Meyers v. Empire Wholesale Lumber Co. Adv.Pr.#99-6079-fra
In re Benjamin Meyers (697-63375-fra7) BAP # OR-00-1046-KMaB

11/30/00 BAP aff'g Alley Unpublished

Plaintiff, Empire Wholesale Lumber Co., filed an action in U.S. District Court, setting out the circumstances of an alleged commercial dispute. Defendant Meyers filed an answer and counterclaim and, shortly thereafter, filed for relief under Chapter 7 of the Bankruptcy Code on 6/10/97. Plaintiff then commenced an adversary proceeding in Bankruptcy Court seeking a determination that the claims against Defendant should be excepted from discharge under § 523 of the Code, for denial of discharge, and for a money judgment.

Plaintiff filed a motion in the District Court seeking summary judgment in its favor on Defendant's counterclaim. The District Court allowed its motion, finding that the claim, as alleged, arose prior to the petition date and was therefore property of the estate. Accordingly, only the trustee had standing to bring the claim. The order dismissing the counterclaim was entered by the District Court and the case was remanded to the Bankruptcy Court for further proceedings. The Bankruptcy Court denied Defendant's motion to reinstate the counterclaim in the bankruptcy action. A trial was held and the court: issued a money judgment in favor of the Plaintiff, found the debt to be nondischargeable under § 523(a)(6), and denied Debtor's discharge under § 727(a)(2). Defendant appealed the court's denial of his motion as well as the judgment after trial.

The BAP affirmed the Bankruptcy Court on all issues. The judgment against Defendant was based on a state-court judgment entered against the Debtor's wholly owned corporation. The Bankruptcy Court did not commit error when it found that it was bound by collateral estoppel with respect to the amount and nature of the judgment against the corporation. Nor did it commit error in finding that the Debtor was jointly and severally liable with the corporation on the judgment because Debtor directed the activities of, and acted in concert with, the corporation. As the actions giving rise to the judgment constituted conversion, the judgment was nondischargeable under § 523(a)(6). Debtor intentionally failed to schedule what he considered a valuable claim such that discharge was rightly denied under § 727(a)(2). The BAP also agreed that Debtor lacked standing to bring his counterclaim and that the Bankruptcy Court did not commit error in denying Debtor's leave to amend the counterclaim.

E00-18(12)

Underlying opinions at E99-18(5) and E99-24(10)
(Meyers has appealed to the Ninth Circuit)

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

FOR THE NINTH CIRCUIT

In re: BENJAMIN R. MEYERS, Debtor.	BAP No. OR-00-1046-KMaB Bk. No. 697-63375-aer7
BENJAMIN R. MEYERS, Appellant, v. EMPIRE WHOLESALE LUMBER CO., Appellee.	Adv. No. 99-06079-fra7 **M E M O R A N D U M**[1]

FILED
NOV 30 2000
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

Argued and Submitted on October 12, 2000
at Eugene, Oregon

Filed - November 30, 2000

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

Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding

Before: Klein, Marlar and Brandt, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Debtor appeals from a judgment that denied debtor's discharge and that declared a judgment debt in favor of Empire Wholesale Lumber Co. to be nondischargeable. We AFFIRM.

FACTS

Appellant / debtor Benjamin R. Meyers ("debtor"), who at all relevant times was the president and sole shareholder of Meyers Lumber Sales, Inc. ("MLSI"), had a business relationship with appellee Empire Wholesale Lumber Co. ("Empire"). Pursuant to this relationship, debtor and MLSI would earn commissions for finding buyers for Empire's lumber products. Empire had the sole authority to invoice buyers.

1. The State Court Judgment and Debtor's Chapter 13 Bankruptcy

In the summer of 1995, Empire discovered that debtor and MLSI had sold Empire's lumber, issued invoices and retained the proceeds. On September 15, 1995, Empire filed a state court complaint against debtor and MLSI for breach of contract, request for accounting, conversion and fraud. Debtor and MLSI filed an answer and asserted various counterclaims including a counterclaim for intentional interference with a business relationship.

A few days before the state court trial, debtor filed a chapter 13 petition. MLSI did not file a petition in bankruptcy. Because the automatic stay was in effect as to debtor, Empire proceeded only against MLSI.

The state court entered a default judgment against MLSI in the amount of $225,615.37 and for costs of $513 and for post-judgment interest at a legal rate until the judgment was paid. MLSI's counterclaims were dismissed. The state court determined that debtor was still protected by the automatic stay and, upon the court's own motion, dismissed the case as to the debtor. Debtor voluntarily dismissed his chapter 13 bankruptcy case on March 12, 1997.

