NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. AK-06-1298-BZR
BERND D. HOFFMAN,	Bk. No. 05-00373
Debtor.	Adv. No. 05-90023
BERND D. HOFFMAN,	
Appellant,	
v.	**M E M O R A N D U M**[1]
BETHEL NATIVE CORPORATION,	
Appellee.	

Argued and Submitted on April 5, 2007
at Anchorage, Alaska

Filed - May 9, 2007

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

Honorable Donald MacDonald, IV, Chief Bankruptcy Judge, Presiding

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Before: BRANDT, ZIVE[2] and RIMEL,[3] Bankruptcy Judges.

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

[2] Hon. Gregg W. Zive, Chief Bankruptcy Judge for the District of Nevada, sitting by designation.

[3] Hon. Whitney Rimel, Bankruptcy Judge for the Eastern District of California, sitting by designation.

After trial, the bankruptcy court entered judgment excepting from discharge Bernd Hoffman's debt of $507,340.47 to Bethel Native Corporation ("BNC") under § 523(a)(4)[4] and denying Hoffman's discharge under § 727(a)(2). Hoffman timely moved for reconsideration under FRCP 59, applicable via Rule 9023, which the bankruptcy court denied. Hoffman timely appealed. We AFFIRM.

I. FACTS

Bernd Hoffman is a property manager in Anchorage, Alaska. He was the sole shareholder and director of a property management company known as Hoffman Commercial, Inc. ("HCI"). HCI managed some of BNC's Anchorage properties.

In 1995, Hoffman, at that time a licensed real estate broker, and HCI, formed Central Park Limited ("CPL") to invest in income property in Albuqerque, New Mexico. Hoffman and HCI were the general partners. BNC and other native corporations[5] invested as limited partners. When the project experienced financial difficulties, BNC loaned CPL $70,000. BNC

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[4] Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from which this appeal arises was filed before its effective date (generally 17 October 2005).

All "Rule" references are to the Federal Rules of Bankruptcy Procedure, and all "FRCP" references are to the Federal Rules of Civil Procedure. "FRE" references are to the Federal Rules of Evidence, and "A.S." references are to Alaska Statutes.

[5] Alaska Native Corporations were established to resolve land and financial claims of Alaska Natives under the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1601 et seq.; 41 Am. Jur. 2d Indians; Native Americans § 87. Bethel Native Corporation is a village corporation.

also co-signed with Hoffman on a $350,000 line of credit from Northrim Bank. These amounts were never repaid.

HCI filed for chapter 11 relief in 30 January 2003. The case was dismissed on motion of the U.S. Trustee on 6 May 2004.

BNC sued Hoffman and HCI in Alaska state court in August 2003.[6] In January 2005 the state court granted BNC judgment on its claims and awarded damages of $669,423.41, which included the amounts BNC had loaned CPL and amounts BNC had expended to repay Northrim.

In September 2004, while the state court litigation was pending, HCI sold all of its assets, including its rights under property management and homeowners association contracts to AREC, LLC, a limited liability company owned by Hoffman's wife Christine. As consideration, AREC agreed to pay (1) the trust fund portion of HCI's obligations to the IRS, (2) HCI's attorney's fees owed to William Artus, and (3) HCI's utilities and equipment lease obligations. No dollar amount was specified. HCI ceased operations immediately thereafter.

Hoffman filed for chapter 7 relief on 6 April 2005. BNC filed a timely nondischargeability complaint under § 523(a)(4) (fraud or defalcation while acting in a fiduciary capacity) and for denial of discharge under § 727(a)(2) (transfer of property with intent to hinder, delay, or defraud a creditor).

Hoffman answered,[7] then moved for partial summary judgment of dismissal on the § 727 claim, arguing that the property transferred was

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[6] Bethel Native Corporation v. Hoffman, Case No. 3AN-03-10782CI, Superior Court for the State of Alaska, Third Judicial District at Anchorage.

[7] Hoffman's answer included a counterclaim for violation of the automatic stay. He does not dispute the bankruptcy court's dismissal of that counterclaim.

