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NOT FOR PUBLICATION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.	CC-16-1113-TaLN
)		
CHONGHEE JANE KIM,)	Bk. No.	2:13-bk-25661-BB
)		
Debtor.)	Adv. No.	2:16-ap-01032-BB
)		
_____)		
CHONGHEE JANE KIM,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
EDWARD M. WOLKOWITZ,)		
Chapter 7 Trustee,)		
)		
Appellee.)		
_____)		

Submitted Without Oral Argument**
on January 19, 2017

Filed - February 15, 2017

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

Honorable Sheri Bluebond, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Chonghee Jane Kim, pro se, on brief;
Matthew Abbasi on brief for appellee.

* 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(c)(2).

** The Panel unanimously determined that the appeal was suitable for submission on the briefs and record pursuant to Rule 8019(b)(3).

1 Before: TAYLOR, LAFFERTY, and NOVACK,*** Bankruptcy Judges.

2 **INTRODUCTION**

3 Chapter 7¹ debtor Chongee Jane Kim appeals from the
4 bankruptcy court's dismissal of her adversary proceeding. We
5 VACATE the bankruptcy court's dismissal order and REMAND for
6 further proceedings in light of our decision in Hooshim v.
7 Wolkowitz (In re Kim), BAP No. CC-15-1273-TaKuF, 2016 WL 2654350
8 (9th Cir. BAP May 2, 2016) ("Mem. Dec.").

9 **FACTS²**

10 We are familiar with this case. In a related adversary
11 proceeding appeal, we vacated the bankruptcy court's entry of
12 default judgment in favor of chapter 7 Trustee Edward M.
13 Wolkowitz. In the interest of brevity, we provide only the most
14 relevant case history here.

15 **Background events.** Prepetition, a law firm sued Kim and
16 obtained a six-figure judgment. Kim anticipated her legal
17 defeat, however, and before entry of the adverse judgment
18 transferred investment property in Sylmar, California (the
19

20 *** The Hon. Charles Novack, United States Bankruptcy Judge
21 for the Northern District of California, sitting by designation.

22 ¹ 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 ² We exercise our discretion to take judicial notice of
27 documents electronically filed in the adversary proceeding, the
28 underlying bankruptcy case, and other related proceedings. See
Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.
227, 233 n.9 (9th Cir. BAP 2003).

1 "Property") to an LLC that she apparently controlled. The LLC
2 then executed two notes, one payable to Benjamin Hooshim and one
3 payable to Alexandre Oh, and collateralized the notes with deeds
4 of trust encumbering the Property. Hooshim and Oh had
5 previously loaned money to Kim, not the LLC, and they were
6 unaware of and not involved in the LLC's execution and
7 collateralization of these notes.

8 Eventually, the law firm discovered the Property transfer
9 and brought a second state court action against Kim seeking to
10 set it aside as fraudulent. Kim apparently sensed her peril;
11 she caused the LLC to reconvey title to the Property and
12 promptly filed a chapter 7 petition. This first bankruptcy case
13 was dismissed after Kim failed to attend a continued § 341(a)
14 meeting.

15 The law firm then moved on with its fraudulent conveyance
16 action, but, mere days before it obtained entry of a default
17 judgment, Kim filed a second chapter 7 petition.

18 **The Trustee administers the estate.** The Trustee proceeded
19 expeditiously; he eventually moved for authority to sell the
20 Property under § 363(b), subject to overbid and **subject to** any
21 existing liens (i.e., the Hooshim and Oh liens). At auction,
22 Kim emerged as the successful bidder, and the bankruptcy court
23 confirmed the sale. The Trustee then quitclaimed the Property
24 to Kim; it left the estate encumbered by the Hooshim and Oh
25 liens that secured obligations allegedly owed by the LLC, not
26 Kim. The sale order is final.

27 After this point, things get messy.

28 Seven months after he sold the Property to Kim, the Trustee

1 commenced an adversary proceeding against Hooshim and Oh (the
2 "Hooshim-Oh Action") for: "avoidance of title transfer and lien
3 transfers and recovery of the Property"; and "100% title to and
4 possession of the Property free and clear of the liens".

5 Notably, the adversary complaint did not request recovery as to
6 the LLC notes secured by the Property. Eventually, the
7 bankruptcy court granted the Trustee's motion for default
8 judgment, in part. It denied the Trustee's request for
9 recovery, title, and possession of the Property and left Kim as
10 the Property's owner. But, it also concluded that the liens on
11 the Property should be avoided as fraudulent transfers. And,
12 even though the Trustee did not request relief as to the LLC
13 notes, the bankruptcy court ruled that the Trustee, as the
14 "holder in due course" of the LLC notes and LLC trust deeds, was
15 "entitled to fully and completely enforce the terms of the
16 assumed encumbrances."

