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SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
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NOT FOR PUBLICATION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.)	M E M O R A N D U M ¹
)	
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, Justin Parrish. Appellee, Robert M. Vance, appeared pro se and submitted on the briefs.
21		
22		_____

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

¹ 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).³

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

25 ³ 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

25 ///

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

