210,000, and her schedule C listed the value of
7 household goods in her possession as \$1,350. The bankruptcy court
8 in the Lalliss bankruptcy case would later grant her trustee’s
9 motion to abandon to Lalliss all the non-exempt property in her
10 bankruptcy estate on December 10, 2004.

11 Almost three years later, on September 24, 2007, Parents
12 commenced an adversary proceeding against Lalliss in connection
13 with Debtor’s bankruptcy case. In their complaint, Parents sought
14 an order directing Lalliss to turn over the household goods
15 Parents allege they purchased from Debtors’ estate on February 17,
16 2004. Parents also requested the right to sell the Residence and
17 to retain any equity in excess of liens and the homestead
18 exemption.

19 On January 17, 2008, Lalliss filed her First Summary Judgment
20 Motion in the adversary proceeding. In it, Lalliss argued that
21 the sole issue in the adversary proceeding was whether Parents had
22 purchased any equity in the Residence from the estate. According
23 to Lalliss, any equity in the Residence was fully exempt in
24 Debtor’s bankruptcy case, and as a result, that equity had been

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27 ³ There were other exempt items listed in the bankruptcy
28 court’s order which are not implicated in this appeal. Parents
suggest, and we agree, that it appears that this list was cut-and-
pasted directly from Debtor’s schedule C by Lalliss’ counsel, who
apparently prepared the order.

1 abandoned to Debtor and Lalliss via the abandonment order.
2 Lalliss argued that Parents were fully aware that Trustee never
3 claimed that there was any excess equity interest in the
4 Residence, and that Parents' purchase of the assets of the estate
5 did not include any such interest. Because of this, Lalliss
6 argued, Parents' prosecution of the adversary proceeding against
7 her was frivolous, and Lalliss should be awarded attorneys fees
8 against Parents as a sanction.

9 Parents responded to this motion on January 25, 2008.
10 Principally, Parents argued that, at the time Debtor filed his
11 petition, based upon appraisals, the Residence was not "fully
12 exempt," because the value of the Residence exceeded the balance
13 due on the mortgage and Debtor's homestead exemption. As a
14 result, Parents argued, they purchased this nonexempt equity in
15 the Residence on February 17, 2004. Parents submitted affidavits
16 of the Debtor, their counsel, and the appraisals to support their
17 opposition to the First Summary Judgment Motion.

18 The bankruptcy court conducted a hearing on the First Summary
19 Judgment Motion on February 26, 2008. No transcript of this
20 hearing was included in the excerpts of record in this appeal, nor
21 does it appear on the adversary proceeding docket. The Minute
22 Entry in the adversary proceeding docket for this hearing
23 indicates that Parents and Lalliss were present and represented by
24 counsel. According to that Minute Entry, "Findings of Fact and
25 Conclusions of Law were stated on the record. It is ordered
26 granting Summary Judgment in Favor of Defendant [Lalliss]." There
27 was no further explanation in the Minute Entry of the bankruptcy
28 court's reasons for granting summary judgment.

1 Regarding Lalliss' motion for sanctions, the Minute Entry
2 indicates that:

3 The court [next] addressed the motion for attorney's
4 fees. The only basis for any kind of sanctions or
5 attorney's fees is under Bankruptcy Rule 9011(c) (1) (B)
6 on the court's initiative. On that basis,

7 It is ordered directing James and Diane Hamel and their
8 law firm Collins & Collins to show cause why subdivision
9 B has not been violated and in particular subdivision
10 B2. The conduct the court finds particularly to violate
11 it is [Parents'] failure to address the effect of the
12 ruling of October 26, 2004 and to in effect make an
13 argument that the court finds is directly contrary to
14 both the letter and the intent of that order.

