

Appeal (review on)  
Summary Judgment

St. John v. Train Mountain Foundation (In Re St. John)

BAP # OR-97-1281-JHN  
Adv. # 96-6139-aer  
Main Case # 696-62584-aer13

9/16/97                      9th Cir. BAP dismissing                      Unpublished  
   appeal of Radcliffe oral findings and  
   written order

Defendant filed a motion for summary judgment which was denied. The adversary proceeding went to trial and judgment was rendered in favor of the Plaintiff.

Defendant then appealed the denial of his motion for summary judgment. The BAP dismissed the appeal on jurisdictional grounds holding it could not review an order denying a motion for summary judgment after a full trial on the merits.

**E97-24 (8)**

Rec'd  
11-12-97

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FILED

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

# NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re	)	BAP No. OR-97-1281-JHN
EDWARD W. ST. JOHN,	)	Bk. No. 696-62584-AER13
Debtor.	)	Adv. No. 96-6179-AER
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EDWARD W. ST. JOHN,	)	
Appellant,	)	
v.	)	<u>MEMORANDUM</u> <sup>1</sup>
TRAIN MOUNTAIN FOUNDATION,	)	
Appellee.	)	

Argued and Submitted on August 21, 1997  
at Portland, Oregon

Filed - September 16, 1997

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

Honorable Albert E. Radcliffe, Bankruptcy Judge, Presiding

Before: Jones, Hagan, and Naugle<sup>2</sup>, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of the law of the case, res judicata, or collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

<sup>2</sup> Hon. David N. Naugle, Bankruptcy Judge for the Central District of California, sitting by designation.

E97-24(8)

1           In an adversary proceeding, the Train Mountain Foundation  
2 (Appellee) alleged that the debtor had made an inter vivos gift  
3 to the Appellee of certain shares of stock and that the debtor  
4 subsequently converted the proceeds from the sale of the stock to  
5 his own use. After discovery, the debtor moved for summary  
6 judgment contending that the Appellee could not prove, as a  
7 matter of law, that the debtor had made a valid inter vivos gift  
8 to the Appellee. The bankruptcy court denied the debtor's motion  
9 for summary judgment. After a two-day trial, the bankruptcy  
10 court ruled in favor of the Appellee, awarding the Appellee  
11 \$356,687.94. The debtor appeals the bankruptcy court's denial of  
12 his motion for summary judgment. We **DISMISS** the debtor's appeal.

#### 14                           I. FACTS

15           In 1985 or 1986, Edward St. John (the debtor) became friends  
16 with Quinten Breen, a California attorney who had formed a  
17 company to prepare and sell applications for lotteries with the  
18 FCC to award licenses for cellular phone metropolitan statistical  
19 areas ("MSA"). Mr. Breen approached the debtor with an offer to  
20 file applications for FCC lotteries on the debtor's behalf. The  
21 debtor accepted the offer.

22           At the time of filing the lottery applications, Mr. Breen  
23 advised the debtor that federal rules precluded any other entity  
24 from having a legal interest in the debtor's lottery  
25 applications. However, as a result of their mutual interest in  
26 scale-model trains, the debtor agreed that if he was successful  
27 in the lottery, one-half of the proceeds would go to Mr. Breen or  
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1 such other organization as might be formed by him to further the  
2 goal of building and operating a scale-model train facility.

3 In 1987 or early 1988, the debtor was successful in winning  
4 two MSAs, one in Muncie, Indiana, and the other in Pine Bluff,  
5 Arkansas. As part of the winning application, the debtor formed  
6 two separate corporations to hold each MSA license. The Muncie,  
7 Indiana, license was held by Cellular 1 of Muncie, Inc., and the  
8 Pine Bluff license was held by Cellular 1 of Pine Bluff, Inc.

9 Thereafter, Mr. Breen asked the debtor to document his  
10 promise to pay one-half of the proceeds to the Appellee, a  
11 charitable organization of which Mr. Breen was a trustee. The  
12 debtor executed two "Deeds of Gift," one relating to the Cellular  
13 1 of Muncie stock and the other relating to the Cellular 1 of  
14 Pine Bluff stock, purporting to transfer 2500 shares of stock in  
15 each corporation to the Appellee. The debtor delivered the deeds  
16 of gift and the endorsed stock certificates to Mr. Breen.

