

AUG 08 2016

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NOT FOR PUBLICATION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

In re:) BAP No. CC-16-1042-FDKu
)
 SOAMES LANE TRUST,) Bk. No. 2:15-bk-24678-BB
)
 Debtor.)
 _____)
)
 SOAMES LANE TRUST,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 ROSENDO GONZALEZ, Chapter 7)
 Trustee; UNITED STATES)
 TRUSTEE,**)
)
 Appellees.)
 _____)

Argued and Submitted on July 28, 2016
at Pasadena, California

Filed - August 8, 2016

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

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding

Appearances: Stuart J. Wald argued for Appellant Soames Lane
 Trust; Irv Gross of Levene, Neale, Bender, Yoo &
 Brill LLP argued for Appellee Rosendo Gonzalez,
 Chapter 7 Trustee.

Before: FARIS, DUNN, and KURTZ, Bankruptcy Judges.

* 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.

** The United States Trustee did not file an answering brief
or otherwise participate in this appeal.

1 **INTRODUCTION**

2 Debtor Soames Lane Trust (the "Trust") appeals the
3 bankruptcy court's denial of its motion to dismiss its
4 chapter 11¹ case. The bankruptcy court held that judicial
5 estoppel precluded the Trust from arguing that it is not a
6 "business trust" and cannot be a debtor. On appeal, the Trust
7 argues that the bankruptcy court lacked subject matter
8 jurisdiction pursuant to § 109(d) and should have dismissed the
9 case, rather than converting it to chapter 7. We conclude that
10 the Trust's jurisdictional argument is wrong and that the court
11 did not err in applying judicial estoppel. Accordingly, we
12 AFFIRM.

13 **FACTUAL BACKGROUND²**

14 **A. Colin's criminal case, the creation of the Trust, and the**
15 **bankruptcy filing to protect the Property**

16 Grover Henry Nix IV, a.k.a. Colin Nix ("Colin"), owned
17 valuable real property on Aberdeen Avenue in Los Angeles,
18 California (the "Property"). The Property was subject to a deed
19 of trust in favor of Chase Bank.

20 In 2013, Colin was arrested on two federal criminal
21 indictments for alleged securities law violations. The federal
22

23 ¹ Unless specified otherwise, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
25 "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure, Rules 1001-9037, and all "Civil Rule" references are
27 to the Federal Rules of Civil Procedure, Rules 1-86.

28 ² We have exercised our discretion to review the bankruptcy
court's docket, as appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI, Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

1 government alleged that Colin was part of a group of penny stock
2 manipulators who had cheated 20,000 victims out of \$30 million.
3 Colin pled guilty to a single count of conspiracy and has been in
4 prison since February 2013. The Department of Justice ("DOJ")
5 asserted a claim against the Property, identifying it as a source
6 of funds for the victims' restitution.

7 In 2015, after Colin pled guilty, Chase recorded a notice of
8 default and scheduled a trustee's sale for September 2015. The
9 DOJ also scheduled a series of restitution hearings to prove
10 damages (and presumably seize the Property under the DOJ's Asset
11 Forfeiture Program).

12 Faced with foreclosure and forfeiture of the Property,
13 Colin's father, Grover H. Nix III ("Grover"), formed the Trust
14 and appointed himself trustee. Colin, as settlor, transferred
15 the Property into the Trust in August 2015.

16 On September 23, 2015, just one day before the scheduled
17 trustee's sale, the Trust filed its chapter 11 petition. The
18 Trust admitted that "[t]he filing was made to stop the scheduled
19 Chase foreclosure sale on September 24, 2015." In its filings,
20 the Trust identified itself as a business trust and included
21 supporting statements and documentation, including: (1) an
22 attachment to Schedule A that states that Colin conveyed the
23 Property to Grover "as Trustee of a revocable business trust, by
24 Grant Deed"; (2) a declaration of business trust that specifies
25 the Trust's business purposes; (3) a statement in Schedule G that
26 the Trust leased the "mixed use" property for a three-year term
27 to EuroWest Global LLC, which uses the Property as a "corporate
28 headquarters"; and (4) explanations in Schedule I that the Trust

1 is a business trust.

2 Shortly thereafter, the criminal court ordered that the
3 government could not seek restitution from Colin. With the
4 threat of forfeiture removed, the Trust decided that Colin could
5 cure and reinstate the deed of trust and that the Trust no longer
6 needed bankruptcy protection.