15 Parents responded to the bankruptcy court's ruling in a
16 motion for reconsideration filed on April 2, 2008. Perceiving
17 that the bankruptcy court had ruled that the abandonment order
18 entered October 26, 2004, had effectively settled the value of the
19 Residence at \$196,000, and that the Residence was therefore of
20 inconsequential value to the estate and abandoned to the Debtor
21 and Lalliss, Parents disagreed with the court. Parents argued
22 that the October 26, 2004 abandonment order included incorrect
23 values for the assets because they had been copied out of Debtor's
24 schedules and that the order only dealt with exempt assets of the
25 estate and made no reference to non-exempt assets. As they had
26 argued in their original opposition to the motion, Parents noted
27 that, under Ninth Circuit precedent, any post-petition
28 appreciation in the value of the Residence inured to the
29 bankruptcy estate and that the abandonment was irrelevant in
30 setting asset values. In addition, Parents contended that since
31 there was a legitimate difference of legal opinion concerning the
32 issues, Rule 9011 sanctions should not be imposed.

33 In Lalliss' response to this motion, she argued that the

1 October 26 abandonment order was indeed controlling because
2 Trustee abandoned the assets, including the Residence, as exempt
3 assets. According to Lalliss, since there was no merit in
4 Parents' position, Rule 9011 sanctions were justified.

5 The bankruptcy court held a hearing on Parents'
6 reconsideration motion and its order to show cause concerning
7 sanctions on April 22, 2008. Again, there is no transcript of
8 this hearing in the excerpts of record or in the adversary
9 proceeding docket. According to the Minute Entry, although
10 Parents and Lalliss were represented by counsel, they submitted
11 the issues for decision based on the pleadings. Parents however
12 did point out to the bankruptcy court that its consideration of
13 the First Summary Judgment Motion seemed to be restricted to the
14 question of the Residence and did not address the household goods.

15 The bankruptcy court denied Parent's motion for
16 reconsideration as to the Residence but granted it as to the
17 household goods. The bankruptcy court awarded sanctions against
18 Parents in the form of attorney's fees of \$2,959.00 plus costs of
19 \$99.00.

20 Lalliss then filed a Second Summary Judgment Motion
21 concerning the household goods on June 27, 2008. In it, she
22 argued that the piano had been listed with the other household
23 goods in Debtor's schedules, was thus fully exempt, and was not
24 sold to Parents on February 14, 2004. Instead, Lalliss argued,
25 the piano was abandoned with the other household goods in the
26 October 26, 2004 order. Lalliss argued for imposition of
27 additional Rule 9011 sanctions against Parents on the same grounds
28 asserted in the First Summary Judgment Motion.

1 Parents responded on July 23, 2008, generally arguing that
2 the order of February 17, 2004, sold all the non-exempt non-cash
3 assets, including the household goods and the piano, to Parents.
4 Since there was a disputed fact about what was sold, Parents
5 argued that summary judgment should not be granted. Further,
6 Parents insisted that attorney's fees should not have been granted
7 in connection with the First Summary Judgment Motion, nor should
8 sanctions be awarded for their position on this motion, because
9 Lalliss was represented by her father and thus she was under no
10 legal obligation to pay him for his services. Additionally,
11 Parents contended it would be unjust to assess sanctions against
12 them regarding the Second Summary Judgment Motion when Lalliss was
13 at fault for not addressing the household goods in her First
14 Motion.

15 The bankruptcy court conducted a hearing on the Second
16 Summary Judgment Motion on September 8, 2008. There is no
17 transcript of this hearing in the excerpts of record or in the
18 bankruptcy court docket. According to the Minute Entry, Parents
19 and Lalliss were present and their counsel were heard. As stated
20 in the Minute Entry: "Findings of Fact and Conclusions of Law were
21 stated on the record. It is ordered granting the motion for
22 summary judgment." Again, the Minute Entry contains no discussion
23 by the court of its views on the substance of the motion nor of
24 the reasons for its decision. The Minute Entry makes no reference
25 to Lalliss' request for attorney's fees and costs in connection
26 with the Second Summary Judgment Motion.

27 On November 4, 2008, the bankruptcy court entered a Final
28 Order and Judgment in favor of Lalliss and against Parents. The

1 judgment confirmed the granting of the two summary judgment
2 motions and ordered Parents to pay Lalliss attorney's fees of
3 \$2,959.00 plus costs of \$99.00, consistent with the bankruptcy
4 court's decision on April 22, 2008.