17 As part of the process to obtain the license for the MSA,  
18 unsuccessful lottery applicants have the right to file  
19 applications to deny the winner's application. No objections  
20 were filed to the debtor's Muncie, Indiana, MSA and the debtor  
21 was given the Muncie license. The debtor then negotiated for the  
22 sale of this license. In order to facilitate the sale, Mr. Breen  
23 returned his endorsed shares of the Muncie stock to the debtor.  
24 The debtor consummated the sale and on or about February 5, 1988,  
25 the debtor paid the Appellee one-half of the proceeds from the  
26 sale, totaling \$740,000.

27 Unlike the Muncie application, numerous objections were  
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1 filed to the debtor's Pine Bluff, Arkansas, application. This  
2 delayed the debtor's receipt of the Pine Bluff MSA and  
3 accompanying license. However, once the license was received,  
4 the debtor again negotiated for the sale of this license. As  
5 with the Muncie sale, Mr. Breen returned the Cellular 1 of Pine  
6 Bluff stock certificates to the debtor so that the debtor could  
7 complete the sale. This time, however, the debtor sold the Pine  
8 Bluff MSA license but refused to turn over one-half of the  
9 proceeds to the Appellee.

10 On June 3, 1996, the debtor filed for bankruptcy protection.  
11 The Appellee filed an adversary complaint against the debtor for  
12 conversion of the sale proceeds to his own use. After discovery  
13 was completed, the debtor filed a motion for summary judgment  
14 claiming that the Appellee could not establish that there was a  
15 valid inter vivos gift of the shares. On November 27, 1996, the  
16 bankruptcy court denied the debtor's motion for summary judgment.

17 The adversary complaint then proceeded to a trial on the  
18 merits. On February 12 and 13, 1997, the bankruptcy court held a  
19 trial. On March 15, 1997, the bankruptcy court entered its  
20 Judgment and Decree awarding the Appellee \$356,687.94, and  
21 dismissing the debtor's counterclaims. The debtor appealed.

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## II. ISSUE

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Whether the bankruptcy court erred in denying the debtor's  
motion for summary judgment.

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1 III. STANDARDS OF REVIEW

2 Jurisdictional issues are reviewed de novo. In re Hagel,  
3 184 B.R. 793, 795 (9th Cir. BAP 1995).

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5 IV. DISCUSSION

6 Before this panel can address the merits of the appeal, we  
7 are confronted with a threshold jurisdictional question. Namely,  
8 whether the denial of a motion for summary judgment is reviewable  
9 on appeal after a full trial on the merits renders a judgment,  
10 adverse to the movant.

11 On March 10, 1997, the debtor filed a notice of appeal from  
12 the bankruptcy court's March 5, 1997, Judgment and Decree.  
13 However, in his brief the debtor does not challenge the ruling of  
14 the trial court on the merits, but rather limits his appeal to  
15 the single issue of whether the bankruptcy court erred in denying  
16 his motion for summary judgment<sup>3</sup>. The debtor's opening and reply  
17 briefs and every exhibit in the debtor's record on appeal, with  
18 the single exception of the bankruptcy court's Judgment and  
19 Decree, deal solely with the debtor's summary judgment motion.  
20 The debtor has provided no record or legal argument challenging  
21 the bankruptcy court's ruling on the merits. Therefore, the  
22 first, and as it turns out, last question we must address is  
23 whether the denial of the debtor's motion for summary judgment is  
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26 <sup>3</sup> Although purportedly appealing the bankruptcy court's  
27 Judgment and Decree, the debtor's "Statement of the Issues  
28 Appellant Intends to Present on Appeal" reads in total: "Appellant  
intends to present the following issue on appeal: The bankruptcy  
judge erred in denying Appellant's/Debtor's motion for summary  
judgment" followed by a signature line.

1 reviewable by this panel after an adverse judgment on the merits  
2 was rendered against the debtor.

3 This circuit, as well as the overwhelming majority of other  
4 circuits, has concluded that the denial of a motion for summary  
5 judgment is not reviewable after a trial on the merits which  
6 results in a verdict adverse to the movant. In Locricchio v.  
7 Legal Services Corp., 833 F.2d 1352, 1358 (9th Cir. 1987), the  
8 appellant asked the court to review the district court's denial  
9 of its motion for summary judgment. The court noted that at the  
10 outset "we confront the issue whether a denial of a motion for  
11 summary judgment is appealable following a jury verdict adverse  
12 to the mover." Id. After an exhaustive review of cases and  
13 annotations<sup>4</sup>, the court reasoned:

14 To be sure, the party moving for summary judgment  
15 suffers an injustice if his motion is improperly  
16 denied. This is true even if the jury decides in his  
17 favor. The injustice arguably is greater when the  
18 verdict goes against him. However, we believe it would  
19 be even more unjust to deprive a party of a jury  
20 verdict after the evidence was fully presented, on the  
21 basis of an appellate court's review of whether the  
22 pleadings and affidavits at the time of the summary  
23 judgment motion demonstrated the need for a trial.

