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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re:<br><br>ITSV, INC.,<br><br>Debtor.<br>_____<br><br>HOWARD M. EHRENBERG, Chapter 7 Trustee,<br><br>Appellant,<br><br>v.<br><br>IPAYMENT, INC., et al.,<br><br>Appellees.<br>_____ | BAP No. CC-05-1174-MaPaK<br><br>Bk. No. LA 02-31259-VZ<br><br>Adv. No. LA 04-02214-VZ<br><br>**M E M O R A N D U M**[1] |

Argued and Submitted on March 23, 2006
at Pasadena, California

Filed - June 7, 2006

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

Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding.

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Before: MARLAR, PAPPAS and KLEIN, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, claim preclusion or issue preclusion. See 9th Cir. BAP Rule 8013-1.

## INTRODUCTION

Prepetition, the debtor corporation's assets and contract rights were transferred and assigned to an affiliate by its controlling shareholder as part of a plan to financially rehabilitate the affiliate. However, after the shareholder lost control of the affiliate, he and the debtor sued the related parties for fraud and breach of contract, in a California state court. A settlement and global release ensued, and the action was dismissed, with prejudice.

After the debtor filed for bankruptcy relief, the chapter 7[2] trustee filed an adversary proceeding against some of the same state court defendants, who are the appellees herein. He sought money damages for fraud and fraudulent transfers, based on the same allegations and transactions that had been litigated and settled in the state court action. In a summary judgment proceeding brought by the appellees, the bankruptcy court held that the complaint was barred under the res judicata doctrine of claim preclusion. It also denied the trustee's postjudgment motion to amend the complaint in order to bring new claims based on the settlement agreement.

The trustee has appealed both orders, and the appellees have moved for sanctions on appeal. We AFFIRM, and deny sanctions.

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[2] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P.") which make applicable certain Federal Rules of Civil Procedure ("FRCP" or "Fed. R. Civ. P.").

## FACTS

ITSV, Inc. ("ITSV" or "Debtor") (formerly known as R.J. Gordon & Co.) provided management personnel and consulting services to its affiliates (altogether "Gordon Companies"), which were involved in the credit card processing business. All were owned or controlled by Debtor's shareholder, Richard J. Gordon ("Gordon"). Three of these entities were: IT Solution Ventures, LLC ("ITSV-LLC"); ITSV-LLC's subsidiary, Electronic Commerce Network, Inc. ("ECN"); and iPayment Technologies, Inc. ("IPT") (formerly known as Creditcards.com).

IPT, in turn, was a subsidiary of iPayment, Inc. ("iPayment") (successor to iPayment Holdings, Inc. ("Holdings")). iPayment was subsequently controlled by officers Carl Grimstad ("Grimstad"), Gregory Daily ("Daily"), Robert Torino ("Torino") and Richard Schubert ("Schubert").

In 1999, Daily loaned Gordon $2 million. The loan was secured by two convertible promissory notes and all of Gordon's stock in IPT. The notes and stock were then assigned and transferred to Caymas, LLC ("Caymas"), a limited liability company controlled by Grimstad.

## Grimstad Plan

In January, 2000, Grimstad became vice-chairman of IPT and immediately developed an investment strategy known as the "Grimstad Rehabilitation Plan" (the "Grimstad Plan").

In accordance with the Grimstad Plan, on July 20, 2000,

Gordon and the Gordon Companies entered into a series of transactions with iPayment, Grimstad and Caymas. Among other things, they agreed to: (1) a $1.4 million investment by Grimstad in IPT, in the form of a convertible promissory note; (2) the transfer of all of Gordon's and the Gordon Companies' common stock in IPT to Caymas, in return for cancellation of the two promissory notes in the principal amount of $2 million; (3) the assignment or transfer to IPT of certain assets and contract rights of Debtor which were used by IPT in its business operations, in return for the assumption or cancellation by IPT of various contract and lease obligations and debts owed by Debtor; and (4) the transfer by ITSV-LLC to IPT of all its stock in ECN, in exchange for a promissory note for about $1.9 million payable to ITSV-LLC (the "ITSV-LLC Note") and 500,000 shares of IPT common stock.