2. **The District Court Civil Action and Debtor's Chapter 7 Bankruptcy**

On May 29, 1997, Empire filed a civil action in United States District Court against debtor based on the same claims as were determined against MLSI in the state court action. Debtor filed a chapter 7 bankruptcy petition on June 10, 1997. Empire filed an adversary proceeding ("adversary #1") that basically mirrored the claims in the district court action. The bankruptcy court granted Empire relief from stay to pursue the district court action. Adversary #1 was stayed pending the outcome of the district court case.

Empire filed an amended complaint in district court. Debtor filed an answer and a counterclaim. The counterclaim stemmed from allegations of defamation and intentional interference with a business relationship.

Empire filed a motion for summary judgment in the district court case. After a hearing, the summary judgment motion was denied as to Empire's claims against debtor, but granted in

Empire's favor as to debtor's counterclaims against Empire. On Empire's motion, the district court referred its civil action to the bankruptcy court.

3. **The Judgment on Appeal**

Upon receipt of the referral of the district court civil action, the bankruptcy court assigned it a separate adversary proceeding number (adversary #2"). Since adversary #2 raised the same issues as adversary #1, the bankruptcy court handled the balance of the litigation as if the adversary proceedings had been consolidated. Thus, disposition of adversary #2 also disposed of adversary #1.

In the bankruptcy court, debtor filed a motion to reinstate counterclaims of defamation and interference with business relations. Although the bankruptcy court construed the motion as a motion for leave to amend pleadings, the gravamen of the motion called for the bankruptcy court to reconsider the district court's interlocutory grant of summary judgment in favor of Empire. It denied the motion.

After a three-day trial, ending on October 1, 1999, the bankruptcy court announced its decision in a memorandum opinion. Debtor filed a motion to reconsider which the bankruptcy court construed as a motion for a new trial. After a hearing on the motion, the court issued an amended memorandum opinion. The final judgment denying discharge and declaring Empire's judgment debt nondischargeable was entered on December 6, 2000.

Debtor timely appealed.

ISSUES

1. Whether the bankruptcy court erred when it entered judgment that: denied debtor's discharge under 11 U.S.C. § 727(a)(2); held that the judgment in favor of Empire was nondischargeable under 11 U.S.C. § 523(a)(6); and set the amount of the judgment.

2. Whether the bankruptcy court erred when it denied debtor's motion to reinstate counterclaims.

STANDARD OF REVIEW

When reviewing the bankruptcy court's judgment after a trial, the bankruptcy appellate panel reviews findings of fact for clear error and conclusions of law de novo. Britton v. Price, 950 F.2d 602, 604 (9th Cir. 1991); Bowman v. Belt Valley Bank (In re Bowman), 173 B.R. 922, 924 (9th Cir. BAP 1994). A factual finding is clearly erroneous if, after review of the record, the reviewing court has a definite conviction that a mistake has been made. Beauchamp v. Hoose (In re Beauchamp), 236 B.R. 727, 729 (9th Cir. BAP 1999).

The denial of leave to amend is reviewed for an abuse of discretion. Texaco v. Ponsoldt, 939 F.2d 794, 798 (9th Cir. 1991); McCrary v. Barrack (In re Barrack), 217 B.R. 598, 604 (9th Cir. BAP 1998).

DISCUSSION

1. The Bankruptcy Court's Final Judgment

Debtor appealed the bankruptcy court's final judgment which denied debtor's discharge under § 727(a)(2). The judgment also declared that debtor's debt to Empire was nondischargeable as willful and malicious injury under § 523(a)(6). Finally, the judgment determined the amount of Empire's claim.

A. Debtor's Perceived Conflict Between the District Court Ruling and the Bankruptcy Court Judgment

Debtor suggested that the bankruptcy court judgment in some way conflicted with the district court's decision denying in part and granting in part Empire's motion for summary judgment. Debtor's argument reflects a misunderstanding of the effect of a motion for summary judgment.

Summary judgment is a procedure through which a party seeks a judgment in its favor without a trial. 11 MOORE'S FEDERAL PRACTICE, §56-1 (Matthew Bender 3d ed.) The movant must demonstrate that there is no genuine issue of material fact to be tried and that the case must be decided as a matter of law in the movant's favor. Id. Summary judgment motions seek to avoid trial when material facts are not in dispute. Id. at 18-19.

The district court partially denied Empire's summary judgment motion, because it concluded that the question of debtor's personal liability for the judgment against MLSI involved unresolved issues of material fact. The district court did not determine the merits of Empire's complaint. Instead, the

district court determined that a trial would be necessary.