24 Id. at 1359. After weighing the merits of the case the court  
25 concluded: "We hold, therefore, that the denial of a motion for  
26 summary judgment is not reviewable on an appeal from a final  
27 judgment entered after a full trial on the merits." Id.

28 Likewise, in Lum v. City and County of Honolulu, 963 F.2d  
1167, 1170 (9th Cir. 1992), the Court summarily dismissed the

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29 <sup>4</sup> See generally, R. F. Chase, Annotation, "Reviewability of  
30 Order Denying Motion for Summary Judgment," 15 A.L.R. 3d 899, 922-  
31 925 (1967) and 1994 supplement thereto.

1 City of Honolulu's appeal of the denial of its motion for summary  
2 judgment. The court wrote: "We follow the teaching of Locricchio  
3 and hold that there is no need to review denials of summary  
4 judgment after there has been a trial on the merits. Such a  
5 review is a pointless academic exercise." Id. See also General  
6 Signal Corp. v. MCI Telecommunications Corp., 66 F.3d 1500, 1507  
7 (9th Cir. 1995) ("[W]e hold that we may not review the denial of  
8 summary judgment on a claim once a directed verdict has been  
9 entered on that claim.")

10 In addition to the Ninth Circuit, eight other circuits have  
11 adopted the rule that the denial of summary judgment is not  
12 reviewable on appeal after a full trial on the merits. See  
13 Chesapeake Paper Products Co. v. Stone & Webster Engineering  
14 Corp., 51 F.3d 1229, 1234-36 (4th Cir. 1995); Watson v. Amedco  
15 Steel, Inc., 29 F.3d 274, 277-78 (7th Cir. 1994); Black v. J. I.  
16 Case Co., 22 F.3d 568, 570-72 (5th Cir.), cert. denied, 513 U.S.  
17 1017 (1994); Lama v. Borrás, 16 F.3d 473, 476 n.5 (1st Cir.  
18 1994); Whalen v. Unit Rig, Inc., 974 F.2d 1258, 1250-51 (10th  
19 Cir. 1992), cert. denied, 507 U.S. 973 (1993); Bottineau Farmers  
20 Elevator v. Woodward-Clyde Consultants, 963 F.2d 1064, 1068 n.5  
21 (8th Cir. 1992); Summit Petroleum v. Ingersoll-Rand, 909 F.2d  
22 862, 865 n.4 (6th Cir. 1990); Glaros v. H.H. Robertson Co., 797  
23 F.2d 1564, 1573 n.14 (Fed. Cir. 1986), cert. dismissed, 479 U.S.  
24 1072 (1987).

25 The Fifth Circuit concisely stated the rationale behind this  
26 rule: "It makes no sense whatever to reverse a judgment on the  
27 verdict where the trial evidence was sufficient merely because at  
28 summary judgment it was not." Black, 22 F.3d at 572.



1 Furthermore, reviewing the bankruptcy court's decision after a  
2 full trial is also problematic because in denying a summary  
3 judgment motion, the bankruptcy court "does not settle or even  
4 tentatively decide anything about the merits of the claim"; its  
5 denial "decides only one thing--that the case should go to  
6 trial." Switzerland Cheese Ass'n, Inc. v. E. Horne's Market,  
7 Inc., 385 U.S. 23 (1966), quoted in Watson, 29 F.3d at 277.

8 After a review of the cases which have decided this issue,  
9 we follow the clear precedent of the Ninth Circuit, as well as  
10 the persuasive authority from the other circuits which have  
11 decided the issue, and hold that we may not review the denial of  
12 a motion for summary judgment after a trial on the merits results  
13 in a judgment adverse to the movant. Therefore, we **DISMISS** the  
14 debtor's appeal.

#### 16 V. CONCLUSION

17 The debtor's appeal of the denial of his motion for summary  
18 judgment is not reviewable by this panel. After the bankruptcy  
19 court denied the debtor's motion for summary judgment the  
20 bankruptcy court proceeded with a full trial on the merits which  
21 resulted in a judgment adverse to the debtor. The debtor has not  
22 challenged the ruling on the merits but rather has only appealed  
23 the denial of his motion for summary judgment. In accordance  
24 with clear Ninth Circuit precedent, we hold that the denial of  
25 the debtor's motion for summary judgment is not reviewable after  
26 a full trial on the merits and therefore **DISMISS** the debtor's  
27 appeal.

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