

OCT 26 2007

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NOT FOR PUBLICATION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

In re:)	BAP No.	CC-06-1313-PaMkT
)		
WILLIAM EISEN,)	Bk. No.	SA 06-10372-ES
)		
Debtor.)	Adv. No.	SA 05-01715-ES
)		
_____)		
WILLIAM EISEN,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
JEFFREY I. GOLDEN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on September 21, 2007
at Pasadena, California

Filed - October 26, 2007

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

Honorable Erithe A. Smith, Bankruptcy Judge, Presiding

Before: PAPPAS, MARKELL and TCHAIKOVSKY,² 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.

² Hon. Leslie J. Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1
2 This is an appeal of an order imposing sanctions of \$2,000 on
3 debtor William Eisen ("Eisen") for discovery violations.
4 Following the filing of this appeal, the bankruptcy court
5 announced that it lacked sufficient evidence to enforce the
6 sanction order, and that it would not enforce the order unless the
7 trustee refiled the motion for sanctions. Because at that point
8 Eisen ceased to have the requisite personal interest in the
9 outcome of his appeal, and since there are no other appellants
10 with standing, this appeal will be dismissed as moot under the
11 doctrine of standing set in a time frame.

12 **FACTS³**

13 Eisen filed a voluntary petition for relief under chapter 11⁴
14 on December 3, 1993, in the Southern District of California.⁵

15
16 ³ There are currently four appeals before this Panel in
17 Eisen's bankruptcy case. We present here only the facts relevant
18 to this appeal (CC-06-1313) of the decision to sanction Eisen in
19 the adversary proceeding Eisen v. Golden, adv. no. 05-1765-ES.
For the background in the disallowance of James A. Law's claims,
please see our memorandum in CC-06-1387; for the compromise
involving DFL, see CC-06-1385; for the rehearing/reconsideration
see CC-06-1433.

20 ⁴ Unless otherwise indicated, all chapter, section and rule
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
23 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.

24 ⁵ A note about the many procedural irregularities in Eisen's
25 submissions is appropriate here. For example, the excerpts of
26 record begin with page "521." 9th Cir. BAP Rule 8009(b)-1(b)(2)
27 requires only that the excerpts be continuously paginated; it does
28 not dictate that the pagination begin with page one. Apparently,
Eisen begins the excerpts on page 521 to allow for inclusion in
the record on appeal of the 520 pages submitted to this panel in a
previous appeal. In the table of contents, Eisen begins with
"Matters for which this court is requested to take judicial

(continued...)

1 The case was converted to one under chapter 7 on August 24, 1994.⁶

2 On or about May 1, 1995, the case was transferred to the
3 Bankruptcy Court of the Central District of California, and
4 Gilbert R. Vasquez was appointed chapter 7 trustee. On January 4,
5 2002, Vasquez resigned, and Jeffrey I. Golden was appointed
6 successor trustee (the "Trustee") on January 29, 2002.

7 Eisen's Schedule A listed as an asset certain real property
8 (the "Crest Drive Property") "subject to unperfected foreclosure
9

10 ⁵(...continued)

11 notice." Eisen then lists the 520 pages of the excerpts of record
12 in an earlier BAP appeal, CC-05-1333, as well as over 640 pages in
13 an appeal taken to the United States District Court for the
14 Central District of California. Eisen has not provided copies of
15 any of those documents from the other appeals, and we are not
16 obligated to examine portions of the record not submitted in the
17 excerpts of record. In re Kritt, 190 B.R. 382, 386-87 (9th Cir.
18 BAP 1995). Because Eisen did not file a separate request for
19 judicial notice, and has given us neither copies of those 1,160+
20 pages of documents nor any reasons why we should take judicial
21 notice of them, Eisen's request that we take judicial notice of
22 those documents is DENIED.

23 Eisen also failed to provide copies of certain required
24 documents in his excerpts, such as the complaint and answer in
25 this adversary proceeding, which violates Rule 8009(b)(1). In
26 addition, Eisen's citations in the opening brief to documents not
27 submitted in the excerpts of record violate Rule 8010(a)(1)(D).

28 Finally, we note that Eisen submitted a single set of
29 excerpts of record for all four appeals currently before the Panel
30 without leave of the Panel, and this significantly complicates the
31 parties' and the Panel's ability to examine the record. Opposing
32 parties and the Panel are not obliged to search the entire record
33 unaided for error. Dela Rosa v. Scottsdale Mem'l Health Sys.,
34 Inc., 136 F.3d 1241 (9th Cir. 1998).

