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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

5	In re:)	BAP No.	EC-16-1193-TaBJu
6	VISHAAL VIRK,)	Bk. No.	14-25512-C-13C
7	Debtor.)		
8	_____)		
9	VISHAAL VIRK,)		
10	Appellant,)		
11	v.)	MEMORANDUM*	
12	RONNY DHALIWAL; SUNITA)		
13	DHALIWAL; DAVID CUSICK,)		
14	Trustee,)		
	Appellees.)		
	_____)		

Argued and Submitted on March 23, 2017
at Sacramento, California

Filed - April 24, 2017

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

Honorable David E. Russell, Bankruptcy Judge, Presiding

Appearances: Peter G. Macaluso argued for appellant; Sean
Gavin of Foos Gavin Law Firm, P.C. argued for
appellees Ronny Dhaliwal and Sunita Dhaliwal.

Before: TAYLOR, BRAND, and JURY, 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(c)(2).

1 **INTRODUCTION**

2 Appellees Ronny and Sunita Dhaliwal filed a proof of claim
3 for breach of a 2012 settlement agreement in Debtor Vishaal
4 Virk's chapter 13¹ case. Debtor contends that the Dhaliwals
5 should be judicially estopped from raising the claim because
6 Ronny Dhaliwal failed to make appropriate disclosure in his 2007
7 Arizona bankruptcy case. The bankruptcy court first allowed the
8 proof of claim over objection but subject to a potential
9 redetermination of the claim's amount in the Dhaliwals'
10 nondischargeability proceeding. It thereafter disagreed with
11 Debtor's judicial estoppel theory twice: first, when it
12 determined the claim was dischargeable; and then, when it
13 declined to reconsider the initial claim objection order.
14 Debtor appealed only the latter order. He fails, however, to
15 provide us with a transcript of the original hearing where the
16 bankruptcy court stated its findings of fact and conclusions of
17 law. We, thus, summarily AFFIRM.

18 **FACTS**

19 **Debtor's bankruptcy petition and initial proceedings.** In
20 Debtor's 2014 chapter 13 case, the Dhaliwals filed a proof of
21 claim for \$344,568.66, based on Debtor's breach of a 2012
22 settlement agreement. The settlement arose from Sunita
23 Dhaliwal's investment in Debtor's gas station and Debtor's
24 employment of Ronny Dhaliwal. Allegedly, Debtor did not make

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

1 appropriate payment on his obligations as an employer and
2 otherwise defaulted in his obligations, and Sunita and Ronny
3 Dhaliwal separately sued him in state court. On the eve of
4 trial in 2012, the three parties entered into a global
5 settlement under which Debtor was to pay a sum certain over time
6 to the Dhaliwals. Debtor failed to make timely settlement
7 payments.

8 The Dhaliwals commenced a timely adversary proceeding
9 seeking to hold their claim nondischargeable.²

10 Debtor took an offensive as well as defensive position in
11 relation to the Dhaliwals' claim and nondischargeability action.
12 As most relevant here, he objected to their proof of claim,
13 arguing, among other things, that they lacked standing to bring
14 the claim because Ronny Dhaliwal, in his 2007 bankruptcy case,
15 failed to schedule and disclose the money Sunita Dhaliwal
16 invested in Debtor's gas station.

17 The bankruptcy court, Judge Klein presiding, resolved the
18 claim objection after hearing; it entered an order allowing the
19 claim as a \$344,568.66 general unsecured claim, unless a
20 different amount was determined in the adversary proceeding, and
21 provided that \$12,475 of the claim was entitled to unsecured
22 priority status. The order referred back to oral findings at
23 the hearing as it recited that: "Findings of Fact and
24 Conclusions of Law [were] stated orally on the record."

25
26 ² We exercise our discretion to take judicial notice of
27 documents electronically filed in the underlying bankruptcy case
28 and related adversary proceeding. See Atwood v. Chase Manhattan
Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

1 **ISSUE**

2 Whether the bankruptcy court abused its discretion in:
3 (1) denying Debtor's motion to reconsider or vacate its order on
4 the claim objection; and (2) declining to apply judicial
5 estoppel.

6 **STANDARDS OF REVIEW**

7 We review for an abuse of discretion a bankruptcy court's
8 decision on: (1) a reconsideration motion under § 502(j) and
9 Rule 3008, Heath v. Am. Express Travel Related Servs. Co.
10 (In re Heath), 331 B.R. 424, 429 (9th Cir. BAP 2005); (2) a
11 Civil Rule 59 reconsideration motion, Ybarra v. McDaniel,
12 656 F.3d 984, 998 (9th Cir. 2011); and (3) a Rule 60(b)
13 reconsideration motion, Lal v. California, 610 F.3d 518, 523
14 (9th Cir. 2010); Weiner v. Perry, Settles & Lawson, Inc.
15 (In re Weiner), 161 F.3d 1216, 1217 (9th Cir. 1998). We also
16 review for abuse of discretion the bankruptcy court's decision
17 to apply judicial estoppel to the facts of a case. Hamilton v.
18 State Farm Fire & Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001).

19 A bankruptcy court abuses its discretion if it applies the
20 wrong legal standard, misapplies the correct legal standard, or
21 if it makes factual findings that are illogical, implausible, or
22 without support in inferences that may be drawn from the facts
23 in the record. See TrafficSchool.com, Inc. v. Edriver Inc.,
24 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v.
25 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

26 **DISCUSSION**

27 **The scope of the appeal.** Debtor wants the Dhaliwals' claim
28 disallowed on judicial estoppel grounds. His judicial estoppel

1 theory was well ventilated before the bankruptcy court. In his
2 original claim objection, he asserted that the claim was
3 property of Ronny Dhaliwal's chapter 7 bankruptcy estate. The
4 bankruptcy court, however, overruled Debtor's objection and
5 allowed the claim; it left open only the possibility that the
6 amount of the claim could change as part of any decision in the
7 nondischargeability proceeding.

