

MAR 20 2018

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NOT FOR PUBLICATION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

5	In re:)	BAP No.	NV-17-1200-BHTa
6	CAPRIATI CONSTRUCTION)	Bk. No.	2:15-BK-15722-ABL
7	CORPORATION, INC.,)		
	Debtor.)		
8	_____)		
9	CAPRIATI CONSTRUCTION)		
10	CORPORATION, INC.,)		
	Appellant,)		
11	v.)	AMENDED MEMORANDUM¹	
12	SPER, INC.,)		
13	Appellee.)		
14	_____)		

Argued and Submitted on December 1, 2017,
at Las Vegas, Nevada

Filed - March 20, 2018

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Aj Kung argued for appellant Capriati Construction Corporation, Inc.; H. Stan Johnson of Cohen-Johnson, LLC argued for appellee SPER, Inc.

Before: BRAND, HOULE² and TAYLOR, Bankruptcy Judges.

¹ 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.

² Hon. Mark D. Houle, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Reorganized debtor Capriati Construction Corp., Inc. appeals
2 an order denying its motion for contempt against SPER, Inc., for
3 SPER's alleged violations of the automatic stay and discharge
4 and/or plan injunction. Capriati alleged that the fraudulent
5 transfer and alter ego claims SPER was prosecuting in state court
6 against the non-debtor principal of Capriati were property of
7 Capriati's bankruptcy estate or of the reorganized debtor;
8 therefore, SPER's pursuit of those claims prior to confirmation of
9 Capriati's chapter 11³ plan violated the automatic stay and
10 violated the discharge and/or plan injunction once Capriati's plan
11 was confirmed. Capriati also appeals the court's order denying
12 reconsideration. We VACATE and REMAND.

13 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

14 A. The parties

15 Capriati is a construction company that historically
16 generated average annual income of \$55-\$65 million, primarily from
17 public work projects. The recent recession ultimately led
18 Capriati to file for bankruptcy relief. David Rocchio, Sr. is the
19 owner, sole shareholder and person in control of Capriati.

20 SPER is a corporate entity owned by Susan Frankewich, Esq.,
21 through which she conducts her law practice. Frankewich has
22 practiced bankruptcy law for over 30 years. Frankewich was the
23 attorney for Rocchio and his various entities from 2003 to mid
24 2015. Rocchio did not sign any retention agreements with
25 SPER/Frankewich individually and was not a guarantor for any

26
27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 unpaid legal fees owed by his various entities, including
2 Capriati.

3 **B. Capriati's bankruptcy filing, the state court action and the**
4 **chapter 11 plan**

5 Capriati filed its chapter 11 bankruptcy case on October 7,
6 2015. The court subsequently approved Capriati's application to
7 employ Kung & Brown as its bankruptcy counsel. SPER later filed
8 an unsecured proof of claim for Capriati's unpaid legal fees of
9 \$109,459.50.

10 One week later, SPER, represented by Frankewich, sued Rocchio
11 and his entities in state court for Capriati's unpaid legal fees,
12 alleging breach of contract, monies owed, quantum meruit,
13 misrepresentation, alter ego, and fraudulent transfer. SPER did
14 not name Capriati as a defendant, but SPER's claims for alter ego
15 and fraudulent transfer alleged that Rocchio (and the other
16 defendants) manipulated and transferred assets and funds between
17 Capriati and themselves to avoid payment of creditors, including
18 SPER. SPER requested that Rocchio be declared the alter ego of
19 Capriati and be held liable for any judgment.

20 Rocchio retained Capriati's bankruptcy counsel, Kung & Brown,
21 to file a motion to dismiss the state court action as to all
22 defendants. Rocchio argued that, because SPER's fraudulent
23 transfer claim alleged that Capriati fraudulently conveyed assets
24 prior to its filing bankruptcy, such claim had to be heard by the
25 bankruptcy court. In opposition to SPER's later summary judgment
26 motion, Rocchio argued that SPER could not recover Capriati's debt
27 from him or his entities under an alter ego theory, because
28 Capriati had to be named as a necessary and indispensable party

1 but could not be due to the bankruptcy stay. Rocchio also argued
2 that, to the extent any alleged transfers from Capriati to Rocchio
3 were avoidable, they would be reclaimed as property of Capriati's
4 bankruptcy estate; thus, SPER was impermissibly seeking recovery
5 against property of the estate.

6 Kung & Brown thereafter filed a supplement to its employment
7 application, disclosing to the bankruptcy court that the firm had
8 represented Rocchio in the state court action. Kung & Brown
9 asserted that its limited representation of Rocchio and his
10 entities did not create a conflict of interest in Capriati's
11 pending bankruptcy but rather preserved estate assets and
12 prevented further violation of the automatic stay. Kung & Brown
13 maintained that any alleged claims of alter ego and fraudulent
14 transfers by Capriati to Rocchio and his entities were claims
15 belonging to Capriati's bankruptcy estate, and so the firm had to
16 act quickly to ensure that SPER did not usurp estate assets. Both
17 Kung & Brown and Rocchio represented that Rocchio had no adverse
18 interests to the Capriati estate.

