

MAR 02 2009

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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NOT FOR PUBLICATION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. CC-08-1220-PaDC
) CC-08-1221-PaDC
DUSKO CAVIC aka DANNY CAVIC,) (Consolidated)
and LJILIJANA CAVIC aka LILLY)
CAVIC,) Bk. No. SA-04-11921-RK
)
Debtors.)

DUSKO CAVIC,
Appellant,

v.

MEMORANDUM¹

JOHN M. WOLFE, Chapter 7
Trustee; VESTIN MORTGAGE,
INC.; MICHAEL J. MIGAN;
MICHAEL SHUSTEK; PAUL
CONNAGHAN; MATTHEW CALLISTER;
MICHAEL JOSEPH MONA; EMERALD
QTR., LLC; STAN PACK; COREY B.
BECK,
Appellees.²

Argued and Submitted on February 18, 2009
at Pasadena, California

Filed - March 2, 2009

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

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 Of those designated as appellees, Wolfe filed a brief, and Callister, Emerald Qtr. and Mona filed a joint brief. The others have not filed briefs or appeared in this appeal.

1 market and sell their residence within 60 days. Debtors did not
2 comply with the terms of the dismissal order, and on February 2,
3 2005, the bankruptcy court vacated the dismissal order and
4 reopened the case so Trustee could administer assets.

5 To put subsequent events in Debtors' case in context, it is
6 important to consider some related matters.

7 8 The Vieux Carre Bankruptcy

9 The crux of many of the disputes in this bankruptcy case is
10 a real estate complex in Las Vegas, Nevada, known as French
11 Quarter Suites (the "Property"). Before 2001, the Property was
12 subject to two mortgages. The first mortgage secured a loan from
13 Vestin Mortgage, Inc. ("Vestin") in the amount of approximately
14 \$4.5 million; the second secured a debt for approximately \$1
15 million owed to Consolidated Mortgage Corporation
16 ("Consolidated").

17 Sometime in 2001, the former owner of the Property defaulted
18 on the Consolidated mortgage. In lieu of foreclosure, the
19 Property was voluntarily conveyed to Consolidated. Consolidated
20 formed a company named Vieux Carre, LLC ("Vieux Carre"), and
21 conveyed the Property to Vieux Carre as its only asset.

22 Vieux Carre defaulted on the Vestin mortgage and, allegedly
23 to avoid foreclosure, filed a chapter 11 petition in Nevada on
24 September 19, 2001. Bankr. D. Nev. No. BK-S-01-19775-LBR.
25 According to Cavic, he was approached by representatives of
26 Vestin named Shustek and Connaghan to discuss Cavic's possible
27 purchase of all the membership interests of Vieux Carre. In or
28 about December 2001, Cavic purchased 100 percent of the

1 membership interests in Vieux Carre for \$500,000 and his
2 assumption of the Vestin mortgage. Cavic alleges that he was
3 informed in the purchase negotiations that the Property, the sole
4 asset of Vieux Carre, was worth \$7 million.

5 The Nevada bankruptcy court confirmed Vieux Carre's chapter
6 11 plan on February 20, 2002. One provision of that plan
7 required Vieux Carre to make periodic payments to Vestin while
8 Vieux Carre attempted to sell the Property. However, Vieux
9 Carre failed to pay Vestin as provided in the plan, and Vestin
10 noticed the Property for a foreclosure sale to occur on November
11 17, 2003. On November 14, 2003, Corey B. Beck ("Beck"), attorney
12 for secured creditor Shirley Wallace (and allegedly also an
13 attorney for Cavic), filed an emergency motion for a stay of the
14 foreclosure, which was denied by the Nevada bankruptcy court on
15 November 18, 2003. On November 19, 2003, the Property was sold
16 through foreclosure.

17 On January 29, 2004, Vieux Carre's chapter 11 bankruptcy
18 case was converted to a case under chapter 7. Stan Pack ("Pack")
19 was appointed trustee.

20
21 The Consolidated Action and the
Trustee's Attempted Compromise with Debtor

22 On September 24, 2003, Cavic filed a complaint in Clark
23 County District Court, Nevada, against Consolidated, Todd
24 Parriott, Ann Aaron, Cameron Street LLC, and Aleksandar Hadijski
25 (the "Consolidated Defendants") asserting causes of action for
26 fraud, civil conspiracy, concert of action, breach of implied
27 covenants, and breach of contract. Danny Cavic v. Consolidated
28 Mortgage Corp., et al., case no. A474040 (the "Consolidated

1 Action"). Cavic alleged that he suffered damages in excess of
2 \$10 million because of fraudulent misrepresentations by the
3 Consolidated Defendants related to Cavic's purchase of the
4 Property. After Debtors filed their bankruptcy petition, the
5 Consolidated Defendants obtained a judgment on the pleadings in
6 state court, entered on May 5, 2004. There followed a rather
7 confusing flurry of motions and reversals.

8 Cavic moved for reconsideration of the judgment, and on May
9 24, 2004, an order was entered setting aside the judgment. The
10 Consolidated Defendants then moved for reconsideration of the
11 order setting aside the judgment, which was granted on July 30,
12 2004. Although there may have been some dispute whether the
13 original judgment of May 5, 2004, may have been entered in
14 violation of the automatic stay in Debtors' bankruptcy case, the
15 judgment was in effect on July 28, 2004, when Cavic's bankruptcy
16 case was originally dismissed by the bankruptcy court.

17 Trustee entered settlement negotiations with the
18 Consolidated Defendants. In mid-December 2005, Trustee and the
19 Consolidated Defendants agreed to a settlement by which the
20 Consolidated Defendants would pay the estate a total of \$10,000
21 in exchange for dismissal of the Consolidated Action with
22 prejudice. Trustee filed a motion to approve the settlement in
23 the bankruptcy case on December 19, 2005.