In addition, Gordon gave up 60% of his ownership interest in IPT and resigned as CEO; Grimstad then became its CEO and chairman.

**State Court Litigation and Settlement**

In July, 2001, Gordon, Debtor and ITSV-LLC (the "Gordon Parties") filed a lawsuit in Los Angeles County Superior Court ("State Court Action") against IPT, Grimstad, Daily, Torino, and other unnamed entities. Gordon alleged that Grimstad and Torino had defrauded him into accepting the Grimstad Plan. The causes of action in the first amended complaint ("State Court Complaint") included: breach of contract, fraudulent misrepresentation, slander per se, and for rescission based on failure of

consideration and duress.

On April 24, 2002, a "Settlement Agreement" was entered into between the Gordon Parties and defendants Daily, Grimstad, Torino, IPT and Holdings, including its subsidiaries, affiliates, related entities, shareholders, officers, and board members (collectively the "iPayment Parties").

Pursuant to the Settlement Agreement, IPT paid Gordon $1,914,000 and, in exchange, the Gordon parties filed a notice of dismissal of the State Court Action, with prejudice, and cancelled the ITSV-LLC Note. The Settlement Agreement contained a broad release by the Gordon Parties of the iPayment parties,

> of and from any and all manner of action or actions, cause or causes of action, in law or in equity, and any suits, debts, liens, contracts, agreements, indemnities, promises, liabilities, claims, demands, damages, losses, costs, or expenses, of any nature whatsoever, known or unknown, fixed or contingent, foreseeable or unforeseeable, which have existed or may have existed, or which do exist or which hereafter shall or may exist from the beginning of time, including without limitation, <u>anything arising out of, based upon, or in any way relating to a series of transactions known as the Grimstad Reorganization</u> . . . . the acts or omissions of any of the Released iPayment Parties, . . . the management and control of iPayment[3] or any of its affiliates, the [state court] Litigation, or any other aspect of the sale or change of control of iPayment, further including, without limitation, <u>any and all claims that were raised or that could have been raised in the Litigation</u> . . . that they, or any of them, may have or which hereafter shall or may exist against the Released iPayment Parties, and each of them, save and except therefrom the claims, rights, and obligations arising out of or claims based on breach of this Agreement.

Settlement Agreement (Apr. 24, 2002), ¶ 9(a) (emphasis added).

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[3] "iPayment" is defined in the Settlement Agreement as iPayment Technologies, Inc.-- which is the entity identified in this disposition as "IPT."

**Adversary Proceeding in Bankruptcy**

Debtor's bankruptcy petition was filed on July 26, 2002, and a chapter 7 trustee ("Trustee") was duly appointed. Exactly two years later, on July 26, 2004, Trustee, on behalf of Debtor's estate, commenced an adversary proceeding against the iPayment Parties and, in addition, against IT INC[4] and ITSV-LLC. The named defendants are the "Appellees" herein.

The First Amended Complaint ("Complaint") asserted causes of action for fraud, fraudulent transfer under California law, conspiracy to defraud, and violation of state business competition and trade regulations, for which Trustee sought only money damages.

The Complaint alleged that Gordon was the alter ego of all of the Gordon Companies. According to the conspiracy to defraud count, in the Grimstad Plan transactions, the Gordon Companies had conspired with the iPayment Parties to pay monies that were allegedly owed to Debtor directly to Gordon. All of the allegations concerned the transactions arising under the Grimstad Plan and the same ones which had given rise to the State Court Action. The Complaint made no mention of the Settlement Agreement. It was undisputed that Trustee knew about the

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[4] It is unclear whether or not Trustee actually intended to name Debtor as a defendant. The Complaint identifies Debtor, in the jurisdictional statement, as "ITSV, Inc." It then defines "IT Solution Ventures, Inc." as "IT INC" and also names it as a defendant. In addition, in paragraph 27, both ITSV and IT INC are included in a list of defendants that were controlled by Debtor ITSV, implying that they are different entities. See First Amended Complaint (Aug. 5, 2004). This is confusing since Debtor ("ITSV" or "ITSV, Inc.") and "IT Solution Ventures, Inc." are one and the same.