7 **B. The motions to dismiss and the Trust's shifting positions**

8 In the meantime, the United States Trustee had filed a
9 motion to dismiss or convert the chapter 11 case. It noted a
10 number of deficiencies with the Trust's filings, including that
11 it is a single asset real estate debtor; it did not file a
12 disclosure statement or plan; it did not file various
13 declarations, questionnaires, and financial information; and it
14 did not pay any quarterly fees. The U.S. Trustee asserted that
15 the Trust "is a non-business trust and that the bankruptcy was
16 not filed in good faith." In support of its argument, it stated
17 that the Property is a residence; the Property contained only
18 personal property valued at over \$2 million; there was no
19 evidence that the Property or contents had been insured;
20 Schedule E only listed Colin's personal obligations, and the
21 debts are primarily consumer debts; Schedules I and J did not
22 reflect rental income or other business income related to the
23 Property; and the Trust was formed only a month before it
24 initiated the bankruptcy case.

25 In response, the Trust argued (among other things) that
26 "Soames Lane Trust is in fact established under the text book
27 definition of a business trust." It contended that "[a]
28 Massachusetts Business Trust was created and [Colin's] father was

1 appointed Trustee." The Trust offered Grover's declaration, in
2 which he opined that the Trust was a business trust and stated:

3 I personally created the Soames Lane Trust. I
4 have extensive familiarity with Massachusetts Business
5 Trusts, having operated one for my real estate
6 investments for over 30 years. I recently created two
7 business trusts for two companies both of whom had
8 their business trusts reviewed by the respective law
9 departments of Wells Fargo Bank and Chase Bank. Both
10 business trusts were approved, and are operating today.

11 Before the U.S. Trustee's motion could be heard, the Trust
12 filed its first motion to dismiss. It did not address its status
13 as a business trust, but only argued that it no longer required
14 bankruptcy protection, since the Property was no longer the
15 target of DOJ forfeiture: "[p]rotection and 'the safe harbor'
16 provided by the Bankruptcy Court is no longer required as the
17 principle asset sought to be protected by the filing, the single
18 family home of Colin Nix, is no longer a target of Department of
19 Justice 'asset forfeiture program'."

20 On November 2, 2015, Colin filed his personal chapter 11
21 petition. That case was dismissed in December 2015 with a
22 180-day bar on refiling.

23 The court heard the U.S. Trustee's motion to dismiss on
24 November 5, 2015. It granted the motion and converted the case
25 to one under chapter 7. Appellee Rosendo Gonzalez was appointed
26 as chapter 7 trustee ("Trustee").

27 On December 10, the Trust filed a second motion to dismiss,
28 wherein it argued for the first time that it was not a business
trust. The Trust failed to set the motion for hearing.

The court heard arguments on the Trust's first motion to
dismiss on December 16, 2015 and denied that motion.

1 On December 24, 2015, the Trust filed a third motion to
2 dismiss, which is the subject of this appeal ("Third Motion to
3 Dismiss"). It argued that the Trust was not a "business trust"
4 under relevant California law, because "(a) the Trustee is
5 completely prohibited (without the prior consent of the Settlor)
6 from selling the residence, the single asset of the trust . . . ,
7 and (b) the Settlor retains the right at all times to immediately
8 terminate the trust" The Trust attached Grover's
9 declaration, which offered various legal conclusions that the
10 Trust was not a business trust. (He asserted these conclusions
11 with the same boundless confidence with which he had stated the
12 opposite views a short time earlier.)

13 In opposition, the Trustee argued that the Trust had
14 maintained from the inception of the case that it was a business
15 trust eligible to be a debtor in bankruptcy. It argued that the
16 Trust was judicially estopped from asserting that it was not a
17 business trust.

18 The court held a hearing on the Third Motion to Dismiss. It
19 announced its tentative ruling indicating that it was inclined to
20 deny the motion, based on the Trust's previous representations
21 that it was a business trust. It recounted its initial concern
22 whether the Trust was an eligible debtor, and in response the
23 Trust and Grover were adamant that the Trust was a "business
24 trust." The court stated that "we had some discussions about
25 that because at one point we were talking do we dismiss or do we
26 convert." However, "in reliance on [the Trust's representations,
27 the court] converted the case." Although the Trust completely
28 changed its position in the Third Motion to Dismiss, the court

1 noted that "there have been statements made under penalty of
2 perjury and on the record. . . . I've continued to rely from the
3 get-go on that, and we've operated on that assumption. So we're
4 going to continue operating on that assumption. Debtor can't
5 change course now when it serves the debtor's convenience to
6 decide no, now I'm not a business trust." It thus concluded that
7 judicial estoppel prevented the Trust from claiming that it was
8 not an eligible debtor.

9 The court also confirmed with the Trustee that he had been
10 administering the Property and had retained a broker to inspect
11 and market the Property.