24 Cavic objected to this motion and settlement, arguing that
25 there were potentially millions of dollars at stake in the
26 Consolidated Action. Cavic offered to match the \$10,000
27 settlement offer in exchange for the right to litigate the claims
28 on behalf of the bankruptcy estate.

1 A hearing was held on Trustee's motion to approve the
2 settlement on February 14, 2006. The bankruptcy court denied
3 Trustee's motion in an order dated March 2, 2006. There is no
4 transcript of the hearing of February 14, 2006 in the record, nor
5 does the bankruptcy court's order or docket entry explain the
6 reasons for the court's ruling.

7 Trustee apparently engaged in discussions with Cavic, which
8 eventually led to another settlement agreement on September 18,
9 2006, under the terms of which Cavic would pay \$10,000 to the
10 estate and, in exchange, Cavic would assist special counsel of
11 his choosing in prosecuting the Consolidated Action (the
12 "Agreement"). This Agreement provides that Cavic will assume
13 all costs of the litigation against the Consolidated Defendants,
14 but that he would be entitled to recover all fees and costs he
15 advanced if the litigation resulted in a recovery of money for
16 the estate, after court approval. Trustee submitted an
17 application to employ Michael Migan ("Migan"), Cavic's nominee,
18 as special counsel for Trustee to litigate the Consolidated
19 Action.

20 The bankruptcy court, at a hearing on October 24, 2006,
21 denied Trustee's motion to approve the Agreement, without
22 prejudice to resubmitting the arrangement for court approval as a
23 § 363 sale. However, the court approved the employment of Migan
24 "with compensation and reimbursement of costs to be determined
25 and paid upon further application and approval of this Court
26 pursuant to Bankruptcy Code sections 330 and 331."

1 The Callister Adversary Proceeding

2 On November 9, 2006, acting through Migan, Trustee filed an
3 adversary complaint in the Central California bankruptcy court
4 against Matthew Callister ("Callister"); Vestin; Shustek;
5 Connaghan; David A. Riggi; Beck; Pack; Emerald Qtr., LLC; Michael
6 Mona; SM Investments, LLC; Sandy Marr; Candace C. Carylton and
7 Shea & Carylton, Ltd. (together, the "Callister Defendants") for,
8 inter alia, fraud and deceit, negligence, constructive fraud,
9 professional negligence and civil conspiracy. Wolfe v.
10 Callister, et al., Bankr. C.D. Cal. Adv. Proc. no. 06-1527 (the
11 instant "Adversary Proceeding").⁵ On January 26, 2007, most of
12 the Callister Defendants moved to dismiss or transfer the
13 Adversary Proceeding to the Nevada bankruptcy court. They sought
14 transfer on the grounds of forum non conveniens because the
15 claims asserted in the Adversary Proceeding arose from actions
16 allegedly taken by the Callister Defendants during the Vieux
17 Carre bankruptcy case. On April 30, 2007, the bankruptcy court
18 in California transferred the Adversary Proceeding to Nevada.
19 Bankr. D. Nev. Case no. 07-1087-MKN.

20 After the Adversary Proceeding was transferred, Trustee was
21 unable to secure local counsel in Nevada, and began exploring
22 possible settlements with the Callister Defendants. On May 9,
23

24 ⁵ Attorneys Candace C. Carylton and Shea & Carylton, Ltd.
25 represented Consolidated in the formation of Vieux Carre. SM
26 Investments, LLC and Sandy Marr were the purchasers of the
27 Property at the foreclosure sale, and then sellers of the
28 Property to Emerald and Mona. Riggi is an attorney who was
engaged by Cavic between March and November 2003. None of these
parties are directly involved in this appeal.

1 2008, Trustee filed a Motion for Order Approving Settlement and
2 Compromise of Disputes Between the Estate and (1) Matthew
3 Callister; (2) Vestin Mortgage, Inc., Michael Shustek and Paul
4 Connaghan; (3) Corey B. Beck; (4) Stan Pack; and (5) Emerald
5 Qtr., LLC and Michael Joseph Mona (the "Compromise Motion"). The
6 Compromise Motion included over 100 pages of material pertaining
7 to the five separate proposed settlements of disputes with
8 certain Callister Defendants. In the motion, Trustee argued that
9 the settlements would provide \$52,250 in cash to the bankruptcy
10 estate, and put a prompt end to most of the Adversary Proceeding,
11 thereby avoiding its uncertainty and significant litigation
12 costs. In his submissions, Trustee provided a detailed
13 examination of each settlement agreement, and argued that each
14 compromise satisfied the applicable Ninth Circuit case law
15 criteria for approval by the bankruptcy court. Trustee stated
16 that it was his business judgment that the interests of creditors
17 of the estate would be best served if the bankruptcy court
18 approved the Compromise Motion.

19 With the exception of the Beck settlement, all the
20 settlement agreements were subject to overbid procedures. The
21 overbid provisions, except as noted below, included several
22 common requirements, among others: (1) to be considered, an
23 overbid must be in writing and be received by Trustee no later
24 than two business days before the scheduled settlement hearing on
25 June 4, 2008; (2) the overbid must be accompanied by a deposit in
26 certified funds for each overbid; and (3) an overbidder must
27 submit evidence that sufficient funds were available to complete
28 the transaction.

1 The material details of the five settlement agreements
2 referenced in Trustee's Compromise Motion are described below.

3
4 The Callister Settlement

5 From September through November 2003, Callister served as
6 Cavic's attorney in the Consolidated Action. In the suit, Cavic
7 alleged that Callister had engaged in intentional
8 misrepresentation and suppression of facts, constructive fraud,
9 professional negligence, and civil conspiracy. In response,
10 Callister filed a motion for summary judgment, pleading a statute
11 of limitations defense to the charges of professional negligence
12 and fraud.

