

NOV 03 2015

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-14-1559-DJuTa
)	
SAN JOSE AIRPORT HOTEL, LLC,)	Bk. No. 09-51045
DBA Holiday Inn San Jose,)	
)	
Debtor.)	
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MEYERS LAW GROUP, P.C.,)	
)	
Appellant,)	
)	
v.)	M E M O R A N D U M¹
)	
MOHAMMED POONJA, Chapter 7)	
Trustee; MANOU MOBEDSHAHI,)	
)	
Appellees.)	
)	
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Argued and Submitted on October 23, 2015
at San Francisco, California

Filed - November 3, 2015

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Merle Cooper Meyers argued for Appellant.

Before: DUNN, JURY AND TAYLOR, 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 8024-1.

1 Meyers Law Group, P.C. ("MLG") served as counsel for the
2 debtors in two jointly administered chapter 11² cases
3 ("Chapter 11 Cases"). After the bankruptcy court converted both
4 cases to chapter 7, MLG applied for and obtained approval of its
5 fees and costs earned in the chapter 11 cases. MLG subsequently
6 moved the bankruptcy court for a determination that MLG was
7 entitled to payment of interest on its fees and costs pursuant to
8 a subordination agreement entered into between MLG and the
9 debtors' principal during the Chapter 11 Cases. The bankruptcy
10 court denied the motion without prejudice to refile in the
11 event of a change of circumstances. MLG appealed. We DISMISS
12 the appeal for lack of jurisdiction.

13 I. FACTUAL BACKGROUND

14 San Jose Airport Hotel, LLC, and its affiliate, Mobedshahi
15 Hotel Group (collectively the "Debtors") filed chapter 11
16 petitions in February 2009.³ Manouchehr Mobedshahi was the
17 principal of both Debtors, and both Debtors were represented in
18 the Chapter 11 Cases by MLG. On August 25, 2009, the bankruptcy
19 court ordered joint administration of the Chapter 11 Cases.
20 MLG's employment agreement provided for payment of hourly fees
21

22 ² Unless otherwise indicated, all chapter and section
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
24 All "Rule" references are to the Federal Rules of Bankruptcy
25 Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure.

26 ³ We exercise our discretion to take judicial notice of
27 documents filed in the Debtors' bankruptcy cases and related
28 adversary proceedings. See Atwood v. Chase Manhattan Mortg. Co.
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 and reimbursement of costs, with interest to accrue at the rate
2 of twelve percent per annum.

3 During the Chapter 11 Cases, Mr. Mobedshahi made a \$400,000
4 loan to the Debtors, secured by a postpetition lien on all of the
5 Debtors' assets, including causes of action. This loan was
6 governed by a debtor-in-possession loan agreement ("Loan
7 Agreement"), which granted Mr. Mobedshahi a superpriority
8 administrative expense claim. Pursuant to the Loan Agreement, as
9 approved by the bankruptcy court, Mr. Mobedshahi's secured claim
10 was to be paid prior to all administrative and other claims with
11 two exceptions. First, the Loan Agreement acknowledged the
12 priority of a prepetition lien on most of the Debtors' assets in
13 favor of General Electric Capital Corporation ("GE"). Second,
14 the Loan Agreement included the following provision regarding
15 subordination ("Subordination Clause"):

16 [T]he liens and security interests of [Mr. Mobedshahi],
17 and the superpriority administrative expense claim of
18 [Mr. Mobedshahi], shall be fully and irrevocably
19 subordinated to the following: (a) the allowed fees and
20 expenses of professionals retained by [the Debtors in
the Chapter 11 Cases]; and (b) any fees accruing and
payable after the [p]etition [d]ate to the United
States Trustee pursuant to 28 U.S.C. Section
1930(a)(6).