12 The court issued its order denying the Third Motion to
13 Dismiss on February 4, 2016. The Trust timely appealed.

14 **JURISDICTION**

15 Subject to our discussion below, the bankruptcy court had
16 jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(1). We
17 have jurisdiction under 28 U.S.C. § 158.

18 **ISSUE**

19 Whether the bankruptcy court erred in declining to dismiss
20 the Trust's bankruptcy case on the ground that it is not a
21 business trust.

22 **STANDARDS OF REVIEW**

23 We review de novo whether the bankruptcy court had subject
24 matter jurisdiction over a particular case. See McCowan v.
25 Fraley (In re McCowan), 296 B.R. 1, 2 (9th Cir. BAP 2003)
26 ("Whether a court has subject matter jurisdiction is a question
27 of law that we review de novo."); Odd-Bjorn Huse v. Huse-Sporsem,
28 A.S. (In re Birting Fisheries, Inc.), 300 B.R. 489, 497 (9th Cir.

1 BAP 2003) (“Subject matter jurisdiction is a question of law.”).
2 “De novo review requires that we consider a matter anew, as if no
3 decision had been made previously.” Francis v. Wallace
4 (In re Francis), 505 B.R. 914, 917 (9th Cir. BAP 2014).

5 We review the bankruptcy court’s application of the doctrine
6 of judicial estoppel for an abuse of discretion. See Hamilton v.
7 State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001);
8 see also Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC,
9 692 F.3d 983, 992 (9th Cir. 2012) (“Federal law governs the
10 application of judicial estoppel in federal courts, and a
11 district court’s application of judicial estoppel is reviewed for
12 abuse of discretion.”).

13 We review the denial of a debtor’s motion to voluntarily
14 dismiss its bankruptcy case for an abuse of discretion. Hickman
15 v. Hana (In re Hickman), 384 B.R. 832, 836 (9th Cir. BAP 2008);
16 Leach v. United States (In re Leach), 130 B.R. 855, 856 (9th Cir.
17 BAP 1991) (“The granting or denial of a voluntary motion to
18 dismiss rests within the sound discretion of the judge and is
19 reversible only for an abuse of discretion.”).

20 To determine whether the bankruptcy court has abused its
21 discretion, we conduct a two-step inquiry: (1) we review de novo
22 whether the bankruptcy court “identified the correct legal rule
23 to apply to the relief requested” and (2) if it did, we consider
24 whether the bankruptcy court’s application of the legal standard
25 was illogical, implausible, or “without support in inferences
26 that may be drawn from the facts in the record.” United States
27 v. Hinkson, 585 F.3d 1247, 1262–63 & n.21 (9th Cir. 2009)
28 (en banc).

1 DISCUSSION

2 **A. The court had subject matter jurisdiction over the Trust's**
3 **bankruptcy case.**

4 The Trust's primary argument is that the court should have
5 dismissed the bankruptcy case, rather than converting it, because
6 it lacked subject matter jurisdiction over the case. This
7 argument flies in the face of binding precedent.

8 Section 109(a) provides that "only a **person** . . . may be a
9 debtor under this title." (Emphasis added.) Similarly,
10 subsection (d) provides that "a **person** that may be a debtor under
11 chapter 7 of this title . . . may be a debtor under chapter 11 of
12 this title." (Emphasis added.) The Code defines a "person" as
13 including "individual, partnership, and corporation[,]"
14 § 101(41), where "corporation" includes a "business trust[,]"
15 § 101(9). Conversely, the broader term "entity" includes a
16 "trust." § 101(15). As such, a "business trust" is a "person
17 that may be a debtor," while other forms of trust are not.

18 It is well accepted that only a business trust - as opposed
19 to an individual or personal trust - is eligible to be a debtor
20 under the Bankruptcy Code. See Hunt v. TRC Props., Inc.
21 (In re Hunt), 160 B.R. 131, 135 (9th Cir. BAP 1993) ("the
22 majority of case law considering this issue also concludes that a
23 non-business trust is not a 'person'"); In re McCarthy, 312 B.R.
24 413, 419 (Bankr. D. Nev. 2004) ("it is undisputed that only a
25 business trust is eligible to file a bankruptcy petition. A
26 nonbusiness trust is not eligible").

27 The Trust contends that the court lacked subject matter
28 jurisdiction over the case because the Trust was not a "business

1 trust" under § 101(9) and therefore could not be a "debtor" under
2 § 109(a) and (d). It argues that the court erred in relying on
3 judicial estoppel to create jurisdiction where there is none.

4 The premise of the Trust's argument is that debtor
5 eligibility under § 109 is a limit on subject matter
6 jurisdiction. This premise is false.

