

DEC 28 2006

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NOT FOR PUBLICATION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 Nos.	CC-05-1322-MoBK
	)		CC-05-1333-MoBK
WILLIAM EISEN,	)		(cross-appeals)
	)		
Debtor.	)	Bk. No.	96-11114-ES
	)		
	)	Adv. No.	05-01765-ES
WILLIAM EISEN; THE ALLEN	)		
GROUP PARTNERS,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
	)		
JEFFREY I. GOLDEN, Chapter 7	)		
Trustee; UNITED STATES	)		
TRUSTEE;	)		
	)		
Appellees.	)		
	)		
JAMES A. LAW,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
JEFFREY I. GOLDEN, Chapter 7	)		
Trustee; UNITED STATES	)		
TRUSTEE; THE ALLEN GROUP	)		
PARTNERS; WILLIAM EISEN;	)		
WILLIAM KENGEL;	)		
	)		
Appellees.	)		

Argued and Submitted on November 15, 2006  
at Orange, California

Filed - December 28, 2006

<sup>1</sup>This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case or the rules of res judicata, including issue and claim preclusion. See 9th Cir. BAP Rule 8013-1.

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

3 Honorable Erithe A. Smith, Bankruptcy Judge, Presiding.

4  
5 Before: MONTALI, BRANDT and KLEIN, Bankruptcy Judges.

6 Prior to the petition date, property owned by the debtor was  
7 sold at what appears to have been a friendly foreclosure sale.  
8 The purchaser, however, did not record a trustee's deed until  
9 almost twelve years after the petition date. After the purchaser  
10 commenced efforts to sell the property, the chapter 7<sup>2</sup> trustee  
11 filed a complaint against the purchaser for avoidance and  
12 recovery of a post-petition transfer, for turnover, for quieting  
13 of title and for preliminary injunction. The bankruptcy court  
14 granted the preliminary injunction enjoining creditor's efforts  
15 to market and sell the property. The purchaser and the debtor  
16 (as well as, purportedly, another creditor) appealed. We AFFIRM  
17 the bankruptcy court's decision to issue the preliminary  
18 injunction against the purchaser, DISMISS debtor's portion of the  
19 appeal for lack of standing, and DISMISS the appeal purportedly  
20 filed by the creditor.

21 **I. FACTS**

22 Appellant William Eisen ("Debtor") owned certain real  
23 property in Manhattan Beach, California (the "Property"). In  
24 1990, Appellant The Allen Group Partners ("Allen Group"), with  
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26 <sup>2</sup>Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 which entity Debtor has a relationship that is not adverse,  
2 purportedly purchased the Property at a foreclosure sale. A  
3 trustee's deed upon sale reflecting the Allen Group's alleged  
4 purchase of the Property was not recorded until January 11, 2005,  
5 almost twelve years after Debtor filed his bankruptcy petition.

6 In the interim, Debtor continued to reside on the Property  
7 and represented that he was still the owner of the Property  
8 capable of transferring title.<sup>3</sup> Debtor admitted on his Schedule  
9 "A" that as of the bankruptcy petition date, he held an ownership  
10 interest in the Property "subject to unperfected foreclosure  
11 sale." Moreover, a title report dated August 24, 2004, shows  
12 Debtor as the owner of the Property.

13 Debtor filed a chapter 11 petition on December 3, 1993.<sup>4</sup>  
14 The case was eventually converted to chapter 7 and appellee  
15 Jeffrey I. Golden ("Trustee") was appointed as chapter 7 trustee  
16 in 2002. In January 2005, Trustee filed an application to employ  
17 real estate brokers to sell the Property. Debtor opposed the

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18  
19 <sup>3</sup>For example, on April 17, 1992, he executed a quitclaim  
20 deed transferring the Property to an entity that filed a  
21 bankruptcy petition on the same day.