Settlement Agreement at the time the Complaint was filed, but had not yet obtained a copy of it.

Trustee conducted some discovery, to wit, a Rule 2004 examination of Grimstad and a request for the Settlement Agreement, but Grimstad did not produce it. Trustee also sought to examine Gordon, whom he had named as a defendant in the original complaint. In July, 2004, the parties agreed that Appellees would provide a copy of the Settlement Agreement to Trustee in exchange for the release of all claims against Gordon. When it still had not been produced, Trustee filed the original complaint on July 26, 2004. Trustee then obtained a copy of the Settlement Agreement on or about August 2, 2004. He filed the amended Complaint on August 5, 2004, which did not make any allegations concerning the Settlement Agreement.

The district court withdrew the reference at the request of Appellees. Meanwhile, in September, 2004, Appellees filed a motion for summary judgment, a motion to dismiss, and a motion to strike, in the bankruptcy court. The action was then remanded to bankruptcy court, in October, 2004. In rescheduling the matter after remand, Appellees' attorney sent the following email to Trustee's attorney:

> Attached is the actual e-mail from the Court that I just received. Once we get the new dates, we are prepared to file our reply briefs to the motion to dismiss and motion to strike. . . . I would suggest that once those papers are filed, we agree that no more papers be filed either in support or in opposition to the motions. Let me know if this is acceptable.

E-mail from James R. Felton to Michael S. Pratter (Oct. 21, 2004). Trustee's attorney agreed.

In their motion for summary judgment, Appellees argued that Trustee stood in the shoes of Debtor and was therefore barred by the Settlement Agreement and the doctrine of claim preclusion from relitigating the same claims that were or could have been litigated and settled in the State Court Action.

Trustee filed an opposition pleading arguing, for the first time, that he was asserting Debtor's claims to set aside the Settlement Agreement based on the alter-ego doctrine as applied to Gordon. However, the Complaint did not name Gordon as a party. Nonetheless, Trustee's analysis was as follows:

> [T]he Settlement Agreement is invalid because, among other things, [it] was agreed upon by GORDON, who was acting only on his own behalf, even though he was representing Debtor ITSV and GORDON COMPANIES. There was no notification to creditors and shareholders of Debtor ITSV and GORDON COMPANIES of the State Court Action or the Settlement Agreement. Moreover, the Settlement Agreement neither benefited nor helped Debtor ITSV or other GORDON COMPANIES because the money they were to receive in exchange for their release of claims was given personally and wholly to GORDON himself.

Amended Opposition (Dec. 9, 2004), p. 16:20-26.

The evidence of lack of notice was presented in paragraphs 11 and 12 of Gordon's declaration, but those paragraphs were subsequently ruled inadmissible. The evidence of Gordon's self-serving conduct was presented in an email from Gordon to Grimstad, but an objection to this email was also sustained.

In order to make this claim relevant to the Complaint, Trustee also alleged that Appellees had been active participants in Gordon's fraud.

Trustee further contended, for the first time in his amended opposition, that he had standing to commence a fraudulent transfer avoidance action against Appellees under § 548 of the Bankruptcy

Code. He argued anew that the avoidable fraudulent transfer was Gordon's release, via the Settlement Agreement, of Debtor's fraud action against Appellees for their conduct during the Grimstad Plan, a release in which Appellees actively participated.

Appellees questioned the validity of an alter-ego claim that Gordon had defrauded Debtor, when Gordon was not named as a party defendant. Moreover, Appellees questioned Trustee's theory that lack of notice to Debtors' creditors invalidated the Settlement Agreement:

> Plaintiff, as well as Gordon, also allege that the debtor's creditors, did not receive notice or provide consent for the Debtor to enter into the Settlement Agreement. This theory presupposes that the creditors are required to consent or are required to obtain notice. There is no case law or statutory law cited for the proposition that creditors need to consent or need to be notified when a corporate defendant settles a lawsuit. In fact, just the opposite is true. [Citing Pittelman v. Pearce, 6 Cal. App. 4th 1436, 1444-46, 8 Cal. Rptr. 2d 359 (1992).]

