

FEB 1 2011

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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NOT FOR PUBLICATION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

1 In re: ) BAP No. CC-10-1143 PaDKi  
 2 )  
 3 CARY E. MARLOW, ) Bk. No. SV-09-23891-KT  
 4 )  
 5 Debtor. )  
 6 )  
 7 )  
 8 )  
 9 CARY E. MARLOW, )  
 10 )  
 11 Appellant, )  
 12 )  
 13 v. ) **M E M O R A N D U M**<sup>1</sup>  
 14 )  
 15 NANCY HOFFMEIER ZAMORA, Trustee, )  
 16 )  
 17 Appellee. )  
 18 )  
 19 )

Submitted Without Oral Argument  
on January 21, 2011<sup>2</sup>

Filed - February 1, 2011

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

Honorable Kathleen Thompson, Bankruptcy Judge, Presiding

20 \_\_\_\_\_  
 21 Appearances: Elkanah J. Burns of Alan D. Wilner, A.P.C. on brief  
 22 for appellant.  
 23 Appellee Nancy Hoffmeier Zamora, pro se, on brief.  
 24 \_\_\_\_\_

25 <sup>1</sup> This disposition is not appropriate for publication.  
 26 Although it may be cited for whatever persuasive value it may have  
 27 (see Fed. R. App. P. 32.1), it has no precedential value. See 9th  
 28 Cir. BAP Rule 8013-1.

<sup>2</sup> In their briefs, the parties indicated that oral argument  
 was not needed. The Panel agreed, and ordered on December 10,  
 2010, that the appeal be deemed submitted without argument.

1 Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

2 Chapter 7<sup>3</sup> debtor Cary E. Marlow ("Marlow") appeals the  
3 bankruptcy court's order granting a motion by chapter 7 trustee  
4 Nancy Hoffmeier Zamora ("Trustee") to approve a settlement  
5 agreement between Trustee and Jennifer King ("King"). We AFFIRM.

6 **FACTS**

7 In September 2006, Marlow and King orally agreed that Marlow  
8 would be general contractor in a project to improve King's real  
9 property in Studio City, California. Between September 2006 and  
10 October 2007, Marlow performed services on this project for which  
11 he billed King in excess of \$700,000, and received payments in  
12 excess of \$550,000. When a dispute arose between the parties, on  
13 March 4, 2009, Marlow sued King for breach of contract in Los  
14 Angeles County Superior Court, Marlow v. King, case no. LC081209  
15 (the "State Court Action"), alleging that King had failed to pay  
16 Marlow the balance of \$132,616.23 for his services. King filed a  
17 cross-complaint against Marlow for \$400,000 to \$500,000 in  
18 damages.<sup>4</sup>

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19  
20 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

23 <sup>4</sup> In the complaint filed in state court, the plaintiff is  
24 Marlow, individually and dba The Marlow Company. King's counter-  
25 claim names The Marlow Company, Inc. dba The Marlow Company and  
26 Cary Marlow individually and dba The Marlow Company as cross-  
27 defendants. As near as we can tell from the record, it appears  
28 Marlow sometimes billed for services in the name of the  
unincorporated business (The Marlow Company), and sometimes in the  
name of the corporation (The Marlow Company, Inc.). We do not  
have adequate information to determine the legal significance of  
this billing practice. For our purposes, we merely note that the  
corporation designated as a cross-defendant by King is not a  
debtor in this bankruptcy case, but presumably is a distinct legal  
entity, the impact of which is discussed below.

1           On October 23, 2009, Marlow filed a chapter 7 bankruptcy  
2 petition. In his Schedule B, he listed his lawsuit against King,  
3 stating his claim as \$132,616.24, with a cross-complaint for  
4 \$400,000–\$500,000, having a net current value of \$0.00. He did  
5 not claim an exemption in the lawsuit on his Schedule C. Nancy  
6 Hoffmeier Zamora was appointed chapter 7 trustee.

