NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-06-1387-PaMkT
WILLIAM EISEN,	Bk. No. SA 06-10372-ES
Debtor.	
WILLIAM EISEN; THE ALLEN GROUP PARTNERS; JAMES A. LAW,	
Appellants,	
v.	**M E M O R A N D U M**[1]
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.

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

This is an appeal of an order disallowing the claims of James A. Law in the debtor's chapter 7[3] bankruptcy case. We AFFIRM the decision of the bankruptcy court.

FACTS[4]

Eisen filed a voluntary petition for relief under chapter 11 on December 3, 1993, in the Southern District of California.[5] The

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of the relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-08, April 20, 2005, 119 Stat. 23.

[4] There are currently four appeals before this Panel in Eisen's bankruptcy case. We present here only the facts relevant to this appeal (CC-06-1387) concerning the disallowance of Law's claims. For the background in the dispute concerning sanctions, please see CC-06-1313; for the compromise with DFL see CC-06-1385; for the rehearing/reconsideration see CC-06-1433.

[5] A note about the many procedural irregularities in Appellants' submissions is appropriate here. For example, the excerpts of record begin with page "521." 9th Cir. BAP Rule 8009(b)-1(b)(2) requires only that the excerpts be continuously paginated; it does not dictate that the pagination begin with page one. Apparently, Appellants begin 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, Appellants begin with "Matters for which this court is requested to take judicial notice." Appellants then list the 520 pages of the excerpts of record in an earlier BAP appeal, CC-05-1333, as well as over 640 pages in an appeal taken to the United States District Court for the Central District of California. Appellants have not provided copies of any of those documents from the other appeals, and we are not obligated to examine portions of the record not submitted in the excerpts of record. In re Kritt, 190 B.R. 382, 386-87 (9th Cir. BAP 1995). Because Appellants did not file a separate request for judicial notice, and have given us neither copies of those 1,160+ pages of documents nor any reasons why we should take judicial notice of them, Appellants' request that we take judicial notice of those documents is DENIED.

Appellants' citations in the opening brief to documents not submitted in the excerpts of record violate Rule 8010(a)(1)(D).

Finally, we note that Appellants' decision to submit a single set of excerpts of record for all four appeals currently before

(continued...)

case was converted to one under chapter 7 on August 24, 1994.[6]

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

Eisen's Schedule A listed as an asset certain real property (the "Crest Drive Property") "subject to unperfected foreclosure sale." Allen Group Partners ("Allen") claims to be the owner of the Crest Drive Property via a purchase at that foreclosure sale in 1990. In January 2005, the Trustee filed an application to employ real estate brokers to sell the Crest Drive Property. Eisen opposed the application and attached to his opposition a trustee's deed transferring the Crest Drive Property to Allen. That trustee's deed was not recorded until January 11, 2005, some fifteen years after the purported foreclosure sale, and just after

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[5](...continued)
the Panel, without leave of the Panel, significantly complicates the parties' and the Panel's ability to examine the record. Opposing parties and the Panel are not obliged to search the entire record unaided for error. Dela Rosa v. Scottsdale Mem'l Health Sys., Inc., 136 F.3d 1241 (9th Cir. 1998).

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

Trustee filed the application to employ the real estate brokers. The dispute concerning ownership of the Crest Drive Property is at the heart of this bankruptcy case. However, it is not directly implicated in the appeal of the Law claims.

In June 1998, the Initial Trustee filed a notification of asset case and the bankruptcy court established a bar date for filing claims of April 21, 1999. Two proofs of claim were timely filed: one by Rosky Landau & Stahl ("Landau") for $169,250.02, and one by William Kengel ("Kengel") for $250,261.00. In his final report, which was set to be heard on April 20, 2000, the Initial Trustee indicated his intention to pay a dividend to both Landau and Kengel.

The day before the hearing on the Initial Trustee's final report, a proof of claim was purportedly filed by Law for $350,000, and was assigned claim no. 3 by the bankruptcy clerk ("Claim 3"). Although Law appears to have signed the claim, he lists his address for correspondence in care of Lewis Amack, Esq. Attached to Claim 3 was a Declaration of James A. Law (the "First Law Declaration"), which states, "at no time during the pendency of this bankruptcy case did I ever receive notice of the case or of a claims bar date." The First Law Declaration asserts a right to priority over the Kengel and Landau claims under § 726(a)(3).

On May 18, 2000, the Initial Trustee filed an objection to Claim 3, asking that it be disallowed as a timely claim and allowed as a tardily filed claim. Oppositions were filed by Eisen and by Law, purportedly through Amack.

The bankruptcy court conducted a hearing on the Initial Trustee's objection to Claim 3 on October 17, 2000. Eisen

appeared pro se; Landau and Kengel were represented by their regular counsel; Law was represented by Marie Frankel, purportedly substituting for Amack. All parties were given the opportunity to present their positions. The bankruptcy court sustained the Trustee's objection, disallowed Claim 3 as a timely filed claim, but allowed it as a late-filed claim.

