

OCT 27 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NOT FOR PUBLICATION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. EC-15-1401-JuKuMa
	)	
YOUSIF H. HALLOUM,	)	Bk. No. 12-21477-C-7
	)	
Debtor.	)	Adv. No. 15-02091-C
	)	
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YOUSIF H. HALLOUM; IMAN Y. HALLOUM,	)	
	)	
Appellants,	)	
v.	)	M E M O R A N D U M *
	)	
MICHAEL G. KASOLAS, Trustee,	)	
	)	
Appellee.	)	
	)	

Submitted Without Oral Argument  
on October 20, 2016\*\*

Filed - October 27, 2016

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

Honorable Christopher M. Klein, Bankruptcy Judge, Presiding.

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Appearances: Yousif H. Halloum pro se on brief; Scott H. McNutt, Michael C. Abel, and Thomas B. Rupp of McNutt Law Group LLP on brief for appellee Michael G. Kasolas, chapter 7 trustee.

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\* 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.

\*\* By order entered on August 8, 2016, a motions panel determined this appeal suitable for submission on the brief and record without oral argument.

1 Before: JURY, KURTZ, and MARTIN,\*\*\* Bankruptcy Judges.  
2

3 Chapter 7<sup>1</sup> debtor, Yousif H. Halloum (Debtor) and his non-  
4 debtor spouse, Iman Y. Halloum (Ms. Halloum) (collectively, the  
5 Halloums), appeal from the bankruptcy court's order denying  
6 their motion for leave to sue the chapter 7 trustee, appellee  
7 Michael Kasolas (Motion For Leave). We AFFIRM.

8 **I. FACTS**

9 **A. Prepetition Events<sup>2</sup>**

10 Beginning in 2005, the predecessor-in-interest to Midwest  
11 Bank N.A. (MBNA) made loans to Debtor which were secured by  
12 Debtor's real and personal property. Debtor operated an ARCO  
13 gas station and convenience store on the real property located  
14 in Lodi, California (Real Property). Debtor also had his  
15 business checking account with MBNA.

16 In late 2010 and thereafter, Debtor overdrew his checking  
17 account with MBNA. Although Debtor said the overdrafts would be  
18 repaid in the near term and the bank prodded him to do so, the  
19 amount due increased over time. In October 2011, MBNA advised

20 \_\_\_\_\_  
21 \*\*\* Honorable Brenda K. Martin, United States Bankruptcy  
22 Judge for the District of Arizona, sitting by designation.

23 <sup>1</sup> Unless otherwise indicated, all chapter and section  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,  
25 "Rule" references are to the Federal Rules of Bankruptcy  
26 Procedure, and "Civil Rule" references are to the Federal Rules  
27 of Civil Procedure.

28 <sup>2</sup> To provide context for this appeal we borrow from the  
29 facts set forth in Halloum v. McCormick, Barstow, Sheppard, Wayte  
30 & Carruth LLP; Hilton A. Ryder; Michael G. Kasolas, Trustee  
31 (In re Halloum), BAP No. EC-14-1219-JuKuPa, 2015 WL 2386544 (9th  
32 Cir. BAP May 19, 2015).

1 Debtor that he had ten days to establish alternative banking  
2 relationships for his business, no further overdrafts would be  
3 honored after the ten days, and that no overdraft would be  
4 honored in the interim if the cumulative total exceeded  
5 \$300,000. During this ten-day cautionary period, Debtor took  
6 advantage of MBNA's accommodation to boost the overdrafts from  
7 approximately \$190,000 to \$297,372.49.

8         Around this time, Debtor also defaulted under the loans.  
9 On October 12, 2011, MBNA recorded a notice of default that  
10 commenced nonjudicial foreclosure as to the Real Property. On  
11 January 20, 2012, a notice of trustee's sale under the trust  
12 deed was recorded.

13         MBNA also sued the Halloums in the San Joaquin County  
14 Superior Court to recover on the \$297,372.49 overdraft. The  
15 Halloums cross-complained against MBNA, alleging breach of a  
16 contract to transform the overdraft into some unspecified term  
17 loan. MBNA's demurrer to the cross complaint was stayed by the  
18 bankruptcy filing.

19 **B. Bankruptcy Events**

20         Debtor filed a chapter 11 petition on January 26, 2012.  
21 About two years later, Mr. Kasolas was appointed the chapter 11  
22 trustee. Problems ensued which made confirmation of Debtor's  
23 chapter 11 plan extremely unlikely. Therefore, Trustee advised  
24 the bankruptcy court that the case should be converted. As a  
25 result of this advice, the bankruptcy court converted the case  
26 to chapter 7 and Mr. Kasolas was appointed the chapter 7 trustee

1 (Trustee).<sup>3</sup>

2 Trustee took possession of Debtor's business. He also  
3 negotiated a settlement with MBNA that allowed the business to  
4 be sold, with MBNA discounting its claim and further agreeing to  
5 lend up to \$100,000 to the estate to support the sale process.  
6 The bankruptcy court approved Trustee's settlement with MBNA  
7 over Debtor's objection.

