

JUL 07 2016

NOT FOR PUBLICATION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-14-1372-KuWJu
)		
THE ZUERCHER TRUST OF 1999,)	Bk. No.	12-32747
)		
Debtor.)	Adv. No.	13-03046
)		
UPTOWN STERLING, LLC; MONICA)		
HUJAZI,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM*	
)		
E. LYNN SCHOENMANN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
)		

Argued on January 21, 2016
at San Francisco, California

Submitted - May 26, 2016

Filed - July 7, 2016

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

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: Bradley Kass of Kass & Kass Law Offices argued for appellants Uptown Sterling, LLC and Monica Hujazi; Thomas F. Koegel of Crowell & Moring LLP argued for appellee E. Lynn Schoenmann, Chapter 7 Trustee.

*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 Before: KURTZ, WANSLEE** and JURY, Bankruptcy Judges.

2 **INTRODUCTION**

3 Uptown Sterling, LLC and Monica Hujazi appeal from an
4 interlocutory order appointing a receiver and granting injunctive
5 relief pursuant to state law, as made applicable in adversary
6 proceedings by Rule 7064.¹ By order entered December 17, 2014, a
7 motions panel of this court previously granted the appellants
8 leave to appeal.

9 However, upon further consideration, because the appellants
10 lack standing to appeal all but one limited aspect of the order
11 on appeal, and because the probability we could grant meaningful
12 relief as to this limited aspect is remote, we conclude (with the
13 benefit of hindsight) that leave to appeal was improvidently
14 granted. There is no legitimate reason why this appeal needs to
15 be decided now as to the narrow issue that survives our standing
16 inquiry.

17 Accordingly, we hold that leave to appeal will be DENIED and
18 this appeal will be DISMISSED for lack of jurisdiction.

19 **FACTS**

20 The Zuercher Trust was owned and controlled by Monica Hujazi
21 and was formed as a business trust to own, develop and manage
22 California real estate. Hujazi commenced a chapter 11 bankruptcy
23

24 ^{**}Hon. Madeleine C. Wanslee, United States Bankruptcy Judge
25 for the District of Arizona, sitting by designation.

26 ¹Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All "Civil Rule" references are to
the Federal Rules of Civil Procedure.

1 case on behalf of the Zuercher Trust in September 2012 because a
2 foreclosure sale of some of the trust's real property was
3 imminent.

4 In January 2013 the bankruptcy court ordered the appointment
5 of a chapter 11 trustee, and in March 2013 the trustee commenced
6 an adversary proceeding seeking to avoid and recover as
7 fraudulent transfers under § 548 several transfers of real
8 property the Zuercher Trust made to other entities. According to
9 the complaint, these transfers included: (1) an apartment
10 building located on Martin Luther King Junior Way in Oakland
11 California to Uptown Sterling; (2) an apartment building located
12 on Mission street in San Francisco to SF Corners LLC; (3) a
13 parcel of real property located on Amphlett Boulevard in San
14 Francisco to Peninsula Commons LLC; and (4) a parcel of real
15 property located on San Raymundo Road in Hillsborough, California
16 to Peninsula Commons LLC.

17 Defendants admitted in their answer that the Zuercher Trust
18 transferred the Oakland apartment building in September 2011 and
19 that it transferred the other parcels of real property referenced
20 in the complaint in April 2011. Hujazi was unable during
21 discovery to produce any documentation demonstrating that the
22 Zuercher Trust received anything of value in exchange for these
23 transfers, nor was she able to recollect during her January 2014
24 deposition any such value given. Also during discovery, Hujazi
25 confirmed that she owned and/or controlled each of the transferee
26 entities that had received real property from the Zuercher Trust
27 in 2011.

28 After a significant amount of discovery was completed, in

1 March 2014 the trustee filed a motion for the appointment of a
2 receiver.² The moving papers discussed at length the risks the
3 trustee allegedly faced if the transferees continued to retain
4 possession and control of the transferred properties before the
5 resolution of the fraudulent transfer litigation. In addition,
6 the trustee pointed out that, after considerable discovery,
7 Hujazi had been unable to demonstrate that the Zuercher Trust had
8 received any value in exchange for the transferred properties, so
9 the trustee asserted that he had a high likelihood of success in
10 the fraudulent transfer action.