13 Under the proposed Callister Settlement Agreement, Callister
14 agreed to pay the estate \$15,000 in exchange for a dismissal from
15 the Adversary Proceeding and execution by the parties of mutual
16 releases. Trustee's motion provided an overbid procedure to the
17 Callister Settlement. In recognition of the value added to the
18 deal by the mutual releases, and the additional costs to be
19 incurred by local counsel carrying on the litigation, Trustee set
20 the minimum overbid at \$17,500.

21
22 The Vestin Defendants Settlement (Vestin, Shustek and Connaghey)

23 The complaint in the Adversary Proceeding alleged that,
24 among other claims, Vestin, Shustek and Connaghey failed, in
25 negotiating the purchase of the Property, to disclose to Cavic
26 the existence of a \$4.5 million dollar appraisal of the Property
27 when they led him to believe the Property was worth millions
28 more. Among the defenses raised was a statute of limitations

1 defense. The settlement between the Vestin Defendants and
2 Trustee provided that the three individual defendants would
3 collectively pay Trustee \$21,250 in exchange for dismissal from
4 the Adversary Proceeding and mutual releases. Trustee conceded
5 that the value attributable to the mutual releases and
6 elimination of costs was difficult to quantify, but Trustee and
7 the Vestin Defendants reached agreement that it was worth
8 approximately \$10,000. Consequently, Trustee proposed an overbid
9 on the Vestin settlement set at \$31,000.

10
11 The Beck Settlement

12 In the complaint, Trustee alleged that Beck committed
13 professional negligence by filing an emergency motion on behalf
14 of a creditor at the same time that Beck was representing Cavic.
15 Trustee agreed to settle with Beck for \$1,000 in exchange for
16 dismissal from the Adversary Proceeding and mutual releases.
17 Trustee proposed a minimum overbid of \$1,500.

18
19 The Emerald/Mona Settlement

20 Trustee alleged that Emerald and Mona conspired along with
21 other Callister Defendants to deprive Cavic of substantial equity
22 in the Property. Specifically, a straw man purchased the
23 Property at the foreclosure sale for approximately \$4.55 million,
24 the value of the Vestin mortgage, and Mona and Emerald purchased
25 the Property from the straw man within a few days for \$4,673,025.
26 Then, five days after the foreclosure sale, Vestin loaned Emerald
27 and Mona \$6,073,205, secured by the Property.

1 Trustee agreed to settle with Emerald and Mona for \$15,000
2 in exchange for dismissal and mutual releases. In view of the
3 mutual releases and costs associated with continuing litigation,
4 the minimum overbid was set at \$17,500.

5
6 The Pack Settlement

7 Trustee asserts that Pack, the chapter 11 trustee in the
8 Vieux Carre bankruptcy case, breached his fiduciary duty to Cavic
9 by failing to take certain actions relating to the Property.
10 Pack argues that Trustee has no standing, because any claims
11 Trustee may assert are property of the Vieux Carre bankruptcy
12 estate. Under the terms of the Pack settlement, Pack stipulated
13 to assign to Trustee all Vieux Carre claims alleged in the
14 Adversary Proceeding in exchange for mutual releases. In
15 Trustee's view, this would give him standing to pursue those
16 claims, and would defeat the general argument raised by the
17 Callister Defendants that Trustee lacked standing. This
18 settlement was not subject to overbids.

19
20 The Compromise Hearing, the Overbid Hearing
and the Reconsideration Motion and Hearing

21 The hearing before the bankruptcy court on the Compromise
22 Motion was set for June 4, 2008. Cavic, acting at this time
23 without an attorney, filed a late Opposition to Trustee's motion
24 on May 30, 2008. The basis for the Opposition is somewhat
25 difficult to discern. In it, Cavic argues that he "owns" the
26 claims at issue in the settlement agreements as a result of his
27 earlier Agreement with Trustee. On the other hand, he suggests
28 that the Agreement was an "unfair and illegal contract" and

1 should be set aside by the court because it did not give him
2 "equal rights" with Trustee in control of the claims. Also, as
3 an alternative to the settlements, Cavic offered to match the
4 \$52,250 the settling parties had offered to Trustee.

5 Before the hearing, the bankruptcy court posted a tentative
6 ruling on the Compromise Motion. It proposed to:

7 Grant trustee's motion approving settlement and
8 compromise of disputes and overbid procedures. Court
9 has reviewed debtors' opposition and concludes that the
10 agreement re: Nevada lawsuit [the Agreement], copy
11 attached to Opposition, relates to parties different
12 than those who are involved in the motion [] before the
13 court. Trustee has shown that the terms of proposed
14 settlement and compromise are a reasonable exercise of
15 trustee's business judgment.

16 At the hearing, Cavic appeared without counsel. The
17 bankruptcy court noted that Cavic's Opposition did not address
18 the merits of the motion. Rather than argue in opposition, Cavic
19 repeated his offer to match the proposed settlement amounts and
20 pay Trustee a total of \$52,250 in cash, and to grant Trustee a
21 \$50,000 deed of trust secured by his home. Satisfaction of the
22 deed of trust, however, was to be contingent on Cavic's
23 prevailing on the claims in the Adversary Proceeding.

24 The bankruptcy court ruled that Cavic had not shown that the
25 settlements were unreasonable, and that he had not complied with
26 the overbid procedures. However, because Cavic was acting pro
27 se, the bankruptcy court offered him a further opportunity to
28 comply with the overbid procedures. The court approved the
Compromise Motion, advised Cavic to submit an overbid and,
assuming he would, continued the hearing to conduct an overbid
auction on June 11, 2008. Cavic was cautioned by the court that
he would be required to comply with the overbid procedures set

1 forth in Trustee's motion, including the condition that he
2 provide deposits equal to 10 percent of the amount of his
3 overbids delivered to Trustee's counsel no later than the close
4 of business two days before the June 11, 2008 hearing.

