

DEC 01 2011

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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

|    |                     |   |   |
|----|---------------------|---|---|
| 5  | In re:              | ) | BAP No. EC-11-1266-DJuKi                |
|    |                     | ) |   |
| 6  | ROBERT M. VANCE and | ) | Bk. No. 10-21844-CMK7                   |
|    | MARY L. VANCE,      | ) |   |
| 7  |                     | ) | Adv. No. 10-02255-CMK                   |
|    | Debtors.            | ) |   |
| 8  | _____               | ) |   |
|    |                     | ) |   |
| 9  | JUSTIN PARRISH,     | ) |   |
|    |                     | ) |   |
| 10 | Appellant,          | ) |   |
|    |                     | ) |   |
| 11 | v.                  | ) | <b>M E M O R A N D U M</b> <sup>1</sup> |
|    |                     | ) |   |
| 12 | ROBERT M. VANCE,    | ) |   |
|    |                     | ) |   |
| 13 | Appellee.           | ) |   |
|    | _____               | ) |   |

Submitted Without Oral Argument  
on November 16, 2011

Filed - December 1, 2011

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

|    |              |   |
|----|--------------|---|
| 20 | Appearances: | No appearance by or on behalf of Appellant,<br>Justin Parrish. Appellee, Robert M. Vance,<br>appeared pro se and submitted on the briefs. |
| 21 |              |   |
| 22 |              | _____   |

Before: DUNN, JURY, and KIRSCHER, Bankruptcy Judges.

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



1 nondischargeable pursuant to § 523(a)(2).<sup>3</sup>

2 As relevant to the issues in the Vance Appeal, the California  
3 Eastern Bankruptcy Court entered a "Pretrial Scheduling Order" on  
4 August 24, 2010, which set October 28, 2010, as the date on which  
5 discovery closed, and November 23, 2010 as the date for the pre-  
6 trial conference. Following the pre-trial conference, the  
7 California Eastern Bankruptcy Court entered a civil minute order  
8 ("Trial Scheduling Order"), which (1) set the Vance Trial for  
9 March 8, 2011, at 10:00 a.m., and (2) set the deadline for the  
10 parties to comply with Civil Rule 26(a)(3) and Local Bankruptcy  
11 Rule 9017-1 with respect to alternate direct testimony declarations  
12 and marked exhibits.

13 Local Bankruptcy Rule 9017-1(a) sets forth the procedure for  
14 alternate direct testimony:

15 (a) Alternate Direct Testimony Procedure.

16 (1) Purpose. The purpose of this procedure is to  
17 facilitate pretrial preparation and to streamline the  
18 adducement of direct testimony in trial and contested  
19 hearings so as to reduce trial time without sacrificing  
20 due process and a fair trial. This procedure shall be  
21 known as the Alternate Direct Testimony Procedure.

22 (2) Applicability. Unless otherwise ordered, the  
23 Alternate Direct Testimony Procedure shall be used in all  
24 trials and contested hearings not scheduled for the law

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25 <sup>3</sup> Mr. Parrish previously had included Mr. Vance as a  
26 defendant in the adversary proceeding he filed against Mr. Thomas.  
After the California Central Bankruptcy Court dismissed Mr. Vance as  
a defendant in the adversary proceeding filed in Mr. Thomas's  
bankruptcy case, Mr. Parrish commenced the adversary proceeding  
against Mr. Vance in the California Eastern Bankruptcy Court, where  
Mr. Vance's bankruptcy case was pending.

1 and motion calendar. The failure of any party to any such  
2 trial or contested hearing to object in writing at or  
3 before the pretrial conference, if one is held, or if not,  
4 on or before the date of the trial setting hearing, shall  
5 be deemed as consent to the use of this alternate  
6 testimony procedure for such trial or contested hearing.

7 (3) Content and Preparation. For each witness (excluding  
8 hostile or adverse witnesses) that an attorney calls on  
9 behalf of his/her client's case, there shall be prepared  
10 in triplicate a succinct written declaration, executed  
11 under penalty of perjury, of the direct testimony which  
12 that witness would be prepared to give as though questions  
13 were propounded in the usual fashion. Each statement of  
14 fact or opinion shall be separate, sequentially numbered  
15 and shall contain only matters that are admissible under  
16 the Federal Rules of Evidence (e.g., avoiding  
17 redundancies, hearsay, and other obvious objectionable  
18 statements).