11 Otherwise, however, the moving papers did not go into any
12 detail regarding the trustee's claimed interest in the
13 properties, the merits of the trustee's fraudulent transfer
14 claims, or the likelihood that the trustee would prevail. For
15 instance, there was no discussion in the moving papers regarding
16 the Zuercher Trust's intent in transferring the property, which
17 is an essential element for obtaining relief under § 548(a)(1)(A)
18 from an actually fraudulent transfer, and there also was no
19 discussion regarding the Zuercher Trust's financial condition,
20 which is a critical factor for obtaining relief under
21 § 548(a)(1)(B) from a constructively fraudulent transfer.

22 In their opposition to the receivership motion, the
23

24 ²In the midst of the receivership proceedings, the Zuercher
25 Trust's bankruptcy case was converted to chapter 7, and a
26 chapter 7 trustee was appointed, who took over in place of the
27 chapter 11 trustee in the adversary proceeding. For purposes of
28 resolving this appeal, there is no significant distinction
between the chapter 11 trustee's role in this matter and the
chapter 7 trustee's role, so for ease of reference, we refer to
both herein simply as the trustee.

1 defendant transferees and Hujazi contended that the trustee had
2 not demonstrated a likelihood of success on the merits.

3 After holding two hearings on the receivership motion and
4 considering the additional information submitted by the
5 transferee entities and Hujazi, the bankruptcy court ruled that
6 it would appoint a receiver to take possession and control of two
7 of the transferred properties, one of which was the Oakland
8 apartment building and the other was the Mission Street apartment
9 building. In essence, the bankruptcy court found that there was
10 a substantial risk of loss associated with these two properties.
11 The bankruptcy court inferred this risk of loss based largely on
12 the financial records that the transferee entities and Hujazi had
13 provided to the court, which contained significant errors and
14 omissions. According to the bankruptcy court, the inaccurate and
15 incomplete nature of their financial disclosures demonstrated
16 either that the transferee entities and Hujazi were not competent
17 to operate and maintain the transferred properties or that they
18 were deliberately obfuscating the true financial condition of the
19 properties in order keep the trustee and the Zuercher Trust's
20 creditors at bay. Either way, the court reasoned, the
21 appointment of a receiver was necessary to preserve both the
22 Mission Street apartment building and the Oakland apartment
23 building and to preserve the rents derived from those two
24 buildings.

25 In the process of ruling on the receivership motion, the
26 bankruptcy court did not make any determination regarding the
27 probability that the trustee actually had an interest in the
28 transferred properties, regarding the merits of the trustee's

1 fraudulent transfer claims or regarding the likelihood of the
2 trustee's success on the merits.

3 The bankruptcy court entered its receivership and injunction
4 order on July 7, 2014. That order appointed a receiver with
5 respect to the Oakland apartment building and the Mission Street
6 apartment building and enjoined the transferee entities from
7 interfering with the receiver's control and operation of these
8 two apartment buildings. The order further enjoined Hujazi and
9 the transferee entities from transferring or encumbering any of
10 the four transferred properties. Only Uptown Sterling and Hujazi
11 filed a notice of appeal.

12 On December 17, 2014, a motions panel of this court issued
13 an order holding that the order on appeal was interlocutory
14 because it did not fully and finally dispose of the underlying
15 litigation. See Slimick v. Silva (In re Slimick), 928 F.2d 304,
16 307 (9th Cir. 1990). Nonetheless, the motions panel held that
17 leave to appeal should be granted under 28 U.S.C. § 158(a)(3).

18 JURISDICTION

19 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
20 §§ 1334 and 157(b)(2)(H).³ We discuss our jurisdiction below.

21
22

³While not directly at issue in this appeal, there is no
23 question here that the bankruptcy court will have authority to
24 enter a final judgment in the underlying adversary proceeding
25 because both parties expressly consented to the bankruptcy court
26 entering a final judgment in this matter. See Wellness Int'l
27 Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1941-45 (2015) (holding
28 that parties may consent to have bankruptcy court enter a final
judgment in "Stern claims" - core claims that could be heard and
finally determined by bankruptcy courts but for the
unconstitutionality of the statute granting the bankruptcy
court's authority to hear and determine such claims).

1 **ISSUES**

- 2 1. Do appellants Uptown Sterling, LLC and Hujazi have standing
3 to appeal?
- 4 2. Is Hujazi's appeal from the injunction imposed against her
5 moot?
- 6 3. Is granting leave to appeal appropriate under the specific
7 circumstances of this matter?

8 **STANDARDS OF REVIEW**

9 We have an independent duty to examine our jurisdiction,
10 which we consider de novo. Couch v. Telescope, Inc., 611 F.3d
11 629, 632 (9th Cir. 2010); Wolkowitz v. Beverly (In re Beverly),
12 374 B.R. 221, 230 (9th Cir. BAP 2007), aff'd in part, dismissed
13 in part, 551 F.3d 1092 (9th Cir. 2008).