5 On June 6, 2008, the bankruptcy court entered an order
6 approving the Compromise Motion.

7 Cavic did not submit any overbids. Rather, the day before
8 the scheduled overbid hearing, now acting through counsel, he
9 filed his declaration in which he claimed that, pursuant to his
10 Agreement with Trustee, he was entitled to reimbursement from the
11 estate for the significant amounts of fees and costs he had
12 incurred in prosecuting the Consolidated Action and Adversary
13 Proceeding. Cavic argued that if his as yet unfiled
14 reimbursement claim exceeded the settlement amount, then the
15 settlement agreements would confer no benefit on creditors and
16 should not be approved by the bankruptcy court.

17 At the hearing on June 11, 2008, the bankruptcy court ruled
18 that in his declaration, Cavic was attempting to reargue the
19 merits of the Compromise Motion, which the court had already
20 approved. To the extent that Cavic was arguing that he had a
21 right to reimbursement, the court advised that he should submit
22 an administrative claim for court approval at an appropriate time
23 in the future. If Cavic wished to challenge the court's decision
24 approving the settlement agreements, he should file a motion for
25 reconsideration. The court then found that, because there had
26 been no proper overbids, there was no need for the court to
27 conduct an overbid auction. Since there were no valid overbids,
28 the court confirmed the settlement agreements.

1 On June 27, 2008, the bankruptcy court entered its Order
2 Confirming Approval of the Compromise Motion with no overbids.

3 On July 7, 2007, Cavic filed a motion for reconsideration.
4 The motion makes two main points. Cavic first suggests, without
5 citation to authority, that he was entitled to a "superpriority"
6 lien on any litigation recovery for the attorney's fees and costs
7 he had advanced. Cavic alleged that he had thus far provided
8 \$55,685.68 in attorney's fees, and if Cavic was "given credit"
9 for those sums, he "could be very competitive in the bidding
10 process." Second, Cavic argued that creditors were not given
11 notice of the effect the settlement may have on the estate.

12 The hearing on the motion for reconsideration occurred on
13 August 14, 2008. Regarding Cavic's alleged administrative
14 expense, the court ruled that even assuming he held an
15 administrative claim, it had not been allowed, and it could not
16 be used as a credit bid in the auction:

17 But, reading Judge Ryan's order that authorized
18 employment . . . any fees and costs would have to be
19 reviewed and approved under section 330 of the
20 Bankruptcy Code. So even though Mr. Cavic may have
21 incurred attorneys' fees, those expenses are not
22 allowable as an administrative claim until there's been
23 a fee application that's been approved after review by
24 this court. So he may have an claim for administrative
25 [expenses] but it's not recognized yet because the
26 court hasn't determined whether or not such fees and
27 costs were reasonably incurred so that they should be
28 authorized to be paid. So he has the administrative
claim, but he can't use that to credit bid at an
overbid auction.

Hr'g Tr. 2:16-3:5 (August 14, 2008).

As to the question of notice to creditors, the court ruled:

He argues that there's . . . lack of notice to the
other creditors. Well, he lacks standing to assert the
interests of the other creditors. And then secondly

1 with respect to the impact on the estate, that's
2 something that can be handled . . . when Mr. Cavic
3 files a proper request for administrative expenses and
4 that's litigated. But right now that controversy is
5 not [ripe]. And so notice that went out to creditors
6 was adequate. It did go to the proper parties. It did
7 tell them about the compromise and they can evaluate
8 for themselves their impact of that.

9 Id. at 4:8-16.

10 In sum, the bankruptcy court concluded that Cavic's motion
11 for reconsideration should be denied because "[Cavic's] arguments
12 don't really go to the merits of the [compromise] motion and he
13 hasn't shown that the granting of the motion was legally
14 incorrect or erroneous." Id. at 4:5-6.

15 Cavic filed a timely appeal of the Order Confirming Approval
16 of the Compromise Motion and the order denying the motion for
17 reconsideration.

18 **JURISDICTION**

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
20 §§ 1334 and 157(b) (2) (A). We have jurisdiction under 28 U.S.C.
21 § 158.

22 **ISSUES**

- 23 1. Did the bankruptcy court abuse its discretion in approving
24 the settlement agreements?
- 25 2. Did the bankruptcy court abuse its discretion in denying
26 Cavic's motion for reconsideration?

27 //

28 //

1 Id.

2 The bankruptcy court in this case was given abundant
3 information by Trustee about the five proposed settlements,
4 including over 100 pages of background data and analysis.
5 Following receipt of Cavic's Opposition, Trustee and Vestin
6 provided detailed reply briefs, further addressing application of
7 the case law factors for approval of compromises. A summary of
8 the Trustee's analysis of these factors follows:

9 1. The probability of success in litigation.

10 a. The Callister Settlement. Callister is a
11 practicing attorney and, as such, Trustee expressed serious
12 questions whether he would participate in the fraudulent and
13 unprofessional conduct alleged in Cavic's complaint.
14 Nevertheless, there was some competent evidence supporting the
15 claim. However, Trustee expressed apprehension that the claims
16 may be barred by the statute of limitations, as asserted in
17 Callister's motion for summary judgment pending at the time the
18 settlement agreement was reached. There was also a motion to
19 dismiss filed by Callister that Trustee would be required to
20 oppose. While Trustee believed that he might prevail on the
21 summary judgment and dismissal motions, he was concerned about
22 the cost and delay in doing so.

