

AUG 05 2005

NOT FOR PUBLICATION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**

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In re:)	BAP Nos.	CC-04-1169-BMoR
)		CC-04-1509-BMOR
RODEO CANON DEVELOPMENT CORP.,)		(related appeals)
)		
Debtor.)	Bk. No.	LA 99-49349-VZ
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)	Adv. No.	LA 03-02072-VZ
BEVERLY RODEO DEVELOPMENT)		
CORP.; FRED YASSIAN,)		
)		
Appellants,)		
v.)	MEMORANDUM¹	
)		
LIBERTY MUTUAL INSURANCE CO.;)		
ROBERT L. GOODRICH, Chapter 7)		
Trustee; UNITED STATES TRUSTEE;)		
AMERICAN GUARANTEE & LIABILITY)		
INSURANCE CO.; AMERICAN HOME)		
ASSURANCE CO.; NATIONAL UNION)		
FIRE INSURANCE CO. OF)		
PITTSBURGH; BIJAN CHADORCHI;)		
FERESHTEH CHADORCHI; THE)		
CHADORCHI LIVING TRUST; ROBERT)		
D. PRYCE; PRYCE, PARKER & HILL,)		
LLP; NELSON SHELTON; NELSON)		
SHELTON & ASSOCIATES, INC.;)		
SUSAN DEL PRETE,)		
)		
Appellees.)		
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Argued and Submitted on May 12, 2005
at Pasadena, California

Filed - August 5, 2005

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

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Honorable Vincent P. Zurzolo, Bankruptcy Judge, Presiding

2
3 Before: BRANDT, MONTALI and RIMEL,² Bankruptcy Judges.
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6 After conversion of the Rodeo Canon Development Corporation
7 ("debtor") case from chapter 11, the chapter 7³ trustee sold real
8 property to which the estate had legal title. He later resigned
9 amid allegations of fraud, some related to the sale.

10 Appellants Beverly Rodeo Development Corporation ("Beverly
11 Rodeo") and Fred Yassian, its president and sole shareholder
12 (jointly, "Appellants"), filed an adversary proceeding against the
13 former trustee and others, alleging an interest in the property.
14 Holding that they either lacked standing or were not the real
15 parties in interest, the bankruptcy court granted defendants' motion
16 to dismiss the first amended complaint with prejudice. Beverly
17 Rodeo and Yassian appealed.

18 Later, predicated on the Ninth Circuit's subsequently withdrawn
19 opinion in a related appeal, Appellants moved to vacate the
20 dismissal, and for leave to file a fourth amended complaint. The
21 bankruptcy court denied the motion, and Appellants filed a second
22 appeal. We consolidated the appeals for briefing and oral argument.
23

24
25 ² Hon. Whitney Rimel, United States Bankruptcy Judge for
the Eastern District of California, sitting by designation.

26 ³ Unless otherwise indicated, all chapter and section
27 references are to the United States Bankruptcy Code, 11 U.S.C.
§ 101 et seq.; all "Rule" references are to the Bankruptcy Rules,
28 Rule 1001 et seq.; "FRCP" references are to the Federal Rules of
Civil Procedure.

1 In the first appeal (04-1169) we VACATE and REMAND as to
2 Beverly Rodeo and AFFIRM as to Yassian. We DISMISS the second
3 appeal (04-1509) as moot.

4 5 I. FACTS

6 A. Background

7 Both appeals concern multiple parties and claims originating
8 from the administration of the debtor's interest in a commercial
9 office building at 9615 Brighton Way, Beverly Hills, California (the
10 "Property"). Debtor held legal title to the Property, which
11 generated substantial monthly rents. Debtor valued it at
12 approximately \$14 million on the petition date. Debtor and Beverly
13 Rodeo were general partners in the 9615 Brighton Way Partnership
14 (the "Partnership"), having entered into a general partnership
15 agreement in 1990 for the purpose of operating the Property.

16 Debtor filed a voluntary chapter 11 petition on 27 October
17 1999, scheduling its interest in the Property as the bankruptcy
18 estate's primary asset. There had been no partnership dissolution
19 action; under § 541, a debtor's partnership interest becomes part of
20 the bankruptcy estate, but partnership property does not. See
21 Everest Investors 8 v. McNeil Partners, 114 Cal. App. 4th 411, 424,
22 8 Cal. Rptr. 3d 31, 40 (Cal. Ct. App. 2003); In re Signal Hill-
23 Liberia Ave. Ltd. P'ship, 189 B.R. 648, 651-52 (Bankr. E.D. Va.
24 1995).