5 Parents filed a timely appeal of the Final Order and
6 Judgment; Lalliss filed a timely cross-appeal concerning the
7 bankruptcy court's failure to award additional sanctions on the
8 Second Summary Judgment Motion.

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JURISDICTION

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The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b) (2) (A) and (O). The Panel has jurisdiction over these appeals under 28 U.S.C. § 158.

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ISSUES

1. Whether the bankruptcy court erred in granting the two summary judgment motions.
2. Whether the bankruptcy court abused its discretion in awarding attorney's fees and costs against Parents.

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STANDARDS OF REVIEW

We review de novo a bankruptcy court's decision to grant summary judgment. Wood v. Stratos Product Dev. (In re Ahaza Sys., Inc.), 482 F.3d 1118, 1123 (9th Cir. 2007) (stating that both the Court of Appeals and the BAP apply de novo review to a bankruptcy court's grant of summary judgment).

It is within the discretion of the Bankruptcy Appellate Panel to summarily affirm a bankruptcy court's grant of summary judgment

1 for non-compliance with its procedural rules. Ehrenberg v. Cal.
2 St. Univ. (In re Beachport Entm't), 396 F.3d 1083, 1086 (9th Cir.
3 2005).

4 A bankruptcy court's decision to impose sanctions under Rule
5 9011 is reviewed for abuse of discretion. In re Brooks-Hamilton,
6 400 B.R. 238 (9th Cir. BAP 2009).

8 DISCUSSION

9 I.

10 Because Parents have not provided an adequate record on appeal
11 to allow the Panel to conclude otherwise, the bankruptcy court's
12 summary judgments, presumably based upon its interpretation
13 of its own orders, must be affirmed.

13 A.

14 Parents argue in their appeal that the bankruptcy court erred
15 in granting the two summary judgment motions filed by Lalliss.

16 As noted above, we review summary judgments de novo. In
17 particular, our duty as an appellate court reviewing the
18 bankruptcy court's grant of summary judgment is to view the
19 evidence in the light most favorable to Parents and to determine
20 whether the bankruptcy court correctly concluded that there were
21 no genuine issues of material fact and that Lalliss was entitled
22 to judgment as a matter of law. Centre Ins. Co. v. SNTL Corp. (In
23 re SNTL Corp.), 380 B.R. 204, 211 (9th Cir. BAP 2007).

24 An appellant bears the burden of filing an adequate record to
25 allow review of a judgment on appeal. Drysdale v. Educ. Credit
26 Mgmt. Corp. (In re Drysdale), 248 B.R. 386, 388 (9th Cir. BAP
27 2000); Abrams v. Sea Palms Assocs., Ltd. (In re Abrams), 229 B.R.
28 784, 789 (9th Cir BAP 1999). To assist us in performing this

1 task, the Rules specify the items that Parents, as appellants,
2 must provide the Panel. Rule 8009(b) specifies that,

3 [T]he appellant shall serve and file with the
4 appellant's brief excerpts of the record as an appendix,
5 which shall include the following:

6 . . .

7 (5) The opinion, findings of fact, or conclusions of law
8 filed or delivered orally by the court and citations of
9 the opinion if published; . . .

10 (9) The transcript or portion thereof, if so required by
11 a rule of the bankruptcy appellate panel.

12 Rule 8009(b) (5) and (9). This Panel's rules mandate that an
13 appellant provide transcripts of the important proceedings
14 occurring in the bankruptcy court:

15 The excerpts of the record shall include the transcripts
16 necessary for adequate review in light of the standard
17 of review to be applied to the issues before the Panel.
18 The Panel is required to consider only those portions of
19 the transcript included in the excerpts of the record.

20 9th Cir. BAP R. 8006-1.

21 The bankruptcy court conducted hearings concerning the two
22 summary judgment motions on February 26, 2008 and September 8,
23 2008. The bankruptcy court rendered its rulings from the bench
24 and apparently explained the basis for its decisions at those
25 hearings, as is reflected in the clerk's hearing minutes
26 indicating that, at each hearing, "Findings of Fact and
27 Conclusions of Law were stated on the record. It is ordered
28 granting the motion for summary judgment." There are no
29 transcripts of those hearings included in the excerpts of record
30 on appeal, nor do they appear in the bankruptcy court's docket.⁴

31 ⁴ Even if not provided in the excerpts on appeal, we may
32 consult the entries in the docket of the underlying bankruptcy
33 case and adversary proceeding. O'Rourke v. Seaboard Sur. Co. (In
34 re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989).
35 However, neither the transcripts, nor any other documents

(continued...)