19 Local Bankruptcy Rule 9017-1(c) provides that the California Eastern  
20 Bankruptcy Court could, in its discretion, allow live direct  
21 testimony even if it had ordered alternate direct testimony by  
22 declaration.

23 The Trial Scheduling Order provided that Mr. Parrish's trial  
24 materials were due February 14, 2011.

25 On February 14, 2011, Mr. Parrish complied with the Trial  
26 Scheduling Order and filed his pre-trial disclosures, in which he  
27 named himself and three other persons to be witnesses on his behalf,  
28 and in which Mr. Parrish included the exhibits he intended to rely  
29 upon at trial. Mr. Parrish also filed a declaration for each listed  
30 witness to be used as direct testimony at trial. On March 2, 2011,  
31 Mr. Parrish filed his trial brief.

32 Mr. Vance's trial materials were due by February 28, 2011.  
33 Mr. Vance filed his declaration and his trial brief on March 3,  
34 2011.

1 In an apparent effort to delay the Vance Trial until after  
2 the California Central Bankruptcy Court had ruled in his favor  
3 against Mr. Thomas essentially on the same claim for relief, on  
4 February 9, 2011, Mr. Parrish filed a motion to continue the Vance  
5 Trial ("Continuance Motion"), which states in its entirety:

6 1. This is an adversary proceeding in which plaintiff is  
7 seeking to prove defendant borrowed money from plaintiff  
8 through false representations and is non-dischargeable  
9 under the Bankruptcy Code.

10 2. On November 23, 2010, this court set trial for  
11 March 8, 2011, and imposed a deadline of February 14, 2011  
12 for plaintiff to file all of his witness declarations with  
13 the court and upon defendant. Plaintiff will meet that  
14 deadline.

15 3. Plaintiff is the senior building inspector assigned to  
16 a multi-million dollar construction project in the City of  
17 Irvine, County of Orange, California. Plaintiff is  
18 committed to being on the job every day for the term of  
19 this project which is scheduled to end by the end of May,  
20 2011. Plaintiff is unable to interrupt this work to  
21 prepare for and attend the trial as currently scheduled  
22 for March 8th, 2011.

23 4. Plaintiff also expects to call three additional  
24 witnesses. One of those witnesses, an attorney, is not  
25 available for the current trial date.

26 5. Plaintiff is otherwise ready for trial and will serve  
upon defendant all of the materials as described in the  
Court's minute order of November 23, 2010.

6. Plaintiff anticipates that defendant will refuse to  
consent to the continuance of this trial date.

7. In the meantime, plaintiff wishes to engage defendant  
in settlement negotiations in order to obviate the  
necessity of trial.

8. Trial against [defendant's] business partner, Glenn S.  
Thomas, based on the identical issues is currently  
scheduled in the Bankruptcy Court for the Central District  
of California for February 23, 2011.

9. Plaintiff will be calling the same witnesses and

1 offering the same exhibits at that trial as in his trial  
2 scheduled in the Eastern District of California.

3 Plaintiff desires to show defendant that he has a strong  
4 case and that settlement would benefit all concerned.

5 Continuance Motion at pp. 2-3 (emphasis added).

6 Mr. Parrish set the Continuance Motion to be heard at 9:30  
7 a.m. on March 8, 2011, immediately before the commencement of the  
8 Vance Trial. On February 22, 2011, a deputy clerk of the California  
9 Eastern Bankruptcy Court left a voice mail message for Mr. Parrish  
10 informing him that the Continuance Motion would be heard at  
11 10:00 a.m. by Judge Russell and requiring that he file an amended  
12 notice of the hearing on the Continuance Motion. On February 28,  
13 2011, Mr. Parrish filed the amended notice of hearing on the  
14 Continuance Motion. Also on February 28, 2011, Mr. Parrish filed a  
15 reply ("Reply") to Mr. Vance's opposition to the Continuance Motion,  
16 in which Mr. Parrish asserted that because Mr. Vance had filed no  
17 declarations or exhibits, he would not be prejudiced by any delay of  
18 the Vance Trial.

