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ORDERED PUBLISHED

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NV-11-1742-DKiPa
)		
FRANK J. LEVESQUE and)	Bk. No.	10-21796-BAM
BONNIE R. LEVESQUE,)		
)		
Debtors.)		
_____)		
FRANK J. LEVESQUE; BONNIE R.)		
LEVESQUE,)		
)		
Appellants,)		
)		
v.)	O P I N I O N	
)		
BRIAN D. SHAPIRO, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and Submitted on June 15, 2012
at Las Vegas, Nevada

Filed - June 25, 2012

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Appearances: _____

 Edward S. Coleman, Esq. argued for the Appellants;
 Brian D. Shapiro, Esq. argued for the Appellee.

Before: DUNN, KIRSCHER and PAPPAS, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:

2
3 The debtor appellants Frank and Bonnie Levesque (the
4 "Levesques") filed motions (collectively, "Motions") to reopen
5 their chapter 7¹ bankruptcy case and convert it to chapter 11.
6 The bankruptcy court granted their motion to reopen but denied
7 their motion to convert. The Levesques appeal the denial of
8 their conversion motion. We AFFIRM.

9 Factual Background

10 The facts relevant in this appeal are limited and
11 straightforward.

12 On September 15, 2009, the Levesques were involved in a
13 motor vehicle accident (the "Accident") that apparently resulted
14 in substantial personal injuries to both Mr. and Ms. Levesque.
15 The Levesques already had fallen behind on their mortgage
16 payments, and their financial problems worsened after the
17 Accident.

18 The Levesques filed a chapter 7 bankruptcy petition on
19 June 24, 2010. Their bankruptcy counsel was Shawn Christopher of
20 the Christopher Legal Group. On June 24, 2010, Brian D. Shapiro
21 ("Trustee") was appointed as the chapter 7 trustee in the
22 Levesques' bankruptcy case.

23 In their schedules, the Levesques confirmed under penalty of
24 perjury that they did not have any unliquidated claims against
25

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

1 any third parties. On June 28, 2010, the Levesques provided
2 written answers under penalty of perjury in a bankruptcy
3 questionnaire, both answering "No" to the following questions:

4 . . .

5 9. Does anyone owe you any money for any reason?

6 10. Do you have any claim against anyone that is not
7 listed in your Schedules?

8 11. Have you filed or do you have a reason to file any
9 lawsuit against any one for any reason?

10 The Levesques attended their § 341(a) meeting and testified
11 under oath that their schedules were true and accurate.

12 The Levesques received their discharge by order entered on
13 October 4, 2010. The Trustee was discharged and the Levesques'
14 chapter 7 case was closed by Final Decree entered on October 7,
15 2010.

16 Sometime prior to October 18, 2010, the Levesques retained
17 the Law Office of Henness & Haight (the "Henness Firm") to pursue
18 recovery of damages (the "Claim") from Falcon Industries, Inc.
19 ("Falcon") based on their injuries resulting from the Accident.
20 On October 18, 2010, the Henness Firm made demand on Falcon for
21 \$750,000. On January 5, 2011, the Levesques filed a lawsuit
22 against Falcon (the "Lawsuit") to assert the Claim.

23 During a deposition of the Levesques taken in the Lawsuit,
24 counsel for Falcon questioned the Levesques and asked them why
25 they had not listed the Claim in their bankruptcy, intimating
26 that they "had committed some fraud." Tr. of December 13, 2011
27 Hr'g at 4:1-8. Thereafter, on November 11, 2011, the Levesques,
28 through new counsel, Edward S. Coleman, filed the Motions. In

1 the combined Motions, the Levesques disclosed the Claim to the
2 bankruptcy court for the first time.