HCI's, not Hoffman's, and thus was not a transfer of property of the debtor. The bankruptcy court denied the motion, citing authority that property of a corporation can be found to be property of the debtor, implicitly finding an issue of material fact as to ownership.

BNC designated Jon Boyd as its expert witness. Mr. Boyd is broker-manager of a property management company and former executive vice-president in charge of real estate and consumer loans for KeyBank of Alaska. He was to testify regarding the value of the property management contracts transferred from HCI to AREC. Hoffman filed a motion in limine objecting to Jon Boyd's qualifications as an expert witness. The bankruptcy court denied the motion.

After trial, the bankruptcy court entered a memorandum of decision and a separate judgment. Hoffman moved to amend judgment or for new trial under FRCP 59, applicable via Rule 9023, arguing that the evidence showed that the funds CPL received from Northrim Bank and BNC had been adequately accounted for. The bankruptcy court disagreed and denied the motion.

This timely appeal followed.

II. JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1) and (b)(2)(I) and (J), and we do under 28 U.S.C. § 158(c).

III. ISSUES

A. Whether the bankruptcy court's denial of debtor's motion for summary judgment is reviewable.

B. Whether the bankruptcy court abused its discretion in denying debtor's motion in limine.

C. Whether the bankruptcy court erred in entering judgment denying debtor's discharge under § 727(a).

D. Whether the bankruptcy court erred in entering judgment excepting the debt to BNC from discharge under § 523(a)(4).

E. Whether the bankruptcy court abused its discretion in denying debtor's motion to amend judgment or for new trial.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. In re Lawson, 122 F.3d 1237, 1240 (9th Cir. 1997). A finding that debtor acted with intent to hinder, delay, or defraud creditors is reviewed for clear error, id., as is the bankruptcy court's finding that a corporation is the alter ago of the debtor. See Commodity Futures Trading Com'n v. Topworth Int'l Ltd., 205 F.3d 1107, 1112 (9th Cir. 1999).

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). If two views of the evidence are possible, the trial judge's choice between them cannot be clearly erroneous. Anderson v. Bessemer City, 470 U.S. 564, 573-575 (1985).

Denial of a motion under FRCP 59, applicable via Rule 9023, is reviewed for abuse of discretion. In re Nunez, 196 B.R. 150, 155 (9th Cir. BAP 1996). A bankruptcy court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or clearly erroneous factual findings. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1991). Under the abuse of discretion standard, we must have

a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion that it reached before reversal is proper. S.E.C. v. Coldicutt, 258 F.3d 939, 941 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

The bankruptcy court's evidentiary rulings are also reviewed for abuse of discretion. Latman v. Burdette, 366 F.3d 774, 786 (9th Cir. 2004). To reverse an evidentiary ruling, we must conclude the error was prejudicial. Id.

V. DISCUSSION

A. Denial of Partial Summary Judgment

Denial of summary judgment is not separately reviewable after a trial on the merits. Price v. Kramer, 200 F.3d 1237, 1243 (9th Cir. 2000); Locricchio v. Legal Services Corp., 833 F.2d 1352, 1358 (9th Cir. 1987). Denial of summary judgment is simply a determination that genuine issues of material fact exist, thus warranting a trial on the merits. Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1250-51 (10th Cir. 1992) (citation omitted).

Accordingly, we decline to consider Hoffman's arguments with respect to that ruling. In any event, he has not shown how the ruling prejudiced him; he had the opportunity to litigate the issues fully. See 28 U.S.C. § 2111; FRCP 61, applicable via Rule 9005; In re Maximus Computers, Inc., 278 B.R. 189, 196-97 (9th Cir. BAP 2002) (Panel has duty to "disregard error that does not affect substantial rights of the parties").