1 There is no other information contained in the Minute Entries, or
2 anywhere else in the record or dockets, regarding the bankruptcy
3 court's reasons or rationale for its decision to grant the summary
4 judgments.

5 At oral argument before the Panel, counsel for Parents was
6 asked to explain why the summary judgment hearing transcripts had
7 not been included in the appellate record.⁵ His response was
8 that, in his opinion, the bankruptcy court's remarks made at the
9 hearings about its reasons for its decisions were not necessary in
10 order for the Panel to conduct an effective de novo review of the
11 summary judgments. Counsel was then asked to recount his
12 understanding of the bankruptcy court's reasons for granting
13 summary judgment. He replied that it was his understanding that
14 the bankruptcy court had "interpreted the February 17, 2004 order
15 in conjunction with the October 26, 2004, order" and determined
16 there were no nonexempt assets related to the Residence because
17 the value of the Residence was no greater than the household
18 exemption plus encumbrances on the Residence. When asked whether
19 the Panel had access to anything in the record on appeal to
20 confirm his understanding of the bankruptcy court's reasoning,
21 counsel replied, "No, you don't." However, Counsel insisted that
22 this deficiency was of no moment, because the Panel could simply
23 look to the plain language of the sale and abandonment orders.

24 Parents' decision not to include the transcripts of the two
25 summary judgment hearings, and their attorney's views concerning

26
27 ⁴(...continued)
28 evidencing the reasons for the bankruptcy court's decisions appear
in the dockets.

⁵ Both Parents and Lalliss filed statements with the Clerk
that they did not intend to submit transcripts of the summary
judgment hearings in this appeal. See Adv. proc. dkt. nos. 35,
53.

1 the value of the Panel's understanding the bankruptcy court's
2 reasons for granting the summary judgments, are incompatible with
3 basic principles of appellate review. We acknowledge that, in the
4 context of a de novo review of a summary judgment, the Panel may
5 not "defer" to the bankruptcy court's decisions. United States v.
6 Washington, 645 F.2d 749, 752 (9th Cir. 1981). But, equally
7 important in our view, we should not be expected to ignore the
8 bankruptcy court's rationale, either.

9 FED. R. CIV. P. 52(a), as incorporated by Rule 7052, does not
10 require a bankruptcy court to state its reasons for granting
11 summary judgment. Couveau v. Am. Airlines, Inc., 218 F.3d 1081,
12 1081 n.2 (9th Cir. 2000). However, "a summary judgment order that
13 fails to disclose the [] court's reasons runs contrary to the
14 interest of judicial efficiency by compelling the appellate court
15 to scour the record in order to find evidence in support of the
16 decision." Id. And where, as here, the bankruptcy court's
17 "underlying holdings would otherwise be ambiguous or
18 inascertainable, the reasons for entering summary judgment must be
19 stated somewhere in the record" and be available for review. Van
20 Bourg, Weinberg & Roger v. NLRB, 656 F.2d 1356, 1357 (9th Cir.
21 1981) (emphasis added; cited for this principle in Couveau, 218
22 F.3d at 1081); accord, Regalado v. City of Commerce City, 20 F.3d
23 1104, 1108 (10th Cir. 1994); Telectronics Pacing Sys., Inc. v.
24 Ventritex, Inc., 982 F.2d 1520, 1526 (D.C. Cir. 1992); Clay v.
25 Equifax, Inc., 762 F.2d 952, 958 (11th Cir. 1985); Hanson v. Aetna
26 Life & Cas., 625 F.2d 573, 575 (5th Cir. 1981).