23 b. The Vestin Settlement. The representation made by
24 Vestin to Cavic that there was substantial equity in the
25 Property, when there had been an appraisal valuing the Property
26 at an amount equal to the mortgage balance, together with its
27 later representation to the bankruptcy court that there was no
28 equity in the Property when Vestin had loaned an insider over

1 \$1.5 million in excess of that value secured by the Property, all
2 militate in favor of a recovery on Cavic's claims against Vestin
3 and the individuals. On the other hand, some of Cavic's fraud
4 claims may be barred by the statute of limitations.
5 Additionally, Cavic may have executed documents indicating that
6 he knew that the value of the Property he was purchasing was not
7 nearly as high as he claimed Vestin represented to him. In
8 short, Vestin may have viable defenses to Cavic's claims,
9 including the statute of limitations and judicial estoppel.

10 c. The Beck Settlement. Trustee alleged that Beck
11 committed professional negligence by filing the emergency motion
12 on behalf of Shirley Wallace despite having been hired by Cavic
13 to stop the foreclosure sale. Moreover, Trustee alleged that
14 Beck's conduct resulted in the dismissal of Cavic's appeal of
15 that foreclosure sale order in the Nevada higher courts.

16 Like the Callister Settlement, Trustee could assume that
17 Beck, an attorney, would vigorously resist a challenge to his
18 professional services. Also, like Callister, Beck may have had a
19 statute of limitations defense. All these suggest that
20 prosecuting a fraud and professional liability case against Beck
21 would be very expensive. Prosecuting this claim would be an
22 especially questionable investment of estate resources since
23 Trustee only valued this claim at \$1,000.

24 d. The Pack Settlement. Trustee asserted that Pack,
25 the trustee in the Vieux Carre bankruptcy, failed to take certain
26 actions relating to the Property. Although Pack countered that
27 Trustee has no standing since all claims that Trustee could bring
28 are claims of the Vieux Carre estate, not Cavic's estate, Trustee

1 suggested that recent changes in Nevada's limited liability
2 company law vest him with standing.

3 Trustee attached no monetary value to this settlement, but
4 it is the legal lynchpin of all the settlement agreements. Pack
5 agreed to assign to Trustee the claims in exchange for dismissal
6 with prejudice from the Adversary Proceeding. While the other
7 settlement agreements can be examined for their relative
8 probability of success in litigation, this settlement agreement
9 is linked to the probability of success of all the other claims.

10 e. The Emerald/Mona Settlement. Trustee argues that
11 Emerald and Mona were key figures in a civil conspiracy involving
12 all the Callister Defendants. On the surface, this claim would
13 seem to have good prospects, in that a property sold for \$4.55
14 million, resold a few days later for \$4.67 million, and then was
15 used as security for a \$6.07 million loan, all within the space
16 of two weeks and involving a related cast of characters, is
17 highly suspicious. However, prosecution of the claim is
18 logically conditioned on success in prosecuting the claim against
19 the Vestin Defendants. Thus, it will likely have the longest
20 delay in reaching final resolution.

21 2. The difficulties in collection.

22 Although Vestin is a large mortgage company with substantial
23 assets, Trustee did not consider the other defendants to be
24 "deep pockets." In other words, there may be some uncertainty
25 attached to collection from the settling parties.

26 3. The complexity, expense, inconvenience and delay of
27 litigation.

28 Trustee's submissions show that although the Adversary

1 Proceeding does not appear to be exceptionally complex – it is,
2 basically, a fraud action – it is factually intensive, and the
3 events surrounding the various alleged frauds occurred five years
4 earlier. There are multiple defendants and witnesses to be
5 deposed. To pursue the Adversary Proceeding, Trustee would have
6 to hire Nevada special counsel, and feared such would be a very
7 expensive proposition. At that point, Trustee had access to few
8 funds, and the estate was verging on administrative insolvency.
9 Finally, in Trustee’s view, it would likely take years to finally
10 litigate and resolve the Adversary Proceeding through trial and
11 possible appeals. In short, in Trustee’s opinion, it would be
12 very expensive, and there would be a substantial delay in closing
13 a case that was already four years old, if he were required to
14 litigate rather than settle these claims.

15 4. The interests of creditors.

16 Trustee determined, in the exercise of his judgment, that
17 the fees and costs of litigation would likely exceed any
18 additional benefit to the estate. Approval of the settlements
19 would provide certainty and prevent the accrual of continuing
20 litigation costs to the estate. Trustee observed that the
21 creditors in the case were provided notice and full details
22 concerning the settlement agreements, and that none of them had
23 objected to Trustee’s motion.

24 Given this showing, it is clear that the bankruptcy court
25 had sufficient information available to make an informed decision
26 consistent with the factors enumerated in A&C Props. Beyond
27 considering the record and Trustee’s submissions, the bankruptcy
28 court also took a very active role at the hearing on the

1 Compromise Motion to inquire about the details and consequences
2 of the Trustee's proposals. After doing so, the court questioned
3 the estate's ability to prosecute the claims in Nevada if they
4 were not settled. The court was also concerned about the
5 expenses to be incurred in litigating, and the lack of cash on
6 hand in the estate. In sum, the record amply demonstrates that
7 the bankruptcy court went beyond mere "boilerplate approval."
8 The bankruptcy court made an informed and independent decision to
9 approve the settlement agreements after it apprised itself of all
10 the relevant facts, consistent with the analysis required in the
11 Ninth Circuit by A&C Props. and Woodson. Simply put, the
12 bankruptcy court did not abuse its discretion in approving the
13 settlements.

14 In his opening brief, Cavic makes essentially three
15 arguments to show the bankruptcy court erred in approving the
16 settlement agreements. First, according to Cavic, the court
17 failed to consider the consequences to the estate if Cavic
18 successfully overbid the settlements. Second, the court abused
19 its discretion by indicating that Cavic's failure to timely
20 oppose the Compromise Motion constituted "consent" to the motion.
21 And third, the bankruptcy court failed to make an independent
22 analysis and simply relied on the Trustee's business judgment.
23 None of these arguments has merit.