8 Trustee eventually sold the business,<sup>4</sup> but not before  
9 Ms. Holloum intervened and asserted her right as the non-debtor  
10 spouse to purchase the business under § 363(i). She asserted  
11 this right even though Debtor's schedules listed the business  
12 and its assets as his separate property, and the real property  
13 records showed that the land upon which the business was located  
14 was Debtor's sole and separate property per an inter-spousal  
15 transfer deed. Without concluding that Ms. Halloum had the  
16 right, the bankruptcy court afforded her the opportunity to  
17 purchase the business.

18 Ultimately, Ms. Halloum was unable to complete her purchase  
19 of the business and filed a motion seeking the return of her  
20 deposit, which was granted. In the context of her seeking the  
21 return of her security deposit, Ms. Halloum alleged that Trustee

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22  
23 <sup>3</sup> On November 17, 2103, MBNA filed a motion to convert to  
24 chapter 7. After several continued hearings on the motion,  
25 Trustee conceded that conversion was appropriate and an order  
converting the case was entered on February 12, 2014.

26 <sup>4</sup> Debtor appealed the bankruptcy court's order approving the  
27 sale to the Panel. The Panel dismissed the appeal as moot since  
28 the sale of the business had been completed. Debtor appealed the  
dismissal ruling to the Ninth Circuit. That appeal is still  
pending. [BAP No. 14-1170; 9th Cir. Case No. 14-60086].

1 interfered with her ability to obtain a fuel franchise agreement  
2 and that this prevented her from purchasing the business. At  
3 other times, including in the underlying adversary complaint,  
4 Ms. Halloum, or Debtor, has alleged that Trustee interfered with  
5 her financing source and convinced the lender not to loan her  
6 money to purchase the business.

7       Apparently dissatisfied with the way things were going in  
8 the bankruptcy court, on February 13, 2015, the Halloums filed  
9 the underlying complaint in the Superior Court of California,  
10 County of San Francisco, as case number CGC-15-544168. The  
11 complaint sought redress against various defendants,<sup>5</sup> including  
12 Trustee in his individual capacity and as chapter 7 trustee, for  
13 the loss of their business as the result of the pending  
14 bankruptcy case. Trustee filed a timely notice of removal in  
15 the bankruptcy court for the Northern District of California.  
16 That court subsequently transferred the adversary proceeding to  
17 the bankruptcy court for the Eastern District of California.<sup>6</sup>

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18  
19       <sup>5</sup> Besides Trustee, Plaintiffs sued: Hilton A. Ryder;  
20 McCormick, Barstow, Sheppard, Wayte & Carruth ("McCormick  
21 Barstow"); David I. Katzen; Katzen & Schuricht; Scott H. McNutt;  
22 Michael C. Abel; McNutt Law Group and Alan Scott Koenig.  
23 Defendant Ryder, a partner in defendant law firm McCormick  
24 Barstow, was counsel to the debtor, who acted as  
25 debtor-in-possession performing the duties of the trustee until  
26 Trustee was appointed to act as Chapter 11 trustee on  
27 November 22, 2013. Defendant Katzen, a partner in defendant law  
28 firm Katzen & Schuricht, and defendant Koenig are attorneys who  
represented the financial institution, MBNA, that was Plaintiffs'  
principal adversary in the bankruptcy case. Defendants McNutt  
and Abel, partners in defendant law firm McNutt Law Group, are  
counsel who represent Trustee in the bankruptcy case.

<sup>6</sup> The Halloums fought the removal and transfer through  
(continued...)

1 Trustee then took steps to prevent the Halloums from forum  
2 shopping and interfering with property of the bankruptcy estate.  
3 On April 23, 2015, Trustee filed a motion requesting (1) a  
4 contempt decree against the Halloums for stay violation;  
5 (2) sanctions; and (3) an order restricting future filings to  
6 the bankruptcy court (Sanctions Motion). The Sanctions Motion  
7 argued that the Halloums had violated the automatic stay by  
8 filing the complaint and pursuing damage claims which, if they  
9 existed at all, would belong to Debtor's bankruptcy estate.  
10 The Sanctions Motion and Trustee's reply in support of the  
11 motion further asserted that the Halloums' refusal to accept the  
12 jurisdiction of the bankruptcy court justified an order that  
13 would "channel" any future litigation through the bankruptcy  
14 court.

15 The Halloums opposed Trustee's motion arguing, among other  
16 things, that the complaint should be litigated in the  
17 San Francisco Superior Court.