On the same day that Law purportedly filed Claim 3, April 19, 2000, he also allegedly filed objections to Landau's and Kengel's claims. These objections were ostensibly filed by Amack acting as Law's attorney. In his Supplemental Brief opposing Law's objection to his claim, Kengel brought to the bankruptcy court's attention several discoveries concerning Amack, including:

- Eisen's telephone number was listed on the state bar website as Amack's business phone number, and
- Amack's business address, where he has allegedly maintained an ongoing law practice, was a private mailbox drop in a strip mall.

In a declaration attached to his Second Supplemental Brief in opposition to Law's objections dated October 11, 2000, Kengel stated that he went to Law's residence and spoke with him regarding Amack. Law allegedly told Kengel that Amack was not his attorney and that he had never met or spoken with Amack.

Also on October 11, 2000, Kengel's attorney submitted a Declaration of James A. Law (the "Second Law Declaration"). In that declaration, Law states:

> I have never met nor have I ever spoken with or hired an attorney by the name of Lewis O. Amack. I do not know Lewis O. Amack.
>
> On September 17, 2000, I received a visit from

> a woman named Kathy James, who stated that she was trying to locate an attorney named Lewis Amack. This was the first I heard of Lewis Amack. Even after this visit from Ms. James, I never spoke with anyone named Lewis Amack.
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> I have also reviewed a document called the claim of James A. Law and accompanying declaration [the First Law Declaration]. I have no knowledge of submitting a claim in any bankruptcy of William Eisen during the calendar year of 2000. If a claim were submitted in my name, it was done without my knowledge or approval, and without my signature.

At the October 17, 2000 hearing, in addition to allowing Law's Claim 3 as a late-filed claim, the bankruptcy court allowed Kengel's claim, and deferred action on Landau's claim to a hearing on November 22, 2000. However, the bankruptcy court ordered that Law and Amack personally attend the hearing on November 22.

On November 21, 2000, a declaration was purportedly filed by Amack (the "Amack Declaration"). The Amack Declaration included the following statements:

- He is the attorney of record for Law.
- He was retained by Law to prosecute a creditor's claim in Eisen's bankruptcy case.
- After receiving a copy of the Second Law Declaration, he sent a substitution of attorney form to Law, and informed Law that, if he did not hear anything further from him, he would make no more appearances for Law.

Despite the court's order requiring Amack to attend the November 22, 2000, hearing, Amack did not appear. However, Law attended the November 22, 2000, hearing, along with his attorney Fruchter. Law was sworn as a witness and confirmed under oath the statements he made in the Second Law Declaration, including that

he never made the First Law Declaration or filed or authorized anyone to file a proof of claim, that Amack was not and never had been his attorney and, indeed, that he did not know Amack.

Although it may not have been known to the bankruptcy court at the November 22, 2000, hearing, on November 21, 2000, Eisen had filed a claim on behalf of Law, which was assigned claim number 5 by the clerk ("Claim 5"). Then, on November 22, 2000, Eisen filed another claim on behalf of Law ("Claim 4").[7] Along with the claims Eisen filed a declaration stating that he was submitting the claims pursuant to 11 U.S.C. § 501(c).

The Initial Trustee filed an objection to Claims 4 and 5 on November 5, 2001. He later amended that objection in light of Law's November 22 testimony to include a new objection to Claim 3 alleging it was a forged document. Law did not file any opposition to the Initial Trustee's objections to his claim. However, Eisen filed an opposition on November 19, 2001.

On January 4, 2002, the Initial Trustee resigned. He was succeeded by the Trustee on January 29, 2002. The Trustee informed the bankruptcy court that he would proceed with the objections to claims 3, 4, and 5.

The bankruptcy court conducted a hearing on February 12, 2002, concerning what was now the Trustee's objections to claims 3, 4, and 5. In addition to the arguments at the hearing and the

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[7] It is not clear from the record why the clerk would assign claim number 5 before claim number 4. We note that claim 5 filed on November 21 used an outdated form, although the content of Claims 4 and 5 are identical. There is one entry that distinguishes Claims 4 and 5 from the earlier and later Law claims. These claims list Eisen and his address for all correspondence regarding the Law claims.

pleadings submitted in connection with the objections, the bankruptcy court also took note of the testimony of Law at the November 22, 2000, hearing.

On August 19, 2002, the bankruptcy court entered its order sustaining the Trustee's objections to Claims 3, 4 and 5 (the "2002 Order"). The court ruled that:

> Claim no. 3 in the amount of $350,000 filed by the debtor on behalf of James A. Law is disallowed in its entirety. The court is convinced that Mr. Law is not asserting such a claim against the estate, but in any event the claim must be disallowed as untimely and not subject to subordination under 11 U.S.C. § 726(a)(2)(C) and 726 (a)(3) because 501(c) is not incorporated thereunder.

The court disallowed Claims 4 and 5 for the same reasons and because they were duplicates.

Eisen appealed the 2002 Order to the District Court. On March 14, 2003, the District Court dismissed the Debtor's appeal on the grounds of failure to prosecute, Eisen's lack of standing, and mootness, and denied Eisen's motion for reconsideration on July 29, 2003. In an unpublished memorandum decision, Eisen v. Golden, Case no. 03-55643 (9th Cir. Apr. 7, 2004), the Court of Appeals affirmed the District Court's dismissal of the appeal. Two comments made by the Court of Appeals in this memorandum decision deserve special mention. Regarding Eisen's failure to prosecute the appeal by neglecting to timely file materials required to perfect the appeal, the Ninth Circuit recognized that dismissal of an appeal for failure to meet a deadline was a "drastic" sanction. However, in the Court of Appeals' words,

> Although there may have been less drastic alternatives available to the district court, prior sanctions imposed upon Eisen apparently have not deterred his litigious nature.