22 <sup>4</sup>Debtor had filed at least four prior personal bankruptcies  
23 between 1984 and 1992 in the Central District of California. In  
24 1994, the Ninth Circuit affirmed the dismissal of one case as a  
25 bad faith filing and imposed sanctions against Debtor for  
26 prosecuting a frivolous appeal. Eisen v. Curry (In re Eisen), 14  
27 F.3d 469 (9th Cir. 1994). After the bankruptcy courts in the  
28 Central District dismissed most of the cases, Debtor filed a  
chapter 13 and a chapter 11 petition in the Southern District of  
California; the bankruptcy court for the Southern District of  
California dismissed the chapter 13 case in 1993, converted the  
chapter 11 case to chapter 7 in 1994 and transferred it to the  
Central District of California in May 1995. The case number has  
changed several times because the case was reassigned to  
different divisions within the Central District of California.

1 application and attached to his opposition a trustee's deed (the  
2 "Deed") transferring the property to the Allen Group; the Deed  
3 had been recorded on January 11, 2005 (after Trustee notified  
4 Debtor that he intended to market and sell the Property) without  
5 Trustee's knowledge or the court's authorization. At the hearing  
6 on the employment application, the bankruptcy court noted that  
7 the recording of the Deed violated the automatic stay.

8 On June 27, 2005, Trustee filed an application to employ  
9 special counsel to litigate the estate's right, title and  
10 interest in the Property and, in particular, to prosecute claims  
11 against the Allen Group with respect to the Property. Soon  
12 thereafter, Debtor (acting on behalf of the Allen Group) placed  
13 an advertisement in the Los Angeles Times to sell the Property.<sup>5</sup>

14 Upon learning of these efforts to sell the Property, Trustee  
15 filed a complaint against the Allen Group and DFL Partnership  
16 (another entity that had asserted ownership interests in the  
17 Property) for declaratory relief, injunctive relief, avoidance  
18 and recovery of post-petition transfer, turnover, and to quiet  
19 title. Debtor was not named as a defendant. At the same time,  
20 Trustee filed an ex parte application for issuance of a temporary  
21 restraining order against the Allen Group to prevent any transfer  
22 of the Property. The court issued the temporary restraining  
23 order on July 15, 2005, ordering the Allen Group to appear on  
24 July 25, 2005, to show cause why a preliminary injunction should  
25 not be entered against it prohibiting it from transferring,

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26  
27 <sup>5</sup>At oral argument before this panel, Debtor admitted that he  
28 was acting in concert with the Allen Group and that he placed and  
paid for the advertisement in the Los Angeles Times. The Allen  
Group later reimbursed him.

1 selling or marketing the Property. The court further ordered the  
2 Allen Group to file any written response to the order to show  
3 cause no later than July 21, 2005.

4 Trustee served copies of the temporary restraining order and  
5 the application for preliminary injunction on Debtor and the  
6 Allen Group on July 18, 2005, by overnight mail. On the same  
7 date, he also served the papers by regular mail to Debtor's post  
8 office box.

9 On July 19, 2005, the court held a hearing on the  
10 application to employ special counsel. The Allen Group appeared  
11 through counsel. Prior to the hearing, Trustee's counsel hand-  
12 delivered the complaint and the temporary restraining order to  
13 Debtor and counsel for the Allen Group. Therefore, as of July  
14 19, 2005, Debtor and the Allen Group had notice of the hearing on  
15 the preliminary injunction on July 25.

16 At the July 19 hearing, counsel for the Allen Group  
17 represented to the court that Allen Group marketed the Property  
18 "to see what they can offer in terms of settlement. They wanted  
19 to know the value of the asset." Transcript of July 19 Hearing  
20 at page 17.

21 The Allen Group did not file an opposition to Trustee's  
22 request for issuance of a preliminary injunction, although the  
23 Debtor did file an opposition on the day of the hearing. The  
24 Allen Group appeared through counsel at the hearing on July 25  
25 and orally requested a continuance, which the court denied.  
26 Counsel for the Allen Group stated on the record that it had not  
27 filed a written request for a continuance because they "did not  
28 have time." Transcript of July 25 Hearing at page 4-5. The

1 Allen Group offered no substantive defense against issuance of a  
2 preliminary injunction at the hearing.

3 In support of his opposition to the preliminary injunction,  
4 Debtor filed the declaration of Bob Allen, a partner of the Allen  
5 Group. Allen declared that "the Allen Group has received a good  
6 offer of \$1.5 million for the subject property which it has  
7 accepted. But the buyer will be lost if the Allen Group is  
8 restrained from transferring its interest in the [P]roperty."