18 The bankruptcy court decided to treat the Sanctions Motion  
19 as a counterclaim or affirmative defense to the complaint that  
20 would be considered after addressing the substance of the  
21 adversary proceeding.

22 Trustee and MBNA filed motions for summary judgment in the  
23 adversary proceeding. Instead of ruling on the motions, the  
24 bankruptcy court ordered an evidentiary hearing at which the  
25 Halloums were directed to present all their evidence in support  
26

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27 <sup>6</sup>(...continued)  
28 various motions and appeals, none of which were successful.

1 of their claims and to identify aspects of their case that  
2 required discovery. The evidentiary hearing was held on  
3 August 12 and 13, 2015. Debtor testified and was cross-  
4 examined; he offered no other witnesses. Ms. Halloum did not  
5 testify. After the Halloums presented their case, the  
6 bankruptcy court entered judgment based on partial findings  
7 pursuant to Civil Rule 52(c), made applicable to adversary  
8 proceedings by Rule 7052 and 9014. The bankruptcy court placed  
9 these findings of fact and conclusions of law orally on the  
10 record. The evidentiary hearing did not reach the stage where  
11 the court took evidence on defenses or counterclaims.

12 The bankruptcy court later supplemented its findings of  
13 fact and conclusions of law in a memorandum decision Halloum v.  
14 Ryder, et al. (In re Halloum), 2015 WL 5095340 (Bankr. E.D. Cal.  
15 Aug. 27, 2015). There, the bankruptcy court determined that  
16 there was no basis for liability against any of the defendants.  
17 The court also dismissed the case against Trustee because the  
18 Halloums had not sought leave from the bankruptcy court before  
19 suing Trustee in the San Francisco Superior Court, finding:

20 It is settled law that a trustee may be sued only with  
21 leave of the court that appointed the trustee. Barton  
22 v. Barbour, 104 U.S. 126, 128 (1881); Beck v. Ft.  
James Corp. (In re Crown Vantage, Inc.), 421 F.3d 963,  
970-71 (9th Cir. 2005).

23 The plaintiffs' action against Mr. Kasolas filed in  
24 the state superior court alleges only activity  
25 associated with the stewardship by Mr. Kasolas of the  
26 bankruptcy estate. Accordingly, the assertion that he  
is being sued in his individual capacity in addition  
to his capacity as trustee is a transparent sham not  
made in good faith and is stricken.

27 This court did not grant permission to sue the  
28 trustee. End of analysis. The action against  
Mr. Kasolas is dismissed.

1 2015 WL 5095340, at \*3. On the same date, the bankruptcy court  
2 entered an order dismissing the adversary complaint as to  
3 Trustee and entered a separate judgment in favor of all  
4 defendants on the merits (Dismissal and Merits Judgment).

5 On August 29, 2015, MBNA and others filed a  
6 motion/application to augment determinations which the  
7 bankruptcy court had made at the evidentiary hearing pursuant to  
8 Rules 7052 and 9023, which incorporate Civil Rules 52(b) and  
9 59(e) (Augment Motion).

10 On August 27, 2015, the Halloums filed a notice of appeal  
11 of the bankruptcy court's order dismissing the complaint against  
12 Trustee. On August 31, 2015, they filed an amended notice of  
13 appeal to add the bankruptcy court's Dismissal and Merits  
14 Judgment dated August 27, 2015.

15 On October 5, 2015, the Halloums filed the Motion For  
16 Leave. The motion begins by referring to the bankruptcy court's  
17 dismissal of Trustee from the state court action filed by the  
18 Halloums and removed to the bankruptcy court by Trustee.  
19 According to the Halloums, they were not required to seek the  
20 bankruptcy court's permission before filing the state court  
21 action against Trustee. The Halloums reasoned that they no  
22 longer had a bankruptcy estate and all their assets had been  
23 sold. In other words, there was no bankruptcy proceeding that  
24 could be impacted by the suit against Trustee in the state  
25 court. They further argued that their claims against Trustee  
26 were not connected to his duties as trustee even though the  
27 bankruptcy court had previously found in its memorandum decision  
28 that the adversary complaint alleged only activity associated

1 with Trustee's administration of the estate.

2 Finally, the Halloums contended that the factors for  
3 evaluating a motion for leave to sue a trustee set forth in  
4 Kashani v. Fulton (In re Kashani), 190 B.R. 875, 886-87 (9th  
5 Cir. BAP 1995) weighed in their favor. According to the  
6 Halloums, none of their claims against Trustee pertained to his  
7 actions while administering the estate. Instead, they  
8 maintained that the claims involved Trustee as an individual who  
9 was not acting within the scope of his authority and his breach  
10 of fiduciary duty through gross negligence and willful and  
11 deliberate violations. For these reasons, the Halloums asserted  
12 that their motion should be granted to sue Trustee in the state  
13 superior court.