And concerning Eisen's standing to appeal, the appeals court observed,

> As we explained in one of Eisen's earlier appeals, "Eisen, as a debtor, has no standing because . . . [the] trustee is the representative of Eisen's estate." In re Eisen, 31 F.3d 1447, 1451 n.2 (9th Cir. 1994).

On July 15, 2005, the Trustee initiated an adversary proceeding in Eisen's bankruptcy case against Allen and DFL Partnership ("DFL")[8]. The complaint sought, among other things, to establish the bankruptcy estate's right, title and interest to the Crest Drive Property. The bankruptcy court approved the Trustee's application to engage special counsel to represent the estate in disputes regarding the Crest Drive Property on July 25, 2005. Eisen, Law (again, purportedly acting via his attorney, Amack) and Allen appealed the order to employ counsel to this Panel.

The Panel ordered the appellants in that appeal to file a motion for leave to appeal the interlocutory order on October 11, 2005. Such a motion was filed on October 21, 2005, by Eisen and Amack (on behalf of Law and Allen). The Trustee opposed the motion for leave to appeal arguing, among other things, that Law lacked standing.[9]

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[8] DFL is successor in interest to Judith Day, who claims to have had an agreement with Eisen to purchase the Crest Drive Property. The claims of Allen, Day, and DFL are examined in detail in appeal CC-05-1385.

[9] Although we have been handicapped in these appeals by the poor quality of (and sometimes nonexistent) excerpts of record provided by Appellants, the Trustee's approach is also not without its faults. The Trustee provided us with 1,400+ pages of documents in his Supplemental Excerpts. However, he does not include numerous critical documents; for example, he does not

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The Panel then ordered the Appellants to submit briefs explaining how they had standing to appeal, to be filed on December 20, 2005, with replies due by December 27, 2005. Appellants requested a three-day extension, which was granted, and the time for filing their brief related to standing was extended to December 30, 2005.[10]

On December 29, 2005, yet another proof of claim was filed in the bankruptcy court with Law's signature ("Claim 6"). Claim 6 indicated that it replaced Claim 4 (which had been disallowed). Claim 6 also indicated that all correspondence regarding Claim 6 was to be sent in care of Amack.

On December 30, 2005, Eisen, Law and Allen filed a brief on the standing issue. Regarding Law, they argued that he had standing as a creditor as evidenced by the filing of Claim 6. The brief was purportedly signed by Amack.

The Panel denied the motion for leave to appeal on February 8, 2006. A joint motion for rehearing was also denied. The Ninth Circuit dismissed an appeal from that order for lack of

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[9](...continued)
include his opposition to Law's standing on appeal. Further, the Trustee provides an unacceptable table of contents for this large mass of material. The table only lists seven entries, each labeled a "compendium of exhibits." This is a violation of 9th Cir. BAP Rule 8009(b)-1(b)(3), which requires a complete list of all documents, with page and tab numbers.

[10] The reason for the extension was a statement, allegedly from Amack, that

> I have been unable to complete the papers to be filed . . . by the December 27 due date because I have been ill during the last 4 days with the stomach flu. A 3 day extension of time, to December 30, is, therefore, requested.

jurisdiction. Eisen v. Golden, case no. 06-55486 (9th Cir. September 26, 2006).

A status conference was held by the bankruptcy court concerning the adversary proceeding on October 16, 2005. Amack was ordered to appear, and this time did so. Based on several representations made by Amack that appeared to contradict other information available to the court, the court issued an Order to Show Cause why Amack should not be subject to various disciplinary procedures, including Rule 9011 sanctions, and referral to the court disciplinary panel, the California state bar, and the U.S. Attorney (the "Amack OSC").

A hearing on the Amack OSC was held on February 16, 2006. Amack was sworn and testified to the following points:

- The address on Crenshaw Blvd. which was listed as his address on pleadings to the court and on Claim 6 was not his address. It is Eisen's post office box. Tr. Hr'g 9:7-9 (February 16, 2006).
- Eisen had been "systematically withholding opposing part[y's]" pleadings from Amack. Tr. Hr'g 17:17-18. Although he "apparently" had been representing Law, it was a "situation where Mr. Eisen is pulling all the strings[.]" Tr. Hr'g 19:11.
- Amack's only personal contact with Law was a one-minute social phone call. Tr. Hr'g 22:2-4.
- Amack did not file Claim 6. Tr. Hr'g 21:7.
- "I can say with almost absolute certainty that I did not sign any pleading involving Mr. Law within the past few years." Tr. Hr'g 23:10-12.

- Amack never prepared or filed any pleadings with the BAP for Law. In response to the court's query whether he had ever filed pleadings for Law with the BAP, Amack replied: "No. That's a definite no[.]" Tr. Hr'g 22:18-21.
- He did not sign the Amack Declaration and his signature on that document was a forgery. Tr. Hr'g 39:4.

The bankruptcy court provided an opportunity to Amack to respond in a written brief to other accusations and questions. There is no indication in the record if the bankruptcy court has taken any action as of this date against Amack.