B. Motion in Limine/Evidentiary Objection

BNC introduced the testimony of Jon Boyd as an expert witness to testify to the value of the 53 (out of a total of 56) property management

contracts that HCI assigned to AREC on 1 September 2004. As noted, the bankruptcy court denied Hoffman's motion in limine objecting to Boyd's testimony, but as the excerpts of record do not contain any findings, we cannot ascertain the basis for the bankruptcy court's ruling.

In any event, Hoffman has shown no prejudice. First, he argues that Boyd's qualifications were inadequate due to his alleged lack of expertise, training and experience in valuing such contracts and lack of any prior court experience as an expert witness. FRE 702 requires that an expert witness be qualified by "knowledge, skill, experience, training or education." According to his resume, Boyd had at least related experience, if not training and skill. Hoffman did not raise any basis to disqualify Boyd; if anything, his argument goes to the appropriate weight to be given to his opinion.

Second, Hoffman argues that Boyd reviewed only the property management contracts, which provided an insufficient basis for an opinion. FRE 702 requires that "(1) the testimony be based on sufficient facts or data, (2) the testimony be the product of reliable principles and methods, and (3) the witness applied the principles and methods reliably to the facts of the case." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) identified four flexible, nonexclusive factors for determining whether the expert's opinion is sufficiently reliable: (1) whether the theory has been or can be tested; (2) whether the theory has been subjected to peer review and publication; (3) when a particular technique is used, whether there is a known or potential rate of error; and (4) the extent of acceptance of the theory in the relevant scientific community. A trial court must use discretion to determine reasonable criteria of reliability based on the circumstances of the case. In re Leap Wireless Int'l, Inc., 301 B.R.

80, 84 (Bankr. S.D. Cal. 2003). Hoffman does not articulate how these requirements were not met here.

Hoffman emphasizes that Boyd's opinion on value failed to account for the fact that HCI's three employees (Zak, Shupilova, and Christy Hoffman), who were servicing the management contracts of HCI, would not be involved in the assignee company, and might actually compete with the existing business. BNC points out that trial testimony showed that value was not impacted by this factor, as none of these individuals actually competed with the business: Zak retired; Shupilova testified she would not compete, and Christy's involvement was minimal, as she managed only two contracts, comprising less than 5% of the monthly revenue.

Finally, Hoffman has not articulated how he was prejudiced by admission of Boyd's testimony and his written report. See Latman, 366 F.3d at 787-88. Boyd arrived at an annual gross income of $400,530, considering the contract management fees, resale certificates and other contract-related fees. He offered a range of three values of between $200,292 to $500,663, allowing for possible multipliers, and his final opinion was the middle value of $400,530.

The bankruptcy court did not explicitly adopt or reject Boyd's opinion of value. It noted in its amended memorandum decision at 3 n.5 that "HCI's most valuable assets consisted of homeowner association management contracts. These contracts generated monthly income of more than $27,500.00."

Denial of discharge under § 727(a)(2) simply requires a disposition of property with intent to hinder, delay, or defraud a creditor; no finding as to the value of the transferred property is required. It was enough for the bankruptcy court to find that HCI's management contracts were its most valuable assets, which were transferred to AREC for a

promise to pay taxes and attorney fees. Hoffman's arguments as to value are irrelevant.

There was no abuse of discretion.

C. Denial of Discharge

The bankruptcy court denied Hoffman's discharge under § 727(a)(2). Under that section, the debtor shall not receive a discharge if he,

> with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed–
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> (A) property of the debtor, within one year before the date of the filing of the petition[.]

A party seeking denial of discharge under this section must prove, by a preponderance of the evidence, "1) a disposition of property, such as a transfer or concealment, and 2) a subjective intent to hinder, delay, or defraud a creditor through the act of disposing of the property." In re Beauchamp, 236 B.R. 727, 732 (9th Cir. BAP 1999), aff'd, 5 Fed. Appx. 743 (9th Cir. 2001). Intent to hinder, delay, or defraud may be inferred from circumstantial evidence. In re Woodfield, 978 F.2d 516, 518 (9th Cir. 1992); In re Devers, 759 F.2d 751, 753-54 (9th Cir. 1985).