7           Shortly after the filing of the petition, Trustee and King's  
8 counsel negotiated a Compromise by which King agreed to pay  
9 \$10,000 to Trustee in exchange for Trustee's release of any and  
10 all further claims against King, together with Trustee's agreement  
11 that the bankruptcy court could grant King relief from automatic  
12 stay to pursue any insurance or bond which may cover King's claims  
13 against Marlow in the State Court Action ("the Compromise").

14           Trustee's Motion for Order Approving Compromise was filed in  
15 the bankruptcy court on January 12, 2010, accompanied by a  
16 memorandum of points and authorities in which Trustee evaluated  
17 the Compromise under the criteria in Martin v. Kane (In re A&C  
18 Props.), 784 F.2d 1377, 1381 (9th Cir. 1986).

19           Marlow filed an Opposition on January 26, 2010, arguing that  
20 the claim against King in the State Court Action was not complex;  
21 it would not be expensive to pursue; and its value greatly  
22 exceeded the amount paid by King to Trustee in the Compromise. In  
23 addition, Marlow's counsel indicated his willingness to continue  
24 advocating Marlow's claim in the State Court Action on a  
25 contingency basis.

26           Trustee replied to Marlow's Opposition on February 9, 2010.  
27 Trustee argued that Marlow's claim in the State Court Proceeding  
28 was oral, that Marlow had grossly overvalued the claim and

1 underestimated the estate's exposure to King's claims, and that it  
2 would be very expensive for Trustee to prosecute the State Court  
3 Action.

4 On February 11, 2010, Marlow requested that an evidentiary  
5 hearing be held on Trustee's compromise motion.

6 The bankruptcy court conducted a hearing on Trustee's motion  
7 on February 16, 2010; a transcript is included in the record.

8 Marlow and Trustee were represented by counsel who were heard.

9 Trustee argued in favor of the Compromise. In response to  
10 the bankruptcy court's indication that it would treat the  
11 Compromise also as a sale of estate assets, Trustee suggested that  
12 the hearing be continued so Marlow and his attorney could  
13 consider whether to submit an overbid. Hr'g Tr. 6:10-11  
14 (February 16, 2010). Marlow's counsel agreed. Hr'g Tr. 6:25-7:1.  
15 The court denied the request for evidentiary hearing. Hr'g Tr.  
16 8:12-17.

17 Neither Marlow nor his attorney attended the continued  
18 hearing on March 9, 2010. The bankruptcy court entered its order  
19 approving the compromise on March 23, 2010. The order provided in  
20 relevant part that the court had read and considered all of the  
21 pleadings, declarations, and exhibits containing evidence  
22 submitted by the parties, as well as arguments of counsel; that  
23 Trustee's motion would be granted and the compromise with King  
24 approved; and that King would be granted relief from stay to  
25 "pursue any insurance or bond claim King may be able to recover  
26 based on her cross-complaint in the State Court Case."

27 Marlow filed a timely notice of appeal on April 5, 2010.  
28



1 identified the correct legal rule, we then determine whether its  
2 "application of the correct legal standard [to the facts] was  
3 (1) illogical, (2) implausible, or (3) without support in  
4 inferences that may be drawn from the facts in the record." Id.  
5 (internal quotation marks omitted). If the bankruptcy court did  
6 not identify the correct legal rule, or its application of the  
7 correct legal standard to the facts was illogical, implausible, or  
8 without support in inferences that may be drawn from the facts in  
9 the record, then the bankruptcy court has abused its discretion.  
10 Id.

## 11 DISCUSSION

### 12 I.

#### 13 Marlow lacks standing to appeal the 14 order approving the Compromise.

15 Bankruptcy appellate standing is limited to those persons who  
16 can demonstrate that they are directly and adversely affected  
17 pecuniarily by an order of the bankruptcy court. Robinson v.  
18 Fondiller (In re Fondiller), 707 F.2d 441, 442-43 (9th Cir. 1983).  
19 A party asserting standing must demonstrate that the bankruptcy  
20 court's order either diminishes his property, increases his  
21 burdens, or detrimentally affects his rights. Id. at 442. It is  
22 well-established that a chapter 7 debtor ordinarily lacks  
23 standing to challenge orders affecting the assets of the estate  
24 unless there is likely to be a surplus after bankruptcy. Duckor  
25 Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d  
26 774, 778 (9th Cir. 1999).