25 Approximately one year later the case was converted to chapter
26 7. Appellee Robert Pryce ("Pryce") was appointed trustee in
27 November of 2000, and obtained the appointment of his law firm,
28 appellee Pryce, Parker & Hill, LLP, as counsel in his capacity as

1 trustee. Appellees Liberty Mutual Insurance Co., American Guarantee
2 and Liability Insurance Co., American Home Assurance, and National
3 Union Fire Insurance (collectively, the "Insurance Parties") were
4 sureties on Pryce's trustee's bond.

5 Although Beverly Rodeo had asserted a 50% interest in the
6 Property, in December 2000 Pryce moved for approval to sell it free
7 and clear of liens under § 363(b) and (f), asserting that debtor was
8 100% owner. Beverly Rodeo objected that Pryce could not sell the
9 Property, and that the bankruptcy court lacked jurisdiction over the
10 sale under § 363(b) because the Property was not "property of the
11 estate." The bankruptcy court found that, while there was a bona
12 fide dispute as to ownership, the Property could be sold free and
13 clear under § 363(b)(f) because debtor held record title. It
14 overruled the objection, and without determining the ownership
15 issues, ordered that the disputed proceeds be retained for the
16 adequate protection of Appellants' alleged ownership interest under
17 § 363(e), and left the dispute "for another day[,] " presumably in
18 the pending Pryce adversary proceeding. Transcript, 22 March 2001
19 at 63:12. The Chardorchi Living Trust, of which appellees Bijan and
20 Fereshteh Chardorchi were trustees (collectively, the "Chadorchis"),
21 purchased the Property for \$10,500,000, and the sale closed on 25
22 April 2001.

23 The bankruptcy court denied Appellants' motion for a stay of
24 the sale order pending appeal without a bond, and authorized a
25 partial distribution of \$7,502,000 from the sale proceeds to secured
26 lienholders, including a disputed \$2,150,000 payment, leaving the
27 estate with proceeds of \$2,998,000.

28 In August 2001, Appellants appealed the distribution order to

1 us, seeking disgorgement. We ruled that, since ownership was
2 disputed, it was clear error to permit Pryce to sell. We reversed
3 the distribution portion of the sale order and remanded, ordering
4 disgorgement of the disputed funds. Amended Memorandum (CC-01-1428-
5 MaMoP), 8 November 2002.

6 The Ninth Circuit affirmed, holding that the sale was
7 unauthorized because debtor lacked equitable ownership of the
8 Property, and remanded to resolve the remaining issues, including
9 ownership:

10 Each partner held a 50% interest. While Rodeo [Canon]
11 held legal title to the Property, Beverly claimed that,
12 because partnership funds were used to purchase it, the .
13 . . partnership is the equitable owner of the Property and
Beverly has a 50% interest. Adversary proceedings remain
pending in the bankruptcy court to resolve this ownership
dispute.

14 In re Rodeo Canon Development Corp., 362 F.3d 603 (9th Cir. 2004)
15 (the "Opinion") at 605-06.

16 On 8 March 2005 the Circuit withdrew the Opinion, referencing
17 the parties' stipulation that a consensual resolution had been
18 reached concerning ownership. It later amended its memorandum
19 explaining the withdrawal, qualifying its initial order by adding
20 the words underscored below:

21 The ownership dispute over the property appears to have
22 been resolved. The only issue remaining is the appropriate
23 distribution of the proceeds from its sale. The Bankruptcy
24 Appellate Panel entered a disgorgement order to protect
25 the interest of the Beverly Rodeo Development Corporation.
26 That order was entered on the assumption that the property
27 was owned by a partnership between Beverly Rodeo and Rodeo
28 Canon Development Corporation, the bankrupt. **Now that the
parties appear to have stipulated that Beverly Rodeo and
Rodeo Canon, and not the partnership, are coowners of the
property, the assumption underlying the disgorgement order
may no longer be valid. Nevertheless, because there may
be claims and obligations between the coowners arising out
of their coownership of the property, we will not vacate
the order, but instead, remand to the bankruptcy court for**

1 **a determination of the appropriate distribution of the**
2 **sale proceeds**

3 126 Fed. Appx. 353, 2005 WL 663421 at *1 (the "Memorandum," amended
4 on denial of rehearing, 1 April 2005) (emphasis added).

