

MAR 07 2007

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:) BAP No. HI-06-1115-BKMo
)
WORLDPOINT INTERACTIVE, INC.,)
) Bk. No. 02-00867
Debtor.)

MASSIMO FUCHS,
Appellant,

v.)

M E M O R A N D U M¹

SANDRA J. LOOMIS, Successor
Chapter 7 Trustee; SNYDER
TRUST ENTERPRISES; JOHN
POPPIN; MARGARET POPPIN; and
706 SANSOME PROPERTIES,
Appellees.

Argued and Submitted on January 19, 2007
at Honolulu, Hawaii

Filed - March 7, 2007

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

Honorable Lloyd King, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN and MONTALI, 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.

1 Massimo Fuchs, debtor's director, officer, shareholder, and alleged
2 creditor, appeals the bankruptcy court's order approving settlement of
3 an adversary proceeding brought by the chapter 7² trustee against owners
4 of commercial property leased by the debtor.

5 Concluding appellant has no pecuniary interest in the outcome of
6 this appeal, as he did not file a timely claim, we DISMISS the appeal for
7 lack of standing.

8

9

I. FACTS

10 Appellees Snyder Trust Enterprises, John Poppin, Margaret Anne
11 Poppin, and 706 Sansome Properties ("Lessors") are the owners of the
12 premises at 706 Sansome Street, San Francisco, California ("Property").
13 Appellant Massimo Fuchs is a director, officer, and shareholder of debtor
14 WorldPoint Interactive, Inc. ("WorldPoint").

15 In October 1999 Lessors leased the Property to WorldPoint. The
16 lease required seismic retrofitting and regulatory compliance work to be
17 completed by 1 January 2000. If not, WorldPoint would not be obligated
18 to pay rent or perform any other obligations under the lease until the
19 work was completed, unless the parties agreed otherwise. Lease, ¶ 3.3.
20 Lessors hired Eicon, Inc., to perform the work. WorldPoint separately
21 hired Eicon to perform tenant improvements on the Property.

22

23

24 ² Absent contrary indication, all "Code," chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to
26 its amendment by the Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from
28 which this appeal arises was filed before its effective date
(generally 17 October 2005).

28 All "Rule" references are to the Federal Rules of Bankruptcy
Procedure; "FRE" references are to the Federal Rules of Evidence.

1 In April 2001 Eicon sued WorldPoint, Fuchs, Lessors and others in
2 Superior Court of California, San Francisco County (case no. 320236), for
3 breach of contract and other claims relating to work done at the
4 Property. Lessors cross-complained against WorldPoint, Fuchs, and
5 others, alleging numerous causes of action including equitable indemnity,
6 breach of express indemnity agreement, and breach of contract.

7 The California court entered a default judgment for \$250,000 plus
8 attorney's fees against WorldPoint and Fuchs in January 2002. Shortly
9 thereafter, on 8 March 2002, an involuntary chapter 7 petition was filed
10 against WorldPoint, and an order for relief was entered 2 April 2002.
11 Mary Lou Woo was appointed chapter 7 trustee; the case is now being
12 administered by successor trustee Sandra J. Loomis. In January 2004 the
13 trustee had the default judgment against WorldPoint set aside on appeal
14 for improper service on Fuchs. Fuchs also had the default judgment
15 against him set aside; that order was recently upheld on appeal. The
16 state court action is still pending but is stayed as to WorldPoint.

17 In the meantime, in August 2002 the trustee filed an adversary
18 proceeding against Lessors and others for rescission, and to recover
19 lease payments, the security deposit and letter of credit proceeds, and
20 the value of WorldPoint's property that had been auctioned pursuant to
21 a writ of execution on the default judgment. At Lessors' request, venue
22 of the adversary proceeding was transferred to the Bankruptcy Court for
23 the Northern District of California; it was assigned to the Hon. Thomas
24 E. Carlson.

25 The parties cross-moved for summary judgment. The Northern District
26 bankruptcy court denied the trustee's motion for partial summary judgment
27 and granted Lessors'. Tentative Ruling, 17 March 2005. The tentative
28 ruling was adopted by order entered 17 May 2005, which is not in the

1 excerpts of record. The bankruptcy court found that, despite the lease
2 provisions allowing termination of the lease for Lessors' failure to
3 deliver a certificate of completion, debtor was estopped from asserting
4 that the lease had terminated. Among the court's findings were that
5 debtor had treated the lease as in full force and effect by paying rent
6 for 15 months, with only one payment made under protest; debtor continued
7 to have tenant improvements built on the property; and debtor had not
8 timely notified Lessors of noncompliance with the lease under its
9 notification provisions.