The Trustee filed an objection to Claim 6 on April 25, 2006. His objection alleged that: (1) Claim 6 was a duplicate of the other claims allegedly filed by Law, all of which were disallowed, and Law is barred under principles of res judicata from re-asserting these claims; (2) Amack was listed on Claim 6 as the attorney, although he testified that he had nothing to do with Claim 6; (3) the claim was a sham, prepared and filed to satisfy the BAP's concern that Law may lack appellate standing; (4) the claim was based upon a promissory note that was faulty on its face; and (5) even though the promissory note was allegedly signed three days before Eisen filed his petition in this bankruptcy case, his schedules failed to list Law as a creditor.

Eisen, as well as Law and Allen (represented by David Burkenroad ("Burkenroad")), filed a joint opposition to this objection supported by declarations from Eisen and (purportedly) from Law on May 10, 2006. Eisen's declaration supported the promissory note challenged by the Trustee, and Law's declaration allegedly contradicted some elements of the testimony of Amack.

Also on May 10, 2006, yet another proof of claim was filed, allegedly by Law (the "New Law Claim").[11] The New Law Claim is a duplicate of Claim 6. The Trustee filed a reply brief, explained that the New Law Claim was merely a duplicate of Claim 6, and requesting that it also be disallowed.

On May 24, 2006, the bankruptcy court held a hearing on the Trustee's objection to Claim 6 and the New Law Claim. Eisen appeared pro se and the Trustee, Allen and Law were represented by counsel; all parties were given the opportunity to be heard.

On July 11, 2006, the bankruptcy court entered its order disallowing Claim 6 and the New Law Claim (the "Disallowance Order"). At the same time, the bankruptcy court issued twenty-six Findings of Fact and eight Conclusions of Law in support of its Disallowance Order. None of the court's findings or conclusions have been appealed. Among those findings and conclusions are the following:

> Finding no. 10: On November 22, 2000, Law personally appeared before the Bankruptcy Court and testified under oath. Law confirmed that the statements in [the Second Law Declaration] were true. Law also stated, among other things, that he had never met Amack, had never spoken to Amack, had never hired Amack, did not file a proof of claim, and did not authorize anyone to file a proof of claim on his behalf.
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> Finding no. 15: In February 2006, Amack personally appeared before the bankruptcy court and testified under oath. Amack testified, among other things, that he did not prepare and/or file Claim 6, that he was not retained by Law to represent Law in connection with Claim 6, and that the Debtor "did all of the work himself."

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[11] The parties use this term to avoid confusion in numbering. Between the filing of Claim 6 and the New Law Claim, the bankruptcy judge presiding over this case relocated from Los Angeles to Santa Ana, and responsibility for this file was apparently transferred to the Santa Ana divisional clerk's office. In the process, the New Law Claim was, for some reason, assigned claim number 1.

Finding no. 19: The Allen Group lacks any pecuniary interest in opposing the disallowance of Law's alleged claim against the Debtor's estate. If anything, it appears to be against the Allen Group's pecuniary interest to oppose disallowance of Law's alleged claim.

Finding no. 20: The Debtor lacks any pecuniary interest in opposing the disallowance of Law's alleged claim. If anything, it appears to be against the Debtor's pecuniary interest to oppose disallowance of Law's alleged claim.

Finding no. 21: The evidence submitted by the Trustee overwhelmingly demonstrated the fraudulent nature of the claims purportedly filed by Law throughout the course of the bankruptcy case, and raised questions as to the authenticity of Law's "declaration" filed in opposition to the objection (the "[Third] Law Declaration"). Among other things:

a. Law previously testified under oath, in writing and in person before the Bankruptcy Court, that he did not hire Amack to file any documents on his behalf in this case.

b. Amack has disavowed under oath any knowledge of the filing of Claim 6 or his representation of Law in connection with Claim 6.

c. Amack has testified that all papers filed in this case in his name on behalf of Law were not actually filed by him.

d. Despite this prior testimony of Law and Amack, Law purportedly states in the [Third] Law Declaration that Amack represented Law in all matters pertaining to this case and that all papers filed by Amack on Law's behalf were filed with his knowledge and consent.

e. The [Third Law D]eclaration purportedly signed by Law was, at a minimum, prepared and typed by the debtor.

Finding no. 25: The mountain of evidence presented by the Successor Trustee, the highly suspicious circumstances relating to the filing of Claim 6, and the history of this case called into question the validity of Claim 6 and the New Law Claim.

Finding no. 26: Counsel representing Law at the hearing submitted on the Bankruptcy Court's tentative ruling, which tentative ruling was to sustain the objection.

Based on these and other findings of fact, the bankruptcy court reached the following conclusions of law:

1. The Allen Group lacks standing to oppose the objection.

2. The debtor lacks standing to oppose the objection.

3. The 2002 Order constitutes a final judgment on the merits involving the same claim and the same claimant as Claim 6 and the New Law Claim.

4. Law is barred from relitigating issues that were or could have been raised in connection with the proceeding which resulted in entry of the 2002 Order.

5. Evidence submitted by the Successor Trustee in support of the objection was sufficient to shift the burden to Law to prove the validity and amount of his alleged claim by a preponderance of the evidence.