As noted, the bankruptcy court denied Hoffman's motion for summary judgment on the issue of whose property was transferred. Ultimately the bankruptcy court found that it was appropriate to disregard the corporate entity. The court also found that the transfer was made to hinder BNC in pursuing its claims against Hoffman and HCI, and that the transfer was made within one year of filing. There is no dispute that the transfer occurred within one year of filing.

Hoffman contends the bankruptcy court erred in concluding that he had an interest in the transferred property, arguing that denial of discharge is not permissible when the transferred property belonged to the corporation. In support, he cites In re Beeber, 239 B.R. 13 (Bankr. E.D.N.Y. 1999), In re Thurman, 901 F.2d 839 (10th Cir. 1990), and In re Wagner, 305 B.R. 472 (8th Cir. BAP 2004). Beeber did not involve facts that would warrant disregarding the corporate entity. There, a doctor transferred corporate assets to himself before filing bankruptcy. In Thurman, a shareholder transferred corporate assets to a subsidiary before filing bankruptcy. The court rejected the argument that this was a transfer of property of the debtor, noting that a derivative interest such as that held by a shareholder does not suffice as "property of the debtor" under § 727(a). 901 F.2d at 841. See also Wagner, 305 B.R. at 475-76 (use of proceeds from LLC asset sale to pay operating expenses was not a transfer of property of the debtor under § 727(a)). While these latter cases support Hoffman's argument, there is no definitive Ninth Circuit authority, and the issue is far from settled at the bankruptcy court level.

The bankruptcy court relied on In re Bonham, 224 B.R. 114 (Bankr. D. Alaska 1998), aff'd, 229 F.3d 750 (9th Cir. 2000) (table). In that case, the debtor had used her corporations to perpetuate a Ponzi scheme. The bankruptcy court noted that debtor "transferred money freely and without rhyme or reason between the corporations and herself." 224 B.R. at 116. Under those circumstances, the bankruptcy court found it appropriate to treat the debtor as the corporation's alter ego. Id.; see also In re Adams, 31 F.3d 389, 394 (6th Cir. 1994) (transfer of property of corporation wholly owned and controlled by debtor was transfer of property of the debtor); In re Hollingsworth, 224 B.R. 822, 829 (Bankr.

M.D. Fla. 1988) (airplane owned by corporation but leased at a commercially unreasonable rate was property of the debtor, who was sole shareholder); In re Hicks, 71 B.R. 508, 509-10 (Bankr. D.N.H. 1987) (cash transferred from one of debtor's corporations to another was transfer of property of the debtor).

In finding that HCI was Hoffman's alter ego, and that the assets were transferred with the intent to hinder BNC, the bankruptcy court cited the following:

1. Hoffman was sole shareholder and director of HCI.

2. HCI was grossly undercapitalized.

3. Corporate formalities were ignored; minutes of annual meetings were prepared only after discovery requests were served in the adversary.

4. Hoffman transferred HCI's assets to his wife's corporation for nothing other than AREC's promise to pay 941 taxes and fees due Hoffman's attorney.

5. Christine Hoffman paid nothing for her stock in AREC.

6. Christine now draws a salary of $8000 per month.

Amended Memorandum Decision, page 7.

The evidence supports these findings. Although Hoffman sets forth numerous factors that he asserts are contrary to the alter ego finding (maintenance of separate corporate bank accounts, regular filing of corporate tax returns, etc.), he has not shown how the bankruptcy court's finding was clearly erroneous. See Anderson, 470 U.S. at 573-75 (where two views of the evidence are possible, the factfinder's choice between them cannot be clearly erroneous).

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D. Objection to Dischargeability under § 523(a)(4)

Section 523(a)(4) provides, in part:

> A discharge under section 727 . . . does not discharge an individual debtor from any debt –
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> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny[.]

The creditor must establish three elements for nondischargeability under this provision: (1) an express trust; (2) that the debt was caused by fraud or defalcation; and (3) that the debtor was a fiduciary to the creditor at the time the debt was created. In re Niles, 106 F.3d 1456, 1459 (9th Cir. 1997) (citation omitted).