35 ⁶ Eisen had filed at least four prior personal bankruptcy
36 cases between 1984 and 1992 in the Central District of California.
37 In 1994, the Ninth Circuit affirmed the dismissal of one case as a
38 bad faith filing and imposed sanctions against Eisen for
39 prosecuting a frivolous appeal. Eisen v. Curry (In re Eisen), 14
40 F.3d 469 (9th Cir. 1994). After the bankruptcy court in the
41 Central District dismissed most of the cases, Eisen filed chapter
42 13 and chapter 11 petitions in the Southern District of
43 California; the Southern District bankruptcy court dismissed the
44 chapter 13 case in 1993, converted the chapter 11 case to chapter
45 7 in 1994 (the instant case) and transferred the latter to the
46 Central District in 1995.

1 sale." Allen Group Partners ("Allen") claims to be the owner of
2 the Crest Drive Property via a purchase at that foreclosure sale,
3 which allegedly occurred in 1990. In January 2005, the Trustee
4 filed an application to employ real estate brokers to sell the
5 Crest Drive Property. Eisen opposed the application and attached
6 to his opposition a trustee's deed purportedly transferring the
7 Crest Drive Property to Allen. That trustee's deed was not
8 recorded until January 11, 2005, some fifteen years after the
9 purported foreclosure sale, and just after the Trustee filed the
10 application to employ the real estate brokers.

11 On July 15, 2005, the Trustee initiated an adversary
12 proceeding in Eisen's bankruptcy case against Allen and DFL
13 Partnership ("DFL")⁷. The complaint seeks, among other things, to
14 establish the bankruptcy estate's right, title and interest in the
15 Crest Drive Property.

16 On February 1, 2006, the Trustee issued a subpoena directing
17 Eisen to appear at a deposition in connection with the adversary
18 proceeding, which would occur on March 9, 2006, and to produce
19 documents in 68 categories for the Trustee's review. On March 1,
20 2006, Eisen sent a letter to the Trustee's counsel stating that
21 service of the subpoena had been improper.⁸ He also argued that
22

23 ⁷ DFL is successor in interest to Judith Day, who claims to
24 have had an agreement with Eisen to purchase the Crest Drive
25 Property in 1986. The claims of Day and DFL are examined in
appeal CC-05-1385.

26 ⁸ Eisen noted that the process server had attempted to serve
27 the subpoena upon Eisen at a meeting of a school board of which he
28 was a member. Eisen argued that the service was disruptive and
violated Cal. Ed. Code § 32210 (2007) which provides, "Willful
disturbance of public school or meeting; Misdemeanor. Any person
who willfully disturbs any public school or any public school
meeting is guilty of a misdemeanor, and shall be punished by a
fine of not more than five hundred dollars (\$500)."

1 the document production demand was too broad. On March 2, 2006,
2 the Trustee sent a letter to Eisen pursuant to C.D. Cal. Bankr.
3 Local Rule 9013-1(c), requesting that Eisen contact the Trustee's
4 counsel to arrange a meeting to discuss Eisen's failure to comply
5 with the subpoena. On the same day, Eisen moved to quash the
6 subpoena and for a protective order.

7 Although the bankruptcy court denied the motion to quash on
8 March 8, 2006, Eisen produced no documents in response to the
9 subpoena, did not attend the deposition, and ignored the Trustee's
10 request to meet and confer. On April 25, 2006, the Trustee filed
11 a Motion for Order Compelling William Eisen to Produce Documents
12 and Appear in his Deposition (the "Motion to Compel"), in which he
13 sought an order directing Eisen to produce the documents, appear
14 at the deposition, and pay \$2,750 to reimburse the Trustee for the
15 cost of preparing and filing the Motion to Compel.

16 On May 10, 2006, Eisen replied to the Motion to Compel.
17 Eisen first argued that the discovery requests concerned materials
18 and information that should have been covered in the § 341(a)
19 meeting. Second, Eisen argued that because the Trustee had
20 allegedly made criminal accusations against him, Eisen should be
21 allowed to invoke his Fifth Amendment right to decline to testify
22 or produce documents. In another submission to the bankruptcy
23 court made the day before the hearing on the Motion to Compel,
24 Eisen repeated his Fifth Amendment defense, and added two
25 additional arguments: that sanctions should be denied because he
26 filed the motion to quash the subpoena, and that the document
27 production request would require hundreds of hours to complete for
28 which he was not compensated.