6. Evidence submitted by Law in opposition to the objection fails to satisfy his burden to prove the validity and amount of his alleged claim by a preponderance of the evidence.

7. The Trustee's objection to Claim 6 and the New Law Claim should be sustained.

Eisen, Law and Allen filed a timely motion for reconsideration of the Disallowance Order on July 21, 2006. The bankruptcy court orally denied reconsideration on October 5, 2006, and an order was entered on November 14, 2006. Eisen, Law and Allen filed a timely appeal of the Disallowance Order on October 16, 2006.

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.

ISSUES[12]

1. Whether Allen and Eisen have standing to oppose Trustee's objection to Law's proof of claim, and to appeal the Disallowance Order.
2. Whether the bankruptcy court erred in sustaining the Trustee's objections to Claim 6 and the New Law Claim.

STANDARD OF REVIEW

Standing is a jurisdictional issue that we may raise sua sponte and that we address de novo. Menk v. Lapaglia (In Re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

We review a bankruptcy court's findings of fact under the "clearly erroneous" standard. Rule 8013. Special deference is given to a trial court's credibility findings. Id.; Anderson v. City of Bessemer, 470 U.S. 564 (1985). Conclusions of law are reviewed de novo. In re Olshan, 356 F.3d 1078, 1083 (9th Cir. 2004).

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[12] In their opening brief, appellants include as an issue in this appeal whether the Trustee's adversary proceeding should be dismissed on grounds of laches and judicial estoppel. We note, first, that this appeal arises in the main bankruptcy case, not in the adversary proceeding. Whether Law's claims are allowed or not is immaterial to the outcome of the adversary proceeding, which was initiated to determine ownership rights in the Crest Drive Property. Second, laches and judicial estoppel were never argued in the bankruptcy court in either the main bankruptcy case or in the adversary proceeding. If an issue is not raised in the bankruptcy court, we need not consider it for the first time on appeal. Beck v. Pace Int'l Union, 427 F.3d 668, 674 (9th Cir. 2005), rev'd on other grounds, 127 S.Ct. 2310 (2007). We decline to exercise our discretion to examine the laches or judicial estoppel argument in this appeal.

DISCUSSION

I.
Eisen and Allen lack standing to appeal the disallowance of Law's claims.

The Trustee challenges the standing of Allen and Eisen to appeal the Disallowance Order. We agree that they lack the requisite standing before this Panel.

The bankruptcy court made two explicit findings of fact concerning the standing of Allen and Eisen to object to the disallowance of Law's claims:

> Finding no. 19: The Allen Group lacks any pecuniary interest in opposing the disallowance of Law's alleged claim against the Debtor's estate. If anything, it appears to be against the Allen Group's pecuniary interest to oppose disallowance of Law's alleged claim.
>
> Finding no. 20: The Debtor lacks any pecuniary interest in opposing the disallowance of Law's alleged claim. If anything, it appears to be against the Debtor's pecuniary interest to oppose disallowance of Law's alleged claim.

Although these findings were made in determining whether Allen and Eisen had standing in the bankruptcy court, they are equally relevant to our consideration of their standing in this appeal. Moreover, our independent review of the record confirms that there is no showing of how disallowance of Law's claims would adversely impact the rights of either Allen or Eisen in any pecuniary manner.

In this circuit, only "persons aggrieved" have standing to appeal an order of the bankruptcy court. In re Fondiller, 707 F.2d 441, 442 (9th Cir. 1983). The test of an aggrieved person in a bankruptcy appeal is if 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).

We give special deference to the bankruptcy court's findings of fact. Rule 8013. Importantly, we note that neither Allen nor Eisen has in this appeal challenged the bankruptcy court's findings of fact that they lacked any pecuniary interest in the Disallowance Order. Issues not specifically and distinctly raised and argued in a party's opening brief[13] are deemed waived. Brown v. State Bar of Az. (In re Bankruptcy Petition Preparers Who Are Not Certified Pursuant to Requirements of the Az. Supreme Court), 307 B.R. 134, 141 (9th Cir. BAP 2004).

The bankruptcy court did not clearly err in determining that neither Allen nor Eisen had a pecuniary interest in the Disallowance Order. Allen is a defendant in the adversary proceeding, and is not a creditor or party in interest in the main bankruptcy case where the Disallowance Order and this appeal arise. We can conceive of no financial injury that may inure to Allen as a result of the disallowance of Law's claims. We conclude that Allen has no adverse pecuniary interest in this appeal and, thus, he has no standing to appeal.

We have held that "debtors only have standing to object to claims where there is 'a sufficient possibility' of a surplus to give them a pecuniary interest." Heath v. Am. Express Travel Related Servs. Co. (In re Heath), 331 B.R. 424 , 429 (9th Cir. BAP 2005). While Eisen insisted otherwise at oral argument, there is simply no evidence in the record to show a "sufficient possibility" that a surplus exists in this case to justify recognizing Eisen's standing.

[13] The Trustee argued this standing issue in his Opening Brief; Appellants filed no Reply Brief.

But even more important, here the bankruptcy court disallowed Law's claim – something which, if anything, would enhance Eisen's prospects for any surplus distribution. Indeed, the bankruptcy court's order seemingly works in Eisen's pecuniary favor.