14 Standing and mootness are questions of law we may review sua
15 sponte and that we consider de novo. Menk v. LaPaglia
16 (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

17 **DISCUSSION**

18 **1. Standing and Mootness Issues**

19 Even though the bankruptcy court's receivership and
20 injunction order affected real property owned by Uptown
21 Sterling, LLC, Peninsula Commons, LLC and SF Corners, LLC, only
22 Huzaji and Uptown Sterling filed a notice of appeal seeking
23 appellate review of the bankruptcy court's order.

24 Hujazi has no standing to appeal the appointment of the
25 receiver, nor does she have standing to challenge the injunctive
26 relief granted against any of the three Limited Liability
27 Companies. Litigants lack appellate standing unless they are
28 directly and adversely affected pecuniarily by the order on

1 appeal. Cheng v. K & S Diversified Invs., Inc. (In re Cheng),
2 308 B.R. 448, 455 (9th Cir. BAP 2004), aff'd, 160 Fed.Appx. 644
3 (9th Cir. 2005); In re Menk, 241 B.R. at 917. Hujazi claims
4 that, because she owns Peninsula Commons, SF Corners, and Uptown
5 Sterling, she is sufficiently affected by the bankruptcy court's
6 order to satisfy the appellate standing requirement. We
7 disagree. The aforementioned limited liability companies are
8 separate legal entities with their own rights and liabilities and
9 can sue and be sued. Abraham & Sons Enters. v. Equilon Enters.,
10 LLC, 292 F.3d 958, 962 (9th Cir. 2002) (citing PacLink Commc'ns
11 Int'l., Inc. v. Superior Court, 90 Cal.App.4th 958, 963 (2001)).
12 Consequently, under California law, a manager or member of a
13 limited liability company cannot pursue in his or her own name an
14 action regarding assets belonging to the company. PacLink
15 Commc'ns Int'l, Inc., 90 Cal. App. 4th at 964-65.

16 As for Uptown Sterling, it owns one of the four parcels at
17 issue: the Oakland apartment building. This ordinarily would
18 have been sufficient to confer appellate standing on Uptown
19 Sterling to challenge the appointment of the receiver and the
20 injunctive relief granted, at least with respect to the Oakland
21 apartment building. However, just before this Panel heard oral
22 argument, the trustee's counsel filed a declaration indicating
23 that the California Secretary of State had suspended Uptown
24 Sterling as of July 23, 2015, for failing to file certain tax
25 returns with the California Franchise Tax Board. At oral
26 argument, Uptown Sterling's counsel admitted that Uptown Sterling
27 has been suspended and that it could not prosecute the appeal as
28 a suspended limited liability company.

1 Thereafter, this Panel issued an order to show cause why
2 this appeal should not be dismissed. In relevant part, the order
3 to show cause directed Uptown Sterling to explain whether it had
4 been reinstated. In response, Uptown Sterling acknowledged that
5 it has not been reinstated and that it does not have the
6 requisite financial resources to take the steps necessary to
7 cause reinstatement.

8 Nearly a year has elapsed since the California Secretary of
9 State suspended Uptown Sterling. Uptown Sterling has conceded
10 that it cannot pursue this appeal while suspended, and the
11 parties' responses to our order to show cause reflect that Uptown
12 Sterling will not be reinstated for the foreseeable future.
13 Under these circumstances, we cannot and will not review the
14 bankruptcy court's appointment of the receiver, nor will we
15 review the injunctive relief granted against the limited
16 liability companies. See Schwartz v. Magyar House, Inc.,
17 168 Cal. App. 2d 182, 188-90 (1959).

18 This only leaves the injunctive relief the bankruptcy court
19 granted against Hujazi. Because the injunction directly and
20 specifically prohibits Hujazi from taking certain actions, Hujazi
21 has appellate standing to challenge this limited aspect of the
22 order on appeal. See generally Giesbrecht v. Fitzgerald
23 (In re Giesbrecht), 429 B.R. 682, 688 (9th Cir. BAP 2010) ("A
24 party has standing to appeal an order if it diminishes his or her
25 property, increases his or her burdens, or detrimentally affects
26 his or her rights.").