19 Capriati filed various reorganization plans and disclosure
20 statements. SPER was the only party to oppose confirmation of
21 Capriati's third amended plan of reorganization, which ultimately
22 became the confirmed plan ("Plan"). In each of its objections to
23 Capriati's disclosure statements, proposed plans and Plan
24 confirmation, SPER alleged that Capriati was not accounting for
25 avoidable fraudulent transfers involving Capriati, Rocchio, his
26 other entities and his family members. In response to one of
27 SPER's objections, Capriati's financial expert opined that either
28 the transfers alleged by SPER were not avoidable fraudulent

1 transfers, or, to the extent that any were avoidable, no benefit
2 existed for the estate and creditors because any amount recovered
3 would not be collectible. In short, the cost of pursuing such
4 claims exceeded any likely recovery.

5 After a two-day confirmation trial, at which the bankruptcy
6 court considered SPER's allegations of fraudulent transfers
7 involving Capriati, the court entered an order confirming the
8 Plan. The Plan provisions relevant here are:

9 **9.1. Vesting of Assets.** Subject to the provisions of
10 this Plan and as permitted by Section 1123(a)(5)(B) of the
11 Bankruptcy Code, the Assets, **including the Litigation**
12 **Claims⁴** and right, title, and interest being assumed by
Reorganized Debtor in the assumed Executory Contracts,
shall be transferred to Reorganized Debtor on the
Effective Date.

13 **9.2. Preservation of Litigation Claims.** In accordance
14 with Section 1123(b)(3) of the Bankruptcy Code, and except
15 as otherwise expressly provided herein, **all Litigation**
16 **Claims shall be assigned and transferred to Reorganized**
17 **Debtor. Reorganized Debtor, as the successor in interest**
to Debtor and the Estate, **may and shall have the exclusive**
right to sue on, settle, or compromise any and all
Litigation Claims, including derivative actions existing
against Debtor on the Effective Date.

18 **9.4. Injunction.** From and after the Effective Date . . .
19 **all entities that have held, currently hold, or may hold**
20 **a Claim . . . that is terminated pursuant to the terms of**
21 **this Plan are permanently enjoined from taking any of the**
22 **following actions on account of any such Claims . . . :**
(I) commencing or continuing in any manner any action or
other proceeding against Reorganized Debtor or its
property[.]

23 (Emphasis added).

24
25 ⁴ Section 1.1.41 of the Plan defined "Litigation Claims" as
26 "[a]ll rights, claims, torts, liens, liabilities, obligations,
27 actions, causes of action, Avoidance Actions [including under
28 §§ 544, 548, 550 & 551] derivative actions, proceedings, debts,
contracts, judgments, damages and demands whatsoever in law or in
equity, whether known or unknown, contingent or otherwise, that
Debtor or the Estate may have against any Person."

1 **C. Capriati's motion for contempt**

2 More than a year after SPER was on notice that the fraudulent
3 transfer and alter ego claims alleged in the state court action
4 were property of the estate or of the Reorganized Debtor, SPER
5 filed another amended complaint in the state court action, this
6 time asserting claims against just Rocchio for Capriati's unpaid
7 legal fees, including claims for fraudulent transfer and alter
8 ego. Capriati was not named as a defendant, but SPER alleged that
9 Rocchio had caused Capriati to transfer its assets to him to avoid
10 paying creditors, including SPER. SPER again requested that
11 Rocchio be declared the alter ego of Capriati.

12 In response, Capriati filed a motion for contempt in the
13 bankruptcy court, seeking sanctions against SPER for its alleged
14 violations of the automatic stay and the discharge and/or Plan
15 injunction ("Contempt Motion"). Capriati argued that SPER's
16 fraudulent transfer and alter ego claims, which alleged only
17 general claims of injury to all creditors of Capriati, were
18 property of the estate that could only be pursued by Capriati and
19 which revested in the Reorganized Debtor upon confirmation; thus,
20 SPER's state court action pursuing those claims after Capriati's
21 bankruptcy filing and prior to Plan confirmation violated the
22 automatic stay under § 362(a)(3) and violated the Plan injunction
23 after confirmation. Capriati requested sanctions against SPER of
24 \$25,000 plus attorney's fees.