1 The bankruptcy court hearing on the Motion to Compel took
2 place on May 24, 2006. Eisen appeared pro se; Law and Allen were
3 represented by counsel at the hearing, but neither counsel argued
4 regarding the Motion to Compel. After hearing from the Trustee's
5 counsel and Eisen, the court decided that Eisen should be
6 compelled to attend the deposition, but significantly reduced the
7 scope of documents he would be required to produce. The court
8 ruled that Eisen should pay a sanction of \$2,000 for his failure
9 to cooperate in discovery, but that this sanction would not be
10 imposed if Eisen complied with the court's directions. The court
11 memorialized its decision in an Order Compelling William Eisen to
12 Produce Documents and Appear at his Deposition on July 11, 2006
13 (the "July 11 Order"), which provided:

14 The debtor is not required to pay sanctions to
15 the Trustee at this time. If the debtor
16 complies with this order by appearing at the
17 deposition and timely producing documents, no
18 sanctions will be awarded. If the debtor fails
19 to comply with this order, the Trustee may
submit a declaration regarding the debtor's non-
compliance together with a proposed order
requiring the debtor to pay sanctions payable to
the Trustee in the amount of \$2,000.

20 The July 11 Order further directed Eisen to produce the required
21 documents by the close of business on July 17, 2006, and to appear
22 at the deposition on July 24, 2006.

23 Eisen did not submit any documents before the deadline on
24 July 17, 2006. Eisen appeared for the scheduled deposition, but
25 he informed the Trustee's counsel that he would make his own tape
26 recording of the proceedings. The following colloquy ensued:

27 BURSTEIN [attorney for the Trustee]: I've asked you to
28 turn [the tape recorder] off and put it away and you've
refused. Is that true?

1 EISEN: That's correct.

2 BURSTEIN: All right, sir. It's our view, Trustee's view,
3 that there's only one transcript and one recording of your
4 testimony made today; that is the reporter's, as provided
5 in the notice of your deposition and in the order.

6 You're not entitled to any other record, sir,
7 including your own audio recording. If you refuse to turn
8 that off and put it away, then we will suspend the
9 deposition. We will file a motion with Judge Smith and
10 ask that you be held in contempt, with regard to her
11 previously entered order on your deposition.

12 We will ask her, in addition, to make issue
13 preclusion findings against you on all issues the Trustee
14 wished to take your deposition on and we will be done with
15 your deposition.

16 EISEN: All right. It's my view that I have a right to
17 record my - my testimony for my personal use, and these
18 are - this is a recording - a recordation of my - for my
19 personal use.

20 The deposition was suspended, and on July 27, 2006, the
21 Trustee submitted a declaration of his counsel to the bankruptcy
22 court advising the court of Eisen's alleged noncompliance with the
23 July 11 Order.

24 At this point, the record on appeal becomes somewhat murky.
25 On August 10, 2006, the Trustee filed a Motion for Order Holding
26 the Debtor in Contempt Due to the Debtor's Failure to Comply With
27 This Court's Order Compelling Him to Produce Documents and Appear
28 at his Deposition (the "Contempt Motion"). The Trustee's Contempt
29 Motion provides:

Evidently, the threat of a \$2,000 sanction was
insufficient to prompt the debtor to comply with
his obligations under the subpoena. The Trustee
requests that the Court issue sanctions against
the debtor in an additional amount of \$2,000,
payable to the Trustee, to compensate the
Trustee for the expense in bringing this motion
and appearing at the hearing. The trustee
further requests that the Court issue sanctions
against the debtor in an amount of \$10,000,
payable to the Clerk of the Court. . . .

1 (emphasis added).⁹

2 On August 18, 2006, the bankruptcy court entered its Order
3 Awarding Sanctions Due to Debtor's Failure to Comply with This
4 Court's Order Compelling William Eisen to Produce Documents and to
5 Appear at his Deposition (the "Sanctions Order"). Specifically
6 referring to the Declaration of the Trustee's counsel, the court
7 awarded a \$2,000 sanction pursuant to its July 11 Order. The
8 Sanctions Order made no reference to the Contempt Motion or the
9 additional damages sought therein.

10 Also on August 18, 2007, in response to the Contempt Motion,
11 the bankruptcy court entered an Order to Show Cause Why Debtor
12 Should Not be Held in Contempt due to the Debtor's Failure to
13 Comply With This Court's Order Compelling Him to Produce Documents
14 and Appear at his Deposition (the "Contempt OSC"). The Contempt
15 OSC made no reference to the Sanctions Order. A hearing on the
16 Contempt OSC was set for October 5, 2006.