27 Even so, we also must account for the fact that, in November
28 2015, an order for relief was entered against Hujazi on an

1 involuntary bankruptcy petition. As a result, a chapter 7
2 trustee has been appointed, who has stepped into Hujazi's shoes
3 for purposes of ownership and control of the three limited
4 liability companies that are relevant to this appeal - Uptown
5 Sterling, Peninsula Commons and SF Corners. See Fursman v.
6 Ulrich (In re First Prot., Inc.), 440 B.R. 821, 830 (9th Cir. BAP
7 2010). Because Hujazi no longer has ownership and control of the
8 limited liability companies, even if she were to succeed in her
9 efforts to overturn the injunction imposed against her, she still
10 would lack any authority or legal right to act on behalf of the
11 limited liability companies or to cause them to take action with
12 respect to the four parcels of real property affected by the
13 order on appeal. See id.

14 Therefore, at first blush, Hujazi's challenge to the
15 injunctive relief granted against her appears moot. The fact
16 that Hujazi's chapter 7 trustee - and not Hujazi - currently has
17 the right to act on behalf of the limited liability companies
18 means that, even if Hujazi were to prevail in this appeal, we
19 could not grant her any effective relief. In re Menk, 241 B.R.
20 at 903 (holding that "appeal is moot if we cannot fashion
21 effective relief in the event of reversal").

22 On the other hand, Hujazi also has appealed the chapter 7
23 order for relief entered against her and that appeal is still
24 pending. See Hujazi v. Recoverex, Corp. (In re Hujazi), BAP No.
25 NC-16-1018 (appeal filed Jan. 27, 2016). As a result, if she
26 were to prevail in that appeal, all meaningful relief in this
27 appeal would not be foreclosed to her. Her success in the appeal
28 from the order for relief would mean that the chapter 7 trustee

1 no longer would be entitled to act on behalf of the limited
2 liability companies and the right to act would re-vest in Hujazi.
3 If her right to act on behalf of the limited liability companies
4 were reinstated, her appeal of the injunction prohibiting her
5 from taking certain actions affecting the four parcels owned by
6 the limited liability companies no longer would be meaningless.

7 In sum, the only portion of the bankruptcy court's order
8 that satisfies our standing and mootness concerns is the portion
9 of the order enjoining Hujazi from further transferring or
10 encumbering any of the four transferred properties. Given this
11 extremely limited scope of review and given the limited and
12 contingent nature of the impact such review might have on the
13 parties and on the litigation, we consider it appropriate to
14 revisit the finality and leave issues formerly addressed by one
15 of our motions panels.

16 **2. Finality and Leave Issues**

17 When an appeal is taken from an interlocutory order, we must
18 dismiss the appeal for lack of jurisdiction unless we decide to
19 grant leave to appeal. In re Giesbrecht, 429 B.R. at 687. Here,
20 our motions panel previously determined that the bankruptcy
21 court's injunction and receivership order was interlocutory
22 because it did not fully and finally dispose of the underlying
23 litigation. See In re Slimick, 928 F.2d at 307. We agree with
24 that determination.

25 However, the motions panel further determined that leave to
26 appeal should be granted. In so holding, the motions panel
27 concluded that the appeal satisfied the criteria we typically
28 apply in deciding whether to grant leave to appeal. Under those

1 criteria, “[g]ranting leave is appropriate if the order involves
2 [1] a controlling question of law where there is substantial
3 ground for difference of opinion and [2] when the appeal is in
4 the interest of judicial economy because an immediate appeal may
5 materially advance the ultimate termination of the litigation.”
6 Kashani v. Fulton (In re Kashani), 190 B.R. 875, 882 (9th Cir.
7 BAP 1995).

8 We are not bound by the motions panel’s determination. See
9 Telescope Inc., 611 F.3d at 632; Stagecoach Utilities, Inc. v.
10 County of Lyon (In re Stagecoach Utilities, Inc.), 86 B.R. 229,
11 230 (9th Cir. BAP 1988). After further consideration, and having
12 the benefit of the standing and mootness analyses set forth
13 above, we conclude that neither of the criteria for granting
14 leave to appeal have been met. Addressing now the injunction
15 against Hujazi would not require us to consider novel or
16 unsettled legal standards. See generally Butt v. State of
17 California, 4 Cal.4th 668, 677-78 (1992) (stating California’s
18 legal standard for preliminary injunctive relief). Moreover,
19 addressing it now is highly unlikely to have any immediate impact
20 on the parties or the ongoing litigation - let alone materially
21 advance the ultimate termination of the litigation.

22 Accordingly, we are persuaded that leave to appeal was
23 improvidently granted in this matter, that leave to appeal should
24 be denied, and that this appeal should be dismissed for lack of
25 jurisdiction.

26 **CONCLUSION**

27 For the reasons set forth above, we DISMISS this appeal for
28 lack of jurisdiction.