10 The trustee moved for leave to file a third amended complaint to
11 assert causes of action for breach of contract and conversion. The
12 bankruptcy court indicated in its tentative ruling that it was not
13 inclined to grant any further motions to amend the complaint due to the
14 length of time the proceeding had been pending. The final order does not
15 so provide, and the trustee's motion has not been ruled upon.

16 Meanwhile, the Hawaii bankruptcy court set a claims bar date of
17 26 September 2002. Notice of Need to File Proof of Claim, 28 June 2002.
18 Although this document is not in the excerpts of record provided us, we
19 may take judicial notice of it. In re E.R. Fegert, Inc., 887 F.2d 955,
20 957-58 (9th Cir. 1989).

21 In December 2005 the trustee moved for approval of a settlement
22 with Lessors, which calls for a release of all claims in exchange for
23 Lessors' payment of \$25,000 to the estate. Fuchs opposed the settlement.
24 After hearing on 28 February 2006, the bankruptcy court approved the
25 settlement, entering its order on 13 March 2006. The order indicates
26 that the parties to the settlement do not intend "to compromise or
27 release any individual claims of Massimo Fuchs" This appeal
28 followed.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
3 § 157(b) (1) and (b) (2) (A) and (O), and we do under 28 U.S.C. § 158(c).

4
5 **III. ISSUES**

6 A. Whether the appeal should be dismissed for Fuchs' failure to
7 timely file his opening brief;

8 B. Whether we should grant Appellees' request for judicial notice;

9 C. Whether the appeal should be dismissed for lack of standing; and

10 D. Whether the bankruptcy court abused its discretion in granting
11 the trustee's motion for approval of settlement agreement.

12
13 **IV. STANDARDS OF REVIEW**

14 Standing is a jurisdictional prerequisite which we review de novo.
15 In re Paine, 250 B.R. 99, 104 (9th Cir. BAP 2000). The issue of standing
16 may be raised at any time. Id.

17 We review a bankruptcy court's order approving a trustee's
18 application to compromise for abuse of discretion. In re A & C Props.,
19 784 F.2d 1377, 1380 (9th Cir. 1986); In re Mickey Thompson Entm't Group,
20 Inc., 292 B.R. 415, 420 (9th Cir. BAP 2003). A bankruptcy court
21 necessarily abuses its discretion if it bases its decision on an
22 erroneous view of the law or clearly erroneous factual findings. Cooter
23 & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1991). Under the abuse of
24 discretion standard, we may reverse only if we have a definite and firm
25 conviction that the bankruptcy court committed a clear error of judgment
26 in the conclusion it reached. S.E.C. v. Coldicutt, 258 F.3d 939, 941
27 (9th Cir. 2001); In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

1 V. DISCUSSION

2 A. Untimely Brief

3 Appellees contend that Fuchs' opening brief should be stricken and
4 the appeal dismissed. The brief was filed six days late; Appellees do
5 not argue that they were prejudiced, nor have they set forth any evidence
6 of bad faith, negligence, or indifference.

7 Although we have discretion to impose sanctions for a party's
8 failure to timely file a brief, 9th Cir. BAP Rule 8009(a)-1(b)(3), no
9 prejudice has been shown, and we decline to do so in these circumstances.

10
11 B. Request for Judicial Notice

12 Appellees have requested we take judicial notice of excerpts of a
13 transcript of Fuch's trial testimony taken in another adversary
14 proceeding for the purpose of showing that Fuchs waived his claims
15 against the estate.

16 We deny the request. This evidence was not before the bankruptcy
17 court in considering the settlement. Although we may take judicial
18 notice of the existence of documents, we do not necessarily take notice
19 of the truth of the matters asserted therein. In re Blumer, 95 B.R. 143,
20 146-47 (9th Cir. BAP 1988). The fact sought to be noticed must be of the
21 type described in FRE 201(b), which provides, in pertinent part: "A
22 judicially noticed fact must be one not subject to reasonable dispute in
23 that it is either (1) generally known within the territorial jurisdiction
24 of the trial court or (2) capable of accurate and ready determination by
25 resort to sources whose accuracy cannot reasonably be questioned." Such
26 is not the case here. Moreover, given our conclusion on standing, the
27 evidence is irrelevant.