25 In opposition, SPER argued that Capriati was judicially
26 estopped from claiming that the fraudulent transfer and alter ego
27 claims were estate assets: Capriati never disclosed any possible
28 avoidance actions against Rocchio in its schedules or statements

1 of financial affairs; at no time prior to confirmation did
2 Capriati ever amend its schedules or statements of financial
3 affairs to disclose the fraudulent transfer and alter ego claims;
4 neither the Plan nor confirmation order reserved or disclosed the
5 claims as a "litigation asset" of the estate; the expert report
6 minimized the value of any fraudulent transfer claim; and the
7 approved disclosure statement disavowed the existence of any such
8 claim. Therefore, argued SPER, Capriati could not now assert that
9 the fraudulent transfer and alter ego claims were estate assets,
10 when Capriati had previously and successfully asserted before the
11 bankruptcy court in connection with Plan confirmation that no such
12 claims existed.

13 Next, SPER argued that Rocchio, a non-debtor, was not
14 protected by the automatic stay or Capriati's discharge. SPER
15 maintained that the claims against Rocchio in the state court
16 action were "direct" claims against him under Nevada law, not
17 derivative corporate claims. SPER argued that at least \$1,285,500
18 in Capriati distributions to Rocchio were recoverable for
19 unsecured creditors, which was more than double what they were
20 getting under the Plan.

21 In reply, Capriati maintained that it did not list any
22 avoidance actions against Rocchio in its schedules or statements
23 of financial affairs because it never believed that any such
24 claims existed. Moreover, the alleged excessive salary payments
25 to Rocchio were the subject of SPER's many objections and the crux
26 of its objection to Plan confirmation, which SPER fully litigated
27 at the confirmation trial. Capriati maintained that SPER's
28 allegations of fraudulent transfers were without merit or support

1 in fact or law; SPER presented no witnesses at the confirmation
2 trial and entered only one document into evidence – Capriati's
3 financial expert's report – which concluded that no viable
4 fraudulent transfer or avoidance actions against Rocchio existed.

5 At the Contempt Motion hearing, counsel for SPER conceded
6 that SPER had no "direct" claim against Rocchio individually and
7 independent from Capriati, but then argued that SPER had a direct,
8 in personam claim against Rocchio as "transferee" of a fraudulent
9 conveyance. Counsel maintained that such claim did not violate
10 the automatic stay or the Plan injunction, because it was not an
11 action to recover the asset for the benefit of Capriati's estate.

12 **D. The bankruptcy court's ruling on the Contempt Motion**

13 The bankruptcy court first determined that the Contempt
14 Motion failed on the basis of judicial estoppel. The court
15 focused on Capriati's prior statement that it did not believe any
16 fraudulent transfer and alter ego claims against Rocchio existed
17 and was unaware of any such claims. To the extent Capriati
18 believed otherwise, Capriati never disclosed the claims in its
19 bankruptcy papers filed under oath. Thus, because of its failure
20 to disclose and outright denial of the existence of any such
21 claims against Rocchio, the court reasoned that Capriati was
22 judicially estopped from now taking the inconsistent position that
23 such claims were estate assets revested in the Reorganized Debtor
24 upon confirmation of the Plan.

25 Alternatively, the court held that the Contempt Motion failed
26 because neither the automatic stay nor the discharge injunction
27 applied to Rocchio, a non-debtor Capriati officer and insider.
28 Sections 9.4 and 9.5 of the Plan prohibited post-confirmation and

1 post-discharge actions against the Reorganized Debtor or its
2 property but excepted direct liability claims against Capriati's
3 officers and other insiders. The court summarily concluded that
4 SPER's claims for fraudulent transfer and alter ego were "direct"
5 claims against Rocchio individually and therefore not protected by
6 the automatic stay or the discharge and/or Plan injunction.

7 Finally, the court found that Capriati failed to meet its
8 burden of proving either a willful violation of the automatic stay
9 or the discharge injunction; SPER legitimately believed that its
10 claims in the state court action were against Rocchio
11 individually.

12 **E. Capriati's motion for reconsideration**

13 Capriati timely moved for reconsideration of the Contempt
14 Order. The bankruptcy court denied the motion, determining that
15 Capriati had not presented any grounds for reconsideration.

16 This timely appeal followed.

17 **II. JURISDICTION**

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

20 **III. ISSUES**

21 1. Did the bankruptcy court err by determining that SPER had not
22 willfully violated the automatic stay or the Plan injunction
23 without determining first whether the fraudulent transfer and
24 alter ego claims were either property of the estate or property of
25 the Reorganized Debtor?

26 2. Did the bankruptcy court err in determining that SPER had not
27 willfully violated the automatic stay or the Plan injunction and
28 therefore abused its discretion by not holding SPER in contempt?

1 3. Did the bankruptcy court abuse its discretion by invoking
2 judicial estoppel to deny the Contempt Motion?

3 4. Did the bankruptcy court abuse its discretion in denying the
4 motion to reconsider?