5 The sale proceeds are the estate's only asset, and undisputed
6 lienholders have been paid. The record does not disclose exactly
7 what proceeds the estate now holds.

8
9 B. Adversary Proceedings

10 There are three related adversaries: the first two are
11 intertwined with the present appeals, but both orders on appeal were
12 entered in the third.

13
14 1. The Pryce Adversary Proceeding: LA-01-01014-VZ

15 In January 2001, Pryce filed an adversary proceeding to avoid
16 post-petition transfers and to compel turnover of property of the
17 estate, etc., against Beverly Rodeo, Yassian and others. Pryce and
18 Beverly Rodeo reached a settlement in April 2002 and executed the
19 Settlement Deal Term Sheet (the "Settlement Agreement"). The
20 Stipulated Judgment, entered 11 July 2002, dismissed most of Pryce's
21 claims and Beverly Rodeo's counterclaims against the estate with
22 prejudice, and provided that:

23 4. The Trustee [Pryce] stipulates to declaratory
24 relief, namely that Debtor's title to the Brighton Way
25 Property up to and at time of its sale (April 2001) was
legal title only, held at all times for benefit of Rodeo
and Beverly Rodeo equally.

26 5. The Trustee's claims against Beverly Rodeo . . .
27 are DISMISSED WITH PREJUDICE.

28 6. The balance of Beverly's claims against the
Trustee [Pryce] set forth in the First through Seventh

1 Counter-Claims in Beverly's First Amended Answer . . . are
2 DISMISSED WITH PREJUDICE.

3 The bankruptcy court interpreted these settlement terms as a
4 release of claims in the Beverly Rodeo Adversary Proceeding, filed
5 approximately one year later.

6
7 2. The Goodrich Adversary Proceeding: LA-03-01606-VZ

8 After the sale, in November 2002, Pryce resigned and was
9 suspended from practice of law. He was later indicted for
10 bankruptcy crimes, some of which were committed as trustee in the
11 administration of the debtor's estate.

12 Pryce was succeeded by trustee Robert Goodrich ("Goodrich").
13 In the Goodrich Adversary, filed April 2003, Goodrich alleged that
14 Pryce entered into a fraudulent scheme with a commercial brokerage
15 company, appellee Nelson, Shelton & Associates ("Nelson Shelton")
16 and its licensed salesperson, appellee Susan Del Prete ("Del
17 Prete"), who had been appointed to list the Property for sale.
18 Under this scheme, Nelson Shelton & Del Prete allegedly kicked back
19 \$100,000 of the authorized commission to Chardorchis, so Chardorchis
20 paid \$100,000 less than their "bid." Goodrich sought to vacate the
21 sale order, disgorgement of professional fees, avoidance of
22 unauthorized post-petition transactions, and damages caused to the
23 estate from the fraud and conspiracy to defraud the estate. However,
24 the proceeding was stayed pending the criminal action against Pryce.

25 In September 2004, Goodrich auctioned the estate's rights in
26 the Goodrich Adversary; Beverly Rodeo and Yassian acquired the
27 trustee's rights against Chadorchis, which were severed and are
28 pending in a separate adversary proceeding.

1 3. The Beverly Rodeo Adversary Proceeding: LA-03-02072

2 In July 2003, approximately nine months after Pryce's
3 resignation and indictment, Beverly Rodeo filed the adversary
4 proceeding against Pryce, the Insurance Parties, Nelson Shelton, Del
5 Prete, and others in which the orders on appeal were entered.

6
7 A. The First Appeal - No. CC-04-1169: Order Dismissing with
8 Prejudice the First Amended Complaint ("1AC") and Order Denying
9 Motion to Vacate Dismissal and to file Third Amended Complaint
10 ("3AC")

11 In the 1AC, filed 30 July 2003, Appellants alleged breach of
12 fiduciary duty, conspiracy, and intentional infliction of emotional
13 distress. They sought determinations that the Partnership, not the
14 estate, owned the entire Property, and that due to defendants'
15 wrongful and collusive conduct, the Property's sale price was
16 suppressed, netting the estate less than it should have received.
17 Appellants sought to vacate the sale order, and sought damages for
18 conspiracy, breach of fiduciary duty, emotional distress, and to
19 establish liability on the bonds. They also asserted that Pryce's
20 fraud and criminal conduct entitled them to attorney fees in the
21 bankruptcy proceedings under the tort of another doctrine.