7 This Panel has repeatedly held that the bankruptcy court has
8 subject matter jurisdiction even if the debtor is ineligible
9 under § 109. See Mendez v. Salven (In re Mendez), 367 B.R. 109,
10 117-18 (9th Cir. BAP 2007) (holding that the debtor's
11 ineligibility under § 109(h) does not deprive the bankruptcy
12 court of subject matter jurisdiction); Fed. Deposit Ins. Corp. v.
13 Wenberg (In re Wenberg), 94 B.R. 631, 636-37 (9th Cir. BAP 1988),
14 aff'd, 902 F.2d 768 (9th Cir. 1990) (same, under § 109(e)).

15 This is consistent with the Supreme Court's jurisprudence
16 that:

17 **when Congress does not rank a statutory limitation on**
18 **coverage as jurisdictional, courts should treat the**
19 **restriction as non-jurisdictional.** Applying that
20 readily administrable bright line to this case, we hold
that the threshold number of employees for application
of Title VII is an element of a plaintiff's claim for
relief, not a jurisdictional issue.

21 Arbaugh v. Y&H Corp., 546 U.S. 500, 515-16 (2006) (emphasis
22 added) (construing 42 U.S.C. § 2000e).

23 Under Wenberg and Mendez, § 109 requirements implicate
24 eligibility to be a debtor, not the court's subject matter
25 jurisdiction. Following the Supreme Court's bright-line test in
26 Arbaugh, we note that § 109 "does not speak in jurisdictional
27 terms or refer in any way to the jurisdiction of the district
28 courts." Id. at 515. Accordingly, we reaffirm our previous

1 decisions concluding that “§ 109 eligibility is not
2 jurisdictional.” See In re Wenberg, 94 B.R. at 637; see also
3 2 Collier on Bankruptcy § 109.02[2] (Alan N. Resnick & Henry J.
4 Sommer, eds., 16th ed. rev. 2016) (“Section 109 is not
5 characterized in terms of venue or jurisdiction by the statute
6 itself, and **it is clear that it is not jurisdictional.**
7 Section 109 is a rule governing eligibility for relief.”
8 (emphasis added)). We hold that this principle applies to the
9 “person” requirement of § 109(a) and (d).

10 We find no merit to the Trust’s jurisdictional argument.

11 **B. The bankruptcy court did not abuse its discretion in**
12 **applying judicial estoppel.**

13 We next consider whether the court abused its discretion in
14 applying judicial estoppel when it denied the Third Motion to
15 Dismiss.

16 “[W]here a party assumes a certain position in a legal
17 proceeding, and succeeds in maintaining that position, he may not
18 thereafter, simply because his interests have changed, assume a
19 contrary position” Baughman v. Walt Disney World Co.,
20 685 F.3d 1131, 1133 (9th Cir. 2012) (quoting New Hampshire v.
21 Maine, 532 U.S. 742, 749 (2001)). Judicial estoppel is meant “to
22 protect the integrity of the judicial process by ‘prohibiting
23 parties from deliberately changing positions according to the
24 exigencies of the moment.’” Id. (quoting New Hampshire, 532 U.S.
25 at 749-50).

26 In deciding whether the bankruptcy court abused its
27 discretion in utilizing judicial estoppel, we consider whether:
28 (1) the party’s later position is clearly inconsistent with its

1 earlier position; (2) the party succeeded in persuading a court
2 to accept its earlier position, creating a perception that the
3 court was misled; and (3) the party seeking to assert an
4 inconsistent position will derive an unfair advantage or impose
5 an unfair detriment on the opposing party. Id.; see Milton H.
6 Greene Archives, Inc., 692 F.3d at 995 (“chicanery or knowing
7 misrepresentation by the party to be estopped is a factor to be
8 considered in the judicial estoppel analysis and not an
9 ‘inflexible prerequisite’ to its application”).

10 **1. Inconsistent later position**

11 First, it is undisputed that the Trust adopted a position
12 inconsistent with its earlier position. The Trust repeatedly,
13 adamantly, and unequivocally represented that it was a business
14 trust. As the bankruptcy court correctly observed, the Trust
15 “was very adamant that, no, no, it’s an eligible debtor.”

16 When the Trust no longer wanted bankruptcy protection, it
17 abruptly reversed its position. The Trust is therefore
18 advocating a position that is the exact opposite of its earlier
19 arguments and representations.

20 **2. Misleading the court**

21 Second, the Trust persuaded the bankruptcy court to accept
22 its earlier position, thereby creating the impression of
23 misleading the court.