19 Notwithstanding notification from the California Eastern  
20 Bankruptcy Court that his hearing on the Continuance Motion was set  
21 at 10:00 a.m. before Judge Russell, on the Friday before the  
22 hearing, Mr. Parrish "signed up with CourtCall" to appear  
23 telephonically for "the 9:30 a.m. law and motion calendar." On the  
24 Monday before the hearing, CourtCall informed Mr. Parrish that they  
25 were cancelling his telephone appearance for the 9:30 a.m. law and  
26 motion calendar. Mr. Parrish asserts that because of this chain of  
events, he was not able to appear at the 10:00 a.m. hearing on the

1 Continuance Motion.

2           On March 8, 2011, the California Eastern Bankruptcy Court  
3 called the hearing on the Continuance Motion. Noting no appearance  
4 by or on behalf of Mr. Parrish, the bankruptcy judge asked the court  
5 clerk whether a message had been received from Mr. Parrish. The  
6 court clerk responded: "I believe so. I believe that he was --  
7 what I have heard was that he was not going to be appearing today."  
8 The California Eastern Bankruptcy Court then ruled on the  
9 Continuance Motion:

10           I read the [Continuance Motion]. [Mr. Parrish] basically  
11 states that he's working elsewhere and that one of his  
12 witnesses isn't available. Unfortunately for him, this  
13 Court is ready to proceed to trial. The trial date has  
14 been set and we're ready to go, and the Plaintiff is not  
15 here. The Plaintiff is apparently more interested in his  
16 job than he is in proceeding with his case.

17 Hrg. Tr. (March 8, 2011) at 3:23-4:4.

18           Although Mr. Parrish did not appear for the Vance Trial on  
19 March 8, 2011, the bankruptcy court conducted the Vance Trial in his  
20 absence. The only witness was Mr. Vance. Mr. Vance "testified"  
21 that on February 23, 2011, the Central California Bankruptcy Court  
22 had conducted the trial in Mr. Parrish's § 523(a)(2) adversary  
23 proceeding against Mr. Thomas. In the Thomas Trial, on the same  
24 evidence Mr. Parrish presented for the Vance Trial as his alternate  
25 direct testimony, the California Central Bankruptcy Court had found  
26 "[t]here was no fraud." Mr. Vance also clarified for the California  
Eastern Bankruptcy Court that Mr. Vance, as of the current March 8  
trial date, still had never met Mr. Parrish. The California Eastern  
Bankruptcy Court then made the following findings on the record:

1 I have reviewed the documents that were submitted by both  
2 sides prior to trial. I know that that's not necessarily  
3 the best evidence that's available, but what was  
4 presented, I agree with you, Mr. Vance, they do not show  
5 fraud, certainly not on your part. You never met the man,  
6 never talked to him prior to his complaint being filed, I  
7 guess. . . . Consequently, judgment will be entered in  
8 your favor. I'm going to enter a judgment rather than  
9 dismissing the case so that [Mr. Parrish] has had his  
10 opportunity to be here in court and he wasn't here. He  
11 presented evidence, you presented evidence. I reviewed  
12 that evidence and concluded that you are entitled to a  
13 judgment in your favor, and that's going to be the ruling.

14 Hrg. Tr. (March 8, 2011) at 7:19-8:20.

15 On March 10, 2011, the California Eastern Bankruptcy Court  
16 entered two civil minute orders. The civil minute order with  
17 respect to the Continuance Motion provided: "The motion is ORDERED  
18 DENIED." The civil minute order with respect to the Vance Trial  
19 provided: "IT IS ORDERED that judgment is awarded in favor of  
20 defendant; any obligation owed to Justin Parrish by Robert Vance is  
21 discharged."

22 Mr. Parrish timely filed a motion to vacate the "judgment"  
23 and for a new trial ("New Trial Motion"). In the New Trial Motion,  
24 Mr. Parrish complained that the Vance Trial should not have taken  
25 place, primarily because he had requested a continuance of the trial  
26 date, and that both the California Eastern Bankruptcy Court and  
27 Mr. Vance had "plenty of advance notice" that Mr. Parrish "wished"  
28 the Vance Trial to be continued.