The bankruptcy court held an actual trial. The bankruptcy court judgment was issued after the trial. Therefore, the district court's partial denial of Empire's motion for summary judgment is not in conflict with the bankruptcy court's judgment after a trial.

B. **Denial of Discharge Under § 727(a)(2)**

Debtor did not disclose his defamation claim against Empire in his bankruptcy filing.

The bankruptcy court concluded that debtor willfully concealed an estate asset with intent to hinder, delay or defraud creditors or the trustee.

The court may deny a debtor's discharge if:

> [t]he debtor, with intent to hinder, delay or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated or concealed -
>
> (A) property of the debtor, within one year before the date of the filing of the petition; or
>
> (B) property of the estate, after the date of the filing of the petition....

11 U.S.C. § 727(a)(2).

There are two elements to an objection to discharge under § 727(a)(2). Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997) First, there must be a disposition of property, such as a concealment. Id. Second, there must be a subjective intent on the part of the debtor to hinder, delay or defraud. Id.

The bankruptcy court found that debtor "believed he had a valuable claim against Empire and individuals acting on Empire's behalf" at the time that he filed his petition which he did not disclose. That debtor failed to disclose the claim against Empire in his schedules is not disputed. Debtor's several attempts to assert this claim, in the form of a counterclaim, against Empire throughout these proceedings supports the bankruptcy court's determination.

The bankruptcy court also specifically found that debtor concealed the existence of the claim against Empire with the intent to deprive the estate of the asset. The bankruptcy court's finding that the debtor acted with intent to hinder, delay or defraud is reviewed for clear error. Id. at 1240. The bankruptcy court found that debtor's explanations for his failure to schedule the claim against Empire lacked credibility. The bankruptcy court's decision is supported by the record, and debtor has not provided the panel with a firm conviction that the finding was erroneous.

C. **Nondischargeability**

The state court entered judgment against MLSI for breach of contract, request for an accounting, conversion and breach of agreement to pay. Federal courts must provide state court proceedings with the same full faith and credit as would be provided by other courts of that state. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Principles of collateral estoppel apply in bankruptcy exception to discharge

proceedings. Id. at 801. Therefore, the bankruptcy court did not err in determining that it was bound by the state court judgment which found that MLSI had converted Empire's funds.

The bankruptcy court then made the factual finding that debtor directed all of MLSI's activities and that debtor and MLSI acted together in converting Empire's property. Debtor provided no compelling evidence at trial to contradict Empire's allegations that debtor controlled and directed the actions of MLSI with respect to the conversion. As a result, the bankruptcy court did not err when it determined that debtor was therefore jointly and severally liable for the conversion and the state court judgment.

Section 523(a)(6) excepts from discharge debts arising from "willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). For purposes of § 523(a)(6), a willful injury is an intentional or deliberate injury. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998). Malice and intent may be inferred from the nature of the act committed. Transamerica Commercial Finance Corp. v. Littleton (In re Littleton), 942 F.2d 551, 554 (9th Cir. 1991).

Willful and malicious conversion is eligible for nondischargeability under § 523(a)(6). Kawaauhau, 118 S. Ct. at 978; Davis v. Aetna Acceptance Co., 293 U.S. 328, 332 (1934). The bankruptcy court found that debtor converted Empire's property in order to bolster his position in a dispute with Empire over the calculation of commissions. Therefore, debtor intended injury to Empire and the conversion was willful and

malicious and nondischargeable under § 523(a)(6). Debtor presented no persuasive evidence to indicate that the bankruptcy court erred in this conclusion.

D. **The Amount of The Judgment**

The state court judgment against MLSI was entered in the principal amount of $225,615.37 and included costs of $513 and post-judgment interest at a legal rate. The bankruptcy court determined Empire's claim to be in the principal amount of $225,615.37 with 9 percent interest from the date of the state court judgment until November 2, 1999, and for costs and disbursements. The bankruptcy court also determined that debtor was entitled to a credit in the amount of $36,500. The bankruptcy court also provided for 5.471 percent post-judgment interest.

In a nondischargeability proceeding there are two issues: one is the debt as determined by state law and the other is the dischargeability of that debt under federal law. Roussos v. Michaelides (In re Roussos), 251 B.R. 86, 93 (9th Cir. BAP 2000). The bankruptcy court's ability to determine the dischargeability of the debt is distinct from its ability to determine the amount of the debt. Id. at 95. The Rooker-Feldman Doctrine prohibits a federal court from reviewing a state court judgment. Id.; see also Pavelich v. McCormick, Barstow, Sheppard, Wayte & Carruth (In re Pavelich), 229 B.R. 777, 782 (9th Cir. BAP 1999)(Rooker-Feldman doctrine, with limited exceptions not applicable here, precludes inferior federal courts from reviewing state court

judgments). The Rooker-Feldman doctrine applies to bankruptcy courts. Audre, Inc. v. Casey (In re Audre), 216 B.R. 19, 26 (9th Cir. BAP 1997).