22 Chardochis, joined by Del Prete and the Insurance Parties,
23 moved to dismiss the 1AC under Rule 7012(b) for failure to state a
24 claim and because plaintiffs were not real parties in interest.
25 After a contested hearing, the bankruptcy court concluded:

26 [U]nder non bankruptcy law, there is no right for
27 this partner in a partnership to assert a claim for
28 attorneys' fees against any of the defendants. I find the
tort of another theory to be inapplicable and therefore,
as a matter of law, that cannot stand as a claim, an

1 element of damages for claim. Therefore, all the claims
2 based on those damages fail and must be dismissed with
prejudice.

3 A second and separate issue has to do with who is the
4 real party in interest to pursue claims based upon the
conduct of the prior Chapter 7 trustee. I think the case
5 law is not very clear

6 When a trustee who is a fiduciary of a bankruptcy
estate and the professionals of the trustee engage in
7 conduct that [is] detrimental to the estate, there is an
obvious harm to creditors of the bankruptcy estate and
8 parties that assert an interest either as a creditor or
through some other fashion in property of the bankruptcy
9 estate, but almost always as a creditor. . . .

10 Here the harm done by the trustee [a]ffects the
bankruptcy estate and doesn't just [a]ffect the plaintiff.
11 . . . [I]t affects all creditors . . . because the
bankruptcy estate, if the allegations are proven true, is
12 diminished. . . . [T]hat kind of a claim where the
activities of the trustee harms the bankruptcy estate so
13 that the claims that are existing at the time of the sale
are diminished only belongs to the bankruptcy
14 estate. . . .

15

16 So on the basis of pursuing claims . . . with regard
to claims which have to do with . . . the subject value,
17 the subject real property, the value of . . . the proceeds
of the sale of it being reduced due to the actions of the
18 trustee and the trustee's professionals and any other
third party, those claims belong to the estate and can
19 only be pursued by the successor trustee.

20 Transcript, 8 January 2004 at 15-17. The bankruptcy court granted
21 the defendants' motion and dismissed with prejudice and without
22 leave to amend on 22 January 2004, but allowed Yassian to proceed
23 separately with a second amended complaint against Pryce on his
24 claim for intentional infliction of emotional distress.

25 Appellants moved to vacate the dismissal, and sought leave to
26 file a proposed 3AC, alleging additional facts to establish
27 standing, and a conspiracy against Beverly Rodeo to drain its assets
28 for the defendants' personal benefit via illegal payoffs, kickbacks,

1 and charges to the estate for unnecessary contractor's fees and
2 costs.

3 The bankruptcy court denied the motion, holding:

4 I find that the legal infirmities in the complaint which
5 was the basis for my granting of the motion to dismiss
6 with prejudice and without leave to amend, still remain.
7 Nothing's changed.

8 You can . . . put in lots of additional allegations
9 in a complaint. That doesn't affect the fundamental legal
10 deficiencies with regard to not being a real party in
11 interest and the inapplicability of . . . the theory upon
12 which plaintiffs seek recovery or attorneys' fees. All
13 those legal barriers remain in place.

14 So this motion fails to meet the standards of Federal
15 Rule of Bankruptcy Procedure 9023 or 9024. As a result,
16 the motion is denied.

17 Transcript, 11 March 2004 at 18-19. Order, 19 March 2004, amended
18 25 March 2004.

19 Beverly Rodeo timely appealed both orders. Appellees
20 questioned finality; Beverly Rodeo sought Rule 7054(b)
21 certification, which the bankruptcy court granted, rendering the
22 dismissal final for purposes of appeal.