5 **IV. STANDARDS OF REVIEW**

6 Determining whether the bankruptcy court applied the correct
7 legal standard is a question of law reviewed de novo. Emmert v.
8 Taggart (In re Taggart), 548 B.R. 275, 286 (9th Cir. BAP 2016).
9 An erroneous view of the law may induce the bankruptcy court to
10 make a clearly erroneous finding of fact. Ozenne v. Bendon (In re
11 Ozenne), 337 B.R. 214, 218 (9th Cir. BAP 2006) (citing Power v.
12 Union Pac. R.R. Co., 655 F.2d 1380, 1382-83 (9th Cir. 1981)).

13 Whether property is included in a bankruptcy estate is a
14 question of law subject to de novo review. Cisneros v. Kim (In re
15 Kim), 257 B.R. 680, 684 (9th Cir. BAP 2000).

16 We review for abuse of discretion the bankruptcy court's
17 decision to apply judicial estoppel, or preclusion of inconsistent
18 positions, to the facts of a case. Hamilton v. State Farm Fire &
19 Cas. Co., 270 F.3d 778, 782 (9th Cir. 2001); Diamond Z Trailer,
20 Inc. v. JZ L.L.C. (In re JZ L.L.C.), 371 B.R. 412, 416 (9th Cir.
21 BAP 2007).

22 We review for an abuse of discretion the bankruptcy court's
23 decision whether to hold a party in civil contempt. Knupfer v.
24 Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003);
25 Rediger Inv. Servs. v. H. Granados Commc'ns, Inc. (In re H
26 Granados Commc'ns, Inc.), 503 B.R. 726, 731 (9th Cir. BAP 2013).
27 The underlying factual findings are reviewed for clear error.
28 In re Dyer, 322 F.3d at 1191; In re H Granados Commc'ns, Inc.,

1 503 B.R. at 731-32. A finding is clearly erroneous when it is
2 illogical, implausible or without support in the record. United
3 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc).

4 We review for an abuse of discretion the bankruptcy court's
5 decision to deny a reconsideration motion under Civil Rule 59.
6 Ybarra v. McDaniel, 656 F.3d 984, 998 (9th Cir. 2011); Cruz v.
7 Stein Strauss Tr. # 1361, PDQ Invs., LLC (In re Cruz), 516 B.R.
8 594, 601 (9th Cir. BAP 2014).

9 A bankruptcy court abuses its discretion if it applies the
10 wrong legal standard, misapplies the correct legal standard, or if
11 it makes factual findings that are illogical, implausible or
12 without support in inferences that may be drawn from the facts in
13 the record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
14 820, 832 (9th Cir. 2011).

15 V. DISCUSSION

16 **A. The bankruptcy court's failure to determine ownership of the** 17 **fraudulent transfer and alter ego claims led to error.**

18 The bankruptcy court denied the Contempt Motion in the first
19 instance based on its determination that judicial estoppel barred
20 the relief sought by Capriati, and second, summarily, on the
21 alternative grounds that the automatic stay and discharge and/or
22 Plan injunction did not apply to preclude SPER's filing and
23 pursuit of its "direct" claims for fraudulent transfer and alter
24 ego against Rocchio, a non-debtor third party and Capriati
25 insider. The bankruptcy court never determined whether the
26 fraudulent transfer and alter ego claims were property of the
27 estate or property of the Reorganized Debtor. This approach puts
28 the cart before the horse. The omission led to the erroneous or

1 incomplete finding that SPER's claims for fraudulent transfer and
2 alter ego were exclusively "direct" claims against Rocchio; the
3 record and the law are to the contrary. And this conclusion
4 improperly colored the determinations that followed.

5 Property of the estate includes "all legal or equitable
6 interests of the debtor in property as of the commencement of the
7 case." § 541(a)(1). A debtor's "causes of action" are "property
8 of the estate." Smith v. Arthur Andersen LLP, 421 F.3d 989, 1002
9 (9th Cir. 2005) (citing United States v. Whiting Pools, Inc.,
10 462 U.S. 198, 205 n.9 (1983)). Thus, the trustee, or in this case
11 the debtor-in-possession, stands in the shoes of the debtor
12 corporation and has standing to bring any suit that the debtor
13 corporation could have instituted had it not filed for bankruptcy
14 relief. Id. The trustee's standing to sue on behalf of the
15 estate is exclusive; a debtor's creditors cannot prosecute such
16 claims belonging to the estate absent abandonment. Estate of
17 Spirtos v. One San Bernardino Cty. Super. Ct., 443 F.3d 1172, 1175
18 (9th Cir. 2006).