27 In her brief, Trustee states that this is not a surplus case,  
28 or in other words, after distribution of funds by Trustee to the

1 creditors filing claims, there will be no funds to return to  
2 Marlow. Trustee's Op. Br. at 9; see § 726(a)(1)-(6) (prescribing  
3 the order of distribution of property of the bankruptcy estate).  
4 Marlow does not challenge this conclusion in his reply brief.  
5 Rather, he argues that he has standing based on his status as the  
6 sole shareholder of his corporation, the Marlow Company, Inc.:

7       Not only will debtor incur expenses in defending this  
8       action, the relief from stay places the debtor in the  
9       disadvantageous position of having to defend himself and  
10      the corporation against the cross-complaint without the  
11      substantive advantage of having an affirmative claim  
12      against the defendant/cross-complainant. As such, his  
13      odds of success are diminished.

14 Marlow's Reply Br. at 2.

15       Appellate standing cannot be asserted derivatively; an  
16      appellant must have standing in his own right. "The Art. III  
17      judicial power exists only to redress or otherwise to protect  
18      against injury to the complaining party, even though the court's  
19      judgment may benefit others collaterally. A federal court's  
20      jurisdiction therefore can be invoked only when the plaintiff  
21      himself has suffered 'some threatened or actual injury resulting  
22      from the putatively illegal action . . . .'" Warth v. Seldin,  
23      422 U.S. 490, 499 (1975), quoting Linda R.S. v. Richard D.,  
24      410 U.S. 614, 617 (1973); Tippett v. Umpqua Shopping Ctr., Inc.  
25      (In re Umpqua Shopping Ctr., Inc.), 111 B.R. 303, 305 (9th Cir.  
26      BAP 1990) (appellant cannot rest its claim to relief on legal  
27      rights or interests of others). Marlow cannot claim standing to  
28      appeal on the basis of harm to his corporation, a separate legal  
29      entity.

30       Marlow, individually, is not adversely affected by the  
31      Compromise. His liability to King, if any, is discharged in his

1 bankruptcy case, and the relief from stay granted under the  
2 compromise was limited to allowing King to "pursue any insurance  
3 or bond claim King may be able to recover." Marlow asserts that  
4 "either a loss or settlement of the case would likely leave the  
5 Debtor either uninsurable or facing increased insurance premiums.  
6 Either outcome would result in a diminished capacity for him to  
7 make a living." Marlow's Reply Br. at 3. But even if Marlow has  
8 some future financial exposure to King arising from his ownership  
9 of the corporation, a potential or future liability is not  
10 adequate to support appellate standing. The direct and adverse  
11 pecuniary effect required to confer appellate standing must be  
12 immediate. In re Fondiller, 707 F.2d at 443 (appellate standing  
13 requires "direct and immediate impact on appellant's pecuniary  
14 interests"); SEC v. Sec. Nw, Inc., 573 F.2d 622, 626 (9th Cir.  
15 1978) (appellant's interest "is remote and consequential rather  
16 than direct and immediate; he thus lacks standing to maintain the  
17 appeal.").

18       If this is an insolvent estate, and Marlow has offered  
19 nothing to show that it is solvent, Marlow has not suffered a  
20 direct, immediate adverse effect on his pecuniary interests as a  
21 result of the approval of the compromise. He may not assert  
22 standing through his separate corporation. At most, his standing  
23 is derivative, consequential and remote. We therefore conclude  
24 that he does not have standing to appeal the order approving the  
25 Compromise.

26 //

27 //

28 //

1 II.

2 The bankruptcy court did not abuse its  
3 discretion in approving the Compromise.

4 Even were we to decide that Marlow had standing to appeal,  
5 the record in this case adequately supports the decision of the  
6 bankruptcy court to approve the Compromise.

7 Rule 9019(a), governing compromises, provides that,

8 On motion by the trustee and after a hearing  
9 on notice to creditors, the debtor and  
10 indenture trustees as provided in Rule 2002(a)  
and to such other entities as the court may  
designate, the court may approve a compromise  
or settlement.

11 Rule 9019(a). The bankruptcy court is required to conduct an  
12 inquiry into all "factors relevant to a full and fair assessment  
13 of the wisdom of the proposed compromise." Protective Comm. for  
14 Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson,  
15 390 U.S. 414, 424 (1968). The criteria for this inquiry are as  
16 follows:

17 In determining the fairness, reasonableness and  
18 adequacy of a proposed settlement agreement, the  
19 court must consider: (a) probability of success  
20 in the litigation, (b) the difficulties, if any,  
21 to be encountered in the matter of collection,  
22 (c) the complexity of the litigation involved,  
and the expense, inconvenience and delay  
necessarily attending it; [and] (d) the  
paramount interest of creditors and a proper  
deference to their reasonable views in the  
premises.

23 In re A&C Props., 784 F.2d at 1381; see also Woodson v. Fireman's  
24 Fund Ins. Co. (In re Woodson), 839 F.2d 610, 620 (9th Cir. 1988)  
25 (repeating factors). The bankruptcy court has wide latitude and  
26 considerable discretion in evaluating a proposed settlement  
27 because the bankruptcy judge "is uniquely situated to consider the  
28 equities and reasonableness." United States v. Alaska Nat'l Bank

1 (In re Walsh Construction, Inc.), 669 F.2d 1325, 1328 (9th Cir.  
2 1982).

3 Marlow argues extensively that the bankruptcy court neglected  
4 to properly analyze the A&C Props. criteria in approving the  
5 Compromise. Instead, according to Marlow, the bankruptcy court  
6 "viewed the issue as a bidding contest" and relied exclusively on  
7 the opinions of Trustee. We disagree.

8 First, the bankruptcy court was correct as a matter of law in  
9 treating Trustee's proposed settlement with King not only as a  
10 compromise under Rule 9019, but also as a sale of the bankruptcy  
11 estate's claim against King under § 363. As we have held, when  
12 confronted with a motion to approve a settlement under Rule  
13 9019(a), "a bankruptcy court is obliged to consider, as part of  
14 the 'fair and equitable' analysis, whether any property of the  
15 estate that would be disposed of in connection with the settlement  
16 might draw a higher price through a competitive process and be the  
17 proper subject of a section 363 sale." In re Mickey Thompson  
18 Entm't Group, Inc., 292 B.R. at 421-22; see also Simantob v.  
19 Claims Prosecutor (In re Lahijani), 325 B.R. 282, 289 (9th Cir.  
20 BAP 2005). To accommodate that the Compromise effectively "sold"  
21 the bankruptcy estate's claims against King, the bankruptcy court  
22 properly continued the hearing to allow Marlow an opportunity to  
23 submit a bid for that claim at a later date. In this fashion, the  
24 bankruptcy court adopted an appropriate competitive process to  
25 determine whether a "higher price" could be obtained for the claim  
26 against King.

27 Second, the bankruptcy court did not rely "exclusively" on  
28 Trustee's opinions about the value of the estate's claim against

1 King, or the desirability of pursuing that claim. To support his  
2 argument, Marlow cites to the hearing transcript, where the  
3 bankruptcy court stated:

4 Well, I think the Trustee has accurately stated the  
5 legal issue that the threshold the Trustee has to meet  
6 in order to be a good faith proponent of this settlement  
– that there does seem to be significant risk of  
litigation.