27 As discussed more fully below, the "underlying holdings" of
28 the bankruptcy court in granting the two summary judgments are

1 "inascertainable" from a review of the summary judgment orders or
2 the Final Order and Judgment. Consequently, by not providing the
3 transcripts of the hearings on the two summary judgment motions at
4 which the bankruptcy court explained the reasons for its orders,
5 Parents have not satisfied their responsibility to assure that the
6 Panel has an adequate record on appeal to allow it to effectively
7 review the bankruptcy court's decisions.

8 **B.**

9 Before electing an option for dealing with an inadequate
10 record on appeal, the case law requires that the Panel examine the
11 record we do have, including the excerpts and appellate briefs, to
12 attempt to discern the grounds on which the summary judgments were
13 granted. In re Beachport Entm't, 396 F.3d at 1086; Hall v.
14 Whitley, 935 F.2d 164, 165 (9th Cir. 1991); Ashley v. Church (In
15 re Ashley), 903 F.2d 599, 605-06 (9th Cir. 1990). Having done so,
16 we are unable to deduce with any precision the bankruptcy court's
17 rationale for granting the summary judgments.

18 There are numerous and inconsistent statements in the
19 excerpts and briefs where the parties endeavor to characterize or
20 paraphrase the bankruptcy court's ruling, and its reasons for that
21 ruling, on the First Summary Judgment Motion. For example,
22 consider the following:

23
24 Both parties focused on the value issue in arguing the
25 [First Summary Judgment Motion]. The trial court,
26 however, reviewed an order abandoning exempt property of
27 the Debtor's estate after the [Parents"] purchase as
28 dispositive on the issue of value, and, thus on the
motion. The order relied on by the trial court was
dated October 26, 2004, and dealt solely with exempt
property. That order never abandoned any nonexempt
property to the Debtor nor to Lalliss, but was made

1 specifically subject to the Hamel's purchase of February
2 17, 2004.

3 Parents' Opening Br. at 7.

4 The Court properly found, because there was no
5 alternative finding available to the Court, that the
6 house and its contents were abandoned to [Debtor] and
7 Lalliss by the order prepared by [Parents' and Debtor's]
8 counsel and signed on October 26, 2004.

9 Lalliss Reply Br. at 14.

10 The trial court stated that since the Debtor made
11 mistakes in his evaluations [in the schedules] those
12 mistakes were binding on all who become involved in the
13 case because of the doctrine of the "law of the case."

14

15 Parents' Opening Br. at 20.

16 The Court expressed a concern at the oral argument on
17 the Motion for Summary Judgment that the order of
18 October 26, 2004, set the value of the home and, as a
19 result, had become the "law of the case." . . . Had
20 value been an issue in the October 26, 2004, order and
21 was either agreed upon or decided by the Court when the
22 order was entered, then the order would be relevant to
23 the issues before the court in the Summary Judgment
24 Motion, but because value was not an issue, was not
25 decided, and was not relevant to entry of the October
26 26, 2004, order, it is not relevant and not law of the
27 case.

28

19 Parents' Response to Court's Motion Re: Attorney's Fees and Motion
20 for Reconsideration, April 2, 2008, pp. 10-12.

21 [Parents] argue that the acknowledgment by the Trustee
22 and the Court of [Lalliss's] contention in October 2004
23 that all equity in the real property and household goods
24 was exempt, by entry of an order of exemption, is not
25 binding on [Parents]. They appear to be contending that
26 the exemption of the real property and the household
27 goods by the Court is not law of the case as to
28 [Parents], because they were not a party to that action.

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30 Lalliss Reply Br. at 20-21.

31 The parties' perspectives reflected in these statements tend
32 to indicate that, in granting Lalliss summary judgment, the

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1 bankruptcy court apparently focused on whether there was any
2 equity in the assets when purchased by Parents in February, 2004,
3 or whether by virtue of the abandonment order entered in October,
4 all equity in those assets was exempt, and therefore, was
5 abandoned to Debtor and Lalliss for division by the divorce court.
6 However, based upon this incomplete record, it is impossible for
7 us to accurately discern what facts the bankruptcy court may have
8 considered to be critical or its reasons for discounting Parents'
9 claims that equity did exist in the subject assets.