Defendants' Reply (Oct. 15, 2004), p. 8:18-21.

Finally, Appellees argued that Trustee's § 548 cause of action was barred by the statute of limitations, i.e., § 546(a), because it made a new claim of a transfer of Debtor's rights in the Settlement Agreement.

The hearing took place on January 13, 2005. The bankruptcy court ruled that assertion of the new claims of rescission and avoidance of the Settlement Agreement was an inappropriate defense to a motion for summary judgment.

The court considered Trustee's alter-ego claim, nonetheless, and stated that Trustee had presented no evidence or law showing any liability of Appellees in regards to a duty to notify Debtor's creditors about the Settlement Agreement.

For the first time, Trustee suggested that the Complaint could be amended because Appellees had withheld production of the Settlement Agreement from him in bad faith, so that he had not seen its terms until after the limitations period ran. The bankruptcy court summarily rejected this argument due to a lack of evidence, and ruled that this claim was another inappropriate defense to the summary judgment motion.

The court concluded that the Settlement Agreement and release clearly precluded all of the claims asserted in Trustee's adversary proceeding. "Pursuant to the order approving that release and settlement agreement, the plaintiff is barred by the doctrine of claim preclusion from re-litigating those claims," the court ruled.[5]

On February 9, 2005, the bankruptcy court entered an order granting the motion for summary judgment and a judgment dismissing Trustee's adversary proceeding.

**Postjudgment Motions**

Within ten days of the order and judgment, Trustee filed a "Motion for Reconsideration . . . ," pursuant to both Rule 9023/FRCP 59 and Rule 9024/FRCP 60(b), or, "In the Alternative, For Leave to Amend," pursuant to Rule 7015/FRCP 15.

Trustee contended that Appellees had prevented him from

[5] The court believed that a final order or judgment had been entered in the state court approving the Settlement Agreement, which was not the case. Nevertheless, under California law, a voluntary dismissal with prejudice is ordinarily deemed to be a final judgment. See Discussion, Section "A" infra.

obtaining a copy of the Settlement Agreement until it was too late to amend the Complaint with the claims for its rescission or for fraudulent transfer. In addition, Trustee argued that the bankruptcy court based its grant of summary judgment on an erroneous sua sponte ruling that Appellees had no duty to notify Debtor's creditors, and therefore Trustee was "deprived . . . of the opportunity to gather and present evidence on this issue." Motion for Reconsideration (Feb. 22, 2005), p. 17:23-25. Trustee filed the declaration of his attorney, but the bankruptcy court sustained numerous evidentiary objections to it, and it has not been included in the excerpts of record. Nor has Appellees' objection been included in the appellate record.

A hearing on the combined motion for reconsideration and for amendment and Appellees' objection was held on March 31, 2005. The bankruptcy court ruled that the pleading of new claims was not grounds to set aside its summary judgment.

On the motion to amend, the bankruptcy court found that Trustee could have obtained the Settlement Agreement in time to bring any claims in the adversary proceeding, for example by filing a motion to compel, but failed to do so. It further found no evidence that the delay was caused by Appellees' "nefarious or bad faith conduct" as opposed to Trustee's own failure to pursue available remedies.

The court also rejected the argument that it had sua sponte raised the issue of Appellees' failure to notify Debtor's creditors or had otherwise committed legal error in granting summary judgment.

The bankruptcy court denied Trustee's motion in its entirety on April 15, 2005. Trustee filed a timely notice of appeal of both the order granting summary judgment and the order denying his postjudgment motions.[6]

Appellees have filed a Motion for Sanctions on appeal, which Trustee has opposed.