The bankruptcy court properly determined the amount of Empire's claim to be consistent with the state court judgment. We perceive no error.

2. **Counterclaims**

The district court dismissed debtor's counterclaims on the basis that debtor had no standing to bring the counterclaims because the counterclaims arose pre-petition and were therefore property of the estate rather than property of the debtor.

After the district court remanded its civil action to the bankruptcy court, debtor filed a motion and an amended motion to reinstate counterclaims. The proposed new counterclaims essentially restated the counterclaims that had been dismissed by the district court. The bankruptcy court deemed the motion to reinstate to be a motion for leave to amend pleadings or a motion for relief from the district court order. The bankruptcy court denied the motion under both theories.

In effect, the bankruptcy court ratified and adopted the district court's interlocutory order concluding that the debtor lacked standing.

The determination that the debtor lacked standing to prosecute causes of action that existed prepetition is plainly correct. All of the debtor's legal and equitable interests in property are allotted to the trustee as of the commencement of

the case. 11 U.S.C. § 541(a).

Treating the bankruptcy court's order as a denial of a motion to amend, its ruling is similarly correct. Whether leave to amend should be granted is governed by the following factors: undue delay; bad faith; futility of amendment; and prejudice to the opposing party. Texaco v. Ponsoldt, 939 F.2d at 798. To the extent that debtor's counterclaim represented a new claim, the bankruptcy court found that allowing debtor leave to amend would be prejudicial. In doing so, the court did not abuse its discretion.

CONCLUSION

The bankruptcy court did not clearly err when it issued its judgment which denied debtor's discharge and held that the debtor's debt to Empire was nondischargeable. The judgment is AFFIRMED.

U.S. Bankruptcy Appellate Panel
of the Ninth Circuit
125 South Grand Avenue, Pasadena, California 91105
Appeals from Central California (626) 229-7220
Appeals from all other Districts (626) 229-7225

NOTICE OF ENTRY OF JUDGMENT

BAP No. OR-00-1046-KMaB

RE: BENJAMIN R. MEYERS

A separate Judgment was entered in this case on November 30, 2000.

BILL OF COSTS:

Bankruptcy Rule 8014 provides that costs on appeal shall be taxed by the Clerk of the Bankruptcy Court. Cost bills should be filed with the Clerk of the Bankruptcy Court from which the appeal was taken.
9th Cir. BAP Rule 8014-1

ISSUANCE OF THE MANDATE:

The mandate, a certified copy of the judgment sent to the Clerk of the Bankruptcy Court from which the appeal was taken, will be issued 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. See Federal Rule of Appellate Procedure 41.

APPEAL TO COURT OF APPEALS:

An appeal to the Ninth Circuit Court of Appeals is initiated by filing a notice of appeal with the Clerk of this Panel. The Notice of Appeal should be accompanied by payment of the $105 filing fee and a copy of the order or decision on appeal. Checks may be made payable to the U.S. Court of Appeals for the Ninth Circuit. See Federal Rules of Appellate Procedure 6 and the corresponding Rules of the United States Court of Appeals for the Ninth Circuit for specific time requirements.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

BAP NO. OR-00-1046-KMaB
BK NO. 697-63375-aer7
ADV. NO. 99-06079-fra7

In re: BENJAMIN R. MEYERS

Debtor

BENJAMIN R. MEYERS

Appellant

v.

EMPIRE WHOLESALE LUMBER CO.

Appellee

FILED

NOV 30 2000

NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for the District of Oregon

THIS CAUSE came on to be heard on the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is AFFIRMED.

FOR THE PANEL,

Nancy B. Dickerson,
BAP Clerk

Patti Ippolito

By: Patti Ippolito
Deputy Clerk

BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT
A True Copy
Attest:

Edwina M. Clay
By Deputy 12-18-00

NAME: BENJAMIN R. MEYERS

BAP NO: OR-00-1046-KMaB

Bk. NO: 697-63375-aer7

Adv. NO: 99-06079-fra7

CLERK, U.S. BANKRUPTCY COUR
DISTRICT OF OREGON
DEC 12 2001
LODGED ____ REC'D ____
PAID ____ DOCKETED ____

PROOF OF SERVICE MANDATE

A certified copy of the attached judgment was sent to:

CLERK

U.S. BANKRUPTCY COURT

at P.O. Box 1335

Eugene, OR 97440

on 12/18/00

By: Edwina Clay
Deputy Clerk

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