9 Declaration of Bob Allen (appended to Debtor's objections to the  
10 application for preliminary injunction at page 7) (emphasis  
11 added). The bankruptcy court noted that this declaration was  
12 contrary to the representations of the Allen Group's counsel on  
13 the record the previous week:

14 I am very concerned that this [Property] is going to be  
15 sold if I don't issue some sort of injunction. I find  
16 it very interesting that you're saying in your papers  
17 that there's currently a buyer for the [Property] that  
18 could be lost if the Allen Group is not allowed to go  
19 forward. I can take judicial notice of the fact that  
20 counsel for the Allen Group last week represented to  
21 the Court that the only reason the [Property] was  
22 marketed was to attempt to ascertain the value of the  
23 [Property]. That was the reason given to me by the  
24 Allen Group.

25 Transcript of July 25 Hearing at page 8.

26 The bankruptcy court asked Debtor how he had standing to  
27 oppose the preliminary injunction. He argued that the estate  
28 could potentially be a surplus estate, thereby conferring  
standing on him, and that he had standing as a lessee and "I  
stand to gain if the [P]roperty is not sold."<sup>6</sup> Id. at page 7.  
Even though the court indicated that Debtor did not have standing

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<sup>6</sup>Debtor did not present any evidence as to how the case  
could be a solvent estate.

1 to oppose the preliminary injunction, Debtor was permitted to  
2 speak at the hearing.

3       The court found that Trustee had presented a "serious issue"  
4 regarding the validity of the purported foreclosure sale of the  
5 Property to the Allen Group. Id. at pages 8-9. The court also  
6 found that the Property was "in danger of being sold" by the  
7 Allen Group and that it would have no control over distribution  
8 of the proceeds of such a sale. Id. at page 11. The court noted  
9 that the Allen Group had taken inconsistent positions regarding  
10 its intent to sell the Property. Given that the estate appeared  
11 to have an interest in the Property and the estate's sale of the  
12 Property would benefit creditors, the court found that the  
13 hardships balanced sharply in favor of the Trustee.

14       The court therefore entered a preliminary injunction on July  
15 26, 2005, stating that pending resolution of the Trustee's  
16 adversary proceeding against the Allen Group or further order of  
17 the court "the Allen Group and all of its partners, agents,  
18 servants, employees, and those acting in concert with it or at  
19 its direction, are enjoined from taking any action whatsoever to  
20 transfer any interest in the [Property], including but not  
21 limited to advertising the [Property] as being for sale,  
22 soliciting offers [for] the purchase of the [Property], opening  
23 any escrow for the purpose of facilitating a transfer of the  
24 [Property], or executing any documents or instruments that would  
25 effectuate a transfer of any interest in the [Property]."

26       Debtor and the Allen Group filed a timely notice of appeal  
27 on July 28, 2005, giving rise to BAP No. CC-05-1322. They  
28 appealed both the preliminary injunction and an order approving

1 employment of special counsel to prosecute the adversary  
2 proceeding against the Allen Group. On August 8, 2005, appellant  
3 James A. Law ("Law"), a purported unsecured creditor who was not  
4 a defendant in Trustee's adversary proceeding, allegedly filed  
5 his own notice of appeal of the preliminary injunction and the  
6 employment order.<sup>7</sup> Law's notice of appeal relates to BAP No. CC-

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8 <sup>7</sup>At oral argument, counsel for the Allen Group conceded that  
9 Law is not an appellant. Evidence suggests that Law's notice of  
10 appeal was forged. The notice of appeal was signed by Lewis O.  
11 Amack ("Amack") as counsel for Law. Amack has since testified  
12 that he did not prepare or file the notice of appeal and that the  
13 signature purporting to be his is a forgery. Amack has also  
14 stated under oath that other papers purportedly filed by him on  
15 behalf of Law before this panel (including the response to the  
16 notice of deficiency) contained his forged signature and were not  
17 prepared or filed by him. Amack has also testified that  
18 pleadings involving Law or the Allen Group purportedly prepared  
19 and signed by him after 1997 were forgeries and that his  
20 purported mailing address on the pleadings is not his address but  
21 instead is a mail drop rented by Debtor.