## ISSUES

1. Whether the bankruptcy court applied an incorrect legal standard in entering summary judgment.

2. Whether the bankruptcy court abused its discretion in denying Trustee's motion to amend the Complaint.

3. Whether sanctions are appropriate on appeal.

## STANDARDS OF REVIEW

A motion for summary judgment is reviewed de novo. Parker v. Saunders (In re Bakersfield Westar, Inc.), 226 B.R. 227, 231 (9th Cir. BAP 1998). The panel reviews whether the bankruptcy court

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[6] Trustee's issues on appeal focus on the merits of the summary judgment order as well as the court's denial of his motion to amend the Complaint pursuant to Rule 7015/FRCP 15(a). He has not challenged the order denying his Rule 9023 motion for reconsideration and Rule 9024/FRCP 60(b) motion to vacate the summary judgment. Therefore, any issues related to those motions have been abandoned. Branam v. Crowder (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd mem., 205 F.3d 1350 (9th Cir. 1999).

applied the correct legal standard de novo. Siegel v. Fed. Home Loan Mortg. Corp., 143 F.3d 525, 528 (9th Cir. 1998).

We will affirm a grant of summary judgment only if the admissible evidence, when viewed in the light most favorable to the nonmoving party, fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Yarbrow v. FDIC (In re Yarbrow), 150 B.R. 233, 236 (9th Cir. BAP 1993); Rule 7056/FRCP 56.

The moving party need not produce evidence to disprove the opponent's claim but has the burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party may meet its burden on summary judgment by demonstrating that the evidence presented by the nonmoving party is insufficient to carry the nonmoving party's burden of persuasion at trial. Id. at 323-24.

In turn, the nonmoving party cannot rely on the allegations or denials of his pleading, but must offer specific facts, by affidavits or otherwise, indicating that a genuine issue for trial exists. Id. at 324; FRCP 56(e). "If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). The nonmoving party creates a genuine issue of material fact by producing sufficient evidence to allow a reasonable jury to find in his favor at trial. Id. at 248.

A bankruptcy court's decision on a motion for leave to amend a complaint under Rule 7015/FRCP 15(a) is reviewed for an abuse of discretion. Magno v. Rigsby (In re Magno), 216 B.R. 34, 37-38 (9th Cir. BAP 1997).

A court abuses its discretion "when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts." Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1557 (9th Cir. 1996) (citation omitted). Abuse of discretion also is found when there is a definite conviction that the court made a clear error of judgment in its conclusion upon weighing relevant factors. Corder v. Howard Johnson & Co., 53 F.3d 225, 229 (9th Cir. 1994).

## DISCUSSION

### A. Summary Judgment

The bankruptcy court ruled that summary judgment was proper because Trustee's entire Complaint was barred by the claim preclusive effect of the Settlement Agreement and the voluntary dismissal of the State Court Action with prejudice.

Under California law, parties may dismiss an action before trial by written agreement, with or without prejudice. See Cal. Civ. Proc. Code § 581(b). The general rule is that dismissal "with prejudice" is the equivalent of a verdict and judgment on the merits for purposes of preclusion. 1 ANN TAYLOR SCHWING, CALIFORNIA AFFIRMATIVE DEFENSES § 14.8 (2006 ed.) ("SCHWING"). The words "with" or "without" prejudice are not, however, an infallible guide and may be contradicted by mistake or noncompliance with § 581(b). In this appeal, there is no assertion that the designation "with prejudice" in the Settlement Agreement was either mistaken or not in accordance with § 581(b).

In California, the doctrine of claim preclusion provides that: (1) a final judgment on the merits in a prior action is conclusive, (2) as to the same parties in a subsequent action; (3) involving the same subject matter. Torrey Pines Bank v. Super. Ct., 216 Cal. App. 3d 813, 821, 265 Cal. Rptr. 217, 221-22 (1989); SCHWING § 14. Claim preclusion bars not only relitigation of the original controversy, but also litigation of "all issues which were or could have been raised in the original suit." Torrey Pines Bank, 216 Cal. App. 3d at 821, 265 Cal. Rptr. at 221-22.

It follows that the voluntary dismissal of the State Court Action was a deemed final judgment on the merits. A voluntary dismissal of an action with prejudice is a "retraxit," which is the equivalent of a final verdict and judgment on the merits of a case. Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co. of Am., 133 Cal. App. 4th 1319, 1330-31, 35 Cal. Rptr. 3d 496, 505 (2005). "'Where the parties to an action settle their dispute and agree to a dismissal, it is a retraxit and amounts to a decision on the merits and as such is a bar to further litigation on the same subject matter between the parties.'" Gates v. Super. Ct., 178 Cal. App. 3d 301, 311, 223 Cal. Rptr. 678, 685 (1986) (citation omitted).