1 **C. Standing**

2 To have appellate standing, an appellant must be "aggrieved" by the
3 challenged order. A person is aggrieved if he is directly and adversely
4 affected pecuniarily by an order of the bankruptcy court; in other words,
5 the order must diminish the appellant's property, increase his burdens,
6 or detrimentally affect his rights. In re Fondiller, 707 F.2d 441, 442-
7 43 (9th Cir. 1983). The party asserting appellate standing bears the
8 burden of proof. Spenlinhauer v. O'Donnell, 261 F.3d 113, 118-19 (1st
9 Cir. 2001).

10 Appellees argue that Fuchs lacks appellate standing because he was
11 not a party to the litigation that was settled: the settlement did not
12 release any claims or rights held by him individually, and Fuchs has
13 presented no evidence of any liability for which he might be entitled to
14 indemnification from the debtor.

15 Fuchs insists he is a "creditor" as he remains a named cross-
16 defendant in the state court litigation. He claims this gives him an
17 unmatured and/or disputed right to indemnity. He also relies on the fact
18 that the bankruptcy court referred to him as a creditor at the hearing
19 on approval of the settlement agreement, and contends that he may have
20 to litigate the "intent" language in the order on appeal to determine
21 whether it is legally binding.

22 Fuchs' right to indemnification, if any, is a contingent claim.
23 In re THC Financial Corp., 686 F.2d 799, 803-04 (9th Cir. 1982). He did
24 not file a claim in the bankruptcy case, and the time for doing so has
25 passed, nor does his status as a shareholder, director, or officer,
26 without a direct pecuniary interest, confer standing. In re Dein Host,
27 Inc., 835 F.2d 402, 406-07 (1st Cir. 1987).

1 We conclude Fuchs lacks standing and, accordingly, will dismiss the
2 appeal.

3

4 **D. Merits**

5 Even if Fuchs had standing, he could not prevail on the merits.
6 Were we not dismissing, we would affirm:

7

8 1. Subject Matter Jurisdiction

9 Fuchs contends the Hawaii bankruptcy court lacked jurisdiction to
10 enter the order on appeal because the adversary proceeding had been
11 transferred to the Northern District of California. He cites no relevant
12 authority for this argument. A motion to approve settlement of an
13 adversary proceeding is heard in the main case. See In re Thompson, 965
14 F.2d 1136, 1141 n.5 (1st Cir. 1992). There is no authority for the
15 proposition that the bankruptcy court administering the main case loses
16 jurisdiction to approve a compromise when the adversary proceeding is
17 transferred to another district. Nor would that make sense - all parties
18 in interest in the case, not just those in the adversary proceeding, are
19 entitled to notice, 9019(a), referencing Rule 2002, and the court must
20 consider the impact of any settlement on the estate.

21 Moreover, the representative of the estate, here the trustee, is the
22 settling party who seeks approval of the compromise from the court that
23 supervises her administration of the estate. Without that approval there
24 could be no effective settlement.

25

26 2. Fair and Equitable?

27 The party proposing a compromise has the burden of persuading the
28 bankruptcy court that it is fair and equitable.

1 In determining the fairness, reasonableness and adequacy of a
2 proposed settlement agreement, the court must consider:

3 (a) the probability of success in the litigation; (b) the
4 difficulties, if any, to be encountered in the matter of
5 collection; (c) the complexity of the litigation involved, and
6 the expense, inconvenience and delay necessarily attending it;
7 (d) the paramount interest of the creditors and a proper
8 deference to their reasonable views in the premises.

9 A & C Props., 784 F.2d at 1381 (citations omitted).

10 Fuchs argues the bankruptcy court had an insufficient factual
11 foundation for approving the settlement, attacking the trustee's motion
12 for approval as conclusory and lacking specific values for her claims and
13 the estimated costs of continued litigation.

14 Fuchs is correct that the bankruptcy court must have an adequate
15 record upon which to base its conclusions. Id. at 1383. Although Fuchs
16 raised this argument in his response to the motion to approve the
17 settlement, he abandoned it at hearing. He did not raise the concern in
18 argument, nor did he respond when the bankruptcy court solicited further
19 opposition before ruling. Clearly his fundamental concerns were
20 indemnification and the releases. Transcript, 28 February 2006, at 5-8.
21 An appellate court need not consider arguments raised for the first time
22 on appeal; we see no need to allow appellants to resurrect arguments
23 foregone in the trial court. See In re Roberts, 331 B.R. 876, 881 (9th
24 Cir. BAP 2005).

25 In any event, the bankruptcy court had an adequate record. Most
26 importantly, Fuchs attached a copy of the Northern District bankruptcy
27 court's detailed tentative ruling to his declaration in opposition. That
28 ruling, adopted in the order granting Lessors' motion for summary
judgment and denying the trustee's, doomed the estate's case: the
Northern District bankruptcy court had already indicated it was unlikely
to grant the trustee's motion to file a third amended complaint.

1 Although the court did not tick off the A & C Properties factors, review
2 of the record unambiguously shows they were taken into account.

3 The bankruptcy court gave ample consideration to the relevant
4 factors, finding that the trustee had aggressively pursued the litigation
5 but had been "uniformly unsuccessful"; collection of any judgment would
6 not likely be a problem; the litigation had been ongoing since 2002, and
7 involved California state court litigation and a Hawaii trustee, such
8 that "a very substantial recovery would have to be made before anything
9 could flow down to unsecured creditors"; and the objecting creditors
10 (debtor's insider and debtor's former counsel) are not of the class of
11 creditors whose interests are typically considered in this context.
12 Transcript, 28 February 2006, pages 4-5.

13 The evidence in the record supports the bankruptcy court's findings.

14

15 3. Abuse of Discretion?

16 Fuchs argues that the bankruptcy court abused its discretion in
17 approving the settlement because (1) the trustee has no power to release
18 claims of third parties, specifically, creditors, shareholders,
19 directors, officers, and employees of the debtor; (2) the bankruptcy
20 court relied on an insufficient record; (3) the bankruptcy court failed
21 to make sufficient findings and conclusions; (4) the bankruptcy court
22 failed to treat the settlement as a § 363 sale; and (5) the bankruptcy
23 court erred when it concluded that by-laws are executory contracts.

24 Fuchs cites In re American Hardwoods, Inc., 885 F.2d 621 (9th Cir.
25 1989), for the proposition that a bankruptcy trustee has no power to
26 release a debtor's officers. In American Hardwoods, the court of appeals
27 upheld the district court's ruling that the bankruptcy court had lacked
28 power to enjoin a creditor from enforcing a state court judgment against

1 non-debtor guarantors, who were officers of the corporation. Id. at 625-
2 26. The facts of this case are not analogous: the trustee did not
3 purport to release claims on behalf of anyone individually, as the order
4 notes, and all appellees' counsel confirmed again at argument that the
5 release did not bar Fuchs' individual claims.

6 Fuchs also complains that the bankruptcy court did not treat the
7 compromise as an asset sale, as required by Mickey Thompson, 292 B.R. at
8 421-22. Specifically, he complains that the bankruptcy court did not
9 make a specific finding of good faith on behalf of the Lessors. Again,
10 Fuchs did not raise good faith in the bankruptcy court, and we need not
11 consider it. Roberts, 331 B.R. at 881.

12 Moreover, he complains that the trustee did not solicit any other
13 bids, and that his offer to step into the trustee's shoes and pursue the
14 litigation was not considered, citing In re Lahijani, 325 B.R. 282 (9th
15 Cir. BAP 2005). The decision of whether to open an asset sale to
16 competitive bidding is discretionary and fact-specific. Mickey Thompson,
17 292 B.R. at 421-22. Fuchs did not back up his offer to pursue the
18 litigation with a concrete proposal. Rather, he made a skeletal offer
19 to support the litigation in return for a share of the potential
20 proceeds.

21 Finally, Fuchs argues that the bankruptcy court erred in concluding
22 WorldPoint's bylaws were an executory contract. He makes this argument
23 in connection with his asserted indemnification right, which he
24 acknowledges is a contingent claim. Opening Brief, at 40. Whether or
25 not the bankruptcy court miscategorized their status is moot: Fuchs
26 filed no claim, and the time for doing so has passed.

27 We have addressed the sufficiency of the record and the bankruptcy
28 court's findings and conclusions above.

1 Approval of the settlement was not an abuse of discretion.

2
3 **VI. CONCLUSION**

4 We deny appellees' request for judicial notice, and will not dismiss
5 the appeal for the late-filed brief, but will for Fuchs' lack of
6 standing.

7 We DISMISS this appeal.
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