22 Law has also testified that he did not authorize anyone to  
23 file certain proofs of claim purportedly filed on his behalf by  
24 Debtor or Amack.

25 In light of Amack's testimony and other irregularities  
26 highlighted by the bankruptcy court in extremely detailed  
27 findings of fact in support of a vexatious litigant order against  
28 Debtor, the bankruptcy court found:

29 The evidence . . . overwhelmingly demonstrates that  
30 the pleadings filed on behalf of the Allen Group and  
31 Law, purportedly by Amack, were a farce. The magnitude  
32 of the fraud perpetuated upon this Court and other  
33 courts, the Trustee, creditors and their counsel is  
34 breathtaking.

35 In twelve years on the bench, this judicial officer  
36 has never seen or witnessed a circumstance such as this  
37 where multiple pleadings were filed improperly. At  
38 this point, the integrity of the Court process is at  
39 stake, and has been severely jeopardized and  
40 undermined. The court cannot allow it to continue.

(continued...)



1 05-1333. The appeals were consolidated for briefing purposes.

2 On August 15, 2005, this panel issued an administrative  
3 Notice of Deficient Appeal noting that Law's appeal appeared  
4 untimely. After considering the responses filed by Law and the  
5 Trustee, the panel entered an order on October 11, 2005, deeming  
6 the Law appeal to be timely. The panel also granted leave to  
7 appeal the interlocutory preliminary injunction, but it severed  
8 the appeal of the employment order from both appeals.

9 **II. ISSUES**

10 (1) Do Law and Debtor have standing to prosecute their  
11 respective appeals?

12 (2) Did the bankruptcy court err in issuing the preliminary  
13 injunction?

14 **III. STANDARD OF REVIEW**

15 We review the grant of a preliminary injunction for an abuse  
16 of discretion. Morgan-Busby v. Gladstone (In re Morgan-Busby),  
17 272 B.R. 257, 260 (9th Cir. BAP 2002). A bankruptcy court abuses  
18 its discretion if it bases its ruling on an erroneous legal  
19 standard or on a clearly erroneous assessment of the evidence.  
20 Alcove Inv., Inc. v. Conceicao (In re Conceicao), 331 B.R. 885,  
21 889 (9th Cir. BAP 2005). When the bankruptcy court is alleged to  
22 have relied on an erroneous legal premise, we review the  
23 underlying issues of law de novo. Earth Island Inst. v. U.S.  
24 Forest Serv., 351 F.3d 1291, 1298 (9th Cir. 2003).

25 \_\_\_\_\_  
26 <sup>7</sup>(...continued)

27 Under the circumstances of this case, the Court can  
28 no longer assume the validity of pleadings filed on  
behalf of or in the name of Law and the Allen Group,  
nor pleadings purportedly filed by Amack.

Findings of Fact at page 26.

1 Standing is a jurisdictional matter, which we review de  
2 novo. Houston v. Eiler (In re Cohen), 305 B.R. 886, 891 (9th  
3 Cir. BAP 2004).

#### 4 IV. JURISDICTION

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
6 §§ 1334 and 157(b). We have jurisdiction under 28 U.S.C.  
7 § 158(a)(3) and (b)(1).

