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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STAN LEE MEDIA, INC., a Colorado corporation,

Plaintiff - Appellant,

v.

CONAN SALES CO. LLC, a Delaware limited liability company; CONAN PROPERTIES INTERNATIONAL LLC, a Delaware limited liability company; PARADOX ENTERTAINMENT INC., a Delaware corporation; PARADOX ENTERTAINMENT AB, a Sweden corporation; FREDRIK MALMBERG; LUKE LIEBERMAN, personal representative of the Estate of Arthur M. Lieberman; JUNKO KOBAYASHI; GILL CHAMPION,

Defendants - Appellees.

No. 12-55405

D.C. No. 2:11-cv-06861-SVW-SS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted October 9, 2013

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Circuit Rule 36-3.

Pasadena, California

Before: PREGERSON, WARDLAW, and TALLMAN, Circuit Judges.

Stan Lee Media, Inc. (SLMI) appeals from an order dismissing its action seeking to set aside a decade-old settlement approval order (Settlement Order) entered by the U.S. Bankruptcy Court in conjunction with SLMI's prior bankruptcy proceeding. Pursuant to the Settlement Order, SLMI transferred ownership of intellectual property rights associated with the fictional character "Conan the Barbarian" to Conan Sales Co., LLC (CSC). In the current litigation, SLMI seeks to recoup those intellectual property rights through Federal Rule of Civil Procedure 60 relief. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo the district court's denial of a motion to set aside an order as void under Rule 60(b)(4). *Export Grp. v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995). The settlement order is not void. SLMI presented insufficient evidence that Kobayashi or Lieberman adversely dominated SLMI, or that any such adverse domination influenced an otherwise arms-length negotiation between CSC and the unsecured creditors' committee, both of which were represented by independent legal counsel. And despite SLMI's argument to the contrary, the record demonstrates that Kobayashi was duly authorized to act on

SLMI's behalf. We also agree with the district court that notice of the settlement was proper under Federal Rule of Bankruptcy Procedure 2002(a)(3). The settlement was not a disguised sale, and thus SLMI's shareholders were not entitled to notice. SLMI's remaining arguments do not raise any of the jurisdictional or due process concerns that alone permit Rule 60(b)(4) relief. *See U.S. Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010) ("Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process[.]"). No such violation occurred here.

The district court did not abuse its discretion in denying relief under Rule 60(b)(6). *See United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985). Rule 60(b)(6) is a catch-all provision that should be used "sparingly as an equitable remedy to prevent manifest injustice." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993). SLMI's allegations on this issue are largely repetitive of its unpersuasive allegations in support of its request for Rule 60(b)(4) relief. Furthermore, Kobayashi, as an SLMI officer of the debtor in possession, had no duty to seek 11 U.S.C. § 327 authorization for her continued employment. *See* 3 *Collier on Bankruptcy* ¶ 327.02[6][c] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed. 2013) ("The general view is that officers of the

debtor are not professionals whose employment must be approved by the court."). There was also no violation of 11 U.S.C. § 510(b)'s mandatory subordination requirement because CSC was a secured creditor properly seeking to foreclose on the asset securing the debt in default. Nor has SLMI demonstrated manifest injustice. *See Alpine Land & Reservoir Co.*, 984 F.2d at 1049.

Nor did the district court abuse its discretion in denying Rule 60(d)(3) relief based on fraud on the court. *See Appling v. State Farm Mut. Auto. Ins. Co.*, 340 F.3d 769, 780 (9th Cir. 2003). To establish fraud on the court, a party must demonstrate by clear and convincing evidence the existence of an "unconscionable plan or scheme . . . designed to improperly influence the court in its decision." *England v. Doyle*, 281 F.2d 304, 309 (9th Cir. 1960). All of SLMI's fraud allegations are based on non-disclosures, which are generally insufficient to support a claim of fraud on the court. *See Appling*, 340 F.3d at 780. Moreover, SLMI failed to present clear and convincing evidence of an "unconscionable plan or scheme." *See England*, 281 F.2d at 309. Even if SLMI had demonstrated a "colorable" claim of fraud, which it did not, it was not automatically entitled to discovery. *See Pearson v. First NH Mortg. Corp.*, 200 F.3d 30, 35 (1st Cir. 1999) ("[O]nce the record evidence demonstrates a 'colorable' claim of fraud, the court

may exercise its discretion to permit preliminary discovery."). The district court did not abuse its discretion in denying discovery. *See id*.

Finally, the district court properly dismissed SLMI's remaining counts in the complaint. Even assuming that SLMI could have proceeded on its additional claims without first setting aside the Settlement Order, which we think unlikely, it unequivocally acquiesced on the record, on several occasions, to the district court's decision to convert SLMI's complaint into a Rule 60 motion for relief. *See Mendoza v. Block*, 27 F.3d 1357, 1360 (9th Cir. 1994) (refusing to reverse the district court's decision to resolve questions of fact without a jury where appellant had "stated unequivocally that he had no objection to the suggested procedure"). SLMI has thus failed to preserve any argument to the contrary. *See id*. Once the district court properly denied the motion to set aside the ten-year-old Settlement Order, that was the end of the case.

AFFIRMED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			TOTAL:	$

* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk