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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NOT FOR PUBLICATION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

In re:) BAP No. CC-04-1492-MoPaN
)
5340 LOS ROBLES, a California) Bk. No. SA 04-12850-JB
Partnership,)
)
Debtor.)

NICK O'MALLEY; LAW OFFICES OF)
NICK O'MALLEY; RODNEY MILES,)
Appellants,)

v.)

MEMORANDUM¹

DAVID B. OKUN; SHEILA REISER-)
OKUN,)
Appellees.)

Argued and Submitted on October 20, 2005
at Santa Ana, California

Filed - November 4, 2005

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

Honorable James N. Barr, Bankruptcy Judge, Presiding.

Before: MONTALI, PAPPAS and NIELSEN,² Bankruptcy Judges.

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

²Hon. George B. Nielsen, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 The bankruptcy court dismissed a bankruptcy petition and
2 entered an order imposing sanctions against the party and his
3 counsel who filed the petition on behalf of the debtor
4 partnership. The sanctioned parties appeal the sanctions order.
5 We AFFIRM.

6 **I.**
7 **FACTS**

8 On April 30, 2004, appellant Rodney Miles ("Miles"),
9 purportedly acting as a general partner of debtor 5340 Los Robles
10 ("Debtor" or "Los Robles"), filed a voluntary chapter 7³ petition
11 on behalf of Debtor. Appellant Nick O'Malley ("O'Malley")
12 appeared as counsel for Debtor on the petition.

13 On June 2, 2004, counsel for appellees David B. Okun and
14 Sheila Reiser-Okun ("the Okuns"), general partners of Debtor,
15 sent by facsimile a letter to O'Malley requesting that Debtor's
16 bankruptcy petition be dismissed because Miles was not a current
17 general partner of Debtor and did not have the authority to file
18 the petition. Okun's counsel, Mark Campbell ("Campbell"),
19 stated that he would file a motion to dismiss and a motion for
20 sanctions if O'Malley did not dismiss the petition by June 4,
21 2004.

22 O'Malley and Miles did not dismiss the petition. Therefore,
23 on August 13, 2004, the Okuns filed a motion to dismiss Debtor's
24 bankruptcy case and a motion for sanctions against O'Malley,
25 Miles, and Law Offices of Nick O'Malley, a law corporation

26
27 ³Unless otherwise indicated, all section and rule references
28 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and the Federal
Rules of Bankruptcy Procedure, Rules 1001-9036.

1 ("Firm") (collectively, "Appellants"). The Okuns noted that
2 they, as general partners of Debtor, had not consented to the
3 filing of the petition. They also contended that Miles did not
4 have the authority to act as a general partner because (1) he had
5 transferred his ten percent general partner interest in Debtor to
6 David B. Okun, M.D., F.A.C.P., a Medical Corporation Retirement
7 Trust ("Okun Trust") in 1992 and (2) even if he had not
8 transferred his general partnership interest to the Okun Trust in
9 1992, he was (as a matter of California law) dissociated from
10 Debtor by virtue of his own individual bankruptcy filing in
11 January 2004 and was thus precluded from participating in the
12 management and conduct of Debtor's business.

13 Miles opposed the motion for sanctions. Miles argued that
14 in the absence of the consent of the Okuns to the filing, the
15 petition should be treated as an involuntary petition. The
16 bankruptcy court held a hearing on both motions on September 14,
17 2004, and issued a tentative decision on the same date granting
18 both motions. The court held that Miles no longer held a
19 partnership interest in Debtor by virtue of the 1992 assignment;
20 alternatively, the court held that Miles was dissociated from
21 Debtor under California Corporations Code sections 16601 and
22 16603 by virtue of his own individual bankruptcy and thus lacked
23 authority to file the petition. The court also rejected Miles'
24 argument that the bankruptcy petition could be treated as an
25 involuntary petition.

26 Even though the Okuns had requested almost \$8,000 in
27 sanctions, the court noted in its tentative decision that it
28 would reduce that amount to \$3,750.00. After hearing further

1 argument from Campbell on that issue on September 14, the court
2 awarded sanctions in the amount of \$5,000.00.

3 The bankruptcy court entered its order awarding sanctions
4 against O'Malley, Miles and Firm on September 21, 2004.
5 Appellants filed a timely notice of appeal on September 30, 2004.

6 On appeal, Appellants argue that after the motion to dismiss
7 and motion for sanctions were granted, the Okuns took the
8 position in an unrelated appeal that Miles is a partner in
9 Debtor. Appellants also repeat their argument that the voluntary
10 petition should be treated as an involuntary petition. In their
11 responsive brief, the Okuns request further sanctions against
12 Appellants in the amount of \$1,500.⁴

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14 **II.
ISSUE**

15 Whether the bankruptcy court abused its discretion in
16 imposing sanctions against Miles, O'Malley and Firm for filing a
17 bankruptcy petition on behalf of Debtor.

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19 **III.
STANDARD OF REVIEW**

20 An order imposing sanctions is reviewed under an abuse of
21 discretion standard. Duff v. United States Trustee (In re
22 California Fidelity, Inc.), 198 B.R. 567, 571 (9th Cir. BAP
23 1996). Under that standard, we must have a definite and firm
24 conviction that the bankruptcy court committed a clear error of
25 judgment before reversal is proper. AT&T Universal Card Services
26 v. Black (In re Black), 222 B.R. 896, 899 (9th Cir. BAP 1998).

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28 ⁴Because the Okuns did not request the sanctions in a
separate motion as required by Rule 8020, we hereby deny the
request.

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2 **IV.**
3 **DISCUSSION**

4 A. We Will Not Consider Evidence Not Presented to The
5 Bankruptcy Court

6 Miles and the Okuns have a litigious history in state and
7 federal courts. Previously, they appeared before the panel as
8 parties in an appeal of a dismissal of several involuntary
9 petitions filed by the Okuns against Miles, Los Robles, and
10 various other persons and entities. The panel's 2002 decision
11 was appealed to the Ninth Circuit and in February 2005 (after the
12 bankruptcy court dismissed the underlying 2004 case and entered
13 the sanctions order which is the subject of the current appeal),
14 the Okuns filed a motion to disqualify the appellate counsel of
15 Los Robles and five other entities. In that motion, the Okuns
16 stated they are two of the four partners in Debtor and that Miles
17 and his spouse "make up the other two partners" in Debtor. Even
18 though the Okuns repeated their arguments that Okun's bankruptcy
19 operated to dissociate him from the Debtor, they did not mention
20 the 1992 assignment that purported to divest Miles of his
21 partnership interest in Debtor.

22 Appellants argue that the Okuns' position before the Ninth
23 Circuit regarding Miles' current partnership interest in Debtor
24 is inconsistent with their position before the bankruptcy court;
25 they argue that the bankruptcy erred by relying on
26 misrepresentations of the Okuns. The bankruptcy court, however,
27 was never presented with the statements made later by the Okuns
28 in their Ninth Circuit motion and was not presented with the
argument now before us regarding inconsistent judicial positions.

1 The Ninth Circuit motion was filed after the bankruptcy court
2 entered its order currently on appeal.

3 Because the Ninth Circuit motion was not admitted into
4 evidence by the bankruptcy court and is not part of the record in
5 this appeal, we cannot consider it in this appeal; similarly, we
6 cannot consider arguments presented by Appellants for the first
7 time on appeal. Kirschner v. Uniden Corp of Am., 842 F.2d 1074,
8 1077-78 (9th Cir. 1988) (papers not filed or admitted into
9 evidence by trial court prior to judgment on appeal were not part
10 of the record on appeal and thus stricken; appellate court would
11 not consider issues which were not supported by record on
12 appeal); see also Oyama v. Sheehan (In re Sheehan), 253 F.3d 507,
13 512 n.5 (9th Cir. 2001) ("Evidence that was not before the lower
14 court will not generally be considered on appeal"); Kabayan v.
15 Yepremian (In re Yepremian), 116 F.3d 1295, 1297 (9th Cir. 1997)
16 (under Rule 8006, appellate court will not consider post-judgment
17 deposition testimony and declarations; because the deposition and
18 declaration were taken after entry of the judgment on appeal,
19 they were not part of the record on appeal).

20 As noted by the Ninth Circuit in Kirschner, "'We are here
21 concerned only with the record before the trial judge *when his*
22 *decision was made.*'" Kirschner, 842 F.2d at 1077, quoting United
23 States v. Walker, 601 F.2d 1051, 1055 (9th Cir. 1979) (affidavits
24 that "were not part of the evidence presented" to the trial court
25 would not be considered on appeal) (emphasis in Kirschner).
26 Therefore, in deciding whether the bankruptcy court abused its
27 discretion in awarding sanctions, we must consider only the
28 record before it when the decision was made.

1 In light of the foregoing, we will not consider Appellant's
2 arguments that the bankruptcy court erred because it relied on
3 misrepresentations of the Okuns in deciding that Miles was not a
4 general partner of Debtor when he filed a bankruptcy petition on
5 its behalf. We find no error by the bankruptcy court on this
6 issue.⁵

7
8 B. The Record Supports the Bankruptcy Court's Findings that
Miles Was Not a General Partner of Debtor

9 On May 18, 1992, Miles and his spouse assigned their ten
10 percent interest in Debtor to the Trust for "\$70,000 plus a
11 twenty-five percent annual percentage rate return on said
12 \$70,000." They retained "a two year right to buy-back [sic] said
13 ten percent interest" in Debtor.

14 Miles admitted at the bankruptcy court hearing that there
15 was no evidence that he reacquired an interest in the partnership
16 pursuant to the buy-back option. He admitted that he never
17 exercised his option to buy back the ten percent interest.

18 Eleven minutes prior to the bankruptcy court hearing,
19 Miles filed a declaration contending that the Okuns "had taken
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21 ⁵In their reply brief, Appellants argue for the first time
22 that the bankruptcy court's finding is inconsistent with its
23 memorandum decision entered on December 13, 2001, in another Los
24 Robles bankruptcy case; that decision states that the Okuns and
25 Miles (and his spouse) are general partners of Debtor.
26 Appellants did not raise this argument or present this memorandum
27 decision to the bankruptcy court; they did not make this argument
28 in their opening brief. As such, it is waived. Golden v. Chicago
Title Ins. Co. (In re Choo), 273 B.R. 608, 613 (9th Cir. BAP
2002) (issues not raised at the trial court will not be
considered for the first time on appeal; arguments not
specifically and distinctly made in an appellant's opening brief
are waived).

1 the position that money is due and that [Miles'] interest in the
2 partnership was not transferred or forfeited." On appeal,
3 Appellants argue that the bankruptcy court "overlooked" this
4 argument that the Okuns "did not treat the . . . transaction as
5 an assignment of a partnership interest in the prior state court
6 action" but instead treated it as a loan and not as a transfer of
7 the partnership interest. Appellants' Opening Brief at 2.
8 Appellants are incorrect; the bankruptcy court did not "overlook"
9 this argument but instead specifically rejected it, noting that
10 Miles had not presented sufficient proof to support his argument
11 or to overcome the evidence presented by the Okuns.

12 We agree with the bankruptcy court's assessment. Nothing
13 in the late-filed declaration or the attachments supported Miles'
14 statement that his partnership interest had not been transferred
15 or forfeited. Miles presented no intelligible evidence to
16 support his argument and did not present any authority for the
17 proposition that the clear language of the assignment had been
18 rescinded by virtue of conduct by the Okuns. We therefore find
19 no clear error in the court's holding that Miles was not the
20 general partner of Debtor when he filed the bankruptcy petition.⁶

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23 ⁶Appellants do not argue in their opening brief that the
24 bankruptcy court erred in holding that Miles had been dissociated
25 from Debtor by virtue of his own individual bankruptcy filing.
26 Accordingly, even if we disagreed with the bankruptcy court's
27 finding regarding the 1992 assignment, we would not reverse
28 inasmuch as the bankruptcy court's alternative basis for
dismissal (Miles' inability to file the petition due to his
disassociation under California Corporations Code sections
16601(6) (A) and 16603(1)) remains unchallenged on appeal. Choo,
273 B.R. at 613.

1 C. The Bankruptcy Court Did Not Err in Refusing to Treat the
2 Voluntary Petition as an Involuntary Petition

3 Miles did not obtain the consent of the Okuns before filing
4 the voluntary petition. Consequently, he lacked the authority to
5 file the voluntary bankruptcy petition on behalf of Debtor.
6 Goldberg v. Rose (In re Cloverleaf Props.), 78 B.R. 242, 244 (9th
7 Cir. 1987) ("A voluntary petition in bankruptcy requires the
8 consent of all general partners."). Since he failed to obtain
9 the consent of the Okuns, Miles argues that the petition should
10 have been treated as an involuntary petition under Cloverleaf and
11 under In re SWG Assocs., 199 B.R. 557, 561 (Bankr. W.D. Pa.
12 1996).

13 In both of the foregoing cases, the courts held that a
14 voluntary petition filed without the consent of all general
15 partners can be treated as a de facto involuntary petition. In
16 both cases, unlike here, the party filing the non-consensual
17 petition was a general partner. Here, however, the bankruptcy
18 court on the record presented found that Miles was not a general
19 partner of Debtor by virtue of the 1992 assignment of his
20 partnership interest. As such, he lacked authority to file an
21 involuntary petition under section 303(b)(3). Thus, even if the
22 bankruptcy court had treated the petition as an involuntary
23 petition, it would have had to dismiss it because Miles did not
24 have standing as a partner to commence an involuntary case
25 against Debtor. Therefore, the court did not err in refusing to
26 treat the petition as a validly filed involuntary petition.

1 D. The Court Did Not Abuse Its Discretion in Imposing Sanctions

2 The Okuns sought sanctions against Appellants pursuant to
3 Bankruptcy Rule 9011. Rule 9011(b) states that the signature of
4 an attorney or party constitutes a certificate that a document
5 presented to a court "is not being presented for any improper
6 purpose, such as to harass or to cause unnecessary delay or
7 needless increase in the cost of litigation," that the positions
8 asserted therein are supported by "existing law or by a
9 nonfrivolous argument" for the extension or modification of law
10 and that the allegations contained therein have evidentiary
11 support. Fed. R. Bankr. P. 9011(b). If a court determines that
12 this provision has been violated, it may impose an appropriate
13 sanction on the attorney or parties responsible for the
14 violation. Fed. R. Bankr. P. 9011(c).

15 In this case, Miles signed (under penalty of perjury) a
16 statement that he had "been authorized to file this petition on
17 behalf of the debtor" even though (assuming he was a general
18 partner) he had not obtained the consent of the Okuns,
19 unquestionably general partners. He further represented (under
20 penalty of perjury) that he was a general partner of Debtor when
21 he was not, and when he was unable to provide credible
22 evidentiary support for that position. The law did not allow him
23 to file the voluntary petition, and he could not offer a
24 nonfrivolous argument that the law should not apply. Moreover,
25 the bankruptcy court found that Miles had filed the petition on
26 the heels of an unfavorable state court judgment against him and
27 in favor of the Okuns and that he had filed the petition to
28 harass the Okuns. The record supports these findings; a multi-

1 million dollar judgment on multiple counts was entered against
2 Miles in favor of the Okuns on April 14, 2004, sixteen days prior
3 to the involuntary petition. In light of the foregoing, the
4 bankruptcy court did not abuse its discretion in imposing
5 sanctions against Appellants for filing an improper voluntary
6 petition on behalf of Debtor.

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8 **V.
CONCLUSION**

9 On this record, the bankruptcy court did not abuse its
10 discretion in concluding that Appellants violated Rule 9011 in
11 filing Debtor's bankruptcy petition. Therefore, we AFFIRM.

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