#### 8 V. DISCUSSION

##### 9 A. Standing Issues

10 In light of the concessions of counsel for the Allen Group  
11 at oral argument that Law is not an appellant, we do not have to  
12 address the Trustee's argument that Law has no standing to  
13 appeal. Instead, based on these concessions, Law's appeal (CC-  
14 05-1333-MoBK) is DISMISSED. We nonetheless note that the  
15 Trustee's argument regarding Law's lack of standing is well  
16 taken.<sup>8</sup>

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18 <sup>8</sup>Trustee contended that Law lacks standing because (1) the  
19 notice of appeal purportedly signed by his counsel was a forgery,  
20 (2) he has no allowed claim against the estate, as the bankruptcy  
21 court has disallowed all five claims purportedly filed on his  
22 behalf, and (3) even if he were a valid unsecured creditor, he  
23 was not aggrieved by the preliminary injunction. We agree that  
24 even if Law were the holder of a valid unsecured claim, and even  
25 if his notice of appeal were valid (which it does not appear to  
26 be), he lacks standing to object to or appeal the preliminary  
27 injunction.

28 "Only a party who is 'directly and adversely affected  
pecuniarily' by an order of the bankruptcy court may appeal. To  
provide standing, 'the order must diminish the appellant's  
property, increase its burdens, or detrimentally affect its  
rights.'" Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp.,  
Inc. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061,  
1066 (9th Cir. 2001). Here, the preliminary injunction has no  
pecuniary effect on Law; to the contrary, issuance of the  
preliminary injunction benefits unsecured creditors as it

(continued...)

1 Similarly, Debtor lacks standing to appeal the preliminary  
2 injunction. "Debtors, particularly chapter 7 debtors, rarely  
3 have a pecuniary interest [in an appealed order] because how the  
4 estate's assets are disbursed by the trustee has no pecuniary  
5 effect on the debtor." Nangle v. Surratt-Sales (In re Nangle),  
6 288 B.R. 213, 216 (8th Cir. BAP 2003); see also Fondiller v.  
7 Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983) (a  
8 "hopelessly insolvent" debtor does not have standing to appeal  
9 orders affecting the size of the estate). Nonetheless, if a  
10 debtor "can show a reasonable possibility of a surplus after  
11 satisfying all debts, then the debtor has shown a pecuniary  
12 interest and has standing to object to a bankruptcy order."  
13 Nangle, 288 B.R. at 216. Here, the record does not reflect a  
14 "reasonable possibility" of a surplus estate; in fact, in their  
15 opening briefs, appellants refer to testimony of Trustee that the  
16 case is administratively insolvent. See pages 8 and 9 of  
17 Appellants' Opening Brief. More importantly, even if the estate  
18 were a surplus estate, the preliminary injunction would not  
19 adversely affect Debtor's pecuniary interests. Instead, as with  
20 Law, an avoidance of the post-petition recordation of the  
21 Trustee's Deed and a liquidation of the Property for the estate  
22 would only serve to increase assets available for distribution to  
23 Debtor, assuming the estate is solvent.

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24  
25 <sup>8</sup>(...continued)  
26 protects what appears to be an estate asset from an improper  
27 post-petition sale. In other words, by preserving this asset,  
28 the preliminary injunction actually increases the chances that an  
estate asset can be liquidated for possible distribution to  
unsecured creditors. Therefore, assuming arguendo that Law holds  
a valid unsecured claim, he is not aggrieved by the preliminary  
injunction. If he were in fact an appellant, he would lack  
standing to pursue his appeal. Id.

1 Debtor additionally argues that the preliminary injunction  
2 affects his rights because he is purportedly a tenant of the  
3 Property now. In making this argument, Debtor told the  
4 bankruptcy court: "I stand to gain if the [P]roperty is not sold,  
5 Your Honor. Because I have an interest in the [P]roperty. I'm -  
6 - I have a lease hold [sic] on the [P]roperty." Transcript of  
7 July 25 Hearing at page 7. By Debtor's own admission, therefore,  
8 the preliminary injunction benefits him: it enjoins a sale of the  
9 Property and he stands to gain if the Property is not sold.  
10 Consequently, assuming arguendo (in the absence of any  
11 independent evidence) that Debtor is a lessee of the Property,  
12 the preliminary injunction does not negatively affect his  
13 pecuniary interests inasmuch as it protects the Property from  
14 sale by the Allen Group.<sup>9</sup>

15 Because Debtor is not "directly and adversely affected  
16 pecunarily" by the preliminary injunction, he lacks standing to  
17 prosecute this appeal or to object to the preliminary injunction.  
18 Debbie Reynolds Hotel & Casino, 255 F.3d at 1066. Accordingly,  
19 Debtor's portion of the appeal in CC-05-1322 is DISMISSED.