23

24 B. The Second Appeal - No. CC-04-1509 - Order Denying Relief
25 from Final Judgment

26 While CC-04-1169 was pending, the Opinion was published, which
27 Appellants construed to mean that the Circuit recognized their
28 individually-cognizable losses. They filed a Motion for Relief from
Final Judgment of Dismissal and for Authority to File Fourth Amended
Complaint ("4AC") to address monetary claims and recover the
Property. Citing Rule 9024, In re Crateo, Inc., 536 F.2d 862 (9th
Cir. 1976), and Canadian Ingersoll-Rand Co. v. Peterson Prods. of
San Mateo, Inc., 350 F.2d 18 (9th Cir. 1965), they argued:

1 D. We review an order denying a motion for reconsideration
2 under Rule 9023 or 9024 for abuse of discretion. In re Edelman, 237
3 B.R. 146, 150 (9th Cir. BAP 1999).

4 5 V. DISCUSSION

6 A. Standing

7 Standing refers to the proper litigant in a suit and relates to
8 capacity to sue: "The fundamental aspect of standing is that it
9 focuses on the party seeking to get his complaint before a federal
10 court and not on the issues he wishes to have adjudicated." Flast
11 v. Cohen, 392 U.S. 83, 99 (1968). "To have standing a party must
12 assert its own legal rights and interests and cannot rest its claim
13 to relief on the legal rights or interest of third parties." In re
14 Stoll, 252 B.R. 492, 495 (9th Cir. BAP 2000) (citation omitted).

15 The bankruptcy court concluded, at the 8 January hearing, that
16 only the present trustee, Goodrich, may pursue claims based on
17 conduct of the prior chapter 7 trustee, which it viewed as affecting
18 the creditors generally.

19 La Sierra Financial established that a property owner in
20 bankruptcy has standing to initiate FRCP 60(b) motions which affect
21 its interest, and also set forth the following requirements for
22 constitutional standing:

23 (1) that the plaintiff have suffered an "injury in fact"--
24 an invasion of a judicially cognizable interest which is
25 (a) concrete and particularized and (b) actual or
26 imminent, not conjectural or hypothetical; (2) that there
27 be a causal connection between the injury and the conduct
28 complained of--the injury must be fairly traceable to the
challenged action of the defendant, and not the result of
the independent action of some third party not before the
court; and (3) that it be likely, as opposed to merely
speculative, that the injury will be redressed by a
favorable decision.

1 La Sierra Financial, 290 B.R. at 726-27 (citation omitted).

2 Beverly Rodeo, as a co-owner or partner, has constitutional
3 standing. It alleges an injury in fact, the diminished value of its
4 interest in the Property as a direct or indirect result of the
5 defendants' actions. Although it is less clear that there is a
6 basis in law to recover, Beverly Rodeo also alleges damages in the
7 form of attorney fees incurred to protect its property interest.
8 Recovery against the defendants could redress Beverly Rodeo's
9 losses.

10 Trustees may be personally liable for wilful and deliberate
11 violations of their fiduciary duties, including failure to use
12 reasonable diligence, carry out fiduciary duties, preserve estate
13 assets, or make adequate provisions for every creditor entitled to
14 consideration. Mosser v. Darrow, 341 U.S. 267 (1951); see also 6
15 Alan N. Resnick & Henry J. Sommer, Collier on Bankruptcy, ¶ 704.05
16 (15th ed. rev. 2005); In re Ferrante, 51 F.3d 1473, 1476 (9th Cir.
17 1995) (successor trustee commenced an adversary proceeding to
18 recover against bond; held, individual creditors can have direct
19 rights against a defaulting bankruptcy trustee and others involved
20 in that wrongdoing); and In re San Juan Hotel Corp., 847 F.2d 931,
21 938 (1st Cir. 1988) (creditors, not estate, may sue trustee where
22 they have directly suffered harm).

23 In Stoll, we held that a debtor lacked standing to sue the
24 professionals employed by the trustee, noting that "[a] creditor
25 does not have standing to assert an action against a third party if
26 the creditor has only suffered a general injury, common to all
27 creditors and derivative of injury to the debtor." 252 B.R. at 495
28 (citation omitted). Stoll is distinguishable: "Ordinarily, a

1 debtor does not have standing to challenge actions affecting the
2 size of the estate, because the debtor has no pecuniary interest in
3 the property of the estate." Id. at 495 n.4. And, as noted in the
4 preamble to that opinion, the principle applies to all individual
5 beneficiaries of the bankruptcy estate, whether creditor or, in a
6 solvent estate, debtor.

7 But the nature of the injury here is particular and personal to
8 Beverly Rodeo as a co-owner of, or debtor's partner in, the
9 Property, and is not "general and common to the estate." Other
10 creditors are either secured lien creditors or taxing agencies whose
11 claims are against only the debtor's interest in the sale proceeds.