24 In response to the U.S. Trustee’s motion to dismiss or
25 convert the case, the Trust argued that it was the “text book
26 definition” of a business trust. Grover submitted a declaration
27 stating that he had intended to create a business trust. The
28 Trust’s schedules repeated this assertion.

1 The bankruptcy court accepted the Trust's representation
2 that it was a business trust. It said that it was for that
3 reason it had converted rather than dismissed the case. The
4 court stated:

5 The principal of the debtor gave me this whole
6 declaration about what an expert he is on Massachusetts
7 business trusts and how this absolutely is a business
8 trust and absolutely is eligible to file. **And we had
9 some discussions about that because at one point we
10 were talking do we dismiss or do we convert.**

11 And the debtor was very adamant that, no, no, it's
12 an eligible debtor and therefore we should convert,
13 which is what we did.

14 The trustee's now -- **and in reliance on that I
15 converted the case.** The trustee's now gotten involved.
16 The trustee's incurred time and effort in connection
17 with this case.

18 And now the debtor is saying: Oh, no, I'm not
19 eligible. I want out.

20 And that's not okay. There is something called
21 judicial estoppel, and there have been statements made
22 under penalty of perjury and on the record. And I
23 don't think it was even just that first hearing. I
24 think we even had a second hearing where there
25 certainly was an opportunity to change course at that
26 point and say we were wrong and here's why.

27 Didn't happen. Debtor doubled down: No, we
28 absolutely are eligible.

**So I've continued to rely from the get-go on that,
and we've operated on that assumption.**

22 (Emphases added.)

23 Accordingly, the court accepted the Trust's representation
24 that it was a business trust eligible for bankruptcy protection
25 when the court converted the case rather than dismissing it.³

27 ³ At oral argument, the Trust said that it did not mislead
28 the court (or the court should not have accepted its statements).
(continued...)

1 **3. Unfair advantage or unfair detriment**

2 Third, the Trust both received an unfair advantage and
3 caused its bankruptcy estate to suffer an unfair detriment.

4 The Trust admitted that it filed for bankruptcy for the sole
5 purpose of halting the foreclosure and forfeiture proceedings.
6 It made misrepresentations to the court and, as a result, gained
7 approximately half a year of bankruptcy protection between the
8 time of the bankruptcy filing and the denial of the Third Motion
9 to Dismiss (and almost two years overall), during which time the
10 Property was protected from foreclosure.⁴ It would be unfair to
11

12 ³(...continued)

13 Among other things, it took the position that the statements in
14 Grover's declaration were not misstatements of material fact, but
15 merely "opinions." The judicial estoppel doctrine does not
16 distinguish between assertions of fact and "opinions." The Trust
17 also argued that, even though it had represented to the court
18 that a business tenant occupied the Property pursuant to a
19 three-year lease, in actuality, the tenant did not pay any rent
20 and there is no evidence of corporate use on the property to
21 "establish materiality" of the statements. In other words, the
22 Trust contends that the court could not rely on its
23 representations because they were false. This argument refutes
24 itself.
25

26 ⁴ At oral argument, the Trust argued that it did not gain
27 any benefit regarding the forfeiture proceedings, since they had
28 been terminated prior to the Trust's bankruptcy filing. This
argument is not supported by the record. The Trust filed for
bankruptcy on September 23, 2015, and the criminal court issued
its order prohibiting the DOJ from seeking restitution from Colin
on October 1. Moreover, the Trust admitted in its first motion
to dismiss, filed well after October 1, that the purpose of the
bankruptcy filing was to avoid forfeiture of the Property: the
"[p]rotection and 'the safe harbor' provided by the Bankruptcy
Court is no longer required as the principle asset sought to be
protected by the filing, the single family home of Colin Nix, is
no longer a target of Department of Justice 'asset forfeiture
program'."

1 allow the Trust to benefit from its underhanded conduct.

2 The Trust also caused a detriment to the estate. The
3 Trustee expended estate assets and resources in administering the
4 estate, and the Trust's interference undoubtedly made his task
5 more difficult and expensive.⁵ The court also confirmed at the
6 hearing that the Trustee was continuing to administer the estate,
7 including retaining a broker to inspect and market the Property.
8 As such, the Trust caused unfair detriment to the estate.

9 Therefore, the court did not abuse its discretion in
10 applying judicial estoppel to preclude the Trust from arguing
11 that it is not a business trust.

12 **CONCLUSION**

13 For the reasons set forth above, we AFFIRM.
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26 ⁵ For example, the Trustee had to file an emergency motion
27 for turnover, due to the Trust's alleged interference with his
28 entry to the Property. The court granted the emergency motion in
part and compelled the debtor to allow the Trustee to enter,
inspect, and examine the Property.