21 The Debtors' primary asset was the Holiday Inn San Jose
22 hotel, which was subject to GE's deed of trust. The Debtors
23 twice attempted to sell the hotel, once to Infinity HI, LLC, and
24 once to Sevak & Sons, L.P. When these sales ultimately failed,
25 GE sought and obtained relief from the automatic stay to
26 foreclose on the hotel. The foreclosure sale took place on
27 April 9, 2010, after which the Chapter 11 Cases promptly were
28 converted to chapter 7 on the Debtors' motion. Mohamed Poonja

1 ("Trustee") was appointed chapter 7 trustee for the converted
2 cases ("Chapter 7 Cases").

3 In the Chapter 7 Cases, MLG applied for and obtained
4 approval of its fees earned and costs incurred in the Chapter 11
5 Cases. The bankruptcy court's order granting the application
6 ("Fee Order") directed the Trustee to pay the total amount
7 requested, \$335,129.52,⁴ from available estate funds, including
8 any funds subject to Mr. Mobedshahi's postpetition lien. The Fee
9 Order permitted MLG to seek additional amounts "to the extent
10 accruing after October 31, 2010."

11 The Trustee brought adversary proceedings against Infinity
12 HI, LLC and Sevak & Sons, L.P., alleging various claims arising
13 out of the failed sales. Infinity HI, LLC eventually paid
14 \$175,000 to the estate in settlement of the Trustee's claim
15 ("Infinity Settlement"), and the Trustee ultimately obtained
16 judgment against Sevak & Sons, L.P. in the amount of \$11,648,758
17 ("Sevak Judgment"). The Sevak Judgment remains on appeal with
18 the United States District Court for the Northern District of
19 California.

20 After the Trustee received the Infinity Settlement, MLG
21 demanded payment of its fees out of the Infinity Settlement
22 proceeds, pursuant to Mr. Mobedshahi's lien and the Subordination
23 Clause. MLG prepared a stipulation that would have provided for
24 the payment of interest on MLG's claim out of funds that
25 otherwise would have been paid to Mr. Mobedshahi on his
26

27 ⁴ This amount was net of a retainer MLG received during the
28 pendency of the Chapter 11 Cases.

1 superpriority administrative expense claim. The Trustee refused
2 to sign the stipulation, citing concerns that the estates would
3 be burdened by interest on MLG's fees as well as on
4 Mr. Mobedshahi's claim. However, the Trustee did move the
5 bankruptcy court to permit disbursement of the Infinity
6 Settlement proceeds to MLG and to the United States Trustee, pro
7 rata, for allowed fees and costs pursuant to the Subordination
8 Clause. The Trustee's motion did not address whether the payment
9 to MLG was to be credited to interest or to principal. The
10 bankruptcy court granted the motion, and the funds were
11 disbursed.

12 On October 15, 2014, MLG filed a supplemental application
13 for compensation ("Supplemental Application"), seeking payment of
14 fees and costs in the combined amount of \$20,897.75, which MLG
15 incurred in defending its prior fee application. Concurrently
16 with the Supplemental Application, MLG filed a document entitled
17 Meyers Law Group's Motion to Determine Disposition of Collateral,
18 Pursuant to 11 U.S.C. § 725 ("Disposition Motion"). In the
19 Disposition Motion, MLG requested "an order determining the
20 disposition of present and future collateral encumbered by MLG's
21 secured claim (by way of subordination of the secured
22 postpetition lender [i.e., Mr. Mobedshahi])." MLG argued that
23 the Subordination Clause operated to "trade" the respective
24 priorities of MLG's and Mr. Mobedshahi's claims. Thus, MLG would
25 be entitled to payment of its entire claim, with interest, out of
26 the Infinity Settlement proceeds and ultimately out of the Sevak
27 Judgment before any distribution could be made to Mr. Mobedshahi.
28 In the conclusion of the Disposition Motion, MLG requested "an

1 order directing the disposition of any and all funds that may be
2 received by the Trustee" to which Mr. Mobedshahi's lien would
3 attach, according to the following scheme ("Proposed
4 Disposition"):

5 A. First, to MLG and the UST, proportionately, up
6 to the lesser of (i) the sum of the UST's fees and
7 MLG's allowed fees and costs . . . plus interest, and
8 (ii) Mr. Mobedshahi's loan balance, including interest
9 accrual;

