

In re Stein, Case No. 392-33885-dds7

7/7/99

Judge Frye, aff'g RLD

Unpublished

The district court affirmed the bankruptcy court's approval, pursuant to BR 9019, of a settlement between the State of Oregon and the bankruptcy trustee.

The State had been allowed to intervene in a district court action in which the trustee, as plaintiff, had obtained punitive damage awards against defendants in the aggregate amount of \$1,456,000. The State sought to amend the August 7, 1997, judgment to include the State as a judgment creditor as to the punitive damages as contemplated by O.R.S. 18.540. The State and the trustee entered an agreement with respect to the division of the punitive damage award proceeds. The effect of the settlement would be to resolve the dispute without amending the judgment. Defendants, who had not received notice of disposition of post-judgment motions in time to make a timely appeal of the judgment, opposed the settlement on the basis that the judgment must be amended to effectuate O.R.S. 18.540.

The standard of review for an order approving a settlement by a trustee in bankruptcy is abuse of discretion. Magistrate Hubel had previously held in Vantulden v. Tactica Corp., Civil No. 96-1647-HU that ORS 18.540 is procedural and does not apply to federal court judgments. Thus, the judgment does not need to be amended to include the State as a judgment creditor. The district court held that the bankruptcy court fully addressed each issue raised by defendants' objections to approval of the settlement and did not abuse its discretion in approving the settlement.

P99-6(8)

See Summary re District Court action at P93-20(20).  
See also P96-21(13), P97-25(18), P97-26(6), P97-27(3), and P98-12(10).

JUL 7 1999

CLERK, U.S. BANKRUPTCY COURT  
DISTRICT OF OREGON

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PAID \_\_\_\_\_ DOCKETED *WJ*

*led 10-1-99*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

In Re )

ALEXANDER V. STEIN, )

Debtor, )

Bank. Case No. 392-33885-rld7  
Civil No. 99-786-FR

OPINION AND ORDER

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Certified to be a true and correct  
copy of original.

Dated 9-30-99

Donald M. Cinnamond, Clerk

By *Thomas L. Berhardt* Deputy

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1 FRYE, Judge:

2 The matters before the court are 1) the notice of appeal by Burt & Gordon, P.C. and  
3 Robert G. Burt from the final order of the United States Bankruptcy Court for the District  
4 of Oregon filed on January 26, 1999 approving a settlement agreement between the Trustee  
5 and the State of Oregon (#199); 2) the trustee's motion for attorney fees and costs (#220);  
6 and 3) the State of Oregon's motion for attorney fees and costs (#223).

7 **FACTS**

8 In July of 1991, Alexander Stein filed a petition in bankruptcy. On August 13,  
9 1992, the trustee in bankruptcy filed an amended complaint against the appellants in this  
10 matter and others. The adversary proceeding was transferred to this court on August 12,  
11 1993.

12 The matter proceeded to trial before this court. On February 24, 1997, a jury  
13 returned its verdict against appellant Burt & Vetterlein, successor in interest to appellant  
14 Burt & Gordon, P.C., for punitive damages in the amount of \$786,000.00 and against  
15 appellant Robert G. Burt for punitive damages in the amount of \$670,000.00. This court  
16 found in favor of the trustee on the equitable state law claims. In re Stein, 208 B.R. 209  
17 (Bankr. D. Or. 1997).

18 On August 7, 1997, this court entered judgment pursuant to the verdict of the jury  
19 in favor of the trustee, which included punitive damages against appellants Burt & Gordon,  
20 P.C. and Robert G. Burt in the respective amounts of \$786,000.00 and \$670,000.00.

21 Appellants Burt & Gordon, P.C. and Robert G. Burt filed post-judgment motions,  
22 which were denied by this court. Counsel for Burt & Gordon, P.C. and Robert G. Burt  
23 did not receive notice of the rulings of this court on the post-judgment motions. After a  
24 lapse of 180 days, Burt & Gordon, P.C. and Robert G. Burt learned that the post-judgment  
25 motions had been denied. Burt & Gordon, P.C. and Robert G. Burt then filed motions to  
26 vacate the judgment in order to allow them to file notices of appeal from the judgment and

1 to obtain an extension of time in which to file their notices of appeal. This court denied  
2 their motions to vacate the judgment and to obtain an extension of time in which to file  
3 their notices of appeal pursuant to Rule 77(d) of the Federal Rules of Civil Procedure and  
4 Rule 4(a)(6) of the Federal Rules of Appellate Procedure. Burt & Gordon, P.C. and Robert  
5 G. Burt filed their notices of appeal from this court's denial of their motions to vacate  
6 judgment with the United States Court of Appeals for the Ninth Circuit. This appeal is  
7 pending.