19 Furthermore, § 1141(b) "vests **all** of the property of the
20 estate, scheduled and unscheduled, in the debtor upon plan
21 confirmation, unless the court or plan provides otherwise." In re
22 JZ L.L.C., 371 B.R. at 418 (emphasis in original). Hence, because
23 of § 1141(b), the general rule under § 554(d) – that property of
24 the estate that is not scheduled and not otherwise administered
25 before the case is closed and is not abandoned to the debtor at
26 the time of closing, but rather remains property of the estate,
27 forever – does not apply. Id. Thus, even undisclosed assets in a
28 chapter 11 case vest in the debtor under § 1141(b), unless the

1 plan provides otherwise. Id. at 419. Section 9.1 of the Plan
2 provides that all Litigation Claims, including all known or
3 unknown causes of action, Avoidance Actions and derivative
4 actions, vested in the Reorganized Debtor on the effective date.
5 This is not inconsistent with § 1141(b).

6 **1. The fraudulent transfer claim**

7 The crux of SPER's fraudulent transfer claim was Capriati's
8 alleged over-payment of salary to Rocchio, which SPER argued was a
9 transfer in fraud of all creditors and harmful to Capriati. In
10 other words, SPER's complaint alleged a direct injury to Capriati,
11 from which an injury to SPER was derived. "If a cause of action
12 alleges only indirect harm to a creditor (i.e., an injury which
13 derives from harm to the debtor), and the debtor could have raised
14 a claim for its direct injury under the applicable law, then the
15 cause of action belongs to the estate." Schertz-Cibolo-Universal
16 City, Indep. Sch. Dist. v. Wright (In re Educators Grp. Health
17 Tr.), 25 F.3d 1281, 1284 (5th Cir. 1994).

18 We conclude that SPER's fraudulent transfer claim asserted in
19 the state court action was property of Capriati's bankruptcy
20 estate by virtue of § 544(b) once Capriati filed its bankruptcy
21 petition, and such claim could only be pursued by Capriati.
22 § 548(a); The Cadle Co. v. Mims (In re Moore), 608 F.3d 253, 261
23 (5th Cir. 2010) (fraudulent transfer claims become estate property
24 "once bankruptcy is under way" by virtue of trustee's successor
25 rights under § 544(b)); Nat'l Tax Credit Partners, L.P. v. Havlik,
26 20 F.3d 705, 708-09 (7th Cir. 1994) (same). See also Whiting
27 Pools, Inc., 462 U.S. at 205 ("Section 541(a)(1) is intended to
28 include in the estate any property made available to the estate by

1 other provisions of the Bankruptcy Code," which would include
2 property made available through § 544).

3 We reject SPER's argument that it could pursue a direct claim
4 against Rocchio as the "transferee" of a fraudulent transfer under
5 Nevada law, namely NRS 112.220, which provides for recovery of the
6 value of the asset transferred from the transferee, during the
7 chapter 11 case. That statute does not consider the effect of a
8 corporate debtor's bankruptcy filing and the fact that a
9 prepetition claim for injury to the debtor by an insider's
10 fraudulent transfers is property of the corporate debtor's estate.

11 **2. The alter ego claim**

12 Whether the alter ego claim was property of the estate or of
13 the Reorganized Debtor is not as easy to determine. The alter ego
14 doctrine is used to establish the direct liability of a
15 shareholder when that shareholder improperly uses the corporate
16 entity to commit acts which harm the corporation. Here, SPER
17 alleged a traditional veil-piercing (alter ego) claim, whereby a
18 creditor attempts to place liability for a debtor-corporation's
19 obligations on its shareholders.

20 Whether an alter ego claim is property of the bankruptcy
21 estate depends on two things: (1) whether under state law where
22 the corporate debtor is incorporated, the debtor is permitted to
23 pierce its own corporate veil; and (2) whether the claim is a
24 general one, of the type that could be brought by any creditor of
25 the debtor. Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d 130,
26 132-33 (2d. Cir. 1993); S.I. Acquisition, Inc. v. Eastway Delivery
27 Serv., Inc., 817 F.2d 1142, 1152-53 (5th Cir. 1987); CBS, Inc. v.
28 Folks (In re Folks), 211 B.R. 378, 384, 387 (9th Cir. BAP 1997),

1 rev'd on other grounds by Ahcom, Ltd. v. Smeding, 623 F.3d 1248
2 (9th Cir. 2010); Murray v. Miner, 876 F. Supp. 512, 516 (S.D.N.Y.
3 1995); In re Davey Roofing Inc., 167 B.R. 604, 608 (Bankr. C.D.
4 Cal. 1994), rev'd on other grounds by Ahcom, Ltd. v. Smeding,
5 623 F.3d 1248 (9th Cir. 2010). If the answer to both of these
6 questions is yes, then the alter ego claim is property of the
7 estate, belongs to the trustee or debtor-in-possession, and cannot
8 belong to any individual creditor. In re Folks, 211 B.R. at 387
9 (citing Davey Roofing, Inc., 167 B.R. at 606). "This rule ensures
10 that all of a debtor's creditors receive equal treatment:
11 otherwise, those who asserted alter ego claims first would obtain
12 payment of the claims in preference to and to the detriment of
13 other creditors, despite having no greater claim on the alter
14 ego's assets." Murray, 876 F. Supp. at 516 (internal quotation
15 marks and citation omitted).