10 The parties apparently agree that the bankruptcy court based
11 its rulings on its construction of its own orders entered February
12 17 and October 26, 2004. Assuming the parties' assumptions about
13 the basis of the bankruptcy court's decision are correct, even in
14 the context of a de novo review, we should accord special
15 consideration to a court's interpretation of its own orders.
16 Officers for Justice v. Civil Serv. Comm'n of City and County of
17 San Francisco, 934 F.2d 1092, 1094 (9th Cir. 1991) (citing the
18 footnote in Brown v. Neeb, 644 F.2d 551, 558 n.12 (6th Cir. 1981)
19 which states, "Few persons are in a better position to understand
20 the meaning of an [order] than the [] judge who oversaw and
21 approved it."); In re Shenango Group Inc., 501 F.3d 338, 346 (3d
22 Cir. 2007) (holding that the court of appeals "accords great
23 weight to the bankruptcy court's construction of an order with
24 which it is familiar by virtue of its direct involvement in the
25 proceedings"); Colonial Auto Ctr. v. Tomlin (In re Tomlin), 105
26 F.3d 933, 941 (4th Cir. 1997) (holding in an appeal of a summary
27 judgment order, "The bankruptcy judge who has presided over a case
28 from its inception is in the best position to clarify . . . the

1 court's rulings."); Graefenhain v. Pabst Brewing Co., 870 F.2d
2 1198, 1203 (7th Cir. 1989) (citing Brown v. Neeb); Tex. Nw. R. Co.
3 v. The Atcheson, Topeka & Santa Fe R. Co. (In re Chicago, Rock
4 Island & P.R. Co.), 860 F.2d 267, 272 (7th Cir. 1987) (stating in
5 an appeal of a summary judgment order that the trial court "is in
6 the best position to interpret its own orders").

7 Traditionally, a failure to provide a sufficient record to
8 support an informed review of the trial court's determinations may
9 result in either dismissal of the appeal or summary affirmance of
10 the trial court's judgment based upon the appellant's inability to
11 demonstrate error. Cnty. Commerce Bank v. O'Brien (In re
12 O'Brien), 312 F.3d 1135, 1136-37 (9th Cir. 2002); Everett v. Perez
13 (In re Perez), 30 F.3d 1209, 1217-18 (9th Cir. 1994); Hall, 935
14 F.2d at 165; Ashley, 903 F.2d at 605-06. On the other hand, where
15 appellant fails to provide a sufficient transcript, the appellate
16 court has discretion to disregard the defect and decide the appeal
17 on the merits. Hall, 935 F.2d at 165; Syncom Capital Corp. v.
18 Wade, 924 F.2d 167, 169 (9th Cir. 1991); Ashley, 903 F.2d at
19 605-06; Portland Feminist Women's Health Ctr v. Advocates for
20 Life, Inc., 877 F.2d 787, 789-90 (9th Cir. 1989) (court declined
21 to review alleged error in contempt hearing where appellants did
22 not provide a transcript of that hearing); Thomas v. Computax
23 Corp., 631 F.2d 139, 143 (9th Cir. 1980) (dismissing a pro se
24 appeal that failed to include relevant transcript); but see Kyle
25 v. Kyle (In re Kyle), 317 B.R. 390, 393 (9th Cir. BAP 2004)
26 (holding that a transcript was not necessary where the Panel could
27 discern the reasoning of the bankruptcy court from other sources).
28 Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187,

1 1190 (9th Cir. 2003), instructs that, when faced with an
2 inadequate record, the Panel should consider whether informed
3 review is possible in light of the record on appeal. Morrissey
4 distinguishes between an incomplete record that limits the
5 appellate court's ability to understand the issues and, on the
6 other hand, an incomplete record that does not contain enough to
7 enable review. In the latter case, there is "little choice" but
8 to affirm or dismiss. Id. at 1191.

9 In this appeal, in the exercise of our discretion,⁶ we
10 conclude the record is inadequate to allow us to perform an
11 effective review of the bankruptcy court's decisions. We simply
12 cannot discern the bankruptcy court's reasons for granting Lalliss
13 the summary judgments. The only instructive items in the excerpts
14 are the bankruptcy court's orders and the Minute Entries from the
15 various hearings. As the parties seem to agree, under the
16 circumstances, we can only assume that the bankruptcy court
17 rejected Parents' claims based upon its interpretation of its own
18 orders. Lacking other substantive information about the reasons
19 for the bankruptcy court's decision, we accord great weight to the
20 decision of the court that entered the orders. In short, under
21 the circumstances, we believe the summary judgments should be
22 summarily affirmed.

