

11 U.S.C. §330(a)(1)
28 U.S.C. §1920
Bankr. R. 7054(b)
Bankr. R. 9011
Local Bankr. R. 9034-5
Attorney Fees
Costs

Tel-Ad Advisors, Inc. v. GBC Liquidation, Inc. BAP No. OR 89-1608
Adv. No. 88-0302
In Re GBC Liquidation, Inc. Case No. 387-06347

1/18/90 BAP (affirming J. Hess) unpublished

The BAP affirmed the bankruptcy court's denial of attorney fees and costs to the successful defendant of a preference action. There is no general right to attorney's fees for the defense of an action in bankruptcy. 11 U.S.C. §330(a)(1) does not create such a right. Under certain circumstances attorney fees may be awarded as sanctions under Bankr. R. 9011 or Local Bankr. R. 9034-5. Based on the record, the trial court properly denied attorney fees or other sanctions.

The type of costs which may be allowed are set forth in 28 U.S.C. §1920. Bankr. R. 7054(b) grants the trial court considerable discretion in awarding those costs. The trial court did not abuse its discretion in refusing to award costs.

NOT FOR PUBLICATION

FILED

JAN 18 1990

Jed G. Weintraub, Clerk
U.S. BKCY. APP. PANEL
OF THE NINTH CIR.

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re	)	BAP No. OR 89-1608-MeJV
GBC LIQUIDATION, INC.,	)	BK No. 387-00659-S11
Debtor-in-Possession.	)	ADV No. 88-0302-H
TEL-AD ADVISORS, INC.,	)	
Appellant,	)	
v.	)	
GBC LIQUIDATION, INC.,	)	
Appellee.	)	

MEMORANDUM

Argued and Submitted
October 19, 1989 at Portland, Oregon

Filed: JAN 18 1990

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

Hon. Henry L. Hess, Jr., Chief Bankruptcy Judge, Presiding

Before: MEYERS, JONES and VOLINN, Bankruptcy Judges

P90-2(8)

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I

This is an appeal from a denial of attorney's fees and costs incurred by Appellant Tel-Ad Advisors, Inc., ("Tel-Ad Advisors") in defending itself in a preference action brought by Appellee-debtor GBC Liquidation, Inc. ("GBC"). Appellant's Motion to Dismiss was granted; judgment was issued in its favor. Nonetheless, Appellant's Petition for Attorney's Fees and Costs was denied by the trial court.

We **AFFIRM**.

II

FACTS

Tel-Ad Advisors entered into a contract with GBC in which it agreed to place GBC's advertisements in the Portland Telephone Directory. GBC sought to identify certain payments it made for the advertising as preferential transfers. Tel-Ad Advisors objected, asserting that the payments were made in the ordinary course of business. Tel-Ad Advisors filed its Motion to Dismiss and GBC filed its own Motion for Summary Judgment. The trial court granted Tel-Ad Advisors' motion, but denied its Petition for Attorney's Fees and Costs without comment.¹ This appeal followed.

¹ Appellant additionally reports that the trial court did not allow it the statutory time to reply to Appellee's objection to its petition. Because we conclude that this could not have been prejudicial to Appellant, we do not address the issue further.

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III

DISCUSSION

A. Attorney's Fees

There is no general right to attorney's fees for the defense of an action in bankruptcy. See In re Coast Trading Co., Inc., 744 F.2d 686, 693 (9th Cir. 1984). Under the American Rule, successful litigants ordinarily are not entitled to recover attorney's fees absent statutory authorization or an enforceable contract. Alyeska Pipeline Co. v. Wilderness Society, 421 U. S. 240, 257 (1975); Perry v. O'Donnell, 759 F.2d 702, 704 (9th Cir. 1985).

Statutory authority for recovery of fees and costs exists under Bankruptcy Rule 9011, the violation of which results in mandatory sanctions which may include reasonable attorney's fees. In re Chisum, 847 F.2d 597, 599 (9th Cir. 1988). Rule 9011 provides that an attorney's signature on a pleading filed with the court is certification that it is well grounded in fact and warranted by existing law and is not interposed for any improper purpose, such as harrassment, delay or to increase the costs of litigation. Bankruptcy Rule 9011. Inexplicably, Appellant has declined to assert this Rule.

Instead, Appellant initially finds statutory authorization in 11 U.S.C. §330(a)(1) and 42 U.S.C. §1988. These statutes are inapposite. The former section pertains to compensation for services and expenses of professionals

1 employed by a bankruptcy estate. The latter pertains to
2 attorney fees in certain actions under the Civil Rights Act of
3 1964. Eventually, more appropriate statutory authorization is
4 asserted by Appellant, albeit tardily. Appellant invokes
5 Local Rule 9034-5 of the Bankruptcy Court for the District of
6 Oregon in its Reply Brief, thus depriving Appellee of an
7 opportunity to respond.

8 Local Rule 9034-5 of the Bankruptcy Court for the
9 District of Oregon permits--but does not require--sanctions
10 such as payment of excess costs, filing fees, attorneys fees
11 or court reporter's fees against any party who presents
12 unnecessary contested matters or adversary proceedings to the
13 court. District courts have broad discretion in interpreting
14 and applying their local rules. In re Walter, 83 B.R. 14, 17
15 (9th Cir. BAP 1988). Hence, the appropriate standard of
16 review is abuse of discretion. Guam Sasaki v. Diana's Inc.,
17 881 F.2d 713, 716 (9th Cir. 1989).