10 B. Second, to Mr. Mobedshahi, up to the remaining
11 amount of his loan balance, including interest; and

12 C. Third, to Mr. Mobedshahi, up to the amount of
13 MLG's allowed fees and costs . . ., without interest
14 accrual, plus the amount of the UST's fees

15 MLG acknowledged that attorney fees ordinarily do not accrue
16 interest except in surplus estates. In spite of this, MLG argued
17 that the court should order payment of interest on MLG's attorney
18 fees, as the Proposed Disposition would have no effect on
19 creditors other than MLG and Mr. Mobedshahi. Since the Proposed
20 Disposition would not increase the aggregate amount of the two
21 claims, there would be no increased burden on the estate.

22 The Trustee filed a joint response to the Supplemental
23 Application and the Disposition Motion. In his response, the
24 Trustee described his discussions with MLG and his concerns
25 regarding the propriety of paying interest on MLG's claim.
26 Nevertheless, the Trustee did not oppose the Disposition Motion
27 and "recognize[d] that this issue was between Mr. Mobedshahi and
28 MLG; provided however, there was no adverse impact upon the
estate." Mr. Mobedshahi did not respond to the Disposition
Motion.

 The bankruptcy court held a hearing on the Disposition
Motion and the Supplemental Application ("Hearing"). At the

1 Hearing, the court announced that it would grant the Supplemental
2 Application but deny the Disposition Motion. In colloquy during
3 the Hearing, MLG's counsel acknowledged that "there really are no
4 funds right now. We're not - we're saying if and when there -
5 there is collateral proceeds . . . it should be paid to us
6" The court likewise noted that "we're not in a situation
7 where there's enough money to pay everybody, anyway." Even with
8 respect to Mr. Mobedshahi's secured claim, the court noted that
9 it was "not clear at this point" whether there would be enough
10 funds in the estate to pay that amount in full.

11 In explaining its rationale for denying the Disposition
12 Motion, the bankruptcy court stated that the bankruptcy estate
13 had no liability for post-petition interest except in a surplus
14 case and that MLG therefore had a claim only for the face amount
15 of its fees and costs. The court went on to conclude that, if
16 MLG wished to receive interest payments, it would have to seek
17 them from Mr. Mobedshahi rather than from the estate. With
18 regard to MLG's argument that payment of interest on its claim
19 would be carved out solely from funds that would otherwise go to
20 Mr. Mobedshahi, the court made the following statements:

21 I think it's a nice distinction, but I don't think it's
22 a correct result. I think what I have to award is
23 nominal fees and that's what I'm going to award.
24 That's all that [§] 726(a)(5) allows. . . .
25 . . .
26 Your argument is that the [Subordination Clause] and
27 the - the retainer agreement that you signed with the
28 estate gives you the right to - to interest. And I
don't think that those two provisions trump the Code.
And I'm telling you that I'm not going to give you an
order that says that the proceeds from this estate
[will] be distributed in that way [i.e., according to
the Proposed Disposition]. You are only entitled to a

1 nominal claim

2 [E]ssentially I think there's a conflict between the
3 statute and the way your subordination and employment
4 arrangement worked.

5 After discussing the pending appeal of the Sevak Judgment,
6 the court told counsel for MLG that MLG was "free to refile the
7 motion" in the event of a change of circumstances, and added, "at
8 this stage in the proceedings that's - that's actually the way I
9 think it should play out."

10 After the Hearing, the bankruptcy court entered an order
11 denying the Disposition Motion ("Disposition Order"). The
12 Disposition Order contained the following language:

13 Except as stated in the Court's oral ruling with
14 respect to the accrual of interest, nothing herein
15 shall be deemed to prejudice MLG's rights and claims
16 against the estate herein or against Manouchehr
17 Mobedshahi or any other party under the terms of [the
18 Subordination Clause], as described in the
19 [Disposition] Motion.

20 MLG appealed.

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction under 28 U.S.C.
23 §§ 1334 and 157(b) (2) (A). We discuss our jurisdiction below.