8 On August 3, 1998, the State of Oregon filed a motion in this court seeking to inter-  
9 vene and to amend the judgment entered by this court on August 7, 1997 to include the  
10 State of Oregon as a judgment creditor as required under ORS 18.540, which states, in part:

11 (1) Upon the entry of a verdict including an award of punitive  
12 damages, the Department of Justice shall become a judgment creditor as  
13 to the punitive damages portion of the award to which the Criminal Injuries  
14 Compensation Account is entitled pursuant to paragraph (b) of this sub-  
15 section . . .

14 . . . .

15 (2) The party preparing the proposed judgment shall assure that the  
16 judgment identifies the judgment creditors specified in subsection (1) of this  
17 section.

17 This court allowed the motion to intervene by the State of Oregon. Prior to any  
18 ruling by this court on the State of Oregon's motion to intervene and to amend the  
19 judgment, the trustee and the State of Oregon entered into a settlement agreement. The  
20 settlement agreement between the trustee in bankruptcy and the State of Oregon provides  
21 that the proceeds from the collection of punitive damages shall be allocated (1) to pay  
22 the reasonable costs of collection; (2) 20 percent of the remainder, up to a maximum of  
23 \$165,000.00, to be paid to the bankruptcy estate for reimbursement of the costs of obtain-  
24 ing the punitive damages award; and (3) the remaining 80 percent to be divided evenly  
25 between the State of Oregon and the bankruptcy estate.

26 This court granted the State of Oregon's motion to abate further proceedings on

1 the State of Oregon's motion to amend judgment pending approval of the settlement agree-  
2 ment between the State of Oregon and the trustee in the United States Bankruptcy Court.  
3 The United States Bankruptcy Court subsequently approved the settlement agreement in  
4 an order dated January 26, 1999. The appeal before this court was filed from the order of  
5 January 26, 1999 by appellants Burt & Gordon, P.C. and Robert G. Burt.

#### 6 **CONTENTIONS OF APPELLANTS**

7 Appellants Burt & Gordon, P.C. and Robert G. Burt contend that the judgment in  
8 this case must be amended to expressly name the State of Oregon as a judgment creditor  
9 pursuant to the requirements of ORS 18.540. Appellants contend that without such an  
10 amended judgment, the State of Oregon has no rights and its settlement with the trustee  
11 in bankruptcy is void.

12 Appellants contend that the promise of the trustee in bankruptcy in the settlement  
13 agreement is insufficient to support a binding contract because the trustee in bankruptcy  
14 is essentially promising to give to the State of Oregon something to which the State of  
15 Oregon is already entitled to receive by operation of law, namely ORS 18.540.

16 Appellants further contend that ORS 18.540 guarantees to appellants Burt &  
17 Gordon, P.C. and Robert G. Burt the right to participate in any agreement that modifies  
18 the statutorily mandated payment schedule and that the settlement agreement deprives  
19 appellants of the finality and protection that payment of a final judgment provides.

20 Appellants contend that the ruling of the bankruptcy judge on the objections of  
21 appellants Burt & Gordon, P.C. and Robert G. Burt to the settlement agreement between  
22 the trustee and the State of Oregon was based upon an erroneous reading of the law and  
23 should be reviewed de novo by this court.

#### 24 **CONTENTIONS OF THE TRUSTEE IN BANKRUPTCY**

25 The trustee in bankruptcy contends that the order of a bankruptcy court approving a  
26 trustee's application to compromise a controversy is reviewed for an abuse of discretion.

1 The trustee in bankruptcy further contends that appellants have no standing to  
2 appeal from the approval of the settlement agreement by the bankruptcy judge. The trustee  
3 in bankruptcy contends that the situation before this court is no different than a judgment  
4 creditor assigning a portion of its judgment to a third party.

5 The trustee in bankruptcy argues that there is no requirement in federal court to list  
6 all judgment creditors in the judgment; that there is adequate consideration to support the  
7 compromise; and that appellants have no standing to participate in the compromise. The  
8 trustee contends that appellants are using this appeal solely as a mechanism to attempt to  
9 reopen the judgment from which they filed an untimely appeal.

10 The trustee further moves the court for attorney fees and two times its costs on the  
11 grounds that the appeal is frivolous.

#### 12 **CONTENTIONS OF THE STATE OF OREGON**

13 The State of Oregon contends that the proper standard of review of an order  
14 approving a settlement by a trustee is abuse of discretion. The State of Oregon contends  
15 that the settlement between the State and the trustee is fair and equitable and is supported  
16 by consideration. The State of Oregon contends that appellants cannot compel the State of  
17 Oregon to litigate the issue of whether it is required to be included as a judgment creditor  
18 in the judgment in federal court if the State of Oregon is willing to compromise its claim  
19 fairly and equitably with the trustee in bankruptcy.