29 In the New Trial Motion, Mr. Parrish characterized as  
30 "facile" the California Eastern Bankruptcy Court's reasoning that  
31 because Mr. Parrish had never met Mr. Vance, Mr. Vance could not  
32 have committed fraud. Mr. Parrish asserts that had he been present

1 at the Vance Trial:

2 - He would have alerted the California Eastern Bankruptcy  
3 Court to a joint venture agreement Mr. Vance had signed representing  
4 that Mr. Vance and Mr. Thomas had a 39.5-mile fiber optic job in  
5 Northern California, and to "evidence" that "they wished to borrow  
6 large sums of money to finance the job."

7 - He would have alerted the California Eastern Bankruptcy  
8 Court to an equipment lease and purchase agreement also signed by  
9 Mr. Vance, and to "evidence" that Mr. Thomas had told Mr. Parrish  
10 that Mr. Vance needed the items of equipment identified in the  
11 agreement to complete the work.

12 - He would have pointed out to the California Eastern  
13 Bankruptcy Court the direct testimony of Valdean Watson, an  
14 attorney, who opined that the documents referred to above  
15 constituted "unfortunate evidence" that Mr. Thomas and Mr. Vance  
16 wanted to borrow a large sum of money from Mr. Parrish without any  
17 intention of paying it back.

18 In addition to the New Trial Motion, Mr. Parrish also filed a  
19 motion for additional findings of fact and conclusions of law  
20 ("Additional Findings Motion"), asserting that the California  
21 Eastern Bankruptcy Court failed to state on the record how  
22 Mr. Parrish had failed to meet his burden of proving fraud.

23 Mr. Vance filed his own post-judgment motion, through which  
24 he sought to recover legal fees and costs of defense ("Costs

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26 ///



1 bringing the Costs Motion. Finally, Mr. Parrish asserts that the  
2 California Eastern Bankruptcy Court erred when it ruled that  
3 Mr. Vance was entitled to a discharge of the Parrish Debt.

#### 4 **STANDARDS OF REVIEW**

5 We may affirm the bankruptcy court's decision on any ground  
6 fairly supported by the record. Wirum v. Warren (In re Warren),  
7 568 F.3d 1113, 1116 (9th Cir. 2009).

8 Ordinarily, we will not consider an issue raised for the  
9 first time on appeal. Golden Gate Hotel Ass'n v. City & County of  
10 San Francisco, 18 F.3d 1482, 1487 (9th Cir. 1994).

#### 11 **DISCUSSION**

12 Our decision in this appeal is easily reached. In the  
13 Continuance Motion, Mr. Parrish stated that he would be "calling  
14 the same witnesses and offering the same exhibits at [the Vance  
15 Trial as in the Thomas Trial] . . . ." The declarations and the  
16 exhibits that Mr. Parrish relied upon as his alternate direct  
17 testimony in the Vance Trial was a subset of the evidence he relied  
18 upon in the Thomas Trial. The Panel conducted a complete de novo  
19 review of the sufficiency of that evidence in the unpublished  
20 memorandum decision issued in the Thomas Appeal and found that  
21 evidence wanting to except the Parrish Debt from Mr. Thomas's  
22 discharge. We therefore find no reversible error in the California  
23 Eastern Bankruptcy Court's determination that any liability  
24 Mr. Vance might have on the Parrish Debt likewise was discharged.

25 In light of this determination, we do not address  
26 Mr. Parrish's issues with respect to the Continuance Motion, the New

1 Trial Motion, and the Additional Findings Motion.

2 We reject Mr. Parrish's assertion on appeal that the  
3 California Eastern Bankruptcy Court abused its discretion when it  
4 failed to sanction Mr. Vance for prosecuting the Costs Motion.  
5 Nowhere in the record before us can we find that Mr. Parrish asked  
6 the bankruptcy court to impose any sanction on Mr. Vance. The  
7 relief Mr. Parrish requested in his opposition to the Costs Motion  
8 was that the California Eastern Bankruptcy Court deny the Costs  
9 Motion, "but only after the Court takes the time to examine  
10 defendant Robert M. Vance to document his PERJURY AND FRAUD."

11 **CONCLUSION**

12 Based on the Panel's analysis of Mr. Parrish's evidence in  
13 the Thomas Appeal, which we adopt for purposes of disposition of the  
14 Vance Appeal, the California Eastern Bankruptcy Court did not err in  
15 its determination that the Parrish Debt was discharged in  
16 Mr. Vance's bankruptcy case. We AFFIRM.

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