24 **III. ISSUE**

25 Whether we have jurisdiction over this appeal.

26 **IV. STANDARDS OF REVIEW**

27 We can raise issues concerning our own jurisdiction sua
28 sponte, and we address them de novo. Giesbrecht v. Fitzgerald
(In re Giesbrecht), 429 B.R. 682, 687 (9th Cir. BAP 2010).

29 **V. DISCUSSION**

30 Before considering the substance of this appeal, we consider
31 sua sponte whether we have jurisdiction to do so.

1 Unless an appellant requests and receives leave to appeal
2 from an interlocutory order of the bankruptcy court, we have
3 jurisdiction only over appeals from final orders. 28 U.S.C.
4 § 158(b). A bankruptcy court's order is final if it "1) **resolves**
5 and seriously affects substantive rights and 2) **finally**
6 determines the discrete issue to which it is addressed." Rosson
7 v. Fitzgerald (In re Rosson), 545 F.3d 764, 769 (9th Cir. 2008)
8 (emphasis added). A final order is one that "clearly evidences
9 the judge's intention that it be the court's final act in the
10 matter." In re Giesbrecht, 429 B.R. at 687 (citing Slimick v.
11 Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir. 1990)).
12 Otherwise, the order does not "end any of the interim disputes
13 from which appeal would lie." In re Slimick, 928 F.2d at 307
14 n.1.

15 The Disposition Order was not final. The bankruptcy court
16 stated that MLG was "free to refile" the Disposition Motion
17 should additional funds become available. The Disposition Order
18 moreover provided that it should "not be deemed to prejudice
19 MLG's rights and claims against the estate . . . or against
20 Manouchehr Mobedshahi or any other party." Although this
21 provision contained an exception regarding the bankruptcy court's
22 oral statements "with respect to the accrual of interest," the
23 context of those statements makes clear that the Disposition
24 Order was not intended as the bankruptcy court's final act in the
25 matter.

26 Indeed, as the bankruptcy court noted and counsel for MLG
27 conceded at the Hearing, at the time the Disposition Motion was
28 filed, the estate did not have sufficient funds to pay even the

1 principal amount of MLG's claim in full, let alone interest on
2 that claim. Under these circumstances, the issue of interest
3 accrual was not ripe for decision. See Texas v. U.S., 523 U.S.
4 296, 300 (1998) (claim resting upon "contingent future events
5 that may not occur" is not ripe for consideration); see also Ray
6 Charles Foundation v. Robinson, 795 F.3d 1109, 1117 (9th Cir.
7 2015) ("abstract inquiries" into "speculative" future events are
8 not ripe). The Disposition Motion's lack of ripeness bolsters
9 our conclusion that the Disposition Order was not, and indeed
10 could not have been, a final order.

11 Having concluded that the Disposition Order was not a final
12 order, we cannot exercise jurisdiction over the appeal unless we
13 grant leave to appeal. Although MLG did not request leave to
14 appeal, we treat the timely notice of appeal as a motion for
15 leave to appeal. Rule 8004(d); Roderick v. Levy (In re Roderick
16 Timber Co.), 185 B.R. 601, 604 (9th Cir. BAP 1995). In
17 determining whether to exercise our discretion to grant leave to
18 appeal, we consider whether the Disposition Order "involve[d] a
19 controlling question of law as to which there is a substantial
20 ground for difference of opinion and whether an immediate appeal
21 may materially advance the ultimate termination of the
22 litigation," as well as whether refusal to grant leave will
23 result in wasted litigation and expense. Id. (citing Official
24 Comm. of Unsecured Creditors v. Credit Lyonnais Bank Nederland,
25 N.V. (In re NSB Film Corp.), 167 B.R. 176, 180 (9th Cir. BAP
26 1994)). Considering these factors in light of the circumstances
27 discussed above, in particular the lack of sufficient funds in
28 the estate, we conclude that it would be inappropriate to grant

1 leave to appeal.

2 **VI. CONCLUSION**

3 Based on the foregoing, we conclude that the Disposition
4 Order was not a final order. Because we deny leave to appeal, we
5 lack jurisdiction over the appeal. We DISMISS.

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