20 The State of Oregon contends that appellants' arguments are without merit, and  
21 that this court should award attorney fees to the State of Oregon and against appellants.

#### 22 **RULING OF THE COURT**

23 The bankruptcy judge considered the objections of appellants Burt & Gordon, P.C.  
24 and Robert G. Burt to the settlement between the State of Oregon and the trustee and  
25 approved the settlement.

26 Pursuant to Bankruptcy Rule 9019(a), compromises are favored in bankruptcy;

1 therefore, the decision of the bankruptcy judge to approve or disapprove the compromise of  
2 the parties rests in his or her sound discretion. The law is settled that the proper standard  
3 of review for an order approving a settlement by a trustee in bankruptcy is abuse of discre-  
4 tion. In re Sassalos, 160 B.R. 646, 653 (Bankr. D. Or. 1993) (Frye, J.), citing 9 Collier on  
5 Bankruptcy, § 9019.03 (15th ed.). In In re Sassalos, this court stated:

6           The standards for approval of a proposed settlement have been  
7           enunciated in the Ninth Circuit, and in order to determine whether a  
8           proposed settlement is fair and equitable, the bankruptcy court must  
9           consider four factors:

- 10                   (a) The probability of success in the litigation; (b) the diffi-  
11                   culties, if any, to be encountered in the matter of collection;  
12                   (c) the complexity of the litigation involved, and the expense,  
13                   inconvenience and delay necessarily attending it; (d) the  
14                   paramount interest of the creditors and a proper deference to  
15                   their reasonable views in the premises.

16 Id.

17           In Vantulden v. Tactica Corp., Civil No. 96-1647-HU, the State of Oregon filed  
18 a motion to amend the judgment pursuant to ORS 18.540 to reflect the State's alleged  
19 entitlement as a judgment creditor to a portion of the punitive damages awarded to the  
20 plaintiffs on their state law claim. The Honorable Dennis James Hubel, United States  
21 Magistrate Judge, ruled that the State of Oregon is a judgment creditor, even though it  
22 had not been named in the federal court judgment, and that the State of Oregon need not  
23 have been named in the federal court judgment. Magistrate Judge Hubel concluded that  
24 "the statute relied upon by the State to require its identification as a judgment creditor on  
25 the judgment is procedural and does not apply to federal court judgments. Federal court  
26 judgments do not list the judgment creditors, while Oregon state court judgments do."  
Order, October 1, 1998, pp. 3-4.

          Appellant's contention that the State of Oregon must have been expressly named as  
a judgment creditor in the federal court judgment does not preclude the settlement in this  
case. Given the uncertainties of the legal requirements and the collection issues, the trustee

1 in bankruptcy and the State of Oregon were free to work out their own agreement, subject  
2 to the approval of the bankruptcy court. The settlement agreement in this case, which is  
3 between the trustee in bankruptcy and the State of Oregon, eliminated uncertainties detri-  
4 mental to both the State of Oregon and the trustee. The settlement agreement was suppor-  
5 ted by adequate consideration. There are no grounds for appellants to believe that they may  
6 be subject to multiple payment obligations as a result of the settlement between the trustee  
7 in bankruptcy and the State of Oregon.


8 Each of the issues presented to this court was fully considered by the bankruptcy  
9 court through the objections made by appellants Burt & Gordon, P.C. and Robert G. Burt  
10 to the settlement. The bankruptcy judge addressed each issue and approved the settlement.  
11 Excerpts of Record, pp. 91-94. This court finds that the bankruptcy court did not abuse its  
12 discretion in approving the proposed settlement.

### 13 CONCLUSION

14 The court declines to award attorney fees to the trustee in bankruptcy and to the  
15 State of Oregon and against appellants.

16 IT IS HEREBY ORDERED that 1) the notice of appeal filed by appellants Burt  
17 & Gordon, P.C. and Robert G. Burt from the final order of the United States Bankruptcy  
18 Court for the District of Oregon dated January 26, 1999 approving a settlement agreement  
19 between the trustee and the State of Oregon (#199) is DISMISSED; 2) the trustee's motion  
20 for attorney fees and costs (#220) is DENIED; and 3) the State of Oregon's motion for  
21 attorney fees and costs (#223) is DENIED.

22 DATED this 7 day of July, 1999.

23  
24   
HELEN J. FRYE  
25 United States District Judge  
26