12 Beverly Rodeo has standing.

13
14 **B. Dismissal - No. CC-04-1169**

15 1. Real Party in Interest

16 Rule 7017 incorporates FRCP 17, mandating that every action be
17 prosecuted in the name of the real party in interest. Whelan v.
18 Abell, 953 F.2d 663, 672 (D.C. Cir. 1992). The analysis differs
19 from that for standing: "[t]he real party in interest is the person
20 holding the substantive right sought to be enforced, and not
21 necessarily the person who will ultimately benefit from the
22 recovery." In re Unger & Assocs., Inc., 292 B.R. 545, 551 (Bankr.
23 E.D. Tex. 2003). "[R]eal parties in interest are the persons
24 entitled or possessing the right or interest to be enforced through
25 the litigation." 4 James Wm. Moore et al., Moore's Federal Practice
26 ¶ 171[1] (3d ed. 2003).

27 The bankruptcy court's dismissal was predicated on the (since
28 repealed) California Uniform Partnership Act (which was part of the

1 California Corporations Code, § 15007 et seq.), as the Partnership
2 was formed prior to 1 January 1997:

3 Under the Act, [a]ny estate in real property may be
4 *acquired in the partnership name*, and when so acquired can
only be *conveyed in the partnership name*.

5 9 B.E. Witkin et al., Summary of California Law, Partnership
6 § 27 (9th ed. 1990) (citation omitted, emphasis in original). Under
7 the applicable state law, “[a] partner is a co-owner with the other
8 partners of a specific partnership property holding as a tenant in
9 partnership.” Cal. Corp. Code § 15025(1). “The owner of the legal
10 title to property is presumed to be the owner of the full beneficial
11 title. This presumption may be rebutted only by clear and
12 convincing proof.” Cal. Evid. Code § 662. The real party in
13 interest is the Partnership itself, not the partner. See Cal. Civ.
14 Proc. Code § 367; Torres v. City of Yorba Linda, 13 Cal. App. 4th
15 1035, 1040-41, 17 Cal. Rptr. 2d 400 (1993).

16 Reasoning that the complaint alleged that the Partnership owned
17 the Property, and thus it had the exclusive right to bring any
18 claims which derive from ownership, the bankruptcy court concluded
19 that any damages were to the Partnership as owner of the Property,
20 and that only the Partnership could bring a complaint. “Individual
21 partners may not sue for damage to the partnership property or to
22 their individual ‘beneficial interest’ in the property.” Robert I.
23 Weil et al., California Practice Guide: Civil Procedure Before
24 Trial Ch. 2-A ¶ 2:15.5, p. 2-9 (2005). See also Mayer v. C.W.
25 Driver, 98 Cal. App. 4th 48, 60, n.5, 120 Cal. Rptr. 2d 535 (Cal.
26 Ct. App. 2002).

27 But dismissal with prejudice at the pleading stage is strongly
28 disfavored, and should be imposed only if it appears beyond doubt

1 that the plaintiff can prove no set of facts in support of the
2 claims that would entitle him to relief. In re Zimmer, 313 F.3d
3 1220, 1222 (9th Cir. 2002). Federal law strongly favors granting
4 leave to amend and dismissal should not be granted unless the court
5 determines allegations of other facts could not possibly cure the
6 deficiency. U.S. v. McGee, 993 F.2d 184, 187 (9th Cir. 1993).

7 And leave to amend would not be futile: Beverly Rodeo could
8 seek dissolution of the Partnership and an accounting under
9 California law. Cal. Corp. Code § 15682.

10 Further, FRCP 17(a), applicable via Rule 7017, provides:

11 No action shall be dismissed on the ground that it is not
12 prosecuted in the name of the real party in interest until
13 a reasonable time has been allowed after objection for
14 ratification of commencement of the action by, or joinder
15 or substitution of, the real party in interest.

16 The rule is meant to provide time to correct the defect. See FRCP
17 17 advisory committee's note. Failing to consider the prejudice of
18 dismissal to parties is error. Sun Refining & Marketing Co. v.
19 Goldstein Oil Co., 801 F.2d 343, 345 (8th Cir. 1986).