17 On August 28, 2006, Eisen filed a timely appeal of the
18 Sanctions Order. This is the appeal now before this Panel.

19

20 Events Subsequent to the Entry of the Sanctions Order

21 On October 5, 2007, the bankruptcy court held a hearing on
22 the Contempt OSC. Eisen was present, and the Trustee was
23 represented by counsel. Although an attorney appeared
24 representing both Allen and Law, that attorney did not participate

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28 ⁹ This Contempt Motion is clearly distinguishable from the
earlier Motion to Compel in that it sought sanctions in addition
to those sought in the Motion to Compel.

1 in the discussion of the Contempt OSC.¹⁰

2 At the beginning of the OSC hearing, Eisen questioned the
3 bankruptcy court's jurisdiction to impose a \$2,000 sanction
4 because the Sanction Order was on appeal:

5 EISEN: I would like to note that the motion to compel
6 involves \$2,000 in sanctions awarded against me
7 personally, and that motion - that order is on appeal to
8 the BAP. So I question whether this is properly before
9 the Court in that the very same order compelling is
10 before the BAP.

11 THE COURT: Well, the thing is, whether it's before the
12 BAP or not, unless there was a stay of the execution of
13 the order, the order is a final order, and that can be
14 acted upon, absent a stay. And I'm not aware that there
15 has been any stay pending appeal.

16 Tr. Hr'g 10:22-11:6 (emphasis added). In making this comment, it
17 would appear that Eisen confused the sanction imposed in the
18 Sanction Order with the requested additional \$2,000 sanction in
19 the Contempt Motion that was the subject of the hearing. The
20 bankruptcy court did not correct Eisen, and instead a colloquy
21 between the court and the Trustee's attorney shows that the
22 court's attention shifted toward enforcement of the Sanctions
23 Order:

24 THE COURT: I think my ruling was that I would not impose
25 the sanctions of \$2,000 against Mr. Eisen, so long as he
26 complied with the court's order, and if he didn't
27 comply, then he would have to pay the \$2,000.

28 As far as this motion is concerned, I'm going to
suspend that portion of the order regarding the
sanctions.

MR. TEDFORD [Trustee's attorney]: May I note, your
Honor, that the Debtor has created a jurisdictional
problem by appealing that portion of the order, by
appealing the order issuing the \$2,000 sanctions against
him?

¹⁰ The attorney for Allen and Law, David Burkenroad, made one
comment at the hearing: he agreed with the court's reasoning that
Eisen could tape record his deposition for his personal use. Tr.
Hr'g 16:16-23 (October 5, 2006).

1 THE COURT: That's true.

2 MR. TEDFORD: It's the portion that he tried to use
3 earlier in this hearing to say that this Court could not
4 go forward with the present motion.

5 THE COURT: Got it. I guess I can't really suspend it.
6 All I can do at this point is enforce it. Thank you for
7 pointing that out. . . .

8 THE COURT: So, at this point, I'm not enforcing the
9 portion of the order requiring the \$2,000 in sanctions
10 against Mr. Eisen at this point due to insufficiency of
11 evidence, meaning there was a portion requiring that he
12 show up for the deposition. He did. There was a
13 requiring [sic] that he produce documents. He claims
14 not to have them.

15 So at this point, I don't have sufficient evidence
16 that he does have them, but again, should any documents
17 surface or he produce them or anything like that,
18 there's nothing I'm doing today that would prevent the
19 Trustee from filing or refileing the motion. But as far
20 as what is before me today, I am not going to enforce
21 the order to hold Mr. Eisen in contempt as of this
22 hearing.

23 Tr. Hr'g 24:17-26:2.

24 Viewed in the complicated procedural context of the adversary
25 proceeding, we believe a fair interpretation of the bankruptcy
26 court's comments at the hearing shows that the court: (1) was
27 considering what action to take regarding the sanctions imposed in
28 the Sanctions Order, and not the proposed additional sanctions
referred to in the Contempt Motion; (2) decided not to enforce the
Sanctions Order because of insufficiency of evidence that Eisen
actually possessed the documents he was accused of failing to
produce; and (3) instead determined that it would only enforce the
existing Sanctions Order, or impose other sanctions, if the
Trustee filed a new motion, or refiled the Contempt Motion.

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JURISDICTION

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

ISSUE¹¹

Whether this appeal is moot because, during its pendency, the bankruptcy court decided it would not enforce the sanctions awarded against Eisen.

STANDARD OF REVIEW

We examine our own jurisdiction, including mootness issues, de novo. Wiersma v. D.H. Kruse Grain & Milling (In re Wiersma), 324 B.R. 92, 110 (9th Cir. BAP 2005).

DISCUSSION

This appeal is moot because Eisen no longer has a personal interest in this appeal.