16 Despite SPER's assertion and the bankruptcy court's finding
17 to the contrary, the alter ego claim alleged here was a general,
18 as opposed to a personal or individualized, claim. "A cause of
19 action is personal if the claimant himself is harmed and no other
20 claimant or creditor has an interest in the cause." In re Folks,
21 211 B.R. at 387 (internal quotation marks and citation omitted).
22 "A general claim exists if the liability is to all creditors of
23 the corporation without regard to the personal dealings between
24 such officers and such creditors." Id. (internal quotation marks
25 and citation omitted). In other words, if the alter ego claim
26 alleges acts that harmed the financial condition of the
27 corporation as a whole and all creditors equally, such claims are
28 general alter ego claims. Id. See Kalb, Voorhis & Co., 8 F.3d at

1 133; In re Davey Roofing, Inc., 167 B.R. at 608.

2 SPER's alter ego claim alleging that Rocchio (1) had failed
3 to observe corporate formalities with respect to Capriati,
4 (2) used corporate funds for his own personal use, and (3) had
5 manipulated Capriati's assets and funds to avoid payment of
6 creditors was a general claim because all creditors are affected;
7 no particularized injury to SPER existed that could not be brought
8 by other Capriati creditors harmed by Rocchio's alleged bad acts.
9 Accordingly, the bankruptcy court clearly erred to the extent that
10 it found SPER had a "direct" or personal alter ego claim against
11 Rocchio that was not an asset of the chapter 11 estate.

12 As for the question of whether Capriati could pierce its own
13 corporate veil, the parties have been operating under the
14 assumption that Nevada alter ego law applies. However, Capriati
15 is a Rhode Island corporation. Thus, as noted above, Rhode Island
16 alter ego law applies.

17 Rhode Island recognizes the equitable doctrine of alter ego.
18 McFarland v. Brier, 769 A.2d 605, 613 (R.I. 2001) (alter ego
19 doctrine permits creditors of a corporation to reach assets of
20 individual(s) that control the corporation). However, we could
21 not locate any Rhode Island Supreme Court case answering the
22 question of whether a corporation may pierce its own veil.

23 In any event, the general rule in most (if not all) states is
24 that "alter ego" is not an independent cause of action, but is an
25 equitable remedy – a legal theory or doctrine used to impose
26 liability against the alter ego defendant under another cause of
27

28

1 action.⁵ We could not locate a Rhode Island Supreme Court case
2 stating whether this is the law in Rhode Island, but based on that
3 Court's use of the terms "equitable" and "doctrine" in cases
4 discussing alter ego, we can assume that Rhode Island follows this
5 general rule. See Heflin v. Koszela, 774 A.2d 25, 30 (R.I. 2001)
6 ("To invoke the equitable alter ego doctrine . . .").

7 Thus, we question what value SPER's alter ego claim has as a
8 remedy absent the ability to pursue the fraudulent transfer claim.

9 **3. SPER violated the automatic stay**

10 The bankruptcy court determined that SPER could not have
11 violated the automatic stay by filing and pursuing its "direct"
12 claims for fraudulent transfer and alter ego against Rocchio
13 individually in the state court action. We do not argue the point
14 that generally a non-debtor is not protected by the automatic
15 stay. However, as we have determined, SPER's fraudulent transfer
16 claim was not a "direct" claim against Rocchio, because it became
17 property of the estate once Capriati filed its bankruptcy case.

18 The automatic stay continues to protect property of the
19 estate so long as it retains that status. § 362(c)(1). While the
20 automatic stay did not apply to Rocchio, it did apply to claims
21 against property of the estate prior to confirmation under
22

23
24 ⁵ For example, in California "[a] claim against a defendant,
25 based on the alter ego theory, is not itself a claim for
26 substantive relief, e.g., breach of contract or to set aside a
27 fraudulent conveyance, but rather, procedural . . ." Hennessey's
28 Tavern, Inc. v. Am. Air Filter Co., 204 Cal. App. 3d 1351, 1359
(1988). "Alter ego is merely a legal theory, or doctrine,
employed to make a substantive cause of action applicable to the
'alter ego defendant' where otherwise that claim could only be
stated against the corporate entity." Id.

1 § 362(a)(3).⁶ As a result, SPER violated the automatic stay when
2 it asserted the fraudulent transfer and related alter ego claims
3 in its state court complaint. And acts in violation of the stay
4 are void, absent an annulment of the stay. SPER cannot rely on
5 those claims for relief either as initially pled or as amended.
6 Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th
7 Cir. 1992) (actions taken in violation of the automatic stay are
8 void).