20 Appellants did not argue Rule 7017 to the bankruptcy court, and
21 we generally do not consider arguments raised for the first time on
22 appeal. In re Bakersfield Westar Ambulance, Inc., 123 F.3d 1243,
23 1248 (9th Cir. 1997) (citing Bolker v. Comm'r of Internal Revenue,
24 760 F.2d 1039, 1042 (9th Cir. 1985)). See also Robb v. Bethel
25 School Dist. #403, 308 F.3d 1047, 1052 n.4 (9th Cir. 2002). But
26 there are three exceptions to the general prohibition: when "review
27 is necessary to prevent a miscarriage of justice or to preserve the
28 integrity of the judicial process, when a new issue arises while
29 appeal is pending because of a change in the law, or when the issue
30 presented is purely one of law and either does not depend on the

1 factual record developed below, or the pertinent record has been
2 fully developed." Bolker, 760 F.2d at 1042 (citations omitted). If
3 one of the exceptions is present, we have discretion to consider the
4 issue.

5 Nor do we normally consider matters not specifically and
6 distinctly argued in appellant's opening brief, which was the case
7 here. In re Jodoin, 209 B.R. 132, 143 (9th Cir. BAP 1997); see also
8 In re Sedona Inst., 220 B.R. 74, 76 (9th Cir. BAP 1998), and Laboa
9 v. Calderon, 224 F.3d 972, 980 n.6 (9th Cir. 2000) (issues not
10 specifically and distinctly argued in the opening brief are deemed
11 waived). But we are not confined to the arguments of parties on
12 legal issues, In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1379 (9th
13 Cir. 1985), and the issues presented here are purely legal, and do
14 not depend on factual matters outside the record. In view of the
15 strong presumption in favor of resolutions on the merits, and in
16 keeping with the Ninth Circuit's (amended) Memorandum withdrawing
17 the Opinion, we will exercise our discretion to consider these
18 issues.

19 We conclude that failing to afford Beverly Rodeo the time to
20 obtain joinder of or ratification by the Partnership, or leave to
21 amend to assert claims for partnership dissolution or accounting,
22 were errors of law, and thus the denial of leave to amend was an
23 abuse of discretion. But because these issues were not argued to
24 the bankruptcy court, we will vacate, rather than reverse, and
25 remand.

26
27 2. Yassian's Claims

28 Although Beverly Rodeo and Yassian have acted in tandem

1 throughout the adversary proceedings and appeals, the foundation of
2 Yassian's claims rests on a different bottom. As shareholder and
3 president of the corporate partner or co-owner, he has no
4 independent claims beyond those for emotional damages being
5 litigated separately under the 2AC. He has articulated no other
6 basis for direct liability to him. We will affirm the order
7 dismissing the first appeal as to him.

8 **C. The Crateo Motion - No. CC-04-1509**

9 We are asked to review whether the bankruptcy court properly
10 refused to signal, pursuant to In re Crateo, 536 F.2d 862 (9th Cir.
11 1976), a willingness to grant relief from judgment to allow leave to
12 file the proposed 4AC, a further attack on the sale order as being
13 fruit of the frauds perpetuated by Pryce.

14 As we are vacating and remanding on the first appeal,
15 permitting the filing of a new amended complaint, the second appeal
16 is now moot. See Goelz & Watts, California Practice Guide: Federal
17 Ninth Circuit Civil Appellate Practice Ch. 10-E, ¶ 10:177: "Even in
18 cases where the court had jurisdiction at one point in time, changed
19 circumstances may cause an appeal to become moot." (citation
20 omitted, emphasis in original). See also In re Burrell, ____ F.3d
21 ____, 2005 WL 1606483 (9th Cir. Jul 11, 2005) (appeal of
22 nondischargeability judgment rendered moot by denial of discharge to
23 debtor in separate adversary proceeding).

24 Accordingly, we will dismiss the second appeal. Because we are
25 vacating the initial dismissal, we need not reach the settlement
26 issue, but note that settlement is a defense rather than a basis for
27 dismissal for failure to state a claim, which tests the sufficiency
28 of the complaint. Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214

1 (9th Cir. 1988).

2

3

VI. CONCLUSION

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In the First Appeal, we AFFIRM as to Yassian. As to Beverly Rodeo, we VACATE the order dismissing the first amended complaint and REMAND to allow the filing of an amended complaint.

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We DISMISS the Second Appeal as moot.

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