7 Hr'g Tr. 6:12-14.

8 Fairly interpreted, in this comment, the bankruptcy court did  
9 not rely "exclusively" on the Trustee's opinion. It was a finding  
10 that Trustee had carried her burden on the first, and arguably  
11 most important, of the A&C Props. criteria: the probability of  
12 success in the litigation.

13 Marlow contends that the bankruptcy court did not  
14 "independently" consider and analyze each of the A&C Props.  
15 criteria. Presumably Marlow means that the bankruptcy court did  
16 not make four specific findings on the record that each criterion  
17 had been satisfied. However, neither the Ninth Circuit nor this  
18 Panel has ever required slavish devotion to form over substance in  
19 this regard. Indeed, the court in A&C Props. addressed a concern  
20 that a bankruptcy court had not made specific findings in  
21 approving a compromise, and gave the following instructions:

22 Appellate review is made more difficult by the lower  
23 court's failure to write an opinion explaining why it  
24 deemed the compromise to be fair, reasonable and  
adequate. (Citation omitted.) However, where the record  
supports approval of the compromise, the bankruptcy  
court should be affirmed.

25 In re A&C Props., 784 F.2d at 1383. In short, the A&C Props.  
26 criteria are binding criteria that the bankruptcy court must take  
27 into consideration in its analysis of a compromise. Our function  
28

1 as an appellate tribunal is to examine the record in light of the  
2 A&C Props. criteria to see if it supports approval of the  
3 compromise. This approach to review of orders approving  
4 compromises is consistent with the general rule that we may affirm  
5 the bankruptcy court on any basis supported in the record. United  
6 States v. Hemmen, 51 F.3d 883, 891 (9th Cir. 1995); Leavitt v.  
7 Soto (In re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP 1997).

8 Before we examine the four criteria, we note that the  
9 bankruptcy court acknowledged that it had "read and considered"  
10 all of the parties' submissions and arguments regarding the  
11 Compromise. In other words, the bankruptcy court reviewed  
12 Trustee's motion, arguments and evidence in light of Marlow's  
13 objections, arguments and evidence, and conducted two hearings on  
14 the Compromise, before deciding to approve the Compromise. In  
15 general, then, the record suggests that the bankruptcy court gave  
16 full and fair consideration to both sides of this contest, and was  
17 fully aware of both parties' positions on the A&C Props. criteria.

18 Probability of success in the litigation. The bankruptcy  
19 court made a specific finding on the record that there was  
20 significant risk to the bankruptcy estate in prosecuting the State  
21 Court Action. Hr'g Tr. 6:22-23. Trustee brought to the court's  
22 attention a number of problems with Marlow's claim against King,  
23 including that the claim was based on an oral contract for home  
24 improvement services, which arguably violates Cal. Bus. & Prof.  
25 Code § 7159.5;<sup>5</sup> that Marlow had made conflicting sworn statements

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27 <sup>5</sup> "This section applies to all home improvement contracts,  
28 as defined in Section 7151.2, between an owner or tenant and a  
contractor, whether a general contractor or a specialty

1 valuing the claim at \$132,000 and at \$94,520; and that Marlow had  
2 standing problems in the state court, because at least some of the  
3 bills and liens were issued in the name of his corporation, rather  
4 than in his individual name. Trustee also noted that, even if the  
5 bankruptcy estate recovered against King, there was a likelihood  
6 of extended appeals, the outcome of which would also be difficult  
7 to predict.

8 In neither the bankruptcy court nor in this appeal does  
9 Marlow adequately address these potential problems with his claim  
10 against King. Rather, his principal concern has been that Trustee  
11 did not contact his lawyer to obtain his opinion concerning the  
12 likelihood of success, and that his lawyer would be willing to  
13 represent Marlow on a contingency basis.<sup>6</sup>

14 The bankruptcy court was presented with specific problems in  
15 the litigation by Trustee and unspecific opinions by Marlow. For  
16 example, Trustee pointed out that the amount sought in King's  
17 cross-complaint was more than four times the value placed on his  
18 claim by Marlow. Trustee stated that, based upon her review, it  
19 appeared that the services rendered by Marlow to King were

20 \_\_\_\_\_  
21 contractor, who is licensed or subject to be licensed pursuant to  
22 this chapter with regard to the transaction. (a) Failure by the  
23 licensee or a person subject to be licensed under this chapter, or  
24 by his or her agent or salesperson, to comply with the following  
provisions is cause for discipline: (1) The contract shall be in  
writing and shall include the agreed contract amount in dollars  
and cents." CAL. BUS. & PROF. CODE § 7159.5(a)(1).