9 Whether SPER has a post-Plan confirmation "direct" claim is
10 an issue for further consideration, but it must assert such a
11 claim as a new matter after confirmation and without reliance on
12 void assertions during the course of the case. However, SPER's
13 new attempt would remain subject to potentially successful attack
14 based on the discharge and Plan injunction and subject to defenses
15 such as the statute of limitations, as applicable.

16 Section 362(k) permits the recovery of damages resulting from
17 a stay violation. This subsection, however, applies only to
18 individuals, not corporations. In re H Granados Commc'ns, Inc.,
19 503 B.R. at 733. Nonetheless, a corporation may be entitled to
20 recovery for a stay violation under § 105(a) as a sanction for
21 civil contempt. Id.

22 To find a party in civil contempt for a stay violation, the
23 threshold inquiry focuses on a finding of "willfulness." Id.
24 (citing In re Dyer, 322 F.3d at 1191). The bankruptcy court must
25 find that: (1) the party knew of the automatic stay; and (2) the

27 ⁶ Under § 362(a)(3), the automatic stay prohibits "any act
28 to obtain possession of property of the estate or of property from
the estate or to exercise control over property of the estate."

1 party's actions that violated the stay were intentional. Id.
2 Whether the party exhibited bad faith or had a subjective intent
3 to violate the stay is irrelevant. Id. The movant bears the
4 burden of showing by clear and convincing evidence that the party
5 violated the stay. Id.

6 SPER has never claimed that it did not receive notice of
7 Capriati's bankruptcy filing. Indeed, it was careful not to
8 include Capriati as a defendant in the state court action, filed
9 just one week after Capriati filed its chapter 11 case. Further,
10 Frankewich, a bankruptcy attorney of over 30 years, is certainly
11 familiar with the rules of the automatic stay and knew or should
12 have known that usurping property of the bankruptcy estate is a
13 willful violation of the automatic stay. Her subjective belief
14 that the claims in the state court action were against Rocchio
15 only and not Capriati makes no difference for purposes here,
16 despite the bankruptcy court's ruling to the contrary. Because
17 the court applied an incorrect legal standard, its finding that
18 SPER had not willfully violated the automatic stay is clearly
19 erroneous. In re Ozenne, 337 B.R. at 218.

20 The record supported a determination that SPER willfully
21 violated the automatic stay by filing and continuing to pursue the
22 fraudulent transfer claim against Rocchio in the state court
23 action after Capriati filed its bankruptcy case and prior to
24 confirmation of the Plan. Therefore, the bankruptcy court abused
25 its discretion by not holding SPER in contempt.

26 **4. Whether SPER violated the discharge and/or Plan**
27 **injunction can be determined on remand.**

28 Per § 1141(b) and Sections 1.1.41, 9.1, 9.2 and 9.4 of the

1 Plan, the fraudulent transfer claim (and maybe the alter ego claim
2 if viable under Rhode Island law and if it was property of the
3 estate) appears to be a "Litigation Asset" that reverted to the
4 Reorganized Debtor upon confirmation of the Plan, gave the
5 Reorganized Debtor exclusive right to sue on, settle or compromise
6 that claim, and permanently enjoined any other parties from
7 commencing or continuing any action regarding that claim.

8 Capriati argues that the bankruptcy court erred by not holding
9 SPER in contempt for willfully violating the Plan injunction and
10 confirmation order, when it was clear that SPER was attempting to
11 take control over claims belonging to the Reorganized Debtor.

12 The contempt remedy is also available with respect to
13 violations of the discharge injunction under § 105(a). ZiLOG,
14 Inc. v. Corning (In re ZiLOG, Inc.), 450 F.3d 996, 1007 (9th Cir.
15 2006); Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 507 (9th
16 Cir. 2002); In re Taggart, 548 B.R. at 286. The party seeking
17 contempt sanctions has the burden of proving, by clear and
18 convincing evidence, that the alleged contemnor "(1) knew the
19 discharge injunction was applicable and (2) intended the actions
20 which violated the injunction." In re ZiLOG, Inc., 450 F.3d at
21 1007; Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th
22 Cir. 2002) ("The moving party has the burden of showing by clear
23 and convincing evidence that the contemnors violated a specific
24 and definite order of the court."). Knowledge of the injunction
25 is a question of fact that can normally be resolved only after an
26 evidentiary hearing. In re ZiLOG, Inc., 450 F.3d at 1007.
27 However, where the facts are not in dispute, no hearing need be
28 held. Id. at 1007 n.11 (citing In re Dyer, 322 F.3d at 1191-92).

1 Here, the bankruptcy court applied the correct legal standard
2 for a willful violation of the discharge or Plan injunction. It
3 is undisputed that SPER knew of the Plan injunction and
4 confirmation order given its objections to Plan confirmation,
5 which were overruled at the confirmation trial, and that SPER
6 continued to pursue the state court action post-confirmation.
7 However, it is not clear on this record whether SPER was aware
8 that the Plan injunction **applied** to its claims against Rocchio for
9 fraudulent transfer and alter ego. The bankruptcy court may need
10 to conduct an evidentiary hearing on remand to make that
11 determination.