The bankruptcy court did not clearly err in determining that neither Eisen nor Allen has a pecuniary interest in the Disallowance Order. Therefore, we conclude that neither Eisen nor Allen has standing in this appeal.

II.
The bankruptcy court did not err in sustaining the Trustee's objection to Claim 6 and the New Law Claim.

The bankruptcy court did not err in ruling, as urged by the Trustee, that the principles of res judicata barred the allowance of Claim 6 and the New Law Claim because Claim 3, asserting an identical claim, had already been disallowed in a final order. Further, the bankruptcy court correctly determined that the "mountain of evidence" presented by the Trustee called into question the prima facie validity of Claim 6 and the New Law Claim, thus shifting the burden to Law to prove the validity and amount of his alleged claim by a preponderance of the evidence. Finally, the bankruptcy court determined that the evidence presented by Law in opposition to the Trustee's objection failed to satisfy his burden by a preponderance of the evidence.

Based on the evidence and record before it, the bankruptcy court reached two conclusions of law that the disallowance of Claim 3 in the 2002 Order operated to preclude allowance of Claim 6 or the New Law Claim.

> 3. The 2002 Order constitutes a final judgment on the merits involving the same claim and the same claimant as Claim 6 and the New Law Claim.

4. Law is barred from relitigating issues that were or could have been raised in connection with the proceeding which resulted in entry of the 2002 Order.

Again, Appellants did not challenge these conclusions of law of the bankruptcy court in their Opening Brief, and we thus deem waived any argument that the bankruptcy court erred in making these conclusions.

But even if Appellants had properly challenged the determination by the bankruptcy court that they were precluded from asserting Claim 6 and the New Law Claim, we would conclude that the record amply supports the bankruptcy court's ruling that these same claims were disallowed in the 2002 Order, an issue which can not now be relitigated.

In reviewing a trial court's determination that res judicata acts to prevent relitigation of claims, our court of appeals instructs us to consider whether there is:

(1) an identity of claims,

(2) a final judgment on the merits, and

(3) privity between parties.

Headwaters Inc. v. United States Forest Serv., 399 F.3d 1047, 1053 (9th Cir. 2005) (quoting Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1077 (9th Cir. 2003)).

Here, criterion one, the identity of claims, is clearly satisfied. Regarding the identity of claims, Claim 3 asserts a $350,000 unsecured priority claim in favor of Law and against the Eisen bankruptcy estate for money loaned in 1993. This is identical to the basis of the claims made in Claim 6 and the New Law Claim. Also, as noted above, the court in Conclusion of Law 3

explicitly determined that Claims 3, 4, 5, 6, and the New Law Claim were identical, and this conclusion was not appealed.

Regarding the identity of parties, the court made an explicit determination that the claimant in Claim 3 was the same claimant in Claim 6 and the New Law Claim -- Law. The court made that determination in spite of contradictory evidence that Law may or may not have filed the claims. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. United States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003). In fact, the bankruptcy court never ruled that Law did not file or authorize the claims, nor did the court disallow any claims on that basis.[14] In the 2002 Order, the court disallowed Claims 3, 4, and 5 because they were untimely and not subject to subordination under § 726(a).[15] The court disallowed Claim 6 and the New Law Claim on the grounds of res judicata, and that Law had failed to carry his burden of proof to establish the validity and amount of his claim. Again, we note that the court's conclusion that all claims had the same claimant was not challenged in this appeal.

Appellants have only attacked the second prong of the res judicata test, i.e., whether there was a final judgment on the merits. Appellants did not address, nor even mention, the res

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[14] Even the Trustee conceded that it was possible that Law may have signed or authorized one or more of the claims. However, he suggested that, if Law did sign the claims, it was signed and filed for an improper purpose.

[15] In the 2002 Order, the court noted that it was convinced that Law was not asserting claims 3, 4 and 5 against the estate "but in any event the claim must be disallowed as untimely and not subject to subordination under 11 U.S.C. § 726(a)(2)(C) and 726(a)(3) because 501(c) is not incorporated thereunder."

judicata argument in their Opening Brief. Instead, there was but a single off-handed reference in the bankruptcy court in a footnote to their opposition to the Trustee's objection to Claim 6:

> Although the prior disallowance of the claim was appealed the appeal was dismissed as moot because, as the trustee contended at the time, the estate had insufficient funds to pay unsecurred [sic] claims. Thus, the issue is hardly res judicata.

Apparently, appellants were arguing that the second prong of the res judicata test is not met because the District Court and Court of Appeals did not consider the merits of their arguments on appeal.[16]

Appellants misunderstand the nature of finality of judgments and res judicata. The 2002 Order, as noted by the bankruptcy court in this appeal, was a final order in that it settled all aspects of the dispute between Law and the Trustee over Law's claims in the bankruptcy case. The 2002 Order was issued as a separate document along with separate findings of fact and

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[16] Eisen repeated a variation of this argument in his argument before the bankruptcy court at the hearing on objection to Claim 6 and the New Law Claim.

> Well, I – could I just say that I don't think that the – the Court's previous ruling is res judicata because the ruling is not final because it was never heard on appeal.

Tr. Hr'g 8:12-15. [Footnote continues on next page.]