25 <sup>6</sup> On this last point, we note that Marlow's lawyer's  
26 declaration indicated he would represent Marlow; there is no  
27 indication that he would be willing to represent Trustee and the  
28 bankruptcy estate. This is significant if it means that Trustee  
would have to incur the additional expense of retaining her own  
attorney to represent the bankruptcy estate's interest in the  
litigation, or to at least monitor the State Court Action.

1 substandard and had required King to expend significant amounts of  
2 money to remedy Marlow's errors. Trustee was concerned that even  
3 one-fourth of the damages sought in King's cross-complaint would  
4 offset the maximum amount of any recovery for the bankruptcy  
5 estate. The record supports a conclusion that, even if Marlow  
6 succeeded in recovering funds from King, there was a significant  
7 chance that he would not collect because of King's possible  
8 recovery on the cross-claim.

9 Complexity of the litigation involved, and the expense,  
10 inconvenience and delay necessarily attending it. Trustee and  
11 Marlow submitted conflicting views on the complexity of the  
12 litigation. Trustee reviewed the particulars of the residential  
13 construction problems, noting that the issues were fact-intensive  
14 likely requiring expert analysis and testimony. Marlow countered,  
15 without particulars, that, in his opinion, the State Court Action  
16 was a "run-of-the-mill" construction case. Trustee also reminded  
17 the bankruptcy court of the adverse impact of extended appeals in  
18 the State Court Action. Marlow did not address this concern.

19 On this factor, the record supports approval of the  
20 Compromise.

21 Difficulties, if any, to be encountered in the matter of  
22 collection. No significant evidence concerning this factor was  
23 submitted by the parties to the bankruptcy court, nor was it  
24 discussed by the court in rendering its decision. We therefore  
25 assume this factor does not impact whether the compromise should  
26 be approved.

27 The paramount interest of creditors and a proper deference to  
28 their reasonable views in the premises. The bankruptcy court's

1 docket shows that all creditors were served with notice of  
2 Trustee's Motion Approving Compromise. Only one creditor,  
3 Marlow's attorney, filed an objection. Since Marlow's attorney  
4 did not join in this appeal, and there were no other objections  
5 from creditors, and the other A&C Props. criteria suggest  
6 considerable risk to the interests of the creditors, we conclude  
7 that the record supports approval of the Compromise as being in  
8 the paramount interest of creditors.

9 To be sure, our court of appeals has never indicated that all  
10 four of the A&C Props. factors must support approval of a  
11 settlement or compromise. In re A&C Props., 784 F.2d at 1382  
12 ("While creditors' objections to a compromise must be afforded due  
13 deference, such objections are not controlling"). Instead, it  
14 need only appear that the bankruptcy court considered the  
15 appropriate factors and gave them appropriate weight.

16 We conclude that, on balance, there is sufficient support in  
17 the record for approval of the Compromise according to the A&C  
18 Props. criteria. We therefore decline to hold that the bankruptcy  
19 court abused its discretion in approving the Compromise.

20 III.

21 The bankruptcy court did not abuse its discretion  
22 in declining to conduct an evidentiary hearing.

23 Marlow challenges the bankruptcy court's rejection of his  
24 request for an evidentiary hearing concerning the Compromise. In  
25 his brief, Marlow identifies four issues which he argues should  
26 have been considered at such a hearing:

27 1. Whether Marlow violated Cal. Bus. & Prof. Code § 7159 by  
28 engaging in home repair services without a written contract?