23 Beachport cautions us that summary affirmance is tantamount
24 to dismissal of an appeal and, under some circumstances, may

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26 ⁶ A decision to summarily affirm the bankruptcy court
27 because of an inadequate record on appeal is regarded by the Ninth
28 Circuit as one based on noncompliance with non-jurisdictional
procedural requirements. Rather than apply its usual de novo
review to our decision, the court of appeals will apply an abuse
of discretion standard. In re Morrissey, 349 F.3d at 1189-90.

1 constitute an inappropriately harsh sanction. Beachport therefore
2 instructs that, even if we determine that we have an inadequate
3 record on appeal, before we dismiss summarily for noncompliance
4 with a procedural rule, the Panel must consider the impact of the
5 sanction, alternative sanctions, and "the relative culpability of
6 the appellant and his attorney, because dismissal may
7 inappropriately punish the appellant for the neglect of his
8 counsel." Id. at 1087. Beachport recognizes, however, that there
9 may be some appeals where the inadequacy of the record is so
10 "egregious" as to obviate the need for consideration of
11 alternative sanctions.⁷

12 The record in this appeal contains no information of
13 consequence concerning the bankruptcy court's reasons for granting
14 the two summary judgment motions, other than a reference in the
15 hearing minutes that the court's findings and conclusions were
16 stated on the record. Parents elected not to submit the
17 transcripts of the hearings on the two summary judgment motions,
18 the only reliable source for understanding the bankruptcy court's
19 rationale for granting the motions. As noted above, even in de
20 novo review, the trial court's reasons for granting summary
21 judgment must be given appropriate consideration. All things
22 considered, we conclude that Parents' failure to supply an
23 adequate record for review was, under these circumstances, an
24 egregious omission. As a result, we summarily AFFIRM the Final

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26 ⁷ Beachport cites Morrissey, where, among other
27 deficiencies in its brief and the record, the appellant
28 "egregiously violated" the requirements of the bankruptcy rules by
failing to include the "crucial transcript" that addressed the
controversy. In re Beachport Enters, 396 F.3d at 1086, quoting In
re Morrissey, 349 F.3d at 1189.

1 Order and Judgment of the bankruptcy court as to its grants of the
2 First and Second Summary Judgment Motions.

3
4 **II.**

5 The bankruptcy court abused its discretion in awarding sanctions
6 against Parents for violation of Rule 9011(b) (2), and there is no
7 basis for this Panel to award Lalliss additional sanctions.

8 Parents argue that the bankruptcy court erred in imposing
9 sanctions in the form of an award of attorneys fees against
10 Parents for alleged violations of Rule 9011(b) (2). In the cross-
11 appeal, Lalliss asks us to "transfer" those sanctions to the
12 attorneys for Parents and, in addition, to order an increase in
13 the amount of the sanctions.

14 The bankruptcy court's Minute Entry for February 26, 2008,
15 provides that: "It is ordered directing James and Diane Hamel and
16 their law firm Collins & Collins to show cause why subdivision B
17 [of Rule 9011] has not been violated and in particular subdivision
18 B2." The Minute Entry for the April 22 proceedings indicates that
19 this was a hearing concerning "Order Directing James and Diane
20 Hamel and Their Law Firm Collins & Collins to Show Cause Why
21 Subdivision B(2) Has Not Been Violated." The final entry on the
22 Minute Entry states that "It is ordered granting an award of
23 attorney's fees in the amount of \$2,959 plus costs of \$99.00
24 against [Parents]."