12 **B. We need not decide whether the bankruptcy court abused its**
13 **discretion by invoking judicial estoppel to deny the Contempt**
14 **Motion.**

15 Capriati argues that the bankruptcy court misapplied and
16 grossly over-extended the doctrine of judicial estoppel. We do
17 not fault the court for wanting to apply some sort of equitable
18 doctrine in this case to deny Capriati's request for monetary
19 damages for contempt, which is all it requested. Like the
20 bankruptcy court, we question why a corporate debtor like Capriati
21 would concern itself with a creditor's pursuit of a third party,
22 albeit a corporate insider, in state court. The fairly obvious
23 reason Capriati was seeking monetary damages for contempt in the
24 bankruptcy court was to protect and benefit Rocchio, Capriati's
25 principal and sole shareholder.

26 Judicial estoppel is an equitable doctrine that precludes a
27 party from gaining an advantage by asserting one position, and
28 then later seeking an advantage by taking a clearly inconsistent
position, either in the same or different actions. Hamilton,

1 270 F.3d at 782-83. The court invokes judicial estoppel not only
2 to prevent a party from gaining an advantage by taking
3 inconsistent positions, "but also because of general
4 considerations of the orderly administration of justice and regard
5 for the dignity of judicial proceedings, and to protect against a
6 litigant playing fast and loose with the courts." Id. (internal
7 quotation marks and citation omitted).

8 Although Capriati as a chapter 11 debtor-in-possession and
9 revested debtor had exclusive standing to sue on causes of action
10 that were property of the estate, that right is subject to certain
11 equitable constraints. In re JZ, L.L.C. 371 B.R. at 418; § 1107.⁷

12 As the Panel has noted:

13 Section 1141(b) vesting does not mean that a debtor
14 necessarily has unfettered control over property of the
15 estate. It neither authorizes nor condones mischief, such
16 as omitting to schedule property. For that reason,
17 equitable constraints may be imposed in order to preserve
the integrity of the system. In principle, the full
panoply of equitable remedies, from constructive trust
through equitable and judicial estoppel, are available to
assure that debtors do not overreach.

18 In re JZ L.L.C., 371 B.R. at 420. Accordingly, as JZ L.L.C.
19 instructs, the bankruptcy court had discretion to apply an
20 equitable doctrine like judicial estoppel to deny Capriati
21 contempt damages. We simply disagree that applying the doctrine
22 without recognizing that a stay violation occurred and that SPER
23 continues to rely on void claims for relief is appropriate.

24 On remand, the bankruptcy court may certainly revisit any
25 equitable doctrine it deems appropriate to deny contempt damages

26 ⁷ Under § 1107(a), the debtor in possession is vested with
27 the rights, powers, and duties of a trustee, including the right
28 to sue and be sued. See § 323(b) (trustee has capacity to sue and
be sued).

1 to Capriati.

2 **C. The bankruptcy court abused its discretion in denying the**
3 **motion to reconsider.**

4 A motion under Civil Rule 59(e) should not be granted unless
5 the court is presented with newly discovered evidence, committed
6 clear error, or if there is an intervening change of controlling
7 law. 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th
8 Cir. 1999). Capriati asked the bankruptcy court to reconsider its
9 ruling on the Contempt Motion, arguing that the court had erred
10 when it determined that (1) SPER had a direct claim against
11 Rocchio, (2) that judicial estoppel authorized the court to allow
12 a single creditor to bring postpetition and post-confirmation
13 fraudulent transfer and alter ego claims, which were property of
14 the estate and of the Reorganized Debtor, for the creditor's sole
15 benefit, and that (3) SPER had not willfully violated the
16 automatic stay or Plan injunction. Because we have determined
17 that the court applied incorrect standards of law and made clearly
18 erroneous findings of fact based on its erroneous view of the law,
19 it abused its discretion by not granting Capriati's motion to
20 reconsider.⁸

21 **VI. CONCLUSION**

22 For the foregoing reasons, we VACATE and REMAND the Contempt
23 Order for the bankruptcy court to determine what sanctions are

24
25 ⁸ SPER requests sanctions against Capriati for filing a
26 frivolous appeal. First, Capriati has prevailed in this appeal.
27 In addition, we deny SPER's request because it fails to comply
28 with Rule 8020, which requires a party to request sanctions for a
frivolous appeal by separate motion. State of Cal. Emp't Dev.
Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1154 (9th
Cir. 1996).

1 appropriate for SPER's willful violation of the automatic stay and
2 perhaps willful violation of the Plan injunction. We leave to the
3 court's discretion as to whether any further proceedings are
4 necessary for it to make that determination.

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