The Settlement Agreement resolved forever "any and all claims that were raised or that could have been raised in the Litigation . . . that they, or any of them, may have or which hereafter shall or may exist against the Released iPayment Parties, and each of them, save and except therefrom the claims, rights, and obligations arising out of or claims based on breach of this Agreement." Settlement Agreement, supra, ¶ 9(a).

In the Complaint, Trustee asserted claims, which were derivative from Debtor, for fraud, conspiracy to commit fraud, fraudulent transfers and unfair business practices under California law, against Appellees, who were also parties to the State Court Litigation and Settlement Agreement. All of Trustee's claims were based on facts and transactions surrounding the Grimstad Plan, which was the subject of the State Court Action and Settlement Agreement. However, the Complaint made no mention of or allegations concerning extrinsic fraud or the Trustee's avoidance powers and the Settlement Agreement.

Nonetheless, Trustee argued, on summary judgment, that the Complaint had alleged a distinct alter-ego claim belonging to Debtor's estate, which was not barred by the Settlement Agreement, but which, if proven, would invalidate the Settlement Agreement as to Debtor.

Trustee's argument fails because the Complaint did not include such a claim. It merely stated that Gordon was the alter-ego of the Gordon Companies, but did not allege facts concerning an alter-ego theory[7] or how such a theory connected Gordon's and Appellees' alleged fraudulent conduct in regards to the Settlement Agreement. Fraud must be pleaded with particularity. See Rule 7009/FRCP 9(b). Trustee first presented the fraudulent Settlement Agreement allegations in his opposition to the motion for summary judgment, not in the Complaint.

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[7] In California, an alter-ego claim requires proof (1) that there was such unity of interest and ownership between a corporation and an individual that the separate personalities of each cease to exist; and that (2) if the acts are treated as those of the corporation alone, an inequity will result. Gough v. Titus (In re Christian & Porter Aluminum Co.), 584 F.2d 326, 338 (9th Cir. 1978).

Trustee's new theory alleged that Gordon, operating as Debtor's alter ego, had conspired with Appellees to defraud Debtor by entering into the Settlement Agreement to pay him $1.9 million, but which gave no benefit to Debtor, and did so without first notifying Debtor's shareholders and creditors and obtaining their consent. In addition, Trustee alleged new facts in regards to the avoidance claim, i.e., that Trustee had the right, under § 548, to avoid the Settlement Agreement, which was, itself, the fraudulent transfer of Debtor's alleged claim against Appellees.

The bankruptcy court correctly rejected Trustee's arguments in opposition. The new claims based on the Settlement Agreement went beyond the scope of the Complaint and Trustee had not amended the Complaint prior to judgment. A court lacks authority, without the consent of all parties, to enter a summary judgment which goes beyond the claims asserted in the complaint. Crawford v. Gould, 56 F.3d 1162, 1168-69 (9th Cir. 1995). See also Brawner v. Pearl Assur. Co., 267 F.2d 45, 47 n.2 (9th Cir. 1958) (citing Sylvan Beach v. Koch, 140 F.2d 852, 861 (8th Cir. 1944) ("In the absence of (1) notice to a party of the claim made against him, and (2) of a hearing or an opportunity to be heard in opposition thereto, a judgment entered upon the claim is a nullity.")). Only matters that have been actually tried and litigated take precedence over the pleadings. Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 852 (9th Cir. BAP 2002); Rule 7015/FRCP 15(b).

Furthermore, here, summary judgment had been entered on the grounds that all of the alleged claims were barred by the dismissed State Court Action and Settlement Agreement. Trustee's attempt to vacate the summary judgment and insert new claims was

an improper collateral attack upon the Settlement Agreement. See Rein v. Providian Fin. Corp., 270 F.3d 895, 902 (9th Cir. 2001) ("The collateral attack doctrine precludes litigants from collaterally attacking the judgments of other courts.")