25 The bankruptcy court committed an error of law when it
26 awarded Lalliss attorney's fees and costs from Parents for alleged
27 violations of Rule 9011(b) (2). Rule 9011(b) (2) prescribes that
28 the presentation of a pleading to the court by "an attorney or
unrepresented party" constitutes a representation that, as

1 relevant here, "the claims . . . therein are warranted by existing
2 law or by a nonfrivolous argument for the extension, modification,
3 or reversal of existing law or the establishment of new
4 law. . . ." Rule 9011(c)(2)(A) provides that "Monetary sanctions
5 may not be awarded against a represented party for violation of
6 subdivision (b)(2)." Polo Bldg. Group, Inc. v. Rakita (In re
7 Shubov), 253 B.R. 540, 546 (9th Cir. BAP 2000) (holding that "a
8 represented party cannot be required to pay sanctions for
9 violating Bankruptcy Rule 9011(b)(2)."). Without regard to
10 whether Parents' position was frivolous, it was error for the
11 bankruptcy court to impose a monetary sanction for violation of
12 Rule 9011(b)(2) on Parents, because they were represented by
13 counsel. We therefore REVERSE the bankruptcy court's award of
14 attorney's fees and costs against Parents.

15 Lalliss' cross-appeal concerning sanctions lacks merit.
16 Apparently recognizing the bankruptcy court's mistake, Lalliss
17 asks the Panel to "substitute" Parents' law firm for Parents as
18 the proper party against whom the bankruptcy court's Rule 9011
19 sanctions should have been imposed and to increase those sanctions
20 to \$6,854.00 for attorney's fees and \$99.00 for costs. Lalliss
21 provides neither authority, nor persuasive reasoning, for
22 requesting this novel form of relief from this appellate body.

23 Even assuming the Panel could grant the sort of relief
24 Lalliss seeks in her cross-appeal, the Panel declines to consider
25 Lalliss' argument that we should "transfer" the sanction from
26 Parents to their law firm because it was raised for the first time
27 on appeal. In re E.R. Fegert, 887 F.2d at 957 (appellate court
28 will not consider argument raised for the first time on appeal);

1 Concrete Equip. Co., Inc. v. Fox (In re Vigil Bros. Constr., Inc.,
2 193 B.R. 513, 520 (9th Cir. BAP 1996).

3 We also decline to consider Lalliss's request that we
4 increase the amount of the sanctions to take into account the
5 additional attorneys fees she incurred in pursuing the Second
6 Summary Judgment motion. The bankruptcy court's order and
7 judgment is silent on this request, and we decline to consider it
8 on appeal, especially without knowing whether the bankruptcy court
9 would consider imposing sanctions against Parents' counsel.⁸

10 Therefore, Lalliss' cross-appeal is DISMISSED.

11
12 **CONCLUSION**

13 We summarily AFFIRM the Final Order and Judgment insofar as
14 it grants the First and Second Summary Judgment Motions, because
15 Parents have not provided us with an adequate record to
16 effectively review the bankruptcy court's decision.

17 We REVERSE the bankruptcy court's award of attorney's fees

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19 ⁸ Although we have discretion to consider an issue raised
20 for the first time on appeal, our discretion is not limitless. We
21 may only consider a new issue if "(1) there are 'exceptional
22 circumstances' why the issue was not raised in the trial court,
23 (2) the new issue arises while the appeal is pending because of a
24 change in the law, or (3) the issue presented is purely one of law
25 and the opposing party will suffer no prejudice as a result of the
26 failure to raise the issue in the trial court." United States v.
27 Carlson, 900 F.2d 1346, 1349 (9th Cir. 1990). We find no
28 exceptional circumstances, or even an argument, why the request to
"transfer" the sanction from Parents to their attorneys was not
first raised in the bankruptcy court. There has been no change in
the law. And Parents would certainly be prejudiced by having to
respond late in an appeal to the introduction of a novel,
unsupported legal theory. And if Lalliss believes there is merit
to her request for an award of Rule 9011 sanctions against Parents
or their counsel as a result of the proceedings on the Second
Summary Judgment motion, Lalliss may bring that issue to the
attention of the bankruptcy court via a motion for relief from the
court's Final Order and Judgment under Rule 9024, which
incorporates FED. R. CIV. P. 60(b).

1 and costs pursuant to Rule 9011(b) (2) against Parents, and we
2 DISMISS Lalliss' cross-appeal asking us to modify and increase
3 that sanction award.

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