Section 523(a)(4) requires an express or technical trust in existence before and independently of the defalcation. In re Lewis, 97 F.3d 1182, 1185 (9th Cir. 1996) (citing Ragsdale v. Haller, 780 F.2d 794, 795 (9th Cir. 1986)). Whether a fiduciary is the trustee of an express trust depends on state law. Lewis, 97 F.3d at 1185. Under Alaska law, a general partner is a fiduciary. See Old Harbor Native Corp. v. Afognak Joint Venture, 30 P.3d 101, 106 n.18 (Alaska 2001); Munn v. Thornton, 956 P.2d 1213, 1220 (Alaska 1998); Paskvan v. Mesich, 455 P.2d 229, 232 (Alaska 1969). See also A.S. § 32.06.404(b)(1) (partner holds property derived from partnership business as a trustee for the partnership). A real estate broker is also a fiduciary for his clients. Black v. Dahl, 625 P.2d 876, 880 (Alaska 1981); A.S. § 08.88.351(3).

Defalcation is the "misappropriation of trust funds or money held in any fiduciary capacity; [the] failure to properly account for such funds." Lewis, 97 F.3d at 1186 (citing Black's Law Dictionary 417 (6th ed. 1990)). Defalcation under § 523(a)(4) does not require an intent to defraud; an innocent failure to account for funds may give rise to liability. Id.; see also In re Moreno, 892 F.2d 417, 421 (5th Cir.

1990). The fiduciary bears the burden of adequately explaining the disposition of all funds entrusted to him by the principal. Niles, 106 F.3d at 1461-62.

Hoffman does not dispute that a fiduciary relationship existed, but contends that he adequately accounted for partnership funds. The bankruptcy court found to the contrary:

> [Hoffman] has failed . . . to accurately account for the $350,000 Northrim loan or the $70,000 in direct loans from BNC. The Central Park balance sheets, cash flow statements and budget comparisons do not provide a clear and accurate statement of account. The statements are inconsistent, inaccurate and incomplete. They can't be reconciled with the line of credit history Hoffman prepared. They don't show when, to whom and for what purposes payments were made. . . .

Amended Memorandum Decision, pages 6-7.

Hoffman points out that the evidence showed CPL spent more on debt and operating expenses than it brought in, and the loan proceeds were the only possible source of the extra funds. However, the law imposes a heavy burden on a fiduciary to account for entrusted funds with specificity. See Niles, 106 F.3d at 1461-62. Hoffman's summary explanations do not meet this burden. He has not shown clear error.

E. Motion for Reconsideration

Hoffman moved to alter or amend judgment or for a new trial on the § 523(a)(4) claim only. The granting of a motion under FRCP 59(e) is appropriate only if the moving party demonstrates (1) manifest error of fact; (2) manifest error of law; or (3) newly discovered evidence. In re Basham, 208 B.R. 926, 934 (9th Cir. BAP 1997), aff'd, 152 F.3d 924 (9th Cir. 1998) (table).

On appeal, Hoffman does not challenge the ruling on reconsideration. He has thus waived the issue. Laboa v. Calderon, 224 F.3d 972, 981 n.6

(9th Cir. 2000) (issues not specifically and distinctly argued in the opening brief are deemed waived). In any event, he has shown no abuse of discretion.

He pointed to no manifest error of law or fact, and no new evidence. Rather he reargued some aspects of the case after trial.

VI. CONCLUSION

Denial of summary judgment is not reviewable on appeal.

The bankruptcy court did not abuse its discretion in admitting Jon Boyd's testimony.

Nor did the bankruptcy court err in denying Hoffman's discharge under § 727(a)(2), or excepting his debt to BNC under § 523(a)(4).

Hoffman has waived any argument respecting the motion for reconsideration, and in any event the bankruptcy court did not abuse its discretion in denying it.

Accordingly, we AFFIRM.