24 Cavic argues in his opening brief that the bankruptcy court
25 did not take "into account whether overbids would affect the
26 settlement." But to the contrary, the court did indeed consider
27 the effect of an overbid by Cavic, and concluded that if he did
28 so, there would be no settlement. That the court did not

1 consider this a significant concern is evidenced by the court's
2 decision to continue the hearing to consider overbids. In
3 retrospect, the bankruptcy court cannot be criticized for not
4 rejecting the settlements simply because there was some
5 possibility that Cavic would submit an overbid.

6 Cavic's second objection is that the court abused its
7 discretion when "it determined that Appellant's failure to timely
8 oppose the motion to approve the compromise is deemed consent to
9 the granting of the motion." The bankruptcy court's conclusion
10 was based upon Bankr. C.D. Cal Local Rule 9013-1(a)(11), which
11 provides "papers not timely filed and served may be deemed by the
12 court to be consent to the granting or denial of the motion, as
13 the case may be." Both the Ninth Circuit and this Panel have
14 confirmed that "courts have broad discretion to interpret their
15 local rules. Only in rare cases will an appellate court question
16 the exercise of discretion in connection with the application of
17 the local rules." Qualls by and Through Qualls v. Blue Cross, 22
18 F.3d 839, 842 (9th Cir. 1994); Katz v. Pike (In re Pike), 243
19 B.R. 66, 69 (9th Cir. BAP 1999) ("The bankruptcy court has broad
20 discretion to apply its local rules."). Although there has been
21 no appellate review of Bankr. C.D. Cal. Local Rule 9013-1(a)(11),
22 the court of appeals has favorably reviewed the similar C.D. Cal.
23 (District) Local Rule 7.9 (now Local Rule 7-12). Yusov v. Yusuf,
24 892 F.2d 784, 787 (9th Cir. 1989) (in affirming magistrate's
25 ruling under Local Rule 7.9, which provided that "papers not
26 timely filed . . . will not be considered . . . ," the court held
27 that, "The magistrate acted as required by law. There was no
28 abuse of discretion.").

1 As can be seen, the bankruptcy court did not abuse its
2 discretion in, consistent with its local rules, treating Cavic's
3 late opposition to Trustee's motion as, effectively, a consent to
4 approval of the motion. This is not that sort of "rare case"
5 that justifies the Panel's reversal of that decision.

6 However, Cavic's argument in this regard is of no moment.
7 As explained above, it appears the bankruptcy court did indeed
8 consider the matters raised in Cavic's opposition in ruling on
9 Trustee's motion. While the bankruptcy court declined to reject
10 the settlement based upon Cavic's late opposition, he suffered no
11 prejudice when the bankruptcy court treated it as late-filed.

12 Finally, Cavic contends that "the record fails to evidence
13 any type of independent analysis the bankruptcy court conducted."
14 Again, we disagree. As discussed above, the record shows that
15 the bankruptcy court was given an adequate record, and through
16 its comments, it is clear that the bankruptcy court considered
17 the information submitted and, as evidenced by its active and
18 critical involvement in the hearings, exercised independent
19 judgment.

20 In his Reply Brief, Cavic adopts a new strategy. He
21 indicates that "significant new developments" have occurred in
22 the bankruptcy case which provide a basis to reverse the
23 bankruptcy court's approval of the settlements. Specifically, he
24 represents that Cavic has, since the bankruptcy court ruled on
25 Trustee's motion, filed a motion seeking reimbursement of the
26 litigation expenses he has incurred, and that on August 1, 2008,
27 the bankruptcy court held a hearing on Cavic's motion, and that
28 the court took his motion under advisement. According to Cavic,

1 Migan testified at the hearing that it was Trustee's idea to
2 split the Nevada lawsuit into two separate lawsuits (one against
3 the Consolidated Defendants and one against the Callister
4 Defendants). Cavic argues that this "new development" allows him
5 to be compensated under the terms of the Agreement.⁶ Cavic then
6 makes a leap of logic that if Cavic can recover compensation
7 under the Agreement, he should be entitled to a credit that he
8 could add to his \$52,250 cash, which would allow him to place a
9 dominant overbid.

10 Cavic fails to understand that, with respect to approval of
11 the settlements, the ship has sailed. Contrary to Cavic's
12 suggestion, the bankruptcy court did not ignore the Agreement
13 between Cavic and Trustee in assessing whether to approve the
14 Compromise Motion; it simply considered the Agreement, or the
15 existence of Cavic's alleged administrative claim, immaterial.
16 The court rejected Cavic's concerns because he had no present
17 entitlement to any administrative expense at the time of the
18 Compromise Motion. Lacking an allowed administrative claim,
19 Cavic's suggestion that he be able to "credit bid" his claim as
20 part of the overbid procedure is unavailing.⁷

21
22 ⁶ In his reply, Cavic also requests that we allow him to
23 supplement the record to provide copies of the transcript of his
24 reimbursement hearing and of the court's ruling. We deem this a
25 motion to supplement the record. The motion is DENIED. The
26 existence, or even results, of Cavic's request for allowance of
27 an administrative expense simply do not bear on whether the
28 bankruptcy court abused its discretion in approving the Trustee's
proposed compromises.

⁷ Section 363(k) provides that the holder of an allowed
claim secured by property to be sold by a trustee may credit bid
(continued...)

1 At oral argument, Cavic's counsel argued that the bankruptcy
2 court did not adequately take into account the Agreement, and
3 possible consequences to the estate of a Cavic overbid. But the
4 record shows that the court considered the Agreement at all three
5 hearings.

6 At the initial, June 4, hearing, the court noted that
7 because the Agreement concerned parties other than those involved
8 in the settlement agreements before the court, it was not
9 relevant.