14 On October 16, 2015, the bankruptcy court entered an order  
15 denying the Augment Motion, but clarified in its order that in  
16 addition to dismissing Trustee due to the Halloums' failure to  
17 request permission to sue in another forum, its detailed no-  
18 merit findings and conclusions applied to Trustee (and his  
19 counsel).

20 On October 20, 2015, Trustee opposed the Motion For Leave  
21 on the ground, among others, that the bankruptcy court had  
22 dismissed the Halloums' claims against him based on the merits.

23 On November 6, 2015, the bankruptcy court entered an order  
24 denying the Motion For Leave. There, the court noted that it  
25 had dismissed the adversary proceeding against Trustee because  
26 the Halloums did not seek permission to sue him, and, in the  
27 alternative, the court found in favor of Trustee (and all other  
28 defendants) on the merits after an evidentiary hearing. The

1 court also noted that the judgment in favor of Trustee and the  
2 other defendants was on appeal to this Panel (BAP No. 15-1292).

3 The court further found the Halloums' arguments without  
4 merit. The Halloums had alleged there was no ongoing bankruptcy  
5 proceeding, which the bankruptcy court found incorrect since the  
6 case was still open. Next, the Halloums' had asserted that  
7 their claims against Trustee were not connected to the  
8 performance of his duties as Trustee. The bankruptcy court  
9 found "That is all incorrect - 'but for' the existence of  
10 Trustee as the trustee in their underlying bankruptcy case, the  
11 Halloums would have no connection with, and no claims against,  
12 Trustee in any capacity."

13 The Halloums filed a timely notice of appeal from this  
14 order.<sup>7</sup>

## 15 II. JURISDICTION

16 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
17 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
18 § 158.

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19  
20  
21 <sup>7</sup> As noted, the Halloums also filed an appeal from the  
22 Dismissal and Merits Judgment (EC-15-1292). The Panel issued a  
23 conditional order of dismissal indicating that appellants had not  
24 filed a brief with respect to this appeal. The Halloums filed a  
25 response stating that the brief and excerpts for EC-15-1292  
26 should be considered in determining this appeal and that the  
27 appeals should be consolidated. They also filed a supplemental  
28 supplemental brief in this case. The Panel denied their request for  
consolidation of the two appeals and further ordered that their  
supplemental brief would be considered their opening brief in  
this appeal. Attached to the supplemental brief are excerpts of  
record that mostly pertain to the merits of their underlying  
allegations in the state court complaint. These excerpts are of  
limited use in this appeal.



1 present adequate grounds upon which to proceed against the  
2 trustee in another forum. Id.

3 We discern no abuse of discretion with the bankruptcy  
4 court's denial of the Halloums' Motion For Leave. Initially,  
5 the Halloums are mistaken that the Barton doctrine does not  
6 apply. They contend the doctrine is inapplicable because their  
7 assets have been sold. However, as noted by the bankruptcy  
8 court, Debtor's main bankruptcy case is open and ongoing.  
9 Further, in this Circuit, the doctrine continues to apply even  
10 after the bankruptcy estate has been closed. In re Crown  
11 Vantage, Inc., 421 F.3d at 972. In addition, the Halloums'  
12 claims against Trustee were all connected with his acts or  
13 conduct while performing his duties as trustee of Debtor's  
14 bankruptcy estate. The Barton doctrine applies to claims based  
15 on alleged misconduct in the discharge of a trustee's duties.  
16 Id. at 970. In the end, other than conclusory arguments  
17 connected to the Kashani factors, the Halloums failed to  
18 demonstrate why the Barton doctrine did not apply.

19 Since the Barton doctrine applies as a threshold matter,  
20 the Halloums must plead the elements of a prima facie case  
21 against Trustee. Here, the bankruptcy court acknowledged in its  
22 order denying the Motion For Leave that it previously found no  
23 merit to the Halloums' claims against Trustee and that its  
24 decision was the subject of a separate appeal. In doing so, the  
25 bankruptcy court implicitly recognized that the Halloums were  
26 asserting claims against Trustee which were already litigated in  
27 the bankruptcy court. Therefore, allowing the Halloums to  
28 pursue the same underlying claims against Trustee in the state

1 court as those involved in their appeal would result in a  
2 tremendous waste of both judicial and the parties' resources.  
3 See In re Kashani, 190 B.R. at 886 (In exercising its discretion  
4 to grant or deny leave to sue the trustee in a court other than  
5 the one in which the trustee has been appointed, the bankruptcy  
6 court is instructed to balance the interests of all parties  
7 involved.) This alone would be a sufficient reason for the  
8 bankruptcy court to deny the motion.

9 **VI. CONCLUSION**

10 For the reasons set forth above, the bankruptcy court's  
11 order denying the Halloums' Motion For Leave is AFFIRMED.