17 The Trustee then hired a foreclosure firm, TD Foreclosure
18 Services, Inc., to foreclose on the LLC notes and under the LLC
19 trust deeds.³ The foreclosures did not go smoothly, and even
20 more litigation, albeit not directly relevant to the merits of
21 this appeal, followed.

22 Kim eventually commenced her own adversary proceeding
23 against the Trustee seeking to quiet title in herself and
24 declaratory relief (the "Kim-Trustee Action"). She accurately
25

26 ³ In their briefs, both parties attempt to explain the
27 Property's status; but neither provide the court with the
28 relevant documents. We assume the parties' representations are
accurate.

1 asserted that she bought the Property from the bankruptcy estate
2 and that the Trustee provided her with a quitclaim deed. She
3 also alleged that she bought the "full derivative authority" to
4 negotiate with Hooshim and Oh. And she complained that,
5 notwithstanding these facts, the Trustee brought suit against
6 Hooshim and Oh and received default judgment. In addition to
7 the catchall "any other proper relief," Kim's prayer for relief
8 requested orders finding that: (1) she owned the Property;
9 (2) she owned the right to negotiate with the Hooshim and Oh
10 liens; (3) the Trustee had no ownership in the Property or the
11 Hooshim and Oh liens after she bought the Property from the
12 Trustee; and (4) any buyer at a foreclosure sale had no claim to
13 title.

14 **Dismissal of the Kim-Trustee Action and this appeal.** In
15 March 2016, the Trustee moved to dismiss the Kim-Trustee Action.
16 He argued, as relevant here, that Kim lacked standing because
17 she never had title to the avoided LLC liens and LLC notes. He
18 contended that the bankruptcy court should dismiss the quiet
19 title cause of action with prejudice because Kim had not offered
20 or tendered monies to satisfy her alleged obligations under the
21 trust deed.⁴ He urged the bankruptcy court to dismiss the
22 declaratory relief claim because it duplicated the quiet title
23 claim.

24 Kim did not oppose the dismissal motion in writing, but she
25

26 ⁴ Again, the Trust Deeds secured notes payable by the LLC
27 – not by Kim. She had an obligation to repay these debts, but
28 it was neither evidenced by the notes nor secured by the trust
deeds.

1 appeared at the hearing to request additional time for response;
2 the bankruptcy court did not directly rule on this request.
3 Trustee's counsel summarized the motion to dismiss: "Your Honor,
4 the crux of our argument is that the sale of the three
5 properties through a debtor, via a sale at court, did not
6 include all liens that went with it. It wasn't -- there was
7 never -- there was actually a finding that as a joinder of the
8 fraudulent transfer claims with title were to be sold at that
9 time." Hr'g Tr. (Apr. 12, 2016) 5:16-22. Turning to Kim, the
10 bankruptcy court then stated:

11 So, I've already adjudicated this. And so, I'm going
12 to grant the motion to dismiss. . . . [W]hen you
13 bought the property, you did not buy the fraudulent
14 transfer claims. I've already adjudicated that. It's
15 a question of interpreting my own orders.

16 Id. 6:23-7:3. The bankruptcy court acknowledged, however, that
17 the judgment was appealed and subject to reversal:

18 [S]o if the judgment is ultimately reversed on appeal,
19 I suppose you could renew this. . . . There's no stay
20 pending appeal, so I'm going to behave as if that's a
21 final order, unless and until it's reversed.

22 Id. at 7:11-16. Two days later, the bankruptcy court entered an
23 order granting the Trustee's motion and dismissing the adversary
24 proceeding with prejudice. Kim timely appealed.

25 **Post-appeal events.** A few weeks later, we issued our
26 decision in the first appeal; in short, we concluded that the
27 Trustee lacked standing to bring the Hooshim-Oh Action as pled.
28 We also held, among other things, that the bankruptcy court could
not properly allow the Trustee any relief or recovery as to the
LLC notes through a default judgment. See Mem. Dec. at 12; Fed.
R. Civ. P. 54(c) ("A default judgment must not differ in kind

1 from or exceed in amount, what is demanded in the pleadings.”);
2 Fed. R. Bankr. P. 7054(a) (applying Civil Rule 54(c) in adversary
3 proceedings). Accordingly, we vacated the default judgment. The
4 Trustee has since appealed our decision to the Ninth Circuit.

5 **JURISDICTION**

6 The bankruptcy court had jurisdiction under 28 U.S.C.
7 §§ 1334 and 157(b) (2) (A), (O). We have jurisdiction under
8 28 U.S.C. § 158.