There is no question that Eisen had standing to initiate this appeal. Eisen was ordered by the bankruptcy court to pay sanctions in the amount of \$2,000. He was an "aggrieved person" because he was "directly and adversely affected pecuniarily" by the court's Sanctions Order. In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983).¹²

¹¹ Because we dismiss this appeal as moot, we do not reach the issues framed by Eisen in his Statement of Issues.

¹² As noted above, Eisen alone filed the Notice of Appeal commencing this appeal. That makes sense since this appeal
(continued...)

1 But although Eisen clearly had standing to commence this
2 appeal, like any litigant he must continue "to have a personal
3 stake in the outcome of the [case] throughout all stages of
4 federal judicial proceedings." United States v. Verdin, 243 F.3d
5 1174, 1177 (9th Cir. 2001). "The requisite personal interest that
6 must exist at the commencement of a case must continue throughout
7 its existence." U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397
8 (1980). At any stage of the proceeding, a case becomes moot when
9 "it no longer presents a case or controversy under Article III,
10 § 2 of the Constitution." Spencer v. Kemna, 523 U.S. 1, 7 (1998).
11 During the course of an appeal, appellants must continue to have
12 "a personal stake in the outcome." Lewis v. Cont'l Bank Corp.,
13 494 U.S. 472, 478 (1990). The Supreme Court refers to this as the

14 _____
15 ¹²(...continued)

16 concerns sanctions imposed against Eisen personally for his
17 failure to cooperate in discovery. The Trustee made no request to
18 recover sanctions from Law or Allen, and neither is liable,
19 directly or indirectly, for any sanctions awarded against Eisen.
20 In other words, Eisen alone has a financial stake in the order
21 being appealed. In spite of this, for reasons that are not
22 apparent, Law and Allen were listed in the captions in the four
23 nearly identical short (seven-page) briefs filed in the four
24 appeals pending before the Panel arising from Eisen's bankruptcy
25 case, including this appeal.

26 Under these circumstances, we do not consider Law or Allen to
27 be appellants in this appeal. Even if Allen or Law intended to
28 join in this appeal, they would be dismissed as appellants for
lack of standing to appeal. In this circuit, only "persons
aggrieved" have standing to appeal an order of the bankruptcy
court. Fondiller, 707 F.2d at 442. Whether a person is aggrieved
for purposes of a bankruptcy appeal is measured by whether that
person is "directly and adversely affected pecuniarily by an order
of the bankruptcy court." Duckor Spradling & Metzger v. Baum Trust
(In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999) (emphasis
added). Simply put, since neither Law nor Allen has any financial
exposure whatsoever as a result of the Sanctions Order, they lack
standing to appeal.

We therefore ORDER that the caption in this appeal reflect
that William Eisen is the only appellant in this appeal. This
order does not affect the captions in the three other appeals in
the Eisen bankruptcy case presently before the Panel.

1 "doctrine of standing set in a time frame" and has recently
2 reaffirmed its vitality. Friends of the Earth, Inc. v. Laidlaw
3 Env't Servs., Inc., 528 U.S. 167 (2000); Arizonians for Official
4 English v. Arizona, 520 U.S. 43, 68 (1997).

5 At the hearing on October 5, 2006, the bankruptcy court
6 stated that it would not enforce the Sanctions Order directing
7 Eisen to pay the \$2,000 sanction to the Trustee. The sanction had
8 been conditionally imposed, and Eisen was allowed an opportunity
9 to avoid it by attending the deposition and producing any relevant
10 documents he might have. At the October 5 hearing, the bankruptcy
11 court declined to enforce the Sanctions Order because there was
12 insufficient evidence that Eisen had violated that order by
13 withholding any documents that the Trustee had demanded be
14 produced. The court also indicated that it would not revive the
15 sanctions unless evidence of the existence of documents in Eisen's
16 possession was thereafter uncovered, and the Trustee refiled the
17 motion requesting sanctions or filed a new motion. The bankruptcy
18 court thereby ended any controversy between the Trustee and Eisen
19 concerning the Sanctions Order. The court decided it would not
20 revisit the dispute unless a new or renewed motion was filed
21 initiating a new controversy, which would require further notice,
22 hearing, and a new order. From the moment the bankruptcy court
23 ruled that Eisen would not be required to pay the \$2,000 sanction,
24 and that this matter would not be revisited unless a new motion
25 was filed, Eisen ceased to have a pecuniary interest or personal
26 stake in the outcome of this appeal. There was no longer an
27 active controversy.

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1 We therefore conclude that this appeal is moot under the
2 doctrine of standing set in a time frame.

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CONCLUSION

The appeal is DISMISSED as moot.