8 Beyond the bare articulation of the bankruptcy court's
9 initial ruling, we know nothing about what happened when the
10 bankruptcy court first considered Debtor's judicial estoppel
11 defense; Debtor did not provide us with a transcript from that
12 critical hearing.

13 During the adversary proceeding, while the claim objection
14 remained unresolved as to amount and subject to final
15 determination in some regard, Debtor again raised judicial
16 estoppel in his trial brief and re-asserted it at trial. The
17 bankruptcy court, however, declined to apply judicial estoppel
18 in connection with its determinations at the trial. We have the
19 transcript of the trial, but it sheds no light on the initial
20 determination by another judge of the bankruptcy court.

21 Finally, in his reconsideration motion and amended
22 reconsideration motion, Debtor again argued judicial estoppel;
23 the bankruptcy court, again, decided not to apply it. We have
24 the transcript of the reconsideration hearing, but it again
25 fails to explain the initial and most critical determination on
26 the issue.

27 Debtor's notice of appeal identifies only one order: the
28 order denying his motion to reconsider the order overruling his

1 claim objection.

2 An allowed or disallowed proof of claim "may be
3 reconsidered for cause." 11 U.S.C. § 502(j); Fed. R. Bankr.
4 P. 3008. And a "reconsidered claim may be allowed or disallowed
5 according to the equities of the case." 11 U.S.C. § 502(j). If
6 the time to appeal an order on a claim objection has not
7 expired, a reconsideration request is governed by Civil Rule 59,
8 applied in bankruptcy by Rule 9023. Wall Street Plaza, LLC v.
9 JSJF Corp. (In re JSJF Corp.), 344 B.R. 94, 103 (9th Cir. BAP
10 2006), aff'd, 277 F. App'x 718 (9th Cir. 2008). When "the time
11 for appeal has expired, a [§ 502(j)] motion to reconsider should
12 be treated as a motion for relief from judgment under Bankruptcy
13 Rule 9024." S.G. Wilson Comp. v. Cleanmaster Indus., Inc.
14 (In re Cleanmaster Indus., Inc.), 106 B.R. 628, 630 (9th Cir.
15 BAP 1989). Rule 9024 applies Civil Rule 60 in bankruptcy
16 proceedings.

17 **We summarily affirm because Debtor provided us with an**
18 **incomplete record on appeal.** This case is a procedural tangle,
19 and Debtor's excerpts of record are deficient and unhelpful. He
20 asks us to review the bankruptcy court's decision on his motion
21 to reconsider the order on his objection to the Dhaliwals' proof
22 of claim. He initially provided us, however, with only limited
23 documents: (1) the bankruptcy court's minute order denying the
24 reconsideration motion; (2) the original proof of claim;
25 (3) Ronny Dhaliwal's Arizona bankruptcy petition; (4) the trial
26 transcript from the adversary proceeding; and (5) the Dhaliwals'
27 reply to a set of interrogatories. After the Panel issued an
28 order directing him to provide the transcript from the

1 reconsideration hearing, Debtor submitted it. He never
2 provided:

- 3 • his underlying motion to reconsider or any of the resulting
- 4 filings;
- 5 • his original objection to the Dhaliwals' claim or any of
- 6 the accompanying filings; or
- 7 • the bankruptcy court's original order on his claim
- 8 objection.

9 If this were all that was missing, we could fill in the blanks
10 by exercising our discretion to independently review the docket.

11 But Debtor also did not provide us with the transcript from
12 the hearing on his claim objection, and he now seeks
13 reconsideration of the order resolving that objection. The
14 order itself does not contain findings and, instead, refers to
15 oral findings at the hearing as it states: "Findings of Fact and
16 Conclusions of Law having been stated orally on the record."

17 If a bankruptcy court makes its findings of facts and
18 conclusions of law on the record, the appellant must include the
19 transcript as part of the excerpts of record. McCarthy v.
20 Prince (In re McCarthy), 230 B.R. 414, 416-17 (9th Cir. BAP
21 1999). Here, Debtor did not. Nor can we find a copy of the
22 transcript on the bankruptcy court's docket. We, thus, cannot
23 meaningfully review either the original claim objection order or
24 the second order denying reconsideration of the claim objection
25 order.⁴ Ehrenberg v. Cal. State Univ., Fullerton Found.

26
27 ⁴ Nor did Debtor, in asking for reconsideration of Judge
28 Klein's claim objection order, provide Judge Russell with a

(continued...)

1 (In re Beachport Entm't), 396 F.3d 1083, 1087-88 (9th Cir.
2 2005); Morrissey v. Stuteville (In re Morrissey), 349 F.3d 1187,
3 1189 (9th Cir. 2003) (failing to provide a critical transcript
4 may result in summary affirmance).

5 **CONCLUSION**

6 Based on the foregoing, we AFFIRM.

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24 ⁴(...continued)
25 transcript of the claim objection hearing. The reconsideration
26 hearing transcript reflects that Judge Russell was justifiably
27 perplexed at what he was being asked to consider. Hr'g Tr.
28 (Feb. 16, 2016) 4:2-5 ("Now, what's got me a little bit
concerned here is apparently the judgments that we're seeking to
reconsider were the judgments entered by Judge Klein and not by
me; is that right?").