3 The Trustee joined the Levesques' motion to reopen their
4 bankruptcy case but opposed their motion to convert it to
5 chapter 11, based on their prior failures to disclose the Claim,
6 citing Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007).
7 The Levesques filed the affidavit of Ms. Levesque in support of
8 their motion to convert, stating in substance that the Levesques
9 failed to disclose the Claim in their schedules and in their
10 testimony at the § 341(a) meeting based on advice from their
11 attorney in light of the fact that there was no pending lawsuit.
12 The Trustee moved to strike Ms. Levesque's affidavit as filed in
13 violation of the bankruptcy court's local rules and filed late.

14 The bankruptcy court heard argument on the Motions at a
15 hearing ("Hearing") on December 13, 2011. At the Hearing, the
16 bankruptcy court denied the Trustee's motion to strike Ms.
17 Levesque's affidavit. Following argument, the bankruptcy court
18 announced oral findings of fact and conclusions of law on the
19 record, citing the Supreme Court's Marrama decision, and granted
20 the Levesques' motion to reopen their bankruptcy case, but denied
21 their motion to convert to chapter 11.

22 The bankruptcy court entered an order reopening the
23 Levesques' bankruptcy case and denying their motion to convert
24 the case to chapter 11 on December 19, 2011. The Levesques
25 timely appealed.

26 At oral argument, the Trustee advised that he had been
27 reappointed as the trustee in the Levesques' reopened chapter 7
28 case.

1 be drawn from the facts in the record.'" Id.

2 Discussion

3 1. The Trustee had standing to appear and be heard with respect
4 to the Motions.

5 This appeal is all about control of litigation of the Claim.
6 The Levesques argue that the Trustee had no standing to file
7 pleadings and be heard with respect to the Motions because he had
8 filed his final report and been discharged and, consequently, had
9 no stake in the relief sought by the Levesques. Appellants'
10 Opening Brief at 6-7. The Trustee responds that the Levesques
11 did not raise any issue as to the Trustee's standing in their
12 pleadings, including the affidavit of Ms. Levesque, presented to
13 the bankruptcy court. Appellee's Brief at 8. We note that
14 counsel for the Levesques did not question the Trustee's standing
15 at the Hearing.

16 Ordinarily, if an issue is not raised before the trial
17 court, it will not be considered on appeal and will be deemed
18 waived. See, e.g., Laub v. U.S. Dep't of Interior, 342 F.3d
19 1080, 1087 n.6 (9th Cir. 2003); Crosby v. Reed (In re Crosby),
20 176 B.R. 189, 195 (9th Cir. BAP 1994). However, in light of the
21 significance of the issue of the Trustee's standing in this
22 context, we exercise our discretion to consider the standing
23 issue raised in the Levesques' opening brief. See City of Los
24 Angeles v. County of Kern, 581 F.3d 841, 845-46 (9th Cir. 2009).

25 This is an issue of first impression before this Panel.
26 Rule 5010, titled "Reopening Cases," specifically provides that,
27 "A case may be reopened on motion of the debtor or other party in
28 interest pursuant to § 350(b) of the Code." (Emphasis added.)

1 The term "party in interest" is not defined in the Bankruptcy
2 Code or Rules. The Levesques, as debtors, filed the motion to
3 reopen their case, and their standing under Rule 5010 is not in
4 question. On the other hand, the Trustee's standing to appear
5 with respect to the Motions presents some interesting technical
6 issues that need to be resolved.

7 We conclude that to deny the Trustee standing to appear and
8 be heard with respect to the Motions would, in the words of the
9 Supreme Court's recent decision (albeit in a different context)
10 in RadLAX Gateway Hotel, LLC v. Amalgamated Bank, be
11 "hyperliteral and contrary to common sense," for the following
12 reasons. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.
13 Ct. 2065, 2068 (2012).