18 The Appellant has the burden of showing a trial court's
19 abuse of discretion. See In re Aviva Gelato, Inc., 94 B.R.
20 622, 624, 625 (9th Cir. BAP 1988). It is well recognized that
21 it is also an appellant's responsibility to file an adequate
22 record on appeal. In re Strowski, 96 B.R. 1007, 1009 (9th
23 Cir. BAP 1989). See also In re Burkhart, 84 B.R. 658, 660
24 (9th Cir. BAP 1988). Reviewing the application of Local Rule
25 9034-5 in this case would require examination of the full
26 record to discern the court's grounds for granting Appellant's

1 Motion for Dismissal of the preference action. The full
2 record has not been provided by Appellant. Nor has Appellant
3 provided declarations from which to evaluate the good faith of
4 the trustee in bringing the preference action. We therefore
5 lack the requisite record to determine whether an abuse of
6 discretion has occurred. Where the record provided does not
7 contain the documentation necessary for the reviewing panel to
8 have a complete understanding of the case, an appellant's
9 argument cannot be considered. In re Anderson, 69 B.R. 105,
10 109 (9th Cir. BAP 1986).

11 Although the grounds for an award of costs and fees
12 under the Local Rule cannot be ascertained here, the court is
13 vested with other authority to impose sanctions on counsel,
14 such as the allowance of fees where the losing party has acted
15 in bad faith, vexatiously, wantonly or for oppressive reasons.
16 In re Akros Installations, Inc., 834 F.2d 1526, 1532 (9th Cir.
17 1987); Beaudry Motor Co. v. ABKO Properties, Inc., 780 F.2d
18 751, 756 (9th Cir. 1986). Moreover, Rule 9011 provides for
19 sanctions to be imposed by the trial court on its own
20 initiative. However, it is well recognized that in most
21 circumstances an appellate court will not consider an issue
22 not raised before the trial court. Further, none of the
23 narrow exceptions to this general rule are applicable in this
24 case because the record is too incomplete to address them
25 adequately. In re Northern California Homes and Gardens,
26 Inc., 92 B.R. 410, 413-14 (9th Cir. BAP 1988). Hence we must

1 conclude that the trial court properly denied attorney's fees
2 and costs, consistent with the American Rule.

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4 B. Costs

5 The applicable rule is Bankruptcy Rule 7054(b), which
6 indicates that the court may allow costs to the prevailing
7 party except when a federal statute or Bankruptcy Rule
8 provides otherwise. This language should be contrasted with
9 Federal Rule of Civil Procedure 54(d), which states that the
10 prevailing party is entitled to court costs unless the court
11 otherwise directs. Both rules appear to vest considerable
12 discretion in the trial court, although some suggest that the
13 language of Rule 7054(b) is designed to give even more
14 discretion to bankruptcy judges. Norton Bankr Rules Pamphlet,
15 1988-1989 Ed, 648 editors' comment (1983). See also In Re Roco
16 Corp, 37 B.R. 770, 775 n. 6 (R.I. 1984); 9 Collier on
17 Bankruptcy, ¶ 7054.07 (15th ed. 1988).² For our own purposes,
18 however, the difference does not appear to be significant.
19 The types of costs allowed are specified in 28 U.S.C. §1920

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21 ² Under former Bankruptcy Rule 754(b), the court's taxing of
22 costs was discretionary. In re Arzola, 11 B.R. 762, 767 (P.R.
23 1981). A suggested rationale for greater discretion is that
24 traditionally costs have often been denied either party in
25 contested proceedings in bankruptcy cases in recognition of
26 the adverse effect on creditors of imposing costs on a
bankrupt estate and of the reciprocal equities of those
involved in litigation with such an estate. Bankruptcy Rules
and Official Forms, advisory committee's note at p. 237,
(Collier pamphlet ed. 1981).

1 and include the fees of the clerk and marshal, court reporter
2 services, printing and witness fees, exemplification and
3 copying fees, compensation of court appointed experts and
4 interpreters and docket fees. The Appellant invokes
5 Bankruptcy Rule 7054(b), and lists in its Cost Bill
6 expenditures for nationwide service, employment of a court
7 reporter at a deposition and parking fees. The only listed
8 cost falling within Section 1920 would be for the court
9 reporter.³ Again, however, in view of the inadequate record
10 provided us on appeal, we cannot consider Appellant's argument
11 as to whether the court abused its discretion in denying
12 Appellant this cost. We must conclude that the trial court
13 properly denied Appellant's allowable costs.
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19 ³ Since the term "court reporter" applies to stenographers
20 other than and in addition to the official court reporters
21 assigned to a particular courtroom, the costs related to
22 depositions may fall within Section 1920(2). Hudson v.
23 Nabisco Brands, Inc., 758 F.2d 1237, 1242-43 (7th Cir. 1985),
24 overruled on other grounds; Provident Bank v. Manor Steel
25 Corp., 882 F.2d 258 (7th Cir. 1989). See also Viacao Aerea
26 Sao Paulo v. Intern. Lease Fin. Corp., 119 F.R.D. 435, 438
(C.Cal. 1988). However, the other listed items may properly
be disallowed as the discretion given district judges to tax
costs does not include the power to tax nonstatutory costs; it
is solely a power to decline to tax, as costs, the items
enumerated in Section 1920. See Crawford Fitting Co. v. J. T.
Gibbons, Inc., 482 U.S. 437, 442-43 (1987).

V

CONCLUSION

On the record provided, the trial court acted within its discretionary power in denying Appellant's petition for attorney's fees and for costs.

We **AFFIRM**.