First, Eisen misstates the facts. The 2002 Order was indeed heard twice on appeal, and Eisen was the appellant. The court also corrected Eisen's misunderstanding of the finality of judgments in federal courts. "In Federal Court, an order is final on entry. This isn't State Court. . . . Under federal law, once an order is entered, it immediately becomes final, notwithstanding that it may be appealed and may be pending on appeal." Tr. Hr'g 8:16-23.

conclusions of law. It thus satisfied the requirements of Rule 9021. It was an appealable order, but the order was not appealed by Law. That Eisen took an appeal of the 2002 Order, which was dismissed by both the District Court and the Court of Appeals on procedural grounds,[17] is irrelevant to its res judicata effect. Unless reversed on appeal or otherwise vacated or modified, the final order of a court of competent jurisdiction is res judicata as to the parties. Montana v. United States, 440 U.S. 147, 153 (1979).

Because the 2002 Order that disallowed Claim 3 was a final order that was not reversed on appeal or otherwise modified, because Claim 3 is identical with Claim 6 and the New Law Claim, and because the parties litigating Claim 3 are the same parties that are litigating Claim 6 and the New Law Claim, we conclude that principles of res judicata bar the allowance of Claim 6 and the New Law Claim. The bankruptcy court did not err in disallowing Claim 6 and the New Law Claim on the grounds of res judicata.[18]

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[17] Appellants' footnote does not present a truly accurate account of the grounds for dismissal of their appeal by the District Court and the Court of Appeals. The Court of Appeals memorandum decision described three grounds for its decision: mootness; that Eisen had no standing to appeal; and that he had failed to prosecute the appeal properly.

[18] We acknowledge that the Supreme Court encourages federal courts to divide res judicata into issue and claim preclusion. New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001). We find it unnecessary here to make these distinctions, because (1) the bankruptcy court did not make the distinction in its conclusions and (2) the identity of parties and the exact identity of Claim 3 disallowed in the 2002 Order and Claim 6 and the New Law Claim blur the distinctions between claim and issue preclusion. For a scholarly and comprehensive discussion of these distinctions, see Christopher Klein, Lawrence Ponoroff & Sarah Borrey, Principles of (continued...)

Besides res judicata, the court also justified its disallowance of Claim 6 and the New Law Claim on a burden of proof analysis. Ordinarily, proofs of claim properly filed pursuant to Rule 3001 constitute prima facie evidence of the validity and amount of the claim. In re Holm, 931 F.2d 620, 623 (9th Cir. 1991). A party objecting to the claim, here the Trustee, bears the burden of providing evidence to rebut the prima facie evidentiary presumption of the proof of claim. Spencer v. Pugh (In re Pugh), 157 B.R. 898, 901 (9th Cir. BAP 1993). The objector to the claim need only present evidence sufficient to meet the probative force of the proof of claim to defeat the presumption of prima facie validity of the claim. Ashford v. Consol. Pioneer Mortgage (In re Consol. Pioneer Mortgage), 178 B.R. 222, 226 (9th Cir. BAP 1995). Once the objector to the claim meets his burden, the burden shifts to the claimant to prove, by a preponderance of the evidence, the validity and amount of his claim. Pugh, 157 B.R. at 901.

The bankruptcy court found that the Trustee had not merely met the probative force of the proof of claim, but had presented a "mountain of evidence" opposing the claim. The Trustee presented a detailed 27-page objection, well documented with appropriate statutory and case law, arguing that the Law claims had already been disallowed, provided a history of the forged documents and questionable pleadings, challenged the circumstances surrounding the alleged promissory note and brought to the court's attention

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[18](...continued)
Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J. 839 (2005).

the facial inconsistencies in the note,[19] and suggested that, even if allowed, Law's claims were not entitled to priority.

Appellants provided a three-paragraph response. Regarding the Trustee's objection that the claims had been rejected, Appellants submitted yet another claim (the New Law Claim). Their only citation to case law was Bell v. Beckwith, 50 B.R. 422 (Bankr. N.D. Ohio 1985) for the proposition that a claim may be filed at any time before a bankruptcy case is closed.[20] Their only challenge to the inconsistency in the promissory note was a declaration from Eisen that the parties intended the amount to be $350,000, and the inconsistent numbers were Eisen's clerical errors.[21] Appellants also submitted the Second Law Declaration which attempted to answer the voluminous problems with Amack's

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[19] The copy of a promissory note attached to Claim 6 by Eisen reads as follows:

> $350,000.00 November 30, 1993
> ON DEMAND, for value received, I promise to pay to the order of James A. Law Three Hundred Thousand and no/100 Dollars in lawful money of the United States of America at Torrance, California with interest at the rate of Ten (10) per cent per annum. Should suit be commenced to enforce payment of this note, I promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit.
> William Eisen [handwritten signature]

(emphasis added.)

[20] Which is, of course, true. However, claims filed after the bar date are considered tardily filed claims. Further, the citation is not relevant to the Trustee's objection that four (and now five) claims had been filed for improper purposes and that, even if allowed, Law was not entitled to priority.