10 At the June 11 hearing, Cavic's attorney urged that Cavic's
11 right to recover from the proceeds of the settlements may wipe
12 out any recovery to the estate: "If those costs exceed the
13 amount of settlement then there's nothing for the estate there.
14 This does not benefit the estate." Hr'g Tr. 4:12-15 (June 11,
15 2008). The bankruptcy court noted that, since it had already
16 approved the compromises, this discussion was not proper at a
17 hearing on overbids and that Cavic should pursue a
18 reconsideration motion if he wanted the court to revisit this
19 topic.

20 Finally, at the August reconsideration hearing, the court
21 directly addressed the "impact on the estate" of Cavic's proposed
22 administrative claim: "[W]ith respect to the impact on the

23
24 ⁷(...continued)
25 the amount of the claim at the sale. As noted, here, Cavic's
26 claim for reimbursement has not yet been allowed, nor is there
27 any indication that his claim is "secured" by the property being
28 "sold" by Trustee (the estate's claims against the various
defendants). We can find no case law that authorizes the holder
of an inchoate administrative expense claim to credit bid that
claim at a trustee's sale.

1 estate, that's something that can be handled when Mr. Cavic files
2 a proper request for administrative expenses and that's
3 litigated." Hr'g Tr. 4:11-14 (June 11, 2008). The court also
4 commented that, in light of the possible (by then, certain)
5 administrative insolvency of this estate, even if Cavic held an
6 allowed administrative claim, that claim would be treated pro
7 rata with the other administrative claims. Hr'g Tr. 3:24-25.
8 And lastly, the court directly considered the financial
9 consequences of allowing Cavic to overbid his contingent
10 administrative claim:

11 THE COURT: [If Cavic won the overbid proceeding], any
12 benefit from the litigation would go to Cavic
13 personally and not to the estate. . . . So it doesn't
14 help the estate.

15 CAVIC'S COUNSEL: The help to the estate is the
16 difference between \$52,500 and 60 or 70 or 80,000 that
17 it ultimately sells for. I'm not saying it's going to
18 be millions of dollars of difference but it would be
19 more money to the estate.

20 THE COURT: But the estate didn't want to incur the
21 additional expense and risk of the litigation if it did
22 not prevail in the litigation. And that's why the
23 trustee exercised its business judgment. . . .

24 COUNSEL: This carries out their business judgment. Mr.
25 Cavic would be the buyer instead of the defendants.
26 And there would be more money to the estate.

27 THE COURT: But the problem is that it was exposed to the
28 marketplace through the competitive bidding process and it
29 didn't realize any value. And maybe it's a situation of a
30 bird in the hand and the trustee being the bird in the hand
31 is better than two in the bush.

32 COUNSEL: I agree. But the Trustee --

33 THE COURT: And that's within the reasonable business
34 judgment of the Trustee.

35 COUNSEL: That I agree with you. But the trustee put him
36 there that's our problem.

37 Hr'g Tr. 15:6-16:12 (August 11, 2008) (emphasis added).

1 In summary, the bankruptcy court repeatedly considered the
2 various possible implications of Cavic's administrative claim.

3
4 II.

5 The bankruptcy court did not abuse its discretion in
6 denying Cavic's motion for reconsideration.

7 Cavic moved for reconsideration of the bankruptcy court's
8 order approving the settlement agreements. Cavic based his
9 motion on Civil Rule 60(b)(6). However, "[a] 'motion for
10 reconsideration' is treated as a motion to alter or amend
11 judgment under Federal Rule of Civil Procedure 59(e) if it is
12 filed within ten days of entry of judgment. Otherwise, it is
13 treated as a Rule 60(b) motion for relief from a judgment or
14 order." Am. Ironworks & Erectors Inc. v. N. Am. Constr. Corp.,
15 248 F.3d 892, 898-99 (9th Cir. 2001) (citation omitted). Cavic's
16 motion for reconsideration was filed on July 7, 2008, within ten
17 days of entry of judgment on June 27, 2008. Rule 9006.
18 Disposition of the motion was therefore governed by Civil Rule
19 59(e).

20 Amendment or alteration of judgment is appropriate under
21 Rule 59(e) only if the court (1) is presented with newly
22 discovered evidence, (2) committed clear error or made an initial
23 decision that was manifestly unjust, or (3) there is an
24 intervening change in controlling law. Zimmerman v. City of
25 Oakland, 255 F.3d 734, 740 (9th Cir. 2001).

26 Cavic submitted no new evidence, nor did he claim to have
27 new evidence, in his motion for reconsideration. Attached to his
28 declaration submitted with the motion were fifteen exhibits, all

1 of which were copies of documents filed in the bankruptcy case
2 before the Compromise Motion.

3 The bankruptcy court, in approving the compromises, also did
4 not commit clear error or make a decision that was manifestly
5 unjust. The only reference to possible error in Cavic's
6 reconsideration motion was his objection to the notice given to
7 the parties of the Compromise Motion:

8 Movant does not dispute that the Trustee gave notice to
9 all creditors of the proposed settlement. The problem
10 is creditors were never notified of the effect the
11 settlement may have on the estate. There is no mention
12 of what funds are already on hand and what costs will
13 be incurred if the settlement were consummated.
14 Nowhere is the Trustee's agreement to reimburse Mr.
15 Cavic for the attorney's fees and costs he has advanced
16 ever mentioned.

17 The bankruptcy court directly addressed Cavic's notice
18 objection:

19 [Cavic] argues that there's lack of . . . notice to the
20 other creditors. . . . With respect to the impact of
21 [reimbursement of his attorney's fees] on the estate,
22 that's something that can be handled in terms of when
23 Mr. Cavic files a proper request for administrative
24 expenses and that's litigated. But right now that
25 controversy is not [ripe]. And so the notice that went
26 out to creditors was adequate. It did go to the proper
27 parties. It did tell them about the compromise and
28 they can evaluate for themselves the[] impact of that.