On appeal, Trustee does not challenge the court's ruling on grounds of claim preclusion. Instead, focusing on the new alter-ego claim, Trustee contends that: (1) the court sua sponte raised the issue of Appellees' duty to notify the creditors about the Settlement Agreement so that Trustee did not have the opportunity to brief it; (2) the notification issue was irrelevant to its alter-ego claim; and (3) thus, the bankruptcy court applied an incorrect legal standard in ruling on the summary judgment motion.

These arguments are "red herrings," which we do not need to address. It is clear that the bankruptcy court entered summary judgment on the basis of claim preclusion and did not rule on the merits of the alter-ego claim.

In summary, the bankruptcy court applied the correct legal standard. Appellees met their burden of demonstrating an absence of any genuine issue of material fact and that they were entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. The bankruptcy court did not err in entering judgment in their favor.

**B. Motion to Amend - Rule 7015/FRCP 15(a)**

Following entry of summary judgment and dismissal of the Complaint, Trustee filed a motion to amend the Complaint. On these facts, an amendment is governed by FRCP 15(a) (Rule 7015), which provides, in relevant part, that "a party may amend the

party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . ." Fed. R. Civ. P. 15(a). Thus, "[w]e review denial of leave to amend for abuse of discretion 'but such denial is "strictly" reviewed in light of the strong policy permitting amendment.'" North Slope Borough v. Rogstad (In re Rogstad), 126 F.3d 1224, 1228 (9th Cir. 1997) (citation omitted). The court generally considers four factors in determining whether leave to amend should be granted: (1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party. Id.

Trustee intended to bring two types of claims: (1) an alter-ego claim for fraud and rescission of the Settlement Agreement; and (2) avoidance of the Settlement Agreement as a fraudulent transfer of Debtor's alleged claim, in regards to the Grimstad Plan, against Appellees.

As grounds for denial of amendment, the bankruptcy court determined that Trustee unnecessarily delayed filing an amended complaint and such delay was prejudicial to Appellees.

First, the motion to amend was filed after summary judgment and dismissal of the adversary proceeding, and there were no grounds for setting it aside. It is well established that "after final judgment has been entered, a Rule 15(a) motion may be considered only if the judgment is first reopened under Rule 59 or 60." Lindauer v. Rogers, 91 F.3d 1355, 1356 (9th Cir. 1996) (affirming district court's decision to strike plaintiff's motion for leave to amend filed after court granted defendant's motion for summary judgment). See also, 6 CHARLES ALAN WRIGHT, ARTHUR R.

MILLER & MARY KAY KANE, FED. PRAC. & PROC. CIV. 2D § 1489 (1990 & Supp. 2005); 3 JAMES WM. MOORE ET AL., MOORE'S FED. PRAC. ¶ 15.12[2] (3d ed. 2005). Therefore, such amendment was untimely because it was filed postjudgment.

Second, the amendment was untimely because the new claims were barred by the applicable statute of limitations, § 546(a)(1)(A).[8] If Trustee had standing to assert the alter-ego/rescission claim, it would be pursuant to his strong-arm powers under § 544. See CBS, Inc. v. Folks (In re Folks), 211 B.R. 378, 388 (9th Cir. BAP 1997). Moreover, his theory for bringing a fraudulent avoidance action was grounded in § 548. Both actions are subject to the limitations period of § 546(a)(1)(A).

Trustee conceded that the statute of limitations had run under § 546(a)(1)(A), but he made an equitable tolling argument based on the alleged bad faith of Appellees. Trustee alleged that Appellees refused to produce the Settlement Agreement until after the limitations period had run.

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[8] Section 546(a) provides, in pertinent part, that "an action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of--"

(1) the later of—
  (A) 2 years after the entry of the order for relief; or
  (B) 1 year after the appointment or election of the first trustee under section 702 . . . of this title if such appointment or such election occurs before the expiration of the period specified in subparagraph (A); or

11 U.S.C. § 546(a).

Here, the original complaint was filed by Trustee exactly two years after the petition date, July 26, 2002. Since his appointment was concurrent with the petition date, the two-year limitations period had run by the time he filed the motion to amend, in February, 2005.