[21] Interestingly, the Second Law Declaration, which was submitted at the same time as the response and Eisen's declaration, made no reference to the error in the promissory note.

representation by stating that Amack was indeed his attorney and all pleadings that Amack submitted in his name were with his consent.[22]

At the hearing on the allowance of Law's claims on May 24, 2006, Kemmerer appeared as substitute attorney for Law and Allen and Eisen appeared pro se. Kemmerer submitted on the court's tentative ruling, which was to disallow the Law claims. Eisen was heard. The court ruled,

> I think that the Trustee has more than met his burden here. . . . First of all, Mr. Law himself has never indicated that his claim is based on any promissory note. There's no declaration from Mr. Law to that effect. The promissory note that you [Eisen] submitted is facially inconsistent in that it includes both a $350,000 and a $300,000 number. Given that several of the claims filed on behalf of Mr. Law were filed under, if I can put it mildly, highly suspicious circumstances, and based on all of the circumstances, based on all of the historical facts of which this Court can take judicial notice of all pleadings filed in this case, the burden has clearly shifted to Mr. Law, Mr. Law to come up with the ultimate evidence of his claim and the validity of his claim. He has not done that.

Tr. Hr'g 11:1-15.

The bankruptcy court supported its determination that Law had not met his burden of proof with its Findings of Fact 21-26, which are presented above in the discussion of the factual background of this case. These findings support two Conclusions of Law regarding Law's failure to bear his burden of proof:

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[22] As discussed earlier, the Second Law Declaration is inconsistent with Law's own sworn testimony as a witness in the presence of the court. It also contradicts the sworn testimony of Amack as a witness.

> Conclusion of Law 5. Evidence submitted by the Trustee in support of the objection shifted the burden to Law to prove the validity and amount of his claim by a preponderance of the evidence.
>
> Conclusion of Law 6. Evidence submitted by Law in opposition to the objection fails to satisfy his burden to prove the validity and amount of his alleged claim by a preponderance of the evidence.

Our independent review of the record reveals ample support for the bankruptcy court's findings and conclusions. The bankruptcy court agreed with the Trustee's challenge to the validity and amount of the claim based on inconsistent documentation provided by Appellants, the "highly suspicious" circumstances surrounding the filing of certain claims, and the long history of pleadings in this case. Law's written response failed to address most of the Trustee's challenges, cited inapposite authority, only increased the confusion by adding yet another identical claim to the stew, and provided a written Second Law Declaration that directly contradicted Law's own sworn testimony in the presence of the court. Law's attorney at the May 24, 2006, hearing, Kemmerer, made no argument and submitted on the court's tentative ruling, which was to disallow the claims. For all these reasons, we conclude that the court did not err in ruling that the Appellants failed to prove the validity and amount of their claim by a preponderance of the evidence.

On appeal, Appellants make no reference to the res judicata issue. Their entire argument in this appeal of the disallowance of the Law claims is contained in one sentence on page 6 of their brief:

> Although the trustee cited Spencer v. Pugh (B.A.P. 9th Cir. 1993), 157 B.R. 898, 901 as

> holding that the objecting party bears the burden of providing evidence sufficient to rebut the prima facie evidentiary effect afforded a proof of claim, the trustee, nevertheless fails to set forth any facts tending to show that Law's claim is not, in fact, valid.

Like most of Appellants' arguments in the bankruptcy court, this sentence in Appellants' brief is conclusory and provides no sound argument or citation to appropriate law. It certainly supplies no cause to reverse or modify the decision of the bankruptcy court.

We conclude that the bankruptcy court did not err in disallowing Claim 6 and the New Law Claim on the grounds of res judicata and because the Appellants did not carry their burden of proof in establishing the validity and amount of the claims.

CONCLUSION

We AFFIRM the decision of the bankruptcy court.[23]

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[23] On page 23 of his Brief, Trustee refers to the "frivolousness" of this appeal. The Panel agrees that this is likely a frivolous appeal. As noted above, Eisen and Allen clearly lacked standing to appeal the bankruptcy court's orders regarding the Law claims, and Appellants' entire argument on appeal is presented in one sentence of their opening brief with no citation to authority. Appellants filed no reply brief. See Hamblen v. County of Los Angeles, 803 F.2d 462, 465 (9th Cir. 1986) (appeal frivolous where entire argument consisted of bare legal conclusions and fragmented, unsupported assertions); Ernst Haas Studio, Inc. v. Palm Press, Inc., 164 F.3d 110, 112-13 (2d Cir. 1999) (appellant's main brief did not cite single relevant statute or court decision and did not present coherent legal theory – even without citation to authority – that would sustain its position); Coastal Transfers Co. v. Toyota Motor Sales, U.S.A., 833 F.2d 208, 212 (9th Cir. 1987) (sanctions for frivolous appeal appropriate where there is a history of meritless claims, needless expenditure of judicial time and the appellate court intends to deter future frivolous appeals). Although Rule 8020 would allow us to initiate proceedings sua sponte for the imposition of sanctions on the Appellants, we are reluctant to involve the Trustee and bankruptcy estate in such proceedings in light of the limited resources available to them. Moreover, we

(continued...)

[23](...continued)
are also mindful of the observation of our court of appeals that "prior sanctions imposed upon Eisen apparently have not deterred his litigious nature." Eisen v. Golden, case no. 03-55643 (9th Cir., April 7, 2004). If the Trustee, in the exercise of his discretion, determines it worthwhile and appropriate to pursue sanctions, he may request such by motion under Rule 8020.