20 B. Appropriateness of the Preliminary Injunction

21 Even if Debtor did have standing to appeal, we would still  
22 affirm the bankruptcy court's issuance of the preliminary  
23

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24 <sup>9</sup>At oral argument, Debtor told us that although he is not  
25 named as a party in Trustee's adversary proceeding, he is subject  
26 to the preliminary injunction as an agent of the Allen Group.  
27 Counsel for the Trustee conceded that the preliminary injunction  
28 does not prevent Debtor from transferring his interests as a  
lessee and agreed to execute a stipulation to that effect to be  
filed with the bankruptcy court. This concession further  
demonstrates that Debtor lacks standing to appeal the preliminary  
injunction; the injunction simply does not affect whatever rights  
he holds as a purported lessee under an oral lease with a month-  
to-month tenancy.

1 injunction on the merits. Debtor and the Allen Group received  
2 sufficient notice of the hearing on the preliminary injunction  
3 and grounds existed for issuance of the injunction.

4 1. Notice

5 Federal Rule of Civil Procedure 65(a)(1) (incorporated by  
6 Rule 7065) provides that “[n]o preliminary injunction shall be  
7 issued without notice to the adverse party” but does not define  
8 “notice.” Therefore, the sufficiency of notice “is a matter left  
9 within the discretion of the trial court.” United States v.  
10 Alabama, 791 F.2d 1450, 1458 (11th Cir. 1986). The Supreme Court  
11 has stated that the rule’s notice requirement “implies a hearing  
12 in which a defendant is given a fair opportunity to oppose the  
13 application and to prepare for such opposition.” Granny Goose  
14 Foods, Inc. v. Teamsters, 415 U.S. 423, 434 n.7 (1974).  
15 Furthermore, Rule 9006(d) states that a written motion and notice  
16 of any hearing “shall be served not later than five days before  
17 the time specified for such hearing, unless a different period is  
18 fixed by these rules or by order of the court.” To the extent  
19 Rule 7065 does not fix a notice period for an application for a  
20 preliminary injunction, we can consider the five-day period of  
21 Rule 9006 in considering whether the notice in this case was  
22 reasonable under the circumstances. See Parker v. Ryan, 960 F.2d  
23 543, 544 (5th Cir. 1992) (incorporating FRCP 6(d)'s five-day  
24 notice requirement into FRCP 65); Granny Goose, 415 U.S. at 434  
25 n.7 (acknowledging that commentators read “into Rule 65(a) a  
26 five-day-notice requirement based on Fed. Rule Civ. Proc. 6(d).”)  
27 Both Debtor and the Allen Group received sufficient notice  
28 of the application for a preliminary injunction. They were hand-

1 delivered the pertinent papers and the temporary restraining  
2 order containing the order to show cause six days prior to the  
3 hearing and two days prior to the deadline for any written  
4 opposition. Neither Debtor nor the Allen Group filed a written  
5 application for extension of time. The July 25 hearing on the  
6 application for a preliminary injunction was discussed by the  
7 parties at a July 19 hearing on a related matter. The nature of  
8 the requested relief was not complicated and did not require  
9 extensive briefing, assuming the parties had a legitimate  
10 defense. Yet the only party with standing -- the Allen Group --  
11 offered no substantive defense orally or in writing. In light of  
12 the nature of the relief requested, the length of the notice  
13 given to the parties (more than the five days otherwise provided  
14 by Rule 9006), and the failure of the affected defendant to offer  
15 even a semblance of a defense notwithstanding a fair opportunity  
16 to at least offer a nominal defense, we find that the notice of  
17 the hearing was adequate. Granny Goose, 415 U.S. at 434 n.7.