Trustee's evidence for such alleged bad-faith conduct on the part of Appellees was unconvincing. First, Appellees' withdrawal of the reference was not proof of an attempt to delay production of documents. Second, Trustee contends that he agreed, at Appellees' attorney's suggestion, not to file any more pleadings in order to facilitate the remand of the action. The email evidence between the attorneys clearly shows the solicitation was for an agreement not to file additional pleadings in regards to the then outstanding motions (summary judgment, to dismiss, and to strike). Such cooperation did not preclude a new motion to amend the complaint, or, logically, it should not have.[9] Nonetheless, the bankruptcy court did not clearly err in finding that Trustee could not shirk his responsibility for agreeing to such terms.

Finally, Trustee cited his thwarted good-faith attempts to obtain a copy of the Settlement Agreement, including requests for production and entering into the release agreement with Gordon, whereupon it was finally produced. However, as the bankruptcy court correctly noted, Trustee did not pursue more aggressive tactics, such as filing a motion to compel in order to force quicker production. Moreover, Trustee failed to add the new allegations in the amended Complaint, even though the Complaint was filed a few days after Trustee received a copy of the Settlement Agreement. See FRCP 15(a) (providing for one amendment as a matter of course).

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[9] Trustee states that "Later, when Appellant sought to argue the viability of their rescission/avoidance to this Court, Appellees explicitly sought to enforce that agreement against Appellant continuing their conduct of obfuscation and avoidance." Reply Brief (Feb. 13, 2006), at 12. However, Trustee does not cite to the record for this allegation, and we therefore cannot assess its accuracy.

Trustee knew about the existence of the Settlement Agreement when he filed the original complaint, but did not take significant measures to obtain a copy of the document, nor did he even mention it in the Complaint. Instead he sought to place the blame on Appellees. Under these circumstances, a motion to amend the Complaint after summary judgment was entered constituted prejudicial delay.[10] We conclude that on grounds of undue and prejudicial delay, the bankruptcy court did not abuse its discretion in denying Trustee's motion to amend.

**C. Sanctions**

Appellees filed a motion for sanctions on appeal, to which Trustee objected. First, Appellees contend that Trustee failed to comply with appellate rules of procedure and that such noncompliance warrants dismissal of the appeal or summary affirmance. See Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187, 1190 (9th Cir. 2003).

We have reviewed the charges, such as failure to provide a standard of review, failure to cite to the record, citing evidence not of record, or misrepresentation of the record. While there are some instances of each charge, we do not find that the omissions or rule violations are egregious enough to warrant sanctions and that our review is still possible in light of the record provided. Id. See also Ehrenberg v. Cal. State Univ. (In re Beachport Entm't), 396 F.3d 1083, 1087 (9th Cir. 2005).

[10] We note the possibility that an amendment might also be futile if these claims do not "relate back" to the original complaint. See FRCP 15(c). However, we do not need to, nor can we, review that issue based on the record before us.

Next, Appellees contend that the appeal is frivolous. We have authority under Rule 8020 to award damages or impose sanctions against a party for a frivolous appeal. See Fed. R. Bankr. P. 8020. "An appeal is frivolous if the results are obvious, or the arguments of error are wholly without merit." George v. City of Morro Bay (In re George), 322 F.3d 586, 591 (9th Cir. 2003)(citation omitted).

Although this case is arguably a close call, we do not find the appeal to be wholly without merit, and decline to award sanctions.

## CONCLUSION

In the absence of any genuine factual issues, the bankruptcy court applied the correct legal standard in determining that Trustee's Complaint was barred by claim preclusion, and that the newly proposed claims were beyond the scope of the summary judgment. Trustee, for reasons under his control, delayed filing the motion to amend until after final judgment had been entered and the claims were time-barred, and the bankruptcy court did not abuse its discretion in denying amendment of the Complaint on the grounds of undue, prejudicial delay.

Both orders are **AFFIRMED**. Sanctions are **DENIED**.