9 **ISSUE**

10 Whether we should reverse the bankruptcy court’s dismissal
11 of an adversary complaint with prejudice because that dismissal
12 was based on a now-vacated judgment.

13 **STANDARDS OF REVIEW**

14 We review dismissal of an adversary proceeding under Civil
15 Rule 12(b) (6) de novo. See Johnson v. Fed. Home Loan Mortg.
16 Corp., 793 F.3d 1005, 1007 (9th Cir. 2015). A dismissal without
17 leave to amend is reviewed for an abuse of discretion. Ditto v.
18 McCurdy, 510 F.3d 1070, 1079 (9th Cir. 2007). A bankruptcy court
19 abuses its discretion if it applies the wrong legal standard,
20 misapplies the correct legal standard, or if it makes factual
21 findings that are illogical, implausible, or without support in
22 inferences that may be drawn from the facts in the record. See
23 TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832
24 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
25 1262 (9th Cir. 2009) (en banc)).

26 **DISCUSSION**

27 Kim is not a sympathetic pro se debtor: as we noted in the
28 first appeal, we found no error in the bankruptcy court’s finding

1 that Kim had actual intent to hinder, delay, or defraud at least
2 one creditor when she transferred the Property to the LLC and
3 then encumbered it.

4 But the Trustee's initial response was to sell the Property
5 subject to the encumbering liens. In the first appeal, we
6 determined that he, thus, lost standing to set aside the LLC
7 liens on the Property. And we also, among other things,
8 determined that neither his complaint as pled nor relevant law
9 allowed him to enforce the LLC notes. We, thus, identified areas
10 of error, but the Ninth Circuit will have the final word.

11 In this appeal, Kim now argues that we should reverse the
12 bankruptcy court's dismissal of her adversary proceeding because
13 the Panel, in the other appeal, vacated the bankruptcy court's
14 earlier judgment. We acknowledge that she could not have
15 asserted this argument before the bankruptcy court because our
16 reversal followed dismissal of her action. But we also observe
17 that Kim's requested relief throughout the Kim-Trustee Action has
18 been a moving target. The majority of her complaint relates to
19 allegations that the § 363 sale included the fraudulent
20 conveyance claims for relief. In our previous decision, we
21 agreed with the bankruptcy court that the § 363 sale did not
22 include those claims to the extent they survived a sale. But
23 then again, Kim also alleges in the complaint that she is the
24 rightful owner of the Property and that any foreclosure would be
25 improper; this argument is consistent with our decision in the
26 first appeal.

27 The Trustee's appellate brief is troubling. The Trustee
28 apparently misunderstands the potential pragmatic impact of our

1 previous decision.⁵ We also acknowledge, however, that the
2 Trustee properly relies, among other things, on arguments
3 consistent with our determinations in the first appeal. There,
4 the Panel: (1) "agree[d] with the bankruptcy court that the
5 Trustee did not sell avoidance claims to Kim and that the
6 quitclaim did not extinguish the claims"; and, again, (2) saw "no
7 error in the bankruptcy court's determination that Kim caused the
8 LLC to encumber the Property with the actual intent to hinder,
9 delay, or defraud" the law firm. Mem. Dec. at 7, 9.

10 Were we writing on a clean slate, we might come to a
11 different conclusion, but, given the Panel's previous decision,
12 we conclude that we must vacate and remand. When the bankruptcy
13 court dismissed the adversary proceeding, it relied on its
14 previous decision – a decision we have since vacated. The
15 bankruptcy court even acknowledged that its decision was under
16 appeal and that Kim may be able to "renew" her adversary
17 proceeding if the Panel reversed. The Panel did so.⁶

18 Accordingly, we vacate the order granting the motion to
19 dismiss and remand for further consideration in light of the
20 Panel's earlier decision and other changed circumstances in the
21 case. We leave to the bankruptcy court's discretion whether to

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23 ⁵ Further, some of his statements are flatly contradicted
24 by the record. For example, he asserts: "[I]t is important to
25 note that [our reversal in the first appeal] has been Appealed
by Mr. Hooshim and Mr. Oh." Aple's Br. at 10. Actually, the
Trustee appealed the Panel's decision.

26 ⁶ We also acknowledge that at some point the mootness
27 doctrine may simplify matters. But we lack sufficient
28 familiarity with the facts to make such a determination in this
appeal.

1 stay the matter pending the Trustee's appeal of our earlier
2 decision to the Ninth Circuit.

3 **CONCLUSION**

4 Based on the foregoing, we **VACATE** the judgment below and
5 **REMAND** for further consideration in light of the Panel's decision
6 in Hooshim v. Wolkowitz (In re Kim).

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