18       2.   Merits

19       Injunctive relief is available in bankruptcy court in two  
20 ways: pursuant to the court's discretionary and inherent  
21 equitable power under section 105(a) "to issue any order,  
22 process, or judgment that is necessary or appropriate to carry  
23 out the provisions of this title," or under the auspices of  
24 Bankruptcy Rule 7065, which makes Federal Rule of Civil Procedure  
25 ("FRCP") 65 applicable in adversary proceedings. Trustee here  
26 sought a preliminary injunction pursuant to Bankruptcy Rule 7065  
27 (incorporating FRCP 65).

28

1 Under Bankruptcy Rule 7065 and FRCP 65, the traditional  
2 criteria for issuing a preliminary injunction are: "1) a strong  
3 likelihood of success on the merits, 2) the possibility of  
4 irreparable injury to plaintiff if the preliminary relief is not  
5 granted, 3) a balance of hardships favoring the plaintiff, and 4)  
6 advancement of the public interest (in certain cases)." Morgan-  
7 Busby, 272 B.R. at 261 (citation omitted).

8 Alternatively, under the traditional test, a preliminary  
9 injunction may issue if the moving party demonstrates "(1) a  
10 combination of probable success on the merits and the possibility  
11 of irreparable harm; or (2) that serious questions are raised and  
12 the balance of hardships tips in its favor." Id. (citation  
13 omitted). "Probability of success and possibility of irreparable  
14 harm can be viewed as two factors on a sliding scale so that as  
15 the required probability of success increases, the likelihood of  
16 irreparable harm that is required decreases." Alcove Inv., 331  
17 B.R. at 889.

18 Applying either test, the bankruptcy court did not err in  
19 granting the preliminary injunction. It also did not err in its  
20 findings (reflected on the record of the hearing on the  
21 preliminary injunction). The facts show that Trustee has an  
22 overwhelming probability of prevailing on the merits: Debtor  
23 admitted in his schedules that the foreclosure sale was  
24 "unperfected" as of the petition date. The Trustee's Deed was  
25 not filed until many years after the petition date. Title  
26 reports show that Debtor was the owner of the Property as of the  
27 petition date, and thus the Property is property of the estate.  
28 11 U.S.C. § 541. Title reports further show that the Allen Group

1 did not record a trustee's deed prior to the petition date.  
2 Therefore, Trustee is highly likely to prevail on his claims to  
3 avoid the post-petition recordation of the Trustee's Deed and any  
4 purported transfer of title to the Allen Group under section  
5 549.<sup>10</sup>

6 Furthermore, if the Allen Group were allowed to market and  
7 sell the Property notwithstanding the estate's interest in the  
8 Property, the estate and its creditors could be irreparably  
9 harmed. The Allen Group has presented contrary positions to the  
10 court regarding its intent to sell the Property; a high  
11 likelihood exists that the Allen Group would sell the Property  
12 without court authorization even though it appears to be estate  
13 property. Neither Debtor nor the Allen Group has offered any  
14 evidence that they would not expend the proceeds of any sale of  
15 the Property, or that they would be able to reimburse the estate  
16 if any such funds were expended.<sup>11</sup>

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17  
18 <sup>10</sup>In the "Statement of Case" portion of their opening brief,  
19 appellants argue for the first time that Trustee's underlying  
20 complaint against the Allen Group is time-barred under section  
21 546(a). Appellants are incorrect. Section 546(a)'s limitations  
22 period does not apply to actions to avoid post-petition transfers  
23 pursuant to section 549. Rather, section 549(d) provides that  
24 the action may be commenced within two years of the transfer  
25 which the trustee seeks to avoid. 11 U.S.C. § 549(d). Here, the  
26 post-petition transfer (the recordation of the Trustee's Deed)  
27 occurred on January 11, 2005. Trustee filed his section 549  
28 complaint on July 15, 2005, well within the limitations period of  
section 549(d). The Trustee's action is not barred by the  
statute of limitations.