14 At the outset, it truly would be ironic, and reward
15 disingenuousness, to deny standing to the Trustee as a party in
16 interest to be heard with respect to the Motions at the behest of
17 the Levesques, when at the time the Motions were filed, the
18 Levesques did not own the Claim that was the sole reason for the
19 Motions. The Claim belonged to their bankruptcy estate. See
20 §§ 541 (property of the estate) and 554(d) (property not
21 abandoned or administered remains property of the estate); Lopez
22 v. Specialty Rests. Corp. (In re Lopez), 283 B.R. 22, 28 (9th
23 Cir. BAP 2002) (An unsecured claim "that is neither abandoned
24 nor administered remains property of the estate even after the
25 case is closed."). The Levesques could not even claim an
26 exemption regarding the Claim until after their bankruptcy case
27 was reopened. On the other hand, the only reason the Trustee did
28 not administer the Claim before the case closed in October 2011

1 was because the Levesques failed to disclose it, and no other
2 potential "party in interest" is more knowledgeable about the
3 Levesques' bankruptcy case than the Trustee.

4 Procedurally, this appeal presents an unusual fact pattern.
5 Ordinarily, the Levesques' motion to reopen would have been set
6 for hearing separately. After it was granted for the purpose of
7 further administration of estate assets, the Trustee or a new
8 chapter 7 trustee would have been appointed or reappointed. As
9 noted above, the Trustee was reappointed in this case. If
10 thereafter, the Levesques' motion to convert was set for hearing,
11 there would be no question as to the Trustee's standing to appear
12 and be heard with respect to the motion to convert. However, the
13 Levesques filed the Motions in a single pleading, and the Motions
14 were scheduled to be heard together.

15 In these circumstances, we are inclined to follow what
16 appears to be the majority approach, recognizing the standing of
17 a discharged chapter 7 trustee to appear and be heard as a party
18 in interest in proceedings relating to reopening a closed case
19 for administration of undisclosed assets. The rationale for that
20 position is well stated in the opinion of the district court in
21 White v. Boston (In re White), 104 B.R. 951, 954 (S.D. Ind.
22 1989):

23 [T]he argument [against standing] is overly
24 formalistic. Followed to its logical conclusion, it
25 would also preclude creditors from seeking a reopening
26 to administer undisclosed assets on the grounds that
27 they would merely be former creditors. Moreover, it is
28 established case law that a trustee's powers are
terminated only when the estate has been properly
closed. It would be incongruous to permit a debtor who
has failed to disclose assets to use this failure (and
the subsequent erroneous closing) as a shield against
reopening. The distinction between a "trustee" and a

1 "former trustee" urged by the debtors is semantic
2 rather than substantive, and does not effect a
3 talismanic change in the trustee's legal status.
4 Therefore, the mere closing of an estate cannot in
5 [and] of itself prohibit trustee standing. (Emphasis
6 in original.)

7 See In re Linton, 136 F.3d 544, 546 (7th Cir. 1998) ("A
8 bankruptcy proceeding can be reopened for cause, . . . § 350(b),
9 by 'the debtor or other party in interest.' [Rule] 5010. The
10 term 'party in interest' is not defined, but is generally held to
11 include the trustee.") (citations omitted and emphasis added);
12 Mendelsohn v. Ozer, 241 B.R. 503, 506 (E.D.N.Y. 1997); In re
13 Sweeney, 275 B.R. 730, 735-36 (Bankr. W.D. Pa. 2002); In re Avis,
14 1996 WL 910911, at *2 n.1 (Bankr. E.D. Va. 1996); In re
15 Winebrenner, 170 B.R. 878, 881 (Bankr. E.D. Va. 1994); In re
16 Stewart, 154 B.R. 711 (Bankr. N.D. Ill. 1993); In re Stanke, 41
17 B.R. 379, 381 (Bankr. W.D. Mo. 1984) ("As one of the few persons
18 informed as to the case, the trustee is a natural person to hold
19 and to exercise the power to move to reopen if his duty is
20 unfinished.").