Hr'g Tr. 4:8-18 (August 14, 2008).

As discussed above, the bankruptcy court correctly
determined that Cavic had, at most, a possible administrative
expense claim that had not yet been allowed by the court, and
that could not be credit bid at the overbid hearing. Trustee was
under no duty to notify creditors of Cavic's inchoate, amorphous
claim. Due process requires adequate notice; it does not require
notice of all possible arguments concerning the matter before the

1 court. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306,
2 314 (1950) (holding that due process requires "notice reasonably
3 calculated, under all the circumstances, to apprise interested
4 parties of the pendency of the action and afford them an
5 opportunity to present their objection"); Espinosa v. United
6 Student Aid Funds, 545 F.3d 1113, 1122 (9th Cir. 2008).

7 In his reconsideration motion, Cavic proposed for the first
8 time that he had an administrative claim that has super-priority
9 status and that, if given credit, he could have participated in
10 the overbid process. Cavic provides no authority for such an
11 audacious statement, nor are we aware of any law that allows
12 super-priority to an administrative claim under these
13 circumstances. And even if there were such law, a bankruptcy
14 court "does not abuse its discretion when it disregards legal
15 arguments made for the first time on a motion to amend."
16 Rosenfeld v. U.S. Dep't of Justice, 57 F.3d 803, 811 (9th Cir.
17 1995).

18 Finally, Cavic does not suggest, nor have we determined,
19 that there was any change in controlling law between the approval
20 of the Compromise Motion by the bankruptcy court and the
21 submission of the reconsideration motion (or, indeed, since
22 then).

23 We conclude that, in his reconsideration motion, Cavic did
24 not submit any new evidence, establish that the bankruptcy court
25 had erred or that its decision was manifestly unjust. There was
26 no change in controlling law. Thus, it was not an abuse of
27 discretion to deny Cavic's motion for reconsideration under Civil
28 Rule 59(e).

1 Although the bankruptcy court appears to have ruled under
2 Rule 9024, incorporating Civil Rule 60(b)(6),⁸ it was harmless
3 error because the bankruptcy court's findings and the record
4 support denial of reconsideration under either Rules 9023
5 (incorporating Civil Rule 59(e)) or 9024. Indeed, Cavic provides
6 no citation to authority whatsoever or reasoned argument why
7 reconsideration should be allowed under either Rule.

8 Moreover, even if Cavic's motion were considered under the
9 standards applicable to Civil Rule 60(b)(6), it would not pass
10 muster. "Relief [under Rule 60(b)] may be permitted in the
11 interests of justice if the relief will not affect the
12 substantial rights of the parties." Gonzalez v. Crosby, 545 U.S.
13 524, 535 (2000). This catch-all provision is reserved for
14 extraordinary circumstances. Delay v. Gordon, 475 F.3d 1039,
15 1044-49 (9th Cir. 2007). Extraordinary circumstances occur when
16 the risk of injustice to parties, the risk that denial will
17 produce injustice in other cases and the risk of undermining the
18 public's confidence in judicial process, is high. Liljeberg v.
19 Health Servs. Corp., 486 U.S. 847, 863 (1988). Seeking relief
20 under Civil Rule § 60(b)(6) usually requires a showing of actual
21 injury and the presence of circumstances beyond the movant's
22 control that prevented timely action to preserve his or her
23 interests. Delay, 475 F.3d at 1044.

25
26 ⁸ "THE COURT: But there really aren't any grounds under
27 Rule 9024, the Federal Rule of Bankruptcy Procedure
28 [incorporating] Rule 60(b)(6) of the Federal Rules of Civil
Procedure, to set aside the judgment in this case." Hr'g Tr.
14:14-17 (August 14, 2008).

1 It is simply not clear from either the motion for
2 reconsideration or the hearing on that motion what extraordinary
3 circumstances are present here that would justify relief under
4 Civil Rule § 60(b)(6). Cavic's attorney argued:

5 I guess my closing argument, if you want, is the
6 extraordinary circumstances are really the way this was
7 set up. And it's set up to create failure for the
8 debtor. He's already lost his homestead exemptions
9 through an extremely creative means. That was \$75,000.
10 He was then lured into an agreement where he expected
11 to get all his money back when he was advancing costs
12 and that seems to be at risk. And then at a point when
13 he's out of money he can't bid on the purchase of these
14 claims because he [doesn't] have money. If he had a
15 credit for what he had already advanced, which has been
16 his contribution to this case, he could competitively
17 bid against the defendants. And I guess my closing
18 statement is the only ones that win by this agreement
19 being approved are the defendants because the estate
20 gets more money if they reopen the bidding process.

21 Hr'g Tr. 13:11-25 (August 14, 2008).

22 None of these circumstances can be considered extraordinary
23 within the meaning of Civil Rule 60(b)(6). There is no evidence
24 in the record to support an argument that Trustee "lured" Cavic
25 into the Agreement. On the contrary, Cavic himself proposed the
26 terms ultimately incorporated in the Agreement in his Opposition
27 to Trustee's proposed settlement with the Consolidated
28 Defendants. A more likely explanation proposed by Trustee was
29 that Cavic engaged six attorneys in the four years of the
30 bankruptcy case, terminating five, and was without counsel in the
31 critical months leading up to the Compromise Motion. Although
32 Cavic's circumstances may be characterized as unfortunate, they
33 were not extraordinary.

34 We conclude that the bankruptcy court did not abuse its
35 discretion in denying Cavic's motion for reconsideration.

CONCLUSION

We AFFIRM the bankruptcy court in all respects.

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