25 <sup>11</sup>Appellants argue that Trustee could simply obtain a lis  
26 pendens in lieu of an injunction. First, appellants did not make  
27 this argument to the bankruptcy court so it is waived. Beck v.  
28 Pace Intern. Union, 427 F.3d 668, 674 (9th Cir. 2005). Secondly,  
recordation of a lis pendens does not necessarily prevent a sale  
(continued...)



1 Finally, given the nature of the conduct of Debtor and the  
2 Allen Group in recording a post-petition Trustee's Deed only  
3 after learning about the Trustee's interest in selling the  
4 Property, in putting the Property on the market without court  
5 consent, in offering contrary positions regarding ownership and  
6 intent to sell and even in filing pleadings with the court, the  
7 balance of the hardships tips sharply in favor of Trustee.  
8 Absent the injunction, the Trustee and estate faced incurring  
9 large expenses simply to recover property (or proceeds from the  
10 sale of property) which the Allen Group likely has no right to  
11 sell. The injunction not only preserves the status quo, it  
12 prevents Debtor and the Allen Group from taking action which  
13 appears to violate the Bankruptcy Code (i.e., transferring assets  
14 of the estate without court authorization). Therefore, the  
15 balance of hardships tips sharply in favor of issuance of the  
16 injunction.<sup>12</sup>

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17  
18 <sup>11</sup>(...continued)  
19 of the Property, which would in turn lead to more litigation and  
20 more expense for the estate. Preservation of the status quo by  
21 preliminary injunction prevents such harm.

22 <sup>12</sup>Debtor and the Allen Group argue that Trustee waived the  
23 estate's right to the Property by not attempting to liquidate it  
24 earlier. First, Trustee was appointed in 2004, and moved for  
25 employment of brokers to sell the Property in 2005. There was no  
26 significant delay. Even if there were, however, Debtor's  
27 argument is not well-taken. Section 554(d) clearly provides that  
28 property that is not abandoned and that is not administered  
"remains property of the estate." There is no time limitation  
placed on trustees to abandon or administer the estate.

29 Debtor and the Allen Group also argue for the first time on  
30 appeal that the hardships tip in their favor because the  
31 preliminary injunction restricts their First Amendment rights to  
32 free speech. Debtor and the Allen Group did not make this  
33  
34 (continued...)

1 Because the Trustee has an overwhelming likelihood of  
2 prevailing on the merits of its action to avoid the post-petition  
3 recordation of the Trustee's Deed, because the estate faces  
4 irreparable harm if the Allen Group were allowed to sell what  
5 appears to be property of the estate, and because the balance of  
6 hardships tip heavily in favor of Trustee, the bankruptcy court  
7 did not err in issuing the preliminary injunction. Morgan-Busby,  
8 272 B.R. at 261. We therefore AFFIRM the issuance of the  
9 preliminary injunction against the Allen Group.

#### 10 V. CONCLUSION

11 For the foregoing reasons, we AFFIRM (in BAP No. CC-05-1322-  
12 MoBK) the bankruptcy court's decision to issue the preliminary  
13 injunction against the Allen Group, we DISMISS Debtor as an  
14 appellant in BAP No. CC-05-1322-MoBK for lack of standing, and we  
15 DISMISS Law's purported appeal in BAP No. CC-05-1333-MoBK.

16  
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18  
19 

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<sup>12</sup>(...continued)

20 argument to the bankruptcy court and it is thus waived. Beck,  
21 427 F.3d at 674. In any event, the argument is not well-taken.  
22 First, the only case cited by Debtor and the Allen Group (Clear  
23 Channel Outdoor, Inc. v. City of Los Angeles, 234 F.Supp.2d 1127  
24 (C.D. Cal. 2002) has been vacated by the Ninth Circuit. See  
25 Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810  
26 (9th Cir. 2003) (vacating district court's preliminary  
27 injunction). Secondly, as noted by the Supreme Court, for  
28 commercial speech to come within the First Amendment, it must "at  
least concern lawful activity and not be misleading." Central  
Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447  
U.S. 557, 566 (1980). To the extent the Allen Group is  
representing that it has the authority to sell the Property in  
its marketing efforts, such representations are misleading and  
thus not entitled to deferential treatment under the First  
Amendment.