21 In the White case, the debtors sought to overturn on appeal
22 the bankruptcy court's decision to grant the trustee's motion to
23 reopen a closed case to administer assets not listed on the
24 debtors' schedules. The case law cited by the White court for
25 the proposition that a trustee's authority is only terminated
26 when a case is "properly" closed includes this Panel's decision
27 in Gross v. Petty (In re Petty), 93 B.R. 208 (9th Cir. BAP 1988).
28 In Petty, the trustee moved to reopen a closed chapter 7 case to
recover an alleged preference that was under investigation at the
time that the bankruptcy case was closed administratively. The

1 preference defendants appealed the judgment that ultimately was
2 entered in favor of the trustee by the bankruptcy court. Id. at
3 210-11.

4 Although the trustee's standing to reopen the case was not
5 raised as an issue in Petty, the Panel did discuss the impact of
6 an undisclosed estate asset on case closure:

7 [S]ince the debtors' potential interest in the subject
8 real estate was not disclosed in the bankruptcy
9 petition the case was never fully administered within
10 the meaning of § 350(a), and therefore not properly
11 closed under that section. . . . Once it has been
12 established that the case was not properly closed and
13 may be reopened to administer the assets of the
14 debtor's estate it would be anomalous to bar the
15 collection of the very assets sought to be recovered
16 because the case was closed.

17 Id. at 212. Likewise, in such circumstances, it would be
18 anomalous not to treat the trustee, the most knowledgeable party
19 concerning administration of the estate, as a party in interest
20 for purposes of Rule 5010, exercising residual authority with
21 respect to any undisclosed estate assets.

22 We recognize that the discharge of the Trustee in
23 conjunction with the original closing of the Levesques' chapter 7
24 case raises a technical question as to his authority to
25 administer or otherwise deal with the Claim during the period
26 between the date of entry of the closing order and the date of a
27 new trustee appointment following the reopening of the case.
28 However, under § 323(a), the trustee in a bankruptcy case is "the
representative of the estate."

Although the trustee is not vested with the title of
the debtor under the Code, section 323(a) gives the
trustee full authority to represent the estate and to
dispose of the debtor's nonexempt property that makes
up the estate.

1 The trustee is required to collect and reduce to
2 money the nonexempt property of the estate, and
3 therefore is entitled to administer the property of the
estate wherever located, including the debtor's
prepetition causes of action.

4 3 Collier on Bankruptcy ¶ 323.02[1] (Alan N. Resnick and Henry J.
5 Sommer, eds., 16th ed. 2012) (emphasis added).

6 In addition, the bankruptcy court in In re Sweeney
7 questioned the assumption that a discharged trustee has no
8 authority to act on behalf of the estate when § 727(e) expressly
9 authorizes the trustee to request a revocation of the debtor's
10 discharge after the discharge has been granted and after the
11 bankruptcy case has been closed.² In re Sweeney, 275 B.R. at
12 735.

13 Clearly, the Levesques had no authority to administer the
14 Claim on behalf of the estate. Also, as we previously have
15 noted, it was the Levesques, rather than the Trustee, who filed
16 the motion to reopen.

17 There are decisions denying a discharged trustee standing to
18 move to reopen a chapter 7 case to administer assets. See, e.g.,
19 In re DeLash, 260 B.R. 4 (Bankr. E.D. Cal. 2000) (citing In re
20 Ayoub, 72 B.R. 808, 812 (Bankr. M.D. Fla. 1987)); In re Thomas,
21 236 B.R. 573, 576-77 (Bankr. E.D.N.Y. 1999). Two rationales

22
23 ² Section 727(e) provides that:

24 The trustee, a creditor, or the United States
25 trustee may request a revocation of a discharge--
26 (1) under subsection (d)(1) of this section within
27 one year after such discharge is granted; or (2)
28 under subsection (d)(2) or (d)(3) of this section
before the later of--(A) one year after the
granting of such discharge; and (B) the date the
case is closed. (Emphasis added.)

1 support this result. First, when a bankruptcy case is reopened,
2 the United States Trustee ("UST") appoints a new trustee, but
3 only following a determination by the bankruptcy court "that a
4 trustee is necessary to protect the interests of creditors and
5 the debtor or to insure efficient administration of the case."
6 Rule 5010. Once that determination is made, the UST may or may
7 not reappoint the original trustee. Handbook for Chapter 7
8 Trustees (hereafter, "Handbook for Chapter 7 Trustees"), U.S.
9 Dep't of Justice, Executive Office of the United States Trustee,
10 July 1, 2002, at p. 8-44. Until reappointment by the UST, the
11 discharged trustee arguably is not authorized to represent the
12 bankruptcy estate and receive compensation for doing so and
13 accordingly, would have no standing to move to have the case
14 reopened or appear in proceedings relating to the case. See In
15 re Thomas, 236 B.R. at 576-77. The bankruptcy court further
16 arguably would be treading improperly upon the UST's prerogatives
17 in recognizing standing for a former trustee in advance of such
18 reappointment. See In re DeLash, 260 B.R. at 6-8; In re Ayoub,
19 72 B.R. at 812.

20 Second, other parties with standing, such as the UST and
21 creditors, ostensibly are available to move to reopen bankruptcy
22 cases to administer assets. See In re DeLash, 260 B.R. at 6-7;
23 In re Thomas, 236 B.R. at 577. The UST is explicitly authorized
24 under the Bankruptcy Code to "appear and be heard on any issue in
25 any case or proceeding under this title," except for filing a
26 plan under chapter 11. § 307. However, that does not mean in
27 practice that the UST appears in every situation where it is
28 authorized to do so. The UST has limited resources to apply to

1 the many tasks it is delegated to perform concerning various
2 bankruptcy proceedings, and typically, the UST does not initiate
3 the bulk of motions to reopen closed cases. In fact, as noted by
4 the bankruptcy court in In re DeLash, 260 B.R. at 6 n.3, the
5 Handbook for Chapter 7 Trustees states (at page 8-44 in the
6 July 1, 2002 edition) that, "[I]f the court has officially closed
7 a case, the trustee, the [UST], or some other party in interest,
8 will have to file a motion to reopen the case. . . ." (Emphasis
9 added.)

10 Relying on "creditors" to move to reopen a case is
11 problematic, both on technical and practical grounds. First, as
12 a technical matter, if the discharge has been entered, do the
13 "former" creditors of the debtor have standing to move to reopen
14 the case? The DeLash court discounted that argument, asserting
15 that under the distribution scheme mandated by the Bankruptcy
16 Code, prepetition creditors are entitled to distributions from
17 estate assets that have not previously been administered. "Given
18 this right, it would be illogical to argue that a creditor of a
19 discharged chapter 7 debtor is a former creditor without standing
20 to reopen the case." In re DeLash, 260 B.R. at 7. Accepting
21 that position, it would appear that prepetition creditors would
22 satisfy the "pecuniary interest" test for standing stated in
23 Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442-43
24 (9th Cir. 1983), if they took the initiative to file a motion to
25 reopen.

26 However, if one depends on prepetition creditors to take the
27 laboring oar on motions to reopen, one confronts the reality that
28 it effectively asks the former creditors to expend 100 cent

1 dollars currently on proceedings to reopen a case that, like the
2 Levesques' bankruptcy case, may have been closed for months or
3 even years, for the benefit of a speculative recovery that has to
4 be shared pro rata with other like-situated prepetition
5 creditors. Realistically, the financial incentives for such
6 conduct generally are slim to nonexistent, and in such
7 circumstances, the prepetition creditors are not likely parties
8 to take the lead on motions to reopen.

9 Based on our analysis of the applicable law and foregoing
10 authorities in this context, our ultimate conclusion is that it
11 would exalt form over substance, to the detriment of creditors
12 and the bankruptcy estate, if the Trustee were not recognized as
13 having standing to appear and be heard with respect to the
14 Motions. No party was in a better position than the Trustee to
15 advise the bankruptcy court as to the status and history of the
16 Levesques' bankruptcy case and administration of their estate.
17 We conclude that the Levesques' argument that the Trustee had no
18 standing to appear regarding the Motions lacks merit.

19 2. The bankruptcy court did not abuse its discretion in denying
20 the Levesques' motion to convert the reopened case to
chapter 11.

21 Under § 706(a), a "debtor may convert a case under this
22 chapter to a case under chapter 11, 12, or 13 of this title at
23 any time, if the case has not been converted under section 1112,
24 1208, or 1307 of this title." In spite of the straightforward
25 language of § 706(a), in Marrama v. Citizens Bank of Mass., 549
26 U.S. 365 (2007), the Supreme Court held that the apparently
27 absolute right of the debtor to convert a chapter 7 case to
28 chapter 13 could be curtailed in the "atypical" case of a

1 fraudulent or "bad faith" debtor, in order "to prevent an abuse
2 of process." Id. at 375 & n.11. As pointedly remarked at the
3 outset of the Marrama decision, "The principal purpose of the
4 Bankruptcy Code is to grant a fresh start to the honest but
5 unfortunate debtor." Id. at 367 (citing Grogan v. Garner, 498
6 U.S. 279, 286, 287 (1991)) (internal quotation marks omitted).

7 While the Levesques' motion to convert requested a
8 conversion from chapter 7 to chapter 11, rather than to chapter
9 13, the language of § 706(a) applies the same whether the chosen
10 chapter for conversion is chapter 11 or chapter 13.

11 Consequently, there is no dispute between the parties as to the
12 application of § 706(a), as interpreted by Marrama, in this
13 appeal. Since the bankruptcy court referred explicitly to the
14 Marrama decision in its oral findings and conclusions, we
15 conclude that the bankruptcy court applied the correct legal
16 standard in deciding the Levesques' motion to convert.

17 The Levesques argue, however, that the bankruptcy court did
18 not give adequate weight to the evidence of the Levesques' good
19 faith in relying on the advice of their counsel, as set forth in
20 Ms. Levesque's affidavit, and that they "effectively canceled"
21 any failure to disclose their Claim by filing the Motions. They
22 earnestly spin the facts in their favor, but their argument
23 misapprehends the standards applicable to analyze whether the
24 bankruptcy court clearly erred in its fact findings.

25 As noted above, in determining whether the bankruptcy court
26 abused its discretion, we must affirm the bankruptcy court's fact
27 findings unless we determine that those findings are illogical,
28 implausible, or without any support from inferences that may be

1 drawn from the evidentiary record. Hinkson, 585 F.3d at 1262 and
2 n.20. If the bankruptcy court's analysis of the evidence makes
3 sense consistent with the entire record, we may not reverse even
4 if we were convinced that we might have weighed the evidence
5 differently. Anderson v. City of Bessemer City, N.C., 470 U.S.
6 564, 574 (1985). See Int'l Ass'n of Firefighters, Local 1186 v.
7 City of Vallejo (In re City of Vallejo), 408 B.R. 280, 289 (9th
8 Cir. BAP 2009).

9 In this case, the bankruptcy court was very careful in its
10 fact findings in support of denial of the motion to convert. It
11 did not find that the Levesques had committed fraud, and it did
12 not determine that the Levesques had "lied." However, the
13 bankruptcy court did find that the Levesques "didn't tell the
14 truth and certainly signed things under oath and under penalty of
15 perjury that were not true." Tr. of December 13, 2011 Hr'g at
16 21:3-5. The record, as discussed above, amply supports those
17 findings. In addition, the bankruptcy court questioned the
18 Levesques' credibility based on their failure to pursue any claim
19 against their former bankruptcy counsel, whose advice they claim
20 led them to their failures of disclosure and thus allegedly put
21 them in their present predicament.

22 Based on the record presented in this appeal, we can discern
23 no error, let alone clear error, of fact that would lead us to
24 conclude that the bankruptcy court abused its discretion in
25 denying the Levesques' motion to convert.

26 Conclusion